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CONTROLLED TENANCY STATUTES IN KENYA: A CASE FOR HARMONIZATION

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DECLARATION

I, PETER OMWENGA MWEBI, do hereby declare that this is my original work and has not been submitted nor is it pending submissions for a Degree in any other University or Institution. All sources and information have been acknowledged.

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This Thesis has been submitted for examination with my knowledge and approval as the University Supervisor.

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ABSTRACT

Tenancy Premises whether Business or Residential are necessary and important to both the Landlord the Tenant and to the economy of any Country. Housing rights are basic and fundamental rights and indeed Articles 40(1) and 43(1) (b) of the Constitution of Kenya clearly state that every person has a right to acquire and own property and to access adequate housing respectively. The challenge facing the enjoyment of the right to own property and access housing is its enforcement especially in a free market economy. This is so in the light of the current statutory framework namely the Rent Restriction Act, the Distress for Rent Act and the Landlord and Tenant [Hotels, Shops and Catering Establishments] Act (hereinafter also referred as the Rent Statutes).

This research interrogates the Rent Statutes and the limitations, conflicts, ambiguities and shortcomings that presents a barrier to access to justice and the enjoyment of the right to property. It makes a case for review, revision, harmonization and consolidation into a single statute as envisaged can be harmonized in the Kenya Constitution. This is with a view to reinforcing the right to access to justice by both the landlord and tenant and the enjoyment of the right to property by both.

ACKNOWLEDGMENT

I wish to take this opportunity to thank the Almighty God to whom without his care love, mercy, guidance, strength and patience, this work would not have been realized. Without His unending grace, it would have been impossible to undertake the many enormous tasks in this LLM programme. Many thanks to my Supervisor Dr. Mercy M. Deche. I do appreciate her guidance during the entire research period of study at the University of Nairobi. I cannot underrate her perpetual encouragement and motivation without which, this work would not have been accomplished.

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To all my colleagues in the offices of Mogaka Omwenga & Mabeya for their support. God bless you.

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Lastly I offer my regards, prayers and blessing to all those who supported me in any way during the research and writing of this Thesis.

DEDICATION

This work is dedicated to the Landlords and Tenants who genuinely understand that they need each other in the tenancy relationship and that their cordial relationship is for the benefit of both. It is also dedicated to all those who anticipate to be Landlords as they have nothing to fear in their endeavor to provide premises to the Tenants.

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Furnished Houses (Rent Control) Act, 1946 (SCOTLAND)

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Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 (KEN)

Land Titles Act (KEN)

Rent Act No. 13 of 1920 (SA)

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Rent Restriction Act, Chapter 296 (KEN)

Rent Restriction Act, 1949 (UG)

Rental Housing Amendment Act No. 35 of 2014 (SA)

Registered Land Act (KEN)

Registration of Titles Act (KEN)

Residential Tenancies Act, 2010 (AUSTRALIA)

Tenants Protection (Temporary) Act (SA)

Trust Land Act (KEN)

LIST OF ACRONYMS AND ABBREVIATIONS

ADT	Administrative Decisions Tribunal
BPRT	Business Premises and Rent Tribunal
ELC	Environment and Land Court
CPSA	Combined Pensioners and Superannuates Association
CS	Cabinet Secretary
CTTT	Consumer, Trader and Tenancy Tribunal
GLA	Government Lands Act
GOK	Government of Kenya
IBEACO	Imperial British East Africa Protectorate Company
JSC	Judicial Service Commission
KLRC	Kenya Law Reform Commission
LAC	Legislation Advisory Committee
LTA	Land Titles Act
LTS	Landlord and Tenant (Shops, Hotels and Catering Establishments)
NCAT	New South Wales Civil and Administrative Tribunal
NSW	New South Wales
RCO	Rent Control Ordinance
REINSW	Real Estate Institute of NSW
RLA	Registered Land Act
RRA	Rent Restriction Act
RRT	Rent Restriction Tribunal
RTA	Registered Titles Act
TLA	Trust Land Act
UK	United Kingdom
USA	United States of America

CHAPTER ONE
INTRODUCTION

1.1 Study Background

A landlord-tenant relationship is as much a contractual relationship as any other business engagement involving the provision of goods and services at a consideration. It is therefore governed by principles of contract such as freedom of contract and privity of contract. Despite the contractual nature of the relationship, there are certain instances where the law has intervened to regulate the rights and obligations of the parties in this relationship. Such is the case with controlled tenancies. Although tenancies in Kenya are generally regulated by the implied covenants and other provisions of the Land Act[1], there are certain categories of tenancies that are specially regulated hence referred to as controlled tenancies. These are tenancies for residential premises whose rent does not exceed Kenya shillings two thousand five hundred (23.36 US$)[2] and business premises where there is a written lease for a period not exceeding five (5) years.[3] The rationale behind the regulation is to protect the tenant from exploitation and eviction by the landlord. The statutory framework that regulates the above two categories are the Rent Restriction Act and the Landlord and Tenant (Hotels, Shops and Catering Establishments) Act (LTS). These two statutes are discussed in detail in the next chapter.

The controlled tenancy statutes create two tribunals which exercise original jurisdiction on matters touching on tenancy and payment of rent. The Rent Restriction Act creates the Rents Tribunal.[4] Its responsibility is to inter alia, assess the standard rent of residential premises either on the application of any party or on its own motion.[5] On the other hand, the Landlord

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[1] Land Act (2012) KEN s 66.
[2] Rent Restriction Act (1959) KEN, s. 2(1).
[3] The Landlord and Tenant (Shops, Hotels and Catering Establishment) Act (1965) KEN, s. 2(1).
[4] Ibid [2], s 4.
[5] Ibid [2], s 5.

and Tenant (Shops, Hotels and Catering Establishment) Act creates the Business Premises Tribunal with more or less similar powers as the Rent Tribunal.[6]

This study is aimed at critically analyzing the two statutes and the institutions they create. This is with a view to exploring their relevance in the current market economy and the value added to access to justice by having two separate frameworks as opposed to a unified one. For purposes of this discourse, the two statutes shall hereinafter be referred to as the controlled tenancy statutes.

The tribunals mentioned are each headed by their respective chairpersons. They are both centralized in Nairobi with limited circuit sessions in few selected counties. Litigants who are resident outside Nairobi have the option of waiting for the tribunals' circuit sessions whose schedule is often uncertain or travel to Nairobi to file their claims. This essentially impedes access to justice as envisaged in the Constitution.[7] This is one of the challenges posed by the existence of the two statutes. Secondly, a landlord who has one property providing both residential and business premises is forced to file two separate claims in two separate tribunals over the same property. The two are unlikely to be prosecuted expeditiously in view of the access to justice challenges stated above. Thirdly, the two statutes are quite old as they were enacted in 1959 and 1965 respectively with minimum amendments hence out of touch with the current market realities.

The upshot of the above is that, in practice, when a landlord attempts to evict a tenant for default in rent payment, the tenant often rushes to the tribunals and obtains exparte restraining orders against the landlord. The case thereafter takes long to be heard and determined to the detriment of the landlord. This study therefore focuses on the efficacy of the existing legal framework and the need to revise, consolidate and rationalize the existing controlled tenancy statutes as has been the case with land registration statutes, pursuant to the

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[6] Ibid [3], s.11.

[7] Constitution of Kenya, art 48.

provisions of the constitution.[8] This intervention is aimed at enhancing justice and fairness to both the landlords and tenants under a single statute. The controlled tenancy statutes are also quite outdated in terms of pecuniary jurisdiction, which is determined by the monthly rent payable as the same has remained unadjusted over the years. The implication of this is that, a good number of parties the statute intends to protect are locked out of the intended protection as inflation pushes them out of the pecuniary jurisdiction threshold. In countries such as United Kingdom (UK), Australia and South Africa, there has been a consistent and progressive intervention aimed at aligning their rent statutes to the current market trends. In view of the above, there is need to review the controlled tenancy statutes in order to align them with the Constitution, international best practices as well as current market trends.

1.2 Statement of Problem

Whereas the law has put in place a framework to protect certain categories of tenancies, the same is contained in two separate statutes which are outdated. This has had the cumulative effect of impeding the intended purpose of facilitating access to justice to both parties, much to the detriment of the landlords. There is therefore need to have the statutes reviewed and consolidated, to ensure that they are in sync with the current market trends, and facilitate expeditious and efficient access to justice.

1.3 Justification for the Study

The legal framework on controlled tenancies has remained static for over fifty five (55) years as the statutes have not been revised and/or amended to conform with the dynamics of the changing legal, social and economic realities. The same has therefore been out of touch, with attributes of good law, like relevance and consistency with the supreme law.[9] There is also a dearth of relevant literature by local authors on the subject. This study is therefore timely as it

[8] Ibid, art 68 (a).

[9] Ibid [7], art 2(1), (4).

will not only contribute to knowledge on the subject but equally provide a platform for redress of the challenges posed by the existing legal framework.

1.4 Statement of Objective

The main purpose of this study is to interrogate the legal framework on controlled tenancies, to the extent to which, they respond to the market realities and facilitate access to justice. The study lays a basis for the revision, consolidation and rationalization of the two statutes for a more efficient and responsive legal framework, that balances the interests of both the landlords and the tenants; in a free market economy.

1.5 Hypothesis

The study proceeds on the basis that, the current legal framework is inadequate, biased in favour of the tenant, and out of touch with the realities of a free market economy. It presupposes that the inadequacy has occasioned injustice to its users and calls for review.

1.6 Research Questions

i. To what extent does the existing legal framework meet the needs of the landlords and tenants in a free market economy?

ii. To what extent does the existing legal framework on controlled tenancies enhance or impede access to justice for concerned parties?

iii. What best practices from select countries can enrich Kenyan legal framework on controlled tenancies?

iv. What possible interventions can improve the legal framework on controlled tenancies?

1.7 Theoretical Framework

This study is undertaken out of concern to a legal framework that is inadequate, biased in favour of the tenant, and out of touch with the realities of a free market economy. Whenever

disputes arise, the law responds more favourably to the tenant than the landlord.[10] One of the fundamental rights and freedoms enshrined in the Constitution is equality and freedom from discrimination. The Constitution provides in unequivocal terms that, every person is equal before the law and has the right to equal protection and equal benefit of the law.[11] All the existing laws must be tailored in a manner that reflects this position save for express exceptions like affirmative action laws. It is therefore unfortunate that despite the controlled tenancy statutes having been in existence for over fifty five (55) years, the landlord-tenant relationship and interests therein remain imbalanced, in favour of the tenant and at the expense of the landlord. When the Controlled Tenancy statutes were enacted, the prevailing circumstances back then were that, the landlords had the upper hand over the tenants. That situation has considerably changed as consumer rights are now recognized in the bill of rights.[12]

As discussed in the foregoing chapter, the existence of the two statutes have hindered as opposed to facilitating access to justice. The tribunals created by the statutes are centralized in Nairobi with limited circuit sessions in specified counties. They are further manned by one chairperson in charge of the entire country, and have not embraced the spirit of devolution as envisaged in the constitution.[13] When a landlord develops their property, it is usually with an expectation of reaping benefits from the same, especially through leasing out the premises. In the event of a dispute, each party expects an expeditious resolution of the same in a cost effective forum. Similarly, a tenant who leases a premise does so with an expectation to receive value for the rent paid for the premises, as well as quality services derived from the use of the premises. The end result is full satisfaction of both parties. It is on this basis that the efficacy and relevance of the controlled tenancies statutes, must be interrogated through a

[10] A consideration of the preambles of the two tenancy statutes expressly state that they are meant for the protection of the tenant and thus a landlord is portrayed as the aggressor.
[11] Ibid [7], art. 27(1).
[12] Ibid [7], art. 46.
[13] Ibid [7], article 174(h).

lens that centralizes the satisfaction of parties to a transaction, hence the theory of utilitarianism.

1.8 Utilitarianism

Utilitarianism is a philosophical and economic theory, which propounds that, the best social policy is that which brings the most good for the greatest number of people. It judges the rightness or wrongness of actions, according to the pleasure they create or the pain they inflict, and recommends actions that create the greatest good for the greatest number of people.[14]

1.8.1 Philosophical background of Utilitarianism

While philosophical reflections upon law and justice have a history extending back to the Greeks, many of the central themes of modern jurisprudence and theories, owe their existence to the works of Jeremy Bentham. The central foundation of Bentham's jurisprudence was his advocacy for utilitarianism. The other classical utilitarianism theorists are; J.S. Mill and Henry Sidwick. They all took the fundamental basis of morality to be a requirement that happiness should be maximized.[15]

1.8.2 Forms of Utilitarianism

There are two major forms of utilitarianism; the act and the rule utilitarianism. Both of them are in agreement that, the overall aim in evaluating actions should be to create the best results possible, but they differ on how to go about it.[16]

Act utilitarians believe in deciding what to do, i.e. one should opt for the action that will create the greatest net utility. In their view, the principle of utility will do whatever will

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[14] Bryan A. Garner et al (eds), *Blacks' Law Dictionary* (9th edn, Sweet & Maxwell 2009)
[15] Nigel E Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (4th edn, Sweet & Maxwell 2013), p. 17.
[16] James Fieser and Bradley Dowden (eds.) Act and Rule Utilitarianism (*Internet Encyclopedia of Philosophy*) https://www.iep.utm.edu/util-a-r/#H2. Accessed on 13th May, 2020 at 1014hrs.

produce the best overall results, and should be applied on a case by case basis. The right action in any situation is the one that yields more utility, i.e. creates more well-being than other available actions.

Rule utilitarians adopts a two part view that stresses the importance of moral rules. According to rule utilitarians, a specific action is morally justified if it conforms to a justified moral rule; and a moral rule is justified if its inclusion into our moral code would create more utility than other possible rules (or no rule at all). According to this perspective, we should judge the morality of individual actions by reference to general moral rules, and one should judge particular moral rules on the basis of whether their acceptance into our moral code would produce more well-being than other possible rules.

The key difference between act and rule utilitarianism is that, act utilitarians apply the utilitarian principle directly to the evaluation of individual actions while, rule utilitarians, apply the utilitarian principle directly to the evaluation of rules and then evaluate individual actions, on the basis of whether they obey or disobey those rules whose acceptance will produce the most utility.

The pros and cons of each form has been considered. The proponents of act utilitarianism argue that it maximizes utility. If every action that is carried yields more utility than any other available action, then the total utility of all our actions will be the highest possible level of utility that could be brought about. In other words, one can maximize the overall utility that is within their power by maximizing the utility of each individual action that is performed. Critiques argue that act utilitarianism gives the wrong answers to moral questions. They say that it permits various actions that everyone knows are morally wrong. For instance, if a doctor can save five people from death by killing one healthy person and using that person's organs for life-saving transplants, then act utilitarianism implies that, the doctor should kill the one person to save five.

Unlike act utilitarians who try to maximize overall utility by applying the utilitarian principle to individual acts, rule utilitarians believe that we can maximize utility only by setting up a moral code that contains rules. The correct moral rules are those whose inclusion in our moral code will produce better results (more well-being) than other possible rules. Once we determine what these rules are, we can then judge individual actions on the basis of their conformity with these rules. However, as in the case with act utilitarianism, rule utilitarianism has its pros and cons. Its proponents argue that one can produce more beneficial results by following rules than by always performing individual actions whose results are as beneficial as possible. The rule utilitarian approach to morality can be illustrated by considering traffic rules. In devising a code for drivers, there is the option to adopt open-ended rules like "drive safely" or specific rules like "stop at red lights," "do not travel more than 30 miles per hour in residential areas," "do not drive when drunk," etc. The rule "drive safely", like the act utilitarian principle, is a very general rule that leaves individuals with the option to determine the best way to drive in each circumstance is. More specific rules that require stopping at lights, forbid going faster than 30 miles per hour, or prohibit driving while drunk do not give drivers the discretion to decide the most appropriate action. They prescribe to the drivers what to do or not do while driving.[17]

Critiques of rule utilitarians accuse its proponents of irrationally supporting rule-based actions in cases where more good could be done by violating the rule than obeying it. They deem this as a form of "rule worship," an irrational deference to rules without utilitarian justification.[18] Whatever the form, it is settled that the recurring theme is satisfaction or the happiness an individual derives.

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[17] Ibid

[18] J.J.C. Smart, Extreme & Restricted Utilitarianism (*The Philosophical Quarterly* Vol. 6, No. 25, October 1956) http://personal.lse.ac.uk/robert49/teaching/mm/articles/Smart_1956Utilitarianism.pdf. Accessed on 13th May, 2020 at 1118hrs.

1.8.3 Scope of Utilitarianism

Utilitarianism is concerned with maximizing happiness, welfare or some other good.[19] It evaluates consequences of one's actions whether good or bad and maintains that in decision making, one ought to consider only the consequences of their actions. This theory adopts the maxim "the greatest good for the greatest number."[20] It thus proposes that, the best action is that which procures greatest happiness for the greatest number of persons.

1.8.4 Criticisms of the Theory

Despite its greater happiness approach, this theory has been criticized by several authors. One such critique is that, utilitarianism treats individual people equally but only by effectively treating them as having no worth, for their value lies not as a person, but as 'experiencers' of pleasure or happiness. The other criticism is the analogy used by utilitarians of a rational single individual, prudently sacrificing present happiness for later satisfaction. This is considered to be untenable for it treats one's pleasure as replaceable by the greater pleasure of others.[21]

Another criticism is that, this theory defines what is right in terms of what is 'good'; that it begins with a conception of what is good (for example, happiness) and then concludes that an action is right as long as it maximizes that 'good.' It is also said to be concerned only with the overall maximization of welfare. There is in principle, no limit to the harm that the utilitarian will be prepared to inflict on individuals provided that the harm is balanced by an even greater increase in welfare for others. Thus, it is argued, there is literally nothing that the utilitarian might not be prepared to do given appropriate circumstances: killing the innocent,

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[19] Raymond Wacks, *Understanding Jurisprudence*, (4th edn Oxford), p. 214. < http://202.166.170.213:8080/xmlui/bitstream/handle/123456789/1000/Raymond%20Wacks-Understanding%20Jurisprudence_%20An%20Introduction%20to%20Legal%20Theory-Oxford%20University%20Press%20%282012%29.pdf?sequence=1&isAllowed=y> Accessed on 6th May, 2020 at 1041hrs.

[20] Brian Bix, *Jurisprudence Theory and Context* (6th edn Sweet & Maxwell 2014), p. 126.

[21] Ibid [28], p. 216

torture, lying and promise-breaking might all in some circumstances be necessary if overall welfare is to be maximized.[22]

1.8.5 Utilitarianism in Landlord-Tenant relationship

The research interrogates existing Controlled Tenancy statutes and their efficacy in responding to needs of the parties. As already stated, utilitarianism is about satisfaction or the happiness a party derives in a thing or enterprise. Both the Land Act[23] and the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act[24] provide for implied terms for both the landlord (lessor) and tenant (lessee). The landlord's obligations are the tenant's rights and vice versa. As long as the tenant pays rent and performs all the covenants contained in the lease, the landlord is obligated to guarantee quiet and peaceful enjoyment of the leased premises by the tenant. Similarly, the landlord is required to ensure that the leased premises, are fit for human habitation. As a tenant, occupying the leased premises which are in habitable condition, it is expected that payment of rent would be prompt. At the end, the landlord derives satisfaction from the rent received while the tenant gets satisfaction in residing in a humanly habitable place, with quiet and peaceful enjoyment.

As earlier noted, though the theory is concerned with maximizing happiness, it has its own undersides for instance, it propagates the narrative that the end justifies the means. Utilitarianism suggests that the only concern of intrinsic worth is happiness but there are also other factors such as pain and pleasure that are worth considering.[25] In the present discourse, more times than not, the tenant will always want to enjoy peaceful and quiet possession of the

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[22] Ibid [24], p. 32.
[23] Ibid [1], ss. 65 and 66.
[24] Ibid [3], schedule.
[25] Natalie Regoli, '15 Utilitarianism advantages and disadavantages' (Connectusfund, 28 April, 2019) < https://connectusfund.org/utilitarianism-advantages-and-disadvantages> Accessed on 31 March, 2020 at 1512hrs.

demised premises without paying rent.[26] On the hand, the landlord would wish to receive rent, no matter the state of the demised premises.[27] Since happiness is subjective, this theory does not give parameters on how to gauge the happiness in question. Access to justice by parties in the present state of affairs is impeded as the dispute resolution forums are centralized, the costs involved are so prohibitive and it takes so long to have a resolution. Equally, the statutes are quite old, as they were enacted over fifty years ago with very few amendments. Thus, a statute that addresses these challenges, would satisfy the landlord – tenant relationship, as their disputes would be expeditiously resolved, thus saving on costs and time.

1.9 Literature Review

The aim of this study is to interrogate the legal framework on controlled tenancies on the extent to which they respond to the market realities and facilitate access to justice. As discussed previously in chapter two, the existing legal framework is inadequate, biased in favour of the tenant and out of touch with the realities of a free market economy. This is attributed in part to the existing overlaps in the tenancy laws, which continue to occasion injustice especially to the landlord.

On the nature of controlled tenancies statutes, Ojienda discusses controlled dealings in tenancy relationships with special emphasis on the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and Rent Restriction Act. He also highlights the powers of each tribunal and their salient features.[28] Throughout his discourse, he does not consider the need to revise, consolidate or rationalize the two statutes which is what this work proposes.

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[26] Under the preamble of both Controlled Tenancy statutes, the emphasis is on tenants' protection and since majority of tenants are currently enlightened on their rights, they tend to take advantage of the statutes.

[27] Under the Distress for Rent Act, the Landlord can simply instruct an advocate to engage licensed auctioneers to seize and sell a tenant's property to recover any

[28] Ojienda T.O., *Conveyancing Principles and Practice* (Revised Edition, Law Africa Publishing (K) Limited, 2010) p.232-246

On the protection offered to the tenant, Onalo discusses the two statutes with emphasis on exploitation and eviction, the protected tenant, continued efforts to protect ordinary tenant, definitions, the rent tribunals and their various functions, the obligations of the landlord and tenant, grounds of termination of tenancies, offences under the Acts and the jurisdiction of the tribunals.[29] In his discussion, there is no consideration regarding consolidation of the two statutes and his perspective is therefore general.

On disputes between landlords and tenants, Wanjala discusses the meaning of the term 'controlled' in relation to the application of the two statutes. The reason it is called controlled is because the rights and duties of parties are imposed by the law.[30] This study adopts this reasoning.

Other authors such as Kowuor have considered the two statutes.[31] This is in relation to the control of residential and commercial tenancies as well as an interrogation of the pending Landlord and Tenant Bill, 2007.[32] The interrogation however falls short of discussing the value added by the revision, consolidation or rationalization of the two statutes.

In 2015, the Kenya Law Reform Commission (KLRC) in its committee report on the rationale for the establishment of tribunals in Kenya indicated that there was need to consolidate the regime relating to tribunals in Kenya.[33] The tribunals created by the two statutes were among those considered. However, there was no specific report on the revision, consolidation or rationalization of the two statutes.

With regards to literature from other jurisdictions, the New South Wales Standing Committee report on Law and Justice in its report recommends the consolidation of tribunals in favour of

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[29] Onalo P.L, *Land Law and Conveyancing in Kenya* (Law Africa Publishing (K) Ltd, 2008), p. 95 – 122.
[30] Wanjala S.C, *Land Law and Disputes in Kenya* (Oxford University Press, 1990).
[31] Kowuor C, "Controlled Tenancy: A Curse or Blessing to Property Investment in Kenya."
[32] Ibid [18].
[33] Kenya Law Reform Committee, Report of the Committee on the review of the rationale for the establishment of the tribunals in Kenya, 20th December, 2015.

"one stop shop" for minor disputes and review of administrative decisions.[34] The report further tasked an expert panel to pursue the issue of tribunal consolidation.

At the international level, authors have focused on controlled tenancies in relation to the free market. For instance, Tucker opines that disadvantage of landlords by system of controlled tenancy has the potential to cause a decline in property value, due to a lack of the landlord's autonomy over his property. It is his view that control of rent is not only an issue between the landlord and tenant but is also a political issue.[35] He gives an example of the United States of America (USA), particularly New York where most of the houses are regulated due to high political considerations and thus, there is an interest in rent control by political players. He makes a case for the protection of the landlord.

This study contributes to existing literature as it interrogates the legal framework, the effectiveness of the said framework and its need for review. The review will entail identifying existing gaps in the controlled tenancy statutes, their impact and a proposal for a total overhaul and an enactment of an all-encompassing statute. The benefits to be derived from the novel unified statute is also considered.

1.10 Research Methodology

The data in this study is gathered from desk research through a review of existing primary and secondary data. This has been sourced from the library of the University of Nairobi, Mombasa Campus. This includes both hard copies and online textbooks, journal articles and reports by key authors conversant with the subject. Literature from other jurisdictions has also been considered for purposes of picking out international best practices. Lastly, the study has interrogated relevant reported and unreported case law from Kenyan courts and

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[34] Standing Committee on Law and Justice, Opportunities to consolidate tribunals in New South Wales, 22nd March, 2012 https://www.parliament.nsw.gov.au/lcdocs/inquiries/1721/120319%20Final%20Report.pdf accessed 12 August, 2019 at 1727hrs.

[35] William Tucker, 'Policy Analysis; Cato Institute Policy Analysis No.274:How Rent Control Drives out Affordable Housing, ,May 21,1997'
< https://object.cato.org/sites/cato.org/files/pubs/pdf/pa274.pdf > accessed 12 August 2018 at 1650hrs.

Tribunals. The reported cases are sourced from Kenya Law Reports website while the unreported cases are from Mombasa Law Courts registry.

1.11 Chapter Breakdown

Chapter one sets out the introduction to the study. It outlines the study background, problem statement, justification for the study, objective of the study, hypothesis, research questions, theoretical framework, research methodology and literature review.

Chapter two interrogates the legal framework on controlled tenancy in Kenya. This includes analysing relevant statutes, pending bills and case law. This is with a view to identifying the gaps in the legal framework.

Chapter three highlights the best international practices with regard to controlled tenancies. This is aimed at considering the extent to which the same may enrich the Kenyan legal framework.

Chapter four discusses the possible interventions that may serve to improve the existing legal framework on controlled tenancy.

Chapter five contains the recommendations and conclusions.

CHAPTER TWO

THE LEGAL AND INSTITUTIONAL FRAMEWORK ON CONTROLLED TENANCIES IN KENYA

2.1 Introduction

The legislative framework that forms the subject of discussion in this chapter includes the Constitution of Kenya,[36] the Land Act, 2012,[37] the Rent Restriction Act,[38] the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act[39] and the Distress for Rent Act.[40] The discussion also includes a consideration of pending bills relevant to the subject of controlled tenancy. These are the Landlord and Tenant Bill, 2007[41] and the Draft Tribunals Bill, 2015.[42]

The chapter is divided into three main parts. Part one gives a broad overview of the historical background. Part two deals with the Constitution, and it interrogates the constitutional provisions in respect to land, specifically consolidation, revision and rationalization of the various existing land laws. Part three discusses the existing statutes on controlled tenancies, their scope and application, the tribunals created under each, the powers of the tribunals thereof, execution of the tribunals' orders and appeals of the tribunals' decisions. Part four discusses pending bills relating to controlled tenancies, their salient provisions and their current status.

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[36] Promulgated on 27th August, 2010 by the then President His Excellency Mwai Kibaki.
[37] Ibid [1].
[38] Ibid [2]
[39] Ibid [3]
[40] Chapter 293, Laws of Kenya.
[41] Ibid [9]
[42] http://www.klrc.go.ke/images/images/downloads/draft-tribunals-bill-2015.pdf. Accessed on 16th May, 2020 at 1012hrs.

2.1.1 Historical Background

In the pre-colonial period, land use in Kenya was purely guided and controlled by customary norms and procedures which were dominant among different ethnic communities.[43] Land was owned by the entire community with individual community members having only user rights to the land. These user rights were secondary to joint communal rights. The user rights system was based on individual land needs which were determined by community leaders who had powers to make decisions around access to land. However, there was no uniform system across all Kenyan ethnic communities. The systems varied from one community to another depending on cultural, geographical, political and socio-economic circumstances.[44] Leasehold interests, including controlled tenancies did not exist. All one needed to do in order to acquire access rights to land was to approach the community leaders with reasons for allocation. It is imperative to note that, ownership was only limited to land use such as cultivation and rearing of livestock and not for private development, in the form of erection of structures and buildings as happens today.

Towards the end of nineteenth century and following the Berlin Conference of 1884, Kenya became a British Protectorate and later a colony in 1920. The main goal of colonisation was the generation of economic benefits to the colonising country. The impression that there was no settled forms of government among local communities gave the British colonial authorities an excuse to claim that there were no sovereign to hold radical title over the land. In essence, the existing communal land ownership among the original inhabitants was overlooked.[45] According to the colonialists, the inhabitants only owned huts and not the land.

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[43] Aggrey Thuo, Geneology of land ownership, use and management problems in Kenya during Pre-August 2010 Constitution period. A review. (August, 2013). https://www.researchgate.net/publication/269099241_Genealogy_of_Land_Ownership_Use_and_Management_Problems_in_Kenya_During_the_Pre-August_2010_Constitution_Period_A_Review/link/5af1b2b40f7e9ba36645ce94/download. Accessed on 16th May, 2020 at 1037hrs.

[44] Ibid

[45] HWO Okoth – Ogendo, 'The tragic African commons: A century of expropriation, suppression and subversion' (2002) University of Western Cape, Paper No. 24 Occasional Paper Series. <

In the absence of codified laws, settlement by colonial settlers was implemented in total disregard of the indigenous pre-colonial land tenure systems. In order to create some semblance of order and legitimacy in land acquisition among the white settlers, legislation under the name East African Order in Council was introduced.[46] Various laws which were referred to as Ordinances were promulgated to regulate various sectors of the economy especially land use and occupation.

Rent control legislation was first introduced in Kenya in 1918 when the Rent Control Ordinance (RCO) was enacted. This was a short term measure to restrict increase in rent because of the expected post World War I housing scarcity.[47] Since this was a short term measure, the same came to an end in 1923. Controls were not imposed again until 1940 when the Increase of Rent and of Mortgage Interest (Restriction) Ordinance of 1940 was enacted. It was meant to protect those tenants who served in the British army.[48] It is after 1940 (the advent of the Second World War) that the two major statutes that are the subject of interrogation of this paper were enacted. The Rent Restriction Act came into force in 1959 while the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act came into force in 1965.[49] The purpose of the two statutes was to regulate tenancy relations in residential and business premises respectively. The statutes created two tribunals where disputes arising between the parties are heard and determined. For residential premises, disputes were taken to the Rent Restriction Tribunal (hereinafter RRT) while those arising

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https://www.google.com/search?client=firefox-b-d&q=tenants+of+the+crown+okoth+ogendo+pdf> Accessed on 6th September, 2020 at 1217hrs.

[46] Ibid [2]

[47] Isaac Karanja Mwangi, 'The nature of rental housing in Kenya' (1997) University of Nairobi, Vol. 9, No. 2, Environment and Urbanization. < https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiAxfKjntTrAhUV8uAKHReuB7AQFjAAegQIAxAB&url=https%3A%2F%2Fjournals.sagepub.com%2Fdoi%2Fpdf%2F10.1177%2F095624789700900205&usg=AOvVaw0uvkEBoLDAGw6bKJIHwUkY> Accessed on 6th September, 2020 at 1304hrs.

[48] Sidiq O. NoorMohamed, 'Economic Consequences of Rent Control in Kenya: A Case Study of Eastleigh, Nairobi' (Masters thesis, University of Nairobi 1975)

[49] Preamble, Chapter 296 and 301, Laws of Kenya.

from business premises were taken to the Business Premises Rent Tribunal (hereinafter BPRT).[50]

2.2 Constitution of Kenya

The Constitution contains a bill of rights which includes socio – economic rights like the right to accessible and adequate housing, as well as reasonable standard of sanitation.[51] This right has been restated by the Supreme Court recently when it upheld the Petitioners right to accessible and adequate housing as envisaged under the Constitution.[52] The court having considered the Petitioners' case where they had been evicted from their residences held as follows:

> "…From the foregoing, the question as to when the right to housing accrues, in our view, is not dependent upon its progressive realization. The right accrues to every individual or family, by virtue of being a citizen of this Country. It is an entitlement guaranteed by the Constitution under the Bill of rights. The persistent problem is that its realization depends on the availability of land and other material resources. Given the fact that our society is incredulously unequal, with the majority of the population condemned to grinding poverty, the right to accessible and adequate housing remains but a pipe-dream for many. What with each successive government erecting the defence of "lack of resources? The situation is compounded by the fact that, for reasons incomprehensible, the right to housing in Kenya is predicated upon one's ability to "own" land. In other words, unless one has "title" to land under our land laws, he/she will find it almost impossible to mount a claim of a right to housing, even when faced with the grim possibility of eviction."

The Constitution further recognizes the right to own property either individually or communally.[53] It however gives exceptions to this right by laying down scenarios and conditions under which the said property may be acquired by the State under its power of compulsory acquisition. All landlords, including those of properties subject to controlled tenancies, are protected by this provision. In practice however, the tenants who are not

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[50] Ibid [36]
[51] Ibid, art 43(b)
[52] Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae), Supreme Court Petition No. 3 of 2018 [2018] eKLR.
[53] Ibid [7], art 40.

property owners enjoy more protection as can be gleaned from the preamble to the two Controlled Tenancy statutes.

This scenario contradicts consumer rights provision which applies to both the landlords and the tenants. Regarding the tenants, the Constitution guarantees their right to quality services.[54] In relation to landlords, the Constitution guarantees protection of their economic interests.[55]

Closely tied to the above provisions, the Constitution has set out the principles of land policy in Kenya. Among the principles are equitable access to land and security of land rights.[56] Landlords are protected from arbitrary deprivation of their investments and in turn they are expected to ensure that tenants enjoy quiet possession of the leased premises.

Prior to the promulgation of the Constitution, there were multiple in land registration statutes including the Government Lands Act (GLA), Registered Land Act (RLA), Land Titles Act (LTA), Registration of Titles Act (RTA) and the Trust Land Act (TLA). All these statutes were dealing with sectorial land issues, for instance, GLA was dealing with regulation of leasing and other disposal of Government lands. For private land, recourse was on either RLA, LTA or RTA. Land dealings were therefore made cumbersome as each regime had its own procedures. With this background, the framers of the Constitution deemed it fit to simplify land dealings and to this end, revision, consolidation and rationalisation of the existing land statutes were considered necessary.[57] It is against the same backdrop that the same procedure adopted on land laws be employed on controlled tenancy statutes.

The constitutional foundation of tribunals including the RRT and BPRT is article 159(1) which states judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution. The High Court while

[54] Ibid [7], art. 46(1) (a).
[55] Ibid, art. 46 (1) (c).
[56] Ibid, art. 60 (1).
[57] Ibid [8].

discussing the term judicial authority as used in the Constitution reiterated that the same can only be exercised by courts and independent tribunals under the 2010 Constitution.[58] The Constitution recognizes local tribunals as part of the subordinate courts. Hierarchically as per the Constitution, it appears that the tribunals are equivalent to Magistrates courts, Kadhis' courts and Courts Martial.[59] In exercising their authority, the tribunals are guided by the national values and principles of governance.[60] The Constitution also advocates for the promotion of alternative dispute resolution mechanisms such as reconciliation and arbitration. In practice however, these alternative mechanisms are rarely invoked by the tribunals created by the two controlled tenancy statutes.

The tribunals are also required to exercise the constitutional threshold of fair administrative action while discharging their functions.[61] This includes the right to be heard by an independent umpire. It is for this reason that their decisions are subject to judicial review processes which are concerned with how decisions affecting individuals were arrived at. The Constitution equally requires the state to ensure affordable access to justice for all persons. The controlled tenancy statutes do not have a settled formula on filing fees which leaves room for arbitrariness in its assessment. For instance, a tenant paying annual rent of twelve million is required to pay Kenya shillings six hundred thousand filing fees in the BPRT. This is prohibitive since it even exceeds filing fees in the High Court which is pegged at a maximum of Kenya shillings seventy thousand. Parliament is then empowered to enact legislation conferring jurisdiction, functions and powers on the subordinate courts.[62] Considering that the RRA and LTS which establishes RRT and BPRT were enacted prior to the 2010 Constitution, there is need for their alignment with the requirements of article

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[58] Juma Nyamawi Ndungo & 5 others v Attorney General; Mombasa Law Society (Interested Party), Mombasa High Court Constitutional Petition No. 196 of 2018 [2019] eKLR.
[59] Ibid [7], art. 169 (1).
[60] Ibid, art. 10.
[61] Ibid, art 47 and Fair Administrative Action Act (2015) KEN ss. 3,4 and 12
[62] Ibid, art. 169 (1) (d), (2).

169(2) which state that Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1).

The Constitution has entrenched devolution in the governance structure which requires decentralization of state organs, their functions and services from the central government and its administrative capital in Nairobi.[63] The RRT and BPRT are currently centralized and does not accord to the objects and principles of devolution. Though there has been an attempt to decentralize the services of BPRT through appointment of a chairperson and four vice chairpersons, the same has been halted by the court because the appointment was found to have been carried out unprocedurally.[64] The appointments, would however not satisfy the requirement of devolution. In essence, access to justice remains impeded as centralization only favours those with the means to access the tribunals.

2.3 The Land Act

This statute came into force on 2nd May, 2012 and as stated in its preamble, it was meant to give effect to the provision of the Constitution which required Parliament to revise, consolidate and rationalise existing land laws.[65] Prior to the enactment of this statute, there were in existence, over ten pieces of legislation touching on land registration. These statutes were not pursuant to any constitutional provision as they were enacted out of necessity.[66] The 2010 Constitution included a positive edict requiring all land in Kenya to be held, used and managed in a manner that is equitable, efficient, productive and sustainable. Several guiding principles were laid down including transparency and cost effective administration of land.[67] This was the basis of enactment of the Land Act. The statute covers all areas of property in

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[63] Ibid [7], art. 174

[64] Benard Odero Okello v Cabinet Secretary for Industrialization, Trade and Enterprises Development & The Attorney General, Nairobi Employment and Labour Relations Court, Petition No. 100 of 2020.

[65] Ibid [1], preamble.

[66] Primoz Kovacic et al, 'A Short Note on Land Laws in Kenya' (*Mapping: (No) Big Deal*, 30th November, 2018) https://mappingnobigdeal.com/2018/11/30/a-short-note-on-land-laws-in-kenya/ Accessed on 29th September, 2020 at 1252hrs.

[67] Ibid [7], article 60.

land such as management and administration of public and private land including leases.[68] It provides the basic minimum rights and obligations of the parties in lease agreements. These rights and obligations form the basis of controlled tenancy relationships though they are not only confined to controlled tenancies. They apply across the entire land spectrum. The High Court has had the occasion to summarize salient provisions with respect to leases under this statute. While noting that all land in Kenya is subject to this statute as it deals with administration, the court remarked that the statute contains elaborate provisions on leases such as power to lease, rights and obligations of parties to a lease and termination of a lease.[69] Among the salient features in the Act are the covenants implied in a lease on part of the lessor such as duty to pay all rates, taxes, dues and other outgoings in respect to the leased premises. On the part of the lessee is the obligation to pay rent in respect of the leased premises at the time and manner specified in the lease.

The statute recognizes the Environment and Land Court as the Court clothed with the requisite jurisdiction to deal with land related issues among them, leases. The court also has appellate jurisdiction on the decisions emanating from the subordinate courts and tribunals. The statute is silent on the issue of tribunals including the RRT and BPRT.[70] The omission of the tribunals in the Land Act is a clear indicator of the urgent need to review the statutes establishing them to align the tribunals with the current legal framework. As already observed under the controlled tenancy statutes, appeals from the tribunals lie with the Environment and Land Court. The Court has supervisory jurisdiction over subordinate courts, local tribunals, persons or authorities with jurisdiction to deal with use and occupation of land.[71]

The Land Act establishes the threshold of minimum rights and obligations beneath which parties are not at liberty to contract. These are enacted as implied conditions on the part of the

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[68] Ibid [1], Part VI.
[69] Midland Properties Investment Ltd v Masinde Muliro University of Science and Technology, Kakamega High Court Civil Case No. 24 of 2018 [2020] eKLR.
[70] Environment and Land Court Act (Ken), s. 13(4).
[71] Ibid, ss. 13 and 30.

lessor and the lessee respectively.[72] Even where they are not expressly agreed upon by the parties, they are still read into the agreement as part of the terms.[73]The landlord is required to among other obligations, grant the tenant peaceful and quiet possession of the leased premises, keep the roof, external walls and drains in a proper state of repair and pay all rates, taxes and other outgoings in respect of the leased premises. The tenant on the other hand, is expected to inter alia pay reserved rent, use the premises for the purpose it was let out and keep the leased premises in reasonable state of repair. These terms are implied in all the leases under the controlled tenancy statutes.[74]

Considering that this statute was enacted in 2012 in response to the requirements of the Constitution, the lawmakers seem to have failed to realize that the controlled tenancy statutes relate to land. As such, the said statutes ought to have been among those to be revised, consolidated and rationalised to bring them in line with the new dispensation. Their oversight meant that an opportunity to breathe fresh air to these statutes was lost.

2.4 The Rent Restriction Act – RRA

As stated above, this statute came into effect on 1st October, 1959 and has therefore been in operation for the last sixty years with minimal amendments. Some of the amendments were enacted in 1981 where sections 3, 4, 5, 10, 15 and 28 were amended. The amendments related introduced new terms such as standard rent. Considering its age, it is no longer in accord with the current market trends and technological advancements. This has denied the key parties in tenancy relationship satisfaction in the respective benefits they derive from each other.

2.4.1 The Scope of the Act

The statute is concerned with low-income earners who are unable to afford expensive housing that attracts high rents. It is meant to protect the tenant with regard to the rent

[72] Ibid [1], ss. 65 and 66.
[73] Ibid [15], p. 1510.
[74] Ibid [2], s. 24, Ibid [3].

payable, eviction and harassment by the landlord.[75] The statute was specifically enacted to protect tenants paying rent of not more than two thousand five hundred shillings (US$ 23.40) per month.[76] It was meant to restrict increase of rent, the right to possession and execution of premiums and to fix standard rents.[77] The statute only applies to dwelling houses of a permanent nature as opposed to temporary shelters such as tents and caravans. The statute exempts certain dwelling houses from its application. These include those belonging to any class which the Cabinet Secretary may exclude by notice in the Gazette. For instance, in gazette notices number 4662/1966 and 259/1983, the Cabinet Secretary exempted dwelling houses which are the property of the Government of Kenya (GoK), Kenya Railways, Kenya Ports Authority, Kenya Post and Telecommunication Corporation, National Housing Corporation or a local authority.[78] The exemptions also includes those let on service tenancies such as houses let out by the landlord to an employee in connection with their employment.[79]

2.4.2 Establishment and Jurisdiction of the Tribunal

The statute establishes the Rent Restriction Tribunal (RRT).[80] It is the primary dispute resolution forum with original jurisdiction which cannot be bypassed. Where, for example, one institutes concurrent proceedings before the tribunal and the High Court, the proceedings before the High Court are referred back to the tribunal.[81] This position was highlighted in *Oza v Jani* where Windham, C.J, held that, the High Court had no jurisdiction to entertain the application for an interlocutory injunction and accordingly ordered that the proceedings be transferred to the Rent Restriction Board which is the equivalent of Kenya's RRT.[82] The Plaintiff in that case had commenced proceedings in the High Court claiming perpetual

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[75] Ibid (2),preamble.
[76] Ibid [36], p. 64.
[77] Ibid [37], p. 2.
[78] Ibid [2], s. 3(1).
[79] Ibid.
[80] Ibid [2], s. 4(1).
[81] Ibid [30] p. 243
[82] Valji Keshav Oza v C.P. Zani & Sons, Zanzibar High Court Civil Case No. 2 of 1957 [1957] E.A. 184

injunction against the Defendants, his landlords, to restrain them from demolishing certain premises adjoining and having a common wall with those occupied by the Plaintiff. The High Court in referring the proceedings to the Rent Restriction Board held that it did not have jurisdiction.

As stated earlier, the RRA as presently constituted has limited applicability for the reason that there are very few residential premises in major urban centers whose rent is less than Kshs. 2,500/= (US$ 23). Therefore, very many tenants who ought to be protected have been locked out. The RRT has time and again found itself exercising jurisdiction where it does not have. This has been occasioned by the fact that the tribunal has little work due to the statute shrinking scope. Even where they have attempted to stretch their jurisdiction, the attempts have been thwarted by the courts. In *Republic v Chairman Rent Restriction Tribunal & another Ex-Parte Ezekiel Machogu & 3 others*, RRT's decision to grant temporary injunction in respect of premises where the agreed rent was Kshs. 3,000/= (US$ 28) was quashed by the High Court for want of jurisdiction on the part of the tribunal.[83]

2.4.3 Composition, Appointment and Term of Members of the Tribunal

The tribunal is composed of the chairperson, their deputy and a panel of members all of whom are appointed by the Cabinet Secretary in charge of Industry, Trade and Cooperatives. Its quorum consists of the chairman or deputy chairman who presides over the panel and two other members selected by the Permanent Secretary of the Ministry responsible for the administration of the Act.[84] The statute only specifies the qualifications of the chairman and the deputy. One must be an advocate of the High Court of Kenya of not less than five years standing.[85] The provisions referred in the statute as regards the qualifications of the chairman and the vice chairman have since been repealed. The statute does not state the qualifications

[83] Nairobi High Court Judicial Review Miscellaneous Application No. 447 of 2012 [2013] eKLR.
[84] Ibid [2], s.4 (5).
[85] Ibid, s. 4(3).

of the other members. It is equally silent on term limits and this has given a scenario where some members have been sitting in the tribunal in Mombasa for the last twenty seven years and another has been a member since 1970s. The said members are well past seventy years and since there is no criteria for appointment and retirement, their legitimacy at the tribunal cannot be questioned. As a result of this lacuna, the competence and efficiency in service delivery is not guaranteed. As a result therefore, the parties approaching the tribunal cannot be guaranteed quality and satisfying services thus a direct denial of access to justice. Viewed from a utilitarian view point, this state of affairs denies parties satisfaction derived from efficient and quality service delivery.

2.4.4 Powers of the Tribunal

The tribunal is vested with certain powers in relation to administration of controlled premises. One of them is the power to assess standard rent of the premises. The assessment maybe on the application of any interested person or on the tribunal's own motion. The court has had occasion to spell out the circumstances under which standard rent may be assessed as per the statute in the case of *J.D. Sumaria & 4 others v Valbaivaji & Another*.[86] The question that was before the court for determination was whether a party, having known the rent of the premises in question, had the right to approach the Tribunal for assessment of the same. Ang'awa, LJ (as she was then) proceeded to set out the circumstances under which the standard rent is assessed by stating as follows:

> There are situations where the standard rent as of 1st January, 1981 was not known because the premises were not let then. In such a case, the landlord would apply for the assessment of the rent. The RRT would then assess the standard rent.... The other situation is when the standard rent is known but the rents are uneconomical. The Tribunal can reassess the standard rent. The fact though is, to rely on this request; there must be standard rent first. The landlord has to then show to the RRT that the rent does not yield "a fair capital return or the costs of return and market value of land as of 1st January, 1981."

[86] JD Sumaria and Others v Valbaivaji and Another, Civil Appeal No. 192 of 1994 (UR), Ibid [15] p.244-245

> The landlord has to prove the value of land, the rent he is getting is uneconomical and the capital is poor.

Where the rent chargeable in respect of any premises is inclusive of water, light, cleaning, security or other service charge in addition to the standard rent, the tribunal has power to fix the amount of such payment or service charge.[87] In addition, where any premises is occupied by tenants who enjoy services in common such as water, light, cleaning or security, the tribunal has powers to apportion such charges to each of the tenants.

The courts have interrogated the powers of the tribunal in various decisions. In *Nganga Kamau v Patrice Kiiru,* the landlord was required to apply for assessment of standard rent which he failed to do. He instead increased the rent without the tribunal's leave. The tenant applied to the tribunal and notwithstanding the tenant's application, the landlord locked the premises and the court had to intervene. The court while considering the powers of the tribunal to assess standard rent along with the duty to protect tenants from exploitation by the landlords remarked as follows:-

> "…Having re-evaluated the evidence adduced and the submissions made, I find that the appellant sought to increase the rent in disregard of the existing law. He choose not to obey the edicts of the law. He did not want to consider that the respondent was a protected tenant. He harassed the respondent to the extent that the respondent was forced to move out of the said rented premises and seek accommodation elsewhere. The appellant took the said action complained of because he wanted to show the respondent that he could get him out of the premises whether or not the law allowed it. The law cannot condone the actions of the appellant. Where the law offers protection to a citizen *(in this case the respondent as a protected tenant*) it is the duty of the court to uphold such a law. In the circumstances of this case, I am not prepared to find that the tribunal erred when it made the orders that it did including making an order that the appellant pays compensation to the respondent for unlawfully locking his premises…"[88]

In exercise of its powers under the Act, the tribunal has the same jurisdiction and powers in controlled tenancy matters as the High Court. The powers include administering oaths,

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[87] Ibid [34], p. 112.

[88] Nakuru Civil Appeal No. 89 of 2001 [2005] eKLR.

issuing summons to any person to attend the Tribunal and powers to order payment of costs by any party either wholly or partially.[89] The tribunal can only exercise those powers that have been donated to it by the statute.

Courts have exercised a supervisory role over the tribunal where the latter has arrogated itself jurisdiction or powers it does not have. In *Republic v Deputy Chairman Rent Restriction & another Ex-Parte Benedict Wambua Kenzi*, the High Court while considering a case where the tribunal had issued orders of injunction barring the landlord from evicting the tenant for premises whose rent was six thousand shillings (Kshs. 6,000/= or US$ 55) held as follows:-

> "In this regard the Rent Restriction Tribunal is a creature of the law and has only jurisdiction as has been specifically conferred upon it by law... Under Section 3 of the Rent Restriction Act *"Standard rent"* in relation to unfurnished dwelling house, means if on January, 1981, it was let unfurnished, the rent, at which it was lawfully so let, the landlord paying all outgoings. This means in my understanding that the standard rent that is established for a dwelling house is that which was there on the first of January, 1981. It seems to me therefore, that once this fact is known and established, the need for assessment of standard rent is eliminated. It becomes clear that the jurisdiction of the Rent Tribunal is specifically defined, and it relates to a standard rent which does not exceed Kshs. 2,500/= per month. There is no denial by the Interested Party that at the time the jurisdiction of the Rent Tribunal was invoked, the Interested Party was paying Kshs. 6,000/= per month. Consequently, the Rent Restriction Tribunal cannot appropriate or arrogate to itself jurisdiction where the standard rent is Kshs. 6,000/= per month. The tribunal thus acted in excess of its jurisdiction..."[90]

Section 6 of the Act empowers the Tribunal to investigate any complaint relating to the tenancy of the premises made to it by either the tenant or the landlord of those premises.[91] Courts have interpreted these powers widely and not only limited to those set out in section 5 of the statute. There are additional powers to investigate any complaints by either parties to the tenancy agreement.[92]

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[89] Ibid [2], s. 30.
[90] Mombasa Constitutional, Judicial Review Miscellaneous Application No. 49 of 2015 [2016] eKLR.
[91] Ibid [2], s 6.
[92] Republic v Rent Restriction Tribunal Ex-Parte Mayfair Bakeries Limited, Nairobi Miscellaneous Civil Case No. 246 of 1981 [1982] eKLR

Service of notices under sections 11 and 15 of the statute can only be personal and in writing. Alternative modes of service and notices are not recognized. These alternatives include internationally registered and recognized courier services, electronic mail services (E-mail) and mobile – enabled messaging applications such as WhatsApp. In *Omar Shallo v Jubilee Party of Kenya & another*, the court had a chance to deal with a case where service of pleadings had been effected by WhatsApp.[93] The court held that this mode of service was outside the means recognised by the law, and was therefore bad service as per the law then. [94] The Civil Procedure Rules on service have since been amended by insertion of rules 22A, B and C to incorporate the above mentioned modern modes of service. The decision in *Omar Shallo* is thus no longer good law. There is however, a need for revision of the Rent Restriction Act to align it with the progress made in the Civil Procedure with regard to service.

2.4.5 Execution of Tribunal's Orders and Decrees

Once the tribunal has made a determination, a copy of the order or decree is certified by the chairman or an officer authorized by the Cabinet Secretary. The certified copies are then lodged in court together with the record of the tribunal's proceedings.[95] The statute does not specify the court but in practice it is the Chief Magistrates' Court within the territorial jurisdiction of the tribunal. The tribunal becomes *functus officio* (it has performed its duties to finality) upon transmitting the order or decree and proceedings to the court. The court is empowered to sign the documents that facilitate the execution of the tribunal's decision. It is clear from the above that the tribunal is not vested with powers to execute its own decrees or orders. As such, a party having obtained an order or decree from the tribunal has to move to another court (magistrates' court) to enforce the order or decree. This causes delay and thus

[93] Political Parties Disputes Tribunal Complaint No. 113 of 2017 [2017] eKLR.
[94] Nairobi High Court Election Petition Appeal No. 18 of 2017.
[95] Ibid [2], s. 31.

an impediment to access to justice as envisaged by the Constitution. Justice delayed is justice denied. Parties have a legitimate expectation to have matters concluded expeditiously and be in a position to reap the fruits of the decisions.

2.4.6 Appeals

The decisions of the Tribunal are final though appeals to the Environment and Land Court are allowed in limited instances.[96] These include appeals on any point of law or in case where premises have standard rent exceeding Kenya shillings one thousand (US$ 9.30) per month on any point of mixed fact and law. Courts have considered a raft of issues that qualify as points of law that can be taken up on appeal. In *Tobias Oyugi v Ismail Nassur Ali*, the Court while considering a preliminary objection that had been raised at the tribunal by the tenant, allowed the appeal by dismissing the tribunal's judgement in favour of the landlord and holding that the purported landlord had no locus standi to lodge a claim against the tenant at the tribunal.[97]

In reality, it is almost an impossibility to get premises with standard rents of US$ 9 thus very many tenants are locked out of the intended protection. In *Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v Chairman, Rent Restriction Tribunal & 99 others*, the Environment and Land Court held that before a party prefers an appeal to the said court, they are required to exhaust the option of review under section 5(1) (m) of the Act. This is the provision that gives the tribunal powers on its own or on application by any party to reopen the proceedings and revoke, vary or amend its decision. Therefore, an appeal to the Environment and Land Court does not lie as of right.[98]

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[96] Ibid [2] s. 8 (2)
[97] Kisumu High Court Civil Appeal No. 58 of 2018 [2019] eKLR
[98] Nairobi ELC Judicial Review Application No. 19 of 2018 [2018] eKLR

2.5 Landlord and Tenant (Shops, Hotels and Catering Establishments) Act- LTS

This statute came to effect on 1st November, 1965 and it was aimed at protecting tenants of business premises against exploitation and irregular eviction. In *Bachelor's Bakery Limited v Westlands Securities Limited*, the Court of Appeal expounded on this purpose as follows:-

> "...The Act is legislation of a special nature enacted solely for the protection of tenants. It allows the parties a choice of occupation of premises under a controlled or uncontrolled tenancy, in the first case, within the ambit, and in the second case, outside the ambit of the Act. In the instances to which the provisions of the Act are declared to apply, it overrides any other written law which is in conflict with its provisions..."[99]

The above remarks confirm that in the event there is any conflict of laws between this statute and any other written law, the provisions of this statute shall prevail. The statute defines relevant terminologies including business, shop, hotel and catering establishment.[100] Business under the statute is perceived widely to include among other things, trade and profession.[101] A shop is defined as a premise mainly used for retail or wholesale business or for purposes of rendering services for money or money's worth. Hotel is defined as a premise offering accommodation, meals or both to five or more adult persons for a consideration. On the other hand, catering establishment refers to a premise rendering food and drinks for consumption to non-residents. The definitions of the three key words in the statute, that is, shop, hotel and catering establishment, are quite narrow. They have not factored in the current business practices and the emerging premises such as stalls and take-away food courts. The Act specifically relates to premises leased for purposes of running shops, hotels and catering establishments.[102] The court has pronounced that premises leased for use as a school or a petrol station are excluded.[103] This denies parties in such business ventures a specialized forum to resolve their disputes. Without right of access to the tribunals, they resort to the

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[99] Nairobi Civil Appeal No. 2 of 1978 [1982] eKLR.
[100] Ibid [3], s. 2 (1).
[101] Ibid [34], p. 117.
[102] Ibid [28], p. 112.
[103] Ibid [30], p.233.

magistrates' courts or even High Court depending on the value of the subject matter. This subjects them to unnecessary hardship in terms of time and costs which negates the principle of satisfaction as envisaged in the theory of utilitarianism.

2.5.1 Purpose of the Act

As stated above, this statute is aimed at protecting tenants of business premises against exploitation and irregular eviction. The threshold of protection under the Act depends on the duration of the tenancy and the purpose for which the tenancy is created. The categories of business premises that qualify as controlled tenancies include, those whose leases have not been reduced into writing and those which though in writing are for a period not exceeding five years. The other applicable tenancies are those that though in writing, contain provision for termination, otherwise than for breach of covenant within five years from the commencement thereof or those that relate to premises of a class specified under subsection (2) of section 2 of the Act.[104] The said sub section provides that the Cabinet Secretary is empowered to specify either by reference to the rent paid or rateable value entered in a valuation roll under the Valuation for Rating Act those classes of shops, hotels or catering establishments tenancies of which shall be controlled tenancies regardless of the form or period of such tenancies.[105]

In *African Universal Merchandise Limited v Kulia Investments Limited*, the Court of Appeal had occasion to consider when a controlled tenancy arises with reference to the length of the tenancy period. The Court emphasized the requirement that for a controlled tenancy to arise where the lease has been reduced to writing, the said lease must not be for a period exceeding five years.[106] The statute excludes tenancy to which the Government, Community or a local authority (now County Government) is a party either as landlord or tenant from controlled

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[104] Ibid [3], s. 2(1)
[105] Ibid, s. 2(2).
[106] Nairobi Civil Appeal No. 8 of 1980 [1980] eKLR.

tenancy. The rationale behind this exception is that the excluded parties are deemed to be capable of protecting themselves. This can be said to have an element of unconstitutionality as every person is equal before the law with equal right of protection and benefit of the law. There is no justification in selectively applying it as it is alive to the fact that the agencies excluded can either be landlords or tenants.

2.5.2 Establishment, Composition and Jurisdiction of the Tribunal

Just like the RRA, the LTS establishes a tribunal known as the Business Premises Rent Tribunal (BPRT).[107] The BPRT consist of a person or persons appointed as such by the Cabinet Secretary. The Act does not explicitly provide the designation of such person or persons. However, in practice, the person who presides over the Tribunal is commonly known as the Chairperson of the BPRT. Unlike RRA, this Act does not give qualifications of any member at all. The practice has been that the chairperson and their vice have been advocates of not less than five years standing. The members serve at the discretion of the Cabinet Secretary (CS) and thus it is open to abuse. There being no set procedure of appointment, nothing stops the CS from appointing their cronies who may not be knowledgeable in this field. This may have the effect of compromising the quality of decisions rendered by the tribunal thereby necessitating lodging of unnecessary appeals which further wastes time and resources thus impeding access to justice.

The Employment and Labour Relations Court has recently dealt with this issue in *Benard Odero Okello v C.S. for Industrialization Enterprise Development & Another*.[108] In that case, the petitioner had contended that the appointing authority with respect to the chairperson and members of BPRT ought to be through the Judicial Service Commission (JSC) and not the

[107] Ibid [3], s.11.
[108] Nairobi Employment and Labour Relations Court Petition No. 100 of 2020 [2020] eKLR.

Cabinet Secretary. The court agreed with the petitioners in that case and quashed the appointment by the Cabinet Secretary.

The Tribunal's jurisdiction emanates from section 12 of the statute. This position was enunciated in the case of *Re Hebtulla Properties Ltd* cited in *Republic v Business Premises Rent Tribunal & another Ex parte Albert Kigera Karume*. The Court stated that the Tribunal, being a creature of the statute, can only exercise powers that have been expressly provided by the statute. Since its powers are express, there is no room for extension of this powers through innovation or craft. Any complaint taken up by the tribunal must be related to a controlled tenancy made by either the landlord or tenant. The court held that the tribunal does not have jurisdiction over criminal matters and matters for superior courts such as stay of its decision pending appeal.[109]

The BPRT is the primary forum established for adjudicating matters related to controlled tenancy under the Act. Parties are not at liberty to by-pass this forum. In *Alex Kadenge Mwendwa v Grace Wangari Ndikimi & Others,* the plaintiffs lodged a tenancy dispute in the High Court their justification being that the High Court is vested with superior powers. This was despite the fact that the respondents had filed a reference in the Business Premises Tribunal. In dismissing the suit, Ojwang, J (as he then was) held as follows:-

> There is a jurisdictional question attached to the definitions of rights and obligations in the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301), which takes the basic dispute settlement forum to be the Business Premises Tribunal; and the jurisdiction of that Tribunal is not to be excluded but for good cause. When, therefore, the deceased tenant submitted a business premises dispute before the Tribunal, he thereby activated a legal process which required the plaintiff herein to deal in the first place with that Tribunal and not leapfrog into the High Court. I therefore reject counsel's submissions that the plaintiff's grievances should only have been resolved in the High Court.[110]

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[109] Nairobi Judicial Review Miscellaneous Application No. 435 of 2012 [2015] eKLR
[110] Nairobi Civil Case No. 2974 of 1991 [2006] eKLR

The finding by the High Court was confirmed by the Court of Appeal in *Dhirajlal J. Shah & another v Vijay Amritlal Shethia*. While unpacking the preamble to the Act, the Court stated as follows:-

> Our construction of the title of this Act together with the content of the preamble (supra) is that, this Act deals specifically with the landlord and tenant relationships in relation to structures standing on the land. The mandate to resolve disputes arising from dealings in relation to such structures is exclusively vested in the BPRT in terms of section 12 of the Act[111]

2.5.3 Powers of the Business Premises Rent Tribunal (BPRT)

The Act grants the Tribunal a wide range of powers.[112] One of them is the power to determine whether or not any tenancy is a controlled tenancy. There are instances where parties approach the High Court challenging the Tribunal's power to make a determination of whether or not the tenancy in place is a controlled one. This was the case in *Real Consult Agencies Ltd v Gerald Wachira Nguthi*.[113] The tenancy had expired though the tenant remained in occupation after expiry of the tenancy. The tenant moved to the tribunal which found that it lacked powers to hear the dispute. However, on appeal, it was ruled that the tribunal had powers to hear the dispute there having existed a dispute as to the payment of rent after expiry of the lease. Therefore, a landlord or a tenant who desires to have a determination of the nature of the tenancy in place is obligated to approach the tribunal for such a determination.

The Tribunal has power to determine or vary the rent payable in respect of any controlled tenancy. The statute sets out a mandatory procedure that must be complied with before a landlord increases rent. The landlord is required to issue a two calendar months' notice upon the tenant indicating their wish to increase rent.[114] The said notice must be in the prescribed

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[111] Dhirajlal J. Shah & another v Vijay Amritlal Shethia, Nairobi Civil Appeal No. 218 of 2015 [2018] eKLR.
[112] Ibid [3], s. 12.
[113] Nyeri Environment and Land Court Appeal No. 24 of 2015 [2016] eKLR
[114] Ibid [3], s. 4(2).

form which is known as form A in the statute.[115] This form is available in the subsidiary legislation, that is, the Landlord and Tenant (Shops, Hotels and Catering Establishments) (Tribunals) (Forms and Procedure) Regulations. The form contains the name of the landlord, the tenant being issued with the notice, particulars of the property, reasons for issuance of the notice, the effective date and the date of issuance of the notice.

In *Munaver N Alibhai t/a Diani Boutique v South Coast Fitness & Sports Centre Limited*, the Court of Appeal considered the importance of complying with the format of the notice issued by the landlord and the timeframe of the said notice. In allowing the appeal, the Court held that the notice issued by the landlord in that case was void and of no legal effect and this rendered the purported termination null.[116] This was because the period specified was less than the one prescribed by the statute and thus the tenant had no obligation to respond to the notice. Upon service of a notice, the tenant is at liberty to file a reference where they wish to object to the notice.[117] A reference is an objection by the tenant to the notice issued by the landlord and once filed, the tribunal is invited to make a determination.

The Tribunal's jurisdiction to determine or vary rent may only be invoked once a reference has been filed by a tenant. In *Nandlal Jivraj Shah & 2 others (all trading as Jivaco Agencies v Kingfisher Properties Limited*, the Court held that upon service of a notice to terminate the tenancy and the tenant fails to file a reference, the landlord and tenant relationship ceases. The tribunal's jurisdiction is therefore ousted.[118] Where the tenant fails to file a reference within the prescribed period, the notice to vary rent takes effect.[119]

The Tribunal is also empowered to make orders upon such terms and conditions as it deems fit for the recovery of possession and for payment of arrears of rent and mesne profits. This power was reiterated by the court in *Tekimamo Company Limited v Julius Gitahi Gichuki.*

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[115] Ibid.
[116] Mombasa Civil Appeal No. 203 of 1994 [1995] eKLR.
[117] Ibid [3], s. 6(1).
[118] Mombasa Civil Appeal No. 35 of 2015 [2015] eKLR.
[119] Ibid [3], s.10.

The court further clarified that the exercise of this power extends to any person, whether or not they are tenants, so long as they are in occupation of the suit premises.[120]

A reference may result in the termination of the tenancy, an order for vacant possession or an order for payment of outstanding arrears and mesne profits.

The Tribunal is further empowered to vary or rescind any order made by it under the Act. This means that, the Tribunal can review its own orders where necessary. In *National Drycleaners Ltd & another v Ndune*, the Court while giving an interpretation of this power, stated as follows:-

> The material words are "to vary or rescind". I must give the ordinary meaning of the words "vary" or "rescind". Variation or precision cannot include the words "Stay pending appeal". An appeal generally seeks to set aside the orders of the Tribunal or court below. I appreciate that in some appeals a variation or rescission is sought but such variation or rescission is necessarily with a view to having the orders of the court below set aside. In my opinion the words "vary or rescind" are used in Section 12 of the Act in a restricted sense, in that the Tribunal can possibly vary or rescind its order or determinations in the sense that the High Court can review its orders or judgments under order XLIV of Civil Procedure Rules and I find nothing else in the Act which empowers a Tribunal to grant stay pending appeal from the Tribunal to the High Court.[121]

2.5.4 Execution of Tribunal's Orders and Decrees

Once the tribunal has made a determination, a duly certified copy of the order or decree may be filed in a competent subordinate court of the first class equivalent to resident magistrate's court by any party to the proceedings. The said order or decree is then enforced as an order or decree of the court. The tribunal, upon being served with a notice by the competent subordinate court sends to the court the record of proceedings and a certified copy of the determination or order.[122] The Act makes reference to competent subordinate court of the first class. With the repeal of Magistrates Court Act, Chapter 10, Laws of Kenya by Act No. 26 of

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[120] Tekimamo Company Limited v Julius Gitahi Gichuki, Nyeri ELC No. 197 of 2014 [2015] eKLR.
[121] National Drycleaners Ltd & another v Ndune, Nairobi Civil Appeals No. 79 and 80 of 1987 [1987] eKLR
[122] Ibid [3], s. 14.

2015, the subordinate court of first class no longer exists. Therefore, the court envisaged under the Act is unknown and it leads to confusion as relates where the orders or decrees are to be adopted. Just like RRT, BPRT becomes *functus officio* which means having given its final determination, upon transmitting the order or decree and proceedings to the court. The fact that the tribunal cannot execute its own decrees or orders is a serious impediment to access to justice as a parties are forced to move to another forum for execution.

2.5.5 Appeals

Under the Act, any party to a reference aggrieved by the tribunal's decision has a right of appeal to the Environment and Land Court (ELC) within thirty days from the date of the decision.[123] The Environment and Land Court's determination of the appeal is final and cannot be appealed further.[124]

2.6 Distress for Rent Act[125]

This statute was enacted on 1st June, 1938. It has been in existence for over eighty years with very minimal amendments. It gives property owners the mandate to seize or cause to be seized goods from a tenant that owes rent.[126] Though the statute is not specific to controlled tenancies, it is imperative to briefly highlight it as it has a correlation to the two statutes discussed above. The key consideration as regards this statute is on the issue of permission to levy distress. The practice is that under both the RRA and the LTS, there is need to seek leave to levy distress from RRT or BPRT by the landlords. The tribunals (RRT and BPRT) may intervene either before the levy of distress or pending distress. Under RRA, the leave before levying distress for rent is based on the statutory position which prohibits distress without the

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[123] Ibid, s. 15.
[124] Ibid, s. 15 (proviso).
[125] Chapter 293, Laws of Kenya.
[126] Anthony Owino, 'Rental Tenants: Rights of a Tenant in Kenya' [8th August, 2019] https://www.kenyans.co.ke/news/42610-rental-tenants-rights-tenant-kenya Accessed on 6th April, 2020 at 1030hrs.

leave of the tribunal.[127] However, under the LTS, there is no corresponding provision on the requirement for leave.[128] The tribunal has powers to permit levy of distress for rent.[129] In practice, High Court and BPRT may not stop distress for rent on account of failure to obtain leave to levy the same. This was the finding in *John Nthumbi Kamwithi v Asha Akumu Juma* where the Court held that the appellant (landlord) was not obligated to seek permission from the tribunal prior to levying distress. This was because distress is a right available to the landlord in recovering rent arrears from the tenant and that if a tenant is aggrieved, there is the option of filing a reference at the tribunal objecting distress.[130]

2.7 The Landlord and Tenant Bill, 2021.

The bill was published on 12th February, 2021.[131] From the preamble, its objective is to simplify, modernize and consolidate the laws relating to controlled tenancy statutes as relates to business and residential premises.[132] Its memorandum of object and reasons is specific that the principal object is to repeal the controlled tenancy statutes together with the Distress for Rent Act. It also seeks to introduce a legal framework which balances the interests of landlords and tenants in a free market economy. This is by ensuring that the landlords earn reasonable income from their investments while also protecting tenants from exploitation.[133] The Bill seeks to consolidate the three statutes and proposes to establish a single tribunal referred to as the Rent Tribunal.[134] The novel aspects introduced by the Bill include prescribing the minimum qualifications of a chairperson and provision for appointment of deputy chairperson and qualifications thereof. On the qualifications of the chairperson, the Bill proposes that one must be a person qualified for appointment as a Judge of the High

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[127] Ibid [2], s.16.
[128] Ibid [34], p. 123.
[129] Ibid [3], s. 12 (1) (h).
[130] Embu High Court Civil Appeal No. 7A of 2016 [2018] eKLR.
[131] Ibid [50]
[132] Ibid [44], preamble.
[133] Ibid, Memorandum of Object and Reasons.
[134] Ibid [9], s. 4.

Court of Kenya.[135] For the deputy, it is proposed that one must be an advocate of the High Court of Kenya of at least five (5) years standing.[136] Other than the qualifications expressly mentioned above, the Bill does not enumerate any other qualifications. This is a departure from the existing legal framework in the sense that the qualifications of the chairperson and the other members are not defined. Further, the position of the deputy chairman is clearly provided. Under the RRA, appointment of a deputy is optional whereas there is no provision for appointment of deputy chairperson(s) under the LTS.

Other provisions in the Bill include that the application of the Act for residential premises will depend what the Cabinet Secretary prescribes.[137] It is silent to the cap for business premises. The Bill also introduces certain powers which the existing tribunals do not have. These include power to reinstate a wrongfully evicted tenant, granting of injunctions, enforcement of its orders and punishment for contempt.[138] The Bill proposes to limit the right of appeal to points of law only otherwise, the decision of the tribunal is final and conclusive.[139] Lastly, the Bill seeks to introduce a scenario where tenancy can be terminated without any reference to the tribunal.[140]

Other than the above departure, the Bill replicates salient provisions of the controlled tenancy statutes save for the arrangement of sections. For instance, sections 34 which deals with alteration of terms and conditions in a tenancy and 35 dealing with reference to the tribunal replicates sections 4 and 6 of the LTS dealing with termination and alteration of terms and conditions in controlled tenancy and reference to the tribunal respectively. Section 40 of the Bill on statement to be supplied as to rent replicates section 20 of the RRA save for the amount of penalty.

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[135] Ibid [9], s. 4(2) (a).
[136] Ibid, s. 4 (2) (b).
[137] Ibid [9], s. 3(1) (a) (iii).
[138] Ibid, s. 5(1) (j), (l) and (m).
[139] Ibid [9], s. 7 (2).
[140] Ibid, s. 25.

2.8 The Tribunals Bill, 2019

The bill is intended to actualize the provisions of articles 1(3) (c) on delegation of sovereign power to the judiciary and independent tribunals, article 20(4) on interpretation of Bill of Rights by courts, tribunals or other authority, article 47(3) on legislation for review of administrative actions by court or independent and impartial tribunal, article 159(1) on judicial authority vesting on courts and tribunals established and article 169 of the Constitution. It further intends to establish the Office of the Registrar of Tribunals, lay out the functions of the Registrar and to rationalize and regulate the administration and functions of Tribunals.[141] Though it is not specific to controlled tenancies, its framework is relevant to this study which interrogates the entire legal framework including the tribunals to align them with the ever changing legal, social and economic realities. It also resonates with utilitarianism because the existing laws ought to be tailored in a manner that reflects equality of all persons as envisaged in the Constitution and for the highest good of the majority. The bill is yet to be published. Its history is traceable to the letter dated 23rd June, 2014 by the Attorney General of Kenya to the Kenya Law Reform Commission (KLRC). In the said letter, the Attorney General directed the KLRC to coordinate a committee to undertake a comprehensive status analysis of tribunals with a view of seeking the possibility of merging or creating a single administrative regime for all tribunals.[142] The committee having considered views from various members came up with this Bill.

Among the key objects of the bill is the rationalization and regulation of tribunals, expeditious settlement of disputes by tribunals, set appropriate qualifications for chairpersons and members of the tribunal, bring all tribunals under single administrative regime and

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[141] The Bill's preamble.

[142] Kenya Law Report Commission, *Report of the Committee on the Review of the Rationale for the Establishment of Tribunals in Kenya* (20th December, 2015) http://www.klrc.go.ke/images/reports/Tribunals-Review-Final-KLRC.pdf Accessed on 1st June, 2020 at 1014hrs.

enhance access to justice.[143] The bill applies to all tribunals except those established by the Constitution and arbitral tribunals under the Arbitration Act.[144] The Constitution does not explicitly establish any tribunal but it empowers Parliament to enact laws establishing local tribunals.[145] The bill establishes an office of Registrar of Tribunals who is the principal person deputized by such number of Deputy Registrars as the Judicial Service Commission (JSC) may deem necessary.[146] JSC is the appointing authority of all members of the tribunals. The Bill provides for qualifications one must attain to be appointed a Registrar or Deputy Registrar. One must be a degree holder from a university recognised in Kenya, have proven knowledge and experience in either management, political science, law, finance, governance or public administration. For the Registrar, one ought to have at least ten years post qualification experience in the relevant area of expertise while for the Deputy, seven years' experience suffices. The registrar or deputy must be a person of high moral character and integrity.[147] In addition to JSC powers under the Constitution, the Bill empowers the Commission to among other duties, develop policies for regulation of tribunals and evaluate, rationalize and recommend to Parliament the tribunals to be established, merged or abolished.[148]

The Registrar's functions include day-to-day management of the registry and the affairs of the tribunal, implementation of Tribunal's decisions, management of the tribunals' assets and finances among others.[149] Every tribunal established shall have jurisdiction to hear and determine any matter provided under the law establishing it. However, this jurisdiction does not include trial of criminal offences. Unlike the controlled tenancy tribunals, the Bill

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[143] Tribunals Bill, 2019, s. 3. http://www.klrc.go.ke/images/images/downloads/draft-tribunals-bill-2015.pdf Accessed on 1st June, 2020 at 1030hrs.
[144] Ibid, s. 4.
[145] Ibid [68]
[146] Ibid [150], s. 6.
[147] Ibid,
[148] Ibid, s.5.
[149] Ibid, s. 7.

specifically gives powers to the tribunals to grant equitable reliefs including injunctions, damages and specific performance.[150] The tribunals envisaged by this bill have power to review their own decisions. The tribunal's decisions are executed and enforced in the same manner as that of a magistrate court and thus no need for transmission to another forum for execution as happens with the controlled tenancies tribunals. A person aggrieved by the tribunal's decision may appeal to the High Court within thirty (30) days of the decision and the decision of the High Court shall be final.[151]

The Bill is a step in the right direction as it partly addresses the concerns of this study with regard to access to justice and expeditious settlement of disputes by the Tribunals. The Bill is now pending at the Attorney General Chambers awaiting approval as the same is yet to undergo public participation.

2.9 Conclusion

From the above discourse, though the existing legal framework has served the country since their enactment, it is no longer responsive to the ever changing tenancy regime. There is an urgent need to review the controlled tenancy statutes to ensure the power relations between the landlords and tenants are at par. The Courts have clearly confirmed that the controlled tenancy statutes are meant to protect tenants. This leaves out landlords without any form of protection.

When the two statutes were enacted, tenants were deemed to have less bargaining power thus the need to protect them. However, with the advent of the Constitution with adequate consumer right protection legislation, both parties are now at par and thus there is need to review the existing framework to bring it to reality. These gaps include devolution, costs of and incidental to access to justice, existence of two separate tribunals discharging almost

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[150] Ibid, s. 20.
[151] Ibid [150], ss. 22 and 23.

similar functions and unequal bargaining power. With consolidation, disputes between landlords and tenants shall be addressed in a single forum thus reducing on costs and improving access to justice.

CHAPTER THREE
INTERNATIONAL BEST PRACTICES IN CONTROLLED TENANCIES AND MANAGEMENT OF TRIBUNALS

3.1 Introduction

Rent control and management of tribunals is not a novel issue as concerns around it are not peculiar to Kenya. This chapter interrogates rent control practices in certain select jurisdictions with special focus on those practices that can enrich our own controlled tenancy system. The jurisdictions identified include the United Kingdom (UK), Australia, South Africa and Uganda. These are all commonwealth countries with certain shared traditions, institutions, and experiences.[152]

3.2 United Kingdom (UK)

As stated in the previous chapter, rent control in the UK was prompted by housing shortages during First World War.[153] The first statute to be enacted in relation to this was the Increase of Rent and Mortgage Interest (War Restrictions) Act of 1915. It was designed to prevent landlords from profiting during the war years when the demand for housing exceeded supply.[154] This Act applied to dwellings with standard rent not exceeding £35 in London £30 in Scotland and £26 elsewhere. Prior to this statute, the relationship between landlord and tenant had been purely contractual. At the expiration or termination of the contract, the landlord could recover possession.[155] The Rent and Mortgage Interest (War Restrictions) Act of 1915 went through several modifications and after World War I, its application was relaxed as the whole rent control concept was relaxed. For instance, in 1918, a new sub-section 3 was introduced to section 1 of the statute. The introduction redefined a landlord to

[152] https://www.britannica.com/topic/Commonwealth-association-of-states. Accessed on 18th October, 2020 at 0733hrs.
[153] Wendy Wilson, 'A short history of rent control' [2017] House of Commons Library Briefing Paper No. 6747. < https://commonslibrary.parliament.uk/research-briefings/sn06747/> Accessed on 9th April, 2020 at 1253hrs.
[154] Ibid, p. 3.
[155] History of rent control in England and Wales. < https://en.wikipedia.org/wiki/History_of_rent_control_in_England_and_Wales> Accessed on 9th April, 2020 at 1405hrs.

exclude any person who had acquired a dwelling house after 12th March, 1918.[156] This was the period towards the end of the First World War.

At the advent of Second World War in 1939, rent control was reintroduced as another phase of housing shortages ensued. The Rent and Mortgage Interests Restrictions Act, 1939 was then enacted to replace the 1915 Act.[157] This statute re-introduced the rent controls with a view of protecting tenants from exploitation by landlords during the war period. After World War II, a committee known as the Ridley Committee whose role was to make recommendations on whether rent control should still be enforced or not was formed.[158] Among the recommendations of the Committee was that England and Wales should enact a statute equivalent to Rent of Furnished Houses Control (Scotland) Act, 1943. In line with the recommendations, the Furnished Houses (Rent Control) Act, 1946 was enacted. It was modelled on Scottish legislation involving rent tribunals and setting of standard rents.[159]

Another key statute in the UK is the Landlord and Tenant (Rent Control) Act, 1949. It empowered rent tribunals to determine reasonable rent for any dwelling-house which the Rents Act applied to as of 1st September, 1939. The determination was upon application by either the landlord or the tenant.[160] Towards the end of 1953, the 1949 statute was found to have limited application in its scope as it only catered for residential houses.[161] In 1954, the Landlord and Tenant Act was enacted. It regulated both residential and business premises tenancies. Its enactment was to expand the scope of protection of tenants to include business premises. In its preamble, it provided that it was an Act to provide security of tenure for occupying tenants under certain leases of residential property at low rents. It also applied to

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[156] https://api.parliament.uk/historic-hansard/commons/1918/apr/24/clause-1-restriction-of-meaning-of#S5CV0105P0_19180424_HOC_252. Accessed on 18th October, 2020 at 0745hrs.
[157] Ibid [121], p. 7.
[158] https://api.parliament.uk/historic-hansard/commons/1943/oct/28/ridley-committee-terms-of-reference Accessed on 9th April, 2020 at 1339hrs.
[159] Ibid [123].
[160] Ibid.
[161] Ibid [121], p.8.

occupying sub-tenants of tenants under such leases. It enabled tenants occupying property for business, professional or certain other purposes to obtain new tenancies in certain cases.[162]

In 1957, the Rent Act, 1957 was enacted with a view to decontrolling tenancies. This was necessitated by the need to encourage landlords to invest in real estate. It was introduced by the Conservative Government. However, in 1965, the Labour Government which had been elected in 1964 repealed the 1957 Act and in its place enacted the Rent Act, 1965. The key feature of this statute was the introduction of Rent Officers. These were individuals appointed to determine appropriate rent for statutory or protected tenancies and tenancies for premises constructed prior to 1945.[163] It also brought within its protection most houses that were decontrolled by the 1957 Act and newer houses that had been controlled. The 1965 Act gave security to tenancies of most dwelling houses with rateable values of up to £400 in Greater London and £200 outside London. The statute began by stating that a tenancy under which a dwelling house (which could be a house or part of a house) was let as a separate dwelling was a protected tenancy.[164] Rent would be set by the market and where landlords and tenants disagreed, either or both could refer the rent to the rent officer service.[165] The 1965 Act was repealed by the Rent Act, 1968 which sought to consolidate all the rent statutes.[166] Between 1968 and 1977 several other statutes on rent control were enacted but in 1977, all the previous legislations were consolidated into the Rent Act, 1977.

The 1977 Act defined a controlled tenancy as one created after 1957 and a regulated tenancy as one created after 1965. A protected tenant was defined as someone who has a tenancy protected under the Rent Acts of 1965 and 1968. In 1980, the Housing Act was enacted. It made various amendments to the Rent Act, 1977 among them procedures for rent

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[162] Chapter 56 of the Laws of England, enacted on 30th July, 1954.
[163] https://www.communities-ni.gov.uk/topics/housing/rent-officer. Accessed on 18th October, 2020 at 0830hrs.
[164] Ibid [123]
[165] Ibid [121], p. 9.
[166] Ibid [123]

registration.[167] Section 64 of the Act converted the remaining four hundred thousand (400,000) controlled tenancies into regulated tenancies.[168] These were the remaining controlled tenancies as UK had begun the process of exercising control in tenancy matters. This Act remained in force until 1988 when the Housing Act, 1988 was enacted. It marked the end of controlled tenancy in England and Wales.[169] After 1989, the concept of tenancy was now subject to the freedom of contract and thus outside the realm of control.

From the above, it is clear that the UK rent control legal framework has not been static. The Kenyan RRA and LTS borrowed heavily from the UK rent statutes in existence at the time of enactment in 1959 and 1965 respectively. For instance, the preamble to Rent Act, 1957 is in similar terms with the preamble to RRA as it applied to dwelling houses. Since 1915, there have been regular amendments, consolidation and in most instances, repeal of English statutes. The trend confirms the realization by the UK government that rent control is not a static phenomenon and should be alive to the ever changing circumstances in the market. It is also imperative to note that despite having had several amendments, the UK has maintained a single control structure in terms of rent control. After many years of control, in 1989, they finally dealt away with control through legislation. This was informed by the fact that parties to a tenancy were much more enlightened and thus the bargaining power was almost at par. With this in perspective, it was only fair that parties be left to agree terms freely under the freedom of contract. This ensured that the parties to the contract would enter into the contracts based on their own comfort and happiness without coercion of the law.

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[167] Ibid.
[168] Ibid [123], p.9.
[169] Ibid

3.3 Australia

Just as in the UK, a limited form of rent control commenced in New South Wales (NSW) in 1916 with the introduction of the Fair Rents Act, 1915.[170] During the 1920s, various amendments were made including the extension of the fair rent legislation to shop premises. The preamble to the said Act clearly stated that its intention was to amend the law relating to landlords and tenants to include shops in addition to residential houses.[171] In 1927, there was a cessation of the Fair Rent Act, 1915 because it became a major election issue. With the change of government, its cessation thus became necessary as the Act was deemed to have been serving the outgoing government's interests.[172] The rent control statute was meant to cushion tenants from the effects of the World Wars when there was so much pressure on the existing housing units. In 1948, the Landlord and Tenant (Amendment) Act (LTA) was enacted. It repealed the Fair Rents Act, 1939 which was the finer version of the 1915 Act.[173] Since 1948, various State governments seeking to curtail rent control for one reason or another have introduced a total of forty five (45) amendment bills.[174] When the Act was enacted, it applied to all the premises except the Crown and NSW Land and Housing Corporation.[175] The Act established Fair Rent Boards which is a body or individual with the power to fix or determine rent payable in relation to protected tenancies.[176] From the wording of section 9 of the Act, it is indisputable that the Boards created are spread throughout the state. Not a single tribunal as envisaged under Kenya's RRA and LTS. There have been several amendments to the Act with a view to bringing it in line with the ever changing needs of Australians.

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[170] Edwina Schneller, 'Protected tenancies: history and proposals for reform' NSW Parliamentary Research Service, March, 2013. < https://www.parliament.nsw.gov.au/researchpapers/Documents/protected-tenancies--history-and-proposals-for-r/Protected%20Tenants.pdf> Accessed on 9th April, 2020 at 1538hrs.

[171] Fair Rents (Amendment) Act, No. 2 of 1926, preamble.

[172] Ibid [135].

[173] Landlord and Tenant (Amendment) Act, 1948, s.2.

[174] Ibid [135]

[175] Ibid [138], s. 5.

[176] Ibid, s. 9.

The amendments have been attributed to among other factors, the reduction of the number of protected tenants and thus the need to amend the Act in line with these changes. There has been a push to have the Act repealed. In 2012, the Real Estate Institute of NSW (REINSW) while giving its views on the need to repeal the Act stated as follows: - "There is no merit in maintaining the current Act or carrying forward these provisions in other legislation unless the actual number of affected properties can actually be determined with certainty."[177]

This view was in part attributed to the fact that as at 2012, the number of protected tenancies had really gone down, though the actual numbers could not be ascertained with particularity. It was thus incumbent that the process of determining the number of protected tenancies be undertaken. The REINSW proposed that any remaining tenants be protected by the government under the Department of Housing. They proposed that all the remaining tenants be regulated under the Residential Tenancies Act, 2010 (RTA).[178] Though there had been proposals to have the Landlord and Tenant (Amendment) Act, 1948 re-drafted, REINSW opposed this proposal for the reason that the cost of re-drafting would outweigh the costs of government providing alternative accommodation and care for any remaining protected tenants.[179]In conclusion, the group strongly submitted for the repeal of the Act for the reasons that it was outdated and uncompetitive. It disadvantaged landlords as it prevented them from being able to use or deal with their properties and that the Act adversely affected values of properties which were the subject of protected tenancies.[180] However, the Tenants Union of New South Wales opposed this move arguing that the Act should not be disturbed but instead be left to end in its own time.[181]

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[177] Ibid [135].

[178] Residential Tenancies Act, 2010 No. 42. https://www.legislation.nsw.gov.au/inforce/cfa8f374-676d-6eea-811e-95d70730f313/2010-42.pdf Accessed on 15th April, 2020 at 1212hrs.

[179] Ibid [135].

[180] Ibid.

[181] Ibid [135].

The Tenants Association was of the view that repeal or re-drafting of the Act would result in a lot of litigation. The Tenants Union argued that if the Landlord and Tenant (Amendment) Act, 1948 was redrafted either as part of a transfer to the Residential Tenancies Act, 2010 or as a stand-alone piece of legislation, there was a strong possibility that changes of substance may be made inadvertently and a stronger possibility that there could be litigation to test the effect of changes. In addition, they argued that transferring the provisions of the 1948 Act to RTA would create a greater regulatory burden than leaving the 1948 Act in its current form. In conclusion, the Tenants Union asserted that the proposals by REINSW would increase the complexity of the RTA as the majority of the public do not know about protected tenancies.[182]

Another Association, Combined Pensioners and Superannuants Association (CPSA) was of a similar view to the Tenants Association. They stated that any repeal of the 1948 Act could severely compromise the protection then afforded to the remaining protected tenants regardless of whether key provisions were transferred to general tenancy laws. They argued that if Landlord and Tenant (Amendment) Act, 1948 was repealed, it was highly likely that controlled premises would be sold. CPSA argued that the Landlord and Tenant (Amendment) Act, 1948 had a rich, complicated and detailed history and tampering with it was likely to create new problems. They also questioned the ability of the Housing Department of NSW to re-house protected tenants. On the re-drafting of the Act, CPSA was of the view that key protections may be lost in translation or compromised if incorporated into the Residential Tenancies Act, 2010. They recommended that the 1948 Act be retained in its current form

[182] Tenants Union of New South Wales Submission: *RE: Landlord and Tenant Act 1899 (NSW) and Landlord and Tenant (Amendment) Act 1948 (NSW)* to the Fair Trading Commissioner, NSW Fair Trading. https://files.tenants.org.au/policy/20180827-ETT-Submission-TUNSW-Final.pdf Accessed on 15th April, 2020 at 1242hrs.

with a rider that should the Act be repealed, its contents be included as a self-contained schedule in the Residential Tenancies Act, 2010.[183]

Though this Act is recent and regulates the relationship between landlords and tenants, it only applies to residential premises and excludes premises regulated under the Landlord and Tenant (Amendment) Act, 1948.[184] It therefore does not adequately fit the objectives of this discourse.

From the Australian perspective, it can be noted that the tribunals created under the Landlord and Tenant (Amendment) Act, 1948 are decentralized unlike Kenya where they are centralized. Secondly, the regulation of residential and business premises tenancies are under one statute. Thirdly, the issue of controlled tenancies' regulation is a live issue as there has been a consistent push for reforms in the existing legal framework. There are over forty five (45) pending bills whose view is to reform the controlled tenancy realm. There are also serious consumer associations whose views have been submitted to the Commissioner for Fair Trading. Those views are always taken into consideration whenever amendments are effected. The same cannot be said of Kenya where only negligible amendments to the controlled tenancy statutes have taken place. Further, there are no powerful consumer associations in controlled tenancy sector in Kenya whose robust views would have influenced development of the law. This is an aspect that Kenya should consider in light of the consumer rights under the Constitution.

3.4. South Africa

South Africa like many the other countries that were affected by the World Wars enacted controlled tenancy statutes immediately after the First World War. The Tenants Protection

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[183] Combined Pensioners and Superannuants Association of New South Wales: Submission to the Commissioner for Fair Trading on the Proposed repeals of the Landlord and Tenant (Amendment) Act, 1948 and Landlord and Tenant Act, 1899. < https://cpsa.org.au/wp-content/uploads/2019/01/Proposed-repeals-of-both-LT-A-A-1948-and-LT-Act-1899.pdf> Accessed on 15th April, 2020 at 1303hrs.

[184] Ibid, s. 7.

(Temporary) Act, 1920 introduced rent control in South Africa. The aim of the Act was to provide urban tenants with substantive tenure protection by automatically creating a statutory periodic tenancy at the end of a fixed-term tenancy, provided that the tenant continued to pay the rent on expiration of the lease and complied with the other conditions of the tenancy. Consequently, the landlord could not evict the tenant except on certain grounds provided in the Act.[185] These grounds included where the tenant damaged the property or when the landlord reasonably required the property for his own use. The Act was succeeded by a number of Rent Acts. They included Rent Act No. 13 of 1920, Rent Amendment Act No. 26 of 1940, Rent Act No. 43 of 1950 and Rent Control Act No. 80 of 1976.[186] Just as was the case in UK and Australia, rent control statutes in South Africa kept changing in response to the socio-economic conditions prevailing at a given point in time. The statutes were therefore not static. Prior to South Africa's independence in 1994, the key statute in controlled tenancies was the Rent Control Act, No. 80 of 1976. Its aim was to control the rent of controlled premises.[187] These were defined as any dwelling, garage, parking space or business premises.[188] Just like Kenyan RRA and LTS A, the South African Rent Control Act excluded some premises among them residential or business premises being let by the National Housing Commission or the local authority.[189]

As expected, the Rent Acts in South Africa prior to independence did not apply to indigenous South Africans. This was because the occupation rights of black individuals were strictly regulated in terms of the racially discriminatory apartheid statutes. Black persons who wished to reside in urban areas could only do so as public sector tenants, associated with limited security of tenure. These tenancies were strictly regulated and permitted black occupiers in

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[185] S. Maass, Rent Control: A Comparative Study [2012] Vol. 15 No. 4. < http://www.scielo.org.za/pdf/pelj/v15n4/03.pdf> Accessed on 15th April, 2020 at 1412hrs.
[186] Ibid.
[187] Ibid [151]
[188] Rent Control Act, No. 80 of 1976, s. 1(iii).
[189] Ibid, s. 51(c).

the metropolitan areas on a temporary basis. The legislation that regulated black urban tenancies did not provide any form of tenure security or rent control, because the apartheid government had to reserve the opportunity to evict any black occupier at will. If black occupiers' tenure security was similar to that of the white minority group, as regulated under the Rents Acts, the government would not have been able to sustain racial segregation successfully.[190] This is because a similar regime meant similar application of the law.

In 1996, South Africa enacted a new Constitution. Article 26(1) thereof decreed that everyone has a right to access adequate housing. It also forbade arbitrary evictions and provided that an eviction could only be legal if sanctioned by court.[191] In line with this provision, the South African Parliament enacted the Rental Housing Act in 1999. It became law upon assent by the President on 9th December, 1999 and commenced on 1st August, 2000.[192] This Act repealed the Rent Control Act, 1976. It specifically stated that there was a need to balance the rights of tenants and landlords and to create mechanisms to protect both against unfair practices. The Act also emphasized the need to introduce mechanisms through which conflicts between the two parties can be resolved speedily at minimum cost to the parties.[193] The Act specifically delineated the rights and obligations of both the tenants and the landlords.[194] A tenant has a right not to have their goods seized without a court order.[195] As for the landlord, they have a right to claim compensation for damage to the rental premises caused by the tenant, tenant's family or visitor.[196] The statute is silent on the scope

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[190] Sue-Mari Maass, 'Tenure Security in Urban Rental Housing' (Doctor of Law, Stellenbosch University, 2010).
[191] The Constitution of the Republic of South Africa, 1996, article 26. https://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf Accessed on 17th April, 2020 at 1141hrs.
[192] Rental Housing Act, No. 50 of 1999. https://urbanlex.unhabitat.org/sites/default/files/urbanlex/rental_housing_act_no._50_of_1999.pdf Accessed on 17th April, 2020 at 1152hrs.
[193] Ibid, preamble.
[194] Ibid [158], s. 4.
[195] Ibid, s. 4(3) (c).
[196] Ibid [158], s. 4(5) (e).

of its application. It is not explicit on whether it applies to both residential and business premises though it appears to be dealing more with residential houses.

The Act provides for implied terms in the leases including the duty of the landlord to issue the tenant with a written receipt for all payments made. [197]The lease need not be in writing.[198] The Act equally creates a Rental Housing Tribunal with a presence in each province.[199] The tribunal is composed of a minimum of three and a maximum of five members. The members include the chairperson and a deputy selected from the members. The qualifications of the members are also prescribed by the statute. The chairperson is required to possess necessary expertise and exposure to rental housing matters. For the other members, at least one and not more than two of them should be persons with expertise in property management or housing development.[200] The Act is prescriptive on how and where the meetings of the tribunal are held throughout the province. It is explicit on hiring of staff for the tribunal and how the tribunals are funded.[201] Another key feature of this Act is on aspects of complaints. Unlike other jurisdictions, groups of tenants or landlords or other interested groups are allowed to come together and lodge a complaint with the tribunal.[202] The Act has been amended severally to bring it in line with the ever changing trends in the market. One such amendment is the Rental Housing Amendment Act, No. 35 of 2014 which introduced the provision of appeals.[203] The Principal Act was silent on the issue of appeal as it only provided for review to the High Court.[204] The Amendment Act has also made it compulsory for a landlord to reduce the lease agreement to writing which is a departure from the requirements under the

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[197] Ibid [158], s. 5(1) (3)
[198] Ibid, s.5.
[199] Ibid [158], s.7.
[200] Ibid, s. 9.
[201] Ibid [158], ss. 10, 11 and 12.
[202] Ibid, s. 13(1)
[203] Act No. 35 of 2014. https://www.gov.za/sites/default/files/gcis_document/201411/38184act35of2014rentalhousingamendment5nov2014.pdf Accessed on 17th April, 2020 at 1300hrs.
[204] Ibid [158], s. 17.

Principal Act.[205] Another key introduction was the requirement that the Minister for Housing and Settlement develops a model lease agreement in all eleven (11) languages for use by the tenants and landlords.[206]

From the above discussion, it is clear that the legal framework on controlled tenancies in South Africa has gone through tremendous changes since its inception in 1920. Since independence, there has been progressive amendments made to existing statutes with a view to aligning them with the Constitution. As noted earlier, the provisions of Rental Housing Act are based on the principles of the Constitution. There have been various amendments to further align the Act with prevailing circumstances. It is also notable that the tribunals are decentralized in terms of Provinces. There is an attempt to ensure that most landlords and tenants understand the terms in lease agreements through translation in all the eleven (11) official languages.[207] This ensures that all users are able to understand the consequences of the tenancy agreement as the rights and obligations of both landlords and tenants are clearly defined. From the preamble of the Rental Housing Act, it is clear that the South African Parliament was aware of the need to balance the rights of the landlord and tenant and the Act was meant to protect both. It also recognizes the need for speedy resolution of rental disputes at minimal cost. These are some of the best practices that Kenya should consider.

When the Kenyan constitution was promulgated, all existing laws immediately before the effective date of 27th August, 2010 were supposed to be construed with alterations, adaptations, qualifications and exceptions necessary to bring them in conformity with the constitution.[208] In reality, RRA and LTS have not been brought in conformity with the constitution. The functions of the tribunals have not been devolved. The existing statutes are

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[205][205] Ibid, s. 8.

[206] Ibid [168], s. 8(i).

[207] The eleven (11) official languages are Afrikaans, English, Zulu, Xhosa, Venda, Southern Sotho, Tswana, Tsonga, Northern Sotho, Swati and Ndebele.< https://www.google.com/search?client=firefox-b-d&q=south+african+official+languages> Accessed on 17th April, 2020 at 1338hrs.

[208] Ibid [7], sixth schedule, s. 7.

only in English language yet English and Swahili are recognized as official languages. This impedes access to justice to the majority of the affected parties especially the unrepresented lot.

3.5. Uganda

Uganda like any other common law country has equally legislated on controlled tenancy. However, the controlled tenancy statutes currently in force were all enacted prior to the country attaining independence in 1962. The Distress for Rent (Bailiffs) Act commenced on 30th June, 1933.[209] The statute was limited in its application as it only dealt with appointment of bailiffs for the purposes of distress for rent. The substantive statute is the Rent Restriction Act which commenced on 1st January, 1949.[210] From its preamble, the Act was meant to consolidate the law relating to the control of rents of dwelling houses and business premises. The Act brought residential houses as well as business premises under one roof. Under this Act, there are established Rent Boards whose appointing authority is the District Commissioner. In terms of membership, it is composed of a chairperson and not more than five members.[211] Decisions of the board are appealable to the High Court and the High Court's decision is final.[212] Just like the Kenyan RRA and LTS, the Act exempts certain premises from control. Such premises include market premises in municipalities or towns or any premises controlled by any urban market authority.[213] From the Act, it is clear that both residential and business premises are regulated under the same statute. It is also noteworthy that the rent boards are devolved as they are found in municipalities and towns. There is no

[209] Chapter 76, Laws of Uganda.
[210] Chapter 231, Laws of Uganda.
[211] Ibid, s. 3.
[212] Ibid [175], s. 4.
[213] Ibid, ss. 8 and 10.

base rent which determines the jurisdiction of the rent board as is the case under the RRA. The two Ugandan statutes are however outdated.[214]

The Landlord and Tenant Bill, 2018 was introduced in the Ugandan Parliament with a view to responding to the changing circumstances and economic realities. After consideration by Parliament, the same was passed on 26th June, 2019. However, the same has not become law as it has not received Presidential assent despite having been forwarded to the President. The preamble states that it is meant to regulate the relationship between the landlord and the tenant; to reform and consolidate the law relating to the letting of premises; to provide for the responsibilities of landlords and tenants in relation to the letting of premises and for related matters.[215] It applies to both residential and business premises. Part II of the Bill recognizes tenancy agreements which can be in writing, by word of mouth or partly in writing and partly by word of mouth. If the consideration is in excess of five hundred thousand Uganda shillings (US$ 141.63), the tenancy agreement must be in writing or in form of a data message.[216] The Bill has specifically defined the duties and obligations of both the landlords and tenants in almost similar terms to Kenya's Land Act.[217]

Another feature of the Bill is the requirement that all rent obligations and transactions must be made in Ugandan shillings unless otherwise provided.[218] Interestingly, the Bill abolishes the remedy of distress for rent.[219] Disputes under the Bill are to be resolved through the court which is defined as the chief magistrate's court.[220] The Bill has no provision for appeals. The Bill repeals the Distress for Rent (Bailiffs) Act and Rent Restriction Act.[221] A wholesome consideration of the Bill shows that it has some features that are pro-tenant like the abolition

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[214] Truth Musimenta, 'We like this law. Uganda tenants' (Wizarts Foundation, 12 July, 2019). https://wizartsfoundation.org/we-like-this-law-ugandan-tenants/ Accessed on 17th April, 2020 at 1506hrs.
[215] Landlord and Tenant Bill, No. 18 of 2018, the long title.
[216] Ibid, ss. 3 and 4.
[217] Ibid [180] ss. 6 to 21.
[218] Ibid, s. 23(2).
[219] Ibid [180], s. 31.
[220] Ibid, s. 48.
[221] Ibid [180], s. 56 (1).

of distress for rent. Though a landlord may apply to court to recover unpaid rent, they are forced to incur extra expenses in obtaining an order for vacant possession. Further, section 49 (2) makes it an offence for a landlord to evict a tenant. There is no corresponding penal consequences for a tenant who fails to pay rent. Since the Bill has not received the Presidential Assent, the 1933 and 1949 Acts are still in operation.

As remarked by Nabbale, S, the enactment of the Bill is a move in the right direction for Uganda as it regulates the landlord and tenant relationship that has for so long remained informal and largely determined by market practice. The Bill however gives more protection to tenants than landlords. For this law to be relevant there is need for balance between the interests of tenants and the landlords.[222]

3.6. International Best Practices on Management of Tribunals

The overriding theme on controlled tenancy statutes is that there is a serious need to consolidate or merge tribunals created by statutes which deal with almost similar issues. Among the reasons for consolidation is that some tribunals have an overlapping mandate while others have been experiencing operational challenges due to the existence of different tribunals within the same sector.[223] As highlighted in Chapter Two of this study, Kenya is now considering the issue of consolidating some tribunals and having central management of the same. This study advances the proposal for a single tribunal in control tenancy matters, a departure from the current scenario where each category of controlled tenancy statute creates a separate tribunal. Internationally the idea of consolidating or merging tribunals has been embraced by some jurisdictions as discussed below.

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[222] Sheila Nabbale, 'Features of the Landlord and Tenant Bill of 2018' (*Shonubi Musoke & Co.*, 14 October 2019). http://www.shonubimusoke.co.ug/Articles/single-article?newsid=55 Accessed on 17th April, 2020 at 1608hrs.

[223] Report of the Committee on the Review of the Rationale for the Establishment of Tribunals in Kenya, 20th December, 2015, Kenya Law Reform Commission. Available at http://www.klrc.go.ke/images/reports/Tribunals-Review-Final-KLRC.pdf. Accessed on 2nd September, 2018 at 1106hrs

3.6.1. United Kingdom (UK)

In the United Kingdom, there have been continuous discussions around reform of tribunals generally with special reference to their roles. In 1954, the Committee on Administrative Tribunals and Enquiries, the Franks Committee, named after Sir Oliver Frank who was the chair of the committee was appointed with a view of addressing complaints about the operation of tribunals in Britain.[224] There were concerns as regards the range and diversity of tribunals, uncertainty about the procedures they followed and worry over lack of cohesion and supervision. In 1957, the committee presented its report and among its key recommendations was that Tribunals were part of the adjudication machinery, which must operate independently of Government Departments.[225] In this respect, the Committee observed as follows:

> We consider that Tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration. The essential point is that in all these cases Parliament has deliberately provided for a decision outside and independent of the Department concerned…and the intention of Parliament to provide for the independence of Tribunals is clear and unmistaken.[226]

As part of the adjudication machinery, the Franks Committee further recommend the need for Tribunals to satisfy three fundamental principles of openness, fairness and impartiality:

> In the field of Tribunals, openness appears to us to require the publicity of proceedings and knowledge of the essential reasoning underlying the decisions; fairness to require the adoption of a clear procedure which enables parties to know their rights, to present their case fully and to know the case which they have to meet; and impartiality to require the freedom of Tribunals from influence, real or apparent, of Departments concerned with the subject-matter of their decisions.[227]

Pursuant to the recommendations of the Franks Committee, the Tribunals and Inquiries Act, 1958 was enacted.[228] The Act created the Council on Tribunals as an advisory body with oversight over specified Tribunals and Inquiries. Its powers did not extend to appointing

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[224] Supra (n 70), p.57
[225] Supra (n 70), p. 57
[226] Ibid
[227] Supra (n 70), p. 58
[228] Supra (n 70), p. 65

members of Tribunals but it was empowered to keep under review the constitution and working of the specified Tribunals and to report on any other question touching on Tribunals referred to it. It could make general recommendations on the membership of those Tribunals and more importantly, it had to be consulted before new procedural rules or regulations were made. This was a big step towards standardization of Tribunals.[229]

However, the tribunals did not go as far as the Committee had recommended as for instance, appeals were only limited to questions of law only as they did allow appeals on questions of fact.[230]

More recent steps have been taken in the United Kingdom to further reform Tribunals. In May 2000, the Lord Chancellor appointed a Committee under Sir Andrew Leggatt to *inter alia* review the delivery of justice through Tribunals to ensure they are fair, timely, proportionate and effective arrangements for handling disputes and further that performance standards of Tribunals are coherent, consistent, public and with effective measures for monitoring and enforcing standards.[231] (The Lord Chancellor formally the Lord High Chancellor of Great Britain, is the highest ranking among those Great Officers of State which are appointed regularly in the United Kingdom, nominally outranking even the Prime Minister. The Lord Chancellor is a member of the Cabinet and, by law, is responsible for the efficient functioning and independence of the courts.) The Committee submitted its report in March 2001 and made recommendations which sought to attain four main objectives. The first was to merge the different Tribunals into one Tribunal System, the second to render Tribunals independent of their sponsoring ministries and departments through administration by one Tribunal Service, third to enhance the training of members of Tribunals and lastly to enable unrepresented users to participate effectively in the Tribunal proceedings.[232]

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[229] Supra (n 70), p. 65
[230] Ibid
[231] Supra (n 70), p. 65
[232] Ibid

The report observed that that the haphazard development of tribunals had resulted in wide variations of practice and approach, and almost no coherence. The current arrangements, it said, appeared to have been developed to meet the needs and conveniences of the departments and other bodies which run tribunals, rather than the needs of the user. It concluded that four criteria needed to be fulfilled if tribunals were to meet the needs and expectations of the modern user: First, users need to be sure, as they currently cannot be, that decisions in their cases are being taken by people with no links with the body they are appealing against. Secondly, a more coherent framework for tribunals would create real opportunities for improvement in the quality of services than can be achieved by tribunals acting separately. Thirdly, that framework will enable them to develop a more coherent approach to the services which users must receive if they are to be enabled to prepare and present cases themselves. Fourthly, a user-oriented services need to be much clearer than it was in telling users what services they can expect, and what to do if the standards of these services are not met.[233] The recommendations of this committee were implemented by the Tribunals and Inquiries Act, 1958 and Tribunals and Inquiries Act, 1992.[234] The report was thus key in the enactment of the above statutes. The best practice from this jurisdiction is merger of tribunals.

3.6.2 Australia

Similarly, Australia has been grappling with the wider issue of consolidating tribunals. Over the past few decades, various jurisdictions in Australia have been grappling with whether and to what extent they should consolidate their Tribunals.[235] Jurisdictions such as Victoria, Western Australia, the Australian Capital Territory and most recently Queensland have

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[233] Gavin Drewry, The Judicalisation of 'Administrative' Tribunals in the UK: From Hewart to Leggatt [2009], p. 53. Available at http://rtsa.ro/tras/index.php/tras/article/view/27/23. Accessed on 2nd September, 2018 at 1214hrs

[234] https://web.archive.org/web/20090421052441/http://www.lawteacher.net/Admin%20Tribunals.php. Accessed on 8th May, 2021.

[235] Ibid [70], p. 19

established variations on the concept of the consolidated Tribunal by attempting to group together matters that could be dealt with a single consolidated Tribunal.[236]

The idea of consolidating Tribunals is not new to New South Wales. The Administrative Decisions Tribunal (ADT) advised the Committee that its establishment in 1998 was considered at the time to be the first stage of a plan that would lead to a super Tribunal. In 2002, the New South Wales (NSW) Parliament's Committee on the Office of the Ombudsman and the Police Integrity Commission conducted a review of the operation and jurisdiction of the ADT and recommended that the Tribunal's jurisdiction required further consolidation. Similarly, the creation of the Consumer, Trader and Tenancy Tribunal (CTTT) in 2002 was another step along the road to consolidation as the residential and fair trading tribunals in New South Wales were consolidated.[237]

The New South Wales Civil and Administrative Tribunal (NCAT) which arose as a result of previous steps of amalgamation of various tribunals in the past was established on 1st January, 2014 by a statute.[238] The final amalgamation of bodies which formed NCAT included the Trader and Tenancy Tribunal.[239] The NCAT has a broad and diverse jurisdiction which is divided over four division: Administrative and Equal Opportunity Division; Consumer and Commercial Division, Guardianship Division and the Occupational Division; with a fifth internal Appeal Division.[240] The Consumer and Commercial Division resolves a large range of disputes related to tenancy and other residential property disputes; disputes as to the supply of goods and services as well.

In Western Australia, a state within the Commonwealth of Australia, has also in recent years made far-reaching proposals for reform to its Tribunal System. The basic reform proposal is the establishment of a general administrative Tribunal to be known as the State

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[236] Ibid
[237] Ibid [70], p. 19
[238] *Civil and Administrative Tribunal Act,* 2013
[239] A Single Tribunal for Tasmania, Discussion Paper, September, 2015, Department of Justice
[240] Supra (n 88), p.95

Administrative Tribunal. In March 2001 the Attorney-General for Western Australia appointed a Committee to examine and develop a model of a civil and administrative tribunal for consideration by the Government. The Committee was specifically requested to consider the structure of the tribunal, its scope or jurisdiction and its relationship with the courts and other Tribunals separate from it. The Committee submitted its report on the establishment of a State Administrative Tribunal in May, 2002. It recommended among other things, the establishment of a new State Administrative Tribunal to exercise original jurisdiction of many of the existing decision making boards and Tribunals and to assume the administrative review functions of the various Tribunals, ministerial and public officials and some of the courts. The Committee enumerated various advantages of a generalised tribunal which would address structural deficiencies in the existing *ad hoc* system. These included:

i. Access by citizens to a single one-stop tribunal instead of a variety of existing Tribunals
ii. An easily identifiable point of contact for all citizens on review of administrative decisions instead of the existing plethora of boards, Tribunals, courts etc.
iii. Easily available information to citizens on making of applications, hearings and reasons for decisions
iv. Development of a more flexible and user-friendly system
v. Availability of a wide range of experts and experienced members serving in various panels
vi. More effective and systematic recruitment and training of members of the Tribunal
vii. Original decision making and administrative review decision making would be conducted on a more cost-effective basis
viii. Administrative review functions would be easily assigned to an existing and experienced tribunal instead of creating an *ad hoc* review body.[241]

From the discussion above, Australia has clearly consolidated related tribunals to form a single tribunal to cater for all the related issues. For instance, the Consumer and Commercial Division deals with disputes related to tenancy and other residential property disputes as well as disputes emanating from supply of goods and services. This forms a good guideline for

[241] Supra (n 70), p.67

Kenya as it considers consolidating or merging of different related tribunals in order to provide for one-stop shop for all related disputes.

3.6.3 New Zealand

Just like United Kingdom and Australia, New Zealand has also considered the wider concept of amalgamating tribunals to form few unified tribunals. In its March, 2004 report titled Delivering Justice for All, the New Zealand Law Commission made recommendations for a unified tribunal framework entailing the rationalization and integration of Tribunals and their membership processes.[242] Prior to that, the Legislation Advisory Committee (LAC) had in 1989 recommended that New Zealand tribunals should be ordered in larger clusters, beginning with three major tribunals encompassing 20 distinct jurisdictions. One would be concerned with welfare, another resources and a third revenue. The LAC saw licensing and indecent publications as two other areas worthy of major tribunals.[243] The LAC proposed an incremental approach to amalgamation. It did not consider it feasible to establish a single overarching tribunal to encompass most bodies, despite acknowledging the advantages that a more complete integration might bring.[244]

The report noted that the benefits of clustering tribunals are no longer seriously debated. Fewer and larger tribunals are thought likely to:[245]

a) be more prominent, better known and more obviously accessible; more independent and authoritative
b) accord tribunal members a more secure career, allow them to be deployed in a range of compatible jurisdictions, and enable them to be better resourced and trained
c) allow processes to be aligned to eliminate needless differences and to ensure that they are simple, usable and fair
d) enable the alignment of rights of review and appeal
e) secure greater efficiencies, and economies of scale.

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[242] Supra (n 70), p.66
[243] Delivering Justice for All, A vision for New Zealand Courts and Tribunals, March 2004, p.286
[244] Supra (n 92)
[245] Ibid

The Law Commission considered that for all aspects of tribunal justice to be coherent and accessible, the approach should be to create fewer and stronger tribunals, by amalgamating or grouping existing tribunals according to their functions.[246]

Unlike in the United Kingdom and Australia where there are already existing frameworks on amalgamation of tribunals, New Zealand is still in the formative stages. The Law Commission considered that a unified tribunal framework should be established by legislation, and that all the individual tribunals which are to be included within it should be brought immediately under the umbrella of this structure, complete with their existing memberships and processes. But the unified structure will help to reduce needless difference and allows tribunals to benefit from each other's experience.[247]

New Zealand's scenario provides opportunities of garnering best practices for the Kenyan situation as it is in its initial stages of implementing the Law Commission recommendations of the international best practices as regards amalgamation of related tribunals.

3.6.4 South Africa

Similar to the preceding jurisdictions, South Africa has a considerable number of tribunals but they are sector specific. Notably, the Tribunals in South Africa are clustered with the first-tier having Tribunals being: General regulatory Tribunal, Social Entitlement Tribunal, Health Tribunal, Education Tribunal, Tax Tribunal and Immigration and Asylum Tribunal. This is a practice that Kenya may wish to consider to ensure that matters are handled in an orderly manner. To ensure that the decisions given are of high quality and standardized, the presidents of the Tribunals are judges. This is to instill public confidence in the way matters are handled by competent people. Further, the judges are appointed by the Judicial

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[246] Supra (n 92), p.288
[247] Supra (n 92), p.289

Appointment Commission, a body that is equivalent to the Kenyan Judicial Service Commission.[248]

Principally, there are five Tribunals that are widely recognized in South Africa.[249] These are; National Consumer Tribunal, Competition Tribunal, Rental Housing Tribunal, Water Tribunal and Companies Tribunal.

The South African approach is an appropriate template for the Kenyan system as the tribunals established are sector specific thus eliminating the issue of duplication of roles and waste of resources in terms of manpower and finances.

3.7 Conclusion

From the consideration of international best practices, it is clear that rent control is not static phenomenon. Technological advancement and market variances have been the major factors for consistent review. With the increased citizenry enlightenment, individuals are in pursuit of happiness and consumer satisfaction. This is possible if parties are allowed to freely negotiate for the goods and services they desire to have. As highlighted in the statutes under review, consumer satisfaction appears lop-sided as one party is protected than the other. Other countries are relaxing regulation in tenancy matters and there is a consistent push to give parties freedom to contract. With the freedom of contract, parties are deemed to be at par and the disputes that arises out of the contract construction are settled as per the terms of the contract. This reduces the litigation aspect as everyone is deemed to have entered into the contract fully aware of their respective responsibilities. In a bid to achieve the foregoing, similar sectors of the economy are now being merged to ensure uniformity. It is therefore imperative that the existing controlled tenancy statutes are reviewed to align them with international best practices.

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[248] Supra (n 70), p. 20

[249] Rashri Baboolal-Frank, Specialized Tribunals in South Africa and Access to Justice, International Journal of Business, Economics and Law, Vol.8

In the next chapter, the author focuses on possible interventions to improve the existing controlled tenancy in Kenya. This will largely borrowed from the best practices highlighted in this chapter.

CHAPTER FOUR

POSSIBLE INTERVENTIONS TO IMPROVE THE EXISTING CONTROLLED TENANCY IN KENYA

4.1 Introduction

The legal framework on controlled tenancies has remained static for the last fifty six or so years as the statutes have not been revised and/or amended to conform with the dynamics of the changing legal, social and economic realities. Having looked at the historical background behind the controlled tenancy statutes in Kenya, the legal and institutional framework on controlled tenancies in Kenya, international best practices in controlled tenancies and management of tribunals, this chapter now discusses interventions likely to improve the existing legal, institutional and social framework of the tenancy statutes.

4.2 Suggested interventions

As highlighted in chapter two, the existing legal framework on controlled tenancies is outdated, static and not responsive to the current needs of the two main players, that is, the tenants and the landlords. It is against this backdrop that the author proposes and makes a case for revision, consolidation and rationalization of the existing statutes to align them with the current market demands and technological advancement. This is to enhance access to justice and ensure greater consumer satisfaction in controlled tenancy realm. As observed in chapter three, there are salient aspects adopted by the select countries in their tenancy controls which if introduced in Kenya, will have a positive impact on the controlled tenancy sector. The interventions are;- repeal of the statutes and enactment of an all-encompassing statute, devolution of tribunals, review of membership requirements for members of the tribunal, the powers of the tribunal to enforce its own orders and incorporation of alternative dispute resolution under the new statute.

4.2.1 Repeal of the Statutes

There is an urgent need to repeal the two controlled tenancy statutes as well as Distress for Rent Act. As earlier noted, the latest of the three statutes in issue was enacted on 1965.[250] This was two years after independence. The nation state is now fifty seven years old yet the statutes in place were majorly pre-independence and during independence infancy. There has been a lot of transformation in all aspects of the economy among them tenancy controls. The applicability of key sections of the statutes have now been overtaken by events. For instance, it is almost impossible to get a decent house whose rent is below two thousand five hundred shillings at this point in time especially in major towns and cities. There is hardly any residential premises fit for human habitation in major towns and cities going for such rent. Similarly, the existence of two (2) tribunals dealing with the same sector is a waste of resources. It is now necessary to have the existing tenancy statutes repealed and in its place, the Landlord and Tenant Bill, 2021 be enacted. The 2021 Bill at section 65 proposes repeal of the three statutes thus very timely. For instance, the RRA which is over 60 years is only applicable to dwelling premises whose rent does not exceed Kshs. 2,500/= (US$ 23). On the other hand, the Landlord and Tenant Bill empowers the Cabinet Secretary to prescribe rent applicable.

When the Constitution was promulgated in 2010, the framers anticipated the need to consolidate some existing statutes providing for related matters like land law.[251] This was in order to eliminate the confusion that had been created by the various existing statutes on land matters. It is for this reason that the Tenancy Statutes need to be revised, consolidated and rationalized to ensure a one stop-shop for hearing and determination of all matters arising from tenancy. As a starting point, there are two pre-existing bills which only need to be refined to capture all the hallmarks of a good law among them predictability, certainty,

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[250] Ibid [3]
[251] Ibid [8].

flexibility and comprehensive. These are the Landlord and Tenant Bill, 2021[252] and the Tribunals Bill, 2019.[253]

The Landlord and Tenant Bill, 2021 is meant to consolidate the laws relating to renting of business and residential premises has been published. This study recommends the fast tracking of this Bill as it partly addresses the issues under interrogation of this study. The Bill is comprehensive as it establishes a rent tribunal[254] which deals with both the business premises and residential rent issues.[255] The Bill categorically prescribes the qualifications of the person to be appointed as the Chairperson of the Tribunal unlike the existing statutes which are not categorical on the qualifications. The Bill clearly specifies the powers of the Tribunal including reinstating a wrongfully evicted tenant, enforcement of its own orders, punishing for contempt, granting of injunctions, awarding compensation arising out of termination of a tenancy in respect of goodwill and improvements carried out by the tenant with the landlord's consent and award compensation to the landlord for damage arising from the willful conduct of the tenant.

The powers highlighted are missing in the existing tenancy statutes. For example, no tribunal has power to issue orders of injunction which has been subject of several decided cases.[256] In relation to the LTS, section 12 does not have a provision for injunctions and declarations by the tribunal. This Bill therefore appreciates the emerging issues and the need to have a tribunal clothed with all the requisite powers.

It also gives power to the Tribunal to appoint registered valuers, rent inspectors, executive officers, process servers, clerks and other officers necessary for the proper functioning of the tribunal. The tribunal is also empowered to engage persons other than its members or

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[252] Ibid [9].
[253] Ibid [48]
[254] Ibid [9], s. 4.
[255] Ibid, s. 3.
[256] Kanthilal Ramji Bhundia & 2 Others v Joseph Waitiki Ndegwa [2014] eKLR, Nyeri Environment and Land Court Miscellaneous Application No. 8 of 2014.

employees to provide professional, technical, and administrative or any other assistance to the tribunal.[257] This ensures creation of an effective and an efficient tribunal as envisaged in the Constitution.[258] The highlighted contents of the Bill are novel as the existing Acts do not provide for them.

In relation to Tribunals Bill, 2019, the review committee in their recommendations, proposed for the merging of tribunals. This was geared towards avoiding duplicity created by several tribunals dealing with almost similar matters, for instance, RRT and BPRT. It is high time that the committee's recommendations are formally adopted through enactment of a substantive statute in relation to their recommendations.

As earlier pointed out, the existing tenancy statutes are biased in favour of tenants and even the tribunals therein are inclined towards the tenant thereby leaving the landlords almost on their own. The preamble to LTS, for instance is very clear that the statute was enacted for the protection of the tenants. There appears to have been no effort at striking a balance between the interests the landlord and tenant. The 2021 Bill has attempted to maintain that balance and a reading of its preamble is instructive. This can be improved by having the consolidated statute clearly stipulating the rights and obligations of both the landlord and tenant. The existing tenancy statutes are framed in a manner to suggest that the tenant is the weaker party in need of absolute protection. The situation depicted in the existing statutes was true when the statutes were enacted but that is no longer the position as there is equality in bargaining and the tenant being a consumer of a service is protected by the Constitution.[259] It is recommended that the consolidated Act comes up with equality provisions to ensure that the two parties relate on a fair footing.

The trend in other jurisdictions has been to do away with the control in tenancy regime. Considering the emancipation of the population and the greater awareness by consumers of

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[257] Ibid [9], s. 14.
[258] Ibid [7], article 169 (d)
[259] Ibid, article 46.

their rights, the current trend has been to let the market forces of demand and supply to determine pricing. Just like in other sectors of the economy like agriculture where the forces of demand and supply dictate pricing of produce, it is prudent that the tenancy controls in place be phased out in the long run. The forces of demand and supply should progressively be allowed to determine the rent payable.

4.2.2 Devolution

In the intervening period prior to doing away with rent control, it is imperative that the tribunals' services be devolved to enhance access to justice. The tribunals established by the Rent Acts have always been centralized having their sittings mainly in Nairobi with selective and unpredictable sittings outside Nairobi. This has led to serious impediment to justice to parties who reside or carry on business out of Nairobi. As proposed in the Landlord and Tenant Bill, 2021 the tribunal should devolve its functions to all the major towns within the country to be manned by chairpersons.[260] This shall be in line with devolution of services closer to the people as per the Constitution.[261] It is a fact that landlord and tenant disputes occur frequently and centralization of the tribunals has translated to a serious disservice to the people whose access to justice has been impeded. In New South Wales (NSW), as earlier discussed, a committee that had been constituted to consider consolidation of tribunals observed that access to justice involves ensuring community awareness of a consolidated tribunal and its role especially in the context of a consolidated tribunal that could handle a range of different jurisdictions and therefore prudent to adopt the New South Wales approach under this head.

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[260] Ibid (9), s. 4 (1).
[261] Ibid [7], art. 174.

4.2.3 Fees

Under the current tenancy regime both under RRA and LTS, there has been the issue of filing fees. Under RRA, the filing fees are very low compared to LTS. The new statute ought to standardize fee payable both for residential and business premises disputes.

4.2.4 Review of Qualifications of Tribunal Members

As regards membership to the tribunals, other than the chairperson, there is no requirement that other members should have a background in law. The new statute ought to make it mandatory that the members of the tribunal be composed of members who have a background in law. The tribunals are in the category of subordinate courts and their procedures are not so much at variance with ordinary courts. The Employment and Labour Relations Court has recently dealt with this issue in *Benard Odero Okello v C.S. for Industrialization Enterprise Development & Another*.[262] In that case, the petitioner had contended that the appointing authority with respect to the chairperson and members of BPRT ought to be through the Judicial Service Commission (JSC) and not the Cabinet Secretary. His argument was that BPRT being a local tribunal is among the subordinate courts envisaged under the Constitution.[263] With JSC being the appointing authority, they are bound by the constitutional requirement to undertake public participation.[264] The court agreed with the petitioner when it declared that the appointments of the first to fifth interested parties (Cyprian Mugambi Ngutari, Patricia May Chepkirui, Kyalo Mbobu, Andrew Muma and Chege Charles Gakuhi was in violation of various provisions of the Constitution among them article 10, 169(1) (d) and 259. It proceeded to quash the gazette notice appointing the said interested parties. The above decision should be incorporated in the new statute as there is now a framework in relation to the appointment of the chairperson and members of the tribunals.

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[262] Nairobi Employment and Labour Relations Court Petition No. 100 of 2020 [2020] eKLR.
[263] Ibid [65]
[264] Ibid [7], art. 10.

4.2.5 Incorporation of Alternative Dispute Resolution in the Act

The 2021 Bill ought to consider making provision for alternative dispute resolution mechanisms such as mediation, reconciliation, arbitration and other traditional dispute resolution mechanisms.[265] In practice, the tribunals in place do not screen the references or complaints lodged to see whether they are fit for trial or diversion to alternative dispute resolution mechanisms. The major contributor to this phenomenon has been the fact that tribunals have very limited time and resources to consider each complaint or reference in depth. It is equally caused by the fact that the existing statutes do not specifically provide for adoption of alternative dispute resolution mechanisms. An amendment would bring the statute to the realms of article 159 (2) (c) of the Constitution.

4.3 Conclusion

Having highlighted what the new statute should include, it is incumbent that the projected benefits to be derived from such a statute be considered. There shall be an in-depth analysis of the perceived weaknesses in the current regime and why an enactment of a new statute is no longer an option but a need.

[265] Ibid, art. 159(2) (c).

CHAPTER FIVE
RECOMMENDATIONS AND CONCLUSIONS

5.1 Introduction

Having considered the state of controlled tenancy in Kenya, the legal framework, best international practices and possible interventions to improve the existing controlled tenancy realm, this chapter wraps up the discourse and highlight the way forward as regards controlled tenancies.

It is one thing to have a statute regulating a certain sphere of economic, social or political field and quite another thing all together to have the statute meet the needs of the targeted populace. The two key controlled tenancy statutes under consideration create tribunals which are quasi-judicial in nature with almost identical powers. The key research questions the author has been interrogating are whether the existing legal framework on controlled tenancy meets the needs of the parties? Whether they enhance or impede access to justice? What best practices from other jurisdictions can enrich the Kenyan controlled tenancy sphere? And what interventions need to be adopted to improve the controlled tenancy framework?

5.2 Salient issues in the existing controlled tenancy statutes

As noted in the preceding chapters, the two controlled tenancy statutes are designed to largely protect the tenants often to the detriment of the landlords. One of the elements of a good law is generality, that is, laws should not benefit only one group or bring harm upon any narrowly-defined group of individuals.[266] Clearly, the two controlled tenancy statutes fall short of a good law as they appear lopsided as they only meet the needs of one target group while excluding the other. Further, the current statutes fall short of the constitutional requirement requiring the state to ensure access to justice for all persons.[267] As highlighted in

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[266] Tom Hoeflings Eight Elements of Good Law. Found at https://www.tomhoefling.com/home/tom-hoeflings-eight-elements-of-good-law. Accessed on 23rd September, 2018 at 1230hrs.

[267] Supra (n 107)

Chapter four, the tribunals are not devolved and as such, for a tenant or a landlord who has an issue related to any controlled tenancy, one has to follow the tribunal to wherever part of the country it is sitting. This is often at a cost to litigants, many of whom are indigent. The affected party is then left with only two options, either to spend so much to access justice or to forego the claim to the detriment of the affected party.

The other issue that the two statutes did not foresee is the fact that a landlord can have residential and business premises housed in a single building. Whenever an issue arises as regards both, the landlord is forced to file two different claims relating to the same subject at different tribunals which may be sitting at different times and places. All these are very costly to the parties and thus seriously calls for a need to re-look the effectiveness of the two statutes going forward.

The RRA's applicability has also been called to question. The Act applies to dwelling houses whose rent is less than two thousand five hundred shillings (Kshs. 2,500/= or US$ 23).[268] This provision therefore exposes a great number of tenants as currently, dwelling houses with rent of less than US$ 23 are very few. No amendment has been attempted to bring the Act in tandem with the current economic realities. Further, a rent of US$ 23 mainly applies to tenants living in low standard houses such as slums. Such dwellers are much more concerned with what they eat than prosecuting or defending a claim at the tribunal.

The LTS on the other hand does not have a cap on filing fees as the same is pegged on a percentage of the annual rent.[269] If for example, a tenant pays rent of US$ 9,259 per month, the filing fees in cases of filing a reference for termination of a tenancy will be US$ 5,555. This is almost equivalent to one month's rent and as such, this is very discouraging to tenants especially the ones whose businesses are not doing well. This is a clear dereliction from the intended purpose of the Act as envisaged in the preamble.

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[268] Supra (n 1), s. 2(1)(c)

[269] Supra (n 3), Form D (4)

Despite several revisions to the Acts, no substantive changes have been effected on the two statutes ever since their enactment.

5.3 Benefits of repeal and revision of the controlled tenancy statutes

This study has shown certain benefits could accrue and flow from a repeal and revision of the two statutes.

Firstly, it shall enable consolidation of resources. At the moment, the two statutes create two tribunals which thus mean there are two sets of officials that comprise the members of the tribunal. These members are paid salaries and allowances while both institutions carry out almost identical functions. The two tribunals also operate from different locations which translates to duplication of infrastructure like office space and related resources. The funds saved from consolidation can be channeled to other sectors of the economy.

Secondly, there shall be a one stop forum for all matters arising from controlled tenancy. There is a possibility of a tenant or a landlord having a residential as well as a business premises issue related to one tenancy premises. In case of a tenancy dispute concerning such a premise, one usually has to file the same complaint in two different forums. However, with the repeal and revision, the affected landlord or tenant will only need to deal with one tribunal. This saves on costs as well as time thereby creating efficiency in the administration of justice.

Thirdly, there shall be avoidance of overlap in functions. As currently constituted, the two tribunals discharge basically the same functions as well as exercise same powers. As such, their powers and functions are more or less overlapping causing unnecessary duplicity and confusion. With repeal and revision of the existing framework, such duplicity and overlap shall be a thing of the past.

Fourthly, it shall lead to efficient and effective delivery of justice. As observed in Chapter four, the existing legal framework is an impediment to access to justice through centralization

and unpredictability of the tribunals sittings. With repeal and revision which envisages decentralization and fixed sittings, the affected parties shall be able to access justice with no administrative bottlenecks as do currently exist. Further, with a single tribunal whose sittings are devolved with clear timelines, there will be efficiency in delivery of justice to the parties.

Fifth, access to justice will be administered with undue regard to procedural technicalities. As earlier noted, a premise can house both residential and business entities. A tenant or a landlord cannot file a dispute relating to the two premises in one forum even if there is one limb that one has filed for reason that RRT can only deal with residential premises while BPRT exclusively deals with business premises. The distinction is unnecessary and it amounts to impediment to justice on account of a technicality. With revision, such technicalities will no longer impede parties' access to justice and the constitutional underpinnings of administration of justice without undue regard to procedural technicalities shall be realized.[270]

Sixth, there shall be an enhancement of career development and progression. With the current set-up, the RRT and BPRT staff only deal with limited disputes but with overhaul and revision with a view of a single regime, there shall be greater opportunity for training, acquiring new skills and career progression especially to the staff and members of the existing tribunals.[271]

Further, greater consistency in procedures shall be achieved. Currently, filing a claim in RRT is not the same as in BPRT. For RRT, there are no standardized forms whereas in BPRT there are standardized forms which are provided in the Act.[272] This inconsistency between the two statutes has led to a lot of confusion as regards filing claims. However, with revision, there

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[270] Ibid [7], art. 159 (2) (d).

[271] Ibid [10]

[272] For instance, CAP 301 creates forms such as Form A, A1, B and C which are standard forms providing for certain specific things for example, landlord's notice to terminate or alter terms of tenancy.

will be consistency in procedures since there shall be a single statute thereby improving access to justice.

Compliance with the Constitution shall be realized. The existing Acts are overlapping in terms of powers and functions. The tribunals created therein are also not living up to among other rights, access to justice. It is not the fault of the framers of the statutes that the existing state is as it is. It is lack of criticism of the existing statutes that has led to failure to revisit the tenancy statutes since their enactment in 1959 and 1965 respectively. The Constitution has now empowered Parliament to revise, consolidate and rationalize existing land laws.[273] With revision, there is an opportunity to ensure that the new statute shall be in tandem with the Constitution.[274]

Strong and clear leadership structure in the tribunal currently missing shall be realized. The existing controlled tenancy legal framework is not clear on the leadership structure. Other than the chairperson, the other members of the tribunal are recognized. There is no provision as regards what happens when there is a vacancy in office of the chairperson. This creates a lacuna which needs to be addressed as such occurrences ought to be clearly provided for. With revision, the leadership structure in the tribunal would be very clear as it would be specifically provided for in the Act. The chairperson shall be deputized by vice chairpersons who shall be tasked with manning the devolved units.

As earlier noted, the two statutes create centralized tribunals. As such, they are not easily accessible to the public and when they are accessed, they are expensive and slow. With revision, there shall be devolution of functions of the tribunal hence creating accessibility to a greater part of the population thus making the process cheaper and speedier.

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[273] Ibid [5]

[274] Article 2 (4) of the Constitution is very clear on the effect of laws that are inconsistent with it.

5.4 Conclusions, Findings and Recommendations

There is already an existing Bill[275] which Parliament ought to fast track by debating it and taking it through the requisite motions with a view of enacting it as an Act of Parliament. The Bill provides for among others, revision of the base amount from US$23 to the amount to be determined by the C.S, qualifications of members and a single tribunal thus it forms a good template that can be used to have the two statutes revised.

The tenancy control statutes were enacted in 1950s and 1960s. They have been in operation for slightly above half a century. The country has had an opportunity to consider its merits and demerits. After half a century in operation, it is now high time to revisit these statutes with a view of overhauling and revising them in line with the Constitutional mandate donated to Parliament. The tenancy statutes have served their usefulness and it is now time for them to be revised, rationalized and consolidated with a view of coming up with one single statute whose benefits have already been highlighted elsewhere. It is the author's considered view that the revision is now long overdue and thus it ought to be actualized.

The real estate development in the country is at its all-time high. The intention of a proprietor when putting up a commercial building is to earn income from the premises be it residential or business. This income cannot be at the instance of a tenant who defaults in paying rent or obeying all the tenant's obligations and then runs to either RRT or BPRT and gets orders restraining the landlord from realizing the fruits of one's investment. Similarly, a landlord should not be at liberty to among others increase rent arbitrarily or evict a tenant with no just cause and due process. There is need to balance the responsibilities of both the landlords and tenants. This is so because the existing statutes are lopsided in favour of one party, that is, the tenant at the behest of a landlord.

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[275] Ibid [9]

To achieve the envisaged balance, an all-encompassing statute which ought to be a one-stop shop for all matters touching on landlord and tenant relationship must be enacted as soon as possible. This need is much more required now more than ever before for the basic reason that residential and business premises are mushrooming every new dawn and without a proper legal framework to regulate this industry, there is a real danger to the interested parties therein. A revised consolidated and rationalized controlled tenancy statute is no longer an option, it is a need, a necessity and a human right.[276] From the foregoing, it is evident that the existing controlled statutes are no longer effective and the benefits of revising them are so much such that it is the only way forward.

The truest test of whether any research has achieved its lofty goals previously envisioned are the answers given. Affirmative answers tend to support the research whilst negative answers or no response, tend to disprove the hypothesis. The hypothesis gleaned from the thesis were;

a. **Whether the current legal framework on controlled tenancies is inadequate and out of touch with the realities of a free market economy**
b. **Whether the current legal framework on controlled tenancies is biased in favour of the tenant**

I intend to herein answer the hypothesis as I give answers to the research questions which are tied to the research objective. A glimpse of the answers to the hypothesis in respect of the first question is a no and to the second question is a yes based on the discussions in Chapter 2 hereinabove. This thesis embarked on the quest to interrogate the legal framework on controlled tenancies in Kenya as well as making a case for their harmonization. In doing so, the research done felt that if roads would be made especially taking note that the Controlled Tenancy Statutes are outdated owing to the lack of amendments over the years. The Statutes have never taken into account the changes that are happening with technology advancement

[276] Ibid [8]

and on the economic sphere. The Objectives that seized the author's mind are highlighted to see whether the same have been actualized through answering the research questions as herein below.

(a) To determine whether the existing legal framework meets the needs of the landlord and tenants in a free market economy

In order to effectively respond to this issue, then knowledge of the free market economy is crucial. The current economic changes and developments makes it almost impossible to acquire a descent housing in major towns in Kenya for a meagre rent of Kshs.2500 per month (equivalent to US$23). As a consequence, many tenants whom the statute intended to adequately protect are left unprotected. This is due to lack of amendments which would have raised the jurisdiction to acceptable and market levels. Pursuant to the above discourse the Landlord need are also not met because the legal frame work is more in favour of the Tenant and even Courts have ruled severally that the Controlled Rent Statutes are meant to protect the Tenants.

(b) To determine whether the existing legal frameworks of controlled tenancies enhances or impedes access to justice for the concerned parties

Since justice delayed is justice denied. A number of issues leading to impediment of access to justice have been noted to be existing in the current Controlled Tenancy Statutes. There is no timely access to justice by the litigants. This leads to denial and access to justice. A classic example is centralization of tribunals within Nairobi. This fact has led to failure to embrace devolution thereby impeding access to justice for litigants residing outside of Nairobi. The current RRT and BPRT tribunals have limited circuit sessions in the few towns (Counties) that are outside Nairobi. The Controlled Rent Statutes are actually not enhancing access to justice but are an impediment to access to justice.

(c) To determine the possible interventions that can improve the legal framework on controlled tenancy

Laws are improved by amendments and where extensive amendments are required on an existing legislation, a repeal may be needed. With respect to the legal framework governing controlled tenancies, amendments are necessary in the short term whilst a complete overhaul of the legal framework is needed. The possible interventions to improve the current legal framework have been exhaustively discussed in Chapter 4 hereinabove.

(d) To determine the best practices from selected countries that can enrich the Kenyan legal framework on controlled tenancies.

As society keeps changing, so must the laws and regulation that govern the society. A legal framework that has existed for quite some time is out to touch with the reality. This is taking into account of rapid technological, social and economic advancement or changes which necessitates amendments to the existing legal frame work. From the selected common wealth Countries that is United Kingdom, Australia, New Zealand, South Africa and Uganda a lot can be learnt that can enrich the Kenyan legal framework as discussed in Chapter 3 hereinabove.

Short term goals

There is urgent need through Parliament to fast track the Enactment of the Landlord and Tenant Bill 2021 into an Act of Parliament. The Bill at section 65 proposes repeal of three Controlled Tenancy Statutes as well as the Distress for Rent Act. Tenancy Statutes need to be revised, consolidated and rationalized for purposes of ensuring a one stop-shop for hearing and determination of all matters arising from Controlled Tenancy Premises. The same ought to be done within the shortest time possible before the current life span of Parliament end and that is before the 2022 General Elections.

Medium goals

With respect to impeding access to justice, devolving the tribunals under the legal frameworks of controlled tenancies would enhance access to justice as the courts would be brought closer to the litigants. This can be achieved through the Judiciary which has got a goal of having High Courts in each of the 47 Counties. The Judiciary has further indicated that a Subordinate Court ought to be established in every Sub-County. The Judiciary should also ensure that the RRT and BPRT Sessions are also held in every Sub-County for purposes of ensuring there is enhancement and accessibility to justice to every litigant. The enormous costs that may have been used to seek redress in Nairobi would have been saved by litigants. Again, delayed justice would have been reduced significantly.

Incorporation of Alternative Dispute Resolution methods like mediation, arbitration, reconciliation must be anchored in the Controlled Tenancy Statutes. This can be done through Parliament. This will offer a better and quicker way of settling disputes than the adversarial nature of the litigation process which costs time and money. This can be done after the next General Election of the year 2022.

Long term goals

From the best practice of other jurisdictions as noted in Chapter 3 there is need to have constant amendments to the Controlled Rent Statutes. It is necessary that Parliament should be alive to the fact that the supply and demand theory. This is the best guiding factor in dealing with the Controlled Tenancy Statutes. Guided by the supply and demand theory the long term goal is to eliminate totally the Controlled Rent Statutes by repealing them. These are the best practice that can be adopted from the selected Countries to enrich the Kenya legal frameworks governing controlled tenancies. The other jurisdictions such as the United Kingdom have done the same successfully. The other selected jurisdictions have allowed the parties to be governed by the Doctrine of Laissez-faire as well as the market forces of supply

and demand with respect to real estate. This should be the ultimate goal for Kenya by repealing the Controlled Tenancy Statutes. This can be achieved through an act of Parliament repealing all the Controlled Tenancy Statutes within a period of the next 10 to 15 years from now.

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