

IMPLIED CONDITIONS IN LEASES AND THE NEED TOWARDS A  
WARRANTY OF HABITABILITY IN RESIDENTIAL TENANCIES: A  
CRITIQUE OF THE LANDLORD-TENANT LAW IN KENYA

DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE  
REQUIREMENT OF LL.B DEGREE

By

OKUNDI TOM AYIEKO

UNIVERSITY OF NAIROBI  
OCTOBER 1993

(i)

### DEDICATION

This work is dedicated to my grandmother Dorcas Okundi whose love, care and kindness all along deserved something better

and

To the memory of my uncle the late Jonathan Okeyo (1945-1993) and his son the late Dickens (1969-1993) who wished it but just never lived long enough to see it.



### ACKNOWLEDGEMENTS

I kindly wish to express my deep and sincere gratitude to my supervisor Mr. Tim Mweseli for his continuous guidance during the course of my research. He scrutinised each chapter as it was written and offered numerous suggestions about the presentation of the materials and the style of the thesis. He was able to point out innumerable mistakes. Without his help I am not sure this thesis would have reached a presentable form.

My deepest gratitude is owed to my parents Mr. and Mrs. Johnson Ayieko Okundi whose love and care saw me this far. I am also very thankful for their assistance delivered in a characteristically calm and thoughtful way.

A particular debt is owed to my dear uncle Eng. Phillip Okundi and Mrs. Phelgona Okundi whose encouragement and assistance have been of inestimable value. The advice they proffered has always been knowledgeable, practical and helpful and I am extremely grateful for the benefit of their experience and understanding and the logistic and financial support they gave towards the completion of the thesis.

To my friends and colleagues in the faculty for their readiness to give me the benefit of their knowledge and experience.

(iii)

To my brother Milton Were Ayieko for all the assistance he delivered to me throughout the whole of my academic life. My cousin Joshia Omune also needs to be thanked for the role he played towards the completion of this laborious task.

TABLE OF CONTENTS

DEDICATION.....i

ACKNOWLEDGEMENTS.....ii

TABLE OF ABBREVIATIONS.....vi

LIST OF CASES.....vii

TABLE OF STATUTES.....ix

  

0:0 INTRODUCTION.....1

0:1 BACKGROUND INFORMATION.....8

    FOOTNOTES TO THE INTRODUCTION.....12

  

CHAPTER ONE: THE POSITION AT COMMON LAW.....13

1.0 The principle of caveat emptor.....13

1.1 Origin of the principle.....14

1.2 Retreat from the principle.....16

1.3 The landlord's liability at common law.....22

1.4 Remedies for the landlord's  
    breach of duty at common law.....31

1.5 Conclusion.....38

    Footnotes to Chapter One.....39

  

CHAPTER TWO: IMPLIED CONDITIONS IN  
LEASES: THE POSITION IN KENYA.....42

2.0 Introduction.....42

2.1 Essentials of a lease in Kenya.....43

2.2 Implied conditions in residential tenancies.....51

2.3 The tenant's obligations.....57

2.4 Remedies for breach of the implied conditions.....65

2.5 Conclusion.....68

Footnotes to Chapter Two.....	70
<b>CHAPTER THREE: TOWARDS A WARRANTY OF HABITABILITY IN KENYA LANDLORD-TENANT LAW.....</b>	<b>73</b>
3.0 Introduction.....	73
3.1 The Public Health Act.....	74
3.2 Statutory nuisance.....	78
3.3 Local Authorities By-Laws.....	87
3.4 The Rent Restriction Act.....	93
3.5 Conclusion.....	96
Footnotes to Chapter Three.....	98
<b>CHAPTER FOUR: RECOMMENDATIONS AND CONCLUSIONS.....</b>	<b>100</b>
4.0 Recommendations.....	100
4.1 Conclusion.....	107
Footnotes to Chapter Four.....	114
<b>BIBLIOGRAPHY.....</b>	<b>115</b>

TABLE OF ABBREVIATIONS

1. A. C.	Appeal Cases
2. All E. R.	All England Reports
3. A. L. R.	
4. Ch.	Chancery
5. Ch. D.	Chancery Division
6. E. A.	East Africa
7. Ex. D.	Exchequer Division
8. H. L.	House of Lords
9. K. B.	King's Bench
10. L. R.	Law Report
11. L. T.	Law Times
12. Q. B.	Queen's Bench
13. Q. B. D.	Queen's Bench Division
14. T. L. R.	Times Law Report
15. W. L. R.	Weekly Law Report

LIST OF CASES

1. Aden V. Pullen (1842) E.R. 492
2. Aldin V. Latimer Clark, Muirhead and Company (1842)  
2 Ch. 437
3. Belfour V. Westorn (1786) 1 T.R. 310
4. Budd-Scott V. Daniell (1902) 1 K.B. 253
5. Cameron V. Young (1902) A.C. 176
6. Chancellor V. Webster (1893) 9 T.L.R. 568
7. Cockburn V. Smith (1942) K.B. 119
8. Collins V. Hopkins (1823) 2 K. B. 617
9. Coomber V. Howard (1845) 1 C.B. 440
10. Dashwood V. Magniac (1891) 3 Ch. D. 306
11. Davidson V. Fischer (1888) 19 Colo 625
12. Diviries V. Dickinson (1919) 12 A.L.R. 155
13. Doherty V. Allman (1878) A.C. 709
14. Donogue V. Stevenson (1932) A.C. 562
15. Elliot V. Boynton (1924) 1 Ch. 236
16. Gibson V. Kirk (1841) 1 Q. B. 850
17. Grosvenor Hotel Company V. Hamilton (1894) 20.B. 836
18. Hart V. Windsor (1843) 12 M. & W. 68
19. Hemmings V. Stoke Poges Golf Club (1920) 1 K. B. 720
20. Heptulla V. Thakore (1957) E. A. 358
21. Hetch V. Morgan (1957) E. A. 741
22. Hudson V. Cripps (1896) 1 Ch. 265
23. Interoven Company V. Hibbard (1936) 1 All E. R. 270
24. Isaac Hotel de Paris (1960) All E.R. 246

25. Jaegar V. Mansion Consolidated Limited (1903) 87  
L.T. 690
26. Jones V. Livingstone (1903) 1 K. B. 253
27. Kenny V. Preen (1963) Q. B. 499
28. King V. Liverpool City Council (1986) 1 W.L.R. 890
29. Lace V. Chantler (1944) K. B. 368
30. Liverpool City Council V. Irwin (1977) A.C. 239
31. Markham V. Peget (1908) 1 Ch. 697
32. McCall V. Ablelesz (1976) Q. B. 583
33. Obongo V. Municipal Council of Kisumu (1971) E.A. 91
34. Palmer V. Fletcher
35. Pandya V. Kampala City Council (1957) E. A. 272
36. Paradine V. Jane (1657) 82 E. R. 8
37. Patel V. Essa (1965) E. A. 486
38. Perera V. Vandiyana (1953) 1 W.L.R. 672
39. Public Trustee V. Westbrook (1965) 3 E.R. 3985
40. Re Cartwright (1889) 41 Ch. D. 532
41. Re Ridge (1885) 31 Ch. D. 504
42. Robin V. Jones (1863) 15 (NS) 221
43. Rylands V. Fletcher (1868) L.R. 3 H.L. 330
44. Searson V. Roberts (1895) 2 Q.B. 395
45. Shaw V. Stanton (1858) 30 L.T. 352
46. Smith V. Marrable (1843) 11 M. & W. 5
47. Sutton V. Temple (1843) 152 E.R. 1108
48. Turner V. Right (1860) 2 De G.F. & J.
49. Wheeldon V. Burrows (1879) 12 1 Ch. D. 31
50. Wilson V. Finch-Halton (1877) 2 Ex. D. 360



TABLE OF STATUTES

1. Distress for Rent Act (Cap 293 Laws Of Kenya)
2. Government Lands Act (Cap 280)
3. Indian Transfer of Property Act (I.T.P.A.) of 1882
4. Interpretation of Statutes act (Cap 2)
5. Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301)
6. Limitation for Action Act (Cap 22)
7. Local Government Act (Cap 265)
8. Mining Act (Cap 306)
9. Public Health Act (Cap 242)
10. Registered Lands Act (Cap 300)
11. Registration of Documents Act (Cap 285)
12. Registration of Titles Act (Cap 281)
13. Rent Restriction Act (Cap 296)
14. The Constitution of Kenya
15. The Judicature Act (Cap 8)
16. The Law of Contract Amendment Act No. 21 of 1963  
(Cap 23)
17. Trust Lands Act (Cap 288)
18. Valuation for Rating Act (Cap 266)



## INTRODUCTION

One of the most important branches of the law is that relating to the landlord and tenant. Its social effects are very great seeing that a very large proportion of the population is directly or indirectly affected. It would be a safe estimate to say that more than two thirds of the dwelling houses in Kenya are not occupied by their owners and are let to tenants. In view of this it is particularly desirable that, in so far as it is possible, this branch of law should accord with the current view of justice and fairness.

The relationship of landlord and tenant in most systems of law e.g. the Anglo-American system is created by contracts express or implied and in some it can be created by a statute.

The relationship of landlord and tenant may generally be described as that which exists when one person (the lessor or landlord) being possessed of an estate or interest in real property whether freehold or not, has granted or is deemed to have granted to another (the lessee or tenant) an estate or interest therein which is less than freehold or less than the estate of the grantor.<sup>1</sup>

The words lease and tenancy in landlord and tenant relationship have been used interchangeably. Some writers and decided cases put them to mean the same thing, so they regard them as more or less synonymous. Chitty J. in the case of Re Negus<sup>2</sup> said that

"it may be said that a distinction is constantly made between tenancy and a lease and I dare say many solicitors speaking to their clients talk of a "lease" in the sense to meaning a lease which the law requires to be by deed; but I am unable to say that I can introduce this same loose parlance into the rule".

The distinction is therefore not technical, whereas for the purpose of this thesis no much distinction will be drawn between the two words, otherwise they will be used in place of another to mean the same thing.

In English law the relationship of a landlord and a tenant arises when a lessor confers on a lessee exclusive possession of the land demised<sup>3</sup> for a period of term which can be made subject to definite time limit by either party.<sup>4</sup> The lease must have a certain beginning and a certain end otherwise it will be invalid.<sup>5</sup> In capitalist mode of production sanctified by absolute ownership of land, any right is therefore safeguarded including leases.

A leasehold agreement conveys a leasehold, a landed estate and also contain more or less contractual undertakings such as promises to pay rent, make repairs, pay taxes and so forth. Logically and analytically it is correct to say that a lease is both a contract and a conveyance.

A tenant has an estate in land in the strictest sense. He has the right to possession, the hallmark to every estate, for a determined period of time.

The tenant's leasehold is an estate carved out of

some estate of longer duration that the landlord holds. Thus the landlord though he has given the tenant a present possessory estate has retained that future part of the longer estate that follows the end of the leasehold. In other words the landlord has retained a reversion.

#### **Creation of a landlord-tenant relationship**

All leases, it is often said, must be found in an agreement between landlord and tenant. Therefore the parties must have the legal capacity to make such an agreement. The statement about an agreement must be understood in a broad way. A rudimentary leasehold "agreement" which is likely to create a tenancy at will may arise by implication simply from the circumstances that the holder of the estate permits another to possess in land.

Absence of covenants including a covenant for rent would not defeat the existence of a landlord-tenant relationship. The possessor would not be a trespasser or adverse possessor.

When the alleged tenant has not taken possession, the word "agreement" must refer most strictly to a verbalised exchange of undertakings, whatever form the agreement is in, it must be sufficiently definite in its essential parts that the courts can determine the partner intent.

The question of definiteness seems to be the same as

in the law of contracts. What are the essential parts of the lease is however a landlord-tenant question as to which there is no categorical answer.

Courts often say that the essential items a lease agreement must cover to be enforced are; identity of the parties, the description of the premises, a statement of the term and amount of rent. Even the amount of rent would not be material if the parties intended a rent free leasehold though perhaps agreement is essential if rent is intended.

It is generally understood that the duration of a leasehold term must be stated either explicitly or by reference to a formula by which it can be computed. If this cannot be determined, the lease is not sufficiently definite to be enforced. Perhaps the most crucial time to be fixed is the commencement of the term for if this cannot be determined no kind of tenancy can arise whereas if only the extent of the term is in doubt, a tenancy at will might exist.

The term may be fixed to commence in future and upon an uncertain event. Though the lease to commence in future is generally exceptional, if it is to commence upon uncertain event that may occur within 21 years, it is arguable that this violates the rule against perpetuities.

When the leasehold commences in future, the time before commencement is no part of the term and the future tenant's right during this time is sometimes



called "interressee termini"

### **The connection between Land law and housing**

The concept of land as we know it today was non-existent deep in the obscure history of mankind. The idea of territory post dates that of land. When mankind involved the idea of a point of orientation which is a base from which one exploits the environment to provide one and his kin with the necessities of life, the modern concept of land and consequently housing was born from this. The rise of cities and city estates in Europe and Asia led to the rigorous legalistic approach to housing as a concept that in modern days has become phenomenal.

Even in the twentieth century the layman's concept of land is the "physical solus" the soil and nothing more. The owner of land is he who owns the soil. This concept is based on the fact that soil was considered as the source of life. It gave man nourishment and life and man's whole life and activity revolved around his use and manipulation of the soil.

However Western jurisprudence has improved a lot more in the definition of land. Western anthropologists like Megarry, Lawson, Powell and Smith to mention only a few have come up with definition however all are based on the old Roman concept of land. The colonialisation of Europe by the Romans imported Roman property jurisprudence to English law. The general rule among the Romans and consequently the English was "Quic quid

plantatur solo solo cedit", which means that "whatever is attached to the soil becomes part of the soil. This definition of the land then shows that land includes the soil plus everything attached to it. Thus if a building is erected on the land and objects are attached to the building, the word land prima facie includes the soil, the building and objects affixed to it and the owner of the land becomes the owner of the building.<sup>6</sup>

Another anthropologist Lawson takes the step forward. According to him, land is not two dimensional. Agriculture requires a depth of the soil and even human movement requires an airspace above the surface. Land must therefore be thought of as having volume. The issue is how far it should extend in the third dimension and the solution adopted by the English law is "cujus est solum eius est esque ad coelum ad usque ad inferos"<sup>7</sup> (the land extends upwards to infinity and downwards to the centre of the earth). This implies that unless restrained by other rules of law, a person may build as high as he likes and dig as deep as he likes in search of minerals which then belong to him.

Section 205 of the Law of Real Property Act defines land as including land of any nature. It includes mines and minerals whether or not held apart from the surface buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and corporeal hereditaments. "A" can have a legal estate in

the surface and "B" a legal estate in the mineral as in the case of enfranchised land. "C" can be the legal owner of one floor of a building and "D" another.

From these definitions of land is born the idea of fixtures. Since the test of deciding whether something is part of the soil and therefore land is "attachment", it is imperative then to discuss the nature of attachment. The word fixture is the name applied to anything which has become attached to land as to form in law part of the land. In deciding whether an object is so attached and therefore a fixture, the legal test is two fold. Firstly there is the degree and the purpose of annexation. As for the degree of annexation, a substantial connection with the land must be established. The more securely an object is affixed the more damage that would be caused by its removal and consequently, the more likely that it was intended to form a permanent part of the land. If the intention is to effect a permanent improvement of the land or building as such and not merely to effect a temporary improvement, the purpose of annexation is established and the objects rightly become a fixture and therefore becomes part of the land. Houses and other buildings therefore are inevitably part of part of the land on which they stand for they had no identity of their own until they were built on it and their materials become merged in it.

It is thus clear buildings are part of the land. The

idea of land is imported to Kenya law through Section 3 of Registered Lands Act.<sup>8</sup> The section defines land as including land covered with water, all things, growing on land and buildings and other things permanently affixed to land.

Buildings therefore form part of the land and since houses are themselves buildings or part of the same, it is inevitable to conclude that they also form part of the land and hence the strong connection between housing and land law. A study of the law of leases is therefore a study of property law. Since a house is capable of being leased just like land (physical solus) and leases are an integral part of the land law, no study of property law can be complete without a discussion on the law of leases (part of which includes leases of buildings) and therefore a problem on housing is a major concern for the property lawyer.

#### **BACKGROUND INFORMATION**

It is clear both from the study of common law and analysis of the existing Kenyan statutes which regulates the relationship between the landlord and tenant that certain basic standards of amenity must be met by any form of residential housing which seeks to provide conditions conducive to civilised humane and purposeful existence.

This thesis will therefore attempt to study the relationship between legal rules and one of the most



fundamental legal rules and one of the most fundamental necessities of life; shelter. Shelter means a dwelling house. A dwelling house is defined as any house or part of a house or room let or to be let as a dwelling or place of residence and includes the site of the house and the garden and other lands or buildings comprised in and incidental to the letting but let as a separate entity or source of profit.

The thesis will therefore seek to outline the legal mechanisms which are aimed at the establishment, maintenance and enhancement of the quality of the residential houses. The landlord and tenant law must ensure that the periodic tenant has effective enjoyment of a "social right" to decent housing as far as possible and free from any adverse conditions.

It has become increasingly clear that a tenant who owns a flat in a private residential block is just as helpless in the hands of his landlord in the matters of repair and maintenance.

The inequality of the bargaining power between the landlord and the tenant suggest a compelling reason for the law's protection of the tenant's legitimate expectation of quality of the residential houses. Tenants have very little leverage to enforce demands for better housing. Various impediments to competition ranging from political, social, tribal and class discrimination means that the landlord places the tenant

in a "take it or leave it" situation. The increasing severe shortage of adequate housing further increases the landlord's bargaining power and escalates in the need for improving and maintaining the existing stock. Again the findings by various studies of the social impact of bad housing has led to the realisation that poor housing is detrimental to the whole society, not merely to the unlucky ones who must suffer the daily indignity of living in a slum.

The main issues that we intend to analyse in this paper are; the implied condition in leases and the legal measures that can be adopted so as to ensure decent environmental conditions of leases and high quality houses that are suitable for human habitation. The broad question that suffice to be analysed here is - "How can we bring into existence a more healthy and uncontaminated environment conducive for human habitation in the residential houses?"

The questions to be answered in this thesis therefore include the following: What is the common law position as regards the quality of tenanted house? What protection does the Kenyan statutes afford for the protection of the residential leases? Does it fundamentally depart from the common law position? What are the statutory rights and obligations imposed upon both the landlord and the tenant to ensure a decent and habitable leased premises? and finally we shall attempt to see whether there is any need whatsoever for more

stringent measures to be adopted to ensure that the implied condition of habitability in residential tenancies is strictly adhered to.

In Chapter One we shall analyse the common law position with regard to the conditions that were implied in the residential tenancies. Since the common law forms a fundamental basis upon which our law was founded, it is necessary to have a fair grasp of it before we venture to discuss the situation that is prevalent in Kenya.

Chapter Two will discuss the conditions that are implied in tenancies for residential accommodation in Kenya and also see some remedies which are available to the tenant in case of breach by the landlord.

Chapter Three will attempt to discuss the statutes that the legislature has enacted to help ensure that the conditions implied in the tenancies are strictly adhered to to ensure decent environmental quality. In this chapter we shall also look at the weaknesses of these statutes.

In our final chapter we shall endeavour to look at certain recommendations which if implemented will help a great deal towards ensuring decent and habitable environments free from defects which may be a creation of either the landlord or tenant or both.

## FOOTNOTES (INTRODUCTION)

1. FOAs General Law of Landlord and Tenant Eighth Ed.  
Thames Bank Publishers Co. Ltd. (1957) p1
2. Re Negus (1895) 1 Ch 73
3. Isaac V. Hotel de Paris (1960) All E.R. 246 at 352
4. Hill and Redman's Law of Landlord and Tenant Tenth  
Ed. London Butterworths and Co. Publishers 1960 p3-4
5. Lace V. Chantler (1944) K.B. 368
6. Megarry: Manual of Law of Real Property: Sweet and  
Maxwell (1972) Third Ed. 73
7. Lawson: Law of Real Property: London Butterworths.  
(1970) Sixth Ed. 181
8. Registered Land Act Cap 300

## CHAPTER ONE

## THE POSITION AT COMMON LAW:

1:0 THE PRINCIPLE OF *CAVEAT EMPTOR*

While that branch of contract law dealing with sale of goods long ago developed implied warranties of fitness for purposes and merchantability, real property law did not partake of this development.<sup>1</sup>

The common law concept of a lease as primarily a conveyance of the leasehold estate resulted in the general application, until quite recently, of the doctrine of Caveat Emptor or "Buyer be ware", with respect to the condition of the leased premises at the inception of the tenancy.<sup>2</sup>

The landlord ordinarily did not impliedly warrant that the leased premises were suitable for the intended use, whether that use was agricultural, residential, commercial or industrial. Hence the tenant generally could not assert either as a basis for recovery of damages in tort or as a defence to an action by the landlord for unpaid rent, that the premises were not suitable for the tenant's use in the absence of an express warranty of fitness.

The tenant could not terminate or rescind the lease on the ground that the premises were not suitable for his use. Moreover, he could not maintain actions for injuries to himself or his belongings caused by defective conditions.

Whether or not the leased premises were suitable for



the tenant's use at the beginning of the lease term, the common law did not impose on the landlord any duty to make repairs required to make or keep the premises suitable for the tenant's use.<sup>3</sup>

The common law only imposed on the tenant a minimal duty to keep the building on the leased premises well enough sealed against the "Wind and Weather" as to prevent "Permissive Waste". This was the only duty with respect to repairs imposed by the common law on either the landlord or the tenant.

The leasehold device was conceptualized very much in terms of a conveyance of an estate in land which conferred upon the lessee a right to exclusive possession at the commencement of the lease, the lessee's obligation to pay rent was absolute and unqualified.<sup>4</sup>

It is clear from the foregoing that at common law the lessee had no right after the commencement of the lease to complain about the fitness of the land for his purpose. He was deemed to assume all risks attached to the condition of the land unless he had reached some contrary agreement with the lessor. In other words the lessee hired at his peril and the lessor gave no implied undertaking as to the physical condition of the land or (in case of building) as to its state of repair.

#### **1:1 ORIGIN OF THE PRINCIPLE:**

The common law rule absolving the lessor of all

obligations originated in the early middle ages. Such a rule was perhaps well suited to an agrarian economy, where the land was more important than whatever small structure was included in the leasehold, and the tenant farmer was fully capable of making repairs himself.

The immunity thus conferred on the lessor was doubtless due in great measure to the fact that subject matter of leases was more commonly agricultural land than residential dwellings.

The courts were greatly concerned to prevent the extension of the lessor's duties in agrarian leases. This approach inevitably coloured the court's view of residential lettings as evidenced by Earle C. J.'s famous observations:

".... Fraud apart there is no law against letting a tumble down house".<sup>5</sup>

The common law was clear:

"The lessee must make his objections to the conditions of the premises before taking the lease."<sup>6</sup>

It went almost without saying that the lessor had no responsibility to maintain the land during the currency of the lease. The law simply epitomized the rule of laissez fair.<sup>7</sup>

As a result the common law courts often held that the landlord of unfurnished premises was under no duty to ensure that they were fit for human habitation or in a state of good repair.

The common law rule was based upon three cases in

the court of Exchequer, Aden V. Pullen<sup>8</sup>, Sutton V. Temple<sup>9</sup> and Hart V. Windsor<sup>10</sup> which were all decided in the early 1840s and was justified in the considerations of the existence of cases deciding that the tenant must pay rent even when the premises were destroyed by such things as fire, flood or tempest and also on a belief in the social philosophy of Caveat emptor that it is much better to leave the parties in every case to protect their interest themselves by proper stipulation.

### 1:2 RETREAT FROM THE PRINCIPLE:

The common law principle even if appropriate in a rural and largely agrarian context could not remain unaffected by the social and economic changes brought about by the creation of an urbanised proletariat during the early years of the nineteenth century.

The sudden aggregation of residential dwellers in large industrial conurbations inevitably gave unprecedented prominence to the legal issue of habitability in the residential sector.

The landlord tenant law developed certain exceptions to mitigate the harshness of the doctrine of Caveat emptor and the rule that landlords were subject to no implied duties to repair or supply services. Thus it was held that a landlord who leased premises on a "furnished" basis for a short term had a duty to put them in a habitable condition before the tenant took possession.<sup>11</sup>



Moreover, the courts also came to hold that a landlord had a common law duty to maintain all the common areas over which he retained control when he leased two or more rental units on the same parcel of land, in a reasonably safe condition for the use of his tenants.

The changes in the common law summarised above constituted the nineteenth (and early twentieth) century response to the problems of an increasingly urban society. A partial recognition of the residential tenant's right to possession of the premises.

The rights were however only partially protected because :- neither contractual remedy nor the power to terminate the lease were ordinarily available to the tenant unless the lessor had expressly covenanted to keep the premises in repair or to provide essential services, but low income tenant rarely had sufficient bargaining power to compel landlords to enter into any express covenant in favour of their tenants.

Secondly many perhaps most low income tenants were tenants from month-to-month or week-to-week, which placed them in a very vulnerable position if they sued their landlords for breach of an express covenant to repair or to provide essential services, because their tenancies could be terminated without cause by the landlord giving the notice required at common law or by statute law.

The response of the bourgeois law to these developments was rather less substantial than the human and social problems to which they gave rise. Even the modern law relating to the residential fitness of rented dwellings still comprise a piecemeal conditions of provisions derived from the common law and sporadic statutory intervention.

In America, the common law notion of the caveat emptor has been replaced with a more humane principle that the landlord is contractually liable to supply his tenant with decent housing conditions throughout the terms of the tenancy.<sup>12</sup>

By contrast, Kenyan law remains tethered to the common law principle and has therefore been forced to seek the same goal, somewhat imperfectly through tortuous and fragmented initiative of statute law.

It remains a matter of curious surmise that in Kenya, the control of quality of residential tenancy relationship may implicitly have traded off for the security of tenure and rent control which ironically is so conspicuously lacking in Kenya.

At early common law a lease was regarded as having merely personal rights against the lessor. But as a result of several remedies that were created in the lessee's favour, he came to be regarded as having rights in "rem" and the lease was regarded as a sale of the demised premises for the term.

Upon this background, the courts held that a lease

was like the sale of a specified personal property to be delivered and applied the same concept of caveat emptor that prevailed generally in that day with respect to the sale of all chattels.

As a corollary of this concept, courts generally held that, the "destruction or any depreciation occasioned by the fault of the lessor was entirely the loss of the lessee".

The courts have broken almost entirely away from the ancient rule of "caveat emptor" with respect to the sale of chattels generally. To some extent, this development has been reflected in the law governing landlord and tenant relations.

In respect to the landlord's responsibility for the conditions of the premises during the lease, courts have failed to reflect the development. As a result of the statute law in this respect still lags behind the modern notion that in general one who sells an article is presumed to warrant that it is good for the purpose for which it is sold.

In order to keep pace the law should recognize that when one pays for the temporary use of a dwelling, the parties contemplate in so far as reasonable care on the part of the owner, he must assure the tenant that the dwelling will be safe and habitable not only at the time ... possession is delivered but throughout the period for which payment is made.

It is fair to presume that no individual would voluntarily choose to live in a dwelling that has become unsafe for human habitation. It therefore follows that at least in the absence of express provision to the contrary, a landlord who leases property should be held to a continuing obligation to exercise reasonable care to provide, namely a safe and habitable dwelling.

Many courts have been unwilling to imply a warranty of quality, specifically a warranty of habitability into leases of apartments. The courts have rather relied upon the old common law rule that the lessor is not obligated to repair unless he covenants to do so in the written contract.

The old non-repair rule cannot co-exist with the obligations imposed on the landlord by various statutes that govern the landlord and tenant relations.

In my judgement, the housing laws must recognize the landlord's obligation to keep the premises in a habitable condition. This is compelled by three separate considerations viz:-

[1] First and foremost, I believe that the old rule was based on a certain factual assumption which are no longer true, on its own terms it can no longer be justified.

[2] Secondly that the consumer protection requires that the common law rules be abandoned in order to bring residential landlord-tenant law into harmony with principles on which those cases



rest.

[3] Finally that the nature of today's urban housing dictates abandonment of these old rules.

The inequality of bargaining power between the landlord and the tenant further suggests compelling reasons for the law's protection of the tenant's legitimate expectations of quality.

Tenants have very little leverage to enforce demands for better housing. Various impediments to competition in the rental housing market, such as political and class discrimination means that the landlord places tenants in a "take it or leave it" situation. The increasing severe shortage of housing further increases the landlord's bargaining power and escalates the need for maintaining and improving the existing housing stock.

Finally, the findings by various studies of the social impacts of bad housing has led to the realization that poor housing is detrimental to the whole society, not merely to the unlucky ones who must suffer the daily indignity of living in a slum.

Of far sweeping importance is the fact that the entire edifice of caveat emptor has began to collapse like a house of cards within the last few years. A number of courts have with leasing of dwelling houses simply abolished caveat emptor and have found implied warranties of fitness for human habitation.

A parallel shift in favour of the housing consumer

has occurred in law governing the sale of houses. Where once the doctrine of caveat emptor prevailed, today's courts are implying a warranty of habitability.

So far, we have discussed the common law principle of caveat emptor, its origin and the changes that have taken place in the principle. It is necessary therefore to have a cursory glance at certain liabilities that the common law imposed on the landlord to ensure that the environmental conditions of the residential tenancies are maintained.

### 1:3 THE LANDLORD'S LIABILITY AT COMMON LAW:

The common law has made a partial contribution towards the development of a recognized standard of habitability in residential lettings. This contribution has come through the declaration of implied conditions in certain kinds of lease, together with the gradual extension of the law relating to nuisance and negligence.

The courts have held that the "implied warranty of habitability" would provide an effective though an indirect way to enforce state and municipal housing laws noting that the traditional caveat emptor rule was inconsistent with the current legislative policy concerning housing standards as exemplified in legislative and administrative rules e.g. the Rent Restriction Act<sup>13</sup> and Landlord (Hotels, shops and catering establishment) Act<sup>14</sup>, all of which impose

certain duties on property owners with respect to the condition of their premises. The common law therefore implied the following conditions:

**(a) Implied condition of fitness for human habitation**

At common law, if a house is let furnished there is an implied condition that the premises shall at the outset of the tenancy be fit for human habitation. If let unfurnished, no such condition exists.<sup>15</sup>

This significant exception to the common law principle of caveat emptor in landlord-tenant law relation was established in 1843 in the case of Smith V. Marrable.<sup>16</sup>

The tenant on taking possession had discovered the premises to be infested with bugs. the court of Exchequer held it to be an implied condition in the letting of any furnished house that the premises should be reasonably fit for habitation. The tenant was therefore entitled to quit the letting without notice. According to Parke B:

".... If the demised premises are encumbered with a nuisance of so serious a nature that no person can reasonably be expected to live in them, the tenant is at liberty to throw them up.

The rule in Smith V. Marrable<sup>17</sup> is however subject to certain grave limitations. The implied condition of fitness for habitation relates only to the condition of the premises at the commencement of the letting. It does not cover defects arising thereafter. The implied condition also does not apply to ordinary disrepair

which merely renders habitation unpleasant and it only applies to residential tenancy.<sup>18</sup>

It has no relevance to unfurnished premises, the implied condition does not extend to dangerous appliances or furnishings supplied by landlords and again because the landlord's liability arises ex contractor no person other than the tenant can maintain an action for the breach of the implied condition.<sup>19</sup>

The potential fertile scope of Smith V. Marrable<sup>20</sup> has been disastrously curtailed thereby frustrating an important opportunity for the construction of a comprehensive common law standard of habitability in residential lettings.

Some ideas of what might have been achieved by the common law becomes apparent in the development of the landlord tenant laws in Kenya and the enactment of the Rent Restriction Act<sup>21</sup>, the central feature of which has been the recognition of an implied warranty of habitability in all residential lettings whether furnished or not.

In the common law with the average consumer of goods and services, the tenant is not generally capable of assessing the fairness of the product supplied and therefore relies inevitably on the skill and bona fides of his landlord at least as much as a car buyer might rely upon the car manufacturer. It is therefore imperative that the landlord should warrant at the



outset of the lease that there are no latent defects in the facilities and utilities vital to the use of the premises for residential purposes and that these essential features shall remain during the entire term in such a condition to maintain the habitability of the dwelling.

**(b) Implied contractual duty of care:**

The fact that the landlord-tenant relationship is at its roots, a contractual relationship has facilitated a more positive move towards the achievement of better housing conditions for tenants under the common law.

Such duties of care may as well arise where the landlord retains with his control common parts of a building over which the individual tenant enjoys right in the nature of an easement.

A most important contribution was made to the development of the landlord's duty of care by the decision of the House of Lords in the case of Liverpool City Council V. Irwin.<sup>22</sup> Here the council tenants living in flats in the upper storey of a high rise block, withheld rent on the ground that the lifts, staircases and rubbish chutes in their building were not maintained by the council in a safe or efficient condition. There was evidence that the lifts were almost continuously out of order and the stairway unfit largely because of the activity of vandals living on the estate. The House of Lords ruled that certain duties of care on the part of

the landlord were to be implied into the contract of tenancy as a matter of necessity.

In the absence of any express undertaking, by the landlord authority, Lord Wilberforce held that the council was under a contractual duty to take reasonable care to keep in reasonable repair and usability the common parts and facilities in the building.<sup>23</sup>

The scope of the landlord's implied contractual obligation is significantly restricted by the court's tendency to imply a contractual duty of care only in those circumstances where the absence of duty would render the contract of tenancy inefficacious, futile and absurd.

The duty if it exists is only owed to the other contracting party; the tenant. The liability of the landlord to non-contracting parties (such as members of the tenant's family) can be established only with reference to the statutory responsibility.

#### **(c) Implied Covenant for Quiet Enjoyment.**

There is in every lease an implied covenant or contractual term binding the landlord to give quiet possession to the tenant.<sup>24</sup> The landlord's obligation is intended to ensure that the tenant enjoys freedom from any physical interference with the demised premises by either the landlord or any other person for whom the landlord is responsible.<sup>25</sup>

The liability founded on the implied covenant plays

some part in protecting the tenant's right to a certain standard of amenity in the land demised. As Lord Denning M. R. ruled in the case of McCall V. Ablelesz<sup>26</sup>

".... The implied covenant extends to any conduct which interferes with the tenant's freedom of action in exercising his right as tenant and therefore covers any acts calculated to interfere with the peace or the comfort of the tenant or his family and is not merely confined to direct physical interference by the landlord."<sup>27</sup>

There is therefore implied in every leasing a covenant of quiet enjoyment, this is both a covenant and a warranty. The landlord warrants that the tenant will not be disturbed in possession by any other person with a superior legal right of possession. In case of disturbance, the landlord covenants to defend the tenant. This covenant is breached only if during the term the tenant is disturbed by a third party or by the landlord.<sup>28</sup>

#### **(d) The landlord's liability in negligence**

The law of negligence provides an additional and sometimes vital form of protection for the residential amenity enjoyed by the tenant.

A landlord cannot be liable to the tenant in negligence by reason of the defective nature of the demised premises at the commencement of the tenancy. It is clear however that liability in negligence can arise in respect of events occurring after the commencement date.

It is well established for instance that a claim in

negligence may be against a landlord if by some action or omission on premises retained within his exclusive possession and control damage is caused to that part of the premises demised to the tenant.<sup>29</sup>

It is possible that a landlord may be liable in negligence even where the defect has been caused maliciously through vandalism committed by unknown parties.<sup>30</sup>

There is however no general duty of care which obliges a landlord to exercise diligence on behalf of the tenant to live in the neighbouring premises. Nor oddly enough does the neighbour principle of Donoghue V. Stevenson<sup>31</sup> require the landlord to enforce standards of good neighbourliness on behalf of one tenant as against other neighbouring tenants.

#### **(e) The landlord's liability for nuisance.**

From the earliest days, the leasehold covenant for quiet enjoyment (both express and implied) protected against interference with the covenantee's title of possession. Despite the express reference to the enjoyment, it did not extend to acts akin to nuisance.

in the second half of the nineteenth century the courts tended to give a wider interpretation to the covenant that the tenant should "peaceably hold and enjoy .... without any interruption or disturbance, so that it extended to some cases akin to nuisance".

In the case of Shaw V. Stanton<sup>32</sup> which concerned a



covenant for quiet enjoyment of a coal mine. Whilst working a quarry above the mine, the lessor negligently bored holes into the mine and caused it to flood thereby making it impossible to work the mine. Counsel for the defendant argued that:-

"... if a man demise a house and afterwards establish chemical works on his own property, some distance off, it may be a nuisance to the tenant, but it is no breach of covenant".

But Pollock C. B. said:-

".... I am of the opinion ... that the covenant for quiet enjoyment extends to acts of this nature. It is not necessary to say whether the case of the chemical works put by the [counsel] would be within the covenant: probably not but the connection between these two properties in the present case the mine and the quarry is that one is beneath the other and I think that the lessor's covenant that he should not act to disturb the lessee extends to injury here complained of and that the plaintiff is entitled to the judgement".

There is no doubt that a tenant being in possession or occupation of land has locus standi to sue in respect of the tort of nuisance. It has been less clear whether he may sue the landlord as distinct from other tortfeasors.

It follows that an action in nuisance may lie where the acts of the landlord on his own land unduly interferes with the tenant's comfortable and convenient enjoyment of the demised premises, such acts would include, the landlords disconnection of water and electricity supply.<sup>33</sup>

A landlord is however not liable for acts of nuisance committed by his tenants since the person to be



sued in nuisance is the occupier of the property from which the nuisance emanates.<sup>34</sup> Thus a landlord bears no responsibility in nuisance simply because he grants a letting to a tenant whom he knows to be a nuisance-prone nor does any implied term in the tenancy make the landlord compellable to seek contractual remedies against another tenant who is nuisance-prone.

There is thus a responsibility that a landlord's nuisance liability vis-a-vis the tenant may be founded in acts committed by other tenants in occupation of a different part of the landlord's property, the landlord may even bear liability for acts committed by non-tenants.<sup>36</sup> This may sometimes prove to be a potent mechanism of redress in dispute arising between neighbours in a crowded multiple residential context.

**(f) The landlord's liability under Ryland V. Fletcher**

The rule in Ryland V. Fletcher<sup>37</sup> imposes a liability on the owners or controllers of a dangerous thing which escapes and does damage. There are obvious respects in which this form of tort liability may impinge on the standard of habitability of residential lettings. It is clear for instance that a landlord who allows water to overflow from his premises into those of his tenant is liable under the rule for damages caused by the escape. There is in this sense a close nexus between the liability of the landlord under the rule in Rylands V. Fletcher<sup>38</sup> and his liability in negligence.

It has been made clear in the foregoing discussion that the need and social desirability of adequate housing for people in this area of rapid population increases is too important to be rebutted by that obnoxious legal cliché, caveat emptor. Permitting landlords to rent "tumble-down" houses is at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for conscientious landowners.

Any discussion of the conditions of the residential tenancies at common law without discussing the remedies for the breach of landlord's duty would be incomplete. It is therefore imperative that we discuss some of the remedies that were open to the tenant in case the landlord breached the implied covenants.

#### **1:4 REMEDIES FOR THE LANDLORD'S BREACH OF DUTY: AT COMMON LAW:**

The tenant's rights in respect of the residential quality of his accommodation are vitally dependent upon his ability to secure an adequate and effective remedy for disrepairs which have occurred in consequence of default by his landlord.

In view of the general principle within the landlord-tenant relationship that the performance of the parties' respective obligations is not inter-dependent, it is not wise (and may be indeed disastrous) for the tenant to withhold payment of rent or service charges on

the ground of his landlord's patent failure to discharge a duty of repair.<sup>39</sup>

The tenant must seek to vindicate his rights through the legitimate channels which the law affords him. The remedies open to the tenant include the following.

**(a) Damages for breach of the covenant**

There seems to be a unanimous agreement that a breach of the landlord's implied statutory duty to put and keep the leased premises in a habitable condition entitles the tenant to a damage recovery whether the tenant does or does not terminate the lease.<sup>40</sup>

It has been pointed out by courts that the tenant may often prefer not to terminate the lease because it would be difficult for him to find another place, to live in most urban areas which are generally characterised by the scarcity of adequate low cost housing.<sup>41</sup>

Any claim by the tenant for damages for breach of the landlord's statutory or implied warranty of habitability may of course be asserted either by a direct action or by way of counter-claim in an action or by the landlord to recover unpaid rent. Such a claim may also be asserted by the tenant as a defence to an action by the landlord to evict the tenant for non-payment of rent.

It is clear that the tenant can sue the landlord for damages for breach of any repairing covenant expressly

or impliedly undertaken by the landlord in the lease.<sup>42</sup>

In assessing the tenant's damages for breach of a landlord's repairing covenant, the courts start from, "the fundamental principle" that the purpose of such damage is so far as possible by means of a monetary award, to place the plaintiff in the position which he would have occupied if he had not suffered the wrong complained of.<sup>43</sup>

The subject of the award is not to punish the landlord but ... restore the tenant to the position he would have been in had there been no breach.

It follows from the general principle above that damages must be assessed as the difference between the value of the property and the value which the property would have had if the landlord had fulfilled his repairing obligations.

The courts can however not apply one set of rules to all cases regardless of the circumstances of the case. The facts of each case must be looked at carefully to see what damage the tenant has suffered and how he may be compensated by a monetary award.

#### **(b) Remedy for termination**

Breach of the statutory warranty of habitability gives the tenant the right to terminate the tenancy and avoid any further liability for rent. This is so long as the landlord's breach of duty "materially" affects the tenants health and safety and the tenant complies with



the stated "notice" requirement.

Here the tenant must vacate the premises if he wishes to terminate the tenancy. If the tenant is willing to vacate the premises he may in substance treat the landlord's breach of duty as a constructive eviction.

#### **(c) Rent withholding and abatement**

The tenant has no right to remain in possession and withhold rent because of the landlord's breach. This is because the landlord can summarily evict the tenant for non-payment of rent despite his own breach, even where the landlord failed to perform an express covenant to put and keep the premises in habitable condition.<sup>44</sup>

The tenant is often faced with a dilemma, he must either continue to pay rent and endure the conditions of untenability or abandon the premises and hope to find another dwelling which in these times of severe housing shortage is likely to be untenable as the last.

#### **(d) Remedy of self-help**

The statute provides the tenant with self-help remedy for breach of the landlord's obligation to provide the tenant with "habitable" premises, i.e. the statute authorises the tenant to make the repairs necessary to put the premises in a habitable condition and to deduct the cost of repairs from the agreed rent.

If therefore, a landlord fails to make repairs and



replacements of vital facilities necessary to maintain the premises in a liveable condition for a period of time adequate to accomplish such repairs and replacements, the tenant may cause the same to be done and deduct the cost thereof from future rents.

The tenant's recourse to such self-help must be preceded by timely and adequate notice to the landlord of faulty condition in order to accord him the opportunity to make the necessary replacement or repair.<sup>45</sup>

If within a reasonable time after the notice to the lessor, of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself where the cost of such repairs does not require an expenditure greater than one month's rent of the premises, in which case he shall be discharged further payment of rent, or performance of other conditions.<sup>46</sup>

This remedies may provide much needed relief for the occupants of mismanaged tenanted property, but is subject to the restrictive qualification that the courts seem unwilling to appoint a receiver to act in respect of housing owned and managed by a local authority.<sup>47</sup>

There is moreover the difficulty that even in relation to privately let premises the appointment of a receiver is likely to prove ineffective in practice if the income (inclusive of any service charge other property or money which can be put under the control of the receiver) is patently inadequate to meet the cost of

repairs.

It is therefore said that the receiver is well advised not to take office unless he is satisfied that the assets of which he is appointed a receiver are sufficient to meet his own remuneration or unless he has obtained an enforceable indemnity in his regard from one of the parties to the litigation

The receiver has no general right to be indemnified by either the landlord or tenant in respect of expenditure incurred on repairs or of remuneration due to him.

These unfortunate constraints serve as a reminder of the limitations inherent in the power to appoint a receiver and detract considerably from the potential utility of this form of remedy for the tenant.

#### **(e) Remedy of specific performance**

Certainly, specific performance (mandatory injunction) could be an extremely valuable remedy in cases where the tenant does not wish to terminate the lease because of the landlord's breach of the implied or statutory warranty of habitability, and also does wish for the landlord to sue for rent and/or for possession.

In view of the disadvantages involved in the use of any of the legal remedies of the tenant e.g. the difficulty of finding alternative housing if he vacates the leased premises and the likelihood that the tenant will be involved in protracted litigation without

necessarily getting the landlord to put the premises in habitable condition.

If the tenant remains in possession and relies on his abatement and/or damage remedies - it is arguable that all the tenant's "legal remedies" are inadequate and he is entitled to the equitable remedy of specific performance. A court order requiring the landlord to perform his warranty obligation or face punishment for contempt is certainly likely to be more effective than the traditional techniques used by local administrative agencies to enforce housing rules.

Specific performance is no panacea. However some of the factors that make traditional administrative agency enforcement of housing rules ineffective in practice may also make specific performance ineffective e.g. the financial inability of the owners of the slum housing to make the expensive repairs and improvements necessary to comply with the warranty of habitability and the difficulty of locating the owners of such housing if he simply decides to abandon his property rather than put it into a habitable condition.

Moreover, tenants of slum housing are usually only periodic tenants who are unlikely to be interested in compelling the landlord to make expensive repairs and improvement that will primarily benefit subsequent tenants. And judicial reluctance to supervise the correction of multiple defects in rental housing might

well result in restricting the specific performance remedy to cases involving a single serious defect.

Like other equitable remedies, relief is granted at the discretion of the court. For example relief was refused when a tenancy had been treated as being at an end and no rent had been paid for twenty two years before the landlord forfeited the lease.<sup>48</sup>

## 1.5 CONCLUSION

In this chapter we have tried to give a brief historical background of the implied conditions in leases with particular reference to the position that prevailed at the common law where the dominant philosophy was that of "caveat emptor". With time however this had to be done away with because of the increasing awareness of the residential tenants. This thus led to the retreat from the principle and as a result the common law started to imply certain conditions in leases of residential tenancies.

In our next chapter we intend to discuss the position that is prevalent in Kenya and be able to make a comparison with that of the common law and see whether there has been any fundamental departure or not.



## FOOTNOTES

1. Cunningham R. A. Law of Real Property (1984) West Publishing Company Chapter 6 p301
2. Davidson V. Fischer: (1888) 19 Colo 652
3. Divines V. Dickinson (1919) 12 A.L.R. p155
4. Paradine V Jane (1657) 82 E.R. 8
5. Robin V. Jones (1863) 15 (NS) pg 221 at p240
6. H. Tittany: Treatise on the Law of Landlord and Tenant (1912) Sweet and Maxwell. p572f.
7. J.I. Reynolds: Statutory Covenants of Fitness and Repairs, Social Legislations and the Judges. (1972) 37 M. L. R. at p378f
8. (1842) 152 E.R. p492
9. (1843) 152 E.R. p1108
10. (1843) 12 M. & W. p68
11. Smith V. Marrable (1843) 11 M. & W. 5 at p8f
12. Ontario Law Reform, Report on Landlord and Tenant Law (1976) p133
13. Chapter 296 Laws of Kenya
14. Chapter 301 Laws of Kenya
15. Collins V. Hopkins (1823) 2 K. B. 617
16. Supra Note 11
17. Ibid
18. William Granville 1: The duties of non-occupiers in respect of dangerous premises (1976) London Butterworths p194ff
19. Cameron V. Young (1902) A. C. p176 at 180f
20. Supra Note 16



21. Supra Note 13 Section
22. (1977) A. C. p239
23. Ibid
24. Budd-Scolf V. Danielll (1902) 2 K.B. p351 at 355
25. Jones V. Livingstone (1903) 1 K. B. p253
26. (1976) Q.B. p583 at 594
27. Kenny V. Preen (1963) Q.B. p499
28. Markham V. Peget (1908) 1 Ch p697
29. Cockburn V. Smith (1924) K.B. 119 at 129
30. King V. Liverpool City Council (1986) 1 W.L.R. 890
31. (1932) A. C. 562
32. (1858) 30 L. T. p352
33. Perera V. Vandiyen (1953) 1 W. L. R. 672
34. Aldin V. latimer Clark, Muirhead and Company (1894)  
2 Ch 437
35. Jaeger V. Mansion Consolidated limited (1903) 87 L.  
T. 690
36. Hudson V. Cripps (1896) 1 Ch 265 at 268
37. (1868) L. R. 3 H. L. 330
38. Ibid
39. Belfour V. Westorn (1786) 1 T. R. 310
40. Ibid
41. Wachtel, A. "Forgotten but not gone slum clearance"  
Unpublished working paper No. 153 for I. D. S.  
(1974)
42. Supra Note 1: p355
43. Ibid p335

44. Gibson V. Kirk (1841) 1 QB 850
45. Lefcoe, G. An Introduction to American Land Law: Cases and Materials: Contemporary Legal Series
46. Supra Note 21 Section 26
47. Supra Note 1 p356
48. Public Trustee V. Westbrook (1965) 3 E. R. 3985

## CHAPTER TWO

## IMPLIED CONDITIONS IN LEASES: THE POSITION IN KENYA:

## 2.0: Introduction

The Kenyan law concerning landlord and tenant relationship basically has its origin in the common law. English law of course has achieved an articulation of principles and range of ideas which are readily admissible and admitted in the local scene. However, the applicable English law remains substantially the law as it stood in 1897.<sup>1</sup>

Landlord and tenant law in Kenya is broadly speaking a special branch of the law of contract in its application to land holding.

At common law, leaseholds were treated as personalty (not as property) but as personal contracts binding on the parties. Their association with land however distinguished them from other personalties and it earned them the name chattels real. Although subsequently regarded as estates they were still denominated as estates less than freeholds.

In Kenya the distinction between personalty and realty is not applicable because the law distinguishes only between movable and immovable property<sup>2</sup>, leaseholds are therefore subsumed under immovable property.

In order for us to be able to have a full grasp of the conditions implied in the residential tenancies, it is necessary for us to scan out the essentials of a valid lease in Kenya.

## 2.1: ESSENTIALS OF A LEASE IN KENYA

These essentials are conditions prerequisite to the existence of a valid lease. A lease devoid of these essentials is a nullity ab initio. According to S. K. MacMillan<sup>3</sup>, there are two substantial requirements which must be present if the lease is to be valid. These requirements are, the intention to create a lease and the right to exclusive possession of the demised premises. He proceeds to contend that all the rest are less fundamental requirements. His contention notwithstanding, we shall discuss all the essentials of a valid lease.

### [1] Intentions to create a lease

As aforesaid, a lease is a contract between the grantor and the grantee. A contract is a legally binding agreement made between two or more parties.<sup>4</sup> Thus for an agreement to arise the parties must come into a consensus. It is this reason that makes the intention to create a lease requisite for validity. In the case of Isaacs V. Hotel de Paris<sup>5</sup> where Isaacs was given exclusive possession in the first floor of a hotel for use as a night-bar, he paid the company which gave him such possession a money consideration. After sometime the company gave Isaacs seven days notice to give up possession of the premises. Issac refused to honour the notice on the ground that he was a tenant and therefore required sufficient notice. It was held by the Privy

Council that circumstances of the case and the conduct of the parties showed that there was no intention to create a lease. Isaac was merely given personal privilege (i.e. licence) which had been terminated by notice.

**[2] Exclusive control: {possession}**

A tenant is one who has exclusive control of the premises which are the subject matter of a lease. The transaction between the landlord and the tenant must therefore confer a right unattended by the simultaneous right of any other person in respect of the same subject matter.

In the case of Hetch V. Morgan<sup>6</sup> where in 1956, the respondent lodged a complaint with the Central Board against his landlord, the board rejected the appellant's defence that the subsisting agreement only created a licence and made an order in favour of the respondent. On appeal it was held that although it may have been the appellant's intention to create a licence, the respondent had not accepted that intention, and that the self-claimed nature of the flat, its separate entrances and the terms as to notice were inconsistent with the agreement constituting a tenancy. McDuff J. said:

"... the question is not a mere matter of words and, if the operative parts of the agreement establish tenancy, an express provision negating a tenancy is ineffective. The courts must look not so much at the words as the substance of the agreement, the relationship of the parties is determined by law and not by label



which they choose to put on it ...."<sup>7</sup>

The right to exclusive possession or occupation includes a right to exclude all persons including the landlord. During the period the lease is in existence, a tenant or the lessee is the one entitled to immediate possession of the property unless he (lessee) acts contrary to the term of the lease. Under the Mining Act<sup>8</sup> Section 47, the lessee among other things is entitled to a right of exclusive possession to mine and erect houses.

The test of exclusive possession is not conclusive, for the result of the recent cases is that although a person who is let into exclusive possession is prima facie to be considered a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy.<sup>9</sup> The test for exclusive possession is the degree of control retained by the landlord over the demised premises.

**[3] The tenanct must be for a period certain or capable of being ascertained**

The commencement and the duration of the lease must be certain or capable of being ascertained. This common law requirement has been codified in Section 105 of the Transfer of Property Act<sup>10</sup> and Section 45 of the Registered Land Act<sup>11</sup>. However, these sections contemplate the creation of perpetual and life tenancies.

According to Professor Ogendo's Manual<sup>12</sup>, reference to leases in perpetuity in Section 105 of ~~ITPA~~ means no more than that such a lease is heritable in substance, the lease is for the life of the lessee.

Under the R.L.A. the reference to an indefinite period is qualified by the requirement that the parties must make provision for the manner of determination. A life tenancy under the R.L.A. is justified on the ground that death of the tenant is easy to prove hence the duration is certain.

The common law requirement of duration has further been modified by Section 46 subsection 1 of the R.L.A. which provides that where in any lease the term is not specified and no provision to determine the tenancy the lease shall be deemed to have created a periodic tenancy. Therefore the failure to specify the duration of a lease does not render it void but merely converts it into a periodic tenancy.

#### **[4] Premises must be ascertained**

For a valid lease in Kenya, premises must be ascertained with clarity. In the case of Heptulla V. Thakore<sup>13</sup> the respondent was a tenant of the premise, the ground floor of a shop. Originally he had occupied the premises alone but in 1938, one Heptulla occupied part of the shop either as a tenant or a licensee. The two executed a deed which purported to be a registrable lease of part of the premises but was never registered.

In 1941, Heptulla assigned his right to the appellant and in 1953 the respondent brought an action to recover possession of the premises and damages. The issue arose as to whether appellants were licensees or tenants. Briggs J. A. held that the document could never be effective as a lease for want of registration but it could be evidence of the term of a monthly tenancy created by occupation. If however by reason of uncertainty of the premises intended to be demised, or by reason that exclusive possession of the premises was not given to the appellant or their predecessor, no tenancy could be shown to have been created, the document could be evidence of the terms of the licence ...". If the premises in question cannot be ascertained with sufficient precision, then no tenancy can be said to have been created. This also follows where the duration of the lease is not ascertained. It is possible to create future leases in Kenya but these should commence before 21 years after their registration which should be a period ascertained.

#### **[5] The need for registration**

The Kenyan statutes have laid emphasis on registration of leases. Most statutes have however exempted cases of relatively short durations like months which if registered would be cancelled and re-registered frequently.

Under the I. T. P. A. registration is required for

tenancies which are from year to year, for periods exceeding one year or reserved an yearly rent.<sup>14</sup> Any other tenancy does not require registration, but a transaction creating such relationship must be accompanied by delivery of possession.

Under Trust Lands Act<sup>15</sup>, Section 59, the duration of the lease to be registered is not stated and every lease is to be registered in the office of the Commissioner of Lands in the manner prescribed by the Act.

The Registration of Titles Act<sup>16</sup>, Section 40, provides that any unregistered instrument shall be ineffective to pass any land or interest therein, but it does not make registration compulsory unless where a third party purchases the premises then no interest will pass because it would be impossible for unregistered lease holder to have a valid interest to pass or for leases of more than 12 months as provided by Section 41 of the Act.

The Registration of Documents Act<sup>17</sup>, Section 4 provides for all leases not exceeding one year to be registered but does not make registration of leases compulsory. Sections 99 and 102 of the Governments Land Act<sup>18</sup> also requires registration of some category of leases.

Section 53 subsection a of 1TPA creates an important exception. It provides that where a contract for the transfer of any interest in immovable property is in writing and the transferee has in part performance taken



possession of the property or part thereof or being already in possession continues in possession and has done some acts in furtherance of the contract and has performed or is willing to perform his part of the contract, the transferor is estopped from erecting the requirement of registration under Section 107 to defeat the interest of the transferee, i.e. Section 53 subsection (a) operates as a shield which the tenant can use should the landlord seek to rely on Section 107 of I.T.P.A.

Under Section 47 of Cap. 300<sup>19</sup> registration is required for all leases for periods exceeding two years or for the life of the lessee or the lessor in respect of the life tenancy since it is essentially not different from a settlement.

In Fiquerido V. Panagapoulos<sup>20</sup> a Ugandan case and thus only of persuasive authority to Kenyan courts, the lease though duly executed was not registered as required by Section 51 of Registration of Titles Ordinance of Uganda and was subsequently assigned to other parties. In an action of unlawful distress the assignee claimed to have acquired exclusive control. It was held inter alia that between them and the party they had distrained from, there was no privity of contract and therefore no landlord-tenant relationship existed and therefore they were guilty of unlawful distress. If their interests had been registered, a tenancy would



have been created and destrain from breach of a term as was the case here would have been legal.

#### [6] Writing

Writing is required for all contracts which are made for the disposition of any interest in land, according to Section 3 subsection (3) of the Law of Contract Amendment Act.<sup>21</sup>

The agreement itself need not be in writing but there must be some memorandum or note thereof. This Section actually reproduces Section 4 of the English Statute of Fraud of 1677.

These requirement applies to all transactions relating to land governed by both the I.T.P.A. and the R.L.A. The effect of this is that no oral evidence may be adduced to prove the contents of unwritten contract for the disposition of an interest in land.<sup>22</sup> The contract is not void but merely unenforceable.

There is an exeption however under proviso to Section 3 (3) of Cap. 23 Laws of Kenya<sup>23</sup> which is to the effect that the absence of writing renders the agreement unenforceable unless the intending purchaser or tenant firstly in part performance has taken possession of the property or part thereof or secondly, being in possession continues in possession in part performance. The proviso therefore codifies the common law doctrine of part performance and thereby enables either party to bring an action on the contract in its original terms.

However, this is useful only in cases of tenancies that do not require registration, where registration is required different considerations apply.

There is however no conflict between the I.T.P.A. and the law of contract since Under Section 107 I.T.P.A. although non-registrable leases are not required to be in writing, the oral agreement must be accompanied by part performance for the interest to pass.

## 2.2: IMPLIED CONDITIONS IN RESIDENTIAL TENANCIES

Here we will endeavour to answer three basic questions. First, what is the nature of rights and obligations of the parties under a valid tenancy? Second, what is the procedure for their enforcement? and finally, what are the conditions for their transfer to third parties?

In an ideal situation, the rights and obligations of the parties ought to be set out in the lease itself. However, in most cases the lease merely defines the demised premises, the length of the term and the rent payable. In such cases certain common law covenants which are now codified in I.T.P.A. and the R.L.A. are implied into the agreement.

These covenants however have been substantially modified by the regulatory statutes in cases of tenancies of dwelling houses and business premises e.g. the Rent Restriction Act<sup>24</sup> and the Landlord and Tenant Act<sup>25</sup>.

The following covenants are therefore implied under both the I.T.P.A. and the R.L.A.

**[1] That there is capacity to make the grant**

This is derived from the general law of contract and is incorporated in Section 7 of I.T.P.A. which states as follows

"Every person competent in contract and entitled to transferable property, or authorised to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force".

This covenant is also incorporated in Section 39 subsection (1) of the R.L.A.

Since the act of leasing is a conveyance of an estate, the landlord necessarily covenants that he has an estate out of which the leasehold can be carved and that he is not legally disabled from leasing.

**[2] Obligation not to derogate from the grant**

It is a principle of general application that a grantor must not derogate from the grant.<sup>26</sup> He must not seek to take away with one hand what he has given with the other.

The landlord is not allowed to permit to be used any adjoining or neighbouring land of which he is the proprietor in any way which could render the leased premises unfit or materially less fit for the purpose for which they were leased. In the case of Aldin V.

Latimer Clark Muirlead and Company<sup>27</sup>, the tenants were in timber business. Their timber drying sheds were interfered with by the flow of air caused by the landlord's building activities on adjoining land. The landlord's assignees were held liable to pay the tenant damages for breach of the implied covenant.

This implied condition imposes an obligation not to act in any way that renders the premises unfit for the purpose for which it was rented. This condition is implied by Section 53 subsection (b) R.L.A. and Section 108 subsection (a) of the I.T.P.A.

In the case of Grosvenor Hotel Company V. Hamilton<sup>28</sup>, Davey L. J. said:

".... A grantor cannot derogate from his own grant and therefore if when letting a house, he retains adjoining land, he cannot use it so as to interfere with the stability of the house ..."

### [3] Implied covenant for quiet enjoyment

The landlord covenants that the tenant shall have peaceful enjoyment of the premises as long as the tenant pays rent and performs the other obligations placed on him under the agreement.

It is a covenant for freedom from interruption by the landlord, or anyone claiming through him such as assignees and legal representatives. The word quiet is not restricted to the absence of noise. It involves freedom to enjoy property without disturbance or interruption. The landlord will be in breach of this covenant if for example he removes with the intention of



getting rid of the tenant the doors and windows of the leased premises or cuts off electricity.<sup>29</sup>

This implied covenant protects the tenant against internal interference by the landlord, his agents or assigns, this condition is implied by Section 53 subsection (a) of the R.L.A. and Section 108 subsection (c) of the I.T.P.A.

#### [4] Implied condition of fitness for human habitation

At common law this covenant was implied only in respect to "furnished" premises at the commencement of a lease.<sup>30</sup> Section 53 subsection (d) of the R. L.A. follows this common law position.

Under the I.T.P.A. there is no implied covenant by the landlord that the property is fit for habitation except where the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act<sup>31</sup> applies.

The wording of Section 108A subsection (a) of I.T.P.A. implies that in respect of the I.T.P.A. tenancies, the covenant is not so restricted. The landlord is required to disclose all material defects in the property which the tenant is not aware of and which he could not discover with ordinary care.

In general the landlord gives no implied undertaking that the premises are or will be fit for habitation.<sup>32</sup> This rule is however subject to the qualification that where a house is let furnished the landlord impliedly undertakes that it is fit for human habitation when



let.<sup>33</sup> If this is not the case the tenant may repudiate the tenancy and recover damages for any loss he has suffered.<sup>34</sup> But if the premises are fit for human habitation when let, the landlord need do no more; he is under no obligation to keep them in this condition.<sup>35</sup>

[5] There is also a covenant in leases of residential tenancies that where premises or part thereof are destroyed by fire, civil commotion etc. the rent or a just portion thereof shall be suspended.

As a general rule the doctrine of frustration has no relevance to the tenant's obligation to pay rent since the landlord's primary obligation i.e. to put the tenant into possession is discharged on the grant of the lease.<sup>36</sup>

The strict application of this rule would imply that the tenant would continue to pay rent upto the end of the term notwithstanding the destruction of the subject matter. This of course would be grossly unjust hence certain qualifications have therefore been imposed by the statutes.

Under the R. L. A. the payment of rent or a just portion thereof is immediately suspended on total or partial destruction of the premises. If after six months the premises have not been rendered habitable or usable, the lessee can avoid the lease by giving one month notice.<sup>37</sup>

Under Section 108B subsection (e) I. T. P. A the

lease becomes immediately voidable where any material part is either wholly destroyed or rendered substantially and permanently unfit for its purpose.

The above section however does not talk about suspension of rent these provisions do not apply where the destruction is occasioned by the wrongful acts or negligence of the tenant.

[6] Under the I.T.P.A. there is a covenant implying that the landlord will put the tenant into possession of the property.<sup>38</sup>

The landlord impliedly warrants and has the duty to see to it that the premises will be free from the presence of a former tenant holding over or from some other person wrongfully in possession.

It is argued that the landlord ordinarily is in a better position than an incoming tenant to know if someone, particularly a holdover tenant, is in possession and to take action against that person. For the breach of this warranty, the tenant may recover damages measured by the excess of rental value over the agreed rent or may repudiate the lease.

#### [7] Duty of repair

In Kenya the general rule is that there is no implied obligation by the landlord to repair leased premises. The only exception to this rule is found in R.L.A. with regard to cases where only part of a

building is leased, here the landlord is required to keep the roof, main walls, main drains, common passages and common installations in repair.<sup>39</sup> In the event of breach of this condition, the tenant is entitled to repudiate the lease and to recover damages.

The foregoing discussion has only been concerned with the obligations that are imposed on the landlord in the residential tenancies. It is necessary therefore to discuss the obligations that are imposed on the tenant by the relevant statutes to enable us to know the ideal conditions that should prevail in a residential tenancy.

### 2.3: THE TENANT'S OBLIGATIONS

A tenant having an estate in land has the general and exclusive rights of possession during the term. He may exclude third persons and with a few exceptions, the landlord as well. Of course the leases frequently give landlords a privilege to enter for stated purposes such as to inspect or to show the premises to prospective new tenants.<sup>40</sup> If a landlord has a duty to make certain repairs he generally is privileged to enter for that purpose. In the absence of some specific privilege to enter, it has been held that the landlord may enter to collect rent and to distraint where that is permitted.<sup>41</sup>

The tenant's estate may carry with it by implication rights in surrounding areas, the landlord owns. The theory upon which tenants have such implied rights is akin to the theory of easement by way of necessity.<sup>42</sup>

Such rights will be implied if they are reasonably necessary to the use of the demised premises.

Unless the leasing agreement limits his rights, the tenant has the right to use the premises for whatever purpose they are suited. He owns all crops that reach maturity during the term, even if they were growing when the term began. Limitations on the tenants are however contained in the rules against waste, nuisance and negligent damage which will be covered in the subsequent sub-topics.

In Kenya, if the tenancy agreement does not make express provisions, the law implies the following covenants on the part of the tenant (lessee)

#### **[1] Obligation to pay rent reserved**

Since rent is not a precondition for the validity of a lease, it must be reserved before a covenant to pay it is implied. Section 108B (c) of I.T.P.A. and Section 54 (a) of the R.L.A. imply a covenant on the part of the lessee at the time and the manner therein specified.

Unless the lease provided for payment in advance, rent is normally payable in arrears.<sup>43</sup> It continues to be payable even if the premises cannot be used e.g. owing to destruction by fire<sup>44</sup> or other calamity or seizure by military authorities for the occupation of troops.

#### **[2] Obligation to pay all rates and taxes**

The tenant is under an obligation to pay all rates



and taxes except where the landlord is under a statutory obligation to do so. This is implied under Section 54 (b) of the R.L.A. which states that:

"save as otherwise expressly provided in the lease and subject to any written law governing agricultural tenancies, there shall be implied in every lease agreements by the lessee ... to pay all rates, taxes and other outgoings which are at any time payable in respect of leased premises during the continuance of the lease unless the same are payable exclusively by the lessor by virtue of any written law".

Since the I. T. P. A. is silent on that issue the common law rules which are similar to the R.L.A. position apply.

Under Section 7 of the Valuation for Rating Act<sup>45</sup>, a statutory duty is imposed on the registered proprietor, life tenant, tenant for a term exceeding 25 years and of a perpetually renewable lease to pay rates and taxes. This therefore means that certain categories of tenants are thereby relieved from the covenant to pay rates and taxes.

A statutory tenant however has no obligation to pay rates and taxes.<sup>46</sup>

### **[3] Obligation not to commit waste**

A tenant, as a holder of present possessory estate followed by a reversion in the landlord is subject to rules against waste. The gist of it is that the holder of the present estate is to a considerable extent inhibited by the law of waste from permanently damaging the land or things in it i.e. from doing damage that



will still be present when the landlord's reversion becomes possessory.

Technically, waste consists of any act which alters the nature of the land whether for the better or for worse,<sup>47</sup> e.g. the conversion of arable land into woodland or vice versa. Four types of waste must be considered.: ameliorating, permissive, voluntary and equitable.

#### **(a) Ameliorating waste**

Alterations which improve the land, such as converting dilapidated store buildings into dwellings constitute what is paradoxically termed ameliorating waste. Claims for this type of waste find little favour in the courts unless the whole character of the property has been changed.<sup>48</sup> Where improvements have been made, an action for damages will fail because no damage has been suffered, and an injunction will be awarded only if the court thinks it fit.

#### **(b) Permissive waste**

This is failure to do that which ought to be done as by the non-repair of buildings or the failure to clean out a ditch or moat so as to prevent foundations becoming rotten. But mere non-cultivation of land is not permissive waste. A tenant for life is not liable for permissive waste unless an obligation to repair is imposed upon him by the terms of the limitation under which he holds.<sup>49</sup> This obligation is as rare in life

tenancies as it is common in tenancies for years.

**(c) Voluntary waste**

This is doing that which ought not to be done. The committing of any spoil or destruction in houses, lands<sup>50</sup> etc. by tenants, to the damage of the heir or of him in reversion or remainder is voluntary waste.

A tenant for life is liable for voluntary waste unless his interest was granted to him by an instrument exempting him from liability for voluntary waste.<sup>51</sup> Where there is such an exemption, the tenant is said to be "unimpeachable of waste". Otherwise he is said to be "impeachable of waste". Thus if nothing is said about waste, the tenant is impeachable. In practice however, he is often made unimpeachable.

**(d) Equitable waste**

Even where a tenant for life was unimpeachable for waste, it was held inequitable to allow him to ruin the property by wanton destruction.

To prevent this the equitable remedy of an injunction would be granted. "Equitable waste" is that which a prudent man would not do in the management of his own property.<sup>52</sup> The term applies to acts such as stripping a house of all its glass, doors, boards etc. or pulling down houses. These acts are of course, also voluntary waste, but are not relevant as such where the tenant is unimpeachable. Equitable waste is therefore a

peculiarly fragrant branch of voluntary waste, which the ordinary dispensation from waste will not excuse.

A tenant for life is liable for equitable waste unless, the document confirming his interest upon him shows an intention to allow him to commit it. It is not enough that his interest has been given to him without impeachment of waste; he must show that it is intended that he should be allowed to commit equitable as well as voluntary waste.

The practical significance of this covenant not to commit waste is that where the tenancy agreement makes no provision for repairs the tenant is liable for them and must maintain the premises in the same condition in which he took them, This covenant is implied by Section 54(c) R.L.A. and Section 108B (m) and (o) of the I.T.P.A.

Section 55 R.L.A. defines the meaning of "keep in repair" and makes it clear that this has been construed in the context of the age, character and locality of the premises.

Under Section 54 (d) of the R.L.A. where part only of the building is leased or where a dwelling house is leased furnished, the obligation is confined to internal repairs only. Indeed, Section 53(c) R.L.A. imposes an obligation for external repairs on the landlord.

Under Section 108B (f) of I.T.P.A. where the landlord after due notice fails to make repairs for which he is responsible the tenant may make them and

deduct the expenses incurred from the rent.

**[4] Obligation not to transfer, charge, sub-let or part with possession of the premises without prior written consent of the landlord**

Under Section 54 (h) R.L.A., the tenant cannot transfer, charge, sub-let or part with the possession of the premises without the previous written consent of the landlord, such consent will not however be unreasonably withheld.

Section 62 (1) however does qualify Section 54(h) by allowing sub-leasing of registered leases in cases where there is no provision to the contrary in the agreement.

This covenant is however not implied in respect to I.T.P.A. tenancies. This is because Section 108B (1) gives the tenant the right to transfer, mortgage or sub-let the whole or any part of his interests in the absence of a contractual term to the contrary. Any such transfer does not however relieve the lessee of any liabilities he is subject to under the lease.

**[5] The lessee is under a covenant to permit the landlord to view the conditions of the premises, this is implied under Section 108B (h) of the I.T.P.A. and Section 54(f) of the R.L.A.**

The landlord or his agent must seek entry at a convenient time and after giving reasonable notice otherwise they will be liable for trespass.



[6] The tenant is also under an obligation to make good any breach of agreement for which he is responsible. Two conditions however must be satisfied here:

- (a) The lessor must have given notice of the breach to the lessee
- (b) The notice must specify the time within which the breach is to be remedied. The covenant is implied under Section 54 (g) of the R.L.A. The I.T.P.A. on the other hand is silent on this.

[7] The tenant is under an obligation to disclose the following to the lessor:

- (a) Any fact as to the nature or extent of the interest which the lessee is about to take, which the lessor is not aware of and which materially increases the value of such interests.<sup>53</sup>
- (b) He must also disclose any attempt by third party to impeach the lessor's title or otherwise encroach upon the property.<sup>54</sup>

[8] The lessee is also under an implied covenant not to erect on the premises except for agricultural purposes any permanent structures without the landlords consent.<sup>55</sup>

[9] Finally the lessee is under implied covenant to put the landlord into possession of the property at the determination of the lease.<sup>56</sup>



## 2.4 REMEDIES FOR BREACH OF COVENANT:

### [1] Landlord's remedies

#### (a) Distress for rent

The landlord's chief remedy in cases of default by the tenant to pay rent is to distrain for it. Distress for rent is however a common law remedy which in essence consist of the right of the landlord exercisable without application to the court to enforce payment by seizing and selling enough of the goods he finds on the premises.

In Kenya, the exercise of this right is now closely regulated by the statute known as the Distress for Rent Act<sup>57</sup>. The Act in Section 3(1) gives the landlord or a certified bailiff on his behalf the right to enter the demised premises and seize and sell any chattels including those of a stranger which are found therein without recourse to the court. Certain conditions must however be satisfied otherwise the distress would be unlawful.

[i] Distress must be levied between sunrise and sunset and not on Sundays

[ii] The reversion must be in the landlord at the time of the levy, that is to say, that the right to immediate possession of the property must reside in the landlord at the time of levying the distress.

Under Sections 16, 19 and 20 the following chattels are exempt from seizure: government property, goods in possession of the law, goods delivered to be managed

according to the tenant's trade, things in the tenant's actual use, perishables and linens, any goods belonging to a lodger or an under-lessee, in respect of which a written declaration that they do not belong to the tenant has been made to the landlord or his agent.

#### **Procedure for levying distress**

According to Section 8 of the Limitation of Action Act<sup>58</sup>, the landlord or his agent must proceed within six years of default. Where the rent is owing at the end of the six months, the landlord must distrain within six months, in either case the reversion must still inhere in the landlord and the tenant must still be in possession.

The landlord or his agent may not break windows, doors etc. in the premises. However, where the tenant has removed the chattels and hidden them elsewhere the landlord or his agent accompanied by a police officer of the rank above that of a sub-inspector may follow them within 30 days and break open any doors, windows etc. to secure entry.<sup>59</sup>

Section 8 of the Distress for Rent Act<sup>60</sup> goes further to state that illegal distress is trespass and gives rise to an action for damages double the value of the goods seized.<sup>61</sup>

In the case of Interoven Stove Company V. Hibbard<sup>62</sup>, where there was a claim for damages for an illegal distress, in delivering his judgement Hilbery J. said:

"... The distress then becomes a trespass to the plaintiff company's goods. An illegal distress has always been a trespass and an action would always lie. And where there is a trespass to goods, though no actual damage results, the law gives right to recover damages not limited to actual damage sustained, but a right to recover substantial damages even though there be no proof of actual loss".

#### [b] Action for money

As an alternative in cases of default to pay rent, the landlord may bring an action for recovery of the rent due. Where the landlord exercises this right even though the judgement remains unsatisfied he loses his remedy of distress altogether for that particular rent.<sup>63</sup>

Under Section 8 of Cap 22<sup>63</sup> an action for rent due must be commenced within 6 years of default or from the date when the rent was last acknowledged to be due; i.e. the time starts to run from the date the rent owed becomes due.

#### [c] Action for damages

The landlord's chief remedy for breach of other obligations is an action for damages. However in the case of continuing breaches he may sue for an injunction and where the breach is of a condition in the lease and not merely a covenant, the landlord may seek to exercise his right of forfeiture.

If a landlord is entitled to forfeit a lease, he can enforce his right of forfeiture either by making

peaceable entry on the land or by commencing an action for possession. It is advisable for a landlord to adopt the first method, for if any force is used, he may be criminally liable.<sup>64</sup> Consequently, the normal method of enforcing a forfeiture is by issuing a letter for possession. Such a letter usually contains an unequivocal demand for possession, so that the mere service of the letter operates to determine the lease.<sup>65</sup>

## [2] The tenant's remedies

Under the Kenyan law the tenant has only two basic remedies. The first remedy is an action for damages if the landlord derogates from any of the implied conditions and obligations; secondly the tenant can alternatively repudiate the agreement between him and the landlord. All the above remedies were discussed in the case of Obongo V. Municipal Council of Kisumu<sup>66</sup>

## 2.5 CONCLUSION

Under the common law the landlord did not impliedly warrant that the leased premises were suitable for the tenant's use at the beginning of the lease term. The common law also did not impose on the landlord any duty to make repairs required to make or keep the premises suitable for the tenant's use.

In Kenya however the rights and obligations under a lease are in general set out in the agreement itself. If the agreement is made under seal the parties are said to covenant. If the agreement is not made under seal, the

parties are said to agree. The terms of agreement will therefore constitute either covenants or conditions.

In a lease agreement, a breach of a condition will automatically terminate the lease, whereas a breach of a covenant will not. There is some difficulty because a covenant may at times amount to a condition. It does not help either to refer to a term in the lease as a condition or a covenant because in case of dispute the court is at liberty to make its own interpretation, having regard to the terminology used in the instrument of conveyance, the law and the surrounding circumstances.



## FOOTNOTES

1. Section 3 (1) of the Judicature Act Cap 8 Laws of Kenya
2. Section 3 (2) of the Interpretation of Statutes Act [Cap 2 Laws of Kenya]
3. Manual of the Law of Real Property: Tenancies
4. R. W. Hodgkin: Law of Contract in East Africa: Kenya Literature Bureau, 1982 p12
5. [1960] 1 All E R 248 at p352
6. [1957] E. A. 741
7. Ibid
8. Chapter 306 Laws of Kenya
9. Redman J. H.: Hill and Redman's Law of Landlord and Tenant (Twelveth Ed.) London Butterworths and Publishers Co.Ltd 1976 at p11
10. Indian Transfer of Property Act 1882 (I.T.P.A.)
11. Registered Lands Act (Cap 300 Laws of Kenya)
12. Okoth Ogendo's Manual on the Law of Property in Land p
13. (1957) E. A. 358
14. Supra (10) Section 107
15. Trust Lands Act (Cap 288 Laws of Kenya)
16. Registration of Titles Act (Cap 281 Laws of Kenya)
17. Registration of Documents Act (Cap 285 Laws of Kenya)
18. Government Lands Act Cap 280 Laws of Kenya
19. Supra Note 11 Section 47
- 20.
21. The Law of Contract Amendment Act No. 21 of 1963

(Cap 23 Laws of Kenya)

22. Ibid Section
23. Supra Note 21 Section 3 (3)
24. Chapter 296 Laws of Kenya
25. Chapter 301 Laws of Kenya
26. Palmer V. Fletcher (1663) 1 Lev 122
27. (1967) 2 Q. B. 1
28. (1894) 2 Q. B. 836
29. Freira V. Vandiyar (1953) 1 W. L.R. 672
30. Collins V. Hopkin (1923) 2 K. B. 617
31. Supra (25)
32. Hart V. Windsor (1844) 12 M & W 68
33. Smith V. Marrable (1843) 11 M & W 5
34. Wilson V. Firich-Halton (1877) 2 Ex. D. 366
35. Searson V. Roberts (1895) 2 Q. B. 395
36. Paradine V. Jane (1657) 82 E. R. 8
37. Section 53 (e) of Cap 300
38. Section 108A (b) I.T.P.A.
39. Section 53 (c) of Cap 300
40. Section 54 (f) of Cap 300
41. Section 3 (1) of Cap 293, Distress for Rent Act
42. Wheeldon V. Burrows (1879) 12 Ch. D. 31 at 49
43. Coomber V. Howard (1845) 1 C. B. 440
44. Belfour (1786) 1 T. R. 310
45. Valuation for Rating Act Cap 266 Laws of Kenya
46. Pandya V. Kampala City Council (1957) E. A. 272
47. R.E. Megarry & H.W.R.Wade, the Law of Real Property

(Third Ed. 1962) p106-108

48. Doherty V. Allman (1878) 3 App. Cas. 709
49. Re Cartwright (1889) 41 Ch. D. 532
50. Dashwood V. Magniac (1891) 3 Ch. D. 306 at 360
51. Re Ridge (1885) 31 Ch. D. 504 at 509
52. Turner V. Right (1860) 2 De G. F. & J. 232
53. Section 108B (k) I.T.P.A.
54. Section 108B (h) I.T.P.A.
55. Section 108B (p) I.T.P.A.
56. Section 108B (h) I.T.P.A.
57. Supra (41) Cap 393
58. Cap 22 laws of Kenya
59. Section 9 and 11 of Cap 293
60. Ibid Section 8
61. Patel V. Essa (1965) E. A. 486
62. (1936) 1 All E. R. at p270
63. Chancellor V. Webster (1893) 9 T. L. R. 568
64. Hemmings V. Stoke Poges Golf Club (1920) 1 K. B. 720
65. Elliott V. Boynton (1924) 1 Ch. 236
66. (1971) E. A. 91

## CHAPTER THREE

TOWARDS A WARRANTY OF HABITABILITY IN THE KENYA  
LANDLORD-TENANT LAW:

## 3:0 INTRODUCTION:

In Chapter two, we saw that when the precise terms of agreement between a landlord and a tenant have been established by due consideration of the relevant statutory provisions, of the express terms, of any written or oral agreement and of any possible implied terms, the next question is how those terms may be enforced.

The basic common law position was that the main remedy against a landlord or a tenant who failed to carry out the terms of a tenancy was a suit for damages and in appropriate cases for the termination of the agreement. The courts were traditionally reluctant to order the parties to comply with the terms of the agreement by issuing what is called an order of "specific performance". Where the landlord fails to perform his obligation under the tenancy, the tenant may in certain limited circumstances do the necessary work himself and deduct the cost from the rent.<sup>1</sup>

The remedies discussed in this chapter are essentially different from those dealt with in Chapters one and two. They are not directly dependent on the existence of a landlord-tenant relationship and the repairing covenants which that relationship usually

creates, but on the enforcement of reasonable standards of maintenance and repair in the public interest.

The Kenyan legislature has enacted various statutes in this regard in order to ensure decent environmental conditions and high quality of residential leases which are conducive for purposeful human existence, prominent of which is the Public Health Act<sup>2</sup>, which will form the core of our study in this chapter.

### **3:1 THE PUBLIC HEALTH ACT:**

#### **Historical background:**

With the settlement of Europeans in Kenya, the urban and town districts started growing. Many people especially the poor natives were flooding into towns from the rural areas in the hope of getting employment. This led to increased interaction among the people laying them open to spread of communicable diseases.

In rural areas, there was little general danger from poor hygiene. Infectious diseases and poor hygiene were regarded as part of normal course of things, though the rural poor, who lived in very primitive conditions, were most at risk. State intervention was directed primarily at the relieve of poverty rather than the improvement of housing conditions and sanitation. In urban areas there had been rather more attention to the provision of the basic sewerage facilities in large towns, and the more progressive Local authorities were already promoting local improvement statutes so that they might control



the layout of new streets and regulate standards in buildings.

As more and more workers began to flock into the new towns especially after independence the problems of public health and hygiene became more pressing. The initial pressure to control these abuses was a mixture of the growth of the medical science on the cause of the epidemics, and of philanthropy and self-protection on the part of the business and professional classes. Increased powers to deal with sewerage, water supply, the removal of nuisance and the control of infectious diseases and to regulate new buildings were provided piecemeal for a whole range of local bodies from the established local authorities.

The first concentrated attempts to control standards of housing was part of the more general campaign initiated by George Branbury in 1907, when he stated that

"... the Indian bazaar is in unsanitary a state as to be a constant menace to the health of the public and other parts of the town are in a very unsatisfactory condition. on the other hand the death rate is somewhat lower than might be expected".<sup>3</sup>

On the legislative side, some regulations for the preservation of public health was contained in a series of rules and ordinance issued by the commissioner. Most important sort of rules were contained in the gazette of June 1904, October 1905 and 1906.

The 1904 ordinance represented a sort of a Public

Health Act for the whole country and contained regulations with regard to assessment of streets, roads, erection of buildings, sanitary matters, slaughters, bakeries, markets, lodging houses, preservation of order and many other matters.

Rules made under the 1904 ordinance regarded, *inter alia*, sanitary disposal of rubbish, removal and disposal of carcasses, dangerous buildings, removal of weeds and filth, forbidding congestion of native slaughter houses and infectious diseases.

The general spirit of this legislation was the prevention of spread of diseases and at least to maintain some minimum health standard in public places. For example, it did not allow a shop used as a butchery to be used for the purpose of human habitation at the same time.<sup>4</sup>

The first comprehensive Public Health Ordinance was enacted in 1921. The act was so detailed and conscious of the tropical environment that it included provisions for the prevention and destruction of mosquitoes. It also imposed duties on persons not to allow to be kept on their premises any collection of water in any well, barrel, tub, water tank or other vessel. It also gave powers and duties to officers of the medical department which included powers of entry and inspection of premises and penalties for destruction.

The 1921 ordinance is the precursor of the present

Public Health Act.<sup>5</sup> The provisions are almost reproduced in the Act.

Public Health Law may be defined as:-

"... that body of statutes, regulations and precedents that have for their purpose the protection and promotion of individual and community health".<sup>6</sup>

The authors of the constitution also saw a need for a statute that would protect the public health as one of public interest. Section 75 of the Constitution makes the protection of health as an overriding public interest.

".... No property of any description shall be compulsorily taken possession of and no interest in or over property of any description shall be compulsorily acquired except where the following conditions are satisfied .... taking of possession or acquisition is necessary in the interest of .... public safety ...public health".

Subsection (5) of Section 75 goes on to provide that ...

".... In circumstances where it is reasonably necessary so to do because the property is in dangerous state or injurious to the health of human beings animals or plants".<sup>7</sup>

This pattern of piecemeal legislations initiated by progressive local authorities in private statutes and subsequently generalized for the use of all authorities has continued to be a feature of development of the law in this sphere and accounts for some of the complexity of the system. For present purposes, it is sufficient to focus attention on those aspects of the law which have survived till the present day, notably the concept of a statutory nuisance and the regulations of new buildings.

### 3:2 STATUTORY NUISANCE:

Long before, the concept was developed by Medieval legal theories that while a man's home is his castle, an individual's use of his private property could be detrimental to others. The case of Rylands V. Fletcher<sup>8</sup> is a classic example where it was held that;

"the person who for his own purpose brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequences of the escape.

The uses of a man's private property is unrestricted only so long as it does not injure another person or property. Innumerable examples of this kind exist in the field of Public Health especially with regard to the residential tenancies. Thus an individual property owner has the right to dispose of his sewage in any manner that he may deem fit provided that it cannot actually or potentially affect another. If he allows raw sewage to flow on the land of another, a social injustice has obviously occurred and the health and the well being of another have been placed in jeopardy. This was already recognized in the common law as the tort in Rylands V. Fletcher.<sup>9</sup>

The most relevant definition of a statutory nuisance is that which covers:-

"any premises in such a state as to be prejudicial to health or a nuisance".<sup>10</sup>

But the definition however also extends to such matters as accumulations and deposits, and



animals kept in such a way as to be prejudicial to health or a nuisance[Emphasis Mine]

Until recently this formulation was somewhat loosely interpreted to cover virtually any kind of disrepair in an occupied dwelling. It was held in one case that anything which could cause discomfort to occupants might constitute a statutory nuisance.

**(a) What constitutes nuisance under the Act?**

The health of the people is largely the concern of the medical profession, but many of the causes of ill-health are controllable by the engineers and surveyors who attend to the provisions of pure water, the removal of refuse, the maintenance and cleansing of the streets and roads and the sanitation and repair of houses.

In its pursuit to guarantee habitable residential tenancies, the Act deems the following to be nuisance and are liable to be dealt with summarily under the Act:

The Act provides that any dwelling or premises or part thereof which is or are of such construction or in such a state or so situated or dirty or so verminous as to be in the opinion of the medical officers of health or which is or liable to favour the spread of any infectious disease is a nuisance. This provision is confined to cases where the premises are decayed, dilapidated, dirty or out of order.<sup>11</sup>

Any street, road or part thereof, any stream, pool, ditch, gutter, water course, sink, water tank, cistern,



water closet, privy tank, cess pit, soil pipe, water pipe, drain sewer, garbage receptacle, dustbin, a dung-pit, refuse-pit, ash-pit, manure heap or fowl or in such a way so situated or constructed as in the opinion of the medical officer of health to be offensive or to be injurious to health.<sup>12</sup>

The Act also deems any noxious matter or waste water flowing or discharged from any premises whether situated into any public street or into the gutter or side channel or any street water course, irrigation channel or bed thereof not approved for the reception of such discharge as a nuisance.<sup>13</sup>

Any stable, cow-shed or other buildings or premises used for keeping of animals or birds which is so constructed, situated, used or kept as to be offensive or which is injurious or dangerous to health is also deemed to be a nuisance.<sup>14</sup>

Any building which is so overcrowded as to be injurious or dangerous to the health of inmates or is dilapidated or defective in lighting or ventilation or is not provided with sanitary accommodation to satisfaction of the medical officer will also be deemed to be a nuisance.<sup>15</sup>

Any public or other building which is so situated, constructed, used or kept as to be unsafe or injurious and dangerous to health. A wall which is in want of repair is unsafe and likely to injure the health of the public. This was the case in Wringe V. Cohen<sup>16</sup>, where

the plaintiff was the owner of a lock-up shop and the defendant the owner of the adjoining house, plaintiffs' shop. The wall next to the plaintiff's shop which had been in bad repair for some time, collapsed and damaged the shop. The defendant stated in evidence that the wall was in good repair so far as he knew, but he had not examined it. A builder stated that two years before the collapse, he had examined the wall at the defendant's request and that it then looked in a fair state of repair.

It was held that, if owing to want of repair, premises upon a highway become dangerous and therefore a nuisance and a passer-by or adjoining owner suffers damage by their collapse, the occupier or the owner, if he has undertaken the duty of repair is answerable whether or not he knew or ought to have known of the danger. The defendant was therefore liable in damage to the plaintiff.

In the case of Mint V. Good<sup>17</sup>, it was held that it is the duty of the landlord to make sure that premises let are in reasonable and habitable condition.

In this case, a wall separating from a public highway the forecourt of two houses within the Rent Restriction Act collapsed on the public footpath and injured the infant plaintiff who was thereon. The defective condition of the wall, which was due to lack of repair could have been ascertained by inspection. The

houses were let on weekly tenancies under oral agreement to different tenants. No express provision was made in the agreement with regard to liabilities of repairs, but he had from time to time carried out repairs. In an action for damages against the landlord, it was held that in the absence of evidence or express stipulation to the contrary, it was to be implied in the agreement for a weekly tenancy which was silent on the matter a term that the premises let would be kept in a reasonable and habitable condition by the landlord. The duty of the landlord in the present case was to see that the wall was as safe as reasonable care could make it and it was immaterial whether or not he had knowledge of the danger of the collapsing and therefore he was liable to the infant plaintiff in damages.

The health authorities have the power cause such premises to be cleansed and disinfected. It is his duty to give the owner a notice in writing specifying the steps to be taken to cleanse and disinfect such buildings. If the person served with such a notice fails to comply with it, he shall be guilty of an offence and shall be liable to a fine. But in the case where the owner of the land is unable to cleanse it due to poverty, the authority can with or without the owner's consent enter, cleanse and disinfect the place.

**(b) Duties and powers bestowed on Public Health officials and Health Authorities to prevent nuisances:**

The Public Health Act provides that no person shall suffer a nuisance or shall cause to exist on any land or premises owned or occupied by him or of which he is in charge any nuisance or other conditions liable to be injurious or dangerous to health.<sup>18</sup>

It therefore makes it the duty of every local authority to take all lawful, necessary and reasonable practicable measures for maintaining its district at all times in clean and sanitary conditions liable to be injurious or dangerous to health and to take proceedings at law against any person causing or responsible for the continuance of any such nuisance or condition.<sup>19</sup>

It shall also be the duty of every health authority to take all lawful, necessary and reasonable practicable measures for preventing or causing to be prevented or remedied all conditions liable to be injurious or dangerous to health arising from erection or occupation of unhealthy dwellings or premises on unhealthy sites or on sites of insufficient extent or from over-crowding or from the construction, condition or manner of use of any factory or trade premises and take proceedings against any person causing or responsible for the continuance of any such condition.<sup>20</sup>

Local authorities have a statutory duty to inspect their areas for statutory nuisances under the Public Health Act. In some areas particularly those designated for clearance or rehabilitation, house to house inspection are carried out. But local authorities are



generally dependent on complaints from members of the public or tenants.

The medical officer of health if satisfied of the existence of a nuisance shall serve a notice on the author of the nuisance. The author of nuisance means the person by whose act, default or sufferance nuisance is caused, exists or is continued. If the author of the nuisance cannot be found, the notice shall be served on the occupier or the owner of the dwelling requiring him to remove it within time specified in the notice and to execute such work and do such things as may be necessary for the purpose and if the medical officer thinks is desirable, specifying any work to be executed to prevent a recurrence of the said nuisance.<sup>21</sup>

Where the author of the nuisance cannot be found and it is clear that the nuisance does not arise or continue to arise by the act, or default or sufferance of the occupier or owner of the dwelling or premises, the medical officer of health shall remove the same and may do what is necessary to prevent the recurrence thereof.<sup>22</sup>

If the person on whom the notice to remove a nuisance has been served as aforesaid fails to comply with any of the requirements thereof within the time specified, the medical officer of health shall cause a complaint relating to such a nuisance be made before a magistrate and such magistrate shall thereupon issue



summons requiring the persons on whom the notice was served to appear before the court.<sup>23</sup>

Where the nuisance proved is such as to render a dwelling unfit for habitation, in the judgement of the court, the court may issue a closing order that no rent shall be due or payable by or on behalf of the occupier of that dwelling in respect of the period in which the closing order exist and on the court being satisfied that it has been rendered fit for use as a dwelling and from the date thereof such dwelling may be let or habited. Notwithstanding the closing order, however, if the premises are again found to be unfit for habitation, new proceedings can be brought to court.<sup>24</sup>

The health authorities or any of its officers, or the medical officer of health or any sanitary inspector, or, on the order of the magistrate, any police officer of or above the rank of inspector, may enter any building or premises for the purpose of examining as to the existence of any nuisance therein at all reasonable times and the health authority or any of its officers may if necessary open up the ground of such premises and cause the drains to be tested, or such other work to be done as may be necessary for the effectual examination of the said premises, provided that if no nuisance is found to exist, the local authority shall restore the premises at its own expense.<sup>25</sup>

Where any such nuisance as is mentioned in Section 118 is proved to exist with respect to a dwelling and

the court is satisfied that such dwelling is so dilapidated or is so defectively constructed or so situated that repairs to or alterations of the same are not likely to remove the nuisance and make the dwelling fit for human habitation, the court may order the owner thereof to commence to demolish the dwelling and any other structures on the premises on or before a specified day, being at least one month from the date of issuing the order, and to complete the demolition and to remove the materials which comprised the same from the site before another specified day.<sup>26</sup>

The court shall give notice to the occupier of a dwelling in respect of which such an order has been issued requiring him to move there from within a time to be specified in such notice, and if any person fails to comply with such notice or enters the dwelling or premises after the date fixed except for the purpose of demolition he shall be guilty of an offence.<sup>27</sup>

The Minister, on the advice of the board, may make rules and may confer powers and impose duties in connexion with the carrying out and enforcement thereof on local authorities, magistrates, owners and others as to:-

[a] inspection of land, dwelling, building for securing the keeping of the same clean and free from nuisance and so as not to endanger the public health

[b] the construction of buildings, the provision of proper lighting and ventilation and the prevention of over-crowding

[c] the periodical cleansing and whitewashing or other treatment of dwellings, and the cleansing of land attached thereto and the removal of rubbish or refuse therefrom

[d] the drainage of land, streets, or premises, the disposal of offensive liquids and the removal and disposal of rubbish, refuse, manure and waste matters

[e] the inspection of the district of any local authority by that local authority with a view to ascertain whether the lands and buildings thereon are in a state to be injurious or dangerous and publication of such records as may be required.<sup>28</sup>

No person shall within a township permit any premises or lands owned or occupied by him or over which he has control to become overgrown with bush or long grass of such a nature as, in the opinion of the medical officer of health to be likely to harbour mosquitoes.<sup>29</sup>

All the above measures are taken so as to ensure decent environmental quality and houses that are fit for human habitation free from any condition that may render it unmerchantable.

### 3:3 LOCAL AUTHORITIES BY-LAWS

Section 126A of the Public Health Act empowers every Municipal Council and every Urban and Area Council to make by-laws if so required by the Minister for the time being responsible for local government and with the agreement of the Minister for all or any of the following matters:-

(a) (i) for controlling the construction of buildings, and the materials to be used in the construction of the building.

(ii) for controlling the space about buildings, the lighting and ventilation of buildings and the dimension of rooms intended for human habitation.

(iii) for prohibiting the erection or use of temporary or movable building, whether standing on wheels or otherwise, and for prohibiting or restricting the use of tents or similar buildings for business or dwelling purposes.

(iv) for requiring and regulating for adequate provision for the escape of the occupants of any building in the event of an outbreak of fire.

(v) for preventing the occupation of a new or altered building until a certificate of the fitness thereof for occupation or habitation has been issued by such a local authority.

(vi) to compel owners to repair or demolish unsafe, dangerous or dilapidated buildings.



**(b) as regards works and fittings:-**

(i) for regulating sanitary conveniences in connexion with buildings, the drainage of buildings (including the means of conveying refuse water and water from the roofs and from yard apartment to buildings) the cleansing, drainage and paving of courts, yards and open spaces used in connexion with buildings and cesspools, and other means for the reception of disposal of foul matter in connexion with buildings.<sup>30</sup>

No such by-law shall however be inconsistent with or repugnant to any written law in force in the same area made under any other provision of Cap 242.

In Kenya the quality of the houses erected and built in urban areas is governed by various Acts, prominent of which is the Public Health Act. This Act as has been illustrated above is the main legal instrument regarding local authorities by-laws related to any matter that may be construed as affecting the health of the public.

With regard to housing Part IX (sanitation and housing) which includes Public Health (drainage and latrine) Rules 1948 directly apply. With the exception of detailed requirement for the provision of sanitation, the residue of the Public Health Act in respect of housing is concerned with the avoidance of "nuisance or other conditions liable to be injurious or dangerous to



health".

The legal instrument by which the provisions of the Public Health Act is realised with regard to housing is the Building Code. The Code is a by-law established under Section 210 of the Local Government Act.<sup>31</sup> By this Section, the minister may order adoptive by-laws in respect of any matter which a local authority has powers to make under the Act or any other Act. In exercise of these powers, the Minister for Local Government in 1968 ordered the enactment of a Building Code, which has since been adopted by virtually all the councils.

The building Code is in effect supposed to be a National Building Code, although it should be noted that they are adoptive and not mandatory. Though made under Section 210 of Cap 265, they should be adoptive building by-laws which any Municipal or County Council may adopt.

The Building Code applies throughout the republic but some local authorities can and do have local modifications, applicable only within area of jurisdiction.

Formal building control of housing development was created originally in Europe at the end of the 19<sup>th</sup> Century to combat the unpleasant odour and sites and later, public health dangers created by sanitary living conditions of the over-crowded urban poor as a result of Industrial Revolution.

Thus the early Public Health Acts were born. Their

main objective was to prohibit and regulate conditions which may pose a danger to the health of the public. The water supplies either from the wells, stand pipes or industrial piped supplies had to be uncontaminated, human wastes and refuse had to be collected and disposed of in a clean sanitary manner. Subsequently, the controls were extended to cover the construction of buildings to ensure stability, weather resistance, minimum level of lighting and ventilation.

With the advent of colonialism, the standards were imported into Kenya. However, the most strictly applied regulations were and still are embodied in the Public Health Act and its by-product, the Building Code. Historically, the pre-eminence of the Public Health Acts and their creation to protect the public from contagious disease gave them legal precedence over all legislation. The early building regulations setting up the standards of construction for urban houses were first modeled on British regulations.

### **(c) Functions of a Building Code**

The primary intention of a Building Code is to guarantee safety and hygiene by preventing the construction of unsafe housing. The better illustration of this function has been given by Rinal B. He states that:

"... are a systematic collection of by-laws arranged so as to avoid inconsistency and ambiguity in their specific technical requirements and directives. They are established

to ensure the public health safety and welfare of the population (sic) with respect to design construction and alteration of buildings by provision of appropriate minimum standards. They cover regulations that pertain to the efficient and effective application of the Code and requirements concerning the use and occupancy, structural design, materials, building service, plumbing, construction safety measures and specific requirements for housing.<sup>32</sup>

Another author states that "the general purpose of Building Codes is to guarantee the structural and mechanical integrity of new construction including fire resistance".<sup>33</sup>

The criticisms that have been leveled against the Building Code are not targeted at its primary intentions i.e. ensuring safety of buildings for human habitation. The Code has worked fairly well in this regard. Rather it has centered on the extent to which the Code increases construction costs and this limits the supply of housing, particularly low-cost housing.

In Kenya, another important criticism has been that the Building code is largely based on the English standards and thus not suited to our local needs. This has meant that the local objectives set out in Kenyan housing policy has been hampered with in achieving its target.

The Building Code originated as a codification of the common law nuisance concept. This made the Building code vague to some extent. This is because there is no generally agreed upon definition for such key terms as "adequate", in "safe condition", in "good repair" and

also the fact that the Code is frequently subjected to different interpretations. This has led to uncertainty in terms of making policy decisions by council officials (local authorities). This has in turn led to the problem of inconsistency in addressing the problem of housing.

### 3:4 THE RENT RESTRICTION ACT:

Brief mention should also be made of the additional statutory covenant incorporated in certain tenancies under Rent Restriction Act<sup>34</sup>. This imposes an obligation on the landlords to ensure that the house is fit for human habitation at the start of the tenancy and is maintained in that state throughout. But the Act only applies to houses let at very low rents.<sup>35</sup>

In its pursuit to protect the quality of the residential tenancies, the Act provides as follows:-

(i) that an order for the recovery of possession of any premises or for the ejectment of a tenant therefrom shall be made if the tenant, or any person residing with him, has been guilty of conduct which is a nuisance or annoyance to adjoining occupiers, or has been convicted of using the premises or allowing the premises to be used for an immoral or illegal purpose or the conditions of the premises have in the opinion of the Tribunal, deteriorated owing to acts of waste by, or the neglect or default of the tenant or



any such person or<sup>36</sup>,

(ii) if the premises are occupied by a large number of persons that can reasonably be accommodated so that in the opinion of the tribunal the premises are over-crowded to constitute for any reason a danger to the premises or to the neighbours.<sup>37</sup>

Secondly, Section 26 of the Act states that in the absence of any provision to the contrary in the contract of tenancy, for the purpose of this Act it shall be deemed to be an obligation of the landlord of any premises to maintain and keep the premises in a state of good structural repair and in a condition suitable for human habitation and it shall be deemed to be the obligation of the tenant of any premises, other than a tenement house to maintain the premises in the same state as that in which the premises were at the commencement of the tenancy, fair wear and tear, damage arising from irresistible force and structural repairs for which the landlord is liable expected.

The Act also protects the tenant from constructive ejection i.e. a situation where the landlord deprives the tenant of the use of amenities like water and electricity.<sup>38</sup>

The tenants however do not know their rights or if they do, they are low income earners thus end up getting procedural hurdles which bar them from getting the benefits of the protection offered by the Rent



Restriction Act, as envisaged by the housing policy.

Notwithstanding the above observations, it has been observed that the provisions of the Act in fact tends to favour the landlords rather than the tenants. This is because, the Act gives so much powers to the landlord to evict the tenant or increase the rent. What the landlord has to conform to is only the requirement as to notice. Indeed many landlords utilise the provisions of the Act to circumvent the spirit and purpose of the legislation. For instance, Section 14 has been used by the landlord to legally evict their tenants who they want vacant possession for their use.

After the recovery of possession of the premises, the landlord gives them to new tenants at an increased rent.<sup>39</sup> This subversion of the intent of the Act has led to it being used as a tool of oppression by the landlord rather than a shield of protection by the tenant.

Rent Restriction Act cannot succeed in a vacuum, as observed by Willy Mutunga in his thesis: "the legislation is half-hearted because it does not seek to deal with the root cause of the problems it aims to solve. Why are there excesses? Why is there a housing shortage? This legislation aims at curbing the effect and not cause of the housing shortage".<sup>40</sup>

Mutunga further observes that "it is the housing shortage which explains why the legislation is violated with impunity ... With acute urban housing shortage,

therefore, tenants will normally value retention of their houses more than legal rights against the landlord.<sup>41</sup>

We have seen in our argument that the promulgation of the Rent Restriction Act in consequence of the need to control powers of the landlord and to give the tenant premises that are fit for habitation has failed to achieve its objective. The hardest hit group has been the low income earners who neither have the financial clout nor the knowledge of the legal machinery involved in realising the advantages of protection offered by the Act.

Apart from the above factors, the low income groups in the urban areas reside in areas which are designated illegal (slums) and thus cannot enjoy the protective shield of the Act from the overwhelming power of the landlord.

### 3:5 CONCLUSION

This chapter completes our discussion on the ideal conditions in residential tenancies and the measures that the legislature have adopted to ensure decent environmental quality of residential tenancies. This chapter has highlighted some statutes that impose certain obligations both on the landlord and the tenant in order to ensure decent residential tenancies and some difficulties that are experienced in their implementations.

Though the efforts of the government in enacting these statutes is laudable, it has failed to address the issue of the low income tenants. By their provisions, it seems the Acts were geared towards catering for the Middle class and other classes who have sophistication to activate the legal processes anticipated by the Acts.

The next chapter will lay out the recommendations which have been found imperative in order to address the issue of housing of the urban poor. In the recommendations, several reforms and suggestions have been put forward to enable the policy to adequately deal with the problems faced in the residential tenancies.

## FOOTNOTES

1. Hadden T., Social work and the law: Housing repairs and improvements London Sweet and Maxwell 1979 p52
2. Chapter 242 Laws of Kenya
3. George Bransbury - Report on the Sanitation of Nairobi, Nakuru and Kisumu
4. Section 112 of the 1904 Public Health Ordinance
5. Supra (2)
6. John Hawxlon Principles of Public Health Administration
7. The Constitution of Kenya, Section 75 (b) v.
8. Rylands V. Fletcher (1868) L.R. 3 H. L 330
9. Ibid
10. Supra (1) p53
11. Supra (2) Section 118 (1) b.
12. Supra (2) Section 118 (1) c.
13. Supra (2) Section 118 (1) e.
14. Supra (2) Section 118 (1) f.
15. Supra (2) Section 118 (1) k.
16. (1950) 2 All E.R. 1159
17. (1939) 4 All E.R. 241
18. Supra (2) Section 115
19. Supra (2) Section 116
20. Supra (2) Section 117
21. Supra (2) Section 119
22. Supra (2) Section 119 (ii)
23. Supra (2) Section 120 (1)

24. Supra (2) Section 120 (9)
25. Supra (2) Section 123
26. Supra (2) Section 124
27. Supra (2) Section 124 (2)
28. Supra (2) Section 126
29. Supra (2) Section 138
30. Supra (2) Section 126A (b)
31. Local Government Act Cap 264 Laws of Kenya
32. A UN Seminar on building codes and regulations in developing countries (A UN Publication) 1980 p1
33. Saad Yahya. Review of Building Codes and Regulations "A manual based on Kenya's experience" HRDU, University of Nairobi 1987 p4
34. The Rent Restriction Act Cap 296 Laws of Kenya
35. Ibid Section 2(1) c
36. Supra (34) Section 14(b)
37. Supra (34) Section 14(1)
38. Supra (34) Sections 23 and 29
39. L. W. Muriuki, The Rent Tribunal as a tool of implementing the provision of the Rent Restriction Act. LLB Dissertation University of Nairobi
40. Willy Mutunga - The Rent Act and the Housing problem in Kenya LLM Thesis Dar-es-Salaam University 1976 p141
41. Ibid p143



## CHAPTER FOUR

## RECOMMENDATIONS AND CONCLUSIONS

## 4.0: Recommendations

Despite the existence and operation of both the Public Health Act and the Building Code, jerry buildings both in rural and especially urban centres<sup>1</sup> still increase daily. This is a symptom of the housing problem and undoubtedly could be attributed to lack of total efficacy of the law, in this respect the instruments mentioned above.

There is need for standard to be valid year by year. Thus not only the builders should be faced with mandatory provisions but the building officials should also meet with a mandatory provision in the code elsewhere requiring him to bring a revised list of standards before the council to exercise the power under Section 126B of Chapter 242 Laws of Kenya, as the relaxation of "any by-law where it considers its application unreasonable". In effect efforts must be concentrated not only on mere provision of models in the code but also in ensuring that they are such that they can be adopted to meet the basic needs of the poor and are easily capable of enforcement.

Mere legal backings provided to the code and its administrators via court process are not enough. For most there is need for clarity. Clarity in the sense of simplicity, intelligibility, and straightforwardness. Clarity is not only valid for those who apply the code

out also for those who invoke the sanctions.<sup>2</sup> Besides, the code was never intended to apply to strictly intelligent professionals but also to some illiterate rural folk.

It has been suggested that each region or local authority should codify its own by-laws and the adoption code be abandoned.<sup>3</sup>

The Building Code should be amended to reflect the Kenyan concept of what constitutes adequate housing. The provisions of the code that unnecessarily increases the expenses of constructing a house in urban areas should be deleted. In amending the code, the government should commission a study on the low-income housing. This will be with the view of arriving at what can be adopted as standard house, which is both durable and within the limits of the purchasing power of the low-income earners. In this respect, the Public Health Act should also be amended to reflect this suggested position.

Instead of demolishing defective houses, the government should seek to harness the resources that are put in constructing the structures. This could end up being an appropriate solution to the poor houses. The government should provide infrastructure to such settlements and encourage the building of permanent houses using a prototype plan that is cheap and inexpensive. This would be proverbially killing two birds with one stone. The government should also issue

title to such slum dwellers so that they can have security of tenure. This will enable them to erect houses within the specification of the Building Code as suggested above.

The government should also give incentives to the private sector so that it may be able to aptly supplement the government's effort in the provision of housing for low-income earners. With the increased stock of houses, it would mean that the chronic housing shortage would be improved. This will enable the provisions of the Rent Restriction Act to be fully enforced.

Chapter 296 of the Laws of Kenya should be amended so as to offer adequate protection to the tenants especially to the low-income groups. While the rights of the landlord should not be overtly trammated, the tenant should be given adequate security of tenure in the tenement and should be protected from arbitrary increase of rent and eviction. The populace should be informed of the respective rights and duties in a tenancy. This can only operate if the tenant is not under the fear of eviction by the landlord, because he has nowhere to go at a short notice.

The government has realised the shortcomings of the various Acts on housing. Thus in 1989-93 Development Plan, it was stated that;

".... A number of regulations and building codes exist under the Town Planning Act<sup>4</sup>, Housing Act<sup>5</sup>, the Public Health Act<sup>6</sup> and the Local Government

Act<sup>7</sup> (By-laws). To a large extent, these instruments have become major obstacles to rapid development in the country".

This realisation augurs well for the housing sector especially the low-income housing. It is hoped that the above declaration does not become a mere platitude, but a prelude to a comprehensive reformation of the housing shortage in urban areas.

The recent shift in landlord-tenant law reflect more than an increased consumer consciousness. They mirror discontent with the free market bargaining model. Individuals simply do not want to spend time haggling over terms, especially at the risk of disrupting a desirable transaction for both parties. Landlords do not want individually negotiated agreements. Nor would the individual tenant necessarily fair better even if each clause were carefully negotiated. The lease agreements and the other form contracts are being perceived as unfair because the parties lack equal bargaining ability.

The usual attempted remedies take either of two forms, neither of which is unsatisfactory. The most common way of handling problems of unequal bargaining power proceeds from the assumption that the free market model is basically sound, but needs occasional shoring up. This is what usually lies behind the concept of duress and unconscionability. The possibility of bargaining irregularity is admitted and redressed either by invalidating the agreement or providing the weaker



party both with more information in the hope that he can protect himself. The second way of dealing with public complaints about the unfairness of many form leases, has been through legislation. Both judicial and legislative processes are cumbersome expensive and peacemeal.

How then are form agreements to become fair? One alternative would be for a more direct intervention by the government, not just through legislation such as rent control laws or laws mandating habitability, but by placing a government administrator within every private bargaining session between employer and employee, buyer and seller, or landlord and tenant. The shortcomings of this sort of solutions are clear enough. But just what alternatives are there to the model of free market negotiations than wholesome governmental intervention.

Each year new residential construction amounts to less than three per cent of the housing stock. Each year only one fifth of households change their residence.<sup>8</sup> Thus the character of the housing stock and residential patterns evolve gradually, several years are required for ordinary market forces to correct housing shortages or deficiencies. These forces include new constructions, improvement or deteriorating of existing units, conversion of real property to or from residential use, splitting or consolidating existing housing units, and filtering.

If market forces work quickly and efficiently,



housing problems due to population movement or income shifts do not persist. Tenants move, owners alter units and change rent and maladjustment quickly vanish. On the other hand, if the forces work slowly and inefficiently and problems persist, public action might be justified to speed adjustments. Such actions might range from efforts to increase the housing stock, in order to raise the vacancy rates and thereby facilitate changes of residence, to moving allowances or small loans for property improvements. Little solid information exists on the speed at which the housing market adjusts to changes in housing demands in Kenya. The kind of public actions if any, that is necessary to deal with large changes in demand is thus difficult to choose.

The major nationally supported programme intended solely for the low-income Kenyans is "low rent public housing". States and local governments have been co-operating in the programme for more than three decades. The number of public house residents is about one tenth of the poor, but not all public house residents are poor. In contrast, actual and prospective tenants seem to regard public housing as a better buy than housing available to them on the free market. Most projects have extremely low vacancy rates and long waiting hours for admission, the public image ignores the extremely heterogenous architecture, tenant population, management efficiency, social services provision and other amenities of public housing. Despite its unfavourable

image, public housing has weathered political opposition, and in recent years construction of public housing has accelerated. As a panacea to the problems faced in this area of the la, it is suggested that the tenants can come together pool resources and form a co-operative union which will help towards eradicating possible exploitation by the private landlords.

Beyond possibly psychological satisfaction, that the urban dwelling tenant-shareholder may derive from owning his own home, there are significant advantages to owning a co-operative apartment notably; Firstly, as a tenant-shareholder the tenant has long term security of possession and therefore will have the right to continue to occupy his apartment as long as he wishes without fear of eviction by a landlord who may decide to exercise any right he may have to refuse to renew the tenant's lease.

Secondly, it is contented that because the tenant-shareholder may reside in his apartment for many years, or even for his lifetime, it becomes financially prudent and otherwise desirable for him to make improvements and decorations to his home that he would not ordinarily make in a rental lease. The annual rent (maintenance charge) that is paid by each tenant-shareholder represents the proportionate share of actual operating expenses necessary to maintain and improve the building.

Finally, tenancy in a co-operative is relatively

stable. Tenant-shareholders tend to move less frequently than dwellers in conventionally rental apartments because co-operatives are better maintained, apartments can adopt to each tenant-shareholder's particular needs and the building will be operated in the manner desires by the tenant-shareholders rather than in accordance with the ideas of a non-residential landlord-investor.

#### 4.1: CONCLUSION

In the preceding chapters, we have with loads of agony endeavoured to discuss the conditions that are implied in residential tenancies and the legal instruments that the government has adopted to ensure decent housing quality that are conducive for purposive human existence. In Chapter one, we were able to discuss the position that reigned supreme at the common law which we saw was basically hanging on the caveat emptor principle. Here the landlord ordinarily did not impliedly warrant that the leased premises were suitable for the intended use whether that use was agricultural, residential, commercial or industrial. Hence the tenant could not generally assert either as a basis for recovery of damages in tort or as a defence to an action by the landlord for unpaid rent, that the premises were not suitable for the tenant's use in the absence of an express warranty of fitness.

However, with time the sudden aggregation of residential dwellers in large industrial conurbations

inevitably gave unprecedented prominence to the legal issue of habitability in residential sector. The landlord-tenant law developed certain exceptions to mitigate the harshness of the doctrine of caveat emptor and the rule that the landlords were subject to no implied duties to repair and supply services. The courts also broke entirely away from the ancient rule with respect to the sale of chattels generally. To some extent this development reflected in the law governing landlord and tenant relations. The common law therefore made partial contribution towards development of a recognised standard of habitability in residential lettings, the contribution has come through the declaration of implied conditions in certain kinds of leases, together with the gradual extension of the law relating to nuisance and negligence. We finally saw that at common law, the tenant's rights in respect to quality of his accommodation were vitally dependent upon his ability to secure an adequate and effective remedy for disrepairs which occurred in consequence of default of his landlord. Such remedies include, inter alia, damages for breach of the covenant remedy for termination, rent withholding and abatement, remedy of self-help etc.

In Chapter two we discussed the terms that the Kenyan landlord-tenant law imply in residential tenancies. We saw that the Kenyan law has remained fettered to the common law principles and has been forced to seek the same goals somewhat imperfectly through



tortious and fragmented initiatives of the statute law. We also saw that there are certain conditions that are prerequisites to the existence of a lease and that a lease devoid of these essentials is a nullity ab initio. Such conditions include the presence of an intention to create a lease and the right of an intention to exclusive possession of the leased premises. We also discussed the nature of rights and obligations of the parties under a valid tenancy and the procedure for their enforcement. We also saw in passing, the conditions for the transfer of the leased premises to the third parties. Our discussion in this chapter ended by a cursory glance of the remedies which the landlord can have recourse to in case of any breach by the tenant of the implied conditions, examples of such remedies include distress for rent, action for money and finally that the landlord can bring a suit to recover damages. The landlord-tenant law in Kenya also confer on the statutory tenant certain remedies namely, that the tenant can sue for breach and recover damages, the tenant can alternatively repudiate the agreement between him and the landlord.

In Chapter three our main aim was directed at the general question tendered at the introductory abstract, the question whether there is a need towards a warranty of habitability in the residential tenancies. In particular we focused housing and the law. We have



questioned the various models of overcoming these housing problems which involves lack of both quality and quantity housing. We have viewed the various instruments used in providing the same questioning efficacy and the very salient problems they are faced with, coming up with various inferences and recommendations. Chapter three is basically descriptive and prescriptive analysis of housing policy implementation instruments and illustrate nothing but the fact that law supplemented by other modes of implementation can be aptly used in development of both society and man's status as well. It is thereby suggested that the Building Code and the Public Health Act are suitable and if applied mutatis mutandis will all contribute a great deal in helping to reduce the degree of national housing problem.

In Chapter three we therefore discussed the measures that the government has adopted to ensure decent housing units that are fit for human accommodation. What emerged from the discussion was the Public Health Act and the Building Code, (a by-law enacted under it). The Building Code as a special legislation, has a great trial in setting the standards which have enhanced the quality of houses. Unfortunately, a majority of the standards set therein are foreign imports from the United Kingdom. These standards and the "over procedural" aspects of the code is above most squatter housing provisions. They have only whited away the possibility of cheaper housing for all.<sup>9</sup> The code which was intended to be a

post colonial independent plan thus does not really seem independent and is dependent on the assumption, ideas, approaches and concepts brought along by various foreign consultants.

Apart from increasing the cost we have seen that the code does not conform to the idea of what constitutes adequate housing. The shortcomings of the code were highlighted with the view of showing how it increases the financial implications of building and maintaining a house in urban areas.

Another statutory instrument discussed in Chapter three is the Rent Restriction Act. This was with the view of showing how inadequate the Act is in protecting the tenants especially the low-income tenants. It was also seen that the provisions of the Act presupposed an enlightened populace who could be in a position to summon its protective shield. Moreover, it was seen that the Act's machinery precluded the low-income earners from getting any remedy from it. In the context of the housing shortage, we saw that the Act cannot achieve much as people will be more willing to retain their rented premises rather than enforce their rights because of the risk of eviction.

It was in view of the latent and apparent defects in the legislation that seek to ensure decent housing quality that we sought to discuss some possible recommendations that the government can adopt so as to

overcome the weaknesses inherent in these legislative instruments.

A nation committed to market allocation of most resources might intervene in the housing market in order to alter income distribution. It might act to restrict the benefit of costs of housing transactions passed on persons not directly involved or to correct imperfections in the functioning of housing markets. It might also wish to offset the consequences of fiscal and monetary policies in the building sector.

These justifications for interfering with the housing markets are extremely vague. Because evidence for the public concern is scarce or non-existent, it is hard to know which policies most effectively remove causes of concern or whether actual policies achieve their stated goals. Housing laws may for example attempt to control the effect of one's family housing on another's welfare or to limit the dangers of consumer ignorance but their success in doing so is unknown. Therefore it is impossible to know whether they bring about better housing - for the poor, the middle class or the rich - or even improve methods of production. It has been argued that housing laws designed to ensure decent housing for the poor may in fact deny the poor the opportunity to occupy cheap housing below housing standards and to use money saved on housing on such other things as better or more food.

Public policies themselves create hindrance to

efficiency, compliance, cost, delay in inspection, added uncertainties, all may result from public action designed to solve particular problems. Once again the magnitude of these costs is unknown. Unfortunately the numerous but vague reasons why public actions might improve the functioning of the housing market offer little guidance in selecting among alternative policies.

## FOOTNOTES

1. Wachtel, A. "Forgotten but not gone": Slum Clearance (Unpublished) Working Paper No. 153 for I.D.S. (1974)
2. Rihal, U.N. Seminar of Expert on Building Codes Regulations in Developing Countries, Edited by Rihal (A U.N. Publication) (1980) p8
3. Rukwaro G. K. "Redress of Grievances": The Case for an Ombudsman (1973) 9 E.A. L.J. 41 at 44-47
4. Cap 134 Laws of Kenya
5. Cap 117 Laws of Kenya
6. Cap 242 Laws of Kenya
7. Cap 265 Laws of Kenya
8. Eygellar, J. Housing By-laws in Kenya Building Code (unpublished) Paper for HRDU University of Nairobi (1980) p2
9. Sten, R.E. "Urban Development in Kenya and Tanzania" Analysis I.D.S. Working Paper (Nairobi) (1974) p7



## SELECTED BIBLIOGRAPHY

1. H. Tittany: Treatise on the law of landlord and tenant (1912) Sweet and Maxwell 572
2. J.I. Reynolds: Statutory covenants of fitness and repairs, social legislations and the Judges
3. William Glanville: The duties of non-occupiers in respect of dangerous premises (1976) London Butterworths 1974
4. Watchtel A.: "Forgotten but not gone slum clearance" Unpublished Working Paper No. 153 for I.D.S. (1974)
5. Lefcoe G.: An introduction to American Land Law Cases and Materials: Contemporary Legal Series (1974)
6. Hadden T.: Social work and the law: Housing repairs and improvements (London Sweet and Maxwell) (1979) 52
7. A UN Seminar on Building Codes and Regulations - In developing countries (A UN Publication) 1980 p1
8. Saad Yahya: Review of Building Codes and Regulations. "A Manual based on Kenya's experience" HRDU University of Nairobi 1987 p4
9. Hodgkin R.W.: Law of Contract in East Africa: Kenya Literature Bureau (1982) 12
10. Okoth Ogendo's Manual on the law of property
11. FOA's General Law of Landlord and Tenant. Eighth Ed. Thames Bank Publishers Co. Ltd. 1957 p1
12. Hill and Redman: Law of Landlord and Tenant. Tenth Ed. London Butterworths and Co. Publishers 1960 p3-4