

" LEASE AND LICENCE ADMINISTRATION BY A PUBLIC CORPORATION

IN KENYA:

THE CASE OF KENYA RAILWAYS CORPORATION."

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BY

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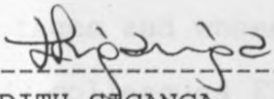
A THESIS SUBMITTED IN PART FULFILLMENT FOR THE  
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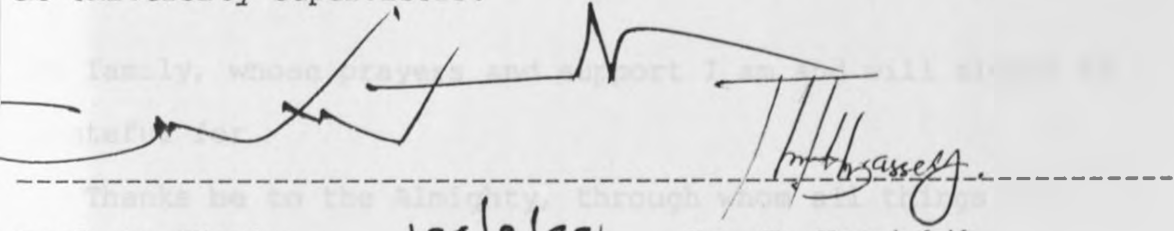
Declaration

This Thesis is my original work and has not been presented for a degree in any other University.



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This Thesis has been submitted for examination with our approval as University supervisors.



Prof. C. Kiamba

18/2/98

Dr. T. Konyimbih

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Thanks be to the Almighty, through whom all things are possible.

DEDICATION.

This study is dedicated to my children, Valerie, Jeremy and Elis, and my parents Christopher and Robai Siganga who with love and patience, always encouraged me to reach for the stars -

"The Sky is the limit".

God bless you all.

### ABSTRACT

This thesis investigates the problems inherent in the landlord and tenant relationship that arise once land has been leased or a licence issued. It focuses on public administration of land because large tracts of land in Kenya, especially in the urban areas, are held on public leaseholds. To maximise the benefits of the leasehold system, it is necessary that the leases and licenses are administered to their best advantage.

The administration of land through the use of leases and licenses allows a landlord to retain control of his land even as he gives up physical possession. The terms and conditions of the lease and license agreements are used by the landlord to maintain this control during the term of the lease or license. Problems arise when the landlord or tenant breach the terms or conditions of the lease or license.

This thesis investigates the causes of the breaches of the lease and license agreement, with the Kenya Railways Corporation with the case study. It begins by examining the institutional arrangements for lease administration as provided for by the Corporation with the aim of assessing their adequacy. The study then proceeds to examine the clauses of the agreements most commonly breached and the remedial action taken. To provide an alternate view point the tenants were also interviewed.

The study is divided into five chapters. The first chapter comprises the introductory section covering the problem statement, the study hypothesis, the study objectives, the scope

of the study and research methodology. The second chapter reviews literature on leases and licences, and their administration by public institutions in general. Chapter three discuss the historical development of the Kenya Railways Corporation real estate and the type of leases and licenses administered. The study findings are recorded in Chapter Four.

The study found that the problems arising during lease and licence administration are not caused entirely by the Estate Manager. Insufficient staff, inadequate equipment and transport facilities have contributed to inefficiency, poor record keeping and minimum supervision. Confusion arising from two departments demanding and collecting rents has resulted in rental arrears. The Estate Manager was also not always able to execute remedial action as this was left to other Departments, for instance physically evicting troublesome tenants or pursuing legal redress. As a result tenants did not take seriously threats of remedial action.

Finally in chapter five the study conclusions and recommendations are given. It is recommended that the institutional set up for land administration by the Kenya Railways Corporation be reconstructed with the department becoming fully operational. It further recommends stronger , clearly defined inter-departmental linkages between all the departments dealing with land.

## TABLE OF CONTENTS

|   | Page |
|---|------|
| THESIS TITLE.....                                     | 1    |
| DECLARATION.....                                      | 2    |
| ACKNOWLEDGEMENTS.....                                 | 3    |
| DEDICATION.....                                       | 4    |
| ABSTRACT.....   | 5    |
| TABLE OF CONTENTS.....                                | 7    |
| LIST OF TABLES.....                                   | 9    |
| LIST OF MAPS.....                                     | 10   |
| LIST OF APPENDICES.....                               | 10   |
| <b>CHAPTER ONE</b>                                    |      |
| INTRODUCTION.....                                     | 11   |
| THE PROBLEM STATEMENT.....                            | 11   |
| THE OBJECTIVES.....                                   | 16   |
| THE STUDY HYPOTHESIS.....                             | 16   |
| THE SCOPE OF THE STUDY.....                           | 16   |
| THE SIGNIFICANCE OF THE STUDY .....                   | 18   |
| RESEARCH METHODOLOGY .....                            | 20   |
| THE ORGANIZATION OF THE STUDY .....                   | 30   |
| <b>CHAPTER TWO</b>                                    |      |
| LEASE ADMINISTRATION IN PUBLIC INSTITUTIONS IN KENYA. |      |
| 2.0 INTRODUCTION .....                                | 33   |
| 2.1 LAND .....  | 33   |
| 2.2 THE LEASE AND LICENCE AGREEMENT .....             | 37   |

|     |   |    |
|-----|---|----|
| 2.3 | THE MANAGEMENT OF PUBLIC LEASEHOLDS ..... | 45 |
| 2.4 | SUMMARY .....                             | 73 |

**CHAPTER THREE:**

THE KENYA RAILWAYS REAL ESTATE.

|     |  |     |
|-----|--|-----|
| 3.0 | INTRODUCTION.....                          | 78  |
| 3.1 | ORIGINS OF KENYA RAILWAYS CORPORATION      |     |
|     | LANDED ESTATE.....                         | 80  |
| 3.2 | LAND TENURE OF KENYA RAILWAYS REAL ESTATE. | 92  |
| 3.3 | THE RAILWAYS ESTATE.....                   | 94  |
| 3.4 | TYPES OF LEASES AND LICENCES GRANTED.....  | 100 |
| 3.5 | STATUTORY BASIS OF KENYA RAILWAYS          |     |
|     | ESTATE MANAGEMENT.....                     | 107 |
| 3.6 | SUMMARY.....                               | 107 |

**CHAPTER FOUR:**

THE EMPIRICAL FINDINGS.

|      |                                       |     |
|------|---------------------------------------|-----|
| 4.0  | INTRODUCTION.....                     | 111 |
| 4.1. | INSTITUTIONAL ARRANGEMENTS FOR LAND   |     |
|      | ADMINISTRATION THE KENYA RAILWAYS     |     |
|      | CORPORATION.....                      | 112 |
| 4.2. | LEASE AND LICENCE ADMINISTRATION..... | 126 |
| 4.3. | SUMMARY .....                         | 162 |

**CHAPTER FIVE:**

CONCLUSIONS AND RECOMMENDATIONS.

|     |                      |     |
|-----|----------------------|-----|
| 5.0 | CONCLUSIONS.....     | 165 |
| 5.3 | RECOMMENDATIONS..... | 168 |
|     | BIBLIOGRAPHY .....   | 170 |



## LIST OF TABLES

|           |     |   |     |
|-----------|-----|---|-----|
| TABLE     | 1.1 | TOTAL LEASE AND LICENCE ITEMS : NAIROBI<br>ENGINEERING DISTRICT.....                    | 23  |
| TABLE     | 1.2 | SAMPLED CASES: NAIROBI ENGINEERING DISTRICT..   | 23  |
| TABLE     | 1.3 | SAMPLED CASES: PERCENTAGE OF TOTAL CASES.<br>NAIROBI DISTRICT ENGINEERING DISTRICT..... | 24  |
| TABLE     | 3.0 | ACREAGE OF FIFTY POUND LAND .....   | 96  |
| TABLE     | 3.1 | ACREAGE OF PURCHASED LAND .....   | 97  |
| TABLE     | 3.2 | RESIDENTIAL LEASE HOLD LAND.....  | 98  |
| TABLE     | 3.3 | RESIDENTIAL FREEHOLD LAND .....   | 99  |
| TABLE 3.4 |     | COMMERCIAL, RESIDENTIAL, RECREATIONAL LEASES...   | 106 |
| TABLE     | 4.0 | PERSONNEL IN ESTATE MANAGEMENT<br>KENYA RAILWAYS CORPORATION, MARCH 1993.....           | 121 |
| TABLE     | 4.1 | LAND ALLOCATION 1982-1993 KENYA RAILWAYS<br>REAL ESTATE .....                           | 128 |
| TABLE     | 4.2 | COMPOSITION OF LAND ALLOTTEE'S.....   | 129 |
| TABLE     | 4.3 | COMPOSITION OF LICENCES'S .....   | 129 |
| TABLE     | 4.4 | MODES OF RENT PAYMENT .....   | 140 |
| TABLE     | 4.5 | APPORTIONMENT OF RENTAL AREAS: STRATA A 1992..<br>.....                                 | 148 |

## LIST OF MAPS

- MAP 1 KENYA RAILWAYS SYSTEM TODAY.  
MAP 2 INLAND MARINE SERVICES: LAKE VICTORIA.

## APPENDICES

- APPENDIX 1 QUESTIONNAIRE TO ESTATE MANAGER  
APPENDIX 2 QUESTIONNAIRE TO TENANTS.  
APPENDIX 3 A TYPICAL LEASE DOCUMENT.  
APPENDIX 4 A TYPICAL LICENCE DOCUMENT.  
APPENDIX 5 APPLICATION FOR ALLOCATION OF A PLOT.  
APPENDIX 6 APPLICATION FOR WAYLEAVE.  
APPENDIX 7 APPLICATION FOR PROVISION OF PRIVATE SIDING.

## CHAPTER ONE.

"Land belongs to a vast family of which many are dead, few are living and countless numbers are still unborn."  
(Farvacque,1992, xvii)

### INTRODUCTION

Land is regarded as one of the most essential possessions of most communities. Its importance in the life of man is beyond measure. Man lives on it, exploit it to create wealth, obtains his food from it and entails it to his heirs as an invaluable inheritance (Mutiso, 1989, p 1). Every organised human society has been concerned with the setting up of institutions for defining the rights of ownership and use of land, which have been frequently interwoven with the social and religious beliefs of the community. Land policies have been drawn up with the aim of facilitating access to, and management of land. Yahya (1982,p7) asserts that, in Africa, the advent of urbanisation and modernisation has brought about the commercialisation of land, a resource previously communally owned and utilised. A rapidly increasing population concentrated in the urban areas has highlighted the need for public control over the use and development of the available land. Two policy instruments used to facilitate the supply of land are the lease and licence.

#### 1.1 PROBLEM STATEMENT.

Since modern times land has been leased or hired out by a landlord to a tenant for various purposes. The lease or licence

allows a person who hitherto held no interests in the land to occupy the land for a valuable consideration. The landlord/tenant relationship is created by the lease or licence agreement which stipulates the rights and obligations of each party to the agreement. Problems arise when either of the parties fails to fulfil his or her obligations as specified in the agreement.

Although the landlord and tenants are signatories to the lease or license, their perception and understanding of the agreement greatly affects its observance. Kariuki (1990,p10) affirms that the interpretation of leases lies at the heart of property management. Studies have indicated that in some instances tenants are not familiar with the lease (or licence) document and are not aware of its importance (Chomba,1992,p110; Mutua, 1987,p45). Thorncroft (1965,p138) further explains that the problems arising from the lease or licence agreement will also depend on many factors including the nature of the property, the use to which it is put and class or status of the tenant.

Experience from both the private and public sectors in Kenya, has shown that some clauses in the lease and licence agreement are more prone to breach than others (Chomba, 1992; Mutua, 1989; Kariuki, 1990; Mutiso, 1989). These include the clause on payment of rent, rent reviews, maintenance and repair (of buildings), subleasing, assignment and development control. Some of the problems that arise include the following:-

- (a) Rent arrears and Rent reviews.

### i) Rent arrears

The incidence of rental arrears is one of the major problems experienced in the management of real property. The rent payable represents the landlords returns on his investment and may provide the revenue utilised in the estate management process. Tenants do not pay rent voluntarily and the landlord has to ensure rents are collected when they fall due.

Mutiso (1989, p32) attributes arrears to poor rent collection methods by the landlord. He pin-points insufficient staff to carry out the collection, use of inappropriate methods of collection, poor records system and assessed rental being too high, as reasons for rental arrears. In an effort to avoid paying accumulated arrears, tenants have been known to abscond from the premises.

The tenant may be required to pay an extra fee apart from the rent, for instance a service charge. Unless the tenant is persuaded that it is necessary to pay this extra charge, it will fall into arrears as the tenant refuses to pay it.

### (ii) Rental Reviews.

Tenants will normally oppose any attempt to increase the rent, especially where rents are reviewed after long periods, so that the new rents are considerably higher than the old. When the lease specifically states the date of review and the amount of increase, few problems arise.

In 1989 the Government Land Act Cap 280 of the Laws of Kenya

was amended to permit the revision of ground rents on government lands every ten years. Previously rents were reviewed every thirty-three years. This has resulted in considerable increases in the rents charged. Some tenants have objected to the increases, refusing to pay the new rents.

(b) Problems associated with development control and the use to which the property is put.

The type and extent of development allowed on a property is usually indicated in the lease or licence agreement. Lessees of ground leases breach this clause by erecting buildings whose plans have not been approved by the landlord. The buildings constructed may not meet the planning regulations for instance for plot coverage or user. The lessees also risk interfering with existing service lines situated underground during construction if plans are not approved. For licences permanent structures are not permitted as the licencees occupation is usually of a short duration. When permanent structures are erected, remedial action is difficult. In some instances compensation has to be paid prior to demolition of the structures.

The erection of extensions to residential plots in Buru Buru, Umoja and Dandora areas of Nairobi provide a good example of breach of this clause. Responding to the demand for urban housing, leaseholders have erected additional buildings over and above the allowed plot coverage. Some of these structures pose a

danger to the occupants as they are poorly constructed.

(c) Subleasing and Assignment of the leased property.

The lease or licence document usually stipulates that the landlord must be consulted and his permission sought before a lessee or licensee subleases or assigns his premises. This ensures that the landlord retains some control over his property. He can then vet all subtenants, with the aim of avoiding possible problematic subtenants.

For instance in Kisumu Industrial area a lessee subleased his plot without the consent of the Kenya Railways Corporation who are the landlords. The sublessee made major alterations to the premises and proceeded to act without due regard to the landlord. It has proved very difficult to evict the subtenant.

Leases and Licences on land are usually granted by public authorities who own the majority of any country's land. One such organisation in Kenya, is the Kenya Railways Corporation, whose management portfolio includes administration of ground leases and licences like wayleaves, siding agreements and temporary occupation licences. The Kenya Railways landed estate and the land managed on behalf of the government of Kenya, upon which these leases and licences are granted is vast and dispersed. This has brought about the problem of supervision of the tenants to ensure they conform to the lease and licence terms, so crucial if lease administration is to succeed. The Kenya Railways Corporation, an example of a public body, is used as the case study for this thesis.

### STUDY OBJECTIVES.

Using the Kenya Railways Corporation as a case study, this study's objectives are:

- (a) To identify and examine the type of leases and licences created over land owned by the Kenya Railways Corporation and also over the land managed by the Kenya Railways Corporation on behalf of the Government of Kenya.
- (b) To identify and analyze the problems that may arise during lease and licence administration by the Kenya Railways Corporation and their possible causes with the aim of suggesting some solutions.
- (c) To recommend ways of improving the administration of leases and licences on land by the Corporation.

### STUDY HYPOTHESIS

The basic hypothesis of this study is:

"Poor leases and licence administration by the Estate manager in the Kenya Railways Corporation is a major cause of the breaches of the lease and licence agreement terms"

### SCOPE OF THE STUDY

This study aims at looking at lease and licence administration as carried out by the Kenya Railways Corporation. The content of the study has been restricted to the study of ground leases, siding



agreements and wayleaves. Other types of leases and licences administered by the Kenya Railways Corporation include cultivation agreements, cattle crossings, and level crossings. The selected types of leases and licences were chosen because they represent the bulk of management work carried out by the Corporation. They also embody most of the possible problems that may arise during administration. For instance the study of Ground leases will highlight problems arising from long leases while Temporary Occupation Licence, those from short term licences respectively. The study of Wayleave and Sidings Agreements will highlight those problems arising from issuing licences.

For administrative purposes the Kenya Railways Corporation management has divided the entire railway system geographically into three engineering districts as follows:

(a) The Coast Engineering District.

Extending from Mombasa to Makindu, inclusive of the Taveta branch line.

(b) Nairobi Engineering District

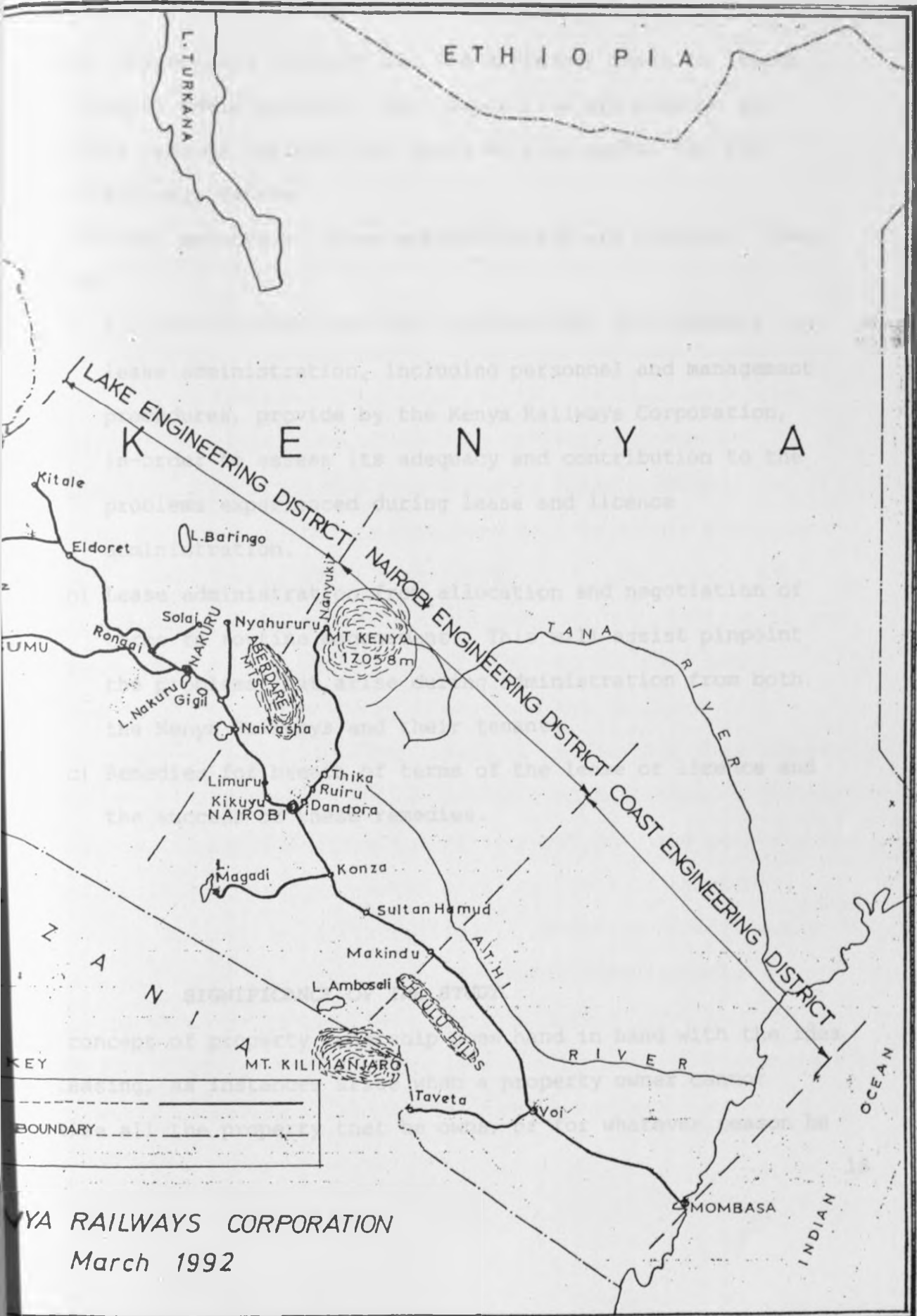
Extending from Makindu to Naivasha, inclusive of the areas covered by the Nanyuki branch line.

(c) Lake Engineering District.

Extending from Naivasha to Malaba, inclusive for the areas covered by the Kisumu Branch Line, the Kitale

Branch line and the Solai Branch Line (see map 1)

This study used only the Nairobi Engineering District for detailed investigation due to limited time and finances. Within



KENYA RAILWAYS CORPORATION  
March 1992

Nairobi Engineering District all the different types of leases and licences administered by the Corporation are present and therefore lessons derived from there will be useful for the entire Railways Estate.

Different aspects of lease administration are studied. These include:

- (a) An investigation into the institutional arrangements for lease administration, including personnel and management procedures, provided by the Kenya Railways Corporation, in order to assess its adequacy and contribution to the problems experienced during lease and licence administration.
- (b) Lease administration from allocation and negotiation of terms to routine management. This will assist pinpoint the problems that arise during administration from both the Kenya Railways and their tenants.
- (c) Remedies for breach of terms of the lease or licence and the success of these remedies.

#### SIGNIFICANCE OF THE STUDY.

The concept of property ownership goes hand in hand with the idea of leasing, as instances arise when a property owner cannot utilise all the property that he owns, or for whatever reason he

finds that he has to relinquish physical possession of the property to another person who is better able to utilise the property. An owner may also wish to lease his property purely for investment purposes.

As human beings we need land to enable us carry out all the functions of living. Thus although we may not be lessors we may be lessees. Therein lies the need for a study concerned specifically with the problems arising from the lease agreement and its administration. Awareness of the problems associated with leases and licences and the ways of avoiding them as discussed in this study may help minimise those problems.

Although numerous studies have been done on estate management (Chomba, 1992, Mutua, 1987; Thorncroft, 1965), the aspect of lease and licence administration has normally been mentioned as one of the duties of the estate manager. No studies have been devoted to establishing the problems inherent in lease administration, especially for leases on land rather than leases in buildings like commercial and residential buildings. Ineffective lease administration affects not only the property in question, it also inconveniences both the landlord and tenant leading to animosities and resulting in reduction of efficiency as time and money is spent trying to settle disagreements.

On the whole it is more profitable to have a lease running smoothly without acrimony. It allows the landlord to concentrate on property improvement, while the tenant maximises his use of the property.

## RESEARCH METHODOLOGY AND LIMITATIONS OF THE STUDY.

The study was undertaken in three steps. It began with the library review of existing literature and historical records on land and administration. Literature on leases and licences were also reviewed. This was done with the aim of providing a conceptual framework for the administration of leases and licences on land. The second stage of the study involved the collection of information from the field on the case study through oral interviews with Officers at the Kenya Railways Corporation as landlords and a questionnaire to the Estate manager of the aforesaid Corporation. Questionnaires were also administered to the tenants of Railways Corporation or their representatives.

Finally the information collected from the field study was analyzed and conclusions and recommendations made therefrom.

## THE USE OF A CASE STUDY.

In Kenya, State Corporations are established under the State Corporations Act, Cap 446 of the Laws of Kenya. These Corporations are created to enable the Government of Kenya provide services to the public more effectively and cheaply. They are semi-autonomous bodies, falling under the control of the central government. These institutions are found in all sectors of the economy, for instance Industry, Insurance, Housing, Banking and Commerce. Examples of State Corporations in Kenya include the Industrial Credit and Development Corporation, The Kenya Power and Lighting Company limited, The Kenya Railways

Corporation, Kenya National Housing Corporation and the National Bank of Kenya Ltd.

State Corporations have such powers for granting leases and licences as conferred to them by their special statutes and in conjunction with any other relevant statutes (Wheeler, 1987, P599). There is no single Corporation that deals exclusively with land management, this function being carried out by the Commissioner of Lands (Ministry of Lands, Government of Kenya) or his agents. Each Corporation provides machinery for the management of lands falling under its jurisdiction .

The Kenya Railways Corporation has large tracts of land adjacent to railway lines and stations over which it issues leases and licences. It also manages land on behalf of the Government of Kenya. This relationship is discussed in chapter Three. The origins of Railways land can be traced to the period prior to the construction of the railway in the 1890's. With interests in prime land over most of the country, the Railways Corporation has been, until the mid 1970's an ex- official member of local authority land management decision making machinery. Indeed in colonial times the General Manager of the railways authority deputised for the Governor of the Kenya Colony in his absence and was a nominated Member of Parliament. This reflects the importance placed on the land held and managed by the Railways authority.

A study of lease and licence administration as carried out by the Kenya Railways Corporation will demonstrate problems that

are encountered during public administration of land.

### Research Methods and data collection.

#### a) Sampling.

The chosen study area covers the Nairobi Engineering District (see Map 1). Due to limited time and finances not all areas could be included in the study. Representative samples were selected from Nairobi, Thika, Ruiru Dandora, Limuru and Kikuyu. Selection of the areas to be studied was done on the basis of the availability of different types of leases and licences at the chosen area and their population. Records maintained by the Kenya Railways Corporation provided the total number of lease and licence items in the different towns. The researcher was then able to select the towns to study.

Table 1.1 below illustrates the population of each lease and licence type in the towns under study. For instance, Government Leases number 469 in Nairobi and 25 in Thika. Wayleaves are 47 in Nairobi and 24 in Thika.

Table 1.1

Table 1.1

## TOTAL LEASE AND LICENCE ITEMS: NAIROBI ENGINEERING DISTRICT.

| Location | Govt. | Ryls | T.O.L. | Public Siding | Wayleave | Total |
|----------|-------|------|--------|---------------|----------|-------|
| Nairobi  | 469   | 75   | 20     | 25            | 47       | 636   |
| Thika    | 25    | -    | 3      | 5             | 24       | 57    |
| Ruiru    | -     | 7    | 4      | -             | -        | 11    |
| Dandora  | -     | -    | 3      | -             | -        | 3     |
| Limuru   | -     | 9    | 1      | -             | -        | 10    |
| Kikuyu   | -     | 19   | 1      | -             | -        | 20    |
| Total    | 494   | 110  | 32     | 30            | 71       | 737   |

Source: Compiled from Kenya Railways Corporation, Estates Department, 1993.

Table 1.2 shows the sample selected for each town. For instance in Nairobi 40 Government leases, 20 Railway leases, 6 Temporary Occupation Licences, 13 Public Sidings and 19 Private Wayleaves were selected.

Table 1.2

## SAMPLED CASES: NAIROBI ENGINEERING DISTRICT

| Location | Govt. Lease | Ryls Lease | T.O.L | Public Siding | Wayleave | Total |
|----------|-------------|------------|-------|---------------|----------|-------|
| Nairobi  | 40          | 20         | 6     | 13            | 19       | 98    |
| Thika    | 10          | -          | 2     | 2             | 4        | 18    |
| Ruiru    | -           | 2          | 2     | -             | -        | 4     |
| Dandora  | -           | -          | 2     | -             | -        | 2     |
| Limuru   | -           | 4          | -     | -             | -        | 4     |
| Kikuyu   | -           | 4          | -     | -             | -        | 4     |
| Total    | 50          | 30         | 12    | 15            | 23       | 130   |

SOURCE: Samples selected by the Researcher, 1993.



Table 1.3 shows the selected samples as percentage of the population, for instance in Nairobi 8.5% of Government leases were selected, while at Thika 40% were selected. In all, 10% of all Government leases were selected.

Table 1.3

SAMPLED CASES: PERCENTAGE OF TOTAL ITEMS. NAIROBI ENGINEERING DISTRICT.

| Location | Govt. Lease | Rlys Lease | T.O.L. | Public Siding | Wayleave |
|----------|-------------|------------|--------|---------------|----------|
| Nairobi  | 8.5%        | 26%        | 30%    | 52%           | 40%      |
| Thika    | 40%         | -          | 66%    | 40%           | 16%      |
| Ruiru    | -           | 28%        | 50%    | -             | -        |
| Dandora  | -           | -          | 66%    | -             | -        |
| Limuru   | -           | 44%        | -      | -             | -        |
| Kikuyu   | -           | 21%        | -      | -             | -        |
| Total    | 10%         | 27%        | 37.5%  | 50%           | 32%      |

Source: Samples selected by Researcher, 1993.

Using the stratified random sampling method samples were selected as follows:-

(a) Leases.

Ground leases were first divided into two groups representing Government leases and Railways leases. Government leases are those created over government land managed on their behalf by the Railways. Railways leases are those created over Railways owned land. The total number of lease items in each group were obtained from the records maintained by the Estate Department of the Railway Corporation. A pilot study identified that there

isted cases that had problems, for instance rent arrears, illegal subleasing, illegal developments, illegal alterations to development. An interview with the Estate Manager at the Railways Corporation helped identify these cases.

A strata comprising the known problematic cases was therefore identified. This became strata A. Another strata comprising non-problematic cases was also identified. This became strata B. The process was repeated for each respective town.

The cases identified in each strata were then allocated serial numbers from 1 to x (continuously), from which random selection was done to choose the cases for study. These cases formed the final strata A and B. A sample size of ten percent (10%) of the total number of cases was taken as being representative of the population, this percentage being the traditionally accepted minimum sample size. Each strata yielded 5% of the samples of the selected, except in cases where there were not enough problematic cases and all available cases were studied. However, as seen in table 1.3, some samples were larger than ten percent of the population, in-order to facilitate study. The process is represented diagrammatically below:-

Figure 1

POPULATION  
e.g. Ground Leases

Government leases

Railways leases

|                  |                  |                  |                  |
|------------------|------------------|------------------|------------------|
| Sample A         | Sample B         | Sample A         | Sample B         |
| Random Selection | Random Selection | Random Selection | Random Selection |
| n=Final Sample A | n=Final Sample B | n=Final Sample A | n=Final Sample B |

i) Licences.

ii) Temporary Occupation Licences.

Unlike ground leases these occur only on Railway Land. Strata A and B (as explained above) were selected.

iii) Siding agreements.

Public sidings were treated as ground leases above to obtain Strata A and B. For private Siding agreements no management is carried out.

iv) Wayleave.

Samples for private wayleave were chosen in a like manner.

Questionnaires were posted to the selected licences as attempts to locate them physically proved difficult. For statutory

wayleaves samples were selected on the basis of the use to which the wayleave is put, that is power lines, telephone lines, water pipes and sewer pipes. Thus all four wayleave licensee's were interviewed.

The number of cases in some areas were found to be small, some few as seven cases, giving rise to small sample sizes.

Analysis of very small samples is difficult and may give a false result. In some instances like sidings, problematic cases were few, thus all available cases were then studied.

A pilot study carried out on selected cultivation agreements revealed that locating the licences was difficult. Inspections on site revealed that some licencees had abandoned their plots, leaving their whereabouts unknown. Some sites could not be surveyed because access to them was difficult and they were located far away from the nearest roads.

During the pilot study it was discovered that in the selected study areas the total number of temporary occupation licences were small. For instance Limuru and Kikuyu yielded only one licence each on the ground. This was not sufficient for study. For level crossings and cattle crossings the actual numbers (9 for level crossings and 4 for cattle crossing) were found to be small and not significant for study, the assumption being that the problems experienced in these types of licences was not peculiar to them and solutions found for the other lease and licence types would be applicable to them.

#### b) The Questionnaire.

The method used to obtain information from the field was the questionnaire. Two sets of questionnaire were administered, one to the Estate Manager at the Kenya Railways and the other to the

tenants (see Appendix 1 and 2). The questionnaires followed a similar format, with that to the Estate Manager containing special sections on the organisational framework provided for lease administration by the Corporation. The Estate manager was interviewed, as the head of the Estates Department, but the Financial Controller was also interviewed because his departments workings are closely connected to the performance of the Estate department.

The draft to the lessees and licencees was tested on twenty tenants chosen at random, with some subsequent alterations being made to the questionnaire. The questionnaire was administered personally by the researcher to the sampled lessees and licencees. Some lessees and licencees were not willing to complete the questionnaire with the researcher. In most cases, when the researcher left the questionnaire for the lessee or licencee to complete this was never done. The researcher was also viewed with a lot of suspicion, especially from lessees of problematic cases.

Locating grantees of Wayleaves proved difficult. Using the last forwarding addresses provided by the Estate Manager, the researcher posted 36 questionnaires. From a total of 180 cases, a sample size of 18 being ten percent, was selected. This was doubled in order to cover the uncertainty of responses. The questionnaires were mailed with a covering letter, explaining the purpose of the exercise. It was expected that responses

ould be received within eight weeks of the date of postage. At the end of this period it was found that the responses were unexpectedly low, with only 2 questionnaires being returned.

Using convenient sampling method, the researcher then resorted to interviewing licencees whose whereabouts were known, for instance major companies. This yielded 18 cases, of which 8 were problematic, forming Strata A as explained above and 10 were not. This information obtained from the field survey was then examined and analyzed.

### Data Analysis and Presentation

Leedy P. (1980,p76) asserts that the type of data to be collected dictates the research methodology used to acquire and analyze it. For instance data of a historical nature cannot be collected or analyzed using an experimental methodology because it is not experimental data.

The study used two types of data, namely Primary and Secondary data. Secondary data was obtained through library research from published studies and texts and unpublished theses and dissertation dealing with land and land management. Other sources of information included land records maintained by the Kenya Railways Corporation, Memoranda, Acts of Parliament, and newspaper reports among others. The secondary data, factual in nature, provided a conceptual framework for lease and licence administration.

Primary data comprised the responses obtained from the Estate

Manager at the Kenya Railways Corporation and the Tenants through the questionnaire and interviews. Responses from both the Estate Manager and the tenants provided descriptive, nominal and ordinal data. Information required included that on the clauses breached, reasons for the breach, the nature and extent of the breach, for instance total numbers breaching the clause on subleasing, and the remedies the Estate Manager employs and the relief the Tenant has.

The data collected was analyzed using basic statistical tools namely percentages for comparison purposes, inferences being made from the tables, graphs and charts used. Where qualitative data was obtained, this was presented as supporting descriptive text. Nominal data, for instance on the outstanding rentals, was represented using tables and charts. Data of an ordinal nature was also presented in tables, charts and line graphs, for instance the arrears position from 1983-1993.

#### ORGANISATION OF THE STUDY

The study is divided into five chapters.

Chapter one covers the introductory section providing a comprehensive overview of the study. It carries the Statement of the study problem, the study objectives, scope of the study and the research methodology.

Chapter Two contains review of literature on leases and lease administration practice in public institutions.

Chapter Three consists of a detailed historical account of the Kenya Railways real estate from its origins to date and the types of leases administered.

Chapter Four carries the study findings as obtained from the responses of the Estate Manager and the Tenants.

Chapter Five contains study conclusions and recommendations.



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## CHAPTER TWO

### Lease Administration in Public Institutions in Kenya.

"The conception of land as property is deeply entrenched in our society. On the other hand the use and enjoyment of land by it's owners is profoundly modified by the demands of society."

(R.G.W. Byrant, 1972,pl).

#### 2.0 Introduction

This chapter reviews literature related to leases and licences and their management. It discusses the different types of land tenure is existence in Kenya with the aim of understanding the nature of leaseholds. It then proceeds to discuss how leases are administered, with the problems arising therein also being investigated. Finally the remedies available to the Estate Manager are also discussed.

#### 2.1 Land

Land is the starting point of all human activity. Its distribution and use are of vital importance ( Rowton,1976,p3). Byrant (1972,pv) notes that the whole subject of land lies at the heart of most urban problems, yet it is often accorded only passing reference. The rapid pace of urbanisation already seen and projected for developing countries, especially those in Africa, has resulted in increased demand for land. Not only in the urban areas but also in the rural areas, where seventy percent of the population live. The threat posed by the ever increasing human population has meant that more land has to be converted to human use. For instance the Basic Report of the

Urban Housing Survey 1983, Kenya p(iii) states that third world populations estimated to be 550 million, are projected to increase to 1.2 billion by the year 2000, with the demand for land more than doubling. Although future demand is deemed to be high, what is significant is that it will occur in more stringent conditions than prevail today.

These trends and projections make it clear that the question of land supply and management are of vital importance. Policies that try to ensure that the little available land is delivered to the people is crucial. Two instruments of land policy that facilitate the supply of land are the lease and the licence. In majority of countries the central government and quasi-government bodies are the largest land owners, leasing their land to individuals, companies or partnerships. These lands need to be efficiently administered to ensure optimum use. In Kenya, Sessional Paper No.1 of 1986 on Economic Management for Renewed Growth has put the case concisely:

"Anything short of optimal land use would jeopardize the economic future of the country".

#### 2.1.1 Interests in Land.

Land tenure or land holding refers to the holding of a bundle of rights which amount to an interest in land (Kiamba, 1991,p1). It concerns the laws, customs and practices governing the rights, duties and relationships of people to the land. Even in the

former Soviet Union, where land belonged to the state, personal rights to houses and the plots attached and the resulting inheritance were recognised in law (Obumnene, 1966,p1).

In Kenya land is held under three broad tenures: Customary land tenure, Freehold and Leasehold tenures. Other subordinate tenure types, whose basis stems from the above three, exist. These include Group ownership of Land as held under the Co-operative Societies Act cap 490 of the Laws of Kenya and the Land (Group Representatives) Act cap 287 of the Laws of Kenya, and Sectional or Horizontal land ownership as is the case for residential flats.

Customary land tenure is the oldest form of land tenure (Doebele, 1983, p72). Land is communally owned. Nyerere, in "Freedom and Socialism (1957-1967)" says that communal ownership of land is traditional in Africa societies where the family was considered by far the most important land holding unit. There was no absolute ownership of land, even on the part of the chiefs. Rather it was a matter of a whole network of interrelated rights and obligations, governed by custom (Byrant, 1972, p19). There was little need for leases on land as an individual or family secured rights to land for as long as they were using it, hence usufructuary land rights. It reverted to tribal land, able to be reallocated once the family stopped working it. No-one could alienate clan land by sale, as ownership was vested in the clan.

Yahya (1982, p20) maintains that with colonialism an "artificial and irrelevant system of land tenure", namely freehold and leasehold tenure, were imposed on communities who even now still find it difficult to differentiate between the two. This is reflected in the difficulty experienced when trying to explain termination of one's interests at the expiry of a leasehold. Customary land tenure has been criticised as it does not clearly define an individuals rights. This has meant that lands held under this system cannot be used by individuals as collateral when obtaining a loan for development. Kiamba (1992, p8) claims that in Kenya, seventy percent of the total land area falls under this tenure.

Different interests can coexist on the same piece of land concurrently, for example, there can be a head lease and a sublease. These interests have been classified by duration as freehold and leasehold interest. Although freehold interest are deemed to be absolute, indeed under the Registered Land Act cap 300 of the Laws of Kenya, the freehold interest is known as "absolute proprietorship", in reality this is not the case. Few if any, societies permit individuals unrestricted powers with regard to land. The holder of a freehold interest has the right to enjoy and dispose of his property should he wish, subject to certain restrictions and limitations set by the state, which is deemed to be the only absolute owner of land (Onalo, 1986, p18). His ownership of the land has no time limit as is the case with leaseholds.

Leaseholds are an interest in land for a definite period, usually subject to the payment of a fee and subject to certain conditions. Public leaseholds are created when government or public bodies lease or rent land to private individuals or firms. Public lands owned by the government are alienated under the Government Lands Act cap 280 and the Local Government Act cap 265 of the Laws of Kenya for Local Authorities. Private leaseholds refer to the leasing of land by a private owner to a third party.

Although tenure is generally considered a legal concept, it involves the occupants perception of his interest in terms of development (Doebeler, 1983,p66). When it is leasehold, the lease or licence greatly affects the activities that the leaseholder can engage in, directing his occupation. The lease or licence becomes the most important document to both the lessee and the lessor.

## 2.2 The Lease and Licence Agreement: The Kenyan Context.

### 2.2.1. Definitions.

The grant of an interest in land in exchange for periodic payment of a rent is a well developed commercial concept (Scarrett, 1983, p38). This may take the form of a lease or a licence.

The word "Lease" often refers to a documentary leasing instrument. The Encyclopedia of Forms and Precedent "Landlord and Tenant" defines a lease as follows:

"A transaction whereby one party, while reserving a reversion to himself, confers upon another party the right to exclusive possession of real property for a term, whose limit is either definite as a lease at will or from year to year, and as rule receives a recompense in the shape of rent normally in the form of money, fine rendering of chattels or service." (p6).

In the Kenyan statutes a lease is defined as :

"a grant with or without consideration, by the proprietor of land, of the right to exclusive possession of his land".

(Registered Land Act cap 300, section 3)

The Indian transfer of property Act defines a lease of immovable property as

"a transfer of a right to enjoy such property made for a certain time, in return for a consideration to be rendered periodically or on specified occasions to the transferor by the transferee" (section 105).

The grantor of a lease is usually a landlord, the lease being granted in terms that are consistent with the nature and quantity of the estate he holds.

### **A Licence**

Although it creates an interest similar to a lease, a licence is not a lease. Defined simply, it is a permission which is granted by a person to another allowing them to enter upon his land and do something or perform an act which would otherwise be a trespass (Wanjala, 1990, p19). It is a temporary arrangement that can be terminated at any time.

Not all licences are temporary in nature. Some allow licencees to remain on land for long periods, thereby acquiring an interest in the land. It is this situation that makes it

difficult to distinguish between a licence and a lease.

A lease or licence may be created either by the execution of a document, or in equity by an agreement for a lease. In Kenya there are several statutes that deal with leases and licences. Each lease or licence has to be administered in accordance with the statute under which it falls.

### 2.2.2. Legislation on Leases and Licences.

Leases on government lands are granted under the Government Land Act cap 280 of the Laws of Kenya while leases on trustlands are alienated under the Local Government act cap 265. These leases are registered under the Registration of Titles Act cap 281. Section 3 of the Government Land Act cap 280 confers on the President of the Republic of Kenya the power to make various grants, leases being one of them. Plots are created from unalienated land and are to be sold by public auction although other methods of allocation may be applied, for instance direct allocation to particular organisations or individuals. The day to day administration of land is carried out by the Commissioner of Lands (or his agents) who does not enter into negotiations with the would be lessees or licencees as to the terms of the agreement and the leaseholder or licencee is bound to accept the terms offered. This is because of the extent of government land and the number of leases or licences granted. Were the Commissioner to negotiate terms with each lessee or licencee, he



would spend most of his time on it. Sections 18, 34 and 39 of the Government Land Act cap 280 provide the implied covenants to the agreement while sections 69-76 indicate the rights and obligations of the lessee and lessor, licensee and licensor, to the agreement. Section 99 requires that all transactions on government land be registered and Section 100 makes it clear that when a lease is not registered, it is not acceptable in litigation.

Under the Registered Land Act cap 300 of the Laws of Kenya leases are created on privately owned land. The landowner usually negotiates the terms and conditions of the lease and licence with the wouldbe lessee or licensee. However, the act contains terms and conditions which are applicable to the lease and licence granted under it.

The Indian Transfer of Property Act ( orders in Council and applied acts, Group 8) applies to the lands originally held by the colonial settlers. It was enacted primarily to allow for the transfer of "crown" land to the early settlers under leases or freehold. Leases created under this act are registered under the Registration of Titles Act cap 281.

Under the law emphasis has been placed on the registration of leases. The Registration of Titles Act cap 281 , section 40-41 provides for registration of leases exceeding one year. Under this Act any unregistered lease does not pass on any interest in land, however, it does not make registration compulsory. Section

9 of the Trust Land Act cap 288 of the Laws of Kenya states that all leases must be registered in the office of the Commissioner of Lands in the manner prescribed by the act under which it is being registered. The Indian Transfer of Property Act requires registration of any leases for a period exceeding two years. Under the Registered Land Act an unregistered lease can operate as a contract between the two parties and can be used to support a caution, an action for specific performance, for damages or for recovery of anything paid under the agreement.

A leaseholder or licensee does not have the freedom to utilise or develop the plot as he so wishes. In Kenya several development control legislation exist. These include the Town Planning Ordinance of 1931, the Land Planning Act cap 303, and The Local Authority Powers of Control derived from the Local Government regulations 1963. They aim at directing the development of an area in an orderly manner in accordance with a pre-conceived plan.

The Town Planning Ordinance 1931 contains provisions for the development, use and control of government land. Under section 24 the Commissioner of Lands is empowered to control subdivision of plots in urban areas by ensuring that no land within a township or municipality is subdivided except under the provision of a town planning scheme approved under this ordinance or a another plan approved by the Commissioner of Lands.

The Land Planning act is mainly concerned with the control of developments and requires that consent be obtained from the

relevant authorities before development is carried out. Applications for approval must include the development plans and any other information to show the applicants intentions. The Act defines "development" to include the erection of buildings, any material change in the use of or density of any building or land and the subdivision of land.

The extent of development control will greatly depend on the type of lease granted and its duration.

### 2.2.3 Types of Leases.

The type of lease drawn will depend on the type of property being leased and the intentions of the parties as each category of real property has its own peculiarities. For instance building leases are granted over land ripe for development. The lessee undertakes to pay a yearly ground rent, which is usually nominal, and to develop the land and maintain the developments in a good state of repair (Balchin, 1985, p68). Under the Government Lands Act such leases on urban plots are usually granted for a term of 99 years. Longer leases of upto 999 years are granted on agricultural land. Shorter leases of 33 years are common on urban trust land.

Other types of leases include:-

- (a) Occupation leases granted on land and buildings for occupation by the lessee. These are usually for short a term such as 3 years or 5 years.
- (b) Periodic tenancies in which the tenant holds the

property from year to year or a period less than a year.

- (c) Service tenancies where the tenants occupation is strictly in connection with his work.
- (d) Tenancies by estoppel in which property owner or tenant are estopped from denying the existence of a lease after behaving in a manner as to make another believe that there is a lease.

A lessee may sublease or assign his interest, creating a tertiary interest for the duration of the term that he holds the lease either at the same rent or at any other figure he may be able to obtain. The lease may contain a clause allowing this. Sublessees may further sublet their interest and the resulting chain of tenancies have the effect of diminishing the control the owner has on his property.

#### **2.2.4. Controlled or Statutory Leases.**

Controlled or statutory leases are a special type of lease. They are controlled because the parties, especially the property owner, cannot act of their own free will. In Kenya controlled tenancies over residential and commercial premises are governed by the Rent Restriction Act cap 296 of the Laws of Kenya and The Landlord and Tenant Act cap 301 of the Laws of the Kenya. The main characteristics of these leases is the heavy control by the government through special courts referred to as Tribunals (Wanjala, 1990,p18). The aim of this control is to protect

tenants from harassment, eviction and exploitation by the property owner or his agent.

The rent restriction Act cap 296, which was last amended in 1981 after being established in 1959, protects low income earners who are not able to afford high rents for residential quarters. The act defines controlled tenancies as those whose standard rent does not exceed Kshs. 2,500 per month or are not let on a service tenancy and those exempted from the provisions of the act.

The Landlord and Tenant Act cap 301, provides protection for small business men who engage in common retail business. This category of traders are deemed not be wealthy nor influential as the landlord. Under section 2(1) of the Act a controlled tenancy of a shop, hotel or catering establishment is that which has not been reduced into writing or which is in writing but does exceed 5 years or has provision for termination within 5 except for breach of lease, or tenancies especially exempted by the Minister under section 2 of the act.

A tenant is protected in the eyes of the law and can make reference to the tribunal when disputes arise. The landlord and tenant must follow a prescribed procedure in cases of dispute and issue the required notices before terminating the tenancy. For the landlord this can prove to be time consuming, costly and frustrating, especially as the tribunals aim at ensuring that tenants are not exploited or evicted.

The lease document acts as an agreement between the two parties and the landlord faced with the problem of controlled

tenancies can avoid them by extending a five year lease by a month or months in case of commercial leases. For residential properties one way of avoiding controlled tenancies is by setting a rent above the controlled rent which was set in 1981. However, a tenant may apply to the tribunal to assess the rent payable on the rented quarter if they consider the rent excessive. In the current residential market inflation and rising costs ensure that the majority of newly constructed houses do not fall into this category.

The landlord must also be aware that delays in preparing and signing lease documents can create controlled tenancies.

### **2.3. Management of Public Leaseholds.**

Management, whether of property or any other resource is mainly concerned with decision making and the carrying out of those decisions. It has been defined as the implementation of policy decisions and the accomplishment of objectives (Scarrett, 1983,p2). Public institutions usually have reports, memoranda or a policy document defining their objectives. The estate plan states these objectives and provides a description of how they are to be met.

Estate management is concerned with the control and management of landed property. The land owner may manage the property by himself or appoint an Estate Manager to manage it on his behalf. For public estates the Estate Manager is usually an employee of

the organisation, while for private estates, in many cases, the Estate Manager acts as an agent for a principal. He implements the landlords policies, giving advice on the probable effects of the policies and suggesting alternative courses of action.

Whereas the chief objective of both private and public estates maybe to satisfy an economic or social need, for private estates " profit or at least the avoidance of losses, are usually essential " ( Thorncroft, 1969, p16). Thus the type of ownership, whether individual, joint or group, public or private, will affect the management style.

Management control through leasing and granting licences depends partly on well drawn and enforced lease terms and partly on the personal trust and confidence of the parties. Both the landlord and the tenant are expected to be conversant with the agreement signed, as it spells out the responsibilities of each party. However, successful estate management will depend on the institutional arrangements made for it. This involves the personnel and the duties they have to carry out and finally the remedies available when the terms of the lease or licence are breached.

### **2.3.1 The Institutional Framework for Estate Management.**

It has been said that staffing and organisation are a major determinant of an organisations success (Kreitner, 1983, p278). The structure of any organisation determines the line of authority and outlines and chain of command, division of labour

and assignment of responsibilities. Usually, authority flows from the top to the lower levels, diminishing with each successive lower level of management. Horizontally, it displays the division of labour and duties.

In estate management the type of organisation structure employed will depend on the type of property being managed, its size, distribution and the particular needs of the estate. It's form will try to ensure that management is direct, co-ordinated uniform and totally effective. Two commonly employed organisation structures are the Functional Departments System and Geographical Location System.

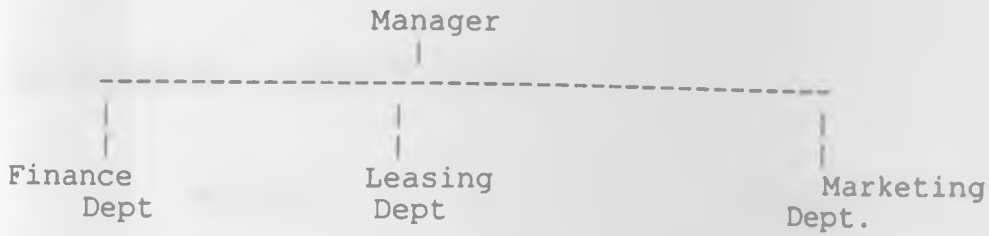
**(a) Functional Department System.**

It entails the categorising of jobs according to the activity performed, thus allowing for those with similar technical expertise to work together. It is criticised because it creates separate groupings which may work against the organisation, as some people will feel superior to others. The diagram below illustrates a typical functional department organisation chart, which can be modified to suit the situation.



CHART 1

A FUNCTIONAL DEPARTMENT SYSTEM CHART



SOURCE: MANAGEMENT, Kreitner, R. (1983)p246.

b) **Geographical Location System.**

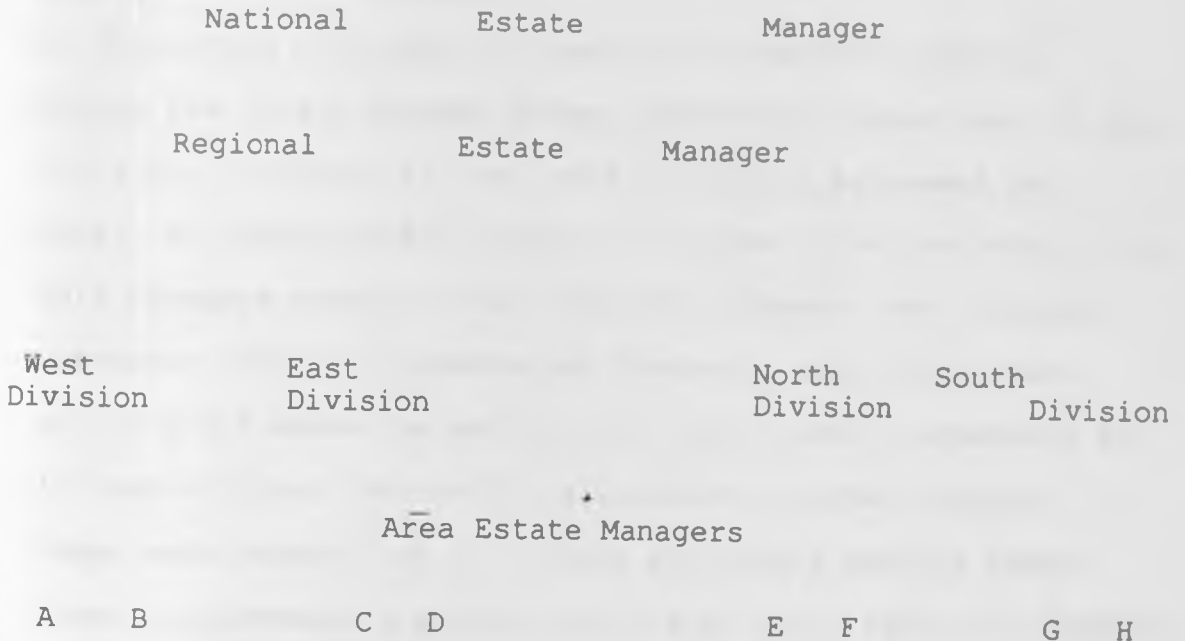
A geographic location structure is used by organisations whose span of operations are nation-wide or country-wide. It enables administrators to locate close to their place of work and has the advantage of localised supervision. However, problems of communication among the different units may arise, as units may be far flung. A typical geographic location chart is illustrated below.

The type of organisation structure employed affects estate management in that if the structure is too narrow, problems of over supervision, overly long lines of communication, slow multilevel decision making may occur. However, if it is too wide, it can erode efficiency, interfere with communication and create problems from under-supervision of subordinates. As each estate management situation is different, there is no ideal organisation structure. The structure chosen should aim at enabling the

Estate Manager control every aspect of the estate.

CHART 2

THE GEOGRAPHIC LOCATION SYSTEM



SOURCE: PRINCIPLES OF ESTATES MANAGEMENT, THORNCROFT, (1969) P194.

In any organisation the type and number of staff employed is of vital importance. Whereas in the short run an understaffed organisation can handle routine jobs, wider functions involving policy are ignored in the long run. However, having the appropriate number of staff does not automatically mean work will be done well. The staff need to be motivated and encouraged to do their work properly. Thus the institutional framework selected must allow for adequate staff to carry out duties involved in

lease administration. These duties are summarised as follows :-

- (a) The selection of tenants.
- (b) The negotiation of the lease terms.
- (c) Routine management.

### 2.3.2. Selection of tenants.

The Allocation of a plot or premises is the most important decision the Estate Manager makes. Selecting a tenant who is able and willing to adhere to the lease or licence agreement is crucial. An unsatisfactory tenant can prove to be the bane of the Estate Managers working life. From rent arrears and increased maintenance costs to nuisance and frequent allocation costs. Even rents set above the market level will rarely compensate for the trouble caused. Before the allocation is done, certain minimum requirements are set. Those applicants meeting these minimum requirements are then shortlisted for allocation. Methods that may be employed to select tenants include :-

- (a) **Date order schemes** which are usually used where demand is greater than supply. They entail the allocation in accordance with the order of receipt of the applications and are frequently used by public bodies as they are easy to administer. They assume that all applicants can pay, leading sometimes to selection of tenants who cannot.
- (b) Under the **Tender system** prospective tenants are invited to bid for the space available, indicating the amount of

money they can or are willing to pay. Usually the highest bidder gets allocation. This system has the disadvantage of not enabling the Estate Manager to look into the background of the prospective tenant. Also the highest bidder is not necessarily the most suitable tenant. For public bodies this system may ensure fairness.

**(c) Points System.**

The Estate manager first makes a list of factors he considers relevant in determining the need or suitability of the applicant. Each factor is awarded points according to its relative importance. The total number of points scored determines the applicants actual priority on the waiting list. This is usually used for allocation of public residential quarters. The points system is difficult to devise. Points require to be reviewed continuously as situations change. It however, provides a yardstick against which an applicants need can be measured with a fair degree of fairness.

**(d) Computer Selection.**

This method is used to speed up the selection process. Data on the applicants is fed into a computer. Programmes commonly used are based on the points system of allocation. Although this system is expected to be impartial, the data used may impede this.

**(e) Secret ballot.**

The granting of public leases permits a high degree of co-ordination between development policies and the appropriate use and development of the (Urban) land (Kiamba, 1991 p11). By allocating the lease to the party who will utilise it best, in the context of existing overall development policies, the lease terms can also be used to impose or grant individual relief. As leases expire the property can simply, in theory, be released to the most appropriate use.

Once tenants have been selected, the negotiation of suitable lease terms follows.

### **2.3.3 The Negotiation of Lease Terms.**

Like most contracts, real estate leases and licences contain certain express and implied covenants and conditions which constitute the essence of the lease and licence (Adkin, 1961, P23) and it is these that the Estate Manager administers to see that there are no breaches. Wheeler (1987, p 598) says that two separate but related requirements must be met if a lease ( or licence) is to achieve its objective. It must ensure that the parties have actually reached an agreement and that the lease document gives expression to the agreement reached.

The simple purpose of the lease and licence from the landlords point of view is to regulate the tenants occupation to the best advantage of the landlord, while the tenant has the benefit of knowing the precise terms of his temporary occupation

and although there is no prescribed form of lease or licence, nonetheless most are structured similarly into four parts. Typical lease and licence documents are attached as appendix 3 and 4 respectively.

The first part of the lease and licence document, referred to as the premises, usually covers the names of the parties to the agreement and the property leased. Details concerning the terms including the date of commencement are contained in the next section. The third section contains details of the rent, indicating the amount to be paid, the manner it is to be paid, and when it is to be paid. Finally, the fourth section covers the covenants in respect of the agreements. Nowadays there is a tendency to shorten the particulars of the main part of the lease or licence document and include a more detailed schedule.

In most leases and licences the major part of the document is concerned with the lessees covenants (Thorncroft, 1969, p142). Onalo (1986,p75) points out that the rights and liabilities agreed upon by the landlord and tenant are corresponding. For instance the right of the landlord to receive rent, rates and other outgoings corresponds with the liability of the tenants to pay them. The most common covenants entered into by the parties are those concerned with:-

- 1) Payment of rent and other outgoings.
- 2) The use to which the premises are put.
- 3) Alterations, additions and improvements to the property.
- 4) Assignments and subleasing.

5) Repair and maintenance.

6) The lessees right to quiet enjoyment of the property.

**1) The payment of Rent and other outgoings.**

Rent has been defined by Rowles (1959,p95) as the "sum of money paid by the tenant for the occupation of the landlords premises or land". It is usually a fixed sum, but instances where it is variable exist. The payment of rent is the most important covenant to the landlord and in the case of ground leases with distant reversions, it may be only one that is material.

The rent payable is normally expressed explicitly. For long leases rents are usually expressed as an annual sum, however, payment may be made weekly, quarterly or at agreed intervals (Wanjohi, 1987, p16). For licences rents are paid monthly, quarterly or half yearly, usually to coincide with the notice of termination period. Any interest to be paid on overdue rent will also be stated.

Rents are normally calculated with reference to the general level obtaining in the market, with comparisons being made with recent transactions of similar properties (Scarrett, 1983, p4). In the absence of a market, assessment of rents becomes difficult and may prove a point of contention between the two parties. Under Section 30 (2) of the Government Lands act cap 280 of the Laws of Kenya, any improvements carried out on the land are not considered when ascertaining the value of government

land for purposes of arriving at the rental value.

Apart from the rent, the lessee or licensee is also usually liable for the payment of all outgoings on the property. These vary in relation with the type of property leased and generally will include items like rates, water and sewerage charges, taxes, management costs and insurance. For long leases and licences on land and the major outgoings paid by the lessee are rates, which in Kenya are calculated using the unimproved site value rating system (Wanjohi, 1987, p14). The lease or licence will identify the outgoings and extra charges and their payment identified as additional or further rent.

Thorncroft (1969, p137) asserts that the main problem of rents is that they constitute a fixed income in times of falling money values. This means that rents fall below market value, especially with long leases on land, as costs of other outgoings keep raising. To guard against this the Estate Manager may employ the following actions:-.

- (a) Restrict the lease period over which the rents run unadjusted. For instance under the Government Land Act cap 280 of the Laws of Kenya, rents on Government leaseholds are revised after every ten years.
- (b) Include a rent review clause in the lease document, allowing for review at stated periods. The review is usually proportional to changes in the property market.



Hansson (1979, p72) points out that problems arise when landowners try to increase rents. Even when a reasonable increase is suggested to the lessee, he reacts against paying it, more so if the increase is double what he has been paying, which will be the case when rents are reviewed after long periods. Most review clauses indicate the period of review, the formula used to calculate the new rents and the provisions for an arbitrator in cases of dispute.

## 2) The Permitted User and Control of Developments.

The use to which the plot is to be put is usually decided upon by the landlord, in conjunction with existing Town Planning regulations in existence, where applicable (Smith, 1989, p128). The lease or licence will usually indicate the use to which the plot is to be put, such as " Shop" or " Offices", and the type of developments permitted, that is temporary or permanent. This enables the landlord maintain some control of what trade is carried out on his plot and prevent the tenant from engaging in offensive use of the premises. However, the length of ground leases and the unpredictable changes in the requirements of the business community and the property market are liable to result in problems quite unforeseeable at the time the document is drafted resulting in changes in the use of the plot. A change of user may have an adverse effect on the value of the premises themselves and neighbouring premises (Smith, 1979, p128). It maybe inevitable if a property is to continue to be profitably

used.

Yahya (1980,p401) says that although the written law in town planning and building control has a wide scope and is very strict on paper, the means of enforcing that law are generally ineffective. The authority inherent in these legislation is largely left to the Local authorities to enforce using their by-laws. Where leases and licences are drawn up, the covenants and conditions set therein seem to be more effective than the requirements of a statute or local authority by-law. This has been attributed to the property owner or Estate Manager being more sensitive than the planning authority to changes in property values, thereby enforcing the covenants.

### 3) Improvements, Alterations and Additions.

The restriction on carrying out of alterations (or additions) is an important safeguard for the landlord in ensuring that the premises do not lose their identity or the structure suffer physical distress (Thorncroft,1969,p144). The tenant is usually allowed to carry out such works with the landlords consent. Under certain circumstances the landlord may be required to compensate the tenant for improvements carried out on the expiry of the lease. This is usually the case with short leases of upto 30 years, as alterations made by the tenants tend to be small and related to the day to day activities. For long leases, this may take the form of a major redevelopment affecting the entire estate and it's surroundings. Ground leases granted under the

Government Lands Act cap 280 of the Laws of Kenya stipulate that the lessee is expected to develop the leased property within three years. The developments reverting to the landlord upon expiry of the lease.

Smith (1989,p126) asserts that the landowner or his estate manager may by content to rely on the law to protect the reversionary interest on the lease against damage caused by tenants making alterations or improvements to the premises. However, this does not absolve the landowner or his estate manager from the need to prevent it happening.

Conflicts sometimes arise between the landlord and the tenant as to what comprises additions, improvements, and alterations. Semenow(1977,p401).gives an example of a tenant erecting shelves in a leased store, on expiry of the lease can he remove them or are they considered alterations, additions or improvements, to be left on the premises upon expiry of the lease?. A clause directing the tenant to restore the premises to its original condition may help lessen this problem.

#### **4) Assignments, Subleasing and parting with possession.**

An Estate Manager may restrict a tenants powers by requiring that his consent is sought before any transaction or specified transactions are done. These transactions include subleases, assignments and transfers. When a tenant assigns his interest, he transfers his entire interest to the assignee, who becomes liable under law to the lease. A sublessee is directly

responsible to his immediate landlord, who is the tenant, and has no direct relationship to the head leaseholder. This has the effect of diminishing the landlords control on his property.

At common law a tenant has freedom to dispose of his leasehold interests by assignment, subletting mortgaging or by allowing any persons into exclusive or none exclusive occupation (Smith, 1989,p117) .

#### 5) Repair and Maintenance

Preservation of the fabric of an estate is of importance to the Estate Manager. For leases and licences on land, where the tenant erects the buildings himself, responsibility for their repair and maintenance usually rest entirely on the tenant. When the landlord leases a building the responsibility for repair and maintenance usually is shared between the landlord and tenant. For instance, in commercial properties with leases of over seven years, tenants are responsible for all repairs and maintenance. For terms less than seven years, any responsibility is shared, the landlord maintaining the external part of the building while the tenant caters for the internal repairs. This also applies to residential lettings.

#### 6) The tenants right to quiet enjoyment of the property.

The term "quiet enjoyment" refers to the landlord allowing the tenant to occupy the leased premises without interference from him. The clause aims at protecting the tenant from

harassment from the landlord. Interference by the landlord may occur, for instance, when the he erects a fence around the leased property, in an attempt to evict the tenant, thereby preventing the tenant from entering. In residential properties landlords may remove doors, windows, disconnect the water or electrical lighting in an effort to evict the tenant.

Once the terms of the leased and licence are agreed upon,, the estate manager can now enforce them. This is done as part of his routine management duties.

#### **2.3.4. Routine Management Duties.**

Routine estate management duties include rent collection, periodic inspections of premises, answering tenants complaints and maintaining property records. These are the recurrent duties, carried out on a daily basis or at specific intervals. They form the backbone of lease administration.

##### **i) Rent collection and arrears management.**

Although the tenant is aware of his obligation to pay rent, in practice many tenants do not pay rent voluntarily. It is left to the Estate Manager to ensure that rents are collected when they fall due. It is important to note that it is not the Landlords duty to send out demand notices and a tenant cannot claim non-payment for lack of a demand notice.

Different methods of rent collection may be used. In most public institutions office collection is used as the estate is

vast and tenants many. This method entails use of a central office where all tenants pay their rent. It is easy to administer and can pin-point defaulters quickly. As rents are not paid continuously throughout the day, staff involved in receipting rents are able to handle other duties.

The use of door to door collection or credit transfers are limited to defaulters and well known clients respectively. The Estate Manager is able to meet with defaulting tenants and inspect the premises at the same time. No single collection method has successfully eliminated arrears and the Estate Manager may find it necessary to use more than one method. At the end of the day the lack of arrears will demonstrate how successful the method used is.

Non-payment of rent by a lessee, for whatever reason, is the commonest breach of the lease agreement. Various reasons have been given to explain non-payment of rent. Mutua (1987,p10) points to poor collection methods by the Estate Manager as a major reason. A tenant may also deliberately withhold rent over some grievance or he may forget to pay his rent on time. Arrears may also arise due to a sudden crisis like the death of the lessee or the rent set may not be affordable by the tenant. It is the Estate Managers duty to ensure that the method of collection employed suits his office requirements in terms of staff and the type and size of property managed. Fox (1983,p15) says that the level of arrears is a very sensitive subject, being seen as an

outward reflection of the Estate Managers efficiency.

Popplestone (1980,p9-11) comments that (housing) managers rarely have any systematic information about the aggregate characteristics of tenant in arrears except a breakdown of defaulters by the amounts outstanding. For monthly rentals the acceptable arrears levels have been recommended as less than one percent (Syagga, 1979,p29) while for annual rentals arrears kept about two percent are acceptable. However, it is the Estate Managers duty to ensure all rents are collected when they fall due.

As soon as it is noted that a tenant is in arrears, immediate action should be taken to recover the arrears and stop their increase.

#### ii) Periodic Inspections.

Periodic inspections are important if breaches to the lease or licence agreement are to be discovered at an early date. Especially breaches to clauses concerned with maintenance and repair of the building, the use to which the premises is being put, and possible subleases or assignments, which diminish the control the landlord has. Their frequency will depend on the length and type of the lease or licence granted, with fewer inspections being expected for long leases of over 50 years (Thorncroft, 1969,p134). Personal contact with the tenants, which helps the Estate Manager know his tenants and record any complaints tenants is also made this way.

### iii) Maintenance of records

Estate reports and records provide the facts from which decisions are made (Thorncroft, 1969, p200). They require to be continuously updated to ensure the information held is current. Apart from financial documents and accounting records other records maintained include:-

- 1) The Estate Terrier which provides information on the physical, legal and economic character of the estates.
- 2) Records of correspondence which are normally maintained in case files or archives.
- 3) Estate reports which provide useful information for day to day management of the estate, for instance rent arrears, or annual reports carrying various details on the estate.
- 4) Revival systems consisting of cards, dairies or registers where remainders of action may be stored for revival at the appropriate time. For example information on lease renewals and inspections may have to be kept in this form.

Poor record keeping may result in wrong decisions being made, delays in making decisions or in the case of revival system, decisions never being made or made too late.



### 2.3.5 Breaches of the Lease Terms.

Landlords tenants enter into the leasing arrangement with the intention of maintaining a cordial relationship with each other during the duration of the lease or licence. The discovery of breaches of the lease or licence agreement sours this relationship. The Estate Manager may discover breaches during periodic inspections of the premises or after receiving complaints from other tenants. Tenants breach the lease terms because they are, for some reason, unable to fulfil them, for instance non-payment of rent in case of bankruptcy. Some tenants are ignorant of the terms of the agreement as they have never read or understood them, and therefore cannot carry them out.

Once the breaches have been detected, it is necessary for the Estate Manager to consider what action to take and carry out his decision promptly. Thorncroft (1969,p184) asserts that "...no action should be started unless it is intended to follow it through to its logical conclusion". Half hearted measures erode the effect of the actions taken. They only give the impression that the party seeking redress is not serious and may have the effect of encouraging others lessees into breaching the lease or licence. The remedies employed to breaches of the agreement by the Estate Manager must be consistent, avoiding haphazard remedial action.

Sometimes the Estate Manager breaches the lease covenants. When this occurs it is essential that he listens to the tenants complaints and work to rectify them.

### 2.3.6 Remedies for breach of the terms of the lease or licence.

Since a lease is a contract, the usual remedies available to any contractual relationship are applicable (Onalo, 1986, p80). These include the landlords right to distrain for rent, forfeiture or termination and re-entry, a restraining order against threatened breach or a continuing breach, an action for damages and specific performance.

#### 1) Distress for Rent

When a tenant has not paid his rent, a landlord has two direct methods through which he can recover the rent in arrears. These are by levying distress or by a court action. Semenow (1977, 407) defines distress as the right of a landlord to levy upon a tenants goods and chattels, for rent in arrears. It allows the landlord to seize and sell the movables found on the leased property for payment of arrears of rent due in him. Distress may be levied under the Distress for Rent Act cap 293, the Landlord and Tenant Act cap 301 or the Rent Restriction Act cap 296 of the Laws of Kenya.

Under section 16 of the Rent Restriction Act cap 296 of the Laws of Kenya, distress for rent can only be levied through the rent tribunal, which hears the complaint and may order distress to be levied. There are two schools of thought concerning distress for rent as provided for under the Landlord and Tenant Act cap 301 of the Laws of Kenya. Onalo (1986, p122) asserts that

whereas the Rent Restrain Act has section 16 which states clearly the position as regards distress, the Landlord and Tenant Act cap 301 lacks such a specific provision. Section 12(1) h of cap 301 permits the landlord to levy distress through the Business Tribunal. In the case of Provident Securities Ltd versus Trimfit Ltd, H.C.C.A no 91 of 1976 at Nairobi, Justice Platt held that where arrears of rent were not in dispute and the landlord did not want to terminate the lease, there was no need to apply to the Business Tribunal and the Distress for Rent Act cap 293 could be applied directly. However, in the case of Tetu Farmers Co-operative Society Ltd. versus Gerald Gatheru and 3 others at Nyeri H.C.C.A. no. 40 of 1981, Justice O'Kubasu maintained that the preamble to cap 301 states clearly that the intention of the act is to protect the interest of the tenants from exploitation by the landlord. The direct application of the Distress for Rent Act cap 293 would render the tribunal useless. He also held that cap 293 should be applied directly to tenancies that are not controlled. It is accepted that where there is a conflict between the Rent Acts and other acts of parliament bias is in favour of the Rent Acts.

Under the Distress for Rent Act cap 293 of the Laws of Kenya, distress can only be carried out when rent is in arrears. The Act allows the landlord to levy distress without the necessity of court proceedings. However, to be able to levy distress the landlord must be entitled to the reversionary

interest in the lease or licence. If he assigns his term, he may not distress for rent as he has no reversion. Under section 3 (2) of the Distress for Rent Act, goods may not be distrained between sunset and sunrise or on Sundays. The lessee or licensee can recover the distrained goods within ten days from the date they were impounded or notice given of the intention to impound them, after which the Bailiff can sell the goods to recover the rent in arrears. The Act further allows for the levy of distress within six months after expiry of lease or licence, in the case of a tenant holding over, provided the same landlord owns the property.

Under section 16 of the Act, government property, things delivered to a person exercising a public trade, tools and implements of the lessee or licensee to the value of one hundred Kenya Shillings, perishable goods, wild animals, wearing apparel and beddings, things exempt from distress under the Electric Power Act cap 314 of the laws of Kenya, any meter supplied or let on hire by a Corporation or company supplying water to the premises, are all exempt from distress. If the proceeds from the distrained goods are not sufficient to cover the debt, the landlord may sue for the balance of arrears. But when he first files proceedings, he cannot subsequently turn to levy distress if the judgment does not cover the entire debt. Section 76 of the Government Lands Act permits the Landlord to sue for rent in arrears. Walton (1960,p7) points out that a tenant cannot, as a rule, unless specifically agreed upon, set off against this rent

any sums due to the him by the landlord.

Kariuki (1990,p20) refers to distress for rent as "a nasty and hostile remedy" able to be abused by either the landlord or his tenant. The act therefore has strict provisions for interference with levy of distress and against wrongful distraint.

#### **b) Remedies for Wrongful Distraint.**

Walton (1960,p80) asserts that a tenant, whose goods and chattels have been wrongfully distrained may sue for the return of the goods or apply to the court for a restraining order to stop the landlord or his agent impounding his goods. If no rent was owing and the goods distrained have been sold, the tenant is entitled to double the value of the distrained goods. Under English common law the tenant could recover back the actual goods impounded.

#### **2) The Remedy of Forfeiture and Re-entry.**

Forfeiture is the landlords right to terminate the lease or licence when the tenant is guilty of violation of a material covenant. This may result from the tenant omitting to perform any part of the agreement or being declared bankrupt, or if a company, it goes into liquidation. Generally the ability to forfeit a lease or licence provides the landlord with his most powerful sanction for breaches of the covenants by the tenant. However, to enforce this remedy the lease or licence must contain a suitably worded clause. The right may be exercised by the

landlord either physically re-entering the premises or commencing proceeding for possession.

The law regarding forfeiture and the lessees relief is contained in the Registered Land act cap 300 of the Laws of Kenya sections 56-59 and 64; the Indian Transfer of Property Act sections 111g, 112, 114, 114a; and the government Land Act cap 280 sections 77-80. Most laws insist on the landlord or tenant serving the other party with a notice of their intention to forfeit the agreement.

The Government Land Act deals with the forfeiture of government leases and licences. The Act states that a debt due to the government is not extinguished by forfeiture and the acceptance of rent by the government does not concede a waiver of forfeiture, irrespective of the Act under which the lease or licence is registered. The question as to whether the Commissioner of Lands (Ministry of Lands) could automatically forfeit any government lease for non-payment of rent or breach of other terms like the failure to adhere to development conditions, was decided by the case of Sheikh Mohamed Bashir versus The Commissioner of Lands (1959) E.A.L.R 1018. The judicial committee of the Privy Council held that the Commissioner of Lands could not automatically forfeit a lease or licence. Onalo (1986, p46) states that this decision "firmly established the rule that forfeiture of a Government lease is a matter for the High Court of Kenya and not the commissioner of Lands (or his agent)". It is

then left to the High court to determine forfeiture.

Under section 77 of the Government Lands Act cap 280 of the Laws of Kenya, the Commissioner of Lands or his agent can commence an action in the High court for forfeiture of the lease or licence if rent is unpaid after thirty days from the day it fell due or if there is breach of the covenant. The landlord must give the tenant notice of his intention to forfeit the lease and for re-entry . He must also make a last demand to the tenant to make good the breach. It is only then that action can be started. The action must also detail the breach or amount in arrears.

Under the Indian Transfer of Property Act, the lease or licence determines on the notice being given. However, under the Registered land Act cap 300 of the Laws of Kenya the lease determines when the landlord peacefully re-enters the property or successfully sues for possession. In cases where termination is mutually agreed upon between both parties, no problems need arise. This is referred to as surrender of lease or licence. Where there is resistance from the tenant to vacate the premises, the landlord is faced with evicting the tenant.

**b) Relief against Forfeiture.**

Forfeiture may be waived if the landlord, after giving notice, does an equivocal act recognising the continued existence of the lease or licence. The most common action being demanding and accepting rent. However, for government leases and licences, Section 80 of the Government Lands Act states that the acceptance

of money or rent does not waive the governments right to forfeiture neither is a debt to the government extinguished by forfeiture. All subleases are determined when the lease is forfeited except where relief is granted by a court of law.

### 3) Eviction

Eviction is the unwarranted ousting of the tenant by the landlord. Semenow (1977,p401) says that it is a violent assertion of a right by the landlord as opposed to the right the tenant possesses for peaceful and quiet enjoyment. Faced with eviction the tenant may terminate the agreement by moving out and suing the landlord for any damages he has sustained, if he remains in possession of the premises, the tenant is still liable for rental payments.

Somehow (1977,p410) states that a landlord must resort to law and legal means, and not self-help, to obtain possession of the premises. Landlords of residential quarters have been known to remove doors, or windows and in some extreme cases roofs, to force a tenant to vacate a premises.

In spite of these remedies, it is obvious that landlords and Estate Managers prefer not to litigate every point on which non-performance by a tenant is observed (Kinnard, 1973, p37). The implications of enforcing these remedies has the effect of ensuring that they are not used unless absolutely necessary. Some of the remedies are difficult to implement, for instance the remedy of distress for rent is only workable where a lessee



has property that can be distrained. However, once the goods are seized, the landlord or Estate Manager is faced with the problem of storage and disposal. Further if the sale of the distrained goods does not provide all the rent in arrears, the Estate Manager may be forced to initiate an action to recover the balance. In the case of government leases, forfeiture does not automatically follow breaches of the lease. To obtain this remedy, the High Court of Kenya has grant leave. This is often a protracted process. Thus to avoid recourse to the law courts, the landlord or Estate Manager must endeavour to select good tenants and efficiently administer the leases and licences signed.

#### 2.4 Summary

Lease administration, whether of leases on land or buildings, requires the Estate Manager to have a thorough knowledge of the leases or licences he administers. The future relationship between the Estate Manager and the tenant hinges on the selection of tenants willing to adhere to the negotiated terms. This is especially important for long leases where the tenant remains in possession for long periods.

The lease agreement outlines the duties and obligations of each party to the lease. Breaches of the lease terms results in conflicts between the lessee and lessor. The remedies available to both parties involve recourse to the law, which has proved to

be time consuming and tedious. However, it is necessary that both parties ensure that any remedial action instigated is taken to conclusion.

The next chapter discusses the evolution of the Kenya Railways landed estate and the leases and licences created thereon.

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## CHAPTER THREE.

### The Kenya Railways Corporation Real Estate.

" A type of interest in Land will normally imply a certain power and or responsibility in the use and management of the land..." (Kiamba,1991,p1)

#### 3.0 Introduction

It is an accepted concept that land comprises a major asset of any organisation. Government parastatals and quasi government organisations like local authorities in Kenya are the major holders of every prime land (Moturi,1991 p1). The Kenya Railways Corporation holds one of the biggest estates in single "ownership" in Kenya. This land should be managed in such a manner as to effect the best and maximum benefits for the owner and those who use the land.

The Railways of the world have had a great effect on land patterns and the landscape. They have formed part of the revolutionary changes that have occurred throughout history. With the development of transport links, commerce and industry throughout the world have been encouraged. The railway itself modified the landscape and was the means by which many towns have grown to their current sizes (Pollins, 1971,p191).

The railways as a pioneer in opening up new lands is well known and despite fierce competition from other modes of transport, it is still being built. In Britain, the birth place of the railways, the identification, survey and acquisition of land for the railways not only provided the foundation for the

railways but also aided the establishment of the surveying profession. Land was required not just for the track bed but also for stations, locomotive and carriage sheds and works, goods yards, hotels, offices, ports, houses for employees, quarries, steel and gas works (Biddle,1990 p9).

In North America the railway surveyors opened up the west, not merely mapping the ground for the first time but also exploring it, frequently with vigorous opposition from the native Indians. The magnitude of their work can be appreciated by the fact that, in the United States of America about four (4) million acres is owned by the railways, with the line stretching across the continent. In Latin America, the British contractors who build many of the railways insisted on acquiring five kilometres (3 miles) of land on each side of the track for the exclusive use of the railway authority (McAuslan, 1985, p28).

In Asia, the Indian Railways system also built during the colonial era by the British colonialists, virtually forms the lifeline of the country. Spanning a massive 62,211 Km it is Asia's largest and the world's second largest (after the Soviet system) railways system under single management.

In Africa it was anticipated that the railway would have a revolutionary effect in settling the continent thereby opening it up for trading. The railway was also expected to eventually become self financing with land being seen as the most valuable investment.

This chapter looks at the origins of railway land ownership and management in Kenya with the aim of providing the background information to the types of leases managed by the Corporation and any possible historic reasons that may contribute to the problems plaguing land lease and licence administrations today.

### 3.1 Origins of Kenya Railways Corporation landed estate.

It has been erroneously asserted by the colonialists that the railway is the beginning of all history in Kenya (see Hill, 1976, pV). Although this is not true, the modern economic history of Kenya literally "began" with the construction of the Kenya-Uganda Railway. The creation of Kenya as a British Colony was also greatly facilitated by the construction of the Railway.

When the idea of building the railway from the east coast of Africa to the shores of Lake Victoria Nyanza was first conceived, the ownership of land in present day Kenya was deemed by the colonial powers to be under two separate systems:

(a) Freehold at the coast where there was the ten mile strip under the jurisdiction of the Sultan of Zanzibar.

(b) Customary land tenant in the interior where seasonal cultivations of land by the local communities was adjudged not to constitute personal title to land by the colonial government ( Mortimer Report, 1952, p1).

Establishing the status of land tenure in the interior became of utmost importance. In Britain, the railway line was



forced to detour as some landowners demanded huge compensation for land to be acquired by the railways authority or refused to sell their land. This greatly increased the overall costs of construction of the railway (Biddle, 1990,p9). Experience had also taught the British to safeguard themselves against any future adverse reactions of the indigenous people to the British possession of their land (Kingoriah,1980,p100). In 1896 the British foreign office on the question of land ownership in the Kenya protectorate stated

".....The acquisition of partial sovereignty in protectorate does not carry with it any title to the soil. The land is foreign soil and does not become vested in Her Majesty."  
(Kingoriah, 1980,p101)

This then meant that acquisition of land for construction of the railway was virtually impossible. To overcome this, in 1897 an order in Council was passed allowing the application of the Civil and Criminal Laws of British India to the Kenya Protectorate. Land in the interior could now be compulsorily acquired under the Indian Land Acquisition Act of 1894. The Engineer to the Uganda Railways (as it was called then), George Whitehouse, who was also the Commissioner of the Protectorate, was given " permission to lay the railway over any land, irrespective of ownership and occupation and to reserve an area 1.6 kilometers wide on either side of the track for railway purposes" (Kingoriah, 1980, p102).

The first acquisition of land was made at the coast when 372

acres was purchased by the Railways administration. In the interior land extending one mile on each side of the railway line and along the entire length of the track was reserved to the Railways by the May 1897 Proclamation (Lovering, 1951 p1). The railway administration was to alienate this land and the revenue derived therefrom used to offset the loan of ,5,550,000 advanced by the British government to facilitate the construction of the railway line (Mortimer, 1952,p1). They wished to facilitate the construction of the railway to help suppress slave trade and secure the headwaters of the River Nile, which was of strategic importance at the time, to British interests in Egypt (Lovering, 1951,p1). This land became known as the "Railway Zone".

From the beginning certain differences of opinion existed to the status of the "Railway Zone" (Lovering, 1951,p2). This was clarified in 1899 by Lord Salisbury, the British Prime Minister, who stated that the zone was to be regarded as an asset of the Railway. He further pointed out that

"The railways holds its land not for any private need but for the benefit of the British taxpayer who had advanced the capital for making the line and looks to the Zone as practically the whole source from which that capital can be recovered".  
(Lovering, 1952,p2).

This zone was to become the most valuable land in the Protectorate and by 1900 printed forms of leases were in existence with railways Chief Civil Engineer as the lessor on behalf of the railways. The allottees obtained 25 year

certificates with provision for renewal if all the conditions of the certificate had been obeyed.

Construction of the railway begun in 1896. As the railway pushed into the hinterland beyond Mombasa, the civil government of the East African Protectorate followed in its wake. It had been expected that such a railway would open an enormous district around the lake and provide a basis from which trade (and civilization) would permeate Central Africa (Hardy, 1965,p3). Soon a steady trickle of European settlers introduced problems of land tenure as their settlements closely followed the trail set by the railway. It became apparent to the colonial administration that have a two mile wide railway zone separately administered was an anomaly and the question of repayment of the loan received from British government ought to be considered as a separate financial problem without what amounted to an occupational mortgage on the most valuable land in the Protectorate (Mortimer Report, 1951,p4).

In 1902 it became administratively convenient for the protectorate officials to take over the management of the railway zone, with an account being set up for the transfer of profits made from the zone after a percentage deduction for management, to be remitted to the British treasury for the repayment of the loan. The Railways became a branch of the Protectorate administration and their retention of the zone as a separate estate ended. The Protectorate administration became the possessors of the railway together with, as far as it is

separable from the railway itself, the railway zone. However it is important to note that the colonial officials contemplated that some day the zone may again be treated as belonging to the Railways and with this in mind:-

(a) The railways administration was to be consulted before any interest in the land were alienated.

(b) Any land within the zone required for railway purposes was to be handed back to the railways free of charge (Lovering, 1951, p3-4).

Thus although the railway administration had no title to the land it acquired a vested interest. The new Railway zone then became:

(a) An area 100 ft. on each side of line. This is still the case today.

(b) For railway owned buildings outside the 100ft zone, a space between each building and the railway line and moderate space around such buildings.

(c) 10ft. on each side of pipelines.

The corporation has several water pipelines, a heritage from the time of the steam engines (Rupia, 1990,p4).

It was recognised that the Railway zone comprised of an inner zone 100 feet wide on either side of the track which was absolutely reserved and necessary for the proper operations of the railway and an outer zone, one mile wide on either side of the track within which the Railway administration possessed

restrictive rights in respect of alienation.

Today a corridor measuring 100ft on either side of the track along the length of the railway is retained with the station reserves measuring 600ft in width and 2000ft in length. Crown land has also been alienated for railways staff housing and other operation needs (Moturi, 1991, p).

The question of the railway zone was finally settled in 1938 with the loan advanced to the Railways Corporation for construction of the line being written off and the colonial government retaining the railway zone (Lovering, 1951,p18). Map 1 shows the railway system today.

### 3.1.1 The Early Land Policy 1925 - 1950.

In 1925 the Railway administration recovered control of the railway zone under a new arrangement published in a Memorandum of Conclusions arrived at after a joint meeting between the railways administration and the colonial government. As a result of the rapid expansion of the Protectorate's economy, it became necessary to develop rail served industrial areas. The Protectorate administration had neither the funds or the necessary manpower required and looked to the Railways administration for assistance. The Railway administration was to administer the land required for development of rail served godowns and provide the required infrastructure and services. A financial arrangements was also made where the railways would

maintain a land account to hold any profits from land management, originally every five years, but later agreed upon after every 25 years (Lovering, 1951, p9). This was to enable the railways recover the costs of providing the infrastructure and other services.

This arrangement was discontinued in 1932. Despite pleas by the railways administration to have the now rail served industrial areas allocated to it free of any restriction and charges, the land was allocated on a lease, with the railways becoming a lessee of the government (Lovering, 1951,p16). The land was put at the disposal of the railways administration at the nominal fee of K,50, as the government considered that the railways was not interested in making profits but in providing good rail facilities to factory and industrial sites. The lease was subject to:

- (a) The government having a right to resume possession of the land, without compensation for only undeveloped portions, which may be required for public purposes other than godowns development.
- (b) A provision to the effect that any such arrangement would be liable to review in the event of an alteration in the existing financial relations between the Government and Railways.

Following this arrangement it was agreed that there was no need for a formal lease. The existing godown and commercial areas and possible future additions, were to be administered by

the railways who were also to retain the accruing income. This was the beginning of the government agency. This arrangement has the advantage of utilising railway finances and staff for the development of government industrial areas which in turn increased the much needed traffic for the railways.

In order that the railways manage government land (as explained later) the Railway Chief officer dealing with lands namely and Chief Civil Engineer was gazetted an Assistant Lands Officer, this appointment having been carried in Government gazette notice No.588 of 1934 p 1195 (Lovering,1951,p21).

In June 194 discussions on the availability of land in future for industrial use were hold between the government and Railways administration. The government decided that henceforth land required for this purpose would be handed over to the Railways covered by the nominal K\$50 rental subject to the Railways "no profit" policy and the land remaining crown land able to revert to the government should railways fail to maintain the present policy. The new Nairobi industrial area measuring approximately 600 acres was developed under this arrangement.

This policy persisted until 1951 when a report prepared by Sir Charles Mortimer detailing the future land policy was adopted. The colonial government were not happy with the existing arrangement. They feared they were losing revenue.

### 3.1.2 The Mortimer report

In 1951 a report was prepared by Sir Charles Mortimer on

" Land for Industrial purposes administered by the East African Railways and Harbours". The author of the report was a former Commissioner of Lands and a Minister for Lands in the colonial government. This report was to prove a turning point in the history and management of railway land (Lovering, 1951, p22).

The report recommended that in future a different system be put into operation for the planned development of industrial areas whereby " the government of the colony will retain full control over its own land estate.... subject to consultation with the railway administration, whilst, the railway administration would be responsible for the construction and maintenance of sidings and would levy charges against the government for this work" (Lovering, 1951, p22). The report did not mention that the existing system was in any way at fault and no emphasis was made of the "no profits" policy of the Railways.

The recommendations of the report are summarised here below:-

- (a) Government should resume control of the new Industrial area, Nairobi, reimbursing the railways for any over expenditure and applying the new the policy immediately.
- (b) That the government would be responsible for alienating industrial plots and receive all revenue accruing.
- (c) The provision of services would be undertaken by the railways or the government, depending on who could do the work most economically and the cost would be



recovered from the lessee by the government.

- (d) Siding facilities would be constructed by the Railways for government and charges would be levied for construction and maintenance.
- (e) That the existing policy would continue for the old areas already developed and alienated but that on expiry of the 30 year leases granted by the railways the government should secure an adequate benefit from the extensions.

To implement the recommendations of this report, it was proposed that the existing policy (i.e Railway administration of the land) be continued for areas outside Nairobi already developed and alienated. This would be subject to the new system being applied, if practicable, in individual cases of extensions to those areas as stated above. To simplify the implementation process, it was agreed that most of the existing industrial areas should remain under the administration of the Railways. This excluded the new industrial areas at Nairobi, Kisumu, Thika, Kitale, Nakuru and Eldoret which would be administered by the government or local authority.

On reimbursement of moneys expended by the railways on government land, it soon became apparent that the government could not afford to make these payments. The government decided that the railways retain administration of the old industrial areas until such a time as the government could afford to pay the

Corporation. This state of affairs exists today although efforts are being made by the government to take over management of the lands.

### 3.1.3 Effect of the 1978 breakup of the East African Community.

Until 1978, the railways management managed lands owned by the railways in all three East African states. With the breakup of the East African Community this had to change. The issue of division of the real estate and its liabilities arose. The liabilities included the land site rates.

The system of land ownership in the three countries differed. In Tanzania, which followed a socialist system of government, the issue of individual title to land was not of a great importance as here was no private ownership of land. In Uganda, there was the mailo system, a form of lease holding, and customary tenure in the larger part of the country. In Kenya, the inherited colonial capitalist system where private ownership of land existed. With respect to the landed estate each country's government retained the estate within their boundaries.

Since the lands of the now defunct East African Railways had been vested in it, legally the new Corporations could not transact in them. It was therefore necessary for the different governments to vest the lands in the new corporations. In this respect the Minister of Lands in Kenya, in 1985 vested in the Kenya Railways, by a notice in the gazette, all lands held by the East African Railways in Kenya (Estates Dept. KRC, File GL

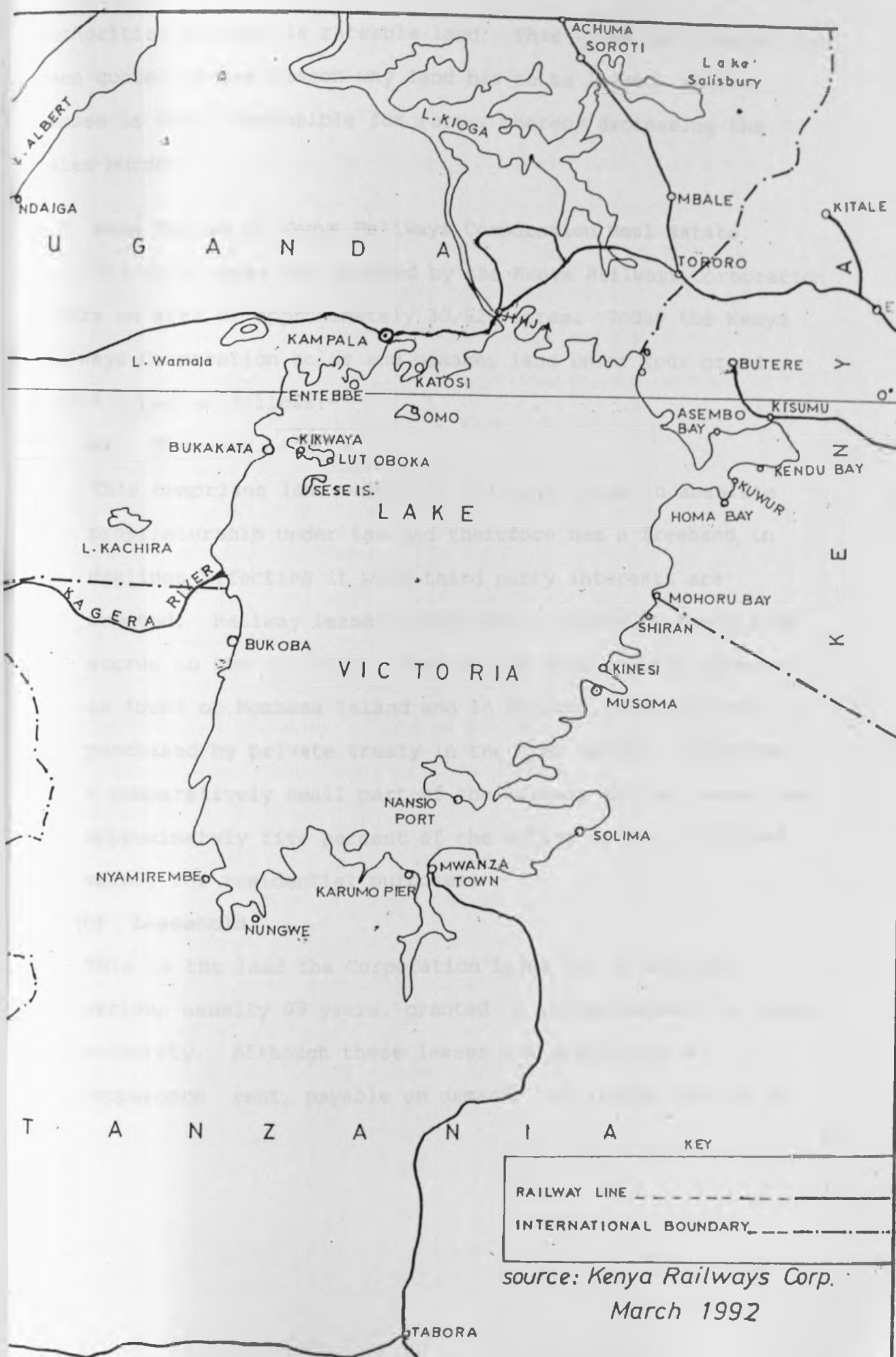
2/12/5). This included land held under various titles, including letters of allotment, freeholds and the " \$50 land" which included all Railways managed Industrial areas and Godowns plots except the new industrial areas.

In 1967 the then East African Railways and Harbours had broken up to form the East African Railways Corporation and the East African Harbours respectively. In the port towns of Mombasa, Tanga and Dar-es-salam assets were divided exclusively to the newly created harbours authority while the railways retained those absolutely necessary for its operations. The inland ports and some vessel were retained by the railways, for instance at Kisumu and Homabay in Kenya, Mwanza and Bukoba in Tanzania and Jinja and Entebe in Uganda. Map 2 illustrate the towns.

The issue of site rates was treated separately with each country inheriting their respective debts. In Kenya, the Minister for Transport successful obtained pardon for the outstanding dept, with the new Corporation being expected to pay rates from its inception. However the question of what constitutes rateable land is still to be revolved. The Corporation has been exempted from paying rates on operational land, which according to the exemption order, includes lands specifically used for the running of the trains. This categorisation is vague leaving room for disputes. Problems of ascertaining the exact acreage that is exempted, especially at stations, has resulted in disputes with the various Local

# LAKE MAP

Map 2



|                        |           |
|------------------------|-----------|
| RAILWAY LINE           | — — — — — |
| INTERNATIONAL BOUNDARY | - - - - - |

source: Kenya Railways Corp.  
March 1992

STABORA

Authorities on what is rateable land. This rates debt burden has been quoted as one reason why land has to be leased, as the lessee is then responsible for rates, thereby decreasing the rates burden.

### 3.2 Land Tenure of Kenya Railways Corporation Real Estate.

The land owned and managed by the Kenya Railways Corporation covers an area of approximately 30,820 acres. Today the Kenya Railways Corporation holds and manages land under four broad tenure types as follows:-

#### (a) Freehold.

This comprises land which the railways holds in absolute proprietorship under law and therefore has a freehand in dealings affecting it when third party interests are created. Railway leases issue and all benefits there from accrue to the railways. Most of the land in this category is found on Mombasa Island and in Nairobi, where it was purchased by private treaty in the open market. It forms a comparatively small part of the Railway estate, measuring approximately five percent of the entire estate, utilised mainly for residential purposes.

#### (b) Leasehold.

This is the land the Corporation holds for a definite period, usually 99 years, granted by the government or local authority. Although these leases are granted at a peppercorn rent, payable on demand, the leases contain a

restrictive covenant prohibiting the grantee from selling, transferring, subletting or otherwise parting with the possession of the land or any part of without the previous written consent of the Commissioner of Lands. Under the current land policy, land is to be surrendered back to the Government of Kenya when it becomes surplus to the needs of the Corporation, free of any compensation unless it is developed. This provision has been on several occasions used to enable the government acquire railway land as is the case of land acquired for the construction of the new British High Commission building in Nairobi, the extension of Pangani Girls High School and the Department of Law of the University of Nairobi.

**(c) Vested Lands.**

This comprises land which was prior to 1st June, 1963 either unalienated government land or was vested in the Trust Land Board and was being used or reserved for the following purposes:

- Premises used by the railway administration.
- Railway lines, marshalling yards and siding reserves.
- Workshops and training schools.
- Operation of Ports including piers, jetties and other related installations.
- The navigation of vessels and aids thereto.

This land is clearly operational and necessary for the running of the railway business. Though it is not mentioned in the vesting rules, it is assumed, that this land is vested in the Corporation if freehold. The assumption is based in the concept of the ownership of the Railway Zone and the latent interest the Corporation has in it.

**(d) Land managed on behalf of the Government.**

The Corporation acts as a managing agent for some rail-served industrial areas on a five year agency agreement. Under this agency, where the Government hold land in an area with sufficient demand for rail served industrial plots, the Corporation plans the area and provides the necessary infrastructure and alienates the plots in consultation with the Government. These plots are then managed by the Railway Corporation with Government grants being issued. These lands are found in the new Nairobi Industrial area, Kisumu, Kitale, Changanwe and Nakuru industrial areas (see Map 1).

**3.3 The Railways Estate.**

The railways estate can be categorised by user into two, Operational lands and Non-operational lands.

**(1) Operational lands.**

These comprise all lands used, required or held for the current or future running of the railway business. They include the trackbed, siding reserves, stations, marshalling

yards, workshops, depots, engineering yards and premises used for administration and control of the services provided by the railways. This land, vested in the railways by the 1963 vested order is yet to be surveyed and has no title. The Commissioner of lands has intimated that once survey work has been done, titles will be issued to the Corporation.

It forms the bulk of railway land holding measuring approximately 28,500 acres, and consists mainly of an operational corridor 200 ft. wide along the track and 600 ft. wide at stations. Temporary occupation licences are granted at station areas and stacking plots to facilitate the movement of goods are also created. Stacking plots are of a very temporary nature and are not the subject of this study.

## (2) Non-operation land

This is land not required for the running of the railway business. It comprises the following groups:

### (i) Commercial land.

This has come about mainly due to changes in zoning where once operational, residential or industrial land has now acquired a high commercial potential. This may also be due to physical growth of the surrounding areas. This has occurred in Upper Hill area in Nairobi, Nairobi Railway Station area and Mombasa



Railway Station area.

(ii) Industrial land.

Railways manages two categories of industrial land covering approximately 1500 acres. These are:

(a) Railway owned industrial areas.

This consists of Railway purchased freehold found mainly on Mombasa Island with the majority of titles in this category being residential with few industrial and operational.

(b) Fifty Pound (K, 50 ) industrial land.

This covers all the remaining rail-served industrial areas other than Mombasa Island and the old Changamwe area.

Government leases are issued on these lands. In some Industrial areas namely Nakuru, Kisumu, Eldoret, Nanyuki and Nyahururu, railways retains the proceeds after paying the annual K,50 rental. The approximate acreage in this category is as follows:

TABLE 3.0

ACREAGE OF K,50 LAND

|                |             |
|----------------|-------------|
| Nairobi .....  | 35 acres.   |
| Nakuru.....    | 100 acres.  |
| Eldoret.....   | 22.5 acres  |
| Naivasha.....  | 1.2 acres.  |
| Kisumu.....    | 60 acres    |
| Nyahururu..... | 18.4 acres. |

SOURCE : KENYA RAILWAYS CORPORATION , ESTATES DEPARTMENT, 1992.

(iii) Land purchased by Railways but vested in Government.

This type of land overlaps that of the above category. It includes land compulsorily acquired by the Government on behalf of Railways with funds supplied by the Corporation.

As custom demands these lands are vested in the Government and the Commissioner of Lands issues leasehold titles to Kenya Railways. This has happened in Old Changamwe industrial areas, Mombasa. Land in this category is to be found in the following areas:-

TABLE 3.1

ACREAGE OF PURCHASED LAND.

|                    |              |
|--------------------|--------------|
| Old Changamwe..... | 82.50 acres. |
| Mikindani.....     | 45 acres     |
| Malaba.....        | 75 acres.    |
| Embakasi.....      | 200 acres.   |

SOURCE : KENYA RAILWAYS CORPORATION. ESTATES DEPARTMENT, 1992.

(iii) Residential land.

This comprises lands held by the Corporation for residential purposes and covers an estimated 1193 acres. This land is held in both leasehold and freehold.

(a) Leasehold Residential Land.

Leasehold plots have been allocated to the corporation by the government specially for housing purposes and are located in virtually all the large towns in Kenya like Nairobi, Kisumu and Nakuru. Most of the leases granted are for 99 years commencing on the 1st of January 1932 at a peppercorn rent.

According to a survey carried out in 1963 in Nairobi, residential leasehold land measured approximately 720 acres covering the housing estates of Makongeni, Muthurwa, Park Road, Parklands, Kileleshwa and Upper Hill areas. Since then several parcel parcels have been surrendered to the government. These include several undeveloped plots in Kileleshwa, at Parklands the land housing the former Government Secretarial College, part of the Nairobi Railway Station area to form extensions to the Government Printers. Today only an area of 550 acres remains under residential use.

In Mombasa, land at Kizingo and Nyali would fall under this category. In Kisumu, changes in zoning have rendered Railways housing areas more suitable for other uses, particularly commercial. For instance several parcels of land have been surrendered to the Government for commercial development like the Central Bank of Kenya, Kisumu site.

The extent of residential leasehold land is as follows:-

TABLE 3.2

RESIDENTIAL LEASEHOLD LAND

|               |           |
|---------------|-----------|
| Nairobi ..... | 550 acres |
| Mombasa ..... | 285 acres |
| Nakuru .....  | 97 acres  |
| Eldoret ..... | 50 acres  |
| Kisumu .....  | 150 acres |

SOURCE: KENYA RAILWAYS CORPORATION, ESTATES DEPARTMENT, 1992.

In the majority of other stations the housing areas are

incorporated in the stations reserves.

**(b) Freehold land.**

Most of these lands have been developed with employee housing. However, the land that is deemed surplus to the Corporation's needs has been leased to private individuals on 99 years leases (to help offset the rates burden). In Nairobi freehold residential land is found at Muthaiga, Riverside Drive, Kilimani, Lavington, Dagoretti and Farasi lane. Elsewhere freehold residential land has been acquired by the Corporation purchasing existing houses, these include in Kisumu, housing on Nehru Road and Changamwe in Mombasa. The acreage of freehold land is as follows:-

TABLE 3.3

RESIDENTIAL FREEHOLD LAND

|               |             |
|---------------|-------------|
| Nairobi ..... | 36.2 acres  |
| Mombasa ..... | 20.54 acres |
| Kisumu .....  | 4.363 acres |

SOURCE: KENYA RAILWAYS CORPORATION, Estates Department. 1992

**(iv) Recreational and Institutional Lands.**

These lands are either vested lands or leaseholds on a 99 year lease with the usual restrictive covenants and includes land developed with the Railway Golf Club Nairobi, the various

railway clubs situated at Nairobi, Mombasa, Nakuru, Kisumu, and Eldoret and the Railway Training Institute in Nairobi.

### **3.3.1 Government Industrial areas under Kenya Railways management.**

The agency agreement between the government and the Railways administration can be traced back to the struggle for control of the Railway zone (that is the land reserved by the 1897 proclamation for the railway administration covering one mile on each side of the track) culminating in the Corporation becoming a lessee of the government. The Mortimer Report of 1951 deals with this agency and has been reviewed elsewhere in this chapter.

Government Industrial plots under Railways management are located at Nairobi, Thika, Changamwe and Kitale. Under the agency proceeds from the plots are remitted to the government every 25 years less management costs, with government leases being issued.

### **3.4 Types of leases and licences granted.**

Leasing is the second most involving aspect of Railways estate management after inspections (Moturi, 1990,p7). It involves leasing of the Corporations surplus housing, offices, good sheds, shops, bars, clubs, canteens, kiosks and bookstalls, and land. Various types of leases and licences are issued. They include the following:

**(a) Ground Leases.**

The majority of leases administered by the Corporation fall under this category. These leases and grants are usually for a term of 99 years with the leases containing restrictive covenants with regard to subleasing and assignments, transfer, mortgaging and charging. The growth of the various urban areas has resulted in re-zoning and change of user.

Ground leases are granted under the Government Lands Act for government land and the Registered Lands Act for railways freehold.

**(b) Temporary Occupation Licences.**

The railways has numerous Temporary Occupation Licences (T.O.L) located all over the railway system. They are allocated to people who require land within station areas for specific purposes like stacking goods like timber, that are to be transported by rail or for light manufacturing or other uses that do not interfere with or hamper the character of the surroundings where they are located. Sometimes they are granted to trespassers in order to protect railways interests on the land against possibilities of adverse possession.

The licences are granted by the Commissioner of Lands in accordance with Sections 40-42 of the Government Lands Act cap 280, for an indefinite period usually not exceeding one year and they cannot be assigned. Termination is by either party serving a three month notice or a notice equivalent to the rent payment period.

When assessing the rent the aspect of insecurity of tenure is considered thereby considerably lowering the rents.

**(c) Wayleaves.**

A wayleave is a right of way given over a piece of land allowing one to use another's land by passing a service either below or above ground (Rupia, 1989, p1). As railway land virtually divides the country into two, it is impossible to avoid granting wayleaves despite their disadvantages, which include "sterilising" the land where the wayleaves traverses. Wayleaves are granted for the following purposes:

- The passage of electrical and telecommunication lines underground and overhead.
- The traversing of water and sewer pipes
- Level crossing and Cattle crossings.

The recent government policy on District focus for Rural development has meant an increase in the number of wayleaves applied for as there has been concerted effort to supply the rural areas with the necessary services like electrical power, telephones and piped water. Situations arise where people carry out installations without the knowledge of the Corporation thereby endangering the lives of passengers and goods transported by the trains. Works above or below the track require supervision by the Kenya Railway authorities to ensure the operations of the trains are not to be affected.

For statutory bodies and other public departments with whom

numerous wayleaves are negotiated, it is the practice to enter into a General Wayleave Agreement with the body or department. The individual wayleaves to be detailed in a schedule attached to each agreement.

Level crossings and cattle crossings are generally issued to private parties rather than for public use. This is because of the dangers posed by frequent unsupervised crossings which may lead to fatal train accidents. It is interesting to note that before a plot is registered it requires to have an access route, yet level crossings are granted as access roads.

Various reasons have been advanced for this and they include the fact that the railway line may have cut across a parcel of land thereby severing a part of the land. For some large farms the original access may be situated at the opposite end from recently constructed main road thereby creating need for a level crossing.

Level crossings are discouraged as they have a tendency of becoming public and where traffic was limited it slowly grows heavier posing a hazard to rail traffic.

Bridges, level crossings and flyovers (public crossings) over railways land on main trunk roads like Mombasa road, do not require wayleaves as the Ministry of Transport and Communications has an overriding right of way.

Two types of agreement are issued:



**(i) Statutory agreements**

These are granted to statutory bodies like Kenya Power and Lighting Company, Local authorities and Government Ministries.

**(ii) Private Agreements.**

Wayleaves granted to private parties fall into this category. Normally an agreement is signed for each wayleave and a number allocated to facilitate the keeping of records.

**(d) Cultivation agreements.**

These are issued at peppercorn rents to individuals to allow them cultivate perennial crops within the Railway 200ft.

Operational corridor. They are usually granted as a measure to avoid squatters and the possibility of adverse possession. The licence so granted only permits the growing of crops and does not allow the construction of residential quarters mainly because the Corporation does not wish to harbour too many people not engaged in the railways business nor entertain the possibility of accidents as a result of impeded visibility by the residential development. Like T.O.L., Cultivation agreements are usually for indefinite periods with a clause for termination subject to a three months notice period.

**(e) Siding agreements.**

Railways provides sidings to plots in rail-served industrial areas. Three categories of sidings are provided.

**(i) Private Sidings.**

These are sidings owed by Railways but leased to the public for exclusive use by the licensees, especially in areas where rail services are provided but the area does not fall under railways management. Eldoret and Karatina Industrial estates are served on private sidings basis with the agreement being signed with the Municipality. Those Industrial areas on private siding agreements include the Maragua, Old Karatina, Sagana and Luanda. The industrial areas are administered by the relevant local authorities. Government owned Industrial estates served by the Railways are situated at Londiani, Athi River, Naro Moru and Nakuru (Dawnsonville).

**(ii) Privately owned Sidings.**

These are completely owned by members of the public but the railways running stock are permitted to use them.

**(iii) Public sidings.**

These are sidings serving Industrial and Godown areas and are owned by the Railways by whom they are also maintained. No individual siding agreements are entered into with the users, however, siding fees are included in the annual rent payable and the lessees are expected to keep the platform to the siding in a good state of repair. Examples of some rail served godown plots existing on Railway land can be found in the following towns:

|              |          |
|--------------|----------|
| Thika (old)  | Kikuyu   |
| Limuru       | Morendat |
| Molo         | Njoro    |
| Lugari       | Bungoma  |
| Ol Joro Orok | Kiganjo  |
| Lumbwa       | Kedowa   |
| Makuyu       | Ruiru    |

SOURCE: KENYA RAILWAYS CORPORATION, Estate Department.1992.

(f) Commercial, Residential and Recreational Land.

These types of leases are few and therefore negligible.

They comprise leases of shops for example at Muthurwa Estate and Makongeni Estate in Nairobi, godowns for example at Malaba Station, residential houses for example in Nairobi. Leases are usually for short periods with a rent review clause incorporated.

The overall number of lease and licence items under this category managed by the Railways are listed below:

Table 3.4

Commercial, Residential and Recreational Leases.

| Subject.                            | No.           | Area in acres |
|-------------------------------------|---------------|---------------|
| Ground leases                       |               |               |
| (a) Railway plots.                  | 728           | 554           |
| (b) Government plots.               | 549           | 829           |
| Subject                             | No. of items. |               |
| Properties<br>(shops, Houses, etc.) | 96            |               |
| Sidings                             | 300           |               |
| T.O.L's                             | 292           |               |
| Wayleaves                           | 759           |               |
| Level Crossings                     | 6             |               |

SOURCE: KENYA RAILWAYS CORPORATION, Estates Department. 1992

### 3.5 Statutory of Kenya Railways Estate Management.

The Kenya Railways is a statutory Corporation established under an act of parliament, the Kenya Railways Act cap 397, which under Section 3, empowers the Corporation to deal in land. The Corporation is empowered to

.....acquire, hold and dispose of movable and immovable property for the purposes of the Corporation.

However as regards the land it manages on behalf of the Commissioner of Lands, all transactions require the consent of the Commissioner, safe guarding the landlord interests.

### 3.6 SUMMARY

The construction of the "railways through a zoo" as the Uganda Railway was fondly called, saw the opening up to the interior of East Africa. The question of land for the railway line introduced problems of land tenure, and indeed, the railway system was initially responsible for the evolution of the greater part of the existing patterns of industrial location and urban settlements.

Maintenance of the railway line became a great strain on the East African protectorate finances. To ease this burden, different types of leases and licences were issued over railway land, which had become the prime land in the protectorate. Management of these lands to realise the investment became of vital importance.

The following chapter investigates the institutional

arrangements provided for estate management by the Kenya railways Corporation and how the leases and licences are administered. Chapter Two of this thesis reviewed the different styles and aspects of land management. This "ideal" situation is used to review the system employed by the Kenya Railways Corporation.

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## Chapter Four

### THE EMPIRICAL FINDINGS.

#### 4.0 Introduction.

This chapter deals with the study findings and data analysis. Information was obtained from the field through the use of interviews and questionnaires administered to the Estate Manager and Tenants. Observation schedules were also used to record details of site visits. Copies of the Questionnaires used are appended as Appendix 1 and 2 respectively. Representatives of the Finance Department were also interviewed with regard to the role the department plays in estate management.

This study examines the problems arising from the relationship created by the lease and licence. The study hypothesised that poor lease administration by the estate manager or landlord was the cause of the problems inherent in the landlord - tenant relationship. The Kenya Railways Corporation was used as the case study. To prove the hypothesis right or wrong the researcher investigated the institutional arrangements provided by the Kenya Railways Corporation for land management before looking into the process of lease and licence administration as carried out by the Estates Department of the Corporation. Lessee's and licencee's were interviewed to provide an alternative point of view and provide information on whether they contribute, if at all, to the problems that arise.

The terms "Landlord" and "Estate Manager" are used



interchangeably to refer to the lessor or licensor, the Kenya Railways Corporation, while the term "tenant" refers to both the lessee and licensee. As explained in Chapter Three the Kenya Railways Corporation provides "in-house management" and also acts as managing agents for the Government of Kenya. The study findings shall be discussed under the following headings:-

- a) The institutional arrangements for land management as provided by the Kenya Railways Corporation.
- b) Lease and Licence Administration.

#### 4.1.0. Institutional Arrangements for Land Administration by the Kenya Railways Corporation.

##### 4.1.1. Organisation Structure.

Lease and licence administration by the Corporation has its beginnings in the acquisition of land for the construction of the Railway line in the early part of this century. Chapter Three provides a historical perspective to the problems inherent today.

Lease and licence administration by the Kenya Railways Corporation is carried out by several departments, whose operations touch on land. These departments include the Civil Engineering Department whose duties entail the maintenance of the railway line, bridges and buildings. The Traffic Department which oversees the railway stations. The Business

Department whose main aim is to secure maximum returns from the railway and its assets. The Corporation Secretary's Department which carries out all the litigation work. The Finance Department receives all payments made to the Corporation and makes payments on behalf of the Corporation. The Estate Department oversees the management of Railways real estate. It also provides a focal point for all land management activities and therefore shall be treated as the "landlord" in as far as lease and licence administration in Kenya Railways is concerned. A graphic presentation of this interaction is presented below:-

#### LAND MANAGEMENT.

Estate dept.

|•

DEPARTMENTS

Finance      Traffic      Civil Engineering      Legal      Business

The Kenya Railways Corporation is organised on a combined functional and geographical system. The departments are categorised functionally in relation to the activities they perform, for instance the Corporation Secretary's Department provides secretarial services to the Board of Directors and attends to any legal matters concerning the Corporation. This allows for specialisation and economy of operations. For ease of administration the Corporation is also organised on geographical lines into three Districts with district headquarters at Nairobi,

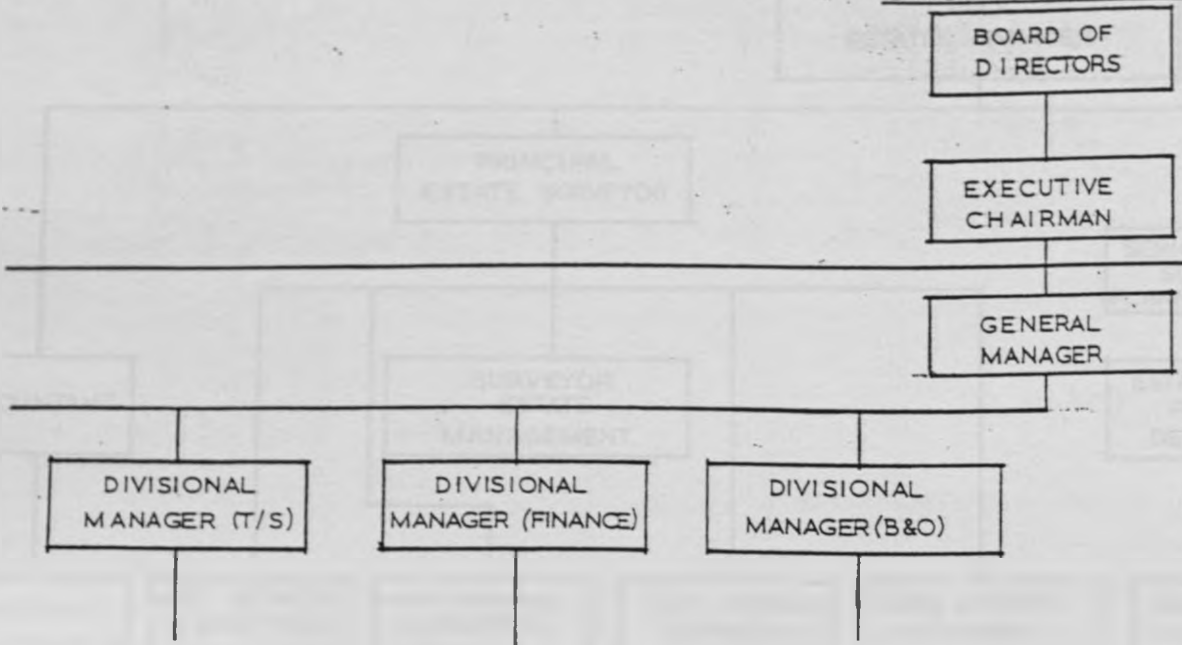
Mombasa and Nakuru.

The Corporation is headed by a Board of Directors under whom falls the Executive Chairman, who manages the affairs of the Corporation on a day to day basis. Below the Executive Chairman is the General Manager and subsequently all heads of Department each with their hierarchy of staff (see Chart 4.A ).

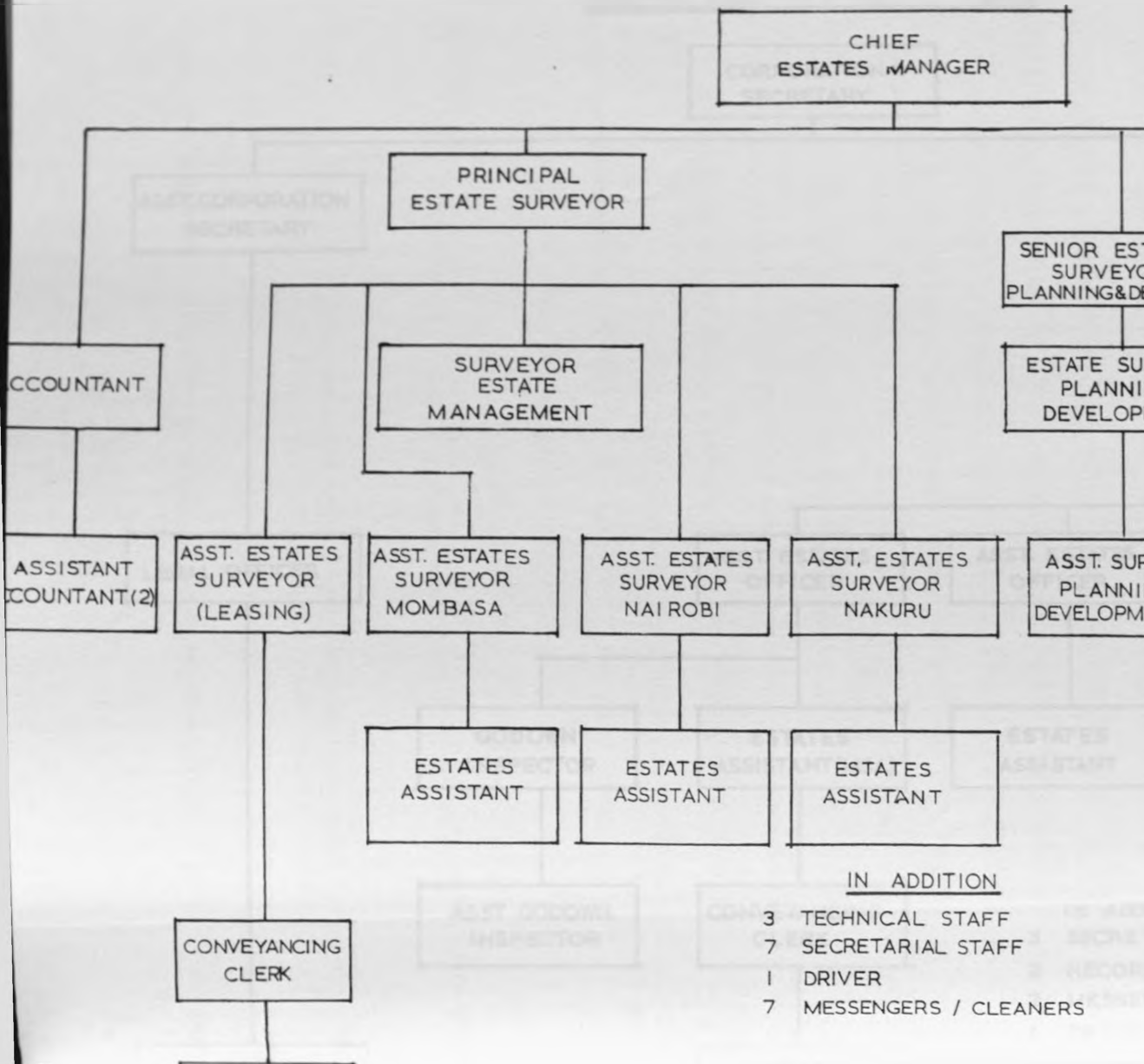
The creation of the Estate Department in 1992 was a prerequisite of the proposed Land Policy whose objective was a more efficient management of the Corporations landed estate. The section was previously part of other departments of the Corporation namely, the Civil Engineering Department and the Corporation Secretary Department. The new department would provide a better and faster decision making machinery, better supervision of the estates, and an autonomous land management authority. To facilitate this it is organised on geographical lines with offices being opened in all the three administrative districts at Nairobi, Nakuru and Mombasa. It is headed by a Chief Estates Manager stationed at the Railway Headquarters in Nairobi, with Assistant Estates officers heading the regional offices in Nakuru and Mombasa. Authority flows downwards from the Chief Estate Manager to the Office Messengers as illustrated in Chart 4.B below.

Chart 4.C illustrates the old organisation structure of the then Estates Section under the Corporation Secretary's Department. Previously the main management office was situated in Nairobi with a subsidiary office in Mombasa. Land Management

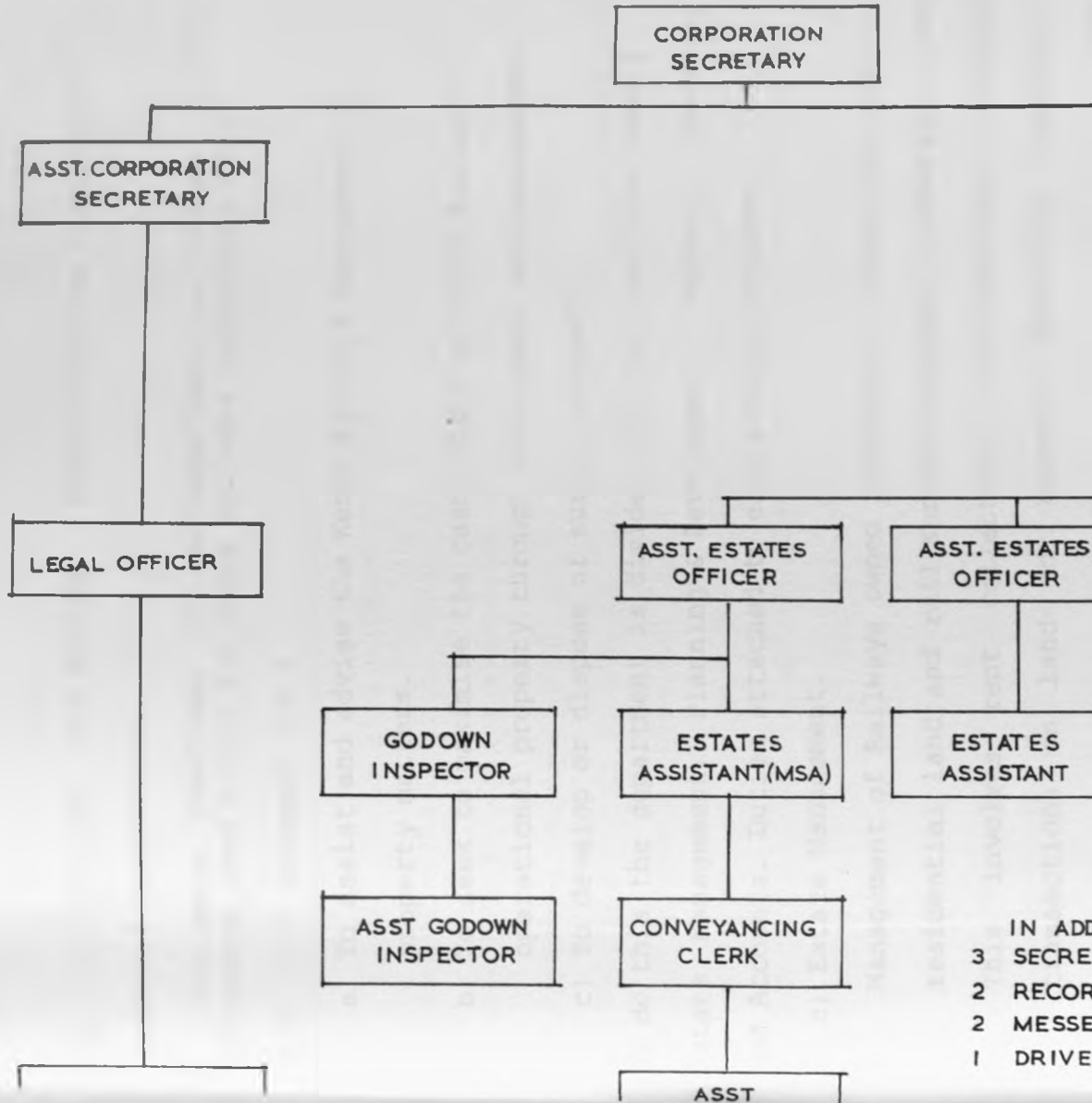
# KENYA RAILWAYS C ORGANISATION CHA



# LANDS AND ESTATES DEPARTMENT



# LEGAL DEPARTMENT 1989



was carried out from Nairobi, eradicating the advantages of localised supervision.

The main functions of the department as stated in the " Proposed Land Policy for Kenya Railways Corporation 1992"

(1992,p21) document are :

- a) To assist and advise the Kenya Railways Management on property matters.
- b) To seek to maximise the cash return on Kenya Railways operational property through development and management.
- c) To develop or dispose of surplus property.

To do this the department is divided into four sections namely Estate Management, Planning & Development, Technical Services and Accounts. Duties attached to each section include:

a) Estate Management.

Management of Railways owned industrial , commercial and residential land and rail-served Government industrial land. This involves rent collection, conveyancing, handling transactions on land for example approving transfers, charges and mortgages , leasing and maintaining land records.

b) Planning & Development.

This deals with the identification and planning of potential areas to create rail served industrial estates for leasing. It also involves the planning of railway land for development or redevelopment, for instance the redevelopment of the

Nairobi and Mombasa station areas currently being undertaken.

c) Technical Services.

This includes the carrying out of valuations for various purposes like rental assessments and owner - occupied house allowance. It also entails the inspection of Valuation Rolls from different local councils for rating purposes and the maintenance of railways-owned and leased premises.

d) Accounts.

This comprises maintaining an accounting system with regards to payments received from grantees and tenants and payments made by railways, for instance for rates. A separate account is maintained for receipts from Government owned land as per the Mortimer Report of 1951 ( see Chapter 3).

The creation of a new department has allowed the Corporation to venture into areas of land management hitherto unexplored. One such area is planning for redevelopment. This is especially important as many of the buildings owned by the Corporation for instance residential estates in major towns like Nairobi Mombasa and Kisumu are old and the lands ripe for redevelopment.

The organisational structure of the Kenya Railways Corporation and the Estate Department is highly centralised with the bulk of decision making being retained by top management. Although the day-to-day land management is carried out by the Estates Department, the overall decisions , especially those of a policy



nature, are made by the Board of Directors of the Corporation. In an attempt to keep control on land matters, even routine decisions like approving charges on land, are now being made by the Board of Directors. This has affected land management in the following manner:-

- a) Decisions take a long time to be made as the board meets only once a month therefore matters may pend awaiting the board meetings. This then affects the level of returns from the estate as for instance if it takes a month or more to decide whether to approve a lease extension, with the corresponding increases in the rent, the new rents then take longer to be effected and the Corporation loses revenue. Or in the case of new allocations, the Corporation pays rates until such a time as the allocation is made.
- b) There is a general interference in the smooth running of the Department and what should otherwise be routine duties. Control of transactions such as transfers, mortgages and allocations are placed outside the Department thereby debilitating the department. For instance it was noted that the Business Department has on several occasions leased out go-downs for example at the Nairobi Station Godown Area without reference to the Estate Department. This has resulted in :
  - i) cases of double allocation, as both departments

lease the same godown,

- ii) instances where rents are set by the Business Department do not reflect market trends,
- iii) No letters of offer or leases are signed before the lessee occupies the leased space, thereby making it difficult to recover outstanding rentals,
- v) leases being granted to unsuitable tenants in terms of user and past payment records.

This had the effect of discouraging staff in the Department from making decisions resulting in work pending as it is referred to the higher echelons of authority. To encourage the staff in the department to make decisions, there needs to be more decentralisation of the decision making mechanism, especially of routine matters.

The Estate Manager considered the current establishment not adequate for the land management work involved in the department. The current establishment structure for the Estates Department provides for 41 posts. However, the Estate Manager felt more staff was needed to cater for the increasing workload. For instance the rapid expansion of urban areas all over the country has resulted in many urban centers being gazetted as rating centres. The Estate Manager felt the Department needed an officer incharge of this work alone. Further the post of Godown Inspector, appearing in the old establishment, was abolished and the Assistant Estates officers are expected to

carry out periodic inspections in their respective areas of operation. The number of clerical staff has also declined from 5 to 4 . The Estate Manager felt this reduction would be detrimental to the working of the Department as the technical staff would have to spend more time on clerical duties.

The Estate Manager considered the creation of a separate accounts section would mean better and improved accounts record keeping. The section would receive and make any payments for the department and accounting records would be more readily available to the Estate manager. This would minimise the problems arising when two departments receive payments. The opening of estates offices outside Nairobi would also improve estate management as it is expected that more frequent property inspections would now be made, thereby providing information on what is happening on the plots. Thus what is happening on the plots would be more easily noted and dealt with.

#### 4.1.2. Personnel and Staffing.

Kreitner (1983,p278) says that effective staffing is a major determinant of an organisation's success. An organisation structure allowing for adequate numbers of qualified staff in relation to the work load goes a long way in ensuring jobs are done properly and efficiently.

Whereas the current establishment of the Estates Department allows for 41 personnel only 27 are employed. Table 4.0 below

illustrates the staff in the Estates Department.

The Estate Manager attributed the present understaffing to the lack of funds for salaries and the slump in the economy which discourages employment. He felt more staff was required, especially clerical and secretarial staff. The employment of such staff would allow the senior officers (from Assistant Estates Surveyors up) to concentrate on the more technical aspects of their jobs, for instance Valuation and Planning.

Staff recruitment in the past five years (1988-1992) has been both external and internal. External staff recruitment has included two clerical officers and a messenger.

TABLE 4.0.

Personnel in Estate Management. Kenya Railways  
Corporation March 1993.

Current No. in

| TITLE                      | CURRENT NUMBER | ESTABLISHMENT | QUALIFICATION |
|----------------------------|----------------|---------------|---------------|
| Chief Estates Manager      | 1              | 1             | B.A (L.Econ)  |
| Principal Estates Surveyor | 1              | 1             | B.A. (L.Econ) |
| Senior Estates Surveyor    | 1              | 1             | B.A. (L.Econ) |
| Estates Surveyor           | 1              | 3             | B.A. (L.Econ) |
| Asst. Estates Surveyor     | 2              | 8             | B.A. (L.Econ) |
| Accountant                 | 0              | 1             | B.Commerce    |
| Asst. Accountant           | 0              | 1             | B.Commerce    |
| Estate Asst.               | 4              | 6             | A Level       |
| Godown Inspector           | 1              | 0             | A Level       |
| Conveyancing Clerk         | 1              | 1             | A Level       |
| Asst. Con. Clerk           | 0              | 1             | A Level       |
| Technical Staff            | 0              | 3             | O Level       |
| Clerks                     | 5              | 4             | O Level       |
| Driver                     | 1              | 1             | O Level       |
| Secretarial Staff          | 5              | 7             | A & O Level   |
| Messengers                 | 4              | 7             | A & O Level   |
| Total                      | 27             | 41            |               |

SOURCE: KENYA RAILWAYS CORPORATION 1993 .

Recruitment from other departments in the Corporation has included four clerical officers and three secretaries.

However, it was pointed out that the clerical staff were usually

recruited from the Welfare section of the Corporation, where they were employed as sportsmen and women and therefore were more on secondment rather than on full employment of the department. When required for an athletic meet they would abandon their duties, thereby compounding the problem of staff shortage.

The department has a low staff turnover. In total over a five year period the Department lost only nine officers, out of a total of 30. One officer was relieved of his duties, the Godown Inspector and Assistant Estates Officer Mombasa retired, an Assistant Estates officer resigned while two messengers and three secretaries transferred their services to other departments. Reasons given for staff leaving include a poor remuneration package offered, heavy work load (especially for secretaries and messengers) and frustration from lack of supporting services like transport facilities. On the whole the Department has retained staff for a long time with eighty percent (80%) of the staff having over fifteen years of service to the Corporation.

The advantage of retaining staff has been:

- a) Staff know what is expected of them and they can get on with it, especially as most of the routine duties are repetitive in nature.
- b) Time that would otherwise have been spent training new staff, who may have left upon completing the training, can now be utilised to do the work on hand.

Understaffing has had its effect on lease administration. The Estate Manager reported that in trying to cope with all the work expected of them in the department, some important duties had been neglected. These included accounting and maintenance of the property records, which are the backbone of management. In some instances, payment records had not been updated for over two years, making the records of little use in as far as current management is concerned. From such records the Estate Manager found it hard to ascertain who was in arrears, for how long they had been in arrears and what amounts are actually outstanding.

Land Registers had also been neglected with entries not being made. These are similar to the terrier system discussed in chapter 2. It then became difficult to ascertain for instance, transfers and the names and addresses of the new grantees, or subleases and their duration. To obtain information, it became necessary to peruse the case file, which may be voluminous. The Estate Manager therefore found it hard to rely on these records to discover any breaches to the lease or licence and in instances where he was aware he did not have the required information on hand to deal with the case immediately.

The lack of support facilities was cited as one major drawback to land management. This included inadequate office space in Nairobi and Mombasa ( the Nakuru office is yet to start functioning and space has not been allocated for it) making

working conditions difficult as staff have little room to place files and read plans or maps. The lack of equipment and stationery like calculators, tape measures, field note books and a computer where land records could be stored and made more readily available, has meant time is wasted as staff look for these items or jobs abort for lack of them.

The most pressing problem was cited as inadequate transport facilities, thereby hindering physical inspections of land, which is necessary for management. The Estate Manager noted that it was difficult to supervise activities on the plots outside Nairobi resulting in subleasing, illegal structures' abandonment of licences going undetected for some time. The department has one vehicle stationed in Nairobi, thus officers outside Nairobi have to rely on other departments of the Corporation for transportation or the railway car pool, which provides transport for all other departments. In Nairobi, an apparent misunderstanding of the departments' duties by other departments of the Corporation has resulted in a situation where the vehicle assigned to the department is treated as belonging to the car pool, and therefore available for use by all members of staff. This misunderstanding is as a result of ignorance of the departments functions and arrogance on the part of some members of staff. The majority of staff are not sure what the department does or have very narrow views of Estate management work. Some of those who have an idea what the department does accord it second place seeing it as insignificant and not



essential. The concept of land, with transactions and information shrouded in secrecy, may be a reason for the misunderstanding. The Railway management does not wish to inform everyone of the extent or transactions taking place over its landed estate. Details of lease and licence holders are considered classified information. Every effort is made to maintain this secrecy. In so doing, other members of staff are either under informed or uninformed of the workings and duties and importance of the department.

The Estate Manager considered staff in the department fairly efficient. He based his assessment of the personnel on their productivity vis-a-vis the working conditions ( no transport etc.) and explained that several members of staff were hesitant to make decisions thereby leaving matters pending. However, he conceded that in some instances external forces dictated this. For instance, lack of transport for inspections would mean otherwise routine duties like approving a charge, could pend for long periods awaiting inspection reports. This has resulted in some breaches of leases subsisting for long periods. An example being where the Estate Manager cannot ascertain whether an illegal subtenant has vacated the premises after being requested to do so.

A general cautiousness as a result of being viewed by the Corporation administration with suspicion as regards transactions on land and land management, has contributed to low morale and

inefficiency. This suspicion has come about as a result of the discovery of illegal allocation of railway land in Mombasa and Nairobi and other mal-practices like delays in finalising cases, for example Transfers. In an attempt to distance his staff from these accusations the Estate Manager at the time, in a memorandum dated 18th July 1989 to the Board of Directors, categorically denied having anything to do with the said illegal allocations and reiterated that his section has always worked professionally. This disclaimer does not appear to have made any difference to the attitude of the Corporation administration, with the result that staff morale is low.

#### 4.2.0. Lease and Licence Administration.

The problems inherent in lease and licence administration are discussed under the following headings:-

- i) Allocation of Land and Licences.
- ii) Determination and Collection of Rent.
- iii) Restrictive Covenants.

#### 4.2.1 Allocation of Land and Licences.

Selection of lessees and licencees is made from applications received by the Corporation. Applications are received not only for plots that have been advertised but also those that the applicants have earmarked suitable for their needs.

The Estate Manager pointed out that due to a government embargo on land allocation, little allocation had been done

recently, the last major allocations having been made in 1987. Several land development schemes, for instance Makadara Scheme in Nairobi and other schemes in Uplands, Kibos and Nakuru are pending allocation awaiting the lifting of this embargo. Table 4.1 illustrates the number of leases allocated over the period 1984- 1993. Allocation of Temporary Occupation Licences include those that were surrendered and reallocated. For instance in 1984, 43 government leases were allocated, as were 8 railways leases and 12 temporary Occupation licences. The highest number of allocations were carried out in 1986 under the New Changanwe Industrial Area Scheme

The Estate Manager revealed that ground leases and temporary occupation licences owned and managed by the Corporation are granted to businesses, companies, partnerships and private individuals.

TABLE 4.1

## LAND ALLOCATION 1984 - 1993 KENYA RAILWAYS REAL ESTATE.

| YEAR  | GOVT.LEASES | RLYS LEASES | T.O.L. | TOTAL |
|-------|-------------|-------------|--------|-------|
| 1984  | 43          | 8           | 12     | 63    |
| 1985  | 1           | 3           | 8      | 12    |
| 1986  | 80          | -           | 14     | 94    |
| 1987  | 15          | 15          | 20     | 50    |
| 1988  | -           | -           | 3      | 3     |
| 1989  | -           | -           | -      | -     |
| 1990  | -           | -           | 1      | 1     |
| 1991  | -           | -           | 4      | 4     |
| 1992  | -           | -           | -      | -     |
| 1993  | -           | -           | -      | -     |
| TOTAL | 139         | 26          | 62     | 227   |

SOURCE: KENYA RAILWAYS CORPORATION, ESTATE DEPARTMENT, 1993

Statutory wayleaves are granted to bodies like the Kenya Posts and Telecommunications whereas Private wayleaves are granted to individuals wishing to pass a service on railway land. If all wayleaves granted to these statutory bodies were formalised into agreements, there would be very many agreements made with one party. To minimise costs, only one general agreement is entered into with the Kenya Railways Corporation and each wayleave granted is itemised on the agreement.

Sidings are peculiar to railway land. Private sidings are granted to individuals for their sole use while public sidings

are granted to individuals or companies by virtue of the plot they occupy being situated alongside the siding.

Tables 4.2 and 4.3 below illustrates the composition of allottees and licences. For instance 265 government leases are granted to Companies, while 163 to Partnerships and 66 to private individuals. For licences 4 agreements are signed with statutory bodies, having a total of 358 items.

Table 4.2.

Composition of Land Allotees.

| ALLOTTEE     | GOVT. | RLYS. | T.O.L | TOTAL |
|--------------|-------|-------|-------|-------|
| Companies    | 265   | 74    | 26    | 365   |
| Partnerships | 163   | 22    | 2     | 18    |
| Individuals  | 66    | 14    | 4     | 84    |
| Total        | 494   | 110   | 32    | 636   |

Source: KENYA RAILWAYS CORPORATION, 1993.

Table 4.3

Composition of Licences.

| LICENCEES    | STATUTORY WAYLEAVES | PRIVATE WAYLEAVES | PUBLIC SIDING | PRIVATE SIDING |
|--------------|---------------------|-------------------|---------------|----------------|
| Companies    | 4 (358)             | 23                | 283           | 33             |
| Partnerships | -                   | 12                | 26            | -              |
| Individuals  | -                   | 40                | -             | -              |
| Total        | 4 (358)             | 75                | 384           | 33             |

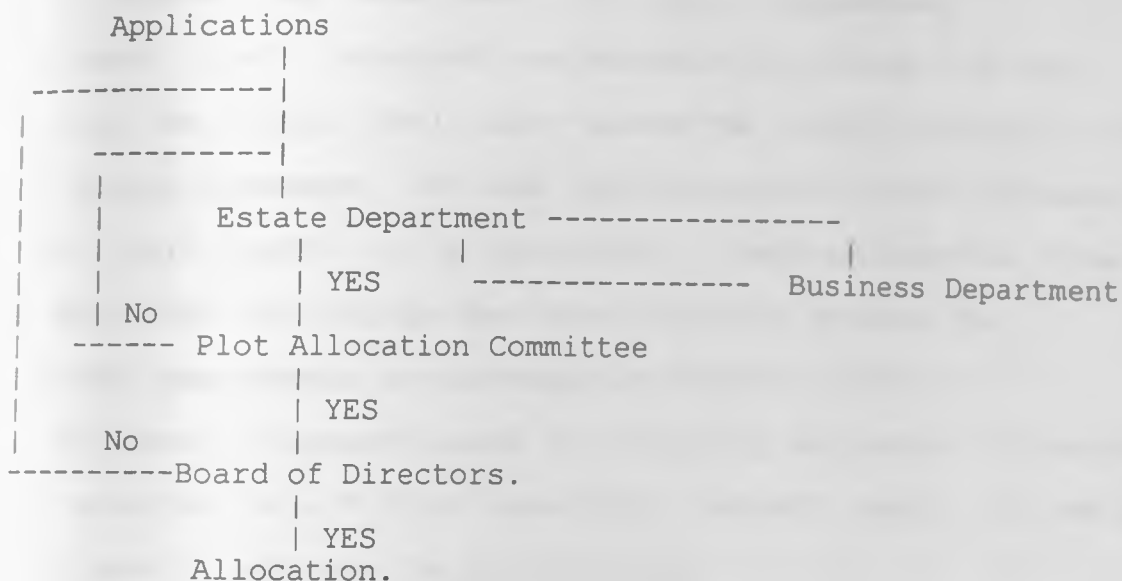
Source : KENYA RAILWAYS CORPORATION, 1993.

Plot allocation procedures for ground leases and Temporary

occupation licences are as follows:

Application letters are received from interested parties by the Estates Department, which then forwards application forms, in triplicate, to the applicants. A sample application form is attached at Appendix 4 . These forms require various information on the plot being applied for , for instance the plot number, location, size, the use the applicant wishes to put the plot, and the expected rail tonnage the applicant expects to generate. The applicants name and address are also required.

The completed forms are first scrutinised by Estates Department and the Business Manager's Department who vet the expected rail tonnage indicated by the applicant to ensure it is adequate. The application is then referred to an allocation committee for consideration. The Plot Allocation Committee comprises chief officers whose departmental functions deal with land, namely the Chief Civil Engineer, the Chief Estates Manager, the Executive Chairman and the Business Manager. The Committee vet all the applications before they are then sent to the Board of Directors for approval. The following flow chart illustrates the procedure:-



Wayleave applications are received by the Estate Department. They are then circulated to various departments within the Corporation for approval. These departments are the Civil Engineering department, which maintains the railway track and supervises the laying of each wayleave to ensure the railway line is not interfered with. The Signals and Telecommunications Department, which also supervise the works, to ensure the signal and telecommunication lines are left intact. The wayleaves are then marked on maps by the Land Survey Section. This ensures no wayleaves interferes with another already existing and avoids arbitrary location of wayleaves especially in cases where one culvert can be used to accommodate several crossings.

Wayleaves are granted on application, on condition they do not interfere with the running of the trains.

Sidings are approved by both the Estates Department and the

Civil Engineering Department. The Civil Engineering Department cost, construct and maintain the siding. As they maintain the siding they also assess the rents to be paid for the siding agreement. Private sidings are allocated depending on the rail traffic to be generated. Specimen approval forms for Wayleaves and Sidings that are circulated between the different departments are appended at Appendix 5 and 6.

Allotees of ground leases and Temporary occupation licences are selected on a "first come first served" basis, criteria being used to allocate the plots include:

- i) For industrial area plots with railway sidings, the ability to generate rail traffic. The Minimum tonnage set at 3000 tons per annum.
- ii) Ability to develop the plot. This is ascertained by obtaining a letter from the applicants bankers indicating the applicants financial position.
- iii) The use to which the plot shall be put, especially for Temporary Occupation Licences. This should coincide with planning regulations where applicable.

The allocation procedures employed try to ensure that deserving applicants get plots. However, incidences of allocations being made against the recommendations of the Estate Department exist. The Estate manager gave examples of allocations made to tenants with a poor rent payment record, for instance the allocation of a plot at Changamwe Industrial area to an applicant with a plot at Ruiru for which he never paid rent. The tenant does not pay rent



for either plot nor has he developed them, despite the statutory two year development period having lapsed. The Estate manager named eight cases of ground leases and 15 cases of Temporary Occupation Licences where this had occurred. He felt that these allocations had contributed to the subsequent problems experienced during lease and licence administration.

The allocation process is long and arduous, steeped in bureaucracy , with some would be applicants losing interest. The researcher found out that although in most cases the above procedure for allocation is followed, instances of " pressure from above" exist , where favours are asked and given, and plots are allocated by the Board of Directors without following the laid down procedures. Two cases in question are the allocation of land belonging to the Railway Training Institute in Nairobi to private individuals and the Railway Club at Pangani to Pangani Girls School .

Once a plot or licence has been allocated the would be allottee sign a letter of offer where conditions of allocation are stated. The Estate Manager assumes that the allottee has read and understood the conditions of offer, which are later incorporated in the lease agreement. No special effort is made by the Estate Manager to emphasise compliance to the lease agreement. For instance Industrial plots in Kikuyu Town were allocated in 1986 but to date no lessee has yet developed his/her plot. Each applicant was required to indicate on the application form, with supporting documents from their

bankers, the amount of finances they intended to spend on developing the plot. The lease also states explicitly that development should be carried out within two years. However, the follow up system maintained by the Railways also seems at fault as nothing has been done to rectify this breach. No letters have been written to the allottee's regarding this nor has the remedy of forfeiture been sought.

Ground leases and temporary occupation licences are offered on the terms contained in the Government Lands Act cap 280 of the laws of Kenya. Special clauses are sometimes inserted to vary the lease or licence where necessary. The most common special clause is that giving the Railways indemnity in the event of fire. The criteria used to determine who are eligible for this is based on the use to which the plot is put. For instance those plots whose use has a high fire risk like oil plots.

The terms of Private Siding and Wayleave Agreements are set out in the "Estate Manual" of the Estates Department. This manual was drawn up by the estates department after comparative studies were carried out with other railways of South Africa, India and Britain, to ascertain what these railways did. Having been compiled in 1969 it is due for review to reflect the current situation. For instance, at the time the manual was written, the East African Community still existed and thus procedures for land management reflected this. Today the situation is very different. The Corporation is a quasi-

government body operating under the Ministry of Transport. Some policy matters need ministerial approval and there is far more government control than before. Further the proposed land policy addresses the case of redevelopment and development of Railways land, something not addressed by the Estates Manual, as originally it was never the intention of the Corporation to engage in land development. Even factual things as calculation of rents and fees need to be amended to reflect what is happening in the market currently.

The lengths of leases and licences differ. For ground leases, those in the same neighbourhood are set so that they terminate at the same time. It then becomes easier to manage the land, for instance in the case of extension of lease, valuations for the assessment of the new rents can be carried out much faster and more easily. Most leases in the Nairobi Industrial area are set to expire in the year 2048. Ground leases should also be for a period longer than 45 years, in order that the lessee can attract a bank loan for development. Under the lease terms the lessee is required to develop his plot within two years. Most entrepreneurs need to borrow finance to develop the plots. Granting a lease term of over 45 years has now become the standard practice.

The instances of double allocation where both the Railway authorities and the Government allocate the same plot to different parties has caused confusion and affected estate management. The collection of rents becomes difficult and

ascertaining whom to address for any breaches of the lease agreement. This has occurred mainly on government owned land located at Thika and Kisumu. It may be seen as part of the governments plan to slowly regain control of lands managed on their behalf by the Railways Corporation ( see Chapter 3). As the overall authority on land matters , government allocation supersede those done by the Railways Corporation.

#### 4.2.2 Determination and Collection of rents.

##### a) Determination of Rents.

Leases and Licences contain explicit clauses stating the amounts of rents to be charged , when they should be paid and to whom they should be paid. Rental levels are determined by the Estate Department in accordance with the Government Lands Act cap 280.

For ground leases a stand premium is usually paid along with the rent in consideration of the reserved rent being fixed at a figure less than the rental value. It has the advantage of giving additional security to the rent received under the lease. The stand premium is calculated at one fifth of the capital value of the undeveloped plot. The annual rent is calculated at five percent of the remainder four fifths of the capital value of the land. For Temporary Occupation Licences the same method is used to calculate the rents but the element of insecurity of tenure is also considered reducing figures by between 10 percent to 20 percent. This is standard procedure for assessment of rents for public lands.

Calculation for Siding fees are based on the cost of maintaining the siding in relation to the size of the plot. The latest market rates being Ksh.3 per square metre of the plot it fronts. For instance a plot measuring 1250 square metres, the fees will be Ksh.3750 per annum. Charges for Wayleave agreements differ according to the type of wayleave granted. A fees schedule based on the use to which the wayleave is put has been calculated. However, in instances where parcels of land are sterilised by the Wayleave, thereby making the land unproductive as it cannot be utilised, the value of the affected area of land is taken into account. Each 100 foot overhead or underground crossing of telephone and electricity lines is charged at Ksh.100 per annum. When the wayleaves crossings are longer than 200 feet, this being the width of the railway reserve except at station areas, an extra Ksh.50 per annum is charged for each additional 50 feet. Sewerage and water pipelines are charged depending on the size of the pipes used. For instance each quarter (1/4) inch pipe traversing 200 feet across the Railway reserve is charged at 50 cents per foot per annum , while a large pipe of 8 inches diameter is charged at Ksh.3 per foot per annum.

Rental levels are generally set below the open market rents in order to encourage (in the case of ground leases) people to lease the land and develop it. For Wayleaves, in order to facilitate the extension of services especially in the rural areas. High annual rentals may prove prohibitive.

With the payment of a stand premium at the commencement of

the lease, the below-market-level rents are expected. Over the years this policy has encouraged entrepreneurs to invest in public land, with the long waiting lists being ample indication of this success. However, although incidences have occurred where the public has taken advantage of this policy and acquired land for speculation or resale at market prices, the threat of litigation has helped minimise these cases. Under the Government Lands Act vacant land cannot be transferred, unless exempted, while those plots not developed within two years are to be forfeited to the government for reallocation. The process involved in forfeiture is long and tedious. The estate manager could only give one example of a plot that had been forfeited in the 19 years he had been with the Corporation, yet 19 plots at Kikuyu allocated in 1986 remain undeveloped.

To determine the capital value of a plot the Government practice of assessing the value of a plot over a six year period then taking the average value, is used. Where values are difficult to obtain values of comparable plots are used. This is an attempt to eliminate instances of sudden increase in value and cushion sudden falls.

All tenants interviewed were aware that land rents accrue for their plots. Some licensee's believed the allocation charges constituted all the payments they were to make. Rental payments for ground leases, wayleaves and siding agreements are made annually. Those for temporary occupation licences

are made quarterly or half yearly, depending on the agreement between the parties.

#### b) RENT COLLECTION

Rents are collected by the Estates Department using office collection through direct payment at the nearest Railway office or through the post to the Finance or Estate Departments. They are considered in arrears a day after they fall due. In cases where arrears accrue door to door collection is used. These methods were chosen because they are easy to manage and could apprehend defaulters. However they have not been successful in eliminating arrears.

A summary of modes of payment by tenants in the control group Strata B and Strata A is illustrated in Table 4.4. Payment of rent is made mostly by cheque, posted to the Finance Department or the Estate Department in Nairobi. A total of eighty-two percent (82%) of the 130 tenants interviewed pay their rent by cheque. This is received by either the Finance department or the Estate department, resulting in accounting problems as it takes some time before either department knows what rents the other has receipted thereby affecting the arrears position. Eighteen percent (18%) of the tenants make rental payment by cash to the cash office at the Kenya Railways Headquarters or to the nearest Railway Station.

TABLE 4.4

## MODES OF RENT PAYMENT.

| TYPE       | SAMPLE SIZE |    | STRATA A |      | STRATA B |      | TOTAL  |      |
|------------|-------------|----|----------|------|----------|------|--------|------|
|            | A           | B  | CHEQUE   | CASH | CHEQUE   | CASH | CHEQUE | CASH |
| Government | 25          | 25 | 84%      | 16%  | 88%      | 12%  | 86%    | 14%  |
| Railways   | 15          | 15 | 80%      | 20%  | 93%      | 7%   | 86%    | 14%  |
| T.O.L.     | 8           | 4  | 57%      | 43%  | 50%      | 50%  | 58%    | 42%  |
| Siding     | 8           | 7  | 75%      | 25%  | 57%      | 43%  | 66%    | 33%  |
| Wayleaves  | 13          | 10 | 83%      | 17%  | 100%     | -    | 91%    | 8%   |
| Total      | 130         |    | 40%      | 10%  | 41%      | 9%   | 82%    | 18%  |

Source: Compiled From Authors own Field Survey, 1993.

Tenants said that payment by Cheque proved to be the simplest method to use. For ground leases, tenants preferred to pay by cheque and avoid the risk of carrying large sums of money. Since for public sidings, fees are paid alongside ground rents, tenant also prefer to pay by cheque. For Temporary Occupation Licences, licencees are able to make cash payments because their rents are considerably lower than those of ground leases. Thus both cheque and cash payments are popular as reflected in the minimal difference in the numbers of those making payments by cheque (58%) and cash (42%) for this licence type as compared to the other licence and lease types.

Of those tenants interviewed ninety-seven percent said they paid rent upon receipt of an invoice. Thirty-two percent thought their leases and agreements stipulated that payment be made on demand, while only eleven percent were aware that the



lease and licence had a clause stipulating that rent is payable on the first day of each year. Fifty-five percent of the interviewee's were not sufficiently familiar with their leases or licences to be sure whether such a clause existed, claiming that matters pertaining to the lease were dealt with by their lawyers or that the leases had been signed long ago and they had not had access to them.

Several reasons were given by tenants for effecting payment of rent only after receiving notification from the Kenya railways Corporation. Although these reasons may be valid, they do not expunge the tenants duty to pay rent on time. Reasons were:-

- a) The lease and licence stipulates what rent is to be paid. The levying of extra charges like statutory penalties, has caused fluctuations in the amounts to be paid. The tenants expect the invoice to reflect the amount owed.
- b) Most firms and businesses require documentary evidence of payments made for accounting and audit purposes. The invoice serves this purpose.

Apart from the annual rents and fees payable as per the lease and licence, other charges may be levied on the tenant. These charges include enhanced rent and statutory penalties paid by lessee's of ground leases, siding fees and management fees like inspection fees. The following reasons were given for these charges:-

- a) Enhanced Rent.

The basis for allocation of a rail served plot is to enable the tenant utilise the rail siding. In order to compensate the Railways corporation for loss of revenue as a result of loss of freightage, an enhanced rent is charged. Tenants complained that rail services are no longer desirable as they are not reliable. The length of time taken to transport goods and the high possibility of derailments causing further delays, has resulted in a shift to road transport where possible. Some tenants, especially in Nairobi Industrial Area, have blocked the access to the siding, viewing it as a possible entry point for thieves and vandals. Several thefts have occurred in the area, the thieves gaining access to the plots through the doors to the siding.

b) Siding fees.

Each plot with a railway siding is liable for payment of this charge which goes towards maintenance of the siding, irrespective of whether the siding is in use or not. Tenants protested against this charge, pointing out that the siding was very rarely maintained. The siding was often overran with grass, providing adequate cover for thieves. Eight percent of the tenants suggested that the siding be lifted as they did not need it.

c) Management fees.

These are fees charged for processing transactions, for instance transfers, mortgages, charges, and extension of lease. They include property inspection fees, valuation fees, stamp duty and wayleave installation supervision fees.

Thirty-five percent of all interviewees were not sure if the leases had a clause allowing for charge of these extra fees. They nonetheless paid them when demanded.

d) Statutory penalties.

As a device to encourage payment of rent, penalties are imposed on late payment of rent. Penalties are charged first at twenty percent (20%) of the rent reserved after four months from 1st January each year. Rents are due on the first day of each year. The penalties increase to fifty percent (50%) of the rent reserved after eight months. The tenants pay the outstanding rent inclusive of the penalties which cannot be waived.

No penalties are charged for late payment of rent from licences.

The author found that the majority of tenants were not familiar with the different rent collection methods used by the Railways Corporation. Rent collection methods are discussed in Chapter Two. After giving careful explanation of the different methods the following were the responses from the lessees on what they considered their shortcomings:-

1) Office Collection.

Payment can be made directly at the cash office in the Railway Headquarters at Nairobi or the nearest railway office. Payment of cheques through the post is discussed later. Long lines at the cash office and lengthy periods spent waiting for the payments to be received indicated that this method was

not popular, even with cases in strata B. For those situated outside Nairobi, for instance at Thika and Limuru, extra costs for transport are incurred when making the payments at the Railways Headquarters in Nairobi.

## 2) Door to door collection

The majority of tenants were not aware that this method is used, indicating how rarely it is applied. They considered it unsafe, as thieves are likely to attack the rent collector while entering or leaving their premises. They preferred the use of other methods. However, in cases where tenants were in arrears, they conceded that this method may catch the defaulters.

## 3) Postage system.

This was considered the easiest and most convenient by the tenants. It involves posting a cheque to the Financial controllers or Estate Manager's office. It lacks the disadvantages of the office collection system of queues, yet it is just as effective. However, delays in receipting of the payments have created avoidable problems. Tenants complained of receiving invoices with penalty charges even after making payment. No incidences of loss of cheques through the postage were found.

As the Railways Real Estate is vast and dispersed, the use of the office collection method minimises the amount of time and personnel involved in rent collection. The Estate Manager considered an eighty percent rent collection for ground leases, at any one time, successful. For all the other licences ninety

percent collection is considered adequate. This is far below the "acceptable" arrears levels. Radford.D. (1980,p4) asserts that as the complete eradication of arrears is unlikely ever to be achieved, for public institutions ( local authority housing), arrears kept down to about two percent or less of the annual revenue is acceptable.

Problems encountered by the Estate Manager during rent collection include the following:

- a) Rent is received by both the Estates Department and The Finance Department, creating confusion as to whom the lessees and licencees should remit their rent to.
- b) The Finance department prepares and sends out the invoices for rent. Invoices are sometimes sent to wrong addresses and occasionally carry erroneous amounts outstanding. Tenants may pay less than the outstanding rents as a result thereby perpetuating rental arrears.
- c) Poor flow of information between the Finance and Estate Departments contributes to the Estate Manager receiving information on payments made, late. The Estate Manager then is not able to promptly update his records and will not know who is in arrears and by how much.
- d) The estate records are not updated promptly as a result of (c) above and the staff shortage experienced by the Estates Department.
- e) For those cases of arrears door to door collection is

difficult because of lack of transport and in most cases when visits are made to the plot, the owner of the property is not available. Sometimes the plot is vacant and locating the allottee difficult.

The Estate Manager stated that for long leases on land like ground leases, the security of tenure also provides security of returns. Lessees are unlikely to vacate the premises without paying their rent. Whatever arrears is outstanding is always recovered, even if only when the lessee wishes to extend his lease. The insecurity of tenure inherent in temporary licences dictates that rents be collected promptly. Incidences of arrears may be an indication that licencees have abandoned the licence. Remedial action then requires to be undertaken immediately. This may be through repossession, subsequent allocation and legal action to recover the arrears.

#### RENT ARREARS.

Rent arrears may be stated both in money terms and as a percentage of the total rent collectable. To ascertain the level of rent arrears it was necessary to define what constituted rent. The Estate Manager considered outstanding rents to be inclusive of all extra charges made. The tenants, on the other hand, differentiated between the extra charges and the "true" rent, paying what they considered rightfully due. The "true" rent refers to the rent reserved under the lease or licence. It was difficult to obtain figures from the Estate

Manager reflecting the "true" rent arrears position. Figure 4.D illustrates the "consolidated" rent arrears position over the period 1983 to 1992.

The arrears are cumulative dating as far back as 1980. Although the number of leases and licences in arrears is high for all cases in 1983, these figures are brought down in 1984. For instance 22% of Railway leases were in arrears in 1983, by 1984 these had reduced to 10%, while 19% of Temporary Occupation Licences were in arrears in 1983 as compared to 12% in 1984. The Estate manager attributed the high arrears levels of 1983 to inadequate staff and the emphasis by the department on the ongoing owner-occupied house allowance revaluation exercise which began in 1982, resulting in the neglect of the other estate management duties by the staff. By early 1984 this exercise was complete and the department now concentrated on reducing the arrears. These efforts continued through to 1986 when a further reduction in the number of staff saw a sharp rise in arrears in 1987. Further the new allocations of 1986 also added to the increase in arrears. Staff recruitment ( two Assistant Estates officers) in 1988, helped to reduce arrears again.

The rent review effective from January 1989 caught several lessees unawares. The first plots to have their rents assessed were ground leases. Lessees were informed of the new rents late. Those who had paid the old rents still showed an outstanding, reflecting the difference between the old rent already paid and

The new rent. This is reflected in the increase in rental arrears for Government and Railways ground leases over the period 1989 to 1990. Reviews for licences were carried out later in 1991 with similar results. Rent arrears for ground leases dropped between 1990 and 1992 as more lessees paid their rents in an attempt to avoid the statutory penalties that would be imposed.

Disputes over the assessed rents also contributed to the increase in arrears, as lessees refused to pay the new rents. None of the control group comprising Strata B were in arrears. The arrears position as at December 1992 for cases in strata A is shown in Table 4.5 below. The table shows that apart from the Temporary Occupation Licences and siding agreements, for all other lease and licence types the extra charges form a large percentage of the rental arrears. In the case of railways leases, "true" rent comprises only seven percent of the total rental arrears, while the statutory penalties comprise forty-seven percent.

TABLE 4.5

Apportionment of Rental Arrears: Strata A 1992.

| TYPE     | SAMPLE SIZE | STAT. PENALTY | ENHANC RENT | SIDING FEES | MAN. FEES | TRUE RENT | TOTAL |
|----------|-------------|---------------|-------------|-------------|-----------|-----------|-------|
| Railways | 15          | 47%           | 25%         | 7%          | 14%       | 7%        | 100%  |
| Govt.    | 25          | 28%           | 40%         | 5%          | 15%       | 12%       | 100%  |
| T.O.L.   | 8           | -             | -           | -           | 4%        | 36%       | 40%   |
| Siding   | 8           | -             | -           | 15%         | -         | -         | 15%   |
| Wayleave | 13          | -             | -           | -           | 18%       | 13%       | 21%   |

Source: Compiled from Authors own field survey, 1993.



Delays in receiving receipts from the Railways management has resulted in erroneous penalty demands being made on the lessees. Eight percent of all interviewees claimed they received receipts three months after payment was made. Fourteen percent received their receipts within two weeks while thirty-two percent within one month. Twelve percent of lessees who received their receipts late were erroneously charged penalties for late payment.

The Estate Manager attributed the rent arrears to :

- i) The inability of tenants to pay due to financial problems. The tenants complained that they were not able to meet all their commitments, rent included, due to poor business.
- ii) Tenants refusal to pay the outstanding amounts due to disputes. As illustrated in Table 4.5 the tenants considered the outstanding amounts to comprise the extra charges made by the Estate manager, which they considered not payable.
- iii) Unsatisfactory record keeping contributing to the Estates departments inability to ascertain for sure who is in arrears and address them accordingly. Perusal of payment registers maintained by the Department revealed that entries had not been done for some plots since 1990.
- iv) A rent collection method where rents are invoiced and

collected by two separate departments of the Corporation. For this system to succeed it is imperative that information flows smoothly between the two departments. This is not the case, resulting in erroneous rents being charged.

The Estate Manager reported that some leases or licences are more prone to rent arrears than others. Whereas lessees of ground leases felt they have security of tenure, they tended pay their rent, probably because of their investment in the plot and the heavy statutory penalties. For Temporary Occupation Licences, it was discovered that most licencees obtained licences for speculation purposes. Few carried out the intended business on the plot, with the plot remaining vacant for long periods. This disinterest is reflected in the arrears.

For Statutory Wayleaves payments are usually made on time. However, as each item contained in the General Wayleave agreement is invoiced differently, some items are overlooked and fees not paid. Where private wayleaves are granted to groups or communities rather than individuals the subsequent annual payments may not be made, especially if the group is dissolved upon obtaining the wayleave, leading to arrears. The licencee of a private wayleave often believes the allocation charges are all he is required to pay. He then does not pay the annual fees.

When owners of private sidings neglect to pay their fees

either because they have stopped using the siding or because they do not feel it is being maintained, it is difficult for the Estate manager to discover this because of his poorly maintained records, thus hampering effective follow up.

To enforce payment of rent, the Estate manager sends out remainders to lessees and licencees who have not made payment. For ground leases this is usually after the first penalty charges become due i.e. after April 30th each year. If rents remain unpaid a second remainder is sent when penalties rise to fifty percent. The Godown inspector then visits the lessees or licencees to obtain payment. As a last resort the estate manager threatens the lessee or licencee with legal action, withholding consent to transactions, removing Wayleaves and lifting the Siding. For ground leases withholding consent has proved effective although it does not always offer immediate relief.

Transactions on land cannot be registered without the land rent clearance certificate given by the Railways management.

Figure 4.E below illustrates the action taken to recover the arrears and their effectiveness.

Few tenants responded to the first remainders with only 5% of those in arrears making any payments. The second remainders elicited a better response with 16% of those in arrears making payment. A total of Twenty percent of those in arrears responded to threats of distress, while 27% responded to the withholding of consent.

FIGURE 4.E

RENT ARREARS RECOVERY ACTIONS.

| STEP  | ACTION               | RESPONSE |
|-------|----------------------|----------|
| One   | First Remainders     | 5%       |
| Two   | Second Remainders    | 16%      |
| Three | Threat of Distress   | 20%      |
| Four  | Withholding Consent  | 27%      |
| Five  | Distress For Rent    | 3%       |
| Final | Forfeiture/ Eviction | 0%       |

SOURCE: RESEARCHERS FIELD STUDY, 1993.

There was a remarkably lower response to distress, forfeiture and eviction, probably because the tenants believed the Estate Manager would not pursue these actions to finality. Twenty-one percent of the interviewees considered that this action was never taken, while five percent agreed that evictions may have been attempted but never successfully.

For each individual lease and licence type the following are the ongoing efforts being made to reduce the rent arrears:-

a) Ground leases.

As shown elsewhere in this work, most tenants pay their rent upon receipt of an invoice. Efforts are being made to ensure that invoices are sent out early. If rents are received late penalties are imposed, as stipulated by law.

b) Temporary Occupation Licences.

If rent is in arrears the licence is terminated and legal

action instigated to recover the outstanding rent.

c) Wayleaves.

Licences are canceled and the service being passed removed.

d) Sidings.

For public sidings the fees are included in the annual ground rent and recovery is done at the same time. Private sidings are lifted if rents are not paid.

These efforts are ongoing forming the backbone of lease and licence administration.

However, their success is greatly affected by the staff shortage, inaccuracy of the records kept, inadequate equipment and lack of transport. The urgency of the matter is lost when the Legal Department carries out the litigation. It becomes part of their litigation work as important as the other jobs. The attitude of the tenants to the Estate managers efforts has also played a major role in frustrating them. Tenants treat the threats of litigation as if they were of no consequence with token attempts being made to pacify the Estate Manager like payment of a portion of the outstanding rent. Only 18% of all interviewees considered the threat of legal action real.

#### 4.2.3. RESTRICTIVE COVENANTS.

i) DEVELOPMENT CONTROL.

The Estate manager stated that the clause on development control was breached quite often. This clause covers the construction of

new developments, alterations and additions to the existing developments. It requires that all building plans are approved by the Corporation, who retain copies of the same, before works can begin. Inspection of ongoing works to ensure that they conform to the approved plans is rarely done by the department, who lack the personnel or transport to do it, especially when it is out of Nairobi. Thus sometimes construction is completed before the Estate Manager discovers the breach. The Estate Manager may also learn of breaches from concerned or interested persons. The lease or licence usually stipulates the type of development permitted on the plot.

For ground leases permanent developments are allowed while for temporary occupation licences only temporary structures are permitted. Wayleave and Siding agreements by their nature do not involve developments.

Ground lease plots in the industrial areas are developed with godowns, factory buildings, offices and workshops. Temporary Occupation Licences have varied uses like parking of motor vehicles, storage of building materials and a medical clinic.

The survey carried out found twenty-eight percent of the ground leases (out of 80) and sixty-two percent of Temporary Occupation Licences (out of 12) contravened this clause. It was also noted that Tenants have a very narrow perception of what constitutes alterations and additions. In many cases they considered some alterations to godowns like partitioning off a space or additions like a watchman's hut were not covered by

the clause, and did not seek approval for them. Five percent of all tenants interviewed had carried out either additions or altered the building either to create additional space as their businesses expanded or to change the building to suit the current business for instance to include office space.

Although the lease and licence agreement stipulates that the plot must be developed within a specified period ( usually two years for ground leases) some plots are still vacant long after they were allocated. For instance plots situated in Kikuyu town and two railways owned plots in Nairobi's industrial area. All other surveyed ground lease plots were developed as were ninety percent of Temporary Occupation Licences. Tenants said that plots remained vacant, due to :-

- i) Insufficient finances for development.
- ii) Building plans awaiting approval from the Railways Management or other authorities. Tenants complained of plans taking too long to be approved, sometimes over a year. This resulted in increased building costs with projects being shelved or redesigned.
- iii) One Temporary Occupation Licence was issued specifically for parking of motor vehicles and therefore remained vacant.
- iv) Future expansion Programmes by some firms dictated that plots remain vacant until they are required. the two vacant plots in Nairobi Industrial area fall under this

category.

Buildings erected on all ground leases surveyed had approved building plans, most of them having been approved at the turn of the century when the majority of the leases were granted. Eighty percent of Temporary Occupation Licences with buildings erected had approved building plans while fifteen percent had building plans awaiting approval and five percent had no plans approved.

For example two licencees had erected permanent buildings on their plots, one of which had approved plans for a temporary structure. The building erected was similar to that approved in the building plans. The licencee had decided to build in permanent materials to safeguard his merchandise from theft and acts of vagrancy. On the second plot, the licencee has erected a seven foot high perimeter stone wall also for security reasons.

When the Estate manager becomes aware of an ongoing development that does not have approved plans, the immediate reaction is to stop construction and seek to have the plans approved. If the development is complete but does not conform to the approved plans, the Estate Manager will request that the plans be amended to reflect what is on the ground, on condition the buildings erected meet the Town planning regulations. Rarely are plots repossessed or tenants requested to demolish completed structures, unless they can not be accommodated in the Town planning regulations or are of poor workmanship or are uninhabitable. The Estate manager is aware that the law will



sympathise with the tenant who has developed the plot. Equity will view his neglect in halting construction as consent. None of the plots surveyed had been repossessed or the illegal structures demolished. Those tenants who refuse to effect the remedies find they cannot obtain an occupation certificate unless all contravention=s are made good.

In the case of Temporary occupation licences, rather than request the licensee to demolish the structure, the Estate manager prefers that licensee sign an affidavit that he shall demolish the illegal structure when he vacates the plot or when requested to do so. This has not been successful. Licensees have refused to sign an affidavit despite repeated requests from the Estate Manager or demolish the illegal structures before they vacating the site. This was the case with a Temporary Occupation Licence situated at Dandora where the licensee had constructed a permanent office. He refused to demolish it or sign an affidavit and after a protracted struggle was finally evicted.

Recourse to legal action has been the final remedy sought by the Estate manager who knew of twelve cases of which three fell in the study area. In one such case the licensee was allocated a licence to erect a vegetable stall to enable her carry out her retail business. Subsequently, she erected semi-permanent structures and converted the use of the plot to a hotel and lodgings. This was discovered almost eight months after she

says she begun her business. As the area had not been inspected in two years the estate manager had no way of ascertaining when the buildings were erected. On being asked to demolish the structures, she refused and legal action was instigated to force her to demolish the structures and relinquish the plot.

Termination of the licence due to the breach of the clause on development control has proved difficult. The Estate Manager could only cite two cases where successful repossession was done, one of which is the Dandora case mentioned earlier. The department initiated termination by writing and informing the licensee of their intention to repossess the plot. The actual repossession is done by the Security Department. Sometimes repossession takes a long time even after repeated requests from the Estate Department.

Lease administration becomes difficult as the estate manager finds that the available remedies are not effective in stopping the breach.

#### ii) Subleasing and Assignment.

Routine inspections of the plots by the estates manager help reveal cases of illegal subleasing. The following indicators are used by the Estate manager to ascertain whether there is a sublease or assignment :-

a) The presence of a different company name board on the

premises

- b) Different types of businesses being carried out on the same premises
- c) Alterations to the premises, for instance an extra entrance, alternate parking facilities,
- d) Division of premises into separate spaces, utilised separately.
- e) Information obtained from the lessee or sublessee.

Using these indicators and the records maintained in the files one is able to ascertain if a sublessee is illegal.

A total of eighty-six percent of all the lessees interviewed occupy and utilise all or part of their plots. Ten percent of the lessees have sublet either part or all their plot for the following reasons:-

- a) To maximise utilisation of the plot, rather than let all or part of it to remain vacant.
- b) To generate much needed revenue, which may contribute towards the payment of rent.

Tenants of temporary occupation licences have not sublet their premises.

Comparing records maintained by the Estate Department and the results of the field survey, it was found that sixty-three percent of all the subleases noted were legal, thirty-five percent are awaiting approval while two percent are illegal. Problems encountered by the tenants seeking approval for their

subleases include a bureaucracy that lengthens the time in which the subleases are approved. This has seen some sublessees vacating the premises before their occupation is legalised.

Once an illegal sublease has been identified, the lessee is advised to legalise the occupation and application forms are sent to him to complete. Sample application forms are attached at Appendix 7. This application is processed and vetted by the Estate Department, emphasis being placed on the use to which the plot shall be put and the use of rail services, with an enhanced rent being charged to those lessees that do not use the rail services. Usually the illegal subtenancies are legalised following the above action. However, if the illegal subtenancy continues the Estate Manager then withholds his consent on transactions pertaining to the plot. For instance in 1992 the Estate manager withheld consent to thirty-three transactions, of which seven were for illegal subleases.

Although the Estate Manager may also ask the sublessee to vacate the premises, enforcing this is difficult as the Department relies on the Security Department to carry out the physical eviction. Further, unless the lessee wishes the sublessee to vacate the premises, he will not co-operate with the Estate Manager. Previously, when rail transport was the main mode of transportation the Estate Manager could refuse to allocate railway wagons to the plot until the sublease was legalised or the subtenant evicted. Today, with other modes of transport available, this remedy does not work.

The Estate Manger has not considered any other remedial action.

iii) 1989 GOVERNMENT LANDS RENT REVIEW.

The 1989 amendment to the Government Lands Act cap 280, Sections 18A and B, that reviewed rents on government lands was necessitated by the fact that rents had not been revised for a long time. There have been considerable changes in property values and there was need to reflect this in the annual rents charged. Some rents were set back in the thirties, making them unrealistic in today's market. The new rents were assessed using the comparison method to obtain the capital values of the plots, annual rent being assessed at five percent of the capital value of the undeveloped land.

There has been considerable resistance from the lessees and licencees to the revised rents. A total of sixty-eight percent of all cases interviewed stated that they were not sure that their leases carried a clause allowing for the rent review. However, they felt that as the review had been gazetted, it was lawful and they had no alternative but to pay the rent under protest. The general feeling was that the increases were too high, with some lessees complaining that their rents had risen by more than three percent. For instance, the rent for one plot rose from Ksh.48,000 per annum to Ksh. 203,000 per annum.

By the end of 1990 approximately forty-four per cent of all government plots managed by the railways Corporation had sent

written protests to the Estates Department to be forwarded to the Commissioner of Lands, Ministry of Lands, who is to set up a tribunal to listen to each case in accordance with the Government lands act cap 280. The tribunal has not yet been set up. Lessees have continued to pay the revised rent as required by law.

#### 4.3. SUMMARY

The second objective of this study was to identify the problems that arise during lease and licence administration by the Kenya Railways Corporation and their possible causes. Problems identified included rental arrears, breaches of the clauses on development control and illegal subleasing. The study also identified the problems resulting from the recent review of rents on government lands, which resulted in increased rental arrears.

The study hypothesis is to be rejected as the study clearly shows that apart from the Estate manager, various other departments of the Corporation are involved in lease and licence administration. The study also shows that the Estate Manager is unable to carry out his duties for lack of equipment, insufficient staff and Transport. Estate records are not maintained as they should yet they form the backbone of estate management. It was noted that the tenants lax attitude towards threats of remedial action stemmed from the fact that any action taken was not immediate but drawn out, being steeped in bureaucracy.

The next chapter provides the conclusions reached through the

study. An attempt is also made to provide some recommendations to the problems highlighted.

## Reference.

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## CHAPTER FIVE

### STUDY CONCLUSIONS AND RECOMMENDATIONS.

" One of the most predominating influences in the history of Kenya has been issues related to the ownership and rights over land."

Onalo, 1986,pv.

#### 5.0 Conclusions.

This study looked into the administration of leases and licences on land by a Public Corporation, namely the Kenya Railways Corporation, whose estates extend from the coastal town of Mombasa to the west border town of Malaba. This chapter summarises the conclusions arrived at following the analysis carried out in chapter four. An attempt is made at suggesting solutions to the problems identified.

The main findings of the study were:

- Several departments of the Corporation are involved in lease and licence administration.
- The Estates Department was created to provide a focal point for lease and licence administration and to enable the Corporation manage its land more efficiently.
- The Corporation's organisational structure is highly centralised with decision making being retained by top management, and overall decisions being made by the Board of Directors. This has meant that decisions take too long before they are made and so the Estates Department cannot

function properly as the main management function is outside their control.

- The number of staff employed in the Estates Department are not adequate vis-a-vis the establishment and the workload. This has resulted in the neglect of some duties as staff are unable to cope.
- Periodic inspections are not carried out as frequently as required. Thus breaches of the lease and licence terms may go undetected for long periods.
- Lack of adequate support facilities like Transport, office space, equipment has made working conditions difficult, with jobs aborting.
- Allocation of land is done by an allocation committee of whom the Estate manager is a member. The Committee does not always follow the recommendations of the Estate Manager, giving rise to allocation to problematic tenants.
- Laid down procedures of allocation are not always followed.
- The Estate Manager assumes that the lessees and licencees are familiar with the lease and licence agreements. No special effort is made to emphasise compliance.
- Rents for ground leases and licences are set below market levels to encourage investors, with stand premium being paid. However, some investors obtain ground leases for speculation and do not develop the land as required.
- Rents are paid mostly by cheque, with most tenants waiting for a demand note before effecting payment. The Estates

Manager considered an eighty percent rent collection successful.

- Other charges are made apart from rent, namely statutory penalties, enhanced rent, management fees and siding fees. These extra charges form the bulk of the arrears.
- Two departments of the Corporation receive rent- The Estates department and the Finance Department. Poor flow of information between the departments has resulted in accounting records not being maintained accurately and tenants being billed for rents already paid. The arrears records are therefore not accurate.
- The rent review of 1989 resulted in an increase in the arrears as tenants objected.
- The Finance Department has contributed to the arrears position by sending out erroneous demand notes.
- Estate Department not able to inspect premises to discover breaches early like illegal buildings, subleasing and assignment, due to lack of adequate transport and personnel.
- Poorly maintained records has resulted in inadequate follow up of breaches.
- Responses to the remedial action taken by the Estate Manager has not been positive. Tenants do not take the threats of action seriously as the action usually takes time.
- The remedial action is carried out by other departments of the Corporation. For instance eviction is done by the Security Department, while litigation by the Legal

Department.

In conclusion, the study found that although the Estate Manager has contributed to poor lease and licence administration factors outside his control play a major role in this. For instance the lack of decision making authority and the inability to effect remedial action greatly affects his administration.

#### 5.1 RECOMMENDATIONS.

In light of the above findings the study recommends that:-

- The vacancies in the Estate Department be filled. This will create an accounts section and will help ease the problems encountered during rent collection and maintenance of accounting records.
- The Department to become fully operational with the district offices being set up.
- The Department should take over some decision making authority and act as advisor to the Board of Directors with regard to policy matters.
- As different departments of the Corporation have dealings in land, it is necessary that interdepartmental linkages be strengthened to ensure information flows between departments. For instance the passing of information between the Estate Department and Finance Department should be streamlined, with a clear-cut path, to avoid the problems of misinforming or

lack of information leading to inaccurate records.

- Emphasis be placed on the maintenance of updated land records with each member of staff being responsible for maintaining the records concerned with their work area.
- The computerisation of the records system to improve accessibility to information required in making decisions.
- On lowering the rent arrears the Estate Manager should be more vigilant in rent collection. Collection efforts should start as soon as he is aware that rents are in arrears and should be carried to completion. Useful records that maybe maintained to allow for swift action against defaulters include lists of tenants in arrears clearly showing the amounts in arrears and the arrears period, remainder lists, and lists showing previous recovery actions and their effectiveness, to enable the Estate Manager avoid those actions that are least productive and remind him of the action already taken in each case.

It is finally suggested that further research be carried out in the area of recovery of rental arrears for leases and licences on land.

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Appendix 1

QUESTIONNAIRE FOR THE ESTATE MANAGER  
KENYA RAILWAYS CORPORATION.

Part One: INSTITUTIONAL FRAMEWORK FOR LAND MANAGEMENT.

- Q1. Does your organisation have a department dealing with land administration ?.....
- Q2. If there is not, who carries out these duties?.....  
.....  
.....  
.....
- Q3. Describe the organisational structure of the department dealing with land administration ?  
.....  
.....
- Q4. Outline the duties involved in land management?.....  
.....  
.....  
.....
- Q5. As the Estate Manager do you consider the departmental setup adequate in relation to the work load of the Department?  
(explain).....  
.....  
.....



.....  
.....  
Q9. How many members of staff have been employed in the recent past, say 5 years? . ( Use the space provided).

| <u>Title</u> | <u>Number</u> | <u>Qualifications</u> |
|--------------|---------------|-----------------------|
|--------------|---------------|-----------------------|

.....  
.....  
.....  
.....  
.....

Q10. How many staff have been recruited from other departments of the Corporation?.....

Q11a. What is the staff turnover, if any? ( Please indicate type of staff, for instance secretarial). .....

| <u>TYPE</u> | <u>NUMBER.</u> |
|-------------|----------------|
|-------------|----------------|

.....  
.....  
.....

b. Why do some members of staff leave the Department?.....

.....  
.....  
.....

Q12. Are support facilities like office space, transport, equipment, readily available to the department dealing with land management?.....

.....  
.....  
.....

Q13a. How would you term the efficiency of your management team?

good, bad, fair (give reasons)

.....  
.....  
.....  
.....

b. What criteria do you use to evaluate the efficiency of your staff?.....

.....  
.....  
.....  
.....

PART TWO. LEASE AND LICENCE ADMINISTRATION.

A. LAND ALLOCATION.

Q14a. To whom are ground leases granted?.....

• •  
.....  
.....  
.....

b. To whom are licences granted?

Temporary Occupation Licences.....

.....

Private Siding Agreements.....

.....

Wayleaves.....

.....

Q15. What is the procedure followed when plots are allocated from the time the plot is advertised to registration?.....

.....

Q16. Who is responsible for plot allocation?.....

.....

.....

.....

Q17. What method is used to allocate the plots?.....

.....

.....

Q18. What criteria should the applicants meet to be allocated a plots?.....

.....

.....

Q19. Who negotiates the terms of the leases and licences?.....

.....

.....

.....

Q20a. Are there leases or licences with clauses peculiar to themselves? ( give examples of the special clauses).....

.....

.....

.....

b. What criteria are used to determine who is eligible for the special clauses specified in question 20a above?

.....

.....



Q21. How are the lengths of the leases and licences determined?

.....  
.....  
.....

Q22a. Are there incidences of double allocation?.....

b. How have they been handled?.....

.....  
.....  
.....

**B. Determination and Collection of Rents.**

Q23. Does the lease or licence agreement contain a clause covering the payment of rent?.....

Q24. Who determines the rents?.....

.....  
.....

Q25. How are the rents determined?.....

• Ground leases.....

.....

Temporary Occupation Licences.....

.....

Private Siding agreements.....

.....

• Wayleaves.....

.....

Q26a. Are the rents (generally speaking) set above or below what the market reserves for plots of that type and size?.....

.....

b. Why are the rents set above or below the market rates?

.....  
.....  
.....  
.....

Q27. Who collects the rents when they fall due?.....

.....  
.....

Q28. If it is not the department dealing with land management, why don't they collect the rents?.....

.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....

Q29. What method is used to collect Rent?.....

.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....

b. Why was this\ were these methods of rent collection chosen?...

.....  
.....



Q33. What reasons can you give to explain the incidences of rent arrears?.....

.....  
.....  
.....  
.....

Q34a. Are there lease types more prone to arrears than others? .....

b. If yes, please explain in the space provided why this is the case?.....

.....  
.....  
.....  
.....

c. If no, how do you explain disparities in the rent arrears between the different lease and licence types?.....

.....  
.....  
.....

Q35a. Looking at the types of leases you administer, what would you consider to be a successful rent position today? (50%, 70% etc).....

.....

b. Why do you consider this satisfactory?

.....  
.....  
.....

Q36. What penalties are imposed on late payment of rent if any (specify).....  
.....  
.....  
.....

Q37a. If there are penalties imposed, what effects have they had on the rent arrears position?  
a) Reduced them.  
b) Increased them.  
c) Not altered the position  
d) Eliminated them.

b. Please provide a brief explanation why?..  
.....  
.....  
.....  
.....  
.....  
.....  
.....

Q38. How is the payment of rent enforced by the organisation?.....  
.....  
.....  
.....  
.....

39. Have you considered any alternative methods for enforcing rent payment? (explain).....

.....  
.....

40. If you have not considered any alternative methods please give some possible reasons why?

.....  
.....  
.....  
.....  
.....

41. For each type of lease what efforts are being made to reduce the rent arrears?

i) Ground leases.....

.....  
.....  
.....

ii) Temporary Occupation Licence.

.....  
.....  
.....

c. For how long have the efforts stated above been instituted? .....

.....

RENT REVIEW

42. Why was it found necessary to review the rents on Government lands in 1989?

.....  
.....

Q43. How were the new rents assessed? .....

.....

.....

.....

.....

Q44a. Are all the plots under your management covered by the rent review?.....

b. If not, why are they not covered by the reviews?.....

.....

.....

.....

c. If not, are the rents for those plots not covered by he review also being reviewed? .....

.....

.....

Q45. What problems have you faced in enforcing the review?.....

.....

.....

.....

.....

Q46. What has been the lessee's response to the review?.....

.....

.....

Q47. Has the 1989 government rent review affected the overall lease and licence management? ( explain).....

.....

.....

RESTRICTIVE COVENANTS.

Development Control.

48. How often is the clause on development control breached?

.....  
.....  
.....

Q49. What measures are taken by you to try and minimise cases of breach of the clause on development control?.....

.....  
.....  
.....

Q50. What remedial action is taken when the development does not conform to the submitted plans?

- a) Forfeiture of the plot
- b) Legal action
- c) Ignore , take no action
- d) Other

(specify).....

.....  
.....

Q51a. Who is responsible for taking remedial action?.....

.....  
.....  
.....

b. How has this affected land management?.....

.....  
.....

Q52. If no action is taken, why is this the case?.....

.....  
.....



.....

B. Subleasing and Assignment.

Q53. How are breaches to the clause on subleasing and assignment discovered?.....

.....  
.....

Q54. Is this clause frequently breached? ( give supporting information).....

.....  
.....  
.....

Q55. What indicators are used by the Estate Manager to ascertain that a plot is sublet?.....

.....  
.....  
.....

Q56. What procedure is followed when approving a sublease?

.....  
.....

Q57. What criteria are used when approving the sublessee's?

.....  
.....  
.....

Q58. Once illegal sublessee's are noted, what is done by the Estate Manager to legalise them?.....

.....  
.....  
.....

b. Has the action taken reduced the cases of illegal sublesing?.....

.....  
.....  
.....

c. If the action taken does not eliminate the problem, what other appropriate action can be taken in order to do so?

.....  
.....  
.....  
.....

d. Why has the action specified above not been taken?....

.....  
.....  
.....  
.....

SUBLEASING AND ASSIGNMENT.

Sublease and Assignment Indicators.

- i)
- ii)
- iii)
- iv)
- v)
- vi)

Sublease and Assignment Shedule.

| Type of lease    | Plot no. | Indicators present | Conclusion |
|------------------|----------|--------------------|------------|
| <u>/licence.</u> |          | <u>i) to vi)</u>   | Sublease   |

Assignment

BUILDING INSPECTION SCHEDULE

| Plot No.<br>S.R. NO. | THIR.   | USER.      | Development<br>on site.        | Plans/<br>No Plans | Remarks              |
|----------------------|---------|------------|--------------------------------|--------------------|----------------------|
| 6.9.                 |         |            |                                |                    |                      |
| 309/XYZ              | 99years | Industrial | Godown<br>Workshops<br>Offices | Approved<br>Plans  | Building<br>conforms |

APPENDIX 2

QUESTIONNAIRE TO THE TENANTS.

Note : For Wayleaves and Siding agreements parts b and c on development control and subleasing respectively will not be relevant as these refer to plots.

General information.

Questionnaire No. ....

- 1) Type of Lease or Licence.....
- 2) Location.....
- 3) Current User.....
- 4) Permitted User.....

PART ONE. Rent arrears.

Q1. When do you pay rent?

- a) Annually.....
- b) Half yearly.....
- c) Every three months.....
- d) Other (explain briefly).....
- .....
- .....
- .....

2a. How do you usually pay your rent?

- a) By cheque.....
- b) Bankers order.....
- c) Cash.....
- d) Other ( please specify).....
- .....

b. If either a) , b) or d), how is payment effected?

a) Through the post .....

b) Through direct payment to one of the Kenya Railways offices (specify where).....

c. If a), how long does it take before you receive the official receipt from the Railways Management?

a) Within Two weeks

b) Within a month

c) More than a month (please specify).....

Q3a. Do you wait to receive a demand note before paying your rent?.....

b. If yes, why do you wait for a demand notice before effecting payment?.....

.....  
.....  
.....  
.....

Q4a. Do you make other payments apart from the rent stipulated in the lease \ licence document to the Kenya Railways ? (please explain).....

.....  
.....  
.....

b. Why are you charged this extra charge?.....

.....  
.....  
.....

c. Does your lease have provisions for this extra charge?

.....

d. If not, how does the Estate Manager enforce payment of this extra charge? .....

Q5. Looking at the available rent payment methods provided for by the Kenya Railways , What do you consider to be their shortcomings?

i) Payment at a Kenya Railways Office .....

ii) Collection from the tenants premises ( Door to door collection).....

iii) Payment through the postal system.....

iv) Other (explain).....

Q7. Do you consider the rent charged fair? (explain).....

.....  
.....  
.....

Q7a. Do you have rent arrears (as at today)?.....

b. If Yes, why are you in arrears?.....

.....

Q8. What does the Estate Manager do to ensure that you pay your rent on time?.....

.....  
.....  
.....  
.....

Q9. Has this encouraged you to pay your rent on time ?

.....

Q10. If No, please explain why it has not encouraged you to pay your rent on time.....

.....  
.....  
.....  
.....

Q11. What action does the Estate Manager take against those with rental arrears?.....

.....  
.....  
.....



Q12. After how long is this action taken? .....

Part two. Restrictive Covenants.

A. Development Control.

Q13. Is your plot developed?.....

i. If yes, go to Q16.

ii. If no, go to Q13b. Q13b. If No, why is the plot not developed? .....

Q14. How do you use the undeveloped plot?.....

Q15a. Does the plot generate enough money to pay the rent? .....

b. If no, Why do you continue leasing the plot?.....

Q16. What type of development is on the plot?

a) Godowns

b) Offices

c) Godowns and offices

d) other (specify).....

7. Do you have approved building plans ( approved by all the authorities required) ? .....

.....

.....

b. If Not, Why have the plans not been approved ?

.....

.....

.....

Q18a. Have the buildings been constructed in line with the approved plans?.....

.....

b.If No, What changes have been made?

.....

.....

.....

c. Why was it necessary to make the alterations referred to above ?.....

.....

.....

Q19. What penalty , if any , has the Estate Manager placed on you for the illegal buildings or alterations or additions?

.....

.....

.....

20a. What problems , if any, did you encounter when seeking approval for your plans, with respect to the approval given by the Kenya Railways ?.....

.....  
.....  
.....  
.....  
.....

b. What suggestion would you give to solve the problem mentioned above?.....

.....  
.....  
.....  
.....  
.....  
.....

B. Subleases or Assignments.

Q21. Do you occupy and utilise the entire plot?.....

Q22. If No, do you sublet part or all the plot?

Q23..If yes, Why have you found it necessary to sublet part or all your plot?.....

.....  
.....  
.....

24. How many sublesse's are on your plot?.....  
.....

25. Have you obtained approval from the Railway authorities to have the subtenants on the plot?.....

26a. If No, why haven't you obtained the approval of the Railway authorities?.....

b. What has the Railway authority done to encourage you to legalise your subtenants?.....  
.....  
.....  
.....

c. Have the efforts by the Railways authorities been successful?.....  
.....

Q27a. If answer to Q25 is Yes, what problem, if any, did you encounter when applying for the approval?

.....  
.....  
.....  
.....  
.....

b. How do you think the problems stated can be minimised?.....  
.....  
.....  
.....  
.....

20  
21

Recent Rent Review.

8. Does your lease have a clause allowing for the review of rent?.....

9. What has been your response to the recent (1989) rent review? .....

.....

.....

.....

APPENDIX 3

REPUBLIC OF KENYA

THE REGISTRATION OF TITLES ACT  
(CHAPTER 281)

TITLE NUMBER C.R. \_\_\_\_\_

KENYA RAILWAYS CORPORATION a body corporate duly established under the provisions of Kenya Railways Act ( Chapter 397) ( hereinafter refferred to as " the Lessor" which expression shall where the context so admits includes its successors and assigns) being registered proprietors as lessee ( subject to such charges as are notified by Memorandum endorsed hereon) of ALL THAT piece of land situate at \_\_\_\_\_ and known as land reference number \_\_\_\_\_ in the \_\_\_\_\_ Province of the Republic of Kenya containing by measurement \_\_\_\_\_ hectares or threabouts more particularly delineated and described on Land Survey Plan Number \_\_\_\_\_ annexed hereto and thereon edged in red HEREBY LEASE to \_\_\_\_\_ a limited liability company having its registered offices in \_\_\_\_\_ ( Post Office Box \_\_\_\_\_ ) ( hereinafter referred to as " the Lessee" which expression shall where the context admits include its successors and assigns) ALL THAT said peice of land being Land Reference Number \_\_\_\_\_ for the term of \_\_\_\_\_ years from the \_\_\_\_\_ one thousand nine hundred and ninety \_\_\_\_\_ at the yearly rental of Shillings \_\_\_\_\_ payable in advance on the First day of January in every year and subject to the Government Lands Act Chapter 280 and to the following conditions:-

1. The LESSEE HEREBY COVENANTS with the LESSOR as follows:-
  - a) To pay the Rent at the times and in the manner aforesaid.
  - b) To erect if so demanded by the lessor a fence or wall to enclose the whole or part of the land as may be required by the Lessor or a design to be approved by the Chief Civil Engineer of Kenya Railways Corporation ( hereinafter called the "Chief Civil Engineer").
  - c) Not to erect any further buildings until plas (including Block plans showing the position of the buildings and a system of drainage for disposing of sewage surface and sullage water on the land) drawings elevations and specifications thereof shall have been approved in writing by the Local Authority and the Chief Civil Engineer AND not to make any alterations or additions to buildings save with the like consent.

- d) Not to erect any buildings so as to cover a greater percentage of the area of land than is prescribed by the Local Authority in its Bye-laws.
- e) To suitably connect at the Lessee's own expense any drainage system and also the water supply system with any Town drainage and/or Town water supply system when in the opinion of the Local Authority and the Lessor the latter systems are so far completed to enable the lessee so to do.
- f) To make provisions within the land for the loading unloading and parking of motor vehicles being those of the lessee or of persons having business at the demised premises.
- g) To use the land only for the purpose of and to make maximum use of railway access and facilities.
- h) Not to use the premises for any purpose or in any manner which may at any time or become a nuisance or annoyance to the owners or occupiers or other property.
- i) Not to use the premises as a place of residence except that the Lessee may use accomodation not exceeding four hundred square feet for one caretaker or night watchman.
- j) Not to conduct on the land or buildings any retail trade or business of any description.
- k) Not to store on the land or the buildings any goods or merchandise of any explosive or dangerous nature without the prior consent in writing of the Chief Civil Engineer and to indemnify and keep indemnified the Lessor against all claims and demands arising from damage loss of life or injury resulting from the storage of such goods.
- l) No goods or other materials shall be stacked deposited within 3.67 meters of the centreline of any Railway siding adjoining the land. In the event on non-compliance by the Lessee of this condition they will be held responsible for all damage and injury of every description howsoever arising which may be caused as a result of stacking or depositing goods or other materials within 3.67 meters of the centre line of the said railway siding.
- m) Not to subdivide the land.
- n) Not to transfer sublet charge or part with possession of the land or any part thereof or any buildings thereon without the prior consent in writing of the Chief Civil

Engineer.

- o) To pay to the Chief Civil Engineer on demand such sum as the Chief Civil Engineer may estimate to be the proportionate costs of constructing all roads and drains and sewers serving or adjoining the land.
- p) To pay to the Chief Civil Engineer on demand such sum as the Chief Civil Engineer may estimate to be proportionate cost of construction installing or providing railway sidings street lighting and other services which in the opinion of the Chief Civil Engineer are necessary for proper development of the land and of the adjoining areas.
- q) To pay from time to time to the Chief Civil Engineer on demand such proportion of cost of maintaining all roads drains sewers sidings street lighting and other services referred to in Condition Number 1(o) and (p) hereof as the Chief Civil Engineer may assess.
- r) That should the Chief Civil Engineer at any time require the roads serving or adjoining the land to be constructed to a higher standard to pay to the Chief Civil Engineer on demand such proportion of cost of such construction as the Chief Civil Engineer may assess.
- s) To pay to the Lessor such rates taxes charges duties assessments or outgoings of every description as may be imposed charged or assessed by the Kenya Government or Local Authority upon the land and the buildings erected thereon including any contribution or other sum paid by the Lessor in lieu.
- t) To permit the Lessor its agents or servants at all reasonable times without notice to enter upon the land or the buildings for the purpose of inspecting the same.
- u) To permit any authorised person or persons as may be appointed for the purpose to enter upon the land and lay and have access to water mains service pipes and drains telephone or telegraph wires and electrical mains of all descriptions whether overhead or underground and not to erect any buildings in such a way as to cover or interfere with any existing alignment of main or service pipes or telephone or telegraph wires and electrical mains aforementioned.
- v) To keep the buildings (including the internal and external paintwork) and all walls fences drains paths water and pavement fixture belonging thereto in good and substantial



tenantable repair and conditions and to pay such proportionate part of the costs of making and repairing all party walls party fences and gutters as may be assessed by the Chief Civil Engineer.

- w) To insure and keep insured all buildings on the land against loss or damage by fire tempest or storm to the full value thereof with some Insurance Company of repute and to pay all insurance premiums within seven days of becoming due and whenever required so to do produce the policy and premium receipts to the Chief Civil Engineer and cause all moneys received by virtue of such insurance to be forthwith expended on rebuilding and reinstating the premises if and so far as they may be destroyed or damaged by fire tempest or storm and to make up any deficiency out of the Lessee's own money.
- x) To pay legal costs charges and stamp duties incurred in connection with this lease.

2. The LESSOR HEREBY COVENANTS with the LESSEE as follows:-

- a) That the Lessor shall have the right at the expiration of each period of ten years of the term herein granted to raise the annual rent to a figure equivalent to one twentieth part of the unimproved value of the land at the date of such revision. .
- b) The Lessee paying the rent hereby reserved and performing and observing the several covenants on its part therein contained shall quietly and peaceably hold and enjoy the premises without any disturbances from the Lessor or any person rightfully claiming or in trust for it.

3. PROVIDED ALWAYS AND IT IS HEREBY AGREED AND DECLARED as follows:-

- a) At the expiration or sooner determination of the term hereby created the Lessee shall yield up to the Lessor the land together with all improvements thereon in accordance with the foregoing conditions.
- b) That if the said rent or part thereof hereby reserved or any other payment due hereunder shall be in arrear for the space of twenty-one days next after any of the days whereupon the same ought to have been paid as aforesaid whether the same shall have been legally demanded or not or if there shall be any breach non-performance or non observance by the Lessee of any of the covenants or conditions hereinbefore contained and on its part to be performed and observed or if the Lessee shall enter into

liquidation whether compulsory or voluntary ( not being voluntary liquidation merely for the purpose of reconstruction) or being a person or persons shall become bankrupt or enter into arrangements with or for the benefit of his/her or their creditors or for the liquidation of his/her or debts by composition or otherwise than in any such case it shall be lawful for the Lessor at any time thereafter to enter into or upon the demised premises or any part thereof in the name of the whole and the same to have again repossess and enjoy as in its former estate anything herein contained to the contrary notwithstanding and without prejudice to any right of action or remedy of the Lessor in respect of any antecedent breach of any covenants by the Lessee hereinbefore contained or in respect of all loss and damage the Lessor any hereby sustain.

4. Any notice under this lease shall be in writing. Any notice to the Lessee shall be sufficiently served if addressed to the Lessee at the last known address of the Lessee or delivered to the land and any notice to the Lessor shall be sufficiently served if addressed to the Chief Civil Engineer, Kenya Railways Corporation Post Office Box 30079, Nairobi.

IN WITNESS whereof this Lease has been dully executed this

\_\_\_\_\_ day of \_\_\_\_\_ on thousand nine hundred and ninety

SEALED with the COMMON SEAL of  
KENYA RAILWAYS CORPORATION in

the presence of:

\_\_\_\_\_ Managing Director }

\_\_\_\_\_ Secretary

SEALED with the COMMON SEAL of

in

the presence of :-

\_\_\_\_\_ Director

\_\_\_\_\_ Secretary

MEMORANDUM OF CHARGES AND ENCUMBRANCES  
NIL

APPENDIX 4 LICENCE

KENYA RAILWAYS CORPORATION

TO

MR. \_\_\_\_\_

TEMPORARY OCCUPATION LICENCE AT \_\_\_\_\_ STATION.

THIS AGREEMENT made the \_\_\_\_\_ day of \_\_\_\_\_ one thousand and nine hundred and ninety \_\_\_\_\_ BETWEEN ( The Cheif Estate Manager) for and on behalf of KENYA RAILWAYS CORPORATION of Post Office Box Number 30079, Nairobi ( hereinafter referred to as " the Corporation") of the one part and \_\_\_\_\_ of Post Office Box Number \_\_\_\_\_ ( hereinafter referred to as "the Licensee") of the other part.

WITNESSETH as follows:-

(1) The Corporation lets and the Licensee takes ALL THAT piece of land situated at \_\_\_\_\_ as shown in red on the Plan Number \_\_\_\_\_ annexed hereto ( hereinafter referred to as " the land") TO HOLD the same for a period of \_\_\_\_\_ from the first day of \_\_\_\_\_ one thousand and ninety \_\_\_\_\_ at a quarterly rental of Shillings \_\_\_\_\_ payable in advance on the following terms and conditions:-

(2) THE LICENSEE HEREBY COVENANTS witygh the CORPORATYION as follows:-

- a) To pay the rent hereby reserved without deductio on the \_\_\_\_\_ days and in the manner aforesaid.
- b) To deposit with the Corporatin on the execution of this licence a sum of Shillings \_\_\_\_\_ being one quarter's rental which will be refunded to the Licensee on the termination of this Licence PROVIDED that the Corporation shall be at liberty to deduct all monies due to the Corporation at the time of such termination from such deposit and to recover the balance if any by proceedings or otherwise.
- c) To use the land only for the purpose of \_\_\_\_\_ and to make his own arrangement as regards to the supply of electricity and water if such services will be required.
- d) To conform and comply with the Local Authority Rules and Statutory laws for the time being in force.

- e) To erect a suitable fence around the land with a gate giving vehicular access thereon to the satisfaction of the Corporation.
- f) Not to erect any buildings upon the land except temporary structures connected therewith and removable at short notice whose building plans will be approved by the Corporation.
- g) Not to subdivide sublet transfer charge or otherwise dispose of the land.
- h) To re-imburse the Corporation all rates taxes charges duties assessments or outgoings of whatever description as may be imposed or assessed by the Government or Local Authority upon the land which shall include any contribution or other sums paid by the Corporation in lieu thereof.
- i) To deliver up the land in a clean and tidy condition on termination of this licence to the satisfaction of the Corporation.
- j) To hold the Corporation indemnified against all accidents to persons or property and against all demands arising out of or in consequence use of the land.
- k) To permit the Corporation or its accredited representative at all reasonable times to enter upon the land and inspect the same.
- l) To permit the Corporation or such person or authority as may be appointed for the purpose to enter upon the land or any part thereof and lay and have access to sewers water mains service pipes telegraph or wires and electric mains of all description whether overhead or underground.
- m) Shall not use or permit the land to be used for the purpose of carrying out any trade or business which has been or may be declared to be dangerous or offensive by the Corporation.
- n) To pay legal costs charges and stamp duties incurred in connection with this licence.

3. THE CORPORATION HEREBY COVENANTS with the LICENSEE as follows:-

- a) Subject to subclause 2(h) to pay and discharge all existing and future rates imposed under the Rating Act upon the land.
- b) That the licensee paying the rent hereby reserved and performing and observing the covenants agreements conditions restrictions stipulations and provisions herein contained may peaceably and quietly hold and enjoy the land during the said term without any interruption by the Corporation or any person or persons lawfully claiming through or under it.

4. PROVIDED ALWAYS AND IT IS HEREBY AGREED AND DECLARED as follows:-

- a) The Corporation shall have the right to enter upon the land and terminate this licence if the rent hereby reserved or part thereon shall be more than 30 days in arrear or if the licensee shall otherwise fail to perform or observe any of the covenants herein contained and on its part to be performed and observed.
- b) The Corporation shall have the right at the expiration of such period of \_\_\_\_\_ of the term herein granted to revise the rent hereby reserved. PROVIDED that such revised rent shall not be less than the current rent at the time of such revision.
- c) Either party may terminate this agreement by giving to the other three months notice in writing expiring at the end of any calendar month.
- d) Any notice required or unauthorised by this licence or the law to be given or to be served on any party hereto shall be in writing.

AND the licensees hereby accept this licence subject to the conditions restrictions and stipulations above set forth or referred to.

IN WITNESSETH WHEREOF this licence has been

fully executed the day and year first written.

SIGNED by the said for and on  
behalf of KENYA RAILWAYS CORPORATION  
in the presence of

Conveyancing Clerk  
KENYA RAILWAYS CORPORATION

SIGNED by the LICENSEE in the presence of:-

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APPLICATION FOR ALLOCATION OF A RAIL-SERVED PLOT

The Estate & Rating Office,  
Chief Civil Engineer's Dept.,  
P.O. Box 30079,  
NAIROBI.

Name of Applicant .....

Address .....

If Company, names of directors: .....

(Attach Certificate of registration) .....

2. Area of Plot required .....

3. Location .....

4. Plot Number (If known): .....

5. Rail Traffic:

(a) Type of traffic and amount  
(in tons or kilograms) received  
and forwarded by the applicant  
in the last two years .....

(b) Amount of truck load rail traffic  
which the applicant genuinely  
anticipates will be received and  
forwarded from the new plot per year .....

6. Development:

(a) Type of buildings to be erected .....

(b) Plinth area .....

(c) Minimum amount to be spent on development .....

7. State any additional information .....

8. A banker's Reference is attached from .....

Dated ..... Signature of Applicant

KENYA RAILWAYS

APPLICATION FOR WAYLEAVE : COMMENTS SHEETS

A. Applicant's Name.....  
 .....  
 Applicant's address.....  
 .....  
 Description of work.....  
 .....

B. The District Civil Engineer ) 1. Senior Lands Surveyor  
 .....  
 has approved the application) 2. Principal Engineer, (P.W.)  
 .....  
 as at folio..... 3. Principal Engineer (S.S.)  
 Have you any objection to 4. Principal Telecomms. Engineer.  
 this Wayleave? .....  
 .....  
 .....  
 4. Senior Design Engineer.....  
 .....

C. Estate Officer \* 1. ....  
 .....  
 .....

D. Conveyancing Clerk Please prepare a Wayleave Agreement.  
 Details as above.  
 Agreement/Item No.....  
 .....  
 Legal costs is as follows:-  
 Preparation of Agreement  
 Shs.....  
 Stamp Duty Shs.....  
 Remarks:

E. The above mentioned work has now been completed. Will you please record details on relevant drawing in accordance with COMPLETION PLAN at folio.....  
 RECORDED ON DRAWING/MAIN LINE SHEET.  
 NUMBER .....

REMARKS:



APPLICATION FOR THE  
PROVISION OF A PRIVATE SIDING

\*I/We hereby apply for the provision of a siding to deal with traffic of the following description at ..... Station/Industrial Area.

TYPE OF TRAFFIC

.....  
.....

PRESENT ESTIMATED ANNUAL TONNAGES:

TO BE RAILED IN \_\_\_\_\_

TO BE RAILED OUT \_\_\_\_\_

FUTURE ESTIMATED ANNUAL TONNAGES:

TO BE RAILED IN \_\_\_\_\_

TO BE RAILED OUT \_\_\_\_\_

\*I/We am/are the \*Owner/Lessee of the land to be rail served.  
\*I/We wish to carry out all works up to formation level/require the Railways to carry out all works up to formation level.

Name of Applicant \_\_\_\_\_

Address \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Signature ..... Date .....

\*Delete as applicable

|                                    |                             |  |                            |
|------------------------------------|-----------------------------|--|----------------------------|
| District Traffic<br>Superintendent | File No.                    | Comments:  | Signature<br><br>Date:     |
| District Civil<br>Engineer         | File No.<br><br>Drawing No. | Comments:  | Signature<br><br>Date:     |
| Chief Civil<br>Engineer            | File No.                    | Comments:<br><br><u>Dept. Cost Shs.</u><br><br><u>Cash Payment Shs.</u><br><br><u>Annual Rental Shs.</u><br><br>Total Deposit Shs. | Signature<br><br><br>Date: |
| Chief Traffic<br>Manager           | File No.                    | Comments:  | Signature<br><br>Date:     |
| Managing Director                  | File No.                    | Comments:  | Signature<br><br>Date:     |