A CRITICAL EVALUATION OF LANDLORD AND
TENANT LAW IN KENYA:

Dissertation submitted in partial fulfilment
of the requirements for LL.B. Degree
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By NYANYUKI K.E.

PARKLANDS CAMPUS
U.O.N.
FACULTY OF LAW

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DEDICATION

To my beloved mum and dad, without whose endeavour I would have not reached the University level. Also my youngest brother Amos, who at his age knew that I was in University and wished me well.
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INTRODUCTION:

The Law of Landlord and Tenant lays its origin in the dim past when man first started to distinguish between "thine" and "mine" and though its significance may not be of equal importance in all states yet even in Russia where land belongs to the state personal rights in houses with the use of a small plot of land attached thereto and the inheritance thereof are recognized in law\(^1\).

The relationship of landlord and tenant in most systems of Law e.g. the Anglo-American systems is created by contract express or implied, and in some, it can be created by statute. The relation of landlord and tenant may be generally described as that which exists when one person (the lessor or landlord) being possessed of an estate or interest in real property, whether freehold or not, has granted or is deemed to have granted, to another (the lessee or tenant) an estate or interest therein which is less than freehold or less than the estate of the grantor\(^2\).

The words "lease" and "tenancy" in land law and landlord and tenant relationship have been used interchangeably. Some writers and decided cases put them to mean the same. So they regard them as more as less synonymous. Chitty, J. says in the case of Re Negus that "It may fairly be said that a distinction is constantly made between a "tenancy" and a "lease" and I dare say, many solicitors speaking to their clients talk of a "lease" in the sense to meaning a lease which the law requires to be by dead, but
I am unable to say that I can introduce this same loose parlance into the rule. The distinction is therefore not technical whereas for the purpose of this dissertation no much distinction will be drawn between the two words, otherwise they will be used in place of another, to mean the same.

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

This thesis therefore seeks to analyse the statutory provisional governing creation of leases in Kenya before and after independence. The Judicature Act provides for the application of common law, doctrine of equity and statutes of general application we should then look into them to understand its application and their operation in Kenya has borrowed laws. Besides that, to the Indian Transfer of Property Act 1882 which is acodification of the English Law and as it applies in Kenya. The Registered Land Act directs us to the common laws, for matters it does not provide.

The adoption of those laws has brought a dual system of laws in Kenya viz. the written laws and customary laws about Tenancy.
But the written law is the most recognized law in the land, and at times courts find difficulties to apply the law where customary laws relating to leases are used.

The land tenure system was held Communally during the colonial period under the African customary law before the introduction of adjudication process. The introduction of adjudication under the capitalist production required that each individual was to register to own a piece of land as the absolute proprietor. Capital mode of production emphasizes on the privatization of ownership and this gives the rights to dispose the land owned. Therefore the absolute proprietor of land has the legal rights to deal with his own land in any way he pleases, this includes, leasing, mortgaging, charging among other things.

In this dissertation I have deliberated on the relationship existing between the landlord and the tenant in the Kenyan law reflecting the same with the common law, has the fundamental basis for the law in Kenya. The dissertation will be divided into four chapters.

In the first chapter I will deal with the definitions of a landlord and a tenant, the brief historical background of leases, and the statutory provisions governing them in Kenya, lastly I shall look at those who have the capacity to grant a lease and the capacity to take a lease, including the formalities of creating the same.

The second chapter I will discuss the following the common law leases, their essentials, various categories of leases, and An agreement to make a lease as a doctrine and its place in Kenya law.
Since the creation of a lease creates some legal rights and obligations. In the third chapter I will take time to consider just but a few rights and obligation. In this regard the whole chapter I will discuss the tenant's obligation to pay rent under the relationship and law in general, besides that I will consider the right to levy distress warranted to the landlord, how it's exercisable upon the tenant's default to pay rent has required.

The last chapter four, which will be very brief, will discuss about the critique of the tenancy relationship, the conclusion and possible recommendations if any.
FOOTNOTES FOR INTRODUCTION

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7. Section 3 of Cap 8 of the Laws of Kenya.


CHAPTER ONE

1:1 THE DEFINITION OF A LANDLORD AND A TENANT:

The term Landlord implies not merely a lordship over or the ownership of an estate in land, but the person between whom and another the relationship of Landlord and Tenant exists. In other words a landlord is a person who has some legal right over a particular corporeal hereditament and that he has the capacity to lease or demise of the same to another upon agreement. Stroud's Judicial Dictionary defines a landlord as

Landlord in relation to Holding. Shall include a superior mesne or immediate landlord or any person for the time being, entitled to receive the rents and profits or to take possession of any holdings.

From the definition above, a landlord must then be in possession of a freehold of which he is legally entitled, in the event of demising he will be entitled, to rents, profits and reversionary interest. Though the definition does not seem to include the executors and administrators of a landlord, in land they shall be presumed to be entitled to the same profits and rents or to take possession of any holdings as the immediate landlord. The landlord has therefore powers of defending an action of ejectment brought against his tenant and extends to any person claiming title consistent with the tenant's possession whether he has received rent or not. In essence the concept of rent will depend on the agreement between the grantor and grantee. Because, not all landlords are entitled to rents and not all (tenants) grantees one subject to pay. We shall see in the next chapter such as tenancy at will and tenancy on sufferance.

The Registered Land Act provides that a landlord (lessor) is a person who has granted a lease on his successor in title. The proviso
in the Act embraces a landlord as the immediate reversioner to the property leased and his executors and administrators of the same who are otherwise called, his successors in title. The Agents and attorney, in land law are the landlord's successors in title and who will be entitled to reversion interest rents and profits.

In English Law, therefore, the landlord always grants to the tenant an interest less than that which the landlord himself has in land, and does confer the rights to exclusive possession of the same land for a period that is definite or capable of definition. This is similar to Kenyan statutes governing the law relating to landlord and tenant.

A tenant in the hand is a person or includes any person occupying premises whether on payment of rent or otherwise but does not include a person occupying premises under a bona fide claim to the the owner of the premises. As per Abbott J. held in the case of Akinosh vs Enigbokan and Anor:

"the word "occupying" mean "lawfully occupying" so that a mere trespasser in occupation does not come within the term tenant".

A person shall be required to have a legal right of occupation, in order to come within the meaning of the term tenant, otherwise a mere occupation is tantamount to trespass.

The Registered Land Act provision says that a lessee (tenant) means the holder of a lease. It is then correct to say in law that the landlord always has a reversion of the land demised or leased, but as stated in above definitions, a tenant need not pay rent at all and this will not
invalidate the existence of the relationship of a lessor (landlord) and lessee (tenant). Though the concept of the existence of reversion is not per se a conclusive evidence of a tenancy nor is the fact that it is coupled with occupation by the tenant. Once both parties above, the grantor as granted a tenant, a lease, therefore entering into a relationship that shall be called a tenancy, so the kind of grant made by a landlord in which he confers estate or interest into a tenant, and who in turn takes possession is called a lease or tenancy.

In the law of real property and within the Kenyan laws the terms lease and tenancy are always used interchangeably, and indeed they denote the same thing. Both describes the relationship made between a lessor and lessee. In the Registered Land Act a lease means the grant, with or without consideration by the proprietor of land of its right to the exclusive possession of his land and includes the right so granted and the instrument granting it and also includes a sub-lease, but does not include an agreement for a lease.

A distinction made between the two is that a lease denotes a meaning of it, being a document creating an interest in land for a fixed period of certain duration, usually in consideration of the payment of rent and a tenancy which is the relation of a tenant to the land he holds.

Bayley J. in St. Germain (Earl) vs William says "If the owner of the land consents by deed that another person shall occupy the land for a certain time that is a lease."
In essence, the two words convey to the closest point the same meaning. Otherwise it signifies the estate or interest conferred onto the tenant. One can be used in place of, to mean the other, while in actual sense the same relationship of a landlord and tenant is being referred to.

1:2 HISTORICAL BACKGROUND OF LANDLORD AND TENANT RELATIONSHIP:

In this subsection I will discuss the historical background and development of the landlord and tenant law and how it was imported to Kenya as a system of land tenure.

By the 12th Century a lease was being used as a mere contract (rights in personam) which did not pass any rights of property, and this was a time when the feudal system of land tenure was still in operation. It was and is that only the king owns land, and others are merely tenants of land.

At earlier times of its development, a lease was not regarded as an interest in land but was treated as a mere contract only. Therefore a lease was not accepted as a real property. At this time the medieval lawyers invented a doctrine of "estate" which meant an estate or an interest in land, which is capable of ownership. So they classified a lease as a personality because real actions were not available in aspect of it - implying that a tenant under a lease did not have the same rights of recovery of the land in the event of dispossession.

From late the 12th Century and early 13th Century onwards, leases come into common use and more frequently, besides that they obtained
full protection as an interest in land

A.W.B. Simpsons\textsuperscript{16} says that

with delay of the feudal tenurial system and the full
recognition of the leases for years as an adequately
protected interest in land, the lease for years became a
legal institution.

This actually formed the first stage of transformation of a tenancy for
a term of years into a property right. By then it's thought leases
become more often as a device to evade the laws of usury. By the 16th
Century the practice of granting farming leases for periods of twenty-one years became increasingly common\textsuperscript{17}. The Agricultural leases, methods
of farming as they were called continued to spread to 17th Century up to
date: and such leases were generally granted for a term not beyond twenty-one years. Other leases of longer terms were used for building or mining,
which were a more useful means for the development or exploitation of
lands, these extended as from 60 years to 99 years.

Although leases were recognized so early, it's not until 1677 that
they were given a statutory recognition\textsuperscript{18}. Before the enactment of the
statute i.e. before 1677 all leases could be made parol. There was no
requirement of registration which the statute demanded that all leases
be made in writing except leases of not more than three years\textsuperscript{19}. Lack
of registration made the lease a tenancy at will, and, the registered
lease was expected to take effect immediately. A tenancy at will was
subject to determination by the landlord at any time. The writing gave
a lease a recognition of a land right or interest and not a mere contractual
right, whose sole remedy was damages.
Since the middle ages, two separate bodies of law have existed in England, they are the common law and equity. The former (Common Law) does not recognise the existence of Equity, but Equity recognises the existence of the common law and generally follows the law. This led to the development of legal and equitable leases, and it's under this statement that we can understand the distinction between the two types of leases. So a legal lease is one which is recognized by the common law, but statutory provisions now exist, both to define a legal lease and formalities for creating a valid legal lease, while an equitable lease is one which is recognised by Equity, though they can be affected by statutory provisions, but not to the same extent as legal leases.

In essence Equity treats some leases which do not comply with statutory provision in creating a legal lease, to be valid (as legal leases). For instance, Equity using its maxim that "Equity regards as done which ought to be done" make an agreement for a lease (which is not executed rather) to be a valid lease. That maxim was applied in the case of Walsh vs Lonsdale, which latter become the rule in Walsh vs Lonsdale.

In England now, by statute copyhold interest which corresponded in duration to leasehold interests become leasehold interests on 1st January 1926 and copyhold interests for a life or lives were also converted into leasehold interests. Therefore Tenancies of agricultural holdings are by statute subject to provisions which restrict the right of landlord's to terminate tenancies, enable rents to be fixed by arbitration and oral agreements to be reduced to writing and which regulate the rights and liabilities of landlords and tenants during the subsistence and upon determination of tenancies.
How the concept of leasehold was imported to Kenya is the next issue to consider. Kenya was a colony of Britain, in 1897, at the Reception date, the English land tenure system was introduced as a residual law. The Indian Transfer of Property Act\textsuperscript{26} which is a codification of the English laws is also applicable following the common law, land was held by the tenants for the crown, and the same was introduced to Kenya\textsuperscript{27}. The Judicature Act\textsuperscript{28} which permits the application of common law, doctrines of Equity and statutes of general Application gives way for the practice of tenancy system in Kenya\textsuperscript{29}. Then all these together gives us an impression of a brief historical background of landlord and tenant law in Kenya as before and after independence. The lands were registered to sole individuals and the crown who in Kenya was a governor.

Now the Registered land Act\textsuperscript{30} has a provision, directing the use of common laws in the matters pertaining to land law. Besides that there are some other ordinances which assisted in the importation of English Tenure system into Kenya such as the 1897 Land Regulation\textsuperscript{31}, Crown Land Ordinances, under which grants of freeholds and lease holds were made\textsuperscript{32}, and the Registration of Titles Ordinance\textsuperscript{33} which have been replaced by Government Lands Act\textsuperscript{34}, which provided that all the leases exceeding one year should be registered\textsuperscript{35}. So in brief the enacted laws concerning corporal hereditaments in Kenya have a proviso regarding the leases. Though there exists some customary methods of leasing, such are not recognized in law, unless those which fall under S:11 of the Registered Land Act\textsuperscript{36}.
There is a question as to who is capable of granting a lease and who can take the same, in essence to determine who can become a landlord or a tenant. In law not everyone has the legal right over certain hereditament, so as to grant a tenancy, using the principle of "Nemo dat" (no one can give what he does not have or possess). The same not everyone has the capacity to take a lease.

Generally all persons who are not under any legal disability may grant leases for such terms as are not inconsistent with the nature and quantity of the estates which they have, but if a lease be made for a longer term than the estate of the lessor will warrant, it will generally operate as a valid lease or demise during so much of the term as he has power to grant. This includes even an alien so long as he is entitled to the fee simple absolute in land has power to grant a lease.

The essential issue here is that for one to be able to grant a lease he must be an absolute owner i.e. absolutely entitled in fee simple as an individual and is under no personal incapacity, can to his right of disposition, grant a lease for such periods and on such terms and conditions as he pleases. Persons entitled to limited or defeasible or partial interests in property, persons under disability and corporations can grant leases to the extent permitted by law in the particular case, and similarly persons under disability and corporations can accept leases to the same extent.
An alien can now acquire, hold and dispose of real property. But a lease can not be granted to an enemy alien. Where a lease was granted to an alien before the outbreak of war does not determine upon the lessee becoming an enemy alien. Under disability, a lease may be set aside if it was granted upon inadequate consideration by a person of such weak intellect, though not of unsound mind or by a person in a state of habitual intoxication. An infant or a minor in law is considered incapable of granting a lease and therefore quite incapable too to take a lease. If an infant is a beneficially interested in possession in land, the land unless held on trust for sale is settled land, the trustees for sale where the land is held on trust for sale or, the personal representatives in whom settled land is vested or the trustees of the settlement as the case may be, have all the powers including powers of leasing conferred on tenants for life and trustees of settlement.

A tenancy purported to be granted by an infant can at best operate to confer on the tenant an equitable interest which will be liable to be overreached by a disposition made by the trustees in whom the legal estate is vested, such a tenancy is void if it is necessarily to the prejudice of the infant and at the most binds the equitable interest of the infant unless avoided by the infant on attaining his majority or shortly thereafter before confirming the tenancy by conduct or otherwise. It therefore seems that if the landlord acquires the legal estate after attaining his majority and does not avoid a tenancy, a tenancy by estoppel may arise.

A woman legally married is now capable of disposing of any property in all aspects as if she were a sole owner, and can therefore grant leases or tenancies of her property.
An incorporated body being a legal entity may grant a tenancy of the land which it occupies. A corporation not created by a statute has the same powers as an individual unless those powers are restricted by its constitution. A part from that i.e. a statute a corporation can not dispose of its property except by deed sealed by the common seal of the corporation except in trivial matters of daily occurrence or matters of unimportance.

Building Societies too have a capacity to lease what they hold as mortgage in possession in accordance with the statutory powers conferred on such a mortgagee.

Conversely an individual who is under no personal incapacity which disables him from contracting or from holding land is able to accept a lease for such periods and on such terms as he pleases. Where a lease is made to a person of unsound mind it is valid if the landlord at the time of contracting acted on good faith and was not aware of the mental illness of the tenant. An infant entering into a relationship only acquires an equitable interest and the agreement is voidable by the infant during his minority. Also a lease to an infant jointly with one or more person of full age vests the legal estate in the persons of full age on trust for sale, likewise the legally married women can accept a tenancy or lease. Under the common law position i.e. under section one of the Law Reform (married women and fortfeasors) Act a married woman is capable of acquiring, holding and disposing of any property and of rendering herself liable and suing or being sued upon any contract debt, or obligation, in all respects as if she were a feme
sole, and this includes an unfettered power of making leases of land not subject to any settlement\(^48\).

All that is per the common law position and in Kenya, the difference won't be much because to a large extent those laws which govern the leases in England, were enacted in the Kenyan law. As regards the concept of absolute owner, the same is found in the Registered Land Act\(^49\). The Act allows a proprietor of land to lease, it or part thereof as he may wish. Since the Indian Transfer of Property Act\(^50\) is a codification of the English laws it also applies in Kenya, and it provides the same as to disposition of property\(^51\). The Act authorises other bodies to grant a lease and take the same, this includes local government\(^52\).

In Kenya as in England, a person with some mental illness can not grant a lease nor take a lease, unless the other party contracting with that mental incapacitated person acted on a good faith otherwise he or she will find himself on herself liable. The same to married women, and infants. A woman to acquire or dispose of any property should be legally married. If an infant is granted a lease with a group of persons who are above the age they will hold that for him for a trust for sell or until he (infant) attains the age\(^53\). The issue about women i.e. Married Women's Property Act 1881 and the Law Reform (Married Women and Joint Torffeasors) Act of 1935 England were incorporated in the laws of Kenya by the Law of Contract\(^54\). Corporate bodies which fall under Company's Act\(^56\) since they are legal bodies they have that legal capacity to grant and take a lease. Under the repealed Crown Lands Ordinance now (Government Land Act)\(^56\). Crown Lands could be alienated by the Commission of Lands by way of sales or by granting 99 year leases.
The above shows us various categories who can take a lease and who can grant the same, both under the common law and the Kenyan position and to that extent we can notice that there isn't much distinct between the common law and the Kenyan law positions.

1:4 FORMALITIES OF CREATING A TENANCY:

The relationship of landlord and tenant has its origins in the medieval land law and originally one of contract only, which as from that beginning the contract conferred an estate in the land on the tenant without losing all its contractual characteristics which was later recognised by the statute. In essence the concept is that, the two parties entered into a contract, upon which the proprietor derived some estate on the tenant, and this implies clearly that by then the statute was not in operation to govern the relationship. As a rule, a party in whom such estate was conferred he (a tenant) was deemed a right of exclusive possession of the land and including whatever that was leased. The landlord had only to retain a reversion i.e. interest in property leased by him.

This tenancy by contract would be created by writing or orally by any words which express the intention of giving and taking possession for a certain period of time or by conduct. To note, any other written or oral contract of tenancy of which specific performance can be ordered for creates an agreement for a lease. This falls under equitable lease other than a legal lease, as was held in the case of Walsh v Lowsdale. It is called an agreement for a lease, but not a lease, because it's only an instrument which only binds the one to create and the other to accept a lease. In an agreement for a lease, the document is not
executed but rather an agreement to create in the future. In Equity, An
agreement for a lease is not a valid contract, the courts can enforce it
by a decree of specific performance, its validity takes place as from when
possession is taken, provided that any conditions precedent to the granting
of a lease, stipulated by the Agreement, have been performed. In Inland
Revenue Commissioners v. Earl of Derby. It was held that
"a tenant had not performed the conditions before the
the date set, then he was not entitled at the date to
specific performance of the agreement to grant the lease".

To make a tenancy there must exist two separate parties. A sole owner
on a proprietor of an estate can not grant himself a lease; nor a group
of individuals, who are absolute owners of an estate can not grant to
themselves as a group a lease of the same owned estate. In Rye vs Rye
A case in which a purported grant of a tenancy by two brothers to a
partnership of which they were the only partners was held to be ineffective.
A person can convey land to himself under the law; but that does not permit
the creation of a lease since, as soon as the tenancy and reversion are in
the same hands. There is a merger and the terms sinks in the reversion.

The relation of a landlord and tenant, besides their creation by
contract it would and can be created by statute. The operation of a
statute to govern the relationship, commenced as when the changes in the
law of real property were made that is January 1 1926. The Act therefore
stated as to when the relation began and it did set rules such as registra-
tion, rights and liabilities among others.

Leases in Kenya are virtually the same as the common law position,
apart from that in the Registered Land Act. Common law applies subject
to stipulations of the Judicature Act, so it stipulates as follows:
Subject to the provisions of this Act and save as it may be provided by any written law for the time being in force the Common Law of England as modified by the doctrines of Equity shall extend and apply to Kenya in relation to land, leases and charges registered under this Act and interests therein but without prejudice to the rights, liabilities and remedies of the parties under any instrument subsisting immediately before such application.

So far a landlord and tenant relationship can be created by contract and statute in the same way as in the common law. Normally there's requirement by statutes to register long leases. In practice this requirement poses so may problems to the parties concern as we shall see in the second chapter about remedies.

Actually in Kenya the Government Lands Act\textsuperscript{64} requires that leases of more than one year must be registered, and the Registration of Titles Act\textsuperscript{65} requires registration of leases for more than one year and leases with option to renew and right to the lessee to purchase the reversion. The Registration of Titles Act is like the Registered Land Act\textsuperscript{66} but the latter requires registration of a lease exceeding two years instead of one. This kind of registration system as contained in the Acts above is very essential, otherwise if such registration requirements will not be followed the purported leases may actually operate as Agreements for leases. The registration requirements are contained in Section 38 of the Registered Land Act\textsuperscript{67} and Landlord and Tenants (Shops, Hotels and Catering Establishments) Act\textsuperscript{68}. Upon registration of leases parties to it will be bound by the obligations in the statutes therein.
All statutes governing the relation do differ abit as to when the relationship is created for instance under the *Indian Transfer of Property Act*, registration is required of the tenancies from year to year for periods exceeding one year or reserve a yearly rental. The interest passes to the tenant as when the tenancy is granted along with delivery of possession. This Section in the *Indian Transfer of Property Act* reflects the provision requirement as to writing in Section (3(3) of the *Law Contract Act*, while in the other hand such requirement under the *Registered Land Act*, needs at least two years, therefore to determine whether a relationship existed, it must be decided as to what or under which Act they were made.

If the registrable lease under The *Indian Transfer of Property Act* is not registered it therefore renders the transaction void unless the presumption interpretation of tenancy, Section 106 of the same can be applied. In the case of *Meralli vs Parker*, Rudd J. held that

"The fact that a sublease had not been registered, did not defeat the plaintiff's claim. There had been such an oral agreement coupled with delivery of possession as to constitute a tenancy for one year continuing thereafter in this case as a tenancy from month to month in accordance with Sections 106, 107 and 116 of the *Indian Transfer of property Act 1882*, Section 126 of the Crown Land Ordinance does not require registration of a such tenancy".

To some extent as per judgement of Rudd Justice non-registration of a registrable tenancies does not render them totally void, all will depend on the circumstances of the case. Because dicta in the decision of *Grosvenor vs Rogan* seem to suggest that Section 41 of *Government Land Act* thereof makes an unregistered but registrable instruemnt valid inter-parties, rather than void, held that
"as there was a contract which could have been specially enforced there was an agreement to the contrary for the purpose of Section 106 of the Indian Transfer of Property Act 1882".

Tenancies under the Registered Land Act for purpose of registration as talked in Section 38, where it expressly provides that nothing in the previous sub-section prevents such instrument from operating as contracts. In effect such a contract support an action for specific performance where this is not barred by the statute.

Broadly we have seen how the relationship of Landlord and Tenant is created and who are eligible to grant and lease. But as we can see; since the importation of the common law governing the leases dual system of Land tenure evolved. Before the instroduction of the written laws, land was owend communally under the customary ways, but since the inauguration of the common laws as residual law in the former (customary law) were overrided. The written law were the main recognized law, but in Kenya still some people still use the old system of lease in which each party does not realise his rights.

The statutes emphasized, the kind of ownership, therefore a person vested with absolute ownership had the capacity to use, dispose the land he is entitled to for a term or period he pleases. Unlike therefore the customary laws which do not as the written law vest the absolute ownership. A person under customary law will not have some rights as the other recognised under the statutes.
FOOTNOTES FOR CHAPTER ONE

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6. OBUMNEME M.O. Nigerian Law of Landlord and Tenant, London, Sweet and
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27. Op cit Pg. 4.
29. Ibid.
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31. No. 16 of 1901.
32. No. 21 of 1902.
33. No. 26 of 1919.
35. Section 47 of Cap 300 (K).
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40. Gantside vs Isherwood [1783] 1 Bro c.c. 558.
42. Law of real Property Act 1925 (15 & 16).
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45. R. vs Shipping Nortion (Inhabitants) [1804] 5 East 239.
46. Imperial Loan Co. v. Stone [1892] 1QB 559 C.A.
47. Supra (20).
48. Supra (37) Pg. 71.
49. Sections 27, 28 and 46 of Cap 300 (K).
51. Ibid Section 38.
52. Ibid Section 107.
53. Section 113 of Cap 300 (K).
55. Cap 486 (K).
56. Cap 280 (K).
57. Supra Redman's Law of Landlord and Tenant 1946 Pg. 3.


60. [1914] 3.K.B. 1196.


63. Section 3 Cap 3 Laws of Kenya.

64. Cap 280 (K).

65. Cap 281 (K).

66. Cap 300 (K).

67. Ibid.

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CHAPTER TWO

THE ESSENTIALS OF A LEASE:

After having considered how the relationship of a landlord and tenant is created both under the common law and the Kenyan law, I should now discuss in detail the necessary pre-requisites of a legally recognised lease. The essentials of a lease include the right of exclusive possession, a definite period, and defined premises. Each of these essentials shall be considered separately.

2:1:1 THE RIGHT TO EXCLUSIVE POSSESSION:

It is essential for the creation of a tenancy that the tenant should be granted the right to exclusive possession of the premises. It is a necessary feature of a lease that the lessee shall acquire the right of possession to the exclusion of the lessor. Once the grantor of a lease has agreed to demise the property he is the absolute owner, he should grant the grantee the right of exclusive possession. This implies that any part thereof leased is not subject to any control by the lessor unless as can be provided for in the statute, or else once the contract of a lease is sealed, the lessee acquires exclusive right even that property. In Clore vs Theotrical Properties, Question was whether the contract created a lease or not. A theatre company agreed to grant "front of house" rights and grantees were given the exclusive use of all the refreshment rooms in the theatre for the purpose of supplying refreshments to the theatre goers. The court of appeal held that "no lease had been created because" Exclusive possession" had not been given of the refreshment rooms to the grantees, possession, had only been given from the limited purpose of supplying refreshments. There was no right to exclude others except for that limited purpose".
So a mere possession of grant with a limited purpose does not amount to a lease. Otherwise the grantees were only allowed or had rights to the granted house, for the purpose of supplying refreshments to theatre goers, while it was subject to the control of the company (grantor).

However, the fact that the agreement grants a right of exclusive possession is not in itself conclusive evidence of the existence of a tenancy but it's a consideration of the first importance. Therefore to determine whether a grantee is entitled to exclusive possession regard must be had to the substance of the Agreement, and to give a right to exclusive possession there need not be express words to that effect, it will suffice if the nature of the conduct (acts) to be done by the grantee requires that he should have exclusive possession. A grant under which the grantee has only the right to use the premises without being entitled to exclusive possession must operate as a licence and not as a lease. At one time the right of exclusive possession necessarily characterised the grant as that of a lease, but it is now possible for a licencee to have the right to exclusive possession.

This brings us into another issue to differentiate as to when a right to exclusive possession creates a lease or a licence. It may well be that a grantee obtains only a personal privilege in the shape of a licencee which may be revoked according to the express or implied terms of the contract. A licence has been defined as a permission given by a land owner to come into land or do something on the land which, but for the land owner's consent, would be a trespass upon the land. To determine whether a contract creates a lease or a licence, it's a question of intention to be inferred.
from the circumstances of the case and not what the parties had labelled for it.

In the case of Errington vs Errington and Woods⁶ a father wishing to provide a house for his son, purchased a dwelling house through a building society paid a lumpsum and left the balance on mortgage to be paid by weekly instalment. He later handed over the building society's book to the daughter-in-law but instructed her not to part with it. The father died and by his will left everything to his widow including the house. Though by that time the son and his wife were still dwelling in that house and kept on paying the instalments. The son left and went to stay with his widowed mother.

The mother brought an action for possession against the daughter-in-law, which was dismissed by County Court judge on the ground that the son and daughter-in-law were tenants at will and the claim was barred by the limitation Act 1939, on appeal it was held that "the daughter-in-law and her husband were licensees, with no power to assign or sublet, but entitled under a personal contract to occupy the house for so long as they paid the instalments to the building society and the appeal failed".

From the circumstances of the case, the son and his wife did not qualify to be tenants though they were granted that right of exclusive possession there were no legal formalities that created a lease, but a privilege that amounted to a licence. As per Lord Dennig, the couple were licencees having a permissive occupation short of a tenancy, but with a contractual right or at any rate an equitable right to remain so long as they paid the instalments which would grow into a good equitable title to the house
of itself as soon as the mortgage was paid.

Under the tenancy relationship the condition has been described as a right "unattended by a simulatenous right of any other person in respect of the same subject matter". Unless provided in the statute even the landlord cannot re-enter the premises without the tenant's permission as he has exclusive possession. As in the case of Hetcht vs Morgan, the question was whether the agreement thereunder amounted to a tenancy or a licence. The Agreement described the respondent as "a paying guest with effect from March 7, 1956 at a monthly price of Shs.600/= payable in advance, the amount to include early morning tea, electricity, water and part service and terminable by four days notice before the end of the month or either side". On considering the total circumstances of the case MacDuff J. held "inter alia" as follows:

"There was here in my view an intention on the part of the appellant as grantor, to create a licence, but the facts show that the present respondent, as grantee, did not accept that intention. Again I would go further and hold that even if were the intention of the appellant to create a licence by the agreement itself he failed to do so. The whole effect of the agreement of January 19 was to create not a licence but a tenancy. It therefore agrees ...... that the present respondent was in exclusive occupation".

The kind of agreement, as per the circumstances of the case above, therefore depict clearly that the respondent was a tenant with a right of exclusive occupation and not a mere licensee who had the same. The respondent was not in any way from the agreement subject to the control of a landlord (appellant in this case).
registered otherwise it will be void whereas for a licence such a requirement does not exist. About passing of no interest in property Vaughman C.J. in an attempt to define a licence in the case of Thomas v Sorrell said that

"A dispensation or licence properly passeth no interest nor alters or transfers property in any thing but only makes an action lawful, which without it had been unlawful".

So a licence is a mere permission to make unlawful action to be lawful, but does not vest any interest in the licensee over the property in issue or which makes the basis of a transaction.

Unlike tenancy a licence can be terminated at any time whether it be gratuitously given or for good consideration. It is of particular importance in connection with the Rent Act which accord substantial security of tenure to lessees, but not licencees. In Wang vs Weil, the issue was whether a management agreement relating to business premises conferred a lease or a licence. The court considered the agreement to be asham and not a tenancy. Each case, however depends on its facts and a 'franchise agreement' (where there is no allegation that the document granting it conceals the true state of affairs) will probably be held to be a licence.

2:1:2 THE PERIOD MUST BE CERTAIN:

A valid lease must have a particular date of commencement and ending. In other words the length of a lease must be certain. It's said that a contract of tenancy may be created by writing or orally by any words which express the intention of giving and taking possession for a certain period of time. The writing must state the term to be granted and also the time from which it is to commence, but it will be sufficient if the date can
be collected from the agreement read as a whole, as where a date is
fixed for possession to be given or for the payment of rent to commence\(^\text{18}\).

A lease therefore can be held void for failing to specify date of
commencement as in the case of Harvey \textit{v} Pratt\(^\text{19}\), the defendant and the
plaintiff made a written agreement under which the defendant was to take
a lease of a garage. The document described the property, set the annual
rent, and length of a lease but did not indicate the commencement date.
It was signed by both parties and later stamped. The defendant never went
into occupation of the premises and the plaintiff refused to complete,
whereupon the defendant registered the document in land registry as an
estate contract, the plaintiff brought an action arguing that the contract
was not enforceable and binding, the trial judge held that no contract was
concluded. On appeal Lord Denning M.R. held

"that a valid agreement for a lease to exist the parties and
the property the length of the term, the rent, and the date
of commencement must be defined. Accordingly, there was no
a valid concluded contract, the register should be rectified
and the appeal dismissed".

The agreement for commencement will solely depend on the parties.
They may state perhaps at the occurrence of certain event or upon possessio
of the premises becoming vacant. In Brilliant \textit{vs} Micheals\(^\text{20}\). Evershed J.
was of the idea that

"Contract for a lease, was enforceable notwithstanding that
the commencement of the term was expressed by reference to
the happening of a contingency which was at that time uncertain,
provided that at the time the contract was sought to be enforced
the contingency had occurred".
Certainty of a lease, is essential to avoid controversy between the landlord and tenant as in Lace vs. Chantler where the premises were let "furnished for the duration" of the Second World War. The question which arose was whether the agreement was a valid lease. The court of appeal held that no lease had been created by the form of words used, since the length of the lease was uncertain, with approval of Lord Greene quoted:

"a statement that the length of the lease must either have been expressly stated by the parties or be ascertainable by an equally certain method".

Parties therefore to a contract of a tenancy must set a definite period or length of its subsistence; and for that time, its commencement should be stipulated, otherwise for ending can easily be inferred, once the length and commencement are stated. If commencement is upon the occurrence of an event, and in its occurrence, a transaction begins with no dispute since the parties to it (a lease) must have intended. In Swift vs Macbean where an agreement was that a tenant to take possession of a house, or lease to commence upon the outbreak of war, if war would in fact occur, which subsequently did occur, and lease commenced, Birkett J. held that the lease was valid since the parties did not rely upon its terms until the date of commencement had been ascertained.

An agreement for a lease is not void for uncertainty as to the date of commencement when it is expressed to commence on the happening of a future contingency. From the cases therefore it is immaterial if the future event is not likely to happen for many years or indeed at all. It must, however, have happened before the parties can seek the enforcement of the contract.
There are also Reversionary Leases. In such leases the time is limited to commence at some future date. Early alone this future date would go for a long period but the Law of Property Act 1925 limited the same not to go beyond 21 years from the date in the instrument purporting to create it. The period before commencement is a reversionary interest to the grantor. The English Common Law doctrine of "interessee termini" which precluded the tenant from acquiring an estate in the land until he had taken possession during the term of the lease was abolished, and does not apply in Kenya.

In the Kenyan Law, both the Indian Transfer of Property Act and Registered Land Act, a lease can either be in possession or may commence at a future date. The Registered Land Act provides that,

a lease may be made for a period to commence on a future date, not being later than 21 years from the date on which the lease is executed, but shall be of no effect unless it is registered and that any instrument purporting to create a lease to commence on a date more than 21 years after the date of the instrument, or take effect on fulfilment of any condition is void.

By limiting the future leases to commence within a period of 21 years, the Registered Land Act follows the Law of Property Act 1925 which provides the same. The same Act abolished the doctrine of interessee termini". In Kenya it cannot apply as the passing of interest in land concerning the length of time under the R.L.A. will depend on the agreement made by the parties; provides that

Subject to the provisions of this Act and of any other written law, the proprietor of land may lease the land or part of it to any person for a definite term or for the life of the lessor or the lessee or for a period which though indefinite may be determined by the lessor or the, and subject to such conditions as he may think fit.
Therefore it is said, that where no date is mentioned there is no interference that the term is to commence from the date of the agreement in the absence of the language pointing to that conclusion.

2:1:3: DEFINED PREMISES:

The essential of defined premises or areas, is sometimes referred to as Description of the property. The arrangement to make a lease, must indicate precisely what the frontiers of premises are indicated in the lease or demise. It therefore needs an accurate description of the premises to be leased. For a contract to amount to a good lease the area to be demised must be freely identifiable, to evade dispute which might arise there later.

The Property need not be so described as to identify it, provided that the description designates property which is identifiable, parol evidence is admissible to identify the exact property referred to. The essence of this, is that it forms the subject matter of the lease. The right of exclusive possession goes hand in hand with the defined premises. Because the grantee is given a right of exclusive possession it then should be over a particular defined areas or premises. In Ratwani vs Degamela, proposed lessee was let to share a shop. The part of the shop was not defined or described. The court held that it was not a lease because the part of the shop was not defined. This characteristics is provided in the Registered Land Act, and which stipulates as follows:

If only part is leased, it shall be accompanied by a plan or other description which the Registrar in his absolute discretion, deems adequate to identify the part leased.

For a valid lease the parties to it, shall describe, define the area, forming the subject matter of a lease. Especially where the contract involves demising part of the property thereof emphasis should be made
to identify the part that comes thereunder.

The right of exclusive possession cannot suffice without, ascertainment of the premises forming the subject matter. The case of Heptulla vs Thakore\textsuperscript{33}, premises were described as "all ground floor of the said premises with the exception of one shop window and space which is at present occupied by the leased counter-part on the ground floor of the premises and at present occupied by the sublease forming part of the building erected on the said piece of land" Briggs J.A. in deciding the case ruled that "The description was not capable of creating any recognisable frontier .... because the premises intended to be let could never be ascertained with sufficient precision". The intended demise therefore failed.

In describing the property demised the word "land" is commonly used, a term which includes all hereditaments corporeal and incoporeal. So regard should be made not to restrict the word land to mean physical solum (soil). Land includes not only the face of the earth, but everything under it or over it. Therefore making a valid lease the area should be clearly set up after which the tenant will be given the right to exclusive possession.

2:2 CATEGORIES OF TENANCIES:

The tenancy relationship, can be classified into various categories depending either on the agreement.

2:2:1 FIXED PERIOD TENANCIES:

This is a lease whose duration is fixed by the agreement. The length of term is irrelevant so long as it is indicated in the agreement. The term is absolute and its commencement is certain. Therefore the lease need not take effect immediately, as to such it permits a grant of reversionary interest which however commences within 21 years from the date of execution\textsuperscript{34}. 
Tenant for term of years shall be where a man lets lands, tenants, to another for a term of years, certain, and every estate which must expire at a period certain and prefixed by whatever words created, is an estate for years. So the simplest form of term of years absolute consists of a lease for a fixed number of years. Such a term may be made to commence presently, or at some future date, or even at the date which is past at the time when the lease was executed. So all year leases, for year must be certain, they must have a certain beginning and they must have a certain ending and thereby the continuance of the term must be certain.

Actually what this does is to abolish the doctrine of "interesse termini" because the lessee before taking possession has no estate but an interest in the term. In Preece vs Corrie Thomas White held certain premises for the residue of a term of years which would expire November 11, 1826, and on September 11, 1826 he let the premises to the plaintiff to hold until November 11, 1826 rendering immediately 270 for rent. This not being paid, the defendant as the bailiff of Thomas distrained and the plaintiff brought replevin. The court of common pleas held that "the distress was illegal while having no reversionary interest expectant on the term, although an action for debt or assumpsit for rent reserved might have been maintained".

Vesting of possession in a future date, as stipulated in the common law provisions, it should not exceed 21 years from the date of execution if it goes beyond it will be void. Commencement need to be stated by parties, to take place after a month, or some years or exactly at end of the 21 years, which is the limitation period.
enters on or retains possession of premises and pays rent calculated by reference to a yearly holding that person holds under an implied yearly tenancy. In essence, time is not fixed as the fixed term tenancies. In Land Settlement Association Ltd. vs Carr. It was held that a letting for 364 days and thereafter for successive period of 364 days until determined by notice is not a letting from year to year.

Under the Indian Transfer of Property Act and Registered Land Act. They both deal with the granting of leases either by express or implied agreement. They stipulate as follows:

where the proprietor of land permits exclusive occupation of land or any part thereof by any other person at a rent but without any agreement in writing but occupation shall be deemed to constitute a periodic tenancy.

The periodic tenancy accrues as a result of the absolute proprietor of land, has permitted another, means he has consented that, that other person to use his land or part thereof. The grantee will have a right of exclusive possession and he pays rent, that is tantamount to a periodic tenancy. In the Act there is a proviso as follows:

Where in any lease the term is not specified and no provision is made for the giving of the notice to determine the tenancy the lease shall be deemed to have created a periodic tenancy.

The periodic tenancies are common under the Registered Land Act than in the Indian Transfer of Property Act. Periodic tenancy can be created by reference to the period at which the rent is payable, in such periodic tenancies, determination is also by either party giving notice. Another category of periodic tenancy under the Registered Land Act is one if "a right of occupation under the African customary
law is recorded in the adjudication register". The concept of holding over to create a periodic tenancy is contained in the Acts, and this is where a tenant for a term of years holds over after the expiration of his legal lease. He becomes a tenant on sufferance but when he pays or expressly agrees to pay any subsequent rent at the previous yearly rate a new tenancy from year to year may thereby be created upon the same terms and conditions as those contained in the expired lease, so far as the same are applicable to and not inconsistent with yearly tenancy. In the case of **Ladies Hosiery and Underwear Ltd vs Parker**. Maugham J. held that

the inference of a tenancy from year to year, which is drawn from the payment of rent by a tenant after the expiration of his tenancy, ought to be shown only when such payments are by reference to yearly rent".

Leases from year to year give only one time of which, continuance and that time of continuance may be confined to one year extended to several years, depending on the circumstances of the tenancy in its progress. As regards determination, unless required by the statute periodic tenancy is determinable by notice to quit, but varying on the length of tenancy i.e. for instance a yearly tenancy requires 6 months or less notice and some with a quarterly tenancy require 3 months or less. Mainly length of notice in absence of some special stipulation will have to equal the length of a tenancy. In **Lewis v Baker**. The plaintiff by an agreement of tenancy let a public house to the defendant for a term which was expressed in the "habendum". He had to hold until would be determinable as hereinafter mentioned or a yearly rent of 70 l, clear of all deductions except land and property, tax payable quarterly on certain named days, the tenant agreeing (inter alia) to keep the premises in repair. Agreement contained a provision that it was lawful for either
party to determine the tenancy by giving 3 months notice in writing for that purpose. It was held that

"The agreement created a yearly tenancy determinable by three months notice expiring with any year of the tenancy, and not a tenancy for an indefinite term determinable by a three month's notice expiring at any time".

But in Brooke vs Searle it was said that A demise 'for two years certain and thereafter from year to year until either party' gives a three months' notice to determine the tenancy is not determinable at the end of the two years but is a tenancy for three years at least and only determinable by another expiring at the end of the third or any subsequent years.

On the other hand where an agreement of a tenancy provided that the tenancy should commence on May 1, 1895, and that the rent should be payable quarterly on May 1, August 1, November 1 and February 1 "subject to three months' notice or either side at any time to terminate the agreement the lessor on January 24, 1901, gave a tenant three months' notice to quit on April 25. It was held that the notice to quit was good. In this case the three months' notice to quit was actually in accordance with the agreed stipulation.

2:2:3 TENANCY AT WILL:

A tenancy at will is where land or tenements are let by one man to another to hold at the will of the lessor. In this case a lessee is called a tenant at will because he has no certain or sure estate, for the lessor may put him out at any time he pleases. This category of a tenancy is created when one person lets his land to another without limiting any certain or determinate estate. A person to whom land is let is therefore called a tenant at will and he is said to have a right of exclusive possession over land. Any party can determinate the
relationship created, but it's mostly said to be held by a lessor only, because actually the lessee occupies the land, at wish of lessor, who can bring that tenancy to an end any time, even without formal notice.\textsuperscript{56}

As provided in the Real Property Limitation Act \textsuperscript{1833} the lessee has no power to assign or grant the same lease to a third party. While, the lessor by doing so he determines the tenancy at will, where there is a clear intention to create a tenancy at will the reservation and payment of rent by reference to the year do not make it a yearly tenancy.\textsuperscript{58} In \textit{Morgan vs William Harrison Ltd}\textsuperscript{59} A colliery lease which empowered the leases to carry foreign coal over the surface, provided that all disputes relating to the lease should be referred to arbitration.

Shortly before the expiration of the term the lessees by other requested the lessors to grant an extension of the lease on the existing term for six months and the lessors wrote in reply that the lessees might consider themselves tenants at will of both mine and way leave pending further arrangements of lessors having brought an action against the lessees in respect of their exercise of the way-leave during the tenancy at will, the lessees applied for a stay of proceedings under S.4 of the \textit{Arbitration Act 1889} Neville J. J. held that

"upon the construction of the letters, that the terms of the lease including the arbitration clause, applied to the tenancy at will, so far as applicable to such a tenancy, and that the proceedings ought to be stayed".

As per Cozens Hardy consenting to the same was of the view that "where on the expiration of a lease the lessee is expressly authorised to continue in possession as tenant at will in, in the absence of evidence of a contrary intention, the terms and conditions of the original lease apply to the tenancy at will so far as they are consistent with such tenancy".
In this case there was an express agreement for a tenancy at will, but the same principle would appear to apply where a tenancy at will is to be implied. Essentially there should be express or implied agreement for that lease.

Determination of a tenancy at will, is normally by any party, though it's a lessor who has such wide powers than a lessee. An estate at will may be determined by a demand of possession or by implication of law. As in Doe d. Price vs Price\(^62\), the landlord informed the tenant at will that unless the money owing was paid the landlord would recover possession of the land. It was held that this was a sufficient demand of possession to determine the tenancy at will. This case expresses determination by demand of possession. On the other hand determination by implication of law include things as death of either party, acts of ownership exercised by landlord, waste committed by the tenant, landlord's alienation of the reversion and notice thereof e.t.c. but by the acts of subletting and assignment which are impliedly authorised by the lessor and the circumstances under which the tenant occupies at will, do determine the tenancy.

2:2:4 TENANCY ON SUFFERANCE:

This type of tenancy always arises by implication of law where a grantee, without either the assent or dissent of the grantor wrongfully remains in possession after the expiration of the definite term granted to him\(^63\). In law such a tenant is presumed to have a right to sue strangers but he can not sue the landlord. Due to lack of express or implied agreement, there is no privity of tenure between the parties, therefore a tenant gets a right of mere occupation without either privity of tenure or privity of estate\(^64\). Tenant on sufferance closely resembles tenancy at will, but the distinction is that, in the former, a tenant enters by
a lawful title but at its expiry he holds over wrongfully. But he can not be said to be a trespasser because the grantor has not dissented nor assented. The later a tenant at will has a right to be in possession. In this there is privity of tenure and estate, unlike the tenant on sufferance. If then a grantor of property consents with the tenant on sufferance, he will become a tenant at will.

A tenant at sufferance may be ejected at any moment and has no right to emblements, while he becomes liable to statutory penalties if he remained in occupation after he should have departed. Under common law tenants on sufferance were not liable to pay rent, but the Landlord and Tenant Act 1730\textsuperscript{65} required that any tenant who shall willfully hold over after the determination of the term and demand made and written notice given for delivery up of possession, shall pay double the yearly value of the lands for the time the premises are detained.

In the case of French and Another vs Elliot\textsuperscript{66}, it was held that a tenant is not deemed to hold over "willfully" unless he is well aware that he has no right to retain possession. In the case above the landlords demanded Mesne profits and double value, a tenant contended that the notice to quit was bad in respect of the reason for non-payment of rent because it was given before the time for compliance had expired, and that because it contained a reason which had been referred to arbitration. In his judgement Paull J. held that "the landlords were not entitled to double value because the tenant might unreasonable have thought that he would not be disturbed until the arbitration had taken place; such a holding over was not wilful\textsuperscript{67}.

A tenant on sufferance can only be said to hold over willfully, if he is aware that, he is required to surrender possession, and that is with clear notice to quit.

It has been argued that if a tenant on sufferance remains in possession for twelve years without paying rent, he defeats the right of the landlord and those claiming under the landlord to recover the land. In Re Jolly, a testatrix, who had given her son an estate free i.e. without paying rent for more than twelve years, was said to have acquired title to it. Under the Real Property Act 1874. All the rights of the reversion (testatrix) in the farm had become extinguished and that therefore the unpaid rent would not be paid to her, and the son did not owe her any amount. This is otherwise called adverse possession, persons like squatters, can acquire title to land. A tenancy on sufferance may also be enlarged into a tenancy at will or a periodic tenancy this will depend on the conduct of the parties to it.

2:3 THE DOCTRINE OF AGREEMENT FOR A LEASE AND IT'S PLACE IN KENYAN LAW:

An agreement for a lease, is a contract between two parties to grant and take a lease at some future time. Its object is not to convey the land or to give possession of it, but merely to arrange that a lease shall be granted in accordance with the agreement which is made. The difference between a lease is that in the former a contract is made and enforced immediately, and vests possession, while the latter is an agreement to contract, at some future date and therefore does not vest interest nor give possession. A lease may be called an executed agreement, in contradistinction to a promise or covenant by lessor to make or execute a lease. Therefore a lease can take effect without necessity of actual entry, but under agreement for a lease entry, does not create relation of landlord and tenant.
Today's agreement has no effect, as regards the immediate creation of a legal lease is concerned, however, equity takes a different view from the common law, and by doing so it applies the maxim "Equity regards as done that which ought to be done" making an agreement which does not amount to a legal lease to be an equitable lease. The equitable leases need not comply with the formalities of creating a lease under the common law but to be enforceable, equitable leases need not comply with the requirement if Section 40 Law of Property Act. This requirement should be equitable doctrine of "part-performance" which was applied in the case of Walsh vs Lonsdale making an agreement for a lease to be a valid lease and which later become to be known as a rule or doctrine in Walsh vs Lonsdale. An agreement for a lease is void against a purchaser for value of a legal estate unless registered as an estate contract. Also should the tenant assign his equitable lease the assignee will be able to enforce the covenants against the landlord on the general principle that the benefit of a contract, but not the burden may be assigned but the landlord will not be entitled until when to enforce the covenant against the assignee.

2:3:1 THE RULE IN THE CASE OF WALSH vs LONSDALE:

The rule is that where there is an agreement for a lease of which equity will give specific performance then by reason of the maxim that "equity" regards as done which ought to be done", the agreement is in the eyes of equity transformed from that moment the agreement becomes enforceable into a legal lease.

In this case an enforceable written agreement for a legal lease was made, one of the Terms of the intended legal lease was to be that the landlord might demand one year's rent in advance by giving notice to the
tenant. Before a legal lease was made, the tenant went into possession. Thereafter, following the terms set the landlord claimed to exercise the right of demanding the rent in advance the tenant protested to pay on the grounds that no legal lease had been executed and that the terms as to rent did not form part of the implied yearly lease, which had, he said arisen from his going into possession.

The landlord then distrained, the tenant then sued the landlord for illegal distress arguing that no rent was in arrear, and that a distress was a common law remedy only available to landlord under a legal lease. FRY J. held that

"the landlord had been entitled to demand rent and had been entitled to demand levy distress because, in the eyes of equity, a legal lease had come into existence as soon as the agreement become enforceable (which on these facts was as soon as the written agreement was signed)".

From the case the equitable tenant's position is identical to that of a legal tenant. The intention of the parties to create a legal lease and the doctrine of equitable part performance are paramount to the contract. The plaintiff as a tenant had actually signed the written agreement, intending to execute the transaction, and entered into possession expressly indicating that he agreed to the terms and conditions which were stipulated in the written agreement.

The same judgment has been applied in the case of Tottenham Hotspur Football and Athletic Co. Ltd. vs Prince Grove Publishers Ltd 76, where Lawson J. held that

"where a person was in possession and occupied premises as a tenant under an agreement, the position was the same as if an instrument giving effect to the tenancy on the agreed terms, had been executed accordingly, the tenants having
remained in possession under the terms of the compromise agreement embodied in the court order and paying rent thereunder, were in possession under the terms of the new lease".

In this case the judge in arriving at the judgment considered the intention of the parties and the doctrine of part performance, as the essential pre-requisites in deciding whether the agreement creates an equitable lease.

This doctrine is not limited to cases where there is only one agreement, nor to cases were there is a direct contractual relationship between a lessee and a person in whom the legal estate is vested. Though an equitable lease is as good as a legal lease it is said that the tenant's rights are solely dependent on specific performance being available. The agreement does not constitute conveyance within the Property Act 1925. Moreover, the execution of the contract will be in the future date when it shall amount to a legal lease.

In England not all courts have the jurisdiction to make an order for specific performance. For instance the County Court has no jurisdiction if the value of the property exceeds £500, but the parties may both consent to let the court issue the decree. However, depending on the circumstances of the case it will as in the case of Kingswood Estates Co. Ltd. vs Anderson, where the court went ahead and engaged in the case in which the value of
property exceeded £500. But this is not the position in Kenya, all courts have the jurisdiction to order for the decree of specific performance. Further, specific performance is a discretionary remedy like all other equitable remedies; therefore for the court to order for that equitable principles must be followed. For instance undue delay (laches) by the tenant in applying for the aid of the court may result in the remedy being refused by the Court. This follows the maxim that delay defeats equity. Any tenant purporting to be remedied by the equitable remedies should be prompt and must bring an act within the limitation period.

The statutory requirement in Kenya which requires registration of certain categories of leases rule out the applicability of the doctrine or rule in Walsh vs Lansdale. In fact, the doctrine is based on the principle, that even without formal execution of a lease proprietary interest passes in equity. Otherwise for statutes, interest passes once the lease is registered, and this leads to exclusion of this equitable doctrine, since equity cannot be used to override a statute. Otherwise the courts to some extent have used the same to arrive at a judgement, as was applied in Grosvenor vs Rogan. The appellant owned a house in Nairobi, the respondent wished to lease the fourth floor of that building to carry on therein the business of a school. He entered into a written agreement with Tysons Ltd., the appellant's agents. Under the terms the appellant agreed to grant and the respondent to take of the fourth floor for a term of five years and one month. The respondent entered into possession. A draft leave was sent to him for approval but was never approved or executed by him. The respondent paid some rent for a certain time which he later stopped in which the appellant's advocate gave notice by registered letter that they required vacant possession of the premises by reason of failure to pay rent.
But respondent did not comply and suit was instituted on the grounds of failure to pay rent and breach of the express or implied terms of the lease. The trial judge was of the idea that there was never an executed lease and the suit was based on an alleged breach of the agreement to grant and take a lease. So he held that

"In any case, this is a case of an unregistered lease" with respect it is not there never was a lease in existence capable of registration".

But on appeal Chanam Singh J. suggested

"It follows that in my view this appeal must succeed and I would so order, a ward appellant the costs, and remit the suit to the same judge for a decision on the basis that there was a valid contract between the parties for the leasing of the suit premises for the term certain of five years and one month".

In making his judgement the trial judge interpreted the agreement entered into using the Indian Transfer of Property Act which on appeal Justice Chanan did not agree with. The appeal judge followed the rule in Walsh v Lonsdale that there was an agreement for a lease upon which both parties had, consented, and they had agreed on a fixed period i.e. five years and one month. The commencement of a lease was stated and possession had vested in the tenant. However there are no statutory provisions which the judge followed he solely interpreted the rule in Walsh v Lonsdale, reflecting a proviso in the Registered Land Act, concerning the application of common laws where necessary.

In Barchelors Bakery Ltd. vs Westlands' Securities Limited, the plaintiff (new respondent) sought possession of a shop which he had demised to the defendant (now appellant) by a written agreement rent of KShs.2,800/= . The appellant duly went into possession and paid the
agreed rent but refused to deliver up possession and vacate the premises on the expiry of the said term of 6 years. Respondent claimed a sum of KShs.5,623/40 allegedly due by the appellant.

The appellant pleaded that agreement for a lease not having been registered under the Registration of Titles Act was invalid in law. Simpson J. (as he then was) held that

"the agreement for a lease provided for the execution by the parties of a formal lease which was never done the parties being content to abide by the agreement which they regarded as a contract which was binding on them. It was capable of being specifically enforced and did not require to be registered as proviso(e) of S:4 of R.D.A. (Cap. 285)exempts from registration document merely creating a right to obtain another document. In this case there was a tenancy of a shop which had been reduced into writing and was for a period exceeding 5 years. It was not therefore a controlled tenancy within the meaning if SS:2(1) of the Landlord and Tenant Act and the landlord (respondent) was entitled to possession at the end of the Agreement without notice".

It therefore follows from the judgement that the intention of the parties was of great importance. Despite the fact that there was no document executed, the written agreement which specified the time hereinafter, being 6 years and certainty about commencement and the rent under the doctrine in Walsh's case, it was enforceable as a legal lease. The Agreement was binding to them, more so as in Walsh terms and conditions were specified in the written agreement and possession had vested.

So far, since the leases in Kenya found their way to Kenya through the Reception Clause, and even if the agreement for lease is not provided in the statutes there is a proviso which requires that we resort to common law whenever applicable. So in deciding the case, the judge applied
the doctrine in Walsh vs Lonsdale. Otherwise the circumstances of the case matter on arriving at the judgement of such cases.
FOOTNOTES FOR CHAPTER TWO

1. London and N.W. Rly Co. vs Buckmaster
   [1874] 10 QB 70 at Pg. 76.


7. Ibid.


11. Interoven vs. Hibbard [1936].


13. Section 100 of Cap 300 of the Laws of Kenya.


15. Supra (4) at Pg. 368.


29. Supra, Section 45.


32. Section 45 of Cap. 300 (K).


35. Supra: Woodfall’s Landlord and Tenant Pg. 260.

36. Ibid.

37. [1823] 5 Bing 24.

38. Section 51 (2) of Cap. 300 (Supra).


40. Supra: Hill and Redman’s Landlord and Tenant Pg. 41.


42. Group 8 of the Laws of Kenya.


44. SS. 46 1(b) and 106 Cap. 300 and Groups of the Laws of Kenya respectively.

45. SS. 46 (1) (b) Cap. 300 Laws of Kenya (Supra).


46(a) Group 8 of the Laws of Kenya.

47. SS: 52(1) and 116 of Cap. 300 and Group 8 of the Laws of Kenya respectively.

48. SS: 11 of Cap 300 Supra.

49. Ibid.

50. Supra: Woodfalls Pg. 297.
51. [1930] I Ch. 304.

52. [1906] 2 K.B. 599.

53. [1912] 1 Ch. 610.


55. Supra: 42 279.

56. MacMillan S.K. Law of Leases Pg. 31 (Supra).

57. Supra: Cheshire and Burn's Modern Law Of of Real Property Pg. 413.


59. [1907] 2 K.B. 137.

60. Supra: Woodfall's Law of Landlord and Tenant Pg. 53.

61. Ibid.


64. Supra MacMillan: Law of Leases Pg. 33.

65. Op cit Pg. 416.


67. Ibid.

68. [1960] 2 Ch. 616.
69. Supra Cheshire and Burn's Modern Law of Real Property Pg. 561.


72. Supra MacMillan Law of Leases Pg. 18.

73. [1881] 21 Ch.D. 9.C.A.

74. Supra Redman's Law of Landlord and Tenant Pg. 101.

75. Supra (72) Pg. 24.


77. Supra (74) 1982 17th ed. Pg. 102.


82. SS. 106 I.T.P.A. Group 8 of the Laws of Kenya.

83. SS. 163 of Cap. 300 of the Laws of Kenya.

84. Civil Case No. 2691 of 1975 (H.C. of Kenya).

85. Cap. 281.
CHAPTER THREE

THE TENANT'S OBLIGATION TO PAY RENT AND THE LANDLORD'S RIGHT TO LEVY DISTRESS:

The lease, or upon the creation of a tenancy, the parties to it normally covenant to perform some duties to each other, failure to do so will give the aggrieved party a right to claim. These are called the rights and obligations or liabilities of the parties to the tenancy. In this Chapter, I will consider the tenant's duty to pay rent once the interest vests in him and what distress is as a right to the landlord, once the tenant defaults to perform his obligation to pay rent. Though the tenant is under an obligation to pay rent, he should not be exploited, therefore, there are provisions in the Acts, regarding landlord and tenant relationship which protect the tenant in case of exploitation.

3:1 THE OBLIGATION TO PAY RENT:

Rent, that is, rent-service, is the recompense paid by the tenant to the landlord for the exclusive possession of corporeal hereditaments. Generally rent is part of the compensation which the Tenant furnishes to the Landlord in Consideration of the later (Landlord) allowing him (the tenant) to occupy the landlord's premises. Rent is derived from a Latin word "radditus" meaning a return, and defined as "certain profit issuing at a stipulated period, out of lands and tenements corporeal.

The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, defines Rent as

"rent" includes any sum paid as valuable consideration for the occupation of any premises any sum paid as rent or hire for use of furniture or as a service charge where premises are let and furniture therein is hired by the landlord to the tenant or when a premises furnished or unfurnished are let with services;
It can be observed from the above definitions that rent can only be reserved on a lease of corporeal hereditaments, but a grant of rent in respect of the things incorporeal may operate as a personal contract and so bind the grantor. So rent must be reserved out of the subject of the demise, that is out of the lands and tenements whereunto the lessor may have recourse or resort to distrain. In the case of Samuel vs Salmon and Gluckstein Ltd., under the War Damage Act, it stated that where land is let to a tenant, contribution is to be paid to the commission in certain proportions determined by the period for which the tenancy has still to run and the proportion which the rent reserved for the period bears to the contributory value of the property.

In this case a lease of a London Shop was granted in 1931 for a term of twenty two years, the lessees paying an annual premium of 6001 and also a rent of 6001 payable quarterly for every year of the term. Now the matter in issue was, whether the annual premium was part of the rent reserved. Justice Uthwatt held that

"the annual "premium" being a payment for the use of the land, was part of the rent reserved by the lease, and that, for the purpose of calculating the respective proportions of war damage contribution the rent payable was in fact and in law not 6001 but 1201."

The reservation of rent may either be express or implied from the covenant to pay. Under the express covenant for payment of rent the lessee must seek out the lessor and pay it to him, but where there is no express covenant the lessee must be prepared to pay it on the leased premises on the appointed day. So sums reserved as rent on a mere agreement for a lease under which the intending lessee had entered could not formerly be distrained for until a yearly tenancy had arisen by the payment of one of such sums, but usually such an agreement can be specifically enforced and if so it is equivalent to
a lease and lessor has the remedy of distress.  

There are so many payments agreed to be made under the name rent, these in default are normally recoverable by action on the agreement, but not by distress, unless express power to destraining therefore is given, or they are expressly made recoverable as rent. The examples of such payments include inter alia, those payments reserved on the grant of a licence for use of the premises, not giving the right to exclusive possession, those payments reserved on a lease of an incorporeal hereditaments, those reserved on a lease of chattels. As regards licences, they do not confer the right to exclusive possession and since rent is recompense paid by the tenant to the landlord for exclusive possession of corporeal hereditaments, the amount paid should not be distrained for in case of arrears. The licencee does not have the same right to exclusive possession as the lessee does.

The obligation to pay rent is the most fundamental duty imposed on the tenant. Law requires that the tenant to pay the rent reserved for as long as he remains in occupation either actual or constructive. The tenant is obliged to perform that fundamental duty in turn to enjoy the vested interest without interference.

The Registered Land Act provides that so long as the lessee pays the rent and observes and performs the agreements and conditions contained or implied in the lease and on his part to be observed and performed the lessee shall and may peaceably and quietly possess and enjoy the leased premises during the period of the lease without any lawful interruption, from or by the lessor or any person rightfully claiming through him."
Rent therefore acts like a seal of the contract of leasehold. It entitles the tenant to have a right over demised property and such right should be exclusive.

Rent payment is made by many forms. It need not consist the payment of money i.e. in the form of currency notes and coins. It may consist in the render of chattels or the performance of services. In Lanyon vs Carne⁹ a reservation in a lease for lives of a heriot payable on the death of each tenant was treated as rent and heriots were not payable after the determination of the term in the lives of the tenants. This was a kind of barter exchange, especially in Kenya during the colonial period: the Africans who worked at the white's settlements were provided with housing facilities in turn they would work for the settlers in the farms. This were called servant's quarters, so instead of paying they would render some essential service required and were paid very little. Even in modern practice, there are situations where the tenant does not pay money but services. The modern conception of rent is a payment which a tenant is bound by his contract to make to his landlord for use of the property let.

Rent does not necessarily represent the annual produce of the land, a royalty notwithstanding that it is reserved in respect of substances which are taken from the land so as to cause its permanent diminution as a true rent¹⁰. The landlord cannot however, reserve as rent a right involving the actual use by him of the land, as the vesture or herbage. The right is actually a parcel of the annual profits so if the landlord puts the premises or property into his personal use he will not acquire those profits in form of rents, otherwise in the meaning of rent it should be made from one party (tenant) to another (landlord). So putting the property into actual use by himself, does not amount to reserve of rent and cannot even amount to a tenancy relationship. During the creation
of a legal relationship of a tenancy the parties to it should then agree in what payment will be made, that is either in monetary, render of chattels or performance of services among others. Fixation of such terms can be made or reached by the parties themselves or by a third party such as an arbitrator.

The rent must be certain or must be so stated that it afterwards be ascertained with certainty. The parties to a tenancy relationship must be aware as to what amount of rent to be paid, be either in cash or in kind; or must be indicated in a way that afterwards it can be ascertained with certainty. If the rent though at first uncertain afterwards fixed, this will operate as a new demise. The rent may be fixed by arbitration, but an agreement for a lease at a rent to be fixed by arbitration will not be specifically enforced if the arbitration is improperly conducted. The clause or provision for an increase of rent on notice does not render the rent uncertain. In Greater London Council vs. Connolly. The rent books of the tenants contained a printed conditions of the tenancies. By condition two the rent was "liable to be increased or decreased on notice being given". The Council increased the rent by notice, informing the tenants of the increases which were to take effect in 3 months from the date the notices were issued. After two months notices to quit were served on the small minority of tenants who had refused to pay the increased rent eviction notices were signed by the director of housing who had power to authorise proceedings for eviction. In proceedings for possession against tenants where notices to quit had expired the country court judge gave judgement for the council. On appeal it was held dismissing the appeal that "Since it was to be implied that the council could increase or decrease the rent on giving reasonable notice condition 2 was not void for uncertainty and although the amount of
the rent was dependent upon an act of the landlord it could be calculated with certainty at the time when payment become due and so was not uncertain".

The words in the agreement were much certain and therefore did not render the rent uncertain. As indicated from the facts, if a tenant would not afford the rent upon increase he would be required by notice to quit, and that was served to them. The rent review clause must exist, the landlord will seek to ensure that rent keeps pace with inflation, so that throughout the term of the lease, the tenant is paying the market rent or something near to it\(^{15}\). This clause is contained in the Act in form of standard rent\(^{16}\) set where the increasing of rent is set to occur after a certain period. The Act goes further to provide that such a review clause restricts the increasing of rent, section 9 of the Rent Restriction Act\(^ {17}\) restricts the increasing of rent, that "the landlord of premises shall not be entitled to recover any rent in respect thereof in excess of the standard rent notwithstanding any tenancy agreement or lease executed between the landlord and the tenant or any other agreement in writing or otherwise, as to the amount of rent payable made between the landlord and the tenant prior to or after the assessment of the standard rent".

But Section 11 of the same Act: Watersdown Section 9 for it permits increases in rent. Under that section the landlord is permitted to increase the rent only by making notice in writing of which a copy should be delivered to the tribunal, and thereunder, the landlord must show that there has been a general increase of the rates, or rates payable by the landlord have become payable since the premises were let to the tenant by the amount of the rates\(^ {18}\). This is not the true view as concerns landlords' and tenants, because, not all landlords and tenants are aware of the standard rent as contained in the statute. Many landlords include governmental departments, local authorities
and other corporations such as National Housing Corporations and individual or private landlords. Perhaps, the first ones may follow the standard rent which may be set. But for private landlords, they can set their own terms and conditions of tenancy, thereby, the tenant is subject to those same terms and conditions. These may include the arbitrary increase of rent, since there might be no standard rent. Private landlords, fix rents with a variation even though the houses and premises are on the same place and of the similar nature.

Nobody can claim rent unless he has a reversion in the property. Rent reserved by a lease is annexed and incident to and goes with reversionary estate in the land or in any part of it, immediately expectant on the term granted by the lease. In cases where a reservation to the landlord, without mention of his heirs, confined the rent to his life, unless it was expressly reserved during the term. A landlord must have a legal title to the demised property, and if he has then he is entitled to receive rent, if he does not mention his representatives, at death, they (if any) will not claim, where rent is reserved to one person of the property which is jointly owned, the payable rent should be apportioned. Likewise no rent can be reserved on the assignment of a lease, since no reversion remains in the assignor but here also the reservation is good as a contract to pay the rent.

By entering into a lease with the landlord, the tenant creates a privity of contract between themselves, and as the term is vested in the tenant, and the reversion in the landlord there is also a privity of estate. The tenant therefore destroys the privity of estate if he assigns the interest to a third party; but the privity of contract remains and the
original tenants remains liable to the landlord under it. The tenant's liabilities to pay rent after he has assigned, if there is no express covenant for the payment of rent the landlord can sue either the original tenant or his assignee, as he pleases, but if he once accepts rent from the tenant's assignee he can not afterwards sue the original tenant for rent due after the assignment.

3:1:1 TIME AND MODE OF PAYMENT:

The time of payment of the rent will be stipulated in the lease by the parties. Under common law it is said that the reddendum fixes the periods when the rent is to be paid, the parties should agree as to when the rent becomes due and the place of payment. In most cases if no periods are fixed, a yearly rent is presumed to exist and rent is only payable at the end of the year, or it can be payable quarterly or half yearly. No rent should be demanded for unless after the expiry of the said or agreed period. But where the time of payment is left indefinite, evidence may be given of contemporaneous or subsequent dealings of the parties to show that the rent was to be payable earlier than the end of the year.

A reservation of rent at a fixed sum per quarter, with a provision for continuance of the tenancy from quarter to quarter, creates a quarterly tenancy. If rent is payable "quarterly, or half quarterly, if required" the landlord, after receiving it quarterly cannot distrain for a half quarter's rent without previous demand. A lease under seal can be varied by an agreement in writing or even by an oral agreement, provided that it is evidenced by writing or has been partly performed. In the case of Mitas v Hyams, by a lease under seal the rent premises was payable quarterly in advance on unusual quarter. The lessor thereafter agreed
orally with the lessee to change the dates so as to correspond to the usual quarter days, that oral variation was evidenced by a written receipt, signed by the lessor; for a quarter's rent paid in advance by the lessee. The lessee did not pay the rent due the agreed date as he claimed that there had been a surrender of the lease by him on that date. Lessor disputed that and brought an action at the county court claiming; under the terms of the lease, a quarter's rent due on the unusual quarter day. Somervell L.J. held, "affirming the decision of the county court judge dismissing the claim, that the parties were bound by the original lease as amended by the subsequent oral variation, which was both evidenced in writing and had been expressly acted upon by them".

The judge dismissed the claim on the ground that having regard to the oral variation, the plaintiff could no longer maintain that, that rent was due on February 17, which was not the agreed date. Commenting on the same Denning L.J. said according to the old common law the claim would have been perfectly good, because at law you could not vary a document under seal except by another document under seal.

"A lease under seal can be varied by an agreement in writing, and even by an oral agreement, so long as it is evidenced in writing or has been partly performed. This is just a case. This agreed variation, which was evidenced in writing was intended to be binding intended to be acted on, and was in fact acted on. The landlord therefore, is bound by it even though there was no consideration for it".

Following the dicta in the case of Central London Property Trust Ltd. v High Trees House Ltd., the landlord can only sue for the quarter's rent due in advance on March 25, the agreed date. The action must be based not on the original lease alone, but on the lease as amended by the subsequent variation.
Under the Indian Transfer of Property Act a formation of lease can be referred from the payment of rent. It provides that

A lease of immovable property from year to year or for any term exceeding one year or reserving a yearly rent can be made only by a registered instrument.

In such lease the rent is payable yearly. Some with periodic lenancies on which rent is paid at the expiry of the stipulated period. The modern practice in Kenya be either registered leases or not, mainly rent is paid monthly. The payment will depend on the parties; some would like to pay in advance i.e. at the beginning of the month, while some at the end of the month. For fixed leases, a tenant may pay either for a half the fixed period or pay for the whole of it.

If the rent is reserved payable on specified days or within so many days after, it is not absolutely due until the expiration of the last day of grace. But this is not common under the Kenyan law.

In paying, the tenant must pay either himself or by an agent. In Smith v Cox a landlady of premises used an agent, who collected her rents, he was in the habit, when a tenant failed to pay his rent of rendering accounts to her just as if the rent had been paid. The agent levied a distress for the rent, to the tenant who owed £260, but which he had paid to the landlady through the agent, but thought he was entitled to it because she had not made any repairs. It was contended that, in the circumstances, the rent had been paid and that the distress was illegal. Humphreys J. noted in his holding that

"the agent did not intend the payment to be made on behalf of the tenant, and did not have the tenant's prior authority to make the payment, nor was the payment subsequently ratified by tenant. In this circumstances the distress was illegal".
Payment should be made by the tenant himself or by his agent; either to the lessor or to his agent expressly or impliedly authorised to receive it. Rent must be reserved to lessor himself and not to a stranger, for it's something paid by way of retribution or compensation for the land, and ought to be made to him from whom the lands passes. An authorised agent is therefore not a stranger. Landlords like corporations use agents in collecting their rents; the same applies to the local authorities. For example, the City Council (now City Commission) uses its employees to collect the rent, the National Housing Corporation uses its estate agents to receive its rents and even the private landlords have their own agents or authorised person or persons who receive the rents on their behalf.

If the landlord dies the rent is payable to his personal representatives until the reversion vested by them consent or by conveyance in the person to whom it devolves. In case of joint tenants any one of them can sue and give a receipt for the entire rent and if one dies the entire rent is due to the survivors.

The assignment of the reversion, entitles the assignee to receive the rent, but if the tenant continues paying the rent to the assignor he will not be prejudiced, if he has not received notice of the assignment. The landlord may not assign the reversion but can assign the right to receive rent, and such a directive to the tenant, written by the landlord, authorising him to pay rent to the assignee, if given for valuable consideration operates as an equitable assignment. But if no consideration is given it will be mere authority revocable on notice to the tenant. An assignee of the rent without the reversion can sue for it; but he has no right
to levy distress perhaps using the name of the assignor or as the assignor himself would do. The payment of rent is an acknowledgement of tenancy, and therefore the essence of such payment is a recognition of the person in whom the reversion is vested, as such the tenant is estopped from denying him that title. In the case of Hindle and another V. Hick Brothers Manufacturing Co. Ltd, it was established that, if a tenant makes payment of rent by mistake, fraud or misrepresentation to a person not entitled to demand it does not present the tenant from disputing the ownership of that person or showing that he was not entitled to it, so after payment of rent the ones to show mistake or ignorance of facts relating to the title shifts to the tenant. Otherwise in such a case the tenant will be liable to pay it over again to the reversioner. However, the tenant may recover such rent paid to the stranger, or the owner - i.e. reversioner may at his own choice, himself sue the person receiving the rent in an action for money had and received.

The tenant should be provided with the rent book, which should indicate rates paid by the tenant, the amount of rent and as to what interval should be paid, should also contain the summary of statutory provisions concerning the tenancy relationship.

In the Kenyan perspective on assignment it's provided in the Registered Land Act and Rent Restriction Act, but such assignment is not fully, except with the consent of either the lessor or the tribunal that, the lessee can only sub-let part of the lease, in such a period shorter than he holds. Once such sub-letting is consented to, the sub-tenant is to pay the rent to the original tenant who becomes a lessor to the sub-tenant. Section 28(2) of the Rent Restriction Act requires that if at the expiry of the leased period by sub-tenant, he does not vacant possession he will be required to pay the tenant the
the sum equal five times the standard rent, and the sum may be recovered from him (tenant) as a civil debt. Also Section 62(5) of the Registered Land Act requires that if the sub-lessee pays rent to the lessor under the lease, he (sub-lessee) shall be entitled to set off any sum so paid against the rent payable by him to the sub-lessor in respect of the sub-lease.

The Rent Restriction Act also provides that

Every landlord of premises, other than premises the standard rent of which exceed two thousand five hundred shillings per month, shall keep or cause to be kept in respect of the premises a rent book, in such form as the Minister may approve and shall provide his tenant with a copy;

The rent book should maintain a record of the parties to the tenancy, the premises, the standard rent and rent payable and of all payments of rent made, and each entry to the rent book should be signed by the landlord or his authorised agent. If the landlord contravenes that, he will be guilty of an offence and liable to imprisonment for a term not exceeding two months or to a fine not exceeding two thousand shillings or to both.

3:1:2 DEDUCTIONS ALLOWED AND SUSPENSION OF RENT:

There are certain payments which, if made by the tenant, he is entitled to deduct from his rent. These are payments for which the landlord, is required to pay but not the tenant, and these payments include, ground rents and head rents, rent charges and certain rates and taxes, ought to be payable by the landlord. The tenant is only allowed to deduct from the rent where authorised by the lease, or by statute, or when he has paid the sums which the landlord was supposed to pay so he can counterclaim. The lease, binding both parties may include a clause
stating that, the tenant should make payment which the landlord is liable but deduct it from the rent; or upon the agreed rent the statute may authorise the tenant to deduct such sums of money to be paid as rent. The landlord is only entitled to recover the balance after the deductions, and so he has the right to distrain for the balance only after the authorised deductions.

On occasion the tenant can pay on behalf of the landlord sums which was the landlord's duty to pay charged upon the land, without which may prevent tenant's peaceable possession of the property, there the tenant is considered to be authorised by the landlord, to pay and treat the same as having been in satisfaction or part satisfaction of his rent. Where an act imposed on the tenant while in possession a liability to pay all rates it was held that, he was the person who ought to pay and his remedy was to deduct what he had paid from the rent due or to bring an action for it against his landlord. Here the tenant was authorised by the statute to make such deductions after incurring such payments, meant to be made by the landlord.

In Thorley v. Payne the defendant leased from the plaintiff premises which she sub-let in tenements to nine sub-tenants retaining one tenement which remained unlet and unoccupied during the material period. The husband of the defendant, who had since died had formerly been the tenant occupier of the premises and had been assessed to income tax in full and inland revenue acting under S 12(3) and Sch.1 Part III Para 1 of the Finance Act 1941 collected part of the arrears from the sub-tenants of the defendant. The sub-tenants by virtue of para 3, of part III of Sch.1 to the Act of
1941 deducted from the rents payable by them to the defendant the sums so collected by the revenue and the defendant sought to deduct the sums from the rent due from her to the plaintiff. It was held that

"The right to deduct income tax under v. 4 of No. VIII of Sch. A is not limited to tax in respect of the year in which the rent falls due; that the recovery by the revenue authorities of tax direct from the defendant herself; and that, therefore, she was entitled to deduct from the rent claimed by the plaintiff the standard rate of tax for the period through which the rent was accruing".

The person so paying the property tax who omits to deduct it from his next payment of rent has no right to deduct it subsequently, this sum he can not claim to have paid for or on behalf of the landlord. If he has paid the whole rent without deduction he has paid it voluntarily and can not recover it.

The laws in Kenya do not provide for that, but the common practice is that, upon entering into a legal relationship, either the landlord undertakes to pay such taxes and rates personally or a tenant pays them at a reduced rent. Other charges such as water, light, sewerage and e.t.c. are paid by either party mostly, the landlords with standard rent, means that payment of such charges are included, while others like the tenants to instal themselves. In a wide perspective deduction brings inconveniences but where they do occur and the tenant incurs such expenses, he is reimbursed.

During the continuance of the tenancy the rent can be suspended wholly or partially i.e. tenant will not be held liable for rent accruing due after he had been evicted, or the demised property has been destroyed and e.t.c. Eviction of the tenant might be made by the landlord or by a person lawfully claiming by the title paramount, and so long as the
Eviction continues. Eviction here does not mean the physical expulsion alone but any permanent act done by the landlord or his agent with the intention of depriving the tenant of the enjoyment of the leased premises. The Registered Land Act 47 provides that, if at any time the leased premises or any part thereof are destroyed or damaged by fire among other things but not attributable to the negligence of the lessee or his servants or licences so as to render the leased premises or any part thereof unfit, the landlord either suspends the whole rent paid or part thereof. The destruction of the leased premises frustrates the lease but that is the remedy afforded to the tenants.

Now what happens when the tenant defaults to pay his rent, is what I have to consider, the landlord, has a wide range of remedies, amongst them is bring an action, levy distress for rent. The landlord may bring an action before the courts of law for recovery of the rent in arrears at the same time possession. Hereinbelow I will consider the remedy of distress under common law and the Kenyan laws.

3:2 THE RIGHT TO LEVY DISTRESS:

If rent reserved upon a lease be in arrear the landlord has a right to levy distress. This is a remedy for the landlord to obtain rent from the tenant when he defaults to pay rent reserved. Distress has therefore been defined as the taking without previous legal process and without even a previous demand of the rent (for the distress itself operates as a demand) seize upon goods or cattle, whether the property of the tenant or not—subject to any privilege that may be claimed for them, which he may find on the premises, and after selling them which satisfy his claim for rent,
The levying of distress is one of ancient remedies for the recovery of rent and under common law the goods were only a pledge in the distrainor's hands, and the right of sale was introduced later by statute. So it was and is considered the easiest from of compelling the payment of rent by a tenant to his landlord.

The power of selling distress goods granted by the Distress for Rent Act and it was wholly for the benefit of the landlord, but, the Lodgers Goods Protection Act protected the goods of lodgers from distress. Later the Rent Acts prohibited distress for rent of a controlled house except by lease of the county court.

In the Kenyan provisions The Distress for Rent Act provides that Subject to the provisions of this Act, any person having any rent or rent service in arrear and due upon a grant, lease, or contract shall have the same remedy of distress for the recovery of that rent or rent service as is given by the common law of England in a similar case. This Act therefore empowers any landlord to levy distress in case where rent is in arrears. But like the Distress Act of England, distress will not be levied without the consent of the tribunal. The tribunals are the Rent Tribunal appointed by the Minister under the Rent Restriction Act, the same which provides that, no distress for the rent of any premises shall be levied except with the leave of the tribunal.

There are three types of rents which are distrainable for i.e. A rent service which is a rent reserved on a lease or grant of lands as incidental to their tenure, the originally known rent under the common law. Another is a rent charge which is certain annual sum charged upon land and granted deed or will by the owner of land to some other person therefore this one
is not incident to the tenure, and the grantee of the rent charge takes no reversion but only express power to distrain for rent. The last one is a rent seck which is a bare rent reserved by deed or will without express power of distress. It is not accompanied by such powers as the rent-charge.  

A landlord on the other hand has no right to distrain unless there is a lease at a fixed rent, at common law there had to be an actual demise not a mere contract; unless by circumstances a tenancy at fixed rent could be implied. A mere tenancy at will sufficed and an agreement for lease, so long as enforceable by specific performance, or which has subsequently been executed by the actual grant of a lease is subject to the same right of distress in respect of rent as if a lease had been granted. At the time of levying distress the lease must be subsisting i.e. the distress itself must be made during the continuance of the demise. A landlord can not distrain where he elects to commence proceedings in ejectment and where a tenant holds over at the expiration of a notice to to quit a landlord cannot distrain for rent falling due, he will only do so if there is evidence from which a renewal of the tenancy can be inferred.  

The lease above must be one of real and corporal hereditaments, i.e. of lands and tenements. As stated earlier rent only reserved on demise of real and corporeal sereditaments, so those of incorporeal hereditament will not guarantee the right to distrain. Along with that Rent must be certain, i.e. rent payable at a certain amount and at a given period. The rent is certain if, by calculation and upon the happening of certain events it becomes certain, and the mere fact of rent being fluctuating does not make it uncertain. The landlord can not distrain until the rent is in
arrears. When the tenant has defaulted to pay the reserved rent on the stipulated time or until after the moment of the day on which it is made payable.

The Distress for Rent Act\textsuperscript{59} like English laws requires that no distress shall be levied between sunset and sunrise or a Sunday. If therefore a landlord levies distress at that time, it will amount to wrong distress, and he will be liable to pay damages.

3:2:1 WHAT MAY BE DISTRAINED:

Under the common law, all the goods found on the premises whether the tenant's property or not, are "prima facie available for distress. But this does not include the property of incorporeal nature and incorporeal hereditaments as they are not personal. Although the general rule applies to goods and personal chattels, there are also certain exceptions both under common law and statute law. In general as concerns distraining some goods and chattels are open to distress some are exempted completely while others depend on circumstances. The Act\textsuperscript{60} provides goods and chattels which are exempt from distress for rent; inter alia, the property of government, goods or chattels in the possession of the law, things delivered to a person exercising a public trade to be carried wrought, worked up or managed in the way of his trade things in actual use or occupation of the person distrained upon at the time of distress, things of a perishable nature animal ferae naturae, and domestic goods. The exceptions fall into two categories viz. those absolutely privileged and those conditionally privileged.

A landlord levying distress for rent, can do so on goods of a stranger, on the simple reason that he, the landlord has alien on them
in respect of the place in which they were found, and not in respect to the person whom they belong. The stranger can only bring an action against the tenant, on whose goods have been distrained for but not the distrainor himself. Otherwise during the course of distraining the landlord must ensure, that it's only the property on the demised premises, except in the case of fraudulent removal is provided in section 9 of the Act. If the tenant unlawfully removes away the good or chattels, liable to be seized, then within thirty days following the removal, the lessor will take and seize them wherever they are found, as a distress for the arrears of rent, the landlord can also be estopped from seizing the goods of a third party brought on the leased premises himself or with his consent. If he does so he will have waived his right of distress on stranger's goods. In this case the third party include - goods of under tenants, lodgers, and strangers; therefore if their goods which are lawfully on the premises are lawfully distrained by the landlord for rent due from someone else, the owner of the goods is entitled to be re-imbursed their value from the person from whom the rent was due.

As regards time there can be no distress until rent is in arrear, i.e. until it is ascertained due, and unpaid. According to the Act, the landlord should seek the leave of the tribunal to distrain unlike the common law where a landlord seeks leave of the court. The distress may therefore be levied by a certified bailiff, as may be authorised by the landlord. The bailiff should be a person granted a certificate from the high court, by the Registrar or Deputy Registrar. The bailiff then should give copy of charges to person distrained, but this one he will only do so if requested by the person(s) or whose goods and chattels distress is levied. The copy should include of his charges.
and all the costs and charges of the distress signed by him to that, otherwise if he defaults he shall be guilty of an offence and liable to a time not exceeding one hundred shillings.

Under common law a distress could not be levied after the expiration of the lease: so the landlord had no remedy by distress for rent falling due the last day of the term. But later the statute; provided that a landlord may distraint for arrears within six months after the determination of the lease, so long as he (landlord) continues having the legal title and possession held by tenant from whom the arrears become due. The same provision under the English statute is provided by the Kenyan statute viz. Rent in arrear may be distracted for after the determination of lease; provided the distress shall be made within the period of six months after the determination of the lease and during continuance of the landlord's title and during the possession of the tenant from whom the arrears become due.

If the tenant hold over, part of the leased premises the landlord is entitled to distract on that part for arrears of rent due in respect of the whole unless a new tenancy has been created as to that part. However the limit of six months will not apply where the statute prolongs the lease. It has been said that the tenant should be in possession at the time when rent is in arrear, in the case where the original tenant dies and his representatives or heirs take over the landlord may distract as well, but he cannot do so where the tenancy was at will and the representative or wife of the deceased original tenant remains on the leased premises. Rationale for this, is that, both the tenancy and possession of the tenant from whom the arrears become due have ceased.
The landlord has got other remedies other than distress, but he will not be entitled to use others together with distress. Once a landlord has levied distress he cannot bring an action against the tenant in respect of the same rent, not unless the moneys arising from the sale of distrained goods is not sufficient to satisfy the demand. While in the other hand if he exercises his right of suing for rent, he cannot distrain for the same rent and if his judgement remains unsatisfied then he loses his right to distress. In Chancellor vs. Webster, the defendant having commenced an action for recovery of arrears of rent obtained judgement therefor. After the illegal, was signed he distained in respect of the rent. The plaintiff (tenant) brought an action for damages for an alleged wrongful distress, it was held that - the distress was illegal the debt for rent due having become by law merged in the judgment. Accordingly it will generally be wise to distrain before exercising a right of action.

After distress, the distrainor will then sell the goods to meet the arrears and costs of distress. However under common law it was only a pledge in the hands of a distrainor Section 4 of The Distress for Rent Act, if the tenant whose goods have been distrained, does not within ten days after distress has been made, and notice thereof (stating the cause of the making of the distress), pay the rent together with the costs of the distress, or replevy them, giving the bailiff sufficient security, then the person distraining may lawfully sell on the premises or remove and sell the goods so distrained for the best price that can be obtained, to satisfy the rent for which they are distrained for and charges of the distress, removal and sale, and then hand over the surplus (if any) to the owner.
3:2:2: WRONGFUL DISTRESS AND ITS REMEDIES:

The landlord has power under the common law and statute to levy distress, but the distraining might be wrong, and in that case he (himself) or bailiff or both should be held liable and therefore should remedy the aggrieved party (in this case the tenant). Wrongful distress might be illegal, irregular or excessive. Firstly the distress is illegal if there were no right of distress at all and it's irregular, there being a right of distress, a wrongful act has been committed at some state of the proceedings subsequent to the seizure, and finally it might be excessive, in that, while exercising the right a wrongful act has been committed in the seizure of more goods than were reasonably necessary to satisfy the claim.

But distress for rent is not unlawful for any irregularity. In essence as stated above, the irregularity will only amount to wrongful act - hence wrongful distress but not unlawful.

There are many remedies awarded to the aggrieved party, though they will depend on the type of wrong committed. The Act provides that any distress having been levied contrary to the provisions of the Act.

the dispute may be heard and determined by a sub-ordinate court, and that court may make an order for restoration of any livestock or things unlawfully distrained, or may declare the price agreed to be paid for feeding, or may make any other order which justice requires.

This therefore gives the aggrieved party a right to sue for any remedy which can be awarded. It further provides that if the person is not satisfied with the decision of the sub-ordinate court, he may appeal to the High Court.
I will now discuss briefly each remedy available for an aggrieved tenant. Illegal distress is said to be unlawful ab initio that is, the distrainor is treated as a trespasser. So remedies available for an illegal distress include.

3:2:3 ACTION FOR DAMAGES:

Once a wrongful distress has been committed, an action for damages should be commenced within six years from the date on which the cause arose. The remedy of an action for damages can also be used in case of excessive and irregular distress. The action should be brought against the bailiff who committed the wrong complained of; but if the landlord had authorised him or ratified his act he will also be held liable. For irregular and excessive distresses, the action will lie at the election of the plaintiff, he chooses to sue either the bailiff of the employer, even though the act might be done without the employer's consent. In the case of excessive distress also, the landlord may compensate the tenant and recover the amount against the bailiff.

Like English statute, Kenyan law has remedy of action for double value. If distress is made and no rent is in arrears, and the goods have been sold, the tenant should be compensated in double value of the goods taken and sold with full costs. In the case of Kanji Naran Patel v. Noor Essa and another, appellant's shop was closed by a court broker and certified bailiff (as the 2nd respondent) under the authorisation of the 1st respondent who was the owner of the property. The appellant protested that there were no arrears of rent due. The first respondent was present throughout when the second respondent levied distress. The trial judge found as a fact that there were no arrears of rent due and held that distress was illegal and held
only the first respondent was liable to pay damages and dismissed the
suit against the second respondent claiming that the appellant should
have known that he was acting under authority of the first respondent.
On appeal that the trial judge erred in dismissing the suit against
the second respondent, it was held that,

"when a distress is illegal it is the bailiff who is
primarily liable and the landlord is only liable if
he can be shown to have sanctioned or ratified the
bailiff's wrongful act; and that an illegal distress
is a trespass, and where the landlord has knowledge
(as in this case) of bailiff's wrongful acts, he is
jointly liable with the bailiff as a joint tortfeasor
on general principles."

In this case the appeal was allowed and even though the bailiff was
instructed the trial judge misdirected himself in dismissing the suit,
both the landlord and the bailiff were liable and judgement was entered
against both of them.

3:2:4: RESCUE AND REPLEVY:

The first, a rescue means to retake the goods if the landlord has
distrained and he is yet in possession, then the tenant will re-take his
goods provided they are not yet impounded. Once impounded they are in
the custody of the law.

For the second, replevy the tenant should obtain in the county court
an order for the return of the goods, if he gives security for the rent and
costs due, and an undertaking to bring an action against the landlord.
Replevin is not available where the distress was originally lawful.
The remedy is said to lie where there was no tenancy relationship
existing at all, or where there was no lease at a fixed rent.
One limit to this remedy, is that it applies to goods and cattle only, so excluding others like farae naturae, fixtures and e.t.c. Like the remedy of action for damages, the proceedings may be brought against either the bailiff or the lessor (if he had authorised for the distress) or both.

The tenant's representatives or an executor may sue in replevin, and the persons who have a joint interest in the property may join in action. In essence the remedy enables the aggrieved person to re-deliver his goods distrained, and sues to be awarded if he succeeds.

3:2:5 INJUNCTION:

Injunction is an equitable remedy, so it is made pending trial. The injunction should be applied for by the tenant, complaining of either a wrongful distress or that a wrongful distress is threatened. usually the court shall not interfere to favour the tenant by issuing an injunction, against the right of distress. In other words, if the rent is in arrears and the landlord has a legal right, to distress such that he can obtain security for the payment, then the court shall not, restraining him simply by issuing an injunction. The injunction is usually issued conditionally, and in most cases the tenant will be ordered to bring the rent into court as a condition of its being granted, and tenant applying to have distress restrained must establish a prima facie case for relief.
FOOTNOTES FOR CHAPTER III


2. SS: 2(1) of Cap 301 of the Laws of Kenya.

3. [1946] Ch. 8.


9. 2 Saud 161, and Redman's Supra Pg. 336.


11. Ibid.

12. Supra (4) at Pg. 316.

13. Ibid.


18. Ibid.

19. op cit at Pg. 540.

20. Ibid.

22. Redman J.H. Hill and Redman's Laws of Landlord and Tenant:
23. Ibid.
25. Ibid. Pg. 1217.
28. op cit Pg. 330.
30. Lionell A and Wellings N.G: Woodfall's Law of Landlord and Tenant,
31. Supra (2) Redman's Law of Landlord and Tenant Pg. 545.
   Publishers Ltd. 1956 Pg. 546.
34. [1947] 2 All. E.R. 825 C.A.
35. SS: 62 Cap 300 the Laws of Kenya.
37. Ibid. Section 8.
40. Ibid.
41. Supra. Adkin A Handbook of the Law relating to Landlord and Tenant Pg.84.
42. Supra: Redman's Law of Landlord and Tenant Pg. 337.
44. [1943] K.B. 306.
45. The Digest Vol. 31(2) Landlord and Tenant Parts (XVI – XXIX):

47. Section 53 (e) Cap 300 Laws of Kenya.


49. 11 Geo; 2, C.19 Distress for Rent Act 1689 England.


52. SS: 2(1) Cap 293 the Laws of Kenya.


54. SS. 4 Cap 296 Laws of Kenya.

55. Ibid. SS: 16.

56. Redman's Law of Landlord and Tenant Supra Pg. 365.

57. Supra (48) Pg. 337.

58. Op cit Pg. 485.

59. SS: 3(2) of Cap 293 Laws of Kenya.

60. Ibid SS: 16.

61. Supra Pg. 356.


64. Section 16 of Cap. 296 Laws of Kenya.

65. Section 18 Cap. 293 Laws of Kenya.


67. Ibid SS:5.

68. Supra Woodfall's Law of Landlord and Tenant Pg.376.


70. Cap. 293 Laws of Kenya.
71. Foa E.C. Foa's General Law of Landlord and Tenant Supra Pg. 569.

72. SS: 26 Cap 293 Laws of Kenya.

73. Supra Redman's Law of Landlord and Tenant Pg. 423.

74. SS: 8 Cap. 293 and Distress Act of 1689 5.4

75. [1965] E.A. 484.

76. Meggary and Wade H.W.R. The Law of Real Property
      5th ed. London: Stevens and Sons Ltd. 1984 Pg. 711.
CHAPTER FOUR

CLIQUE AND CONCLUSION

The Landlord and Tenant Law was adopted from the English Common Law now with few modifications but immensely reflects the English Common Law and statute law. It is provided that we shall refer to the common law where the law is not clear as concerns leases or land law as a whole. This shows that the Kenyan Parliament has done much on modifying common laws and has not enacted its own governing transactions relating to land.

From Chapter One we have seen that a lease was originally one of contract, made expressly or impliedly and later would be made by statute. This is the same position in Kenya; but the courts in most cases find difficulties in solving problems about leases made under customary laws and statute, and actually do not give satisfactory remedy to the aggrieved party where contract is unenforceable or frustrated.

For instance the law requires that all registrable leases must be registered otherwise they will be void ab initio. Registration of leases has been a matter of issue in Kenya Law Courts and even lawyers end up making mistakes, in the course of sealing the transaction of creating a lease because there are many statutes which govern registration and which are applicable in Kenya. The same applies to settling disputes before courts as regards registration because of lawyer would be arguing using the provisions of one Act while the other is arguing using provision of different Act. For example the Government Lands Act requires the registration of all leases exceeding twelve months which is the same as Indian Transfer of Property Act which also requires all leases exceeding one year to be registered. But the position is not the same with the Registered Land Act, which requires all leases exceeding two years to be registered. According to the requirement of registration
parties intending to create a lease should both comprehend as to which Act they register their lease under.

Though it is clearly stated that all registrable leases must be registered, what does the court do in case where a registrable lease is unregistered? Besides that whom a conflict arises between the parties to a lease about the Acts which one prevails or what do the courts do? Like customary law, intention of the parties is paramount to the creation of a tenancy and on many occasions, the majority of people do not know their rights. Most of the people in Kenya are illiterate legally, they do not know the law governing leases, especially in the rural areas even to a few in urban areas. Such class of people can contract to make a lease of even five years fixed or renewal at the expiry of that period or even more but do not register them. This may expose them to risks of losing it, because there is no evidence of a legal lease. At times such transactions may become unenforceable or frustrated: if the matter goes to court, it can be held against the tenant rendering the contract void. However in reality parties meant to enter into a contract but now because of lack of registration it is declared void.

This brings us to the agreement for a lease. The Registered Land Act denies a recognition of an agreement for a lease, at the same time it provides in section 163 that matters pertaining to that should be referred to common law. An agreement for a lease is one of the doctrines acceptable under common law as was established in the case of Walsh v Lansdale. The rule in that case is that where parties have executed a contract for a lease and possession has vested in a lessee though not yet registered but enforceable by specific performance, it will be held
as though a lease existed or as a legal lease. This a common law menace under executed customary law tenancies. Most parties make verbal or oral agreements and possession vests in the tenants, they do not use any agreement instruments to indicate the validity of the created lease of which after sometime the landlord can decide to terminate the relationship thereby rendering the tenant unable to claim under the law, and even if he does he may in most cases not be remedied.

Though the Kenyan courts are willing to grant equitable remedy to such cases, it is a discretionary remedy which is subject to some limitation, such as delay. Moreover equitable remedy being discretionary the tenant in most cases stands to lose for he does not produce clear evidence as regards the claimed lease and one may not realise his right to claim. In the case of Batchler's Berkery Ltd. v. Westlands Securities Limited (discussed in Second Chapter) where the parties had made agreement for a lease, the court using the facts of the case such as the delivery and vesting of possession, held that a lease existed; and in arriving at the decision the presiding judge interpreted Section 107 of the Indian Transfer of Property Act to mean that a legal lease existed even if it was a mere agreement not registered.

The issue of rent to be paid by the tenant to the landlord has been a subject of complaint. Rent is argued to be determined in a free market i.e. governed by supply and demand. However, this will expose one party, the tenant to exploitation because at the free market the shortage or lower supply at a constant demand or rising demand means the tenant has to pay more. There are several Acts which govern payment of rent for leases. Kenya's first Act was enacted in the colonial days, which applied to dwelling houses whose annual amount of standard rent did not exceed £150. It aimed at checking possible profiteering resulting
from the housing shortage, and then provided for restrictions in increases of rent, protection of tenants from evictions and also prohibited the payment of premium.

The tenant undertakes to recompense the landlord for the enjoyment he derives from being in possession of the leased property. Though the Acts are meant to protect tenants the question remains who really comes under the protection of those Acts? The Rent Restriction Act provides for standard rent to be charged, but this applies to certain classes of houses and tenancies such as statutory tenancies. The Act thus does not equally protect such tenants who pay rent to private landlords.

The standard rent is actually adopted by a few or a class of landlords such as the National Housing Corporation, the local authorities and other registered landlords. This means that private landlords can set their own rents. Due to that there is a variation in payment of rent made by two persons staying in the same area (i.e. estate) and may be residential houses of the same quality. Another issue arises about rent especially to governmental or departmental houses. This normally arises in the case of house allowance and provided houses. In such case if a person takes provided house by government or any department he forgoes his house allowance but a person who takes his and stays in the same area may pay much or less. It is explicit, therefore, that the standard rent does not operate clearly.

Private landlords set terms and conditions concerning the lease which a tenant is only required to sign. On the other hand the contract is unilateral. Such terms and conditions have a clause for increase of rent arbitrary: hence the Act does not protect the tenant suffering under that. Most leases as shown earlier, provide rent review clauses which
state at what interval or period rent may be reduced or increased. But the Act provide that no rent may be increased without the consent of the tribunal. The applicability of this provision becomes meaningful to registered landlords but not private landlords. The latter can decide to alter rent mostly by increasing it at any rate and at any period.

To solve such problems of rent and other problems affecting tenancies Parliament recommended the establishment of a quasijudicial body i.e. the Rent Tribunal to deal with those matters. Members of this tribunal are appointed by the Minister, however the practice in Kenya they are appointed by the President. The composition of the tribunal is headed by the appointed Chairman in most cases Lawyer Chairman and his assistants and Junior Staff. The Junior Staff includes people like inspectors among others.

Its functions include to determine standard rent of any premises to which the Act applies in pursuance of a reference which a landlord is under a duty to make to them in respect of premises for which a standard rent has not been determined. It's also to make orders for the landlord's recovery of possession of the premises in the event of certain circumstances where it considers it reasonable to make such orders.

As stated earlier, these tribunals are quasijudicial bodies settling matters of rent and other related problems affecting that relationship but are still ineffective. To begin with the tribunals are not really known outside the urban areas and even within the urban areas the greater population of the towns who are tenants are not aware of these institutions.
They do not serve a wider area as expected. As regards the valuation and assessment of rent the rent, tribunals (Residential) have assessors who are civil servants and who assess rent the moment applications are made under the Rent Restriction Act. This shows that they (valuers and assessors) do not freely set the required rent before they are invoked by the landlord.

About the role of inspectors, it is still questionable, they are supposed to expand their role from provincial levels to district levels, but they have not. Beside that the tribunals are empowered to act of its own motion but they cannot go to look for and compel those landlords who do not follow the laws relating to standard rent. Further, not all tenants have knowledge about the existence of the tribunal and the work which they perform.

Apart from that issue but in relation to it, after setting a standard rent to be paid and upon creating a lease, a landlord is required to provide the tenant with a rent book. This is one thing which many of the landlords rarely do. Upon payment of rent reserved a tenant should receive a revenue stamp but the landlords don't do that. In any case tenants are not aware of their right to obtain a receipt. Many urban poor tenants have little knowledge of the content of rent control Legislations, though they may be vaguely aware of their existence and they have practically no contact with legal profession in its civil capacity and as such they are totally unable to make use of the facilities provided for them.

Landlords are well aware of this and thus despite the existence of criminal penalties attached to breaches of these legislations, they are able to disregard them with virtual impunity. In many occasions
we have heard and read cases of eviction and distraining of goods of tenants under the guise of rent being in arrears. This practice is common with the local authorities and private landlords, but they undertake to exercise this power of distress without first obtaining consent of the tribunal as required by the law. To that extent the tribunal has been unable to curb such a situation from arising. This has become a shocking behaviour as those exercising such powers destroy property as well as injuring innocent people.

The other issue concerning tenants is that once they are evicted since some don't know about the existence of the tribunals they go straight to court through the police. The question about prosecution becomes hard as to who is to prosecute between the police and tribunals. In relation to that some landlords may take suits against their tenants to the High Court and they can afford to hire advocates, something which the poor tenants cannot afford.

Despite these shortcomings and the like there are several recommendations. First concerning registration an Act of Parliament should be passed to reconcile all the Acts governing the law of leases. In this the variation between the Government Lands Act shall be reconciled with the Registered Land Act in that the registrable lease in the former which is one year should be made two years like the latter or vice-versa. Inasmuch as the Act allows us to refer to the common law which adopts the rule in Walsh's Case it should expressly or impliedly provide for that in all Kenyan laws on leases. In relation to that the courts in handling such cases should meticulously consider all relevant circumstances of the case before arriving at a judgement in awarding the equitable remedy of specific performance.
On her commentary about the tribunals Mrs Sarah Ondeyo, said that the government should amend the Rent Restriction Act empowering the tribunal committee to execute orders against landlords and tenants. Because at times the tribunal is so powerless that it could not compel a landlord to obey orders given to him. Therefore the tribunal should be given more powers to deal with those who refuse to obey its orders. Apart from that for the tribunal to be effective it should not wait for application i.e. for fixing a standard rent, but be under a duty to look for those infringing the Act, and ensure its compliance. It should be more vigorous in using its power to compel people to attend before the tribunal and it should be empowered to fix standard rents without having to wait for the landlord to apply.

The foresaid standard rent should be general regardless of registered landlord or not, and in any case anybody brought before the tribunal over rent should be dealt with as if he were a registered landlord. Otherwise standard rent should apply in general.

Also once fixed, rents should be safeguarded by being registered in public register under the jurisdiction of the tribunal and not left to be entered in rent book a dubious protection for an illiterate tenant. Further to that is that most tribunal courts are centred in some few urban places. There is need for tribunal courts to be decentralised in the districts and more chairmen with legal knowledge to be appointed to hasten determination of cases in backlog. To charge no fee from the tenant as he commences an action or the fee should be minimal (if any).
The landlords should provide tenants with rent books as they remain with their own copies. Also tenants should be issued with receipts at all times payment is made. The terms and conditions set by landlords should be reviewed by rent tribunals, as the contract created between a landlord and tenant on such terms and conditions tends to be unilateral and therefore favouring one side i.e. landlord.

Strict and serious penalties should be imposed against those landlords who deliberately frustrate the transaction, especially where rent is not in arrears. The rent tribunal was established to solve and deal with matters affecting the relationship of a tenancy, wherefor rent is one of them, it should not therefore restrict itself to rent alone. Those who undertake to evict tenants without first obtaining the consent of the tribunal should be held criminally liable and should be penalised. On the other hand, tenants should pay their rents. If they default, they should not be protected; the tribunal should only protect those who have cleared their rents. The tribunal can, if possible, sub-delegate some of their powers to local administrators to assist in some trivial matters, especially transactions taking place locally.

In most rural areas many people have made transactions intending to create leases but they are not legal, as they are not registered as required. The rationale behind this is ignorance. People in rural and even in urban areas should be educated about such laws.
The tribunal inspectors based at Provincial Headquarters should go to districts to help tenants by giving on the spot advice and publicising the purposes and the roles of the tribunals. So this implies that even the numbers of inspectors should be increased.

Even those who know the tribunals fear the duration of litigation but with the introduction and increasing of many courts it will ease the problem of fear. In addition to that the number of or frequency of rent tribunal sittings should be increased in order to reduce pending cases. It should be an offence for a landlord to grant an unregistered lease. The tribunal Chairman's report of 1970\textsuperscript{27} states, inter-alia:

"It has been an opinion of the general public that tribunal's orders are always looked upon with some contempt by some landlords who do not honour such orders unless so enforced by the High Court. I would suggest that more powers be given to the tribunal to enable it to enforce its own orders. It would be observed that while most of the landlords are rich enough to afford High Court suits and advocate fee. Some tenants are poor and cannot afford such proceedings in the High Court".

We are also of the same opinion that, leases should be heard before the rent tribunals where the rights of tenants will be protected. Such rich landlords should be stopped from taking suits to the High Court.
FOOTNOTES FOR CHAPTER IV


5. Section 7 Cap. 300.

6. Ibid.


9. Supra note (4).


13. SS: 9 and 11 Cap. 296.


16. Ibid.


18. Supra (15) Pg. 288.

20. Madan Committee. Rent Restriction Inquiry Gazette


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