

Controlled Tenancy: A Curse or Blessing to Property Investment in Kenya

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Key words: controlled tenancy, controlled tenant, investment, property, statute.

SUMMARY

Controlled tenancy in Kenya has been referred in several terminologies though with same understanding amongst the populace and housing professionals. Some refer to it as protected tenancies, statutory tenancies, rent controlled tenancies and regulated tenancies. However for purposes of this paper, the author shall use one terminology for consistency, that is controlled tenancy and controlled tenants.

Controlled tenancy in Kenya covers two kinds of property uses, residential and commercial. There are two different statutes for these different uses, The Rent Restriction Act for residential users and The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act

The Rent Restriction Act applies to dwelling houses with monthly rents of Kenya Shillings Two Thousand Five Hundred (equivalent to approximately thirty US dollars at current exchange rate) and below. The statute restricts increase of rent, right to possession, execution of premiums and provides for fixing of standard rents.

The Landlord and Tenant Act apply to certain premises and protect tenants of such premises from eviction and exploitation. It applies to premises where tenancy has not been reduced to writing, or where reduced to writing, the tenancy is for five years and less, or the tenancy has provided for termination of the tenancy within five years from the commencement of the tenancy otherwise than for breach of covenants of the tenancy.

The government of Kenya through the Ministry of Housing is currently preparing a bill that seeks to revise and consolidate the aforementioned statutes that control the residential and commercial tenancies. The bill had been drafted in the year 2007 and is called The Landlord and Tenant Bill, 2007 and is currently being relooked at to ensure that it is in consonance with the Constitution of Kenya, 2010.

It is therefore very important to look at the broader picture of control of tenancies, the effect of the existing statutes that control tenancies to tenants and landlords, relevance of such tenancies in achieving Vision 2030 and the intent of the constitution of our country while taking cognize of the trend the world over on controlled tenancies.

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1. INTRODUCTION

Control of tenancies has been in the country since before independence. The Rent Restriction Act came into force in the year 1959 while The Landlord and Tenant Act came into force later after independence in the year 1965. Other countries in the world adopted control of tenancies and particularly rents of residential properties during the First World War. These enactments could have been understandable in the context of the shortages, ideologies and craze of controlling nearly everything ranging from wages and prices. The tenancy control statutes have been modified, abolished or reintroduced in a number of countries.

Kenya has had her fair share of experience in this phenomenon and is now at the verge of changing the history of tenancy control while at the same time setting the new direction on the matter with regard to investment in properties.

Most economists in general and land economists in particular have always viewed control of tenancies as out dated means of regulating housing supply and demand in an economy. This has been informed by the impact of control on the tenants and landlords alike.

Interestingly, control of tenancies particularly controlling residential rents has made a come back in some of the high growth economies mainly in the gulf region. Countries like Qatar and Dubai have been tightening their tenancy control laws with particular emphasis on rent escalation rates and creating rent caps.

Surprisingly, other countries in Eastern and Central Europe have nearly completely abolished controlled tenancies. Asian countries such as Singapore, Japan, China and Malaysia are busy dismantling the tenancy control regimes

Given the interesting different movement on the matter by different countries, it is very important to look the experiences in Kenya, the differing arguments on control of tenancies. The paper will also attempt to give recommendation on the best way forward in the context of implementation of the Constitution of Kenya and the goal of ministry responsible for housing in improving housing provision in the country

2. THE CONTROL OF RESIDENTIAL TENANCIES

2.1 The applicable statute

The Rent Restriction Act, Chapter 296 of Laws of Kenya, governs this in Kenya. It came into effect on 1st of October 1959 and was meant to restrict increase of rent, restrict the right to possession, and restrict execution of premiums and to fix standard rents.

The statute applies to dwelling houses with monthly rents of Kenya Shillings Two Thousand Five Hundred (equivalent to approximately thirty US dollars at current exchange rate) and below. Such rentals form the bulk of rentals for informal housing units in the country, which again form the largest portion of rental market.

The statute does not apply to dwelling houses let on service tenancies and those dwelling houses, which have been excepted by the Minister responsible for housing as provided in the statute through a notice the Gazette.

2.2 Interpretations in the statute

A dwelling-house in the context of this statute means any house or part of a house or room used as a dwelling or place of residence, and includes the site of the house and the garden and other lands and buildings let therewith and not as a separate entity or source of profit

The applicable rent in case of dispute is called standard rent which is essentially a monthly rent equivalent to between one and a quarter, and one and a half percent of cost of construction and market value of land. The cost of construction is actual cost of construction for properties developed after January 1980 but the market value is the value of land as at January 1981. The land has to pay out goings, which include repairs.

The landlord according to the statute includes, in relation to any premises, any person, other than the tenant in possession, who is or would, but for the provisions of the statute, be entitled to possession of the premises, and any person from time to time deriving title under the original landlord.

The statute interprets a tenant to include a subtenant and any person from time to time deriving title under the original tenant, and the widow of a tenant who was residing with him at the time of his death, or where a tenant leaves no widow or is a woman, such member of the tenant's family so residing as may be determined by the court notwithstanding that the rights under the tenancy may have passed, on the tenant's death, to some other person.

2.3 Nature of disputes resolved

A tribunal called Rent Tribunal appointed by the Minister is responsible for resolving disputes arising from the matters regulated by the statute.

The tribunal has the power to do all things it is required or empowered to do by or under the provisions of the statute, and some of the particular powers include but is not limited to:

- Assessing the standard rent of any premises either on the application of any person interested or of its own motion.
- Fixing in the case of any premises, at its discretion and in accordance with the requirements of justice, the date from which the standard rent is payable.
- Apportioning payment of the rent of premises among tenants sharing, and the rent

- payable in respect of different premises included in one composite tenancy.
- Fixing amount of service charge where the rent chargeable in respect of any premises includes payment for water, light, conservancy, sweeper, watchman, or other service charge in addition to the standard rent.
- Apportioning charges to each of the tenants where tenants who occupy a premise enjoy services in common, such as water, light, sweeper or watchman.
- Making order for recovery of possession of premises whether in the occupation of a tenant or of any other person.
- Making an order for the recovery of arrears of rent, mesne profits and service charges.
- Making orders permitting landlords (subject to the provisions of any written law) to excise vacant land out of premises, for the purpose of enabling additional buildings to be erected, where such a course is, in the opinion of the tribunal, desirable in the public interest;
- Ordering the landlord to carry out repairs within such time as the tribunal may stipulate, where the landlord fails to carry out any repairs for which the landlord is liable, and, if the landlord fails to comply with the order, and upon application by notice of motion by the tenant, authorizing the tenant to execute repairs and to deduct the cost thereof from the rent;
- Permitting levying of distress for rent;
- Reducing the standard or recoverable rent of premises, on the application by a tenant by notice of motion, where the tribunal is satisfied that the landlord has failed to carry out such repairs to, or maintenance of, the premises as the landlord has a duty to carry out either by agreement or under the statute.
- Ordering a refund of any sum paid by a tenant on account of rent, being a sum irrecoverable by the landlord under the statute.
- Reopening at any time, any proceedings in which it has given any decision, determined any question, or made any order, of its own motion, or for good cause shown on an application by any landlord or tenant, and to revoke, vary or amend such decision, determination or order, other than an order for the recovery of possession of premises or for the ejectment of a tenant therefrom which has been executed.

3. THE CONTROL OF COMMERCIAL TENANCIES

3.1 The applicable statute

The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 of Laws of Kenya, controls tenancy in commercial properties in Kenya. The statute came into effect on 1st of November 1965 and the purpose of it was to apply to certain premises and protect tenants of such premises from eviction and exploitation. It applies to shops, hotels and catering establishments.

The statute applies to premises where tenancy has not been reduced to writing, or where reduced to writing, the tenancy is for five years and less, or the tenancy has provided for termination of the tenancy within five years from the commencement of the tenancy

otherwise than for breach of covenants of the tenancy.

The Minister responsible for commerce may also by notice in the Gazette, specify, by reference to rent paid or to rateable value entered in a valuation roll under the Valuation for Rating Act, classes of shops, hotels or catering establishments tenancies of which shall be controlled tenancies regardless of the form or period of such tenancies.

However, no tenancy to which the government, the community or a local authority is a party, whether as landlord or as tenant, is considered a controlled tenancy according to the statute.

3.2 Interpretations in the statute

The statute interprets catering establishment as any premises on which is carried out the business of supplying food or drink for consumption on such premises, by persons other than those who reside and are boarded on such premises.

A hotel in the statute means any premises in which accommodation or accommodation and meals are supplied or are available for supply to five or more adult persons in exchange for money or other valuable consideration.

Shop in the statute means premises occupied wholly or mainly for the purposes of a retail or wholesale trade or business or for the purpose of rendering services for money or money's worth.

The landlord in relation to a tenancy, means the person for the time being entitled, as between himself or herself and the tenant, to the rents and profits of the premises payable under the terms of the tenancy.

The statute define rent to include any sum paid as valuable consideration for the occupation of any premises, and any sum paid as rent or hire for the use of furniture or as a service charge where premises are let furnished or where premises are let and furniture therein is hired by the landlord to the tenant or where premises, furnished or unfurnished are let with services.

Services in the context of the statute means the use of water, light or power, conservancy, sewerage facilities, sweeper, watchman, telephone or other amenity or facility available to the tenant, save and except the supplying of meals, and the right of access to any place or accommodation accorded to the tenant by reason of his occupation of the premises comprised in the tenancy;

Tenancy is interpreted in the statute as a tenancy created by a lease or under-lease, by an agreement for a lease or under-lease, by a tenancy agreement or by operation of law, and includes a sub-tenancy but does not include any relationship between a mortgagor and mortgagee as such while tenant in relation to a tenancy means the person for the time being entitled to the tenancy whether or not the person is in occupation of the holding, and includes a sub-tenant.

3.3 Nature of disputes resolved

A tribunal called Business Premises Rent Tribunal appointed by the Minister is responsible for resolving disputes arising from the matters regulated by the statute.

The tribunal in relation to its area of jurisdiction has power to: -

- Determine whether or not any tenancy is a controlled tenancy.
- Determine or vary the rent to be payable in respect of any controlled tenancy.
- Apportion the payment of rent payable under a controlled tenancy among tenants sharing the occupation of the premises comprised in the controlled tenancy.
- Fix the amount of such service charge where the rent chargeable in respect of any controlled tenancy includes a payment by way of service charge.
- Make orders permitting landlords to excise vacant land out of premises of which, but for the provisions of the statute, the landlord could have recovered possession, for the purpose of enabling additional buildings to be erected.
- Where the landlord fails to carry out any repairs for which he is liable ; to have the required repairs carried out at the cost of the landlord and, if the landlord fails to pay the cost of such repairs, to recover the cost thereof by requiring the tenant to pay rent to the tribunal for such period as may be required to defray the cost of such repairs, and so that the receipt of the tribunal shall be a good discharge for any rent so paid; or to authorize the tenant to carry out the required repairs, and to deduct the cost of such repairs from the rent payable to the landlord;
- Permit the levy of distress for rent.
- Vary or rescind any order made by the tribunal under the statute.
- Administer oaths and order discovery and production of documents in like manner as in civil proceedings before the High Court, to require any landlord or tenant to disclose any information or evidence which the tribunal considers relevant regarding rents and terms or conditions of tenancies, and to issue summons for the attendance of witnesses to give evidence or produce documents, or both, before the tribunal.
- Award costs in respect of references made to it, which costs may be exemplary costs where the tribunal is satisfied that a reference to it is frivolous or vexatious.
- Award compensation for any loss incurred by a tenant on termination of a controlled tenancy in respect of goodwill, and improvements carried out by the tenant with the landlord's consent.
- Require a tenant or landlord to attend before the tribunal at a time and place specified by it, and if such tenant or landlord fails to attend the tribunal may investigate or determine the matter before it in the absence of such tenant or landlord.
- Enter and inspect premises comprised in a controlled tenancy in respect of which a reference has been made to the tribunal.

4. THE LANDLORD AND TENANT BILL, 2007

4.1 The bill

The bill seeks to: -

- Simplify, modernize and consolidate the laws relating to renting of business and residential premises
- Establish a framework for the regulation of landlords and tenants so as to promote stability in the rental sector,
- Protect tenants from unlawful rent increases and unlawful evictions.
- Balance the responsibilities of landlords and tenants,
- Provide for the adjudication of disputes and other purposes incidental thereto.

The bill is to give rise to a statute that shall apply to: -

- All furnished or unfurnished residential premises other than those excepted, those let on service tenancies, and those whose fair rent exceed fifteen thousand shillings per month,
- Tenancy of a business premise which has not been reduced into writing, or which has been reduced into writing but are for business premises which has been specified by the Minister by notice in the Gazette that the statute shall apply. The Minister shall refer to such premises by either rent paid or rateable value entered in a valuation roll under the statute for Valuation for Rating.

4.2 Interpretations in the bill

The bill defines fair rent as the rent assessed and determined by the tribunal on the basis of the going rent for comparable lettings taking into consideration the location, size, age, tenable quality and outgoings of the subject premises.

Landlord is defined in relation to a tenancy to mean the person for the time being entitled as between that person and the tenant, to the rent and profits of the premises payable under the terms of the tenancy and includes an agent, clerk or other person authorized to act on the landlord's behalf; and includes the heirs, assigns, personal representatives and successors in title.

Market rent in the bill means the rent at which the premises concerned might reasonably be let on the open market, based on the going rent for comparable lettings taking into consideration location, size, age, tenable condition and outgoings of the subject premises.

The term rent in the bill includes any sum paid as valuable consideration for the occupation of any premises, and any sum paid as rent or hire for the use of furniture or as a service charge where premises are let furnished or where premises are let and furniture therein is hired by the landlord to the tenant or where premises, furnished or unfurnished are let with services;

Residential premises means any living accommodation used or intended for use as rented premises.

Services in relation to a tenancy means the use of water, light or power, conservancy, sewerage facilities, sweeper, watchman, telephone or other amenities or facilities available to the tenant, save and except the supplying of means, and the right of access to any place or accommodation accorded to the tenant by reason of the tenant's occupation of the premises comprised in the tenancy, but does not include capital expenditure on maintenance.

Tenancy means a relationship created by a lease, agreement or assignment and includes a sub-tenancy but does not include any relationship between a mortgagor and mortgagee.

Tenant in relation to a tenancy means the person for the time being entitled to the tenancy whether or not the tenant is in occupation of the holding, and includes the tenant's family, a sub-tenant and any person from time to time deriving title under the original tenancy.

4.3 Nature of disputes resolved

A tribunal called Landlord and Tenant Tribunal appointed by the Minister responsible for housing is responsible for resolving disputes arising from the matters to be regulated by the resulting statute.

The Tribunal shall have the same jurisdiction and powers in civil matters as are conferred upon the *High Court*, and (in particular, but without prejudice to the generalities in the resulting statute) shall have power to –

- Administer oaths and order discovery and production of documents
- Require any landlord or tenant to disclose any information or evidence which the tribunal considers relevant regarding rents and terms or conditions of tenancies.
- Issue summons for the attendance of witnesses to give evidence or produce documents; or both, before the tribunal.
- Award costs in respect of references made to it.
- Reinstate a wrongfully evicted tenant.
- Grant injunctions.
- Enforce its own orders and to punish for contempt in the same manner as any court of law;
- Award compensation other than for misrepresentation.
- Order for payment of rent arrears.
- Review its decisions.
- Award compensation for any loss incurred by a tenant on termination of a tenancy in respect of goodwill and for improvements carried out by the tenant with the landlord's consent.
- Award compensation to the landlord for damage arising from the willful conduct of the tenant.

5. ARGUEMENTS IN FAVOUR OF CONTROLLED TENANCIES

The rental market suffers from information asymmetry. Landlords have more information about a building than a prospective tenant. A landlord can conceal a defect about a building and once the tenant has moved in, the costs of moving again are very high. Unscrupulous landlords could conceal defects and if the tenant complains, they threaten to increase the rent. Tenancy control could thus somewhat compensate for such market inefficiencies as argued by Raess and Sternberg (2002)

Landlords can be allowed by law to claim some tax benefits or have tax shelters on such property. For Instance, in Kenya, landlords can claim relief on mortgage repayments including interest while the tenant pays income tax and gets none of the benefits. By limiting the extent to which landlords can raise rent on some of the property may restore balance to tax benefits that would otherwise become concentrated primarily in the hands of landlords.

In older buildings, tenancy control may actually broaden incentives to renovate individual units. Capek and Gilderbloom (1992) noted that tenants may also invest their own money and/or sweat equity to improve the buildings if they are protected from landlords trying to capture the added value. Vacancy decontrol preserves landlords' financial incentive to renovate vacant units because it allows them to re-rent at market value.

By allowing tenants who are meeting their obligations (including paying the legal rent) to remain in the buildings instead of moving, tenancy control may reduce instability and associated costs of moving.

Tenancy control is considered necessary to protect the public and to prevent landlords from imposing rent increases that cause vulnerable people to leave an area. Maintaining a supply of affordable housing is believed to be essential to sustaining the local society. Neighborhood instability caused by high or frequent rent increases also affect schools, youth groups, and community based organizations when tenants move more frequently.

Housing is a positive human right that equals or exceeds the property rights of landlords as argued by Socialist International (1989).

Without tenancy control, even tenants paying full rent can be forced unexpectedly from their houses through no fault of their own. For example, if their landlords mortgaged excessively and the property goes into foreclosure, tenants may be evicted even in the middle of a lease. Most advocates of moral reasons say that people who work hard and play by the rules should not find themselves out on the street when things turn sour through no fault of their own.

6. ARGUEMENTS AGAINST CONTROLLED TENANCIES

Most economists believe that a ceiling on rents reduces the quality and quantity of housing available. Economists from differing sides of the political spectrum, such as Paul Krugman (2000) and Thomas Sowell (2008) have criticized rent regulation as poor economics, which, despite its good intentions, leads to the creation of less housing, raises

prices, and increases urban blight.

Price ceilings can create shortages and reduce quality when they are less than the equilibrium price. By capping the price of housing, rent control can increase demand and reduce available supply, causing a shortage.

It is argued that rent control also reduces the quality of available housing, deters investment, and raises rents on tenants who are excluded from its protections (for example, in jurisdictions with vacancy decontrol, tenants who move or arrive later). While property owners are restricted in the rents they charge, they are less willing to construct more housing. Since supply is low, landlords worry less about tenants leaving and have little incentive to maintain the property. For example, unless owners can reasonably expect that punitive action will be taken against them, they might let building maintenance deteriorate in order to mitigate the lower rental income. People moving into the city have difficulty finding housing because of the shortage created by tenancy control, Krugman (2000) argued.

Tenancy control laws are a textbook example of the problems that arise in trying to artificially reduce prices. The natural consequence in a free market economy is a reduction in supply and consequent shortages. By artificially lowering rents on some units with long term tenants, even in some cases forcing landlords to maintain that at a loss, rent control forces landlords to recoup this lost income on newly vacated units, thus increasing rent for new tenants beyond what is necessary, Tucker (1997) observed.

Cruz (2009) observed that by creating a disincentive to move from units where they enjoy artificially low rent, such rent regulation will actually limit individuals' mobility, and thus either prevent them from taking advantage of employment opportunities that may require relocation, or force them into longer commute times, with all of the financial, environmental, and personal impacts thus created.

Tenancy control may not be effective at lowering rents in the area under control. The regulatory tribunal may be captured or politically influenced by the landlords, and may be able to influence the regulatory process to the extent that the rent-controlled increases are more than what they would have been in the free market without the tenancy control laws.

Areas with rent-controlled housing are blamed for difficulty of finding vacant housing and the resulting power imbalance between landlords and tenants as tenants may "game the system" to impose onerous conditions on the landlord, forcing long cycles of judicial action, leading to considerable economic hardship for the landlord. Likewise, new tenants have serious difficulty finding housing, so they are seriously disadvantaged if they must move. As a result, landlords can impose numerous conditions and requirements.

Friedman noted in early 20th century that tenancy control restricts the property rights of the property owners, as it limits what they may do with their property.

7. THE KENYAN EXPERIENCE IN CONTROLLED TENANCY

There have been myriad challenges experienced in applying the law. This has affected both the landlord and tenants in various ways some of which are highlighted below: -

- The tribunals have been burdened with numerous complaints compounded with few number of tribunals
- The tribunals do not have enough capacity to handle the disputes due to understaffing.
- Inordinate delays in delivery of rulings thereby affecting the landlord and tenant negatively
- Substantial increase of rent when a property falls vacant or for new developments thereby making it out of reach of most of those the laws intended to protect
- Most buildings with controlled tenancies are dilapidated and some appear unfit for habitation or use
- Use of uncouth and extra legal means to evict the tenants and ensure that they vacate
- Difficulty in exiting by tenants whose businesses are registering losses or insufficient revenues
- High cost of finalizing leases as advocates charge lease costs based on both size of rent and length of lease
- Very low rents from business premises with controlled tenants
- Some landlords use extralegal means to evade tenancy controls and attempt to take advantage of housing conditions.
- Some landlords step up discrimination against any group they dislike if they believe there is a surplus of prospective tenants.
- Some landlords require non-refundable deposit to allow a tenant to move in

8. WAY FORWARD ON CONTROLLED TENANCIES

In light of the fore going and housing being considered a right under Constitution of Kenya, 2010, it is important to come up with incentives and models that will not discourage investment in property and that will not make the cost of housing exorbitant for tenants.

Tenancy control may only be desirable where it help to provide all parties with contractual certainty. As recommended by Cruz (2009), the controlled tenancies can be harmless where it occurs in the context of standardization of contract structures, designed to increase market certainty and to provide guidance to citizens.

There are seven salient aspects of such structures, which should be considered in order to achieve the objectives of certainty and guidance as highlighted below: -

8.1 Simplicity

It should be easy to determine if the unit is covered by rent control or not. This can be achieved by having actual rent as basis of control and not property value or construction cost. Using furnished versus unfurnished property for control delineation can also lead to confusion.

8.2 Transparency

Using the Consumer Price Index or inflation as the basis for rent increases is generally desirable, because it is transparent. Most central banks and statistical agencies regularly report inflation. Using a formula that only the tribunal can understand and configure creates abuse, corruption and confusion.

8.3 Capital recovery

The rent increase structure must allow landlords to recover their investments and certain costs. Without this basic precondition, private housing investment will grind to a halt, with all the attendant evils mentioned earlier.

8.4 Predictability

If the allowable rent increase is changed annually, then the government must announce it early to allow landlords and tenants to negotiate and evaluate their options.

8.5 Enforceability

Decisions must be easy to execute and implement. Given the cyclical nature of the rental market, prolonged litigation and eviction proceedings can lead to substantial losses for the landlord and/or immense distress to the tenant.

8.6 Special Courts

The legal system is an important variable. In most countries with English common law systems, a rent tribunal hears complaints regarding rent adjustments and other issues related to controlled tenancy. The decision can only be appealed to the tribunal itself. The process is usually swift and efficient. If these were to be handled by general courts and appealed to the highest courts, it becomes cumbersome and expensive process.

8.7 Accessibility

The tribunals need to be devolved to lower levels, which can be reached by most citizens easily and efficiently. Centralized systems can lead to back logs and distress to both the landlord and tenants.

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BIOGRAPHICAL NOTES

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