

Way Forward on Termination of Fixed-Term Commercial Leases without a Termination Clause; A Supreme Court Guide

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Introduction and Brief Background of The Case

The Supreme Court delivered a *locus classicus* decision in **Kwanza Estates Limited v Jomo Kenyatta University of Agriculture and Technology Supreme Court Petition E001 of 2024** on 6th December 2024 where it shed light on how parties to a contract can terminate fixed term commercial leases without a termination clause.

The dispute, which dates to the Covid 19 times, arose after JKUAT unilaterally terminated its six years term lease agreement with Kwanza Estates Ltd and vacated the leased premises fourteen months before the end of the agreed term. Due to this termination, Kwanza Estates issued a demand for the settlement of the full rent for the unexpired period of the lease. It is on this premise that JKUAT moved to court contesting the said demand as the agreement was rendered commercially impossible on account of Covid 19 impacts.

One of the major issues for determination by the supreme court was on whether a party can unilaterally terminate a lease agreement where a termination clause does not exist and the attendant repercussions thereto. Before we delve into the impact of the finds of the court, we shall briefly have a situational analysis of fixed term commercial leases in Kenya.

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Fixed-Term Commercial Leases in Kenya

In Kenya, commercial leases are governed by the **Landlord and Tenant (Shops, Hotel and Catering Establishments) Act which was enacted in 1965.**

Section 2(1) of the Act creates controlled tenancies which arise when a lease is not in writing, or if it is in writing, contains a provision for termination or is for a period of less than five years.

Section (4) and (5) of the Act mandates the party intending to terminate the lease to issue at least two months' termination notice. Thereafter, a party issued with such a notice has one month to respond and in the event of challenging the same, to file a reference with the Business Premises Rent Tribunal (BPRT). In such a case, the notice will not take effect until the BPRT conclusively determines the reference and during this process, the tenant is entitled to remain in occupation, paying the same rent, until the reference is resolved.

It is now a common trend that most commercial leases usually have no termination clause and they run for a term exceeding five years, hence not falling under the purview of a controlled tenancy as defined by the Act. While such leases offer stability to both the Landlords and the tenants, they are prone to being problematic when termination provisions are strictly defined. The non-inclusion of a termination clause creates uncertainty on how to lawfully terminate the lease.

It is worth noting that the absence of termination clauses has led to contentious disputes, particularly when one party unilaterally attempts to exit the lease, as was seen in the referenced case.

The impact of the Court's determination

The referenced Supreme court decision has since addressed several critical aspects and has since clarified and offered the following principles and guidelines:

1. Mutual Respect in Tenancies and Balancing of Obligations:

Tenancy relationships in commercial leasing must be based on mutual respect and fairness. As such, Landlords should not demand for rent payment from tenants who have vacated, especially when the tenants no longer derive any benefit from their former premises. At the same time, tenants are expected to communicate promptly and transparently when faced with challenges in meeting their lease obligations.

2. Duty to Mitigate of Losses:

The landlords have a duty to mitigate their losses by taking reasonable steps to advertise the vacated premises and re-let rather than leaving them unoccupied and later on demand rent for the unexpired lease term. The tenants on the other hand, must communicate any challenges that may affect their ability to fulfil their lease obligations.

3. Breach of Contract:

Where parties cannot reach into a mutual agreement and one party unilaterally terminates a lease without a termination clause, the unilateral termination shall constitute a breach of contract. Accordingly, the remedy for such breach is the rent due as at the date of vacating and any damages or losses attendant thereto shall be subject to proof of mitigation.

4. Statutory Provisions for Periodic Tenancies:

In the absence of a termination clause, a party terminating a commercial lease shall issue a notice as per **Section 57(4) of the Land Act** which provides a framework for implied periodic tenancies. Such a notice should be equivalent to the payment period of the rent.

In essence, even if the fixed-term lease is for 5 years or more years, the termination notice period must align with the interval at which rent is paid. If rent is payable quarterly, the required notice period will be for three months.

Conclusion

As highlighted in the foregoing, it is trite that parties to commercial leases ought to incorporate termination clauses

so as to avoid flooding courts with commercial disputes. Also, the decision has underscored the primary duty of

both landlords and tenants to mitigate their losses upon termination of commercial leases.

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