

Real Estate Law

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The Supreme Court's judgment in *Kwanza Estates Limited v Jomo Kenyatta University of Agriculture and Technology*



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The Supreme Court's judgment in *Kwanza Estates Limited v Jomo Kenyatta University of Agriculture and Technology*

Before delving into the specifics of the Supreme Court's decision in *Kwanza Estates Limited v Jomo Kenyatta University of Agriculture and Technology* (Petition E001 of 2024), it is helpful to first establish some key principles that underpin the governance of leases. These foundational concepts will provide context for understanding the significance of the court's findings and their implications for the future of lease agreements:

1. **Hierarchy of judicial pronouncements:** At the apex of the judicial system sits the Supreme Court, and its decisions set binding precedents across the country. This judgment, coming from the highest court, carries profound weight.
2. **The lease agreement as a framework:** The lease agreement is the contract that governs the landlord-tenant relationship. It is not just a document but a blueprint for interactions between the parties. The terms of the lease matter significantly in disputes, as they are the primary source for determining obligations, rights, and remedies.
3. **Party autonomy:** Part VI of the Land Act, 2012 (Land Act) outlines several provisions concerning leases, but only a few are mandatory. Section 55(1) provides that parties are free to craft their own agreements and exclude non-mandatory provisions.
4. **Risk of a lease becoming a controlled tenancy:** Under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (LTA), commercial leases that include termination clauses might inadvertently fall under the realm of controlled tenancies, which are often disadvantageous for landlords. Therefore, the absence of such clauses in lease agreements is likely strategic, ensuring the lease remains under the discretion of the parties involved.
5. **Exemption from controlled tenancy:** Section 2 of the LTA, which defines "controlled tenancy", specifically exempts tenancies where the Government, the community, or a local authority is a party, whether as a landlord or as a tenant.
6. **Party type and location-specific nuances:** When considering lease agreements, various nuances can arise depending on factors such as the nature of the parties involved, the location of the premises, and specific statutory exemptions. The legal landscape is not one-size-fits-all.
7. **Fixed-term leases and the "binding" nature:** A fixed-term tenancy has a fixed term and thereby a fixed date for the end of the tenancy. Historically, tenants have been understood to be bound to fixed-term leases, with no immediate exit unless a break clause or similar provision is specified.
8. **Periodic tenancy:** A periodic tenancy is where parties are not aware of the length of the tenancy. It continues indefinitely depending on when rent is paid and rolls over until either party decides to end it. Accordingly, a periodic tenancy cannot arise if there is certainty as to the term of the lease.



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9. **Change in law:** Change in law refers to a new law or regulation that affects the performance of a contract. It typically does not excuse a party from fulfilling its contractual obligations unless the contract specifically includes provisions for such events. Parties are generally expected to comply with new laws, even if it makes performance more difficult or costly. The law does not typically provide relief for the mere existence of a new law unless specified in the contract.
10. **Mutual exclusivity of *force majeure* and the doctrine of frustration:** *Force majeure* and the doctrine of frustration cannot typically apply simultaneously to the same contract because they address similar risks in different ways and operate under distinct legal principles. The existence of a *force majeure* clause will usually preclude frustration, as the parties have already allocated the risk contractually. Frustration steps in only when the contract lacks a *force majeure* clause or if the clause is silent on the event in question.

Understanding the dispute

In a case that presents a wide array of legal challenges, the tenant in this dispute, Jomo Kenyatta University of Agriculture and Technology (JKUAT), sought to rely on several doctrines and provisions in an attempt to end its lease obligations. JKUAT raised several points, particularly focusing on (i) the application of periodic lease principles to support the duration of its termination notice; (ii) the interpretation of "*sooner determination*;" and (iii) the doctrine of frustration in an effort to discharge itself from its obligations under the lease. The unprecedented nature of the COVID-19 pandemic added a unique dimension to the dispute, making this case an important reference point for how key legal concepts are considered in commercial lease disputes.

This case reached the Supreme Court after being appealed from the Court of Appeal, with earlier proceedings taking place at the Environment and Land Court.

Key arguments put forward by JKUAT

1. JKUAT argued that the COVID-19 pandemic, particularly the closure of educational institutions and the associated financial hardship, rendered the lease commercially impossible to perform, invoking the doctrine of frustration.
2. It further argued that changes in student enrolment policies, particularly the implementation of the new placement policy by the Kenya Universities and Colleges Central Placement Service (KUCCPS), also amounted to frustration of the lease. According to JKUAT, the lease was frustrated by this change in law that resulted in a reduction in student enrolments, rendering its performance under the lease unsustainable.
3. JKUAT contended that the phrase "*sooner determination*" in the lease agreement implied the possibility of early termination. According to its argument, this clause allowed it to exit the lease before



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its full term as it did not preclude an early exit and in fact was a built-in right for early termination before the agreed expiration date. It maintained that the clause was sufficient to grant it the right to terminate the lease under certain conditions, even if no explicit termination clause was present.

4. Regarding the sufficiency of the termination notice, JKUAT argued that section 57(4) of the Land Act provides clear guidance when a lease lacks a specific termination clause. This provision, it claimed, allowed it to terminate the lease by giving notice, with the length of the notice being equivalent to the period of the tenancy. It viewed this statutory provision as a fallback when the lease itself was silent on the matter of termination.
5. JKUAT also argued that it should not be held liable for rent for the entire lease period when it was no longer occupying the premises due to the impact of external circumstances, including the pandemic and changes in student enrolment policies.

How the Supreme Court responded

1. Financial hardship is not a free pass

The Supreme Court unequivocally rejected the argument that COVID-19 itself amounted to frustration. The court emphasised that while the pandemic caused financial hardship for JKUAT, it did not render the performance of the lease *"impossible."* The court pointed out that once the restrictions were lifted, JKUAT could resume normal operations, even adapting to online learning.

Lesson for tenants: Financial difficulty alone, even arising from an extraordinary event like COVID-19, does not automatically discharge a tenant's contractual obligations

unless explicitly provided for in the lease agreement. The tenant can only claim frustration if the lease's purpose is rendered impossible to achieve. Courts will only allow frustration claims when the event is truly unforeseeable, beyond the party's control, and makes the contract's performance impossible, not just difficult or costly.

2. No exit without a clear provision

JKUAT's reliance on the phrase *"sooner determination"* to argue for early termination was dismissed. While the phrase could imply some potential for early termination, the absence of a clear termination clause meant that JKUAT's actions amounted to a unilateral termination. The court found that there was no mutual agreement allowing for termination before the lease's expiration. Although the use of *"sooner"* suggests that the lease could be ended before full term, the circumstances under which this occurs need to be explicitly defined within the lease agreement.

The court further noted that while section 57(4) of the Land Act allows for periodic tenancy agreements to be terminated by either party upon notice, JKUAT did not invoke this provision in its termination notice, making its claim retroactive.

Lesson for landlords and tenants: Where a fixed-term lease lacks a specific termination clause, it cannot be terminated unilaterally unless by mutual agreement. The inclusion of terms like *"sooner determination"* may not suffice to terminate a lease without additional supporting clauses.

3. The duty to mitigate losses

JKUAT's argument that, given that it vacated the premises, it should not be compelled to pay rent for the remainder of the lease term was accepted. The court acknowledged the general principle that landlords must actively seek new



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tenants if the current tenant vacates. Failure to mitigate damages by not attempting to re-lease the property is not acceptable. The court found that a three-month period is reasonable for renovations and finding new tenants, reducing the potential rental claims for vacant periods.

Lesson for landlords: Landlords must take reasonable steps to find a new tenant to minimise financial losses or reduce financial harm resulting from the lease termination.

4. Frustration and the impact of law changes

JKUAT's argument that changes in law, such as the implementation of a new student placement policy, amounted to frustration was rejected. The court highlighted the strict criteria under the doctrine of frustration, which require that the contract's performance be made impossible or radically different from what was agreed upon. In this case, the changes in law did not meet this threshold.

Lesson for tenants: The doctrine of frustration should not be invoked lightly. Even significant changes in law or government policy do not necessarily justify non-performance unless they make a contract's purpose impossible to achieve.

5. The Supreme Court's consideration of public interest

The court acknowledged that COVID-19 pandemic's impact on contractual obligations went beyond the interests of the parties involved. It recognised that the pandemic had widespread effects on the public at large and that resolving the legal question of whether the Government's

management of the COVID-19 pandemic could be considered a *force majeure* event, was of significant public interest which required the intervention of the Supreme Court to clarify and settle the jurisprudence.

The court clarified that *force majeure* clauses must be explicitly written into contracts to be enforceable. In the absence of a *force majeure* provision, the strict common law doctrine of frustration may apply.

Key insight: This decision reinforces the need for parties to explicitly define their rights and obligations in a contract. A *force majeure* clause can only be invoked if it is specifically included in the lease. The court's stance on this issue will have significant implications for future contractual disputes regarding the interpretation of *force majeure* clauses within the context of a pandemic.

Where the Court could have gone further

- While the court touched on the issue of controlled tenancies in the judgment, it did not directly address whether JKUAT, being a public university or institution under the Kenyan Government, qualifies for the exemption outlined in the proviso under section 2 of the LTA. It would have been helpful for the court to engage with this question, as it would provide greater clarity on the application of this exemption and its scope in the context of public institutions like JKUAT.
- The court did not clearly address whether this was a periodic tenancy allowing JKUAT to invoke section 57(4) of the Land Act. It would have been useful to definitively confirm the distinction between periodic tenancies and fixed-term tenancies.



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- The court also did not clarify whether the lease agreement excluded the application of Part VI of the Land Act, especially considering that section 55(1) of the Act provides that the non-mandatory provisions of Part VI may be expressly excluded by a lease agreement. Addressing this would have shed light on important nuances in how the law interacts with the lease agreement in question.
- A more direct discussion on whether three months was a reasonable period for Kwanza Estates Limited to secure a replacement tenant during the pandemic would have added clarity. Given the global scale of COVID-19's impact, one wonders whether three months was enough to secure a new tenant in order to mitigate the financial loss. A landlord's duty to mitigate is important, but so is the landlord's ability to re-let the premises during an unprecedented global crisis.
- While the court emphasised the landlords' duty to mitigate damages by finding new tenants, the specific actions required for a landlord to satisfy this duty were not fully outlined. The threshold for what constitutes reasonable mitigation remains somewhat unclear and may vary by case.

Conclusion

The broad spectrum of arguments raised by JKUAT almost suggested a concerted attempt to cast a wide net in search of a legal avenue to extricate itself from the obligations under the lease, each attempting to provide a foundation for its claims of discharge from the lease. This Supreme Court decision offered much needed clarity and key insights on the principles that govern landlord-tenant relationships, even during extraordinary events like the COVID-19 pandemic.

In the wake of significant policy shifts, such as those seen under President Trump's administration including the suspension of foreign aid and imposition of new tariffs, which have introduced economic uncertainties globally and expected to have ripple effects, we are likely to witness a surge in tenants unable to sustain their existing leases. This situation will place additional pressure on landlords to manage vacancies and enforce mitigation strategies, while tenants may find themselves seeking early termination or renegotiation of terms. Understanding the legal implication of early termination, as well as the practical need for flexibility will be essential for managing the coming wave of challenges in lease agreements.

Another key point arising from the judgment is the importance of clarity in drafting lease agreements. Tenants, particularly those who are presented with "standard" leases that offer no room for negotiation, may find themselves bound by ambiguous terms that are open to interpretation. The judgment reinforces the need for precise language and less room for conflicting interpretations.

A well-drafted lease not only prevents costly disputes but also ensures that both parties understand their rights and obligations from the outset. For future leases, whether drafting, negotiating, or advising on terms, the importance of clarity, foresight and mutual responsibility cannot be overstated – where these terms are ambiguous, the outcome can be costly and unpredictable.

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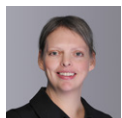


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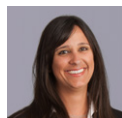
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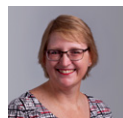
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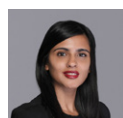
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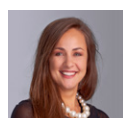
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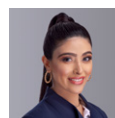
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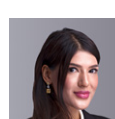
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