

THE LAW ON OCCUPIERS' LIABILITY IN KENYA

Introduction

Occupiers' liability is an area of tort law that deals with the duty of care owed by those who occupy real property through ownership or lease (called 'the occupier') to those who visit or trespass into the property. It arises from accidents that occur due to the defective or dangerous condition of the said property. Although the rules were originally developed by common law, they were codified in Kenya through enactment of the Occupier's Liability Act, CAP 34, Laws of Kenya.

The scope of the law in Kenya was well described in the case of **Soma Properties Limited v. HAYM [2015] eKLR** where Ouko J. A (as he then was) stated that;

***"In Kenya, on the basis of the Occupiers' Liability Act and the common law there is a duty imposed on the occupier to maintain the premises, including all the common areas which are part of the premises in a manner that does not, in all the circumstances, pose any threat to injury or damage to those on the premises, including protection against criminal acts of third parties as long as the risk, injury and damage are foreseeable and the occupier has not restricted, modified or excluded his duty to any visitor or visitors by agreement or otherwise.*"**

Definition of "Occupier"

The **Black's Law Dictionary, 11th Edition** defines an "Occupier" as one who has possessory rights in or control over certain property or premises.

However, in the law of occupiers' liability, there has been uncertainty over that definition since aspects of possession and control are not necessarily similar. While possession implies exclusive occupation, control is more purposive since it involves exercising dominion over the property. Nevertheless, the essence of occupation is a measure of control over the property.

In **Humphreys v. Dreamland (Margate) Ltd [1931]**, the Court defined an Occupier as someone who has a right to possession of the premises and the right to exclude therefrom all except those who come by their invitation. Another definition can also be found in the case **Wheat v. Lacon [1966]** where Lord Denning noted that wherever a person has sufficient degree of control over premises, he ought to realize that any failure on his part to use care may result in injury to a person coming lawfully there, then he is an occupier. Subsequently, in **Harris v Birkenhead Corporation [1976]**, a corporation was found liable for the injuries of a child who fell in a house they had purchased but had not taken possession of.

In view of the above, the legal position is that the degree of control over property makes one an occupier and may be liable under the Occupiers' Liability Act. Therefore, one may still be liable under occupier's liability notwithstanding that he does not have physical possession of the property since a person may exercise dominion or control over property not in his or her physical possession.

Extent of an Occupier's' Ordinary Duty

(i) At Common Law

At Common law, the rule is that entrants to land are divided into four categories and the duty owed to them become progressively less. The categories include;

- a) Contractual visitor – the duty to see premises were safe. For instance, paying customer at a swimming pool.

- b) -Invitee – the duty to prevent damage from an unusual danger. For instance, a customer in a shop
- c) Licensee - the duty to protect from concealed danger. For example, asking a friend to visit your house.
- d) Trespasser - the duty not to intentionally or recklessly harm. For example, someone climbs into your garden over your garden wall. In **British Railway Board v Herrington [1972]** the House of Lords stated that trespassers were owed a 'duty of common humanity'

(ii) **Under the Occupiers' Liability Act, Cap 34**

The Act provides for liability of occupiers for injuries or damage resulting to persons lawfully on any land or other property due to the state of the property or to things done or omitted to be done there.

It is noteworthy that there is no statutory definition of an Occupier in the Act. Definition can however be implied from **Section 2 (3) (b)**, which uses the word '**Obligations of persons occupying or having control over any premises or structure.**'

Section 2(2) of the Act refers to the application of the principles of Common law in determining the liability of an occupier of premises. The principles relate to the elements of negligence including the duty of care, breach of the duty, foreseeability, and injuries or damages resulting from the said breach. However, the Act emphasizes that the rules relating to the extent of liability therein shall have effect in place the rules of common law.

Sections 3 & 4 of the Act provides that an occupier owes the same duty, the common duty of care, to all his visitors. The common duty of care is defined as the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there. In **MNK (suing as father and next friend) Patrick Kyalo Maundu v. Joseph Mwaura [2017] eKLR**, the Court held that an Occupier owes a common duty of care to all lawful occupants, visitors, and trespassers.

Although the duty of care is the same for all categories of persons, regard must be had to the circumstances each case. For instance, the occupier owes a common duty of care to visitors save for instances where they have restricted the duty to any visitor by agreement or otherwise. Additionally, the occupier is also expected to be prepared for children to be less careful than adults.

In determining the extent of the liability, it is important to first establish whether the occupiers had discharged their common duty of care in the circumstances. Where a visitor had been warned by the occupier, the occupier is not to be absolved of any liability unless it is demonstrated that the visitor was reasonably safe.

In **Soma Properties Limited v HAYM, [2015] eKLR (Supra)**, the Court stated that the word '**reasonable**' or '**reasonably**' refers to the standard of care expected of an occupier. It is the standard measured against the care to be exercised by a reasonably prudent person in all the circumstances and what is practicable and to be expected. Thus, an occupier will escape liability if it is established that in the circumstances of the case, there were reasonable systems in place to secure the premises against foreseeable risk and danger.

Just like all other cases, the onus of proving liability is on the Claimant but sometimes it shifts to the occupier who has to prove that he had discharged his duty of care to ensure that the visitor or any other person visiting the premises is reasonably safe. In the case of **Catherine Wangechi Wariahe (Suing as the Administratrix of the Estate of the late James Mwambiro Njeri) v Meridian Hotel Limited [2016] eKLR**, the Court stated the following:

"As is the case with any tort, the party advancing the claim, bears the burden of proof the standard of which, is on a balance of probability. Section 3 aforesaid, does not create a

presumption of negligence against the occupier of the premises whenever a person is injured on the premises. A Plaintiff who invokes that Section must still be able to point to some act or omission on the part of the occupier which caused the injury complained of, before liability can attach.

Although a visitor has the burden to prove their case, the Court in ***Jumuia Hotel v SN & JCO (Suing as the Legal Representatives in the Estate of CAN – Deceased) & another [2021] eKLR*** stated that the evidential burden is on the occupier to prove that it had discharged its duty of care was reasonably safe.

The Occupiers' Liability Act in **Section 3(4) (b)** also provides for occupiers' liability of independent contractors. If the occupier is negligent in selecting, instructing, or supervising the independent contractor, they may be liable for torts committed by the independent contractor. Landlords and contractors are liable in equal measure as was held in ***MNK (suing as father and next friend) Patrick Kyalo Maundu v. Joseph Mwaura [2017] eKLR (supra)***.

Pursuant to **Section 3(5)**, there is no common duty of care to visitors who freely and voluntarily, with full knowledge of the nature and extent of the risk they ran, impliedly agreed to incur it. The aforementioned section covers the defence of Voluntary Assumption of Risk in what is commonly known as ***Volenti non fit Injuria***. Other defences include consents, warnings and exclusions. However, the as for the case of warnings and the other aforementioned defences ipso facto they are not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe.

It is also important to note that under **Section 3(3)(b)** of the Act, an occupier must be prepared for children to be less careful than adults.

In conclusion, Occupiers' have an obligation to duty to take such care as in all the circumstances of the case is reasonable to see that the visitor or any other persons who enter premises for any purpose in the exercise of a right conferred by law will be reasonably safe in using the premises. Otherwise, they would be liable under occupiers' liability in respect of dangers due to the state of the premises or to things done or omitted to be done on them.