SECTION 1
CPA

COMMERCIAL LAW

REVISED SYLLABUS 2015

STUDY TEXT

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ONE CHAPTER

LAWOFCLASSIFICATIONANDPURPOSENATURE,

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CHAPTER ONE

NATURE, PURPOSE AND CLASSIFICATION OF LAW

▶ OBJECTIVE

To provide the candidate with a broad understanding of the following aspects of the nature, purpose and classification of the Laws of Kenya and their application:

- Nature and purpose of law
- Classification of law
- Law and morality
- Ethics and the law

▶ INTRODUCTION

This chapter deals with jurisprudence which is the study of the nature of law. Since the term law has no assigned meaning this chapter provides the various meanings that different scholars have assigned to law. It further advances to give the various classes of law, in other words the different types of laws.

▶ KEY DEFINITIONS

- **Jurisprudence:** The study of the nature of law
- **Accused:** a suspect is charged with a crime
- **Cause of action**:When a person's civil or private rights are violated
- **Plaintiff:** An aggrieved party or one who brings a cause of action to a court of law.
- **Defendant:** A person who is alleged to have committed a wrong or one against whoma cause of action is brought.

▶ EXAM CONTEXT

The exam in this area mainly seeks to test the student's understanding of the fact that law has no assigned meaning. The student should be familiar with the different meanings of law and the various classifications of law. This chapter has been tested in the following years: November 2006; May 2005; November 2003; May 2003; November 2002; November 2001; May 2001; November 2000

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INDUSTRY CONTEXT

Over the years, the study of the nature of the law (jurisprudence) has been of great importance. The different schools of thought that have arisen are all endeavours of jurisprudence: Natural law school Positivism, realism among others. It is these schools of thoughts that have steered debates in parliaments, courts of law and others.

1.1 WHAT IS LAW?

The term law has no assigned meaning. It is used in a variety of senses. Although different writers have attempted to explain the term Law, no generally accepted explanation has emerged.

The study of the nature of law is known as **Jurisprudence**. Persons who explained the term law from the same point of view form a **school of jurisprudence/thought**.

The word **jurisprudence** derives from the Latin term *jurisprudentia,* which means “the study, knowledge, or science of law.” In the United States jurisprudence commonly means the philosophy of law. Legal philosophy has many aspects, but four of them are the most common.

The first and the most prevalent form of jurisprudence seek to analyze, explain, classify, and criticize entire bodies of law. Law school textbooks and legal encyclopaedias represent this type of scholarship.

The second type of jurisprudence compares and contrasts law with other fields of knowledge such as literature, economics, religion and the social sciences.

The third type of jurisprudence seeks to reveal the historical, moral, and cultural basis of a particular legal concept.

The fourth body of jurisprudence focuses on finding the answer to such abstract questions as “What is law?” and “How do judges (properly) decide cases?”

1.2 SCHOOL OF JURISPRUDENCE

1. Positivism
2. Historical School
3. Natural School
4. Sociological School
5. Marxist School

According to **Hart,** Law is a coercive instrument for regulating social behaviour. This is the Command Theory, which assumes that existence of a sovereign, who has the power to impose penalties/sanctions for compliance, which is not necessarily the case.

Marxists postulate the theory that law serves the interests of the dominant classes in society.

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This explanation of law cannot pretend to be of universal application.

According to **Salmond**: Law is a body of rules or principles recognized and applied by the state in the administration of justice.

Law has been defined as a body of binding rules of human conduct prescribed by human beings for the obedience of human beings.

In summary therefore, law consists of binding rules. It can therefore be defined as an aggregate or conglomeration of rules enforced by courts of law at a given time.

Rules of law are certain and originate from parliament and various religious practices of a society.

1.3 LAW AND MORALITY

Morality is the sense of judgement between right and wrong by reference to certain standards developed by society over time.

It consists of standards of behaviour widely used by a society (prescriptions of society) and is binding on the conscience of the members of that society. An action that is considered to be opposed to morality will generally be frowned upon by that society. However, morality is not enforceable by courts of law.

This is compared to rules of law, which are binding, enforceable and have sanctions in all cases. Wrongs in society are contraventions of law or morality or both. However, the law incorporates a significant proportion of morality. In such instances, where law and morality overlap, morality is enforced as a rule of law. Such morality becomes part of the law. E.g. killing a person is immoral as well as a crime. So is theft.

However, certain wrongs in society contravene morality but not the law e.g. disrespect, failure to provide for parents, failure to rescue a drowning person e.t.c. What then is the relation of morality to law?

The existence of unjust laws (such as those enforcing slavery, or legalizing abortions) proves that morality and law are not identical and do not coincide.

The existence of laws that serve to defend basic values such as laws against murder, rape, malicious defamation of character, fraud, bribery, etc. proves that the two can work together.

Laws govern conduct at least partly through fear of punishment. When morality, is internalized, when it has become habit-like or second nature, governs conduct without compulsion. The virtuous person does the appropriate thing because it is the fine or noble thing to do, not because not doing it will result in punishment.

As such, when enough people think that something is immoral they will work to have a law that will forbid it and punish those that do it. . However if there is a law that says doing X is wrong and illegal and enough people no longer agree with that then those people will work to change that law.

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1.4 FUNCTIONS/PURPOSES OF LAW

1. It promotes peaceful coexistence/ maintenance of law and order/ prevents anarchy
2. It is a standard setting and control mechanism. Law sets standards of behaviour and conduct in various areas such as manufacturing, construction, trade e.g. The law also acts as a control mechanism of the same behaviour
3. It protects rights and enforces duties by providing remedies whenever these rights or duties are not honoured.
4. Facilitating and effectuating private choice. It enables persons to make choices and gives them legal effect. This is best exemplified by the law of contracts, marriage and succession.
5. It resolves social conflicts. Since conflicts are inevitable, the rule of law facilitates their resolution by recognizing the conflicts and providing the necessary resolution mechanism.
6. It controls and structures public power. Rules of law govern various organs of Government and confer upon them the powers exercisable by them. The law creates a limited Government. This promotes good governance, accountability and transparency. It facilitates justice in the society.

1.5 CLASSIFICATION/ TYPES OF LAW

Law may be classified as:

1. Written and Unwritten.
2. Municipal (National) and International.
3. Public and Private.
4. Substantive and Procedural.
5. Criminal and Civil.

WRITTEN LAW

This is codified law. These are rules that have been reduced to writing i.e. are contained in a formal document e.g. the Constitution of Kenya, Acts of Parliament, Delegated Legislation, International treaties etc.

UNWRITTEN LAW

These are rules of law that are not contained in any formal document.

The existence of such rules must be proved. E.g. African Customary law, Islamic law, Common law, Equity, Case law e.t.c.

Written law prevails over unwritten law.

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MUNICIPAL/ NATIONAL LAW

This refers to rules of law that are applicable within a particular country or state. This is state law.

It regulates the relations between citizens ***inter se*** (amongst themselves) as well as between the citizens and the state.

It originates from parliament, customary and religious practices.

INTERNATIONAL LAW

This is a body of rules that generally regulates the relations between countries or states and other international persons e.g. United Nations.

It originates from international treaties or conventions, general principles and customary practices of states.

PUBLIC LAW

It consists of those fields or branches of law in which the state has a direct interest as the sovereign.

It is concerned with the Constitution and functions of the various organizations of government including local authorities, their relations with each other and the citizenry. Public law includes:

- Criminal Law
- Constitutional Law
- Administrative Law

Public Law asserts state sovereignty.

PRIVATE LAW

It consists of those branches of law in which the state has no direct interests as the state / sovereign.

It is concerned with the legal relationships between persons in ordinary transaction e.g.

- Law of contract
- Law of property
- Law of succession
- Law of marriage
- Law of torts

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SUBSTANTIVE LAW

It consists of the rules themselves as opposed to the procedure on how to apply them.

It defines the rights and duties of the parties and prescribes the remedies applicable. Substantive law defines offences and prescribes the punishment, for example:

- The Law of torts,
- The Law of succession,
- The Law of contract,
- The Law of marriage.
- The Penal Code[1]

PROCEDURAL LAW

This is adjectival law. It consists of the steps or guiding principles or rules of practice to be complied with in the administration of justice or in the application of substantive law. For example:

- The Civil Procedure Code[2]
- The Criminal Procedure Code[3]

NB: The Evidence Act[4]is both substantive and procedural

CRIMINAL LAW

This is the law of crimes. A **crime** is an act or mission committed or omitted in violation of public law e.g. murder, treason, theft, e.t.c. All crimes are created by parliament through statutes

A person who is alleged to have committed a crime is referred to as a **suspect**.

As a general rule, suspects are arrested by the state through the police at the instigation of the **complainant.** After the arrest, the suspect is charged in an independent and impartial court oflaw whereupon he becomes the **accused.**

Criminal cases are generally prosecuted by the state through the office of the Attorney General (AG) hence they are framed as R (the State) Vs Accused E.g. *R v Kamenchu*

Under Section 77 (2) (a) of the Constitution, an accused person is presumed innocent until proven or pleads guilty.

If the accused pleads not guilty, it is the duty of the prosecution to prove its case against him by adducing evidence i.e. the burden of proof in criminal cases is borne by the prosecution.

The standard of proof is beyond any reasonable doubt i.e. the court must be convinced that the accused committed the offence as charged.

In the event of reasonable doubt, the accused is acquitted. If the prosecution proves its case i.e. discharges the burden of proof, then the accused is convicted and sentenced.

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The sentence may take the form of:-

1. Imprisonment
2. Fine
3. Probation
4. Corporal punishment
5. Capital punishment
6. Community service
7. Conditional or unconditional discharge

Under Section 77 (4) of the Constitution, a person cannot be held guilty of an act or omission which was not a criminal offence on the date of omission or commission.

■ CIVIL LAW

It is concerned with the rights and duties of persons i.e. individuals and corporations. Branches of civil law include:-

- Law of contract
- Law of torts
- Law of property
- Law of marriage
- Law of succession

When a person's civil or private rights are violated, he is said to have a cause of action. Examples of causes of action:

- Breach of contract
- Defamation,
- Assault
- Negligence
- Trespass to goods e.t.c.

Causes of action are created by parliament through statutes as well as the common law and equity.

The violation of a person's civil rights precipitates a civil case or action. The person whose rights are allegedly violated sues the alleged wrongdoer hence civil cases are framed as ***Plaintiff v Defendant.***

It is the duty of the plaintiff to prove his allegations against the defendant. This means that the burden of proof is borne by the plaintiff. The standard of proof in civil cases is on a balance of probabilities or on a preponderance of probabilities i.e. the court must be satisfied that it is more probable than improbable than the plaintiff's allegations are true.

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If the plaintiff proves his allegations by evidence, he wins the case and is awarded judgment which may take the form of:-

1. Damages (monetary compensation)
2. Injunction
3. Specific performance
4. Account
5. Tracing
6. Winding up a company
7. Appointment of receiver

1.6 THE RULE OF LAW

The concept of the Rule of Law is a framework developed by Dicey on the basis of the English Legal system. It is also described as the due process.

According to Dicey, rule of law comprises three distinct conceptions namely:

1. **Absolute supremacy or predominance of regular law:** this means that all acts of theState are governed by law. It means that a person can only be punished for disobedience of the law and nothing else.

2. **Equality before the law:** this means equal subjection of all persons before the law.It means that no person is exempted from obeying the law. All classes of persons are subjected to the same judicial process regardless of their age, sex, creed, gender or race.

3. **The law (Constitution) is a consequence and not the source of rights:** means thatthe law is a manifestation of the will of the people.

FACTORS UNDERMINING RULE OF LAW

- Excessive power of the Executive
- Non - independent Judiciary
- Corruption
- Selective prosecution
- Civil unrest
- Ignorance of the law

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1.7 PROFESSIONAL ETHICS AND THE LAW

Principles that have to be followed by a professional accountant include:

a) **Integrity**
It refers to the character of the accountant. The accountant should be one who is of unquestionable morals, honest, trustworthy and forthright.

b) **Professional Independence**
This refers to the ability of the accountant to do his work without following any instructions from the client or any other person for any reason.
The independence ensures that the accountant will be truthful and will carry out his duties in accordance with the dictates of the profession as opposed to personal whims.

c) **Confidentiality**
This is the duty of secrecy. It is the duty not to divulge to third parties any information that has been received by the accountant in his capacity as such or to use such information in any way for any other purpose without the consent of the client or express authority of the law.

d) **Professional Competence**
Means that for a person to render professional services as an accountant he must have attained the professional ability to do so i.e. he must *inter alia* have the necessary qualifications after having gone through a prescribed course of study.

A person who has fulfilled the requirements of the Accountants Act[5] in relation to qualifications is deemed to be professionally competent.

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CHAPTER SUMMARY

Law consists of binding rules. It can therefore be defined as an aggregate or conglomeration of rules enforced by courts of law at a given time.

Morality is a sense of judgment between right and wrong by reference to certain standards developed by society over time.

FUNCTIONS/PURPOSES OF LAW

1. It promotes peaceful co-existence
2. It is a standard setting and control mechanism.
3. It protects rights and enforces duties by providing remedies
4. Facilitating and effecting private choice.
5. It resolves social conflicts.
6. It controls and structures public power.
7. It facilitates justice in society.

CLASSIFICATION OF LAW

a) Written and unwritten Law.
b) Public and Private Law.
c) Substantive and Procedural Law.
d) Criminal and Civil Law.
e) Municipal (National) and International Law.

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CHAPTER QUIZ

1. What is law?
2. The study of the nature of the law is called?
3. How are civil cases framed?
4. Morality is enforceable?

- TRUE
- FALSE

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CHAPTER QUIZ ANSWERS

1. An aggregate or conglomeration of rules enforced by courts of law at a given time.
2. Jurisprudence
3. Plaintiff v Defendant
4. FALSE

SAMPLE EXAMINATION QUESTIONS

QUESTION ONE

May 2000, Question 1

Distinguish the following:

i. Law and Morality, (2 marks)
ii. Public and Private Law, (2 marks)
iii. Substantive Law and Procedural Law, (2 marks)
iv. Ratio Decidendi and *Obiter Dicta.* (2 marks)

QUESTION TWO

December 2006, Question 1

Define the term "Law" and state the main purpose of Law. (6 marks)

QUESTION THREE

December 2000, Question 1

Describe the various branches of civil law. (10 marks)

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QUESTION FOUR

May 2003, Question 1

b) Write explanatory notes on the following;

i. Supremacy of the Constitution. (3 marks)

ii. The rule of law. (3 marks)

c) Identify the factors that may undermine the rule of law in a country. (4 marks)

(Footnotes)

[1] Cap 63 Laws of Kenya.
[2] Cap 21 Laws of Kenya.
[3] Cap 75 Laws of Kenya.
[4] Cap 80 Laws of Kenya.
[5] Cap 531, Laws of Kenya.

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CHAPTER TWO

SOURCES OF LAW

▶ OBJECTIVE

To provide the candidate with a broad understanding of the Sources of Laws of Kenya:

- The Constitution
- Legislation
- Delegated Legislation
- Statutes of General Application in force in England on 12th August 1897
- Substance of Common Law and doctrines of equity
- African Customary Law
- Islamic Law
- Hindu Law
- Judicial Precedent (Case Law)

▶ INTRODUCTION

The phrase sources of law literally means where rules of law are found. This chapter describes the origins of the rules and principles which constitute the law applicable in a country at a given time. In other words the materials from which rules of law are developed.

▶ KEY DEFINITIONS

- **Bill**: a draft law or legislation
- **Delegated legislation**: law made by parliament indirectly
- ***Ultra vires***: Latin term which means “beyond the powers”
- **Common law**: a branch of the law of England which was developed from customs,usages and practices of the English people
- ***Stare decisis***; Latin term which means “the decision stands”
- **Precedent:** An earlier decision of a court

▶ EXAM CONTEXT

This area has been highly tested by the examiner as shall be seen from the list of questions that shall be provided. It is an important area as it seeks to explain the origin of the various sources of law. The student should be able to identify the various sources of law and their hierarchy. This chapter has been tested in the following sittings: 05/06; 11/05; 05/05; 11/04; 05/04; 11/03; 11/01; 05/01; 07/00; 11/00; 05/00; 11/99; 05/99

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INDUSTRY CONTEXT

This chapter has shown its importance in the industry first by way of hierarchy of laws. It is this particular hierarchy that is used when there is a conflict of laws in courts. Cases like the *S.MOtieno case* can hold proof to this. The law making process described is also the same procedureused in parliament when making laws.

SOURCES OF LAW

The phrase sources of law literally means where rules of law are found. However, the phrase has been used in a variety of senses. It has been used to describe:

i. The origins of the rules and principles which constitute the law applicable in a country at a given time.
ii. The source of force or validity of the various rules or principles applicable as law in a country.
iii. The materials from which rules of law developed.
iv. The factors which influence the development of the rules of law.

Hence the phrase sources of law has been used to describe the legal, formal, historical and material sources of law.

The various sources of law of Kenya are identified by:

1. Judicature Act
2. Constitution
3. Hindu Marriage and Divorce Act
4. Hindu Succession Act
5. Kadhis Court Act.

Sources identified by the Judicature Act

1. The Constitution
2. Legislation (Act of Parliament) (Statutes)
3. Delegated legislation
4. Statutes of General Application
5. Common law
6. Equity
7. Case law or (judge–made law)
8. Africa Customary law

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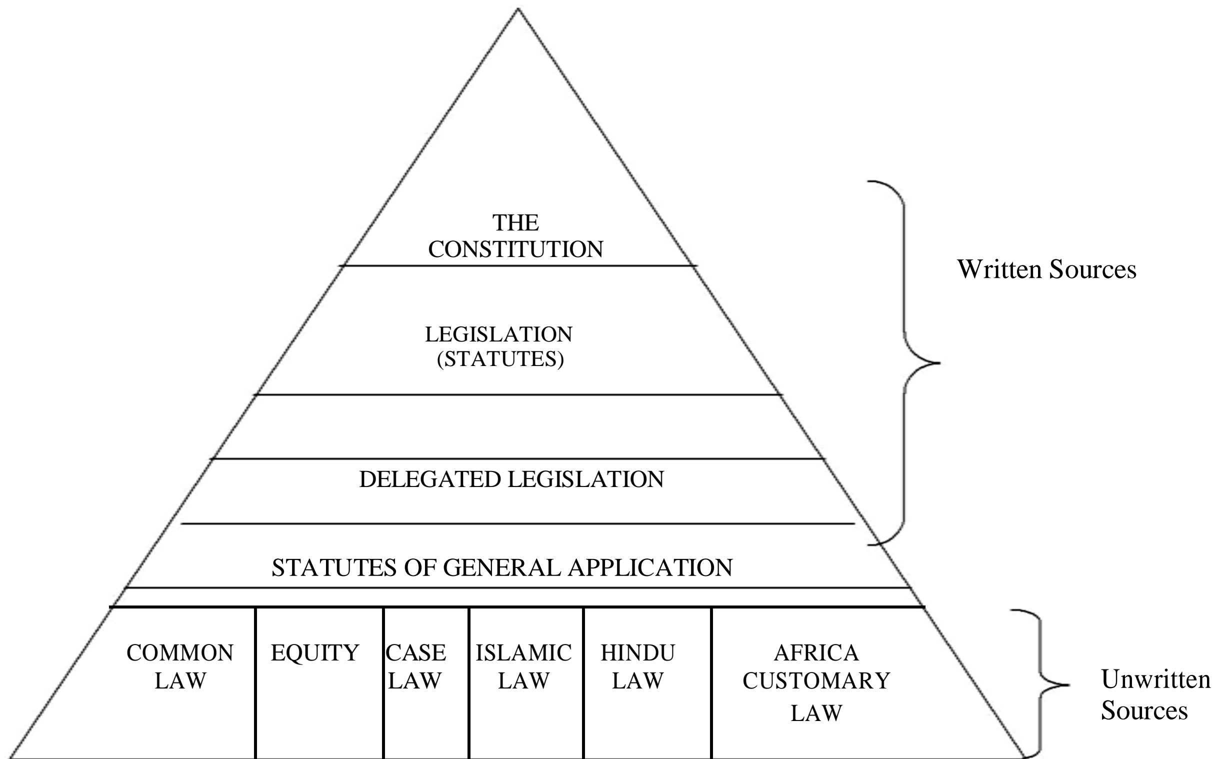
Sources identified by the Constitution and the Kadhis Court Act

Islamic law

Sources identified by the Hindu Marriage and Divorce Act[1] and The Succession Act[2]

Hindu law

DIAGRAMMATIC REPRESENTATION OF THE SOURCES OF LAW OF KENYA



STUDY TEXT

Sources of law of Kenya may be classified as:

1) Written and unwritten sources
2) Principal and subsidiary sources

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PRINCIPAL SOURCES

These are sources of law applicable throughout Kenya, they regulate all persons in Kenya.

SUBSIDIARY SOURCES

These are sources of law which regulate certain categories of people in Kenya in relation to certain matters e.g.

- Islamic law
- Hindu Law
- African customary law

2.1 THE CONSTITUTION

This is a body of the basic rules and principles by which a society has resolved to govern itself or regulate its affairs. It contains the agreed contents of the political system.

It sets out the basic structure of government. A Constitution may be written or unwritten.

Constitutions may be classified in various ways:

1. Written and Unwritten
2. Republican and Monarchical
3. Presidential and Parliamentary
4. Rigid and Flexible

The Kenyan Constitution is written. It was enacted by the English parliament in 1963 for purposes of granting Kenya independence. It has been amended many times.

Section 3 (1) (a) of the Judicature Act recognizes the Constitution as a source of law of Kenya. It is the fundamental law of the land and prevails over all other laws. It is the supreme law.

SUPREMACY OF THE CONSTITUTION

The supremacy of the Constitution as source of law is manifested in various ways:

1) All other laws derive their validity from the Constitution
2) It proclaims its supremacy. Section 3 of the Constitution provides *inter alia* (among other things) “The Constitution is the Constitution of the Republic of Kenya and shall take the force of law throughout Kenya, if any other law is inconsistent with this Constitution, this Constitution will prevail and the other law shall to the extent of its inconsistency be void”

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The phrase "any other law" used in Section 3 of the Constitution was interpreted in **Okunda and Another v. R (1970)** to mean any other law be it international or national.
In this case, the High Court was called upon to determine which law was superior between the Constitution of Kenya and the Official Secrets Act of the East African Community. The court was of the view that Section 3 places beyond doubt the pre-eminent character of the Constitution.

3) **Organs of government:**The Constitution creates the principal and other organs ofgovernment. The Legislature, Executive and the Judiciary owe their existence to the Constitution. Additionally the Constitution creates other bodies and offices e.g.
    - The Electoral Commission (ECK was disbanded and replaced by the Interim Independent Electoral Commission of Kenya after the 2007 general election debacle).
    - Judicial Service Commission
    - Public Service Commission
    - Offices of the AG, Auditor General and the Commissioner of Police are created by the Constitution
4) **Amendment procedures:**The Constitution has a special amendment procedure. UnderSection 47 (1) of the Constitution, parliament is empowered to alter the Constitution. However a Bill seeking to alter the Constitution must be supported by not less than 65% of all the members of parliament excluding the ex-officio members during the 2nd and 3rd readings[3].
5) **Fundamental rights and freedoms**: The Constitution of Kenya guarantees thefundamental rights and freedoms of an individual. Chapter V of the Constitution is devoted to the rights and freedoms which are exercisable, subject to:-
    a. The rights and freedoms of others
    b. Public interest

The rights Guaranteed by the Constitution

1. Right to life - Section 71(1)
2. Right to personal liberty - Section 72 (1)
3. Right to property - Section 75 (1)
4. Right to protection of law - Section 77

Freedoms Guaranteed by the Constitution

1. Freedom of conscience e.g. freedom of thought and of religion
2. Freedom of assembly and association e.g. freedom to form trade unions
3. Freedom of expression
4. Freedom from arbitrary search of a person, his property or entry into his premises
5. Freedom from slavery and servitude
6. Freedom from torture, degrading, inhuman or other punishment
7. Freedom of movement
8. Freedom from discrimination or discriminatory laws

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2.2 ALL OTHER WRITTEN LAWS (STATUTE LAW/ LEGISLATION/ACTS OF PARLIAMENT)

This is law made by parliament directly in exercise of the legislative power conferred upon it by the Constitution. The product of parliament's legislative process is an Act of Parliament e.g. The Mining Act[4].

Sec 3(1) (b) of the Judicature Act recognizes legislation or statues law as a source of law of Kenya by the words "All other written laws". These words encompass:

1. Certain Acts of the UK Parliament applicable in Kenya.
2. Certain Acts of the Indian Parliament applicable in Kenya
3. Acts of the legislative council
4. Acts of the Parliament of Kenya.

Statute law legislation is a principal source of law applicable throughout Kenya. It must be consistent with the Constitution. It is the most important source of law.

THE LAW MAKING PROCESS

Under Sec 30 of the Constitution, the legislative power of the republic is vested in the parliament of Kenya which consists of the president and the National Assembly.

Under Sec 31 of the Constitution, the National Assembly consists of:

a) Elected members
b) Nominated members
c) Ex-officio members

Under Sec 46 (1) of the Constitution, the legislative power of parliament is exercisable by passing Bills in the National Assembly.

BILLS

A bill is draft law. It is a statute in draft. Bills may be classified as:

a) Government and Private members bills
b) Public and Private bills

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a) Government Bill

This is a Bill mooted by the government which it introduces to the National Assembly National Assembly for debate and possible enactment to law. All government bills are drafted by the office of the Attorney General.

Most bills are government bills.

b) Private Members Bill

This is a Bill mooted by a member of parliament in his capacity as such which he introduces to the National Assembly for debate and passage to law e.g. The Hire Purchase Bill, 1968.

c) Public Bill

This is a bill that seeks to introduce or amend law applicable throughout Kenya. It may be government or private members

d) Private Bill

This is a Bill that seeks to introduce or amend law applicable in some parts of Kenya or it regulates a specific group of persons.

The bill may be government or private members.

LAW MAKING PROCEDURE

The procedure of law-making in Kenya is contained in the Constitution and the National Assembly Standing Orders. A bill passes through various stages before enactment to law.

1. Publication of Bill in the Kenya Gazette

All bills must be published in the Kenya Gazette to inform the public and M.P's of the intended law. As a general rule, a Bill must be published at least 14 days before introduction to the National Assembly. However, the National Assembly is empowered to reduce the number of days[5].

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2. Readings

a) **1st Reading**
The Bill is read out to members for the 1st time. No debate takes place. This reading is a mere formality.

b) **2nd Reading**
The Bill is read out to members for the 2nd time. This is the debating stage. All members are given the opportunity to make contributions. Amendments or alterations may be proposed. After exhaustive debate, the Bill proceeds to the committee stage.

c) **Committee/Commital Stage**
The bill is committed either to a select committee of members or to the entire National Assembly as a committee for a critical analysis. At this stage, the bill is analysed word for word.
In the case of a select committee, it makes a report for submission in the National Assembly

d) **Report/Reporting Stage**
The chairman of the Select Committee tenders its report before the National Assembly.
If the report is adopted, the bill proceeds to the third reading

e) **3rd Reading**
The bill is read out to members for the third time. Generally no debate takes place. The Bill is voted on by members of the National Assembly and if supported by the required majority, it proceeds to for presidential assent

3. President's Assent

Under Section 46 (2) of the Constitution, all Bills passed by the National Assembly must be presented to the president for his assent.

Under Section 46 (3), the president must within 21 days of presentation of the bill signify to the speaker of the National Assembly his assent or refusal.

Under Section 46 (4), if the president refused to give his assent, he must within 14 days thereof deliver to the speaker, a memorandum on the specific provisions which in his opinion should be reconsidered including his recommendations for amendment.

Under Section 46 (5), the National Assembly must reconsider the bill taking into account the president's recommendations and must either:

1. Approve the recommendations with or without any amendments and re-submit the bill to the president for assent OR
2. Ignore the president's recommendations and repass the Bill in its original state. If the resolution to repass the Bill as such supported by not less than 65% of all the members of the National Assembly excluding the ex-officio members, the president must signify his assent within 14 days of the resolution.

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4) Publication of Law in the Kenya Gazette

Under Section 46 (6) of the Constitution, a law passed by the National Assembly must be published in the Kenya Gazette before coming into operation. A statute or Act of parliament comes into operation either on the date of publication in the Kenya Gazette or on such other dates as may be signified by the minister by a notice in the Kenya Gazette.

However, under Section 46 (6), Parliament is empowered to make law with retrospective effects

Under Section 46 (7); all statutes enacted by the parliament of Kenya must contain the words "Enacted by the parliament of Kenya."

Advantages of Statutes Law

1. **Democratic:** Parliamentary law making is the most democratic legislative process. This is because parliaments the world over consist of representatives of the people they consult regularly. Statute Law, therefore, is a manifestation of the will of the people.
2. **Resolution of legal problems:** Statute Law enables society to resolve legal problems as and when they arise by enacting new statutes or effecting amendments to existing Law.
3. **Dynamic:** Statute Law enables society to keep pace with changes in other fields e.g. political, social or economic. Parliament enacts statutes to create the necessary policies and the regulatory framework.
4. **Durability:** Statute Law consists of general principles applicable at different times in different circumstances. It has capacity to accommodate changes without requiring amendments.
5. **Consistency/Uniformity:** Statute Law applies indiscriminately i.e. it regulates the conduct of all in the same manner and any exceptions affect all.
6. **Adequate publication**: Compared to other sources of Law, statute Law is the most widely published in that it must be published in the Kenya Gazette as a bill and as a Law. Additionally, it attracts media attention.
7. It is a superior source of law in that only the Constitution prevails over it.

Disadvantages of Statute Law

1. **Imposition of Law:**Statute Law may be imposed on the people by the dominantclasses in society. In such a case, the Law does not reflect the wishes of the citizens nor does it cater for their interests.
2. **Wishes of M.Ps:**Statute Law may at times manifest the wishes and aspirations of M.Ps as opposed to those of the citizenry.
3. **Formalities:**Parliamentary Law making is tied to the Constitution and the NationalAssembly standing orders. The Law making process is slow and therefore unresponsive to urgent needs.
4. **Bulk and technical Bills:**Since parliament is not made up of experts in all fields, bulkyand technical Bills rarely receive sufficient treatment in the national assembly, their full implications are not appreciated at the debating stage.

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FUNCTIONS OF PARLIAMENT

1. Controls government spending
2. Critical function
3. Legislative functions

HOW TO MAKE THE LAW MAKING PROCESS EFFECTIVE

1. M.Ps should consult constituents on a regular basis.
2. Subdivision of large constituencies.
3. Establishment of offices in constituencies for M.Ps
4. Enhance civic education
5. All Bills ought to be supported by not less than 65% of all MPs so as to become Law.
6. Bills should be widely published e.g. the Kenya Gazette should be made available to larger segments of the society. Bills must be published in newspapers.

2.3 STATUTES OF GENERAL APPLICATION

Kenyan Law does not define the phrase “Statutes of General Application”. However, the phrase is used to describe certain Statutes enacted by the UK parliament to regulate the inhabitants of UK generally.

These Statutes are recognized as a source of Law of Kenya by Section 3 (1) (c) of the Judicature Act. However, there application is restricted in that they can only be relied upon:

1. In the absence of an Act of parliament of Kenya.
2. If consistent with the provisions of the Constitution.
3. If the Statute was applicable in England on or before the 12/8/1897
4. If the circumstances of Kenya and its inhabitants permit.

Examples include:

1. Infants Relief Act, 1874
2. Married Women Property Act 1882
3. Factors Act, 1889

Statutes of general application that have been repealed in the UK are still applicable in Kenya unless repealed by the Kenyan parliament.

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DELEGATED LEGISLATION

Although Section 30 of the Constitution rests the legislative power of the republic in parliament, parliament delegates its legislative power to other persons and bodies.

Delegated legislation is also referred to as subsidiary (subordinate

legislation). It is Law made by parliament indirectly.

Delegated legislation consists of rules, orders, regulations, notices, proclamations e.t.c. made by subordinate but competent bodies e.g.

1. Local Authorities
2. Professional bodies such as ICPA(K)
3. Statutory boards
4. Government ministers

These bodies make the laws in exercise of delegated legislative power conferred upon them by parliament through an Enabling or Parent Act.

Delegated legislation takes various forms e.g.

1. Local Authorities make by-laws applicable within their administrative area
2. Government ministries, professional bodies and others make rules, orders, regulations, notices e.t.c.

CHARACTERISTICS OF DELEGATED LEGISLATION

1. All delegated legislation is made under the express authority of an Act of Parliament.
2. Unless otherwise provided, delegated legislation must be published in the Kenya Gazette before coming into force.
3. Unless otherwise provided, delegated legislation must be laid before parliament for approval and parliament is empowered to declare the delegated legislation null and void by a resolution to that effect whereupon it becomes inoperative to that effect

WHY DELEGATED LEGISLATION?

Delegated legislation is described as a “necessary evil” or a Constitutional impropriety”. This is because it interferes with the doctrine of separation of powers which provides that the Law-making is a function of the legislature.

Parliament delegates Law-making powers to other persons and bodies for various reasons:

1. Parliament is not always in session
2. Parliament is not composed of experts in all fields
3. Inadequate parliamentary time
4. Parliamentary Law-making is slow and unresponsive to urgent needs. Additionally it lacks the requisite flexibility
5. Increase in social legislation

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ADVANTAGES OF DELEGATED LEGISLATION

1. **Compensation of last parliamentary time**: Since members of parliament are notalways in the National Assembly making Laws, the Law-making time lost is made good by the delegates to whom legislative power has been given hence no Law-making time is lost.
2. **Speed:** Law-making by government Ministers, Professional bodies and other organs isfaster and therefore responsible to urgent needs.
3. **Flexibility:** The procedure of Law-making by delegates e.g. Government Ministers isnot tied to rigid provisions of the Constitution or other law. The Minister enjoys the requisite flexibility in the Law-making process. He is free to consult other persons.
4. **Technicality of subject matter:** Since parliament is not composed of experts in all fieldsthat demand legislation, it is desirable if not inevitable to delegate Law-making powers to experts in the respective fields e.g. Government Ministries and local authorities.

1. **Less Democratic**: Compared to statute law, delegated legislation is less democratic in that it is not always made by representatives of the people affected by the law. E.g. rules drafted by technical staff in a government ministry.
2. **Difficult to control:** In the words of Professor William Wade in his book "Administrative Law" the greatest challenges posited by delegated legislation is not that it exists but that it's enormous growth has made it impossible for parliament to watch over it. Neither parliament nor courts of law can effectively control delegated legislation by reason of their inherent and operational weakness.
3. **Inadequate publicity**: Compared to statute law, delegated legislation attracts minimal publicity if any. This law is to a large extent unknown.

DISADVANTAGES OF DELEGATED LEGISLATION

4. **Sub-delegation and abuse of power:** Delegates upon whom law making has beendelegated by parliament often sub-delegate to other persons who make the law. Sub-delegation compounds the problem of control and many lead to abuse of power.
5. **Detailedand technical:** It is contended that in certain circumstances, delegatedlegislation made by experts is too technical and detailed for the ordinary person.

CONTROL OF DELEGATED LEGISLATION

Both parliament and courts of law have attempted to control delegated legislation, however neither can effectively do so.

A) PARLIAMENTARY OR LEGISLATIVE CONTROL

Parliament has put in place various mechanisms in its attempt to control or contain delegated legislation:

a. Parliament delegates law-making power to specific persons and bodies e.g. government ministries, local authorities, professional bodies, chief justice e.t.c.

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b. The Enabling or Parent Act prescribes the scope and procedure of Law-making. The delegates can only make law as defined by the scope and must comply with the procedures prescribed.
c. The Enabling or Parent Act may require the draft rules to be circulated to interested parties for comments e.g. By-law.
d. The Enabling or Parent Act may provide that the delegated legislation made be laid before the concerned minister for approval e.g. By-laws made by local authorities. This is political control and is largely ineffective.
e. Under Section 27 (i) of the Interpretation and General Provisions Act[6], unless otherwise provided, delegated legislation must be published in the Kenya Gazette before coming into force.
f. Under Section 34 (i) of the Interpretation and General Provisions Act, unless otherwise provided, delegated legislation must be laid before parliament for approval and parliament is empowered to pass a resolution declaring the Law null and void where upon it becomes inoperative.

Legislative control of delegated legislation is by and large ineffective by reason of the operation and inherent weakness of parliament.

B) JUDICIAL CONTROL

This is control of delegated legislation by courts of law. Courts of Law attempt to control delegated legislation through the doctrine of **ultra vires** (beyond the powers). A court of law declares delegated legislation ***ultra vires*** thereby rendering it null and void.

Delegated legislation may be declared **substantively or procedurally ultra vires.**

a) Substantive Ultra Vires

A court of law on application by a party declares delegated legislation substantively ***ultra vires*** if satisfied that:

a. The delegate exceeded the powers prescribed by the Enabling of Parent Act.
b. The delegate exercised his powers for a purpose other than for which the power was given. This is abuse of power.
c. The delegate acted unreasonably. What amounts to an unreasonable act is for the court to decide on the basis of the facts before it.

b) Procedural Ultra Vires

A court of law may declare delegated legislation procedurally ***ultra vires*** on application if satisfied that the Law-making procedure prescribed by the Enabling or Parent Act was not complied with by the delegate in the law-making process.

STUDY TEXT
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Delegated legislation made in contravention of the procedure prescribed by parliament has a procedural defect. In **Mwangi and Maina v. R. (1950)** the appellants were convicted and sentenced by the Resident magistrate's court in Nairobi for overcharging a haircut contrary to the defense (Control of Prices) Regulations 1945. Under these regulations, the Price controller was empowered to fix the price of certain services including a haircut. He had fixed the price at 50 cents but the appellants had been charging 1 shilling. On appeal, the appellants argued that the regulation fixing the price at 50 cents not been published in the Kenya Gazette as required by the law. As this had not been done, the court declared the rules procedurally ***ultra vires*** thereby setting aside the conviction and sentence of the appellants.

Judicial control of delegated legislation is ineffective for two reasons:

1. Courts are in their nature passive. A court of law will only act when a case is brought before it.
2. The party seeking judicial redress must discharge the burden of proof.

2.4 UNWRITTEN SOURCES OF LAW

Unwritten sources of law apply subject to the written sources. Written sources prevail over unwritten sources in the event of any conflicts.

This is primarily because unwritten law is generally made by a supreme law-making body.

These sources include:

1. Common law
2. Equity
3. Case law
4. Islamic law
5. Hindu law
6. African Customary law.

COMMON LAW

It may be described as a branch of the law of England which was developed by the ancient common Law Courts from customs, usages and practice of the English people.

These courts relied on customs to decide cases before them thereby giving such customs the force of law. The court of Kings Bench, Court Exchequer and the court of common pleas are credited for having developed common law.

These courts standardized and universalized customs and applied them in dispute resolution. At first, common law was a complete system of rules both criminal and civil.

The development of the common law is traceable to the Norman Conquest of the Iberian Peninsula. The Romans are credited for having laid the foundation for the development of the common law.

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CHARACTERISTICS OF COMMON LAW

1. Writ System.
2. Doctrine of *stare decisis*

1. THE WRIT SYSTEM

At common law, actions or cases were commenced by a writ. There were separate writs for separate complaints. Writs were obtained at the Royal office.

A Writ stated the nature of the compliant and commanded the police officer of the country in which the defendant resided to ensure that the he appeared in court on the mentioned date.

Often, police officers demanded bribes to compel the defendant to appear in court and would not compel an influential defendant.

The writ system did not recognize all possible complains and many would be plaintiffs could not access the courts.

It also lengthened the judicial process.

2. DOCTRINE OF STARE DECISIS

Stare Decisis literally means “decision stands” or “stand by the decision.” This is a system ofadministration of justice whereby previous decisions are applied in subsequent similar cases.

At common Law, a judge having once decided a case in a particular manner had to decide all subsequent similar cases similarly.

This made the common Law system rigid. Common Law consists of decisions handed down by courts of law on the basis of customs and usages and may be described as the English Customary Law.

PROBLEMS/SHORTCOMINGS OF COMMON LAW

1. **Writ System**: Cases at common Law were commenced by a writ issued by the Royaloffice.
   There were separate writs for different complaints. However:
   a. This system did not recognize all possible complaints and many would be plaintiffs had no access to the courts
   b. The writ system encouraged corruption
   c. It lengthened the course of justice

2. **Rigidity/inflexibility:** The common Law courts applied the doctrine of *Stare Decisis.*This practice rendered the legal system rigid and hence unresponsive to changes.
3. **Procedural technicalities:** The Common Law procedure of administration of justicewas highly technical. Common Law courts paid undue attention to minor points of procedure and many cases were often lost on procedural matters.

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4. **Delays:** The administration of justice at common Law was characterized by delays. Defendants often relied on standard defenses to delay the course of justice. These defenses were referred to as **essoins**and included; Being out by floods, being unwell or being away on a crusade. If sickness was pleaded, the case could be adjourned for 1 year and 1 day.
5. **Non-recognition of trusts:** Common Law did not recognize the trust relationship. This is an equitable relationship whereby a party referred to as a trustee, expressly, impliedly or constructively holds property on behalf of another known as beneficiary. At common Law beneficiaries had no remedies against errant trustees and trustees had no enforceable rights against beneficiaries.
6. **Inadequate remedies:** Common Law courts had only one remedy to offer namelymonetary compensation or damages. They could not compel performance or restrain the same.
7. **Inadequate protection of borrowers:** At common Law, a borrower who failed tohonour his contractual obligations within the contractual period of repayment would lose not only his security but the total amount paid.

2.5 EQUITY

It may be described as that branch of the law of England which was developed by the various Lord Chancellor's courts to supplement the common Law.

It was developed to mitigate the harshness of the common Law.

The development of equity is traceable to the early petitions to the king by persons dissatisfied with the common Law.

At first, the king heard the petitions and decided the dispute between the parties on the basis of what he thought was fair.

He was overwhelmed by the petitions whereupon he established the office of the Lord Chancellor who would now hear the petitions.

More offices of the Lord Chancellor were established due to the number of petitions.

The Lord Chancellor decided all petitions on the basis of the principle of fairness. Administration of justice was fast and the writ system was not applicable.

However, the decisions handed down by the Lord Chancellor were not legally binding as the Lord Chancellor was not legally trained.

It was not until the beginning of the 16th century that the Lord Chancellors offices were held by legally trained persons and the decisions they made had the force of Law.

These decisions are what are referred to as the **Doctrines of Equity**.

The Lord Chancellors offices had now become courts. The administration of justice by Equity courts was flexible and not tied to the doctrine of *stare desicis*.

The courts had move remedies to offer and had no technicalities of procedure.

The Lord Chancellor Courts were guided by the principle of fairness.

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There were no other guiding principles and as a consequence many inconsistent decisions were made hence "Equity varied with the length of the foot of the chancellor".

To enhance consistency in decision-making, the Lord Chancellors courts:

a) Developed a set of guiding principles. These were the so-called **Maxims of Equity**.
b) Adopted the doctrine of *stare decisis*.

Equity consists of rules developed by the Lord Chancellor Courts based on the principle of fairness.

CONTRIBUTION OF EQUITY

Equity developed to supplement, not to supplant the common Law. It developed as a modification to the common Law; hence it is described as "a glosson the common Law".

Equity has an ordinary, legal and technical meaning.

In the **ordinary sense**, equity means fairness, justice, morality, fair play, equality etc. We are talking about doing good, doing what is morally right.

In a **legal sense,** equity is the branch of the law which, before the Judicature Act of 1873 came into force, was applied and administered by the Court of Chancery. A litigant asserting some equitable right or remedy must show that his claim has "an ancestry founded in history and in the practice and precedents of the court administering equity jurisdiction".

In the **technical sense** equity refers to a body of rules and some authors have defined equity as that which is not the common law. They distinguish equity from the common law. It is regarded as a body of rules that is an appendage to the general rules of law.

The contribution of Equity may be classified as exclusive, concurrent and ancillary.

Equity developed the so-called **"Maxims of equity".** These maxims of equity are statements which embody rules of equity. They are only guidelines. They are not applied strictly in every case. But they help us to understand what the rules of equity are. No logical sequence and they often overlap. You can have two maxims that actually say the same thing. You can have one maxim of equity which is the exact opposite of another maxim.

The Maxims of Equity include:

1. He who seeks equity must do equity
2. He who comes to equity must come with clean hands
3. Equity is equality (Equality is equity)
4. Equity looks to the intent or substance rather than the form
5. Equity regards as done that which ought to be done
6. Equity imputes an intent to fulfil an obligation
7. Equity acts *in personam*
8. Equity will not assist a volunteer (Equity favours a purchaser for value without notice)
9. Equity will not suffer a wrong to be without a remedy (Where there is a wrong there is a remedy for it) *Ibi jus ibi remedium*
10. Equity does not act in vain
11. Delay defeats equity
12. Equity aids the vigilant and not the indolent (*Vigilantibus non dorminentibus jurasubveniunt*)

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1. HE WHO SEEKS EQUITY MUST DO EQUITY

This maxim means that a person who is seeking the aid of a court of equity must be prepared to follow the court's directions, to abide by whatever conditions that the court gives for the relief. And this is most commonly applied in injunctions. The court will normally impose certain conditions for granting the injunction.

2. HE WHO COMES TO EQUITY MUST COME WITH CLEAN HANDS

This scenario was summed up in the case of **Jones v. Lenthal (1669)** as "He who has committed inequity shall not have equity". There is a limit to this rule.

In some cases the court has the discretion whether to apply this

maxim. Limit to the extent that maxim can be applied

The limit is this: It is not all unclean hands that will deny a plaintiff his remedy. The conduct must be relevant to the relief being sought.

In **Loughran v. Loughran (1934)**, Justice Brandeis said equity does not demand that its suitors shall have lead blameless lives. We are not concerned with issues of morality. If the breach is a trifle, a small matter, a minor breach, then that in itself should not deny the plaintiff the remedy.

The first maxim deals with now/future, the second deals with conduct in the past.

3. EQUITY IS EQUALITY (EQUALITY IS EQUITY)

In general, the maxim will be applied whenever property is to be distributed between rival claimants and there is no other basis for division.

For example, husband and wife who operate a joint bank account; each spouse may deposit or take out money. Upon divorce, the maxim applies. They share 50-50. The authority is that equity does not want to concern itself with the activities of a husband and wife - to go into the bedroom and make deep inquiries, hence equal division.

Another example relates to trusts. How do you divide the property? Say there are three beneficiaries. Then one of the beneficiaries passes away, i.e. one of the shares fails to vest. What should accrue to the surviving beneficiaries? Redistribute equally, applying the rule **"Equity isequality".**

4. EQUITY LOOKS TO THE SUBSTANCE OR INTENT RATHER THAN THE FORM

This maxim makes a distinction between matters of substance and matters of form. Equity will give priority to substance (intention) as opposed to form, if there is a contradiction. This maxim is normally applied to trusts. There have been cases where the court has inferred a trust even where the word trust does not appear.

Another illustration is the remedy of rectification of contract, where equity looks to the intention, where intention matters.

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This maxim lies at the root of the equitable doctrines governing mortgages, penalties and forfeitures. Equity regards the spirit and not the letter.

Courts of Equity make a distinction in all cases between that which is a matter of substance and that which is a matter of form; and if it finds that by insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat substance.

Thus if a party to a contract for the sale of land fails to complete on the day fixed for completion, at law he is in breach of his contract and will be liable for damages e.g. for delay. Yet in equity it will usually suffice if he is ready to complete within a reasonable period thereafter, and thus the other party will not be able to avoid performance.

5. EQUITY REGARDS AS DONE THAT WHICH OUGHT TO BE DONE

This maxim has its most frequent application in the case of contracts. Equity treats a contract to do a thing as if the thing were already done, though only in favour of persons entitled to enforce the contract specifically and not in favour of volunteers.

Agreements for value are thus often treated as if they had been performed at the time when they ought to have been performed. For example a person who enters into possession of land under a specifically enforceable agreement for a lease is regarded in any court which has jurisdiction to enforce the agreement as if the lease had actually been granted to him.

In **Walsh v. Lonsdale,** the agreement for lease was as good as the agreement itself where a seven-year lease had been granted though no grant had been executed. An equitable lease is as good as a legal lease. Equity looked on the lease as legal the time it was informally created.

In **Souza Figuerido v. Moorings Hotel** it was held that an unregistered lease cannot create any interest, right or confer any estate which is valid against third parties. However, it operates as a contract *inter-parties*; it is valid between the parties and can be specifically enforced. The tenant in this case was therefore liable to pay rent in arrears.

STUDY TEXT

6. EQUITY IMPUTES AN INTENT TO FULFILL AN OBLIGATION

If a person is under an obligation to perform a particular act and he does some other act which is capable of being regarded as a fulfilment of this obligation, that other act will *prima facie*[7] be regarded as fulfilment of the obligation.

7. EQUITY ACTS IN PERSONAM

This is a maxim which is descriptive of procedure in equity. It is the foundation of all equitable jurisdictions.

Courts of law enforced their judgments **in Rem** (against property of the person involved in the dispute), e.g. by writs but the originally equitable decrees were enforced by Chancery acting against the person of the defendant (i.e. by imprisonment) and not **in Rem** Later, equity invented

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the alternative method of sequestrating the defendant's property until he obeyed the decree. These methods can still be used where necessary, but other and more convenient methods are often available today.

Although the maxim has lost much of its importance, it is responsible for the general rule that an English court has jurisdiction in equitable matters, even though the property in dispute may be situated abroad, if the defendant is present in this country. This was so held in *Penn v. Baltimore* where the Defendant was ordered to perform a contract relating to land in America. However there must be some equitable right arising out of contract, trust or fraud.

8. EQUITY WILL NOT ASSIST A VOLUNTEER

Equity favours a purchaser for value without notice. A volunteer is a person who has not paid consideration.

The exception to the application of this maxim is in Trust. In *Jones v. Lock (1865)* it was stated that the court is prevented from assisting a volunteer regardless of how undesirable the outcome might appear. Equity will therefore not grant specific performance for a gratuitous promise.

9. EQUITY WILL NOT SUFFER A WRONG TO BE WITHOUT A REMEDY

"Ibis jus ibi remedium": This means that if there is a wrong, there is a remedy for it. He who seekssolace in the arms of equity will not go away broken hearted.

No wrong should be allowed to go unredressed if it is capable of being redressed by equity. However, not all moral wrongs can be redressed by equity.

The maxim must be taken as referring to rights which are suitable for judicial enforcement, but were not enforced at common law owing to some technical defect.

10. EQUITY DOES NOT ACT IN VAIN

The court of equity is shy and does not want to be embarrassed by granting remedies that cannot be enforced or issuing orders that cannot be obeyed by the Plaintiff.

11. DELAY DEFEATS EQUITY OR EQUITY AIDS THE VIGILANT AND NOT THE INDOLENT: (*Vigilantabus, non dormientibus, jura subveniunt)*

A court of equity has always refused its aid to stale demands i.e. where a party has slept on his right and acquiesced for a great length of time.

Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence. Where these are wanting, the Court is passive and does nothing.

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Delay which is sufficient to prevent a party from obtaining an equitable remedy is technically called **"laches".**

This maxim, however, has no application to cases to which the Statutes of Limitation[8] apply either expressly or, perhaps, by analogy. There are thus three cases to consider-

(a) Equitable claims to which the statute applies expressly;
(b) Equitable claims to which the statute is applied by analogy; and
(c) Equitable claims to which no statute applies and which are, therefore, covered by the ordinary rules of laches.

12. EQUITY FOLLOWS THE LAW

The Court of Chancery never claimed to override the courts of common law. "Where a rule, either of the common or the statute law, is direct, and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law and can as little justify a departure from it.

It is only when there is some important circumstance disregarded by the common law rules that equity interferes. **"Equity follows the law, but neither slavishly nor always."**

If Common law and Equity conflict, Equity prevails.

Both Common law and Equity are recognized as sources of law of Kenya by section 3 (1) (c) of the Judicature Act.

However, only the substance of common Law and the doctrines of equity are recognized.

Their application by Kenyan Courts is further qualified. A court of law can only rely on Common law or equity as a source of Law:

1. In the absence of an Act of parliament.
2. If it is consistent with written law including the Constitution.
3. If it was applicable in England on 12/08/1897.
4. If the circumstances of Kenya and its inhabitants permits.
5. Subject to such qualifications as those circumstances may render necessary.

2.6 CASE LAW/JUDGE – MADE LAW

This is law made by judges. Judges make law when they formulate (enunciate) principles or propositions where none existed or in doubtful situations, which are relied upon as law in subsequent similar cases.

Case law therefore consists of principles or propositions of law formulated by judges when deciding cases before them.

An earlier decision of a court is referred to as a precedent if it contains a principle of law. The principle or proposition formulated by the judge is referred to as ***ratio decidendi*** which literally means 'reason for decision.'

It is a principle or proposition of law based on the material facts of the case. It disposes off the

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case before the court. It is the binding part in a precedent or earlier decision. It covers a group of factual situations with those of the instant case as the minimum.

Obiter dicta: These are by the way statements of law or facts made by a judge in the courseof judgment. They do not dispose off the case before the court. They have no binding force; however they may be relied upon by advocates in subsequent cases as persuasive authority in subsequent cases.

These statements of ***obiter dicta*** strengthen or reinforce the decision of the court. E.g. the "Neighbour Principle"in *Donoghue v. Stevenson (1932)*

■ Precedents may be classified in various ways:

1. Binding and persuasive precedents
2. Original and declaratory precedents
3. Distinguishing precedents

Original precedents

This is a principle or proposition of law as formulated by the court. It is the law-creating precedent.

Declaratory Precedent

This is the application of an existing principle of law in a subsequent similar case.

Binding precedent

This is an earlier decision which binds the court before which it is relied upon. E.g. a precedent of the Court of Appeal used in the High Court.

Persuasive Precedent

This is an earlier decision relied upon in a subsequent case to persuade court to decide the case in the same manner e.g. a High Court decision used in a Court of Appeal, or a decision handed down by a court in another country.

Distinguishing precedent

This is a subsequent decision of a court which effectively distinguishes the earlier precedents. It is a precedent in its own right.

TO WHAT EXTENT IS CASE LAW A SOURCE OF LAW

■ JUDICIAL PRECEDENT (STARE DECISIS)

Stare decisis literally means 'decision stands'. It is a system of administration of justice wherebyprevious decisions are relied upon in subsequent similar cases.

It is to the effect that each court in the Judicial Hierarchy is bound by principles established by decisions of courts above it in the Hierarchy and courts of co-ordinate jurisdiction are bound by their own previous decisions if the two cases have similar material facts.

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Case law is only a source of law where the cases have similar legal points. The doctrine of judicial precedent applies both horizontally and vertically.

Case law is recognized as a source of law of Kenya by Section 3 (1) (c) of the Judicature Act.

Kenyan courts are required to rely on previous decisions of superior English courts subject to the qualifications in the Judicature Act. In **Dodhia v. National and Grindlays Bank Co. Ltd,** the court of Appeal for Eastern Africa lay down the following principles on the applicability of case law or Judicial Precedent in East Africa;

1) Subordinate courts are bound by decisions of superior courts.
2) Subordinate courts of appeal are bound by their own previous decision.
3) As a matter of judicial policy, the Court of Appeal as the final court, should while regarding its own previous decisions as binding be free in both criminal and civil cases to depart from them whenever it appeared right to do so.

The court was advocating some flexibility in the application of ***stare decisis*** by itself.

However, in certain circumstances, a court may refrain from a binding precedent. In such circumstances, the earlier decision is ignored. This is done in the following circumstances:

a. **Distinguishing;** This is the art of showing that the earlier decision and the subsequentcase relate to different material facts. This enables a judge to ignore the precedent.
b. **Change in circumstances:** A judge may refrain from an earlier decision of a brotherjudge if circumstances have changed so much so that its application would be ineffectual i.e the decision no longer reflects the prevailing circumstances.
c. **Per incurium:** It literally means ignorance or forgetfulness. An earlier decision maybe departed from it if the judge demonstrates that it was arrived at in ignorance or forgetfulness of law, i.e the court did not consider all the law as it existed at the time.
d. **Over-rule by statures:** If a precedent has been over-ruled by an Act of Parliament. Itceases to have any legal effect as statute law prevails over case law.
e. The earlier decision is inconsistent with a fundamental principle of law
f. If the ***ratio decidendi*** of the previous decision is too wide or obscure.
g. If the ***ratio decidendi*** relied upon is one of the many conflicting decisions of a court of co-ordinate jurisdiction.
h. Improper Conviction: In **Kagwe v R. (1950)** it was held that a court could refrain from a binding precedent if its application was likely to perpetuate an incorrect, erroneous or improper conviction in a criminal case.

STUDY TEXT

ADVANTAGES OF CASE LAW (IMPORTANCE OF STARE DECISIS)

1. **Certainty and predictability;** *Stare Decisis*promotes certainty in law and renders alegal system predictable. In*Dodhia's Case 1970*, the Court of Appeal was emphatic that 'a system of law requires a considerable degree of certainty.'
2. **Uniformity and consistency**: Case law enhances uniformity in the administration ofjustice as like cases are decided alike.
3. **Rich in detail:** *stare decisis*is rich in detail in that many decisions which are precedentshave been made by courts of law.

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4. **Practical:** Principles or propositions of law are formulated by superior courts on thebasis of prevailing circumstances hence the law manifests such circumstances.
5. **Convenience:** Case law is convenient in application in that judges in subsequent casesare not obliged to formulate the law but to apply the established principles.
6. **Flexibility:** It is contended that when judges in subsequent cases attempt to distinguishearlier decisions as to justify departing from them, this in itself renders the legal system flexible.

DISADVANTAGES OF CASE LAW

1. **Rigidity:** Strict application of*stare decisis*renders a legal system inflexible or rigid and this generally interferes with the development of law.
2. **Bulk and complexity:** Since*stare decisis*is based on judicial decisions and many decisions have been made, it tends to be bulky and there is no index as to which of these decisions are precedent. Extraction of the *ratio decidendi* is a complex task.
3. **Piece-meal:** Law-making by courts of law is neither systematic nor comprehensive in nature. It is incidental. Principles or propositions of law are made in bits and pieces.
4. **Artificiality in law (over-subtlety):** when judges in subsequent cases attempt to distinguish indistinguishable cases, they develop technical distractions or distinctions without a difference. This makes law artificial and renders the legal system uncertain.
5. **Backwardlooking:** Judges or courts are persuaded / urged to decide all cases before them in a manner similar to past decisions. It is contended that this practice interferes with the ability of a judge to determine cases uninfluenced by previous decisions.

2.7 SUBSIDIARY SOURCES OF LAW

1. ISLAMIC LAW

It is based on the Muslim Holy Book, the Quran and the teaching of Prophet Mohammed contained in his sayings known as *Hadith.*

It is a subsidiary source of law of Kenya.

It is recognized as a source of law by Section 66(5) of the Constitution and Section 5 of the Kadhi's Court Act.

It only applies in the determination of civil cases relating to marriage, divorce, succession or personal status in preceding in which all parties profess Muslim faith.

In **Bakshuwen V Bakshuwen (1949)** the supreme court of appeal observed that:

"the law applicable in the determination of questions of personal law between Muslims was Mohammedan Law as interpreted by judicial decisions."

In **Kristina d/o Hamisi-v- Omari Ntalalaand another,** the parties were married under Christian law. Subsequently the husband changed his faith and married another woman under Islamic law.

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In a divorce petition, the 1st respondent argued that the second respondent was his wife under Islamic law. Question was whether Islamic Law was applicable in the divorce.

It was spelt that since the parties were married under Christian Law, Islamic law was not applicable and the divorce petition was granted.

2. HINDU LAW

It is based on the Hindu faith and philosophy. It is a subsidiary source of law of Kenya.

It is recognized as a source of law by the Hindu Marriage and Divorce Act and the Hindu Succession Act.

It only applies in the determination of civil cases relating to marriage, divorce, succession or personal status in proceedings in which all parties profess Hindu faith.

3. AFRICAN CUSTOMARY LAW

It is based on the customs usages and practices of the various ethnic groups in Kenya. A custom embodies a principle of utility or justice. Customs are by their nature local. Not every rule of local customs is relied upon by a court of law in the settlement of a dispute.

For a custom to be relied upon as law, it must have certain characteristics:

1. **Reasonableness;** A good local custom must be reasonable i.e it must be consistent with the principle of justice. Whether or not a custom is reasonable is a question of facts to be determined by the courts.
2. **Conformity with statute law:** A local custom must be consistent with parliament-made law. This is because parliament is the principle law-making body and has Constitutional power to disqualify the application of any rule of custom.
3. **Observation as of right:** A good local custom is that which a society has observedopenly and as of right i.e. not by force or by stealth nor at will.
4. **Immemorial antiquity:** A custom must have been observed since time immemorial.Time immemorial means that no living person can attest as to when the custom did not exist.

Kenyan law recognizes African customary law as a source of law. Section 3(2) of the Judicature Act, is the basic statutory provision regarding the application of African Customary Law in civil cases in which one or more of the parties is subject to it or affected by it, so far it is applicable and is not repugnant to justice and morality or inconsistent with any written law

1) Guide

African Customary law can only be relied upon as a guide. Courts are not bound to rely on any rule of custom. It is the duty of the court to decide whether or not to rely on a particular rule of custom.

STUDY TEXT

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2) Civil Cases

African customary law can only be relied upon by a court of law in the determination of civil cases. Section 2 of the Magistrates Court Act[9], identifies the various types of disputes the determination of which may be based on African customary law. This section provides that the phrase 'claim under customary law' means:

1. Land held under customary tenure
2. Marriage, divorce, maintenance or dowry
3. Seduction or pregnancy of an unmarried woman or girl
4. Enticement of or adultery with a married woman.
5. Matters affecting personal status and in particular the status of women, widows, and children including custody, adoption, legitimacy etc.
6. Intestate succession and the administration of intestate estates not governed by written law.

In **Kamanza Chimaya-v- Tsuma (1981)**, the High Court held that the list of disputes outlined by section 2 of the Magistrates' Court Act was exhaustive.

3) African Customary Law

This can only be relied upon by a court of law if one or more of the parties to the proceedings is bound by it or affected by it.

In **Karuru v. Njeri**, the parties who belonged to the kikuyu ethnic group married under the customs of the group and had two children.

In a divorce case, each party sought custody of children. Karuru had not applied for the return of the bride price.

However, the district magistrate's court awarded custody to Njeri. On appeal to the High Court, the court awarded custody to the appellant.

In the words of Simpson J, 'the custom in question is however applicable to the present case and the parties are subject to it.'

In **R v. Ruguru,** the defendant alleged that she was the plaintiff's wife under Embu customs. It was held that there was no marriage between them since whereas she was bound by the customs, the plaintiff was only affected by them.

4. Repugnant to justice and morality

African customary law can only be relied upon if it is not repugnant to justice and morality. The custom in question must be just and must not promote immorality in society.

In **Karuru v. Njeri,** it was held that the custom in question was not repugnant to justice and morality. In the words of Simpson J; 'I am not prepared to hold that the custom is repugnant to justice and morality.' However, in **Maria Gisese d/o Angoi v. Marcella Nyomenda (1981)**, the High Court sitting in Kisii held that the Gusii custom which permitted a woman to marry another in certain circumstances was repugnant to justice and morality.

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5. Consistency with written law

For a rule of custom to be relied upon in the settlement of a civil dispute, it must be consistent with written law as parliament is the supreme law-making body. In **Karuru-v-Njeri,** Simpson J observed, 'I know of no written law with which it is inconsistent.'

6. Proof

The party relying on a particular rule of custom must prove it in court by adducing evidence unless the custom is a matter of public notoriety in which case the court takes judicial notice of the custom without any evidence. It was so held in **Kamani-v-Gikanga.** The scope of application of African customary law as a source of law diminishes as the legal system develops.

2.8 INTERPRETATION OF STATUTES (construction of statutes)

Since statutes are drafted by experts who use legal terminologies and sentences which may be interpreted by different persons, it becomes necessary to construe or interpret statutes.

Traditionally, statutory interpretation has been justified on the premises that it was necessary to ascertain and give effect to the intention of parliament. However, a more recent justification is that it is necessary to give meaning towards phrases and sentences used by parliament in a statute.

Generally, statutory interpretation facilitates uniformity and consistency in the administration of justice or application of law. To interpret statutes, courts have evolved rules and presumptions.

RULES / PRINCIPLES / CANNONS OF INTERPRETATION

1. Literal Rule

This is the primary rule of statutory interpretation. It is to the effect that where the words of statute are clear and exact, they should be given their literal or natural, dictionary or plain meaning and sentences should be accorded their ordinary grammatical meaning. However, technical terms and technical legal terms must be given their technical meanings.

This rule was explained in **R.-v- City of London Court Judge.** Under this rule, no word is added or removed from the statute.

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2. Golden rule

This rule is to some extent an exception to the literal rule.

It is applied by courts to avoid arriving at an absurd or repugnant or unreasonable decision under the literal rule.

Under this rule, a court is free to vary or modify the literal meaning of a word, phrase or sentence as to get rid of any absurdity.

The rule was explained in **Becke-v-Smith (1836)** as well as in **Grey-v-Pearson** and was applied in *R-v-Allen* to interpret the provision of the Offences against the Person Act (1861). It was also applied in **Independence Automatic Sales Co Ltd –v- Knowles and Foster** to interpret the word 'book debt' used in Section 95 of the Companies Act of 1948.

The court interpreted it to mean all debts of the company which ought to have been entered in the books in the ordinary course of business whether or not they were so entered.

3. Mischief Rule [Rule in *Heydons Case (1584)*]

This is the oldest rule of statutory interpretation. Under this rule, the court examines the statutes to ascertain the defect it was intended to remedy so as to interpret the statute in such a manner as to suppress the defect.

The rule was explained by Lord Coke in **Heydon's case (1584)**. According to the judge, four things must be discerned and discussed:

1. What was the common law before the making of the Act?
2. What was the mischief and defect for which the law did not provide?
3. What remedy has parliament resolved i.e. appointed to cure the disease?
4. What is the true reason for the remedy?

The judge shall give such construction as shall advance the remedy and suppress the mischief.

The mischief rule was applied in **Smith v. Hughes (1961)** to interpret the provisions of the Street Offences Act 1959.

Under the act, it was a criminal offense for a prostitute to 'solicit men in a street or public place.'

In this case the accused had tapped on a balcony rail and hissed at men as they passed by below. The Court applied the mischief rule and found her guilty of soliciting as the purpose of the Actwas to prevent solicitation irrespective of the venue.

The mischief rule was also applied by the Court of Appeal for Eastern Africa in **New greatcompany of India v. Gross and Another (1966)**, to interpret the provisions of the Insurance(Motor Vehicles Third Party Risks) Act.

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4. *Ejus dem generis* Rule

This rule is applied to interpret words of the same genus and species. It is to the effect that where general words follow particular words in the statute, the general words must be interpreted as being limited to the class of persons or things designated by the particular words.

The rule was explained in **R. v. Edmundson** and was applied in **Evans v. Cross** to interpret the provisions of the Road Traffic Act (1930).

5. *Noscitur a sociis*

This rule literally means that a word or phrase is known by its companions. It is to the effect that words of doubtful meanings derive their meaning and precision from the words and phrases with which they are associated.

6. *Expressio unius est exclusio ullerius*

This rule literally means that the expression of one thing excludes any other of the same class. This rule is to the effect that where a statute uses a particular term without general terms the statutes application is restricted to the instances mentioned.

7. Rendendo singula singullis

This rule is to the effect that words or phrases variously used in a statute must be accorded the same meaning throughout the statute.

8. A statute must be interpreted as a whole

This rule is to the effect that all words, phrases and sentences must be given their due meaning unless meaningless. All conflicting clause must be reconciled unless irreconcilable.

9. Statutes *in pari materia*

The interpretation of one statute is used in the interpretation of another related (similar) statute.

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2.9 PRESUMPTIONS IN THE CONSTRUCTION OF STATUTES

In the construction of statutes or Acts of parliament, courts of law are guided by certain presumptions, some of which include:

1. The statute was not intended to change or modify the common law
2. The statute was not intended to interfere with individual vested rights.
3. The statute was not intended to affect the crown or residency.
4. The statute was not intended to apply retrospectively.
5. The statute was not intended to be inconsistent with international law.
6. The statute was not intended to have extra-territorial effect.
7. An accused person is innocent until proven guilty.

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CHAPTER QUIZ

1. Which is the supreme source of law in Kenya?
2. Written is to unwritten as Principal is to?
3. The three main organs of Government are?
4. State a right and a freedom guaranteed by the Constitution

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CHAPTER QUIZ ANSWERS

1. The Constitution
2. Subsidiary
3. Judiciary, Legislature and Executive
4. Right to life and freedom of conscience

SAMPLE EXAMINATION QUESTIONS

QUESTION ONE

July 2000 – Pilot Paper

Define Statute Law and discuss its advantages. (10 marks)

Explain each of the following rules of Statutory Interpretation;

a) Noscitur a sociis, (3 marks)
b) Ejusdem Generis, (3 marks)
c) Mischief Rule. (4 marks)

QUESTION TWO

May 2000, Question 2 b)

Explain 8 sources of law in Kenya. (16 marks)

QUESTION THREE

November 2007, Question 2

a) Identify the disadvantages of case law as a source of law. (6 marks)

b) State 4 maxims of equity that developed to supplement the inadequacies of common law. (6 marks)

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QUESTION FOUR

June 2007, Question 7

a) Distinguish between the following:
   i. Common Law and Equity. (6 marks)
   ii. Statute Law and Judicial Precedent. (6 marks)

Explain the discretionary remedies available in equity. (8 marks)

(Footnotes)

[1] Cap 157 Laws of Kenya

[2] Cap 160 Laws of Kenya

[3] The ex-officio members are the AG and the Speaker

[4] Cap 306 Laws of Kenya.

[5] As was done when the National Accord and Reconciliation Act of 2008 was tabled in Parliament

[6] Cap 2 Laws of Kenya

[7] On the face of it

[8] Such as the Kenyan Limitation of Actions Act Cap 22

[9] Cap 10 Laws of Kenya

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CHAPTER THREE

ADMINISTRATIVE LAW

▶ OBJECTIVE

To provide the candidate with a broad understanding of the following aspects of Administrative Law:

- Separation of powers.
- Natural justice.
- Judicial control of the executive.
- Administrative Legislation.
- Arbitration.

▶ INTRODUCTION

Administrative Law refers to the law relating to public administration. It is the law relating to the performance, management and execution of public affairs and duties. Administrative law is concerned with the way in which the Government Government carries out its functions.

▶ KEY DEFINITIONS

- **Judicial Review:** It is the process through which a party aggrieved by an administrativebody can find redress in a Court of Law.
- ***Ultra Vires*:**It simply means "**beyond the powers".**The courts will intervene on mattersof public administration if the administrative bodies have acted beyond the powers that have been conferred on them.
- **Principles of natural justice**: These are rules governing procedure and conduct ofadministrative bodies. They were developed by the courts in England and imported into Kenya as part of common law principles.

▶ EXAM CONTEXT

This is a new topic that was introduced as part of the changes in the syllabus by KASNEB. Therefore there are no previous examination questions.

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INDUSTRY CONTENT

This chapter will help the student to understand how administrative bodies operate in their delivery of public service. The student will be able to know what actions by Administrative Bodies can give rise to judicial review, and which remedies can be given by the courts.

The student will also be able to know exactly in which court to file an action for judicial review. The student will also get to understand the arbitration process.

3.1 ADMINISTRATIVE LAW

Administrative Law can be defined as the law relating to public administration. It is the law relating to the performance, management and execution of public affairs and duties. Administrative law is concerned with the way in which the Government carries out its functions.

Administration is the act or process of administering, which simply means it is the act of meting out, dispensing, managing, supervising and executing government functions

It is the law relating to control of governmental power. It can also be said to be the body of general principles, which govern the exercise of powers and duties by public authorities.

The primary purpose of administrative law, therefore, is to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse.

Administrative law is also concerned with the administration and dispensation of delivery of public services. However it does not include policy making.

Administrative law is concerned with how the government carries out its tasks.

The government tasks include delivery of public services such as health, security, facilitating trade, arbitration of disputes, and collection of revenue.

Administrative law is the law relating to the executive branch of government. The law deals with a variety of things e.g.

i. The establishment of public authorities e.g. the city council, establishment of public bodies and organs.
ii. The nature of the tasks given to various public organs and public agencies.
iii. The legal relationship between the public bodies themselves and also between the public agencies and the public and between public agencies and the citizens.

Administrative Law is concerned with the means by which the powers and duties of the various public agencies, public bodies and public institutes can be controlled.

Administrative functions can be divided into a number of broad categories namely

1. **Ministerial functions;** Examples of Ministerial Functions are those functions carriedout or performed by Government Ministers in their implementation of governmental policies and programs. Examples include appointment of public officials by Ministers and the grant of ministerial approvals and consents.

STUDY TEXT

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2. **Administrative functions:** these are the functions carried out by public offi cials andpublic bodies in their management of various governmental bodies in their provision of services for example educational services and in their administration of various social services as in the case of social security services. Please note that management of public schools and universities provide yet another example of administrative functions of governmental bodies.

3. **Legislative functions:** These include the function of making or creating subsidiarylegislation. The responsibility of legislative functions is on the respective Ministers'. The duty of making by-laws is also the respective minister's.

4. **Judicial functions:** These primarily involve the functions of determining claims ordisputes between individuals and other bodies. A good example of administrative body that performs judicial functions is the Industrial Court which functions as a court of law.

5. ***Quasi* Judicial functions:**These involve the exercise of powers which are fundamentallyjudicial but without the usual trappings of a court of law for example without strict requirement of rules of evidence or the observance of rules of evidence, without strict requirements of examination of witnesses and without other legal technicalities. A good example being the Liquor Licensing Court, the Land Control Boards and the Motor Vehicle Licensing Authorities.

FUNCTIONS/PURPOSES OF ADMINISTRATIVE LAW

1. It ensures proper dispensation of services.
2. It seeks to protect citizens from abuse of power.
3. To keep the powers of government i.e powers of various public bodies within their legal bounds, so as to protect citizens from their abuse. Abuse of power can arise either from malice, bad faith or even from the complexities of the law.
4. There are duties placed in public bodies (public institutions) such that another function of the law is to see that the duties are performed and that the public agencies can be compelled to perform their duties where there is laxity or where they refuse or otherwise fail to do so.

3.2 JUDICIAL REVIEW

Judicial Review is the process through which an aggrieved person can fi nd redress in a Court of Law. Judicial Review forms part of administrative law because it is the most appropriate way that a party aggrieved by an administrative body can fi nd redress.

Judicial Review refers to the examination of the actions or inactions of public bodies by the High Court.

Judicial Review is an examination of the manner in which a decision was made or an act done or not done. This defi nition is found in **<u>Chief Constable of North Water Police V. Evans</u>**

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The purposes of Judicial Review from that definition are as follows:

1. To prevent excessive exercise of powers by administrative bodies and officials;
2. To ensure that an individual is given fair treatment by Administrative authorities;
3. To keep Administrative excesses in check and also to provide a remedy to those aggrieved as a result of excessive exercise of power by administrative bodies.

The primary legal basis of Judicial Review is the Law Reform Act.[1] From the wording of **Section8** of the Law Reform Act, one can only apply for Judicial Review in the **High Court** and not theMagistrates Courts.

GROUNDS OF JUDICIAL REVIEW

By looking at the grounds of judicial review, we will be studying the circumstances in which an aggrieved person may petition the High Court for Judicial Review.

Courts of Law will intervene in public administration in one or more of the following circumstances i.e. courts of law will review actions of administrative bodies in one or more of the following circumstances:

1. When a body acts *ultra vires*;
2. Unreasonableness;
3. When there is jurisdictional error;
4. When there is an error of law;
5. When there is an error of fact;
6. When there is an abuse of power;
7. When irrelevant considerations governed the making of a decision;
8. When there is bias;
9. When there is unfair hearing;
10. When there is procedural flaw;
11. When there is irrationality
12. When a public official or body acts in bad faith;
13. When there is breach of the principles of natural justice.

There are some overlaps in these grounds e.g. what amounts to procedural flaw may at the same time amount to *ultra vires*. In actual practice any one of the grounds will entitle an aggrieved party to apply for judicial review and in actual practice circumstances occasioning judicial review will involve one or more of those grounds.

One does not have to have all the 13 circumstances to apply for judicial review. Any one of the grounds will suffice and the list is not exhaustive.

1. DOCTRINE OF *ULTRA VIRES*

The doctrine of ***ultra vires**is* a legal doctrine. In the English Legal System judicial control of administrative agencies is based on the doctrine of *ultra vires*. This is the doctrine on the basis of which the courts will interfere or intervene in matters of public administration. Ordinarily courts would not interfere.

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WHAT IS *ULTRA VIRES*

It simply means "**beyond the powers"** so that if ***ultra vires*** is the basis in which courts will interfere or intervene on matters of public administration then the point is that courts will intervene on matters of public administration if the administrative bodies have acted beyond the powers that have been conferred on them.

The essence of this doctrine is that administrative bodies must act within the powers granted them by statutes. They must also act within the requirements of common law.

Administrative bodies must act only within the powers that they have been given by the statutes. They must also recognise the limits imposed on them by the statutes. The exercise of powers by administrative bodies often affects the rights of citizens and for this reason it is necessary that these powers be exercised only with accordance with the statute granting the power so that people do not suffer. Limits are placed by statutes to ensure that powers conferred to administrative bodies do not end up causing suffering to citizens.

For these reasons any act of a public administrative body that is outside the limit of law has no legal validity because it is ***Ultra Vires***.

The term ***Ultra vires*** can cover a wide range of actions undertaken in excess of the law or in excess of the powers granted.

For example an administrative body acts ***ultra vires*** if that body does an act which it has no authority to do. The second example is where an administrative body in the process of exercising the powers, it abuses those powers, which amounts to acting ***ultra vires***.

There are also cases where bodies act ***ultra vires*** because in the cause of exercising those powers that are authorised, they have failed to follow prescribed procedure.

TYPES OF *ULTRA VIRES*

1. Substantive *Ultra Vires*.
2. Procedural *Ultra Vires*.

1. SUBSTANTIVE ULTRA VIRES

Substantive **ultra vires** is acting in excess of powers with regard to matters of substance. This would include for example an administrative body acting beyond what is authorized to do. Substantive **ultra vires** includes the following cases:

1. Exercising power in excess of statutory limits;
2. Acting in excess of jurisdiction;
3. Breach of the principles of natural justice; in this case failure to give notice of hearing to a concerned party. For example would amount to breach of principles of natural justice and that falls under substantive ultra vires

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2. PROCEDURAL ULTRA VIRES

These are cases where administrative bodies fail to follow prescribed procedure. They also include cases where an error occurs in following the procedure.

Whereas we do have procedure prescribed in statutes, there are also matters of procedure that are not in the statutes but they are applicable under common law and this is where we find the procedural requirements that fall under the principles of natural justice.

A person has to be given notice of a hearing of their case; this is one of principles of natural justice. This is in order that the person affected must be made aware of what is going on and be given an opportunity to raise any objection that they might have. They must also have the chance to defend themselves.

Courts are mandated to use or to apply ***ultra vires*** doctrine to invalidate actions of public bodies. If a body has done something that amounts to procedural ***ultra vires***, the court will be prepared to apply the doctrine of ***ultra vires*** to invalidate that action.

The effect of finding that an act or a decision is ***ultra vires*** is that it is invalidated. It means that the court will declare that act or decision null and void. Consider the case of *White and Collins v.Minister of Health.*

This case concerns the exercise of power of compulsory purchase of land. In this case a housing authority was granted power under the Housing Act of 1936 to acquire land compulsorily for housing 'provided that land did not form part of any park, garden or pleasure ground.' The Housing Authority went ahead and acquired land or purported to acquire land that was a park. After they acquired this land, they sought and obtained confirmation of their acquisition from the Minister of Health (the one responsible for giving confirmation of such services). The parties brought a suit seeking to have the purchase order invalidated on the grounds that the order to purchase this land was ***Ultra Vires*** because the land was a park and there was a statutory restriction on the purchase of any land that was a park. The court quashed the order for purchase as well as the purchase declaring it null and void

2. UNREASONABLENESS

One of the things the court considers, in determining unreasonableness is whether a public body has considered or taken into account any matter that it ought not to take into account.

Another thing that the court will consider is whether a public body has disregarded any matter that it ought to take into account.

In *R v. Ealing London Borough Council Ex parte Times Newspapers Ltd,* the council was held to be unreasonable in refusing to provide certain Newspapers to their libraries because the council did not agree with the Newspapers Proprietors on political grounds. The court held that the council was unreasonable in refusing to provide their libraries with certain Newspapers.

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3. JURISDICTIONAL ERROR

Jurisdiction means the scope or area in which a body is allowed to act. It includes territorial limits.

Where there is an error it means:

1. That an administrative agency has acted without jurisdiction i.e. they have acted over matters which they have no authority to act.
2. They have acted within jurisdiction but have gone beyond or exceeded their limits. This can happen:
   - When a body erroneously exercises power or authority over a matter that is outside of its territorial limits.
   - Where a body legislates over a matter that falls outside of the matters it is authorised to legislate over.
   - Where an administrative body declines to exercise jurisdiction to hear and decide a case or to legislate over a matter over which it has jurisdiction to hear or decide or legislate over. (the Administrative body has the authority to do something but it declines to do it.)
   - It may also arise when a body fails to administer a function or to carry out a duty that it has the statutory authority to administer or to carry out.

In case any one of these things occurs and a person is aggrieved, the aggrieved person can apply to the High Court for Judicial Review on the ground that a public body has committed jurisdictional error.

4. ERROR OF LAW

An error of law is a condition or an act of ignorance, negligence or imprudent deviation or departure from the law.

Ignorant departure would include a situation where an administration official is ignorant of the law. If the Minister of Local Government for example has no idea that he cannot sack an elected mayor, this is an act of ignorance.

Negligence would be where an administrative body fails to do what the law provides and in that case they have failed to look up the law to see what it provides.

This can result from a number of things:

1. Failure to ascertain what the law says about a particular matter;
2. misconstruction of the law;
3. Misinterpretation of the law;
4. Blatant disregard of the law;
5. Misunderstanding of the law; or
6. Misdirection on the law (this involves a situation where an administrative body seeks direction on the law) i.e. if the head of civil service seeks direction from the AG or from the Chief Justice or Minister for Justice and Constitutional Affairs and they give incorrect directions on the same, this is misdirection.

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5. ERROR OF LAW ON THE FACE OF THE RECORD

In all the above cases, it is usually said that there is **an error of law on the face of the record**. An error of the law on face of the record is an error which may be ascertained by an examination of the record of proceedings without recourse to any evidence. Just by looking at the record of proceedings, one can tell that the law was not followed.

The result of error of law is that the decision made and all the acts done in error of law are invalidated upon judicial review because they are illegal.

In *R v. Northumberland Compensation Appeals Tribunal ex parte Shaw* a former employee of an administrative body claimed compensation on termination of his employment. Under the applicable regulations the tribunal was required to assess compensation payable by aggregating two periods of employment i.e. the law was saying that in computing compensation one would have to aggregate two periods of employment. In its decision the tribunal stated that of the two periods of employment, they would take into account only the second period. Upon application for judicial review this decision was quashed because of the error of law that had been committed. The court found that this amounted to an error on the face of the record and the decision was quashed. The court issued an order of *certiorari* which involves the production of proceedings of the tribunal to the High Court so they can be quashed.

6. ERROR OF FACT

It is important to note that facts are integral to the making of a decision. The validity of a decision depends on the proper appreciation and interpretation of facts.

An error of fact occurs where there has been an act or a condition of ignorance, negligence or imprudent deviation from facts. This may occur from a number of facts:

1. Where facts have not been properly appreciated;
2. Where facts have not been properly interpreted;
3. Where there is an incorrect finding of facts;
4. Where irrational conclusions are made from facts;
5. Where a decision is made without giving due regard to the factual circumstances of the case at hand.

The effect of error of facts is that it renders a decision null and void.

7. ABUSE OF POWER

Abuse of power includes cases where the power and authority given public bodies have:

1. been put to a wrong or improper use;
2. been used so as to injure or to damage;
3. been misused;
4. Been used corruptly.

If the court finds that an administrative body has abused its power or his power, any act done or decision made will be invalidated.

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8. IMPROPER EXERCISE OF DISCRETION

An administrative body has the authority to exercise discretion whenever the limits of its statutory authority leave it to decide between two or more causes of action or inaction.

There will have to be a statutory authorisation to do something but the statutory provisions does not completely specify what one is authorised to do. The exercise of discretion is an important aid to the exercise of statutory powers.

Whenever circumstances give rise to the exercise of discretion:

1. Discretion must be exercised properly;
2. Discretion must be exercised reasonably;
3. Discretion must be exercised by the proper authority only and not by a delegate;
4. Discretion must be exercised without restraint;

Certain circumstances will give rise to improper exercise of discretion which includes:

1. Exercising discretion for improper motive;
2. Where power to exercise discretion is delegated to a person who is not charged with the responsibility in question;
3. Where discretion is exercised so as to serve self-interest.

Consider *Fernandes V. Kericho Liquor Licensing Court.* The case concerns the authority given to Kericho Liquor Licensing Court to grant licences. In this case they decided they were only going to give liquor licences to Africans. The Court ruled that they had exercised their discretion improperly by deciding to issue licences only to Africans.

8. IRRELEVANCY

Irrelevancy occurs in two situations:

1. Where a decision making body considers a matter which it ought not to consider in arriving at a decision; e.g. if on the basis of gender a licence is denied.
2. Where an administrative body disregards something which it ought to consider in making a decision.

9. BIAS

It is a predetermined tendency to favour one outcome, one outlook or one person against another. It involves acting partially i.e. acting favourably to one side. Whenever an allegation of bias is made, a reviewing court will investigate whether there is an appearance of partiality. A reviewing court will evaluate whether there is a tendency of one side to favour one person.

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There are certain principles that will guide the court in determining the presence of bias.

(i) The Real Likelihood of Bias;
Circumstances in which the court will conclude that there was a real likelihood of bias include cases where the decision maker has an interest in the matter under consideration. Interest may be pecuniary, interest may also be adverse.

(ii) The Real Danger Test:
This is another of the tests that the court will apply in determining the presence or absence of bias. The consideration is whether there is a real danger that a public official or body participating in a decision will be influenced by a personal interest in the outcome of a case.
The question to ask is how significant the interest is and how closely or remotely related to the issue it is. In the real danger test the consideration is whether there is a real danger that an official participating in a decision will be influenced by a pecuniary interest and how closes or remote it is to the matter decided.

(iii) Actual Bias:
There are cases where in the absence of the real likelihood of bias, pecuniary or other interests and the real danger of partiality, bias does actually occur and in this situation the test is whether there was actual bias.
In cases where there is a likelihood of bias, for example in cases where members of the decision making body have a pecuniary interest in the matter to be considered, they must disqualify themselves from taking part in making that decision.
If they do not, this will give rise to bias and the decision made can be invalidated upon review. Invalidation is by way of quashing the decision.

10. UNFAIR HEARING

Administrative bodies are bound to give a fair and proper hearing to those who come before them. Often the statutes will prescribe the procedure for hearing indicating how concerned parties are to be heard.

In such statutory provisions, the duty to grant a fair and proper hearing may be implied. In the absence of statutory provisions setting forth procedure for hearing, common law rules regarding fair and proper hearing will apply.

Where a public body makes a decision without due regard to prescribed procedure or without due regard to common law principles of fair hearing, an aggrieved party will be entitled to petition the court for review.

In *Neil v. North Antrim Magistrate's Court* it was suggested that even if a right decision is arrived at a party may still petition the court if some procedural flaw occurred occasioning damage. This means that if a party had a case and even if he argued that case as cogently as he could, failure to grant a fair hearing will bring the court to invalidate that decision no matter how bad the case was. A person must have a chance to be heard.

It is important to note that if a party petitions the court for judicial review on the ground that he was not granted a fair hearing and should the court find that this person was not given a fair hearing, the court will declare the decision null and void.

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11. IRRATIONALITY

Irrationality is derived from the word irrational. This means that if a decision making body or an administrative body acts irrationally, whatever that body does or whatever decision it makes can be invalidated upon judicial review.

Irrationality means conduct beyond the range of responses reasonably open to an administrative body. In determining whether a particular act or decision is irrational, a reviewing court will consider whether a public body has done something which a reasonable body with the same function and confronted with the same circumstances could not do. This is an objective test.

12. BAD FAITH (*Mala Fides*)

If the court finds that a body made a decision in bad faith, it will be invalidated. It is rather hard to define bad faith but it covers a wide range of circumstances including malice, corruption, fraud, hatred and similar things. It also includes cases of vindictiveness.

Definitions:

Natural: Natural is being in accordance with or determined by nature i.e. based on the inherentsense of right and wrong.

Just: Means morally upright, correct, proper, good, merited deserved etc.

Natural Justice is the administration, maintenance, provision or observance of what is just, right,proper, correct, morally upright, merited or deserved by virtue of the inherent nature of a person or based on the inherent sense of right and wrong.

The **principles of natural justice** are rules governing procedure and conduct of administrative bodies. They were developed by the courts in England and imported into Kenya as part of common law principles.

Principles of natural justice are implied i.e. they are not expressed in a statute; they are supposed to apply in every case unless a statute expressly states that they will not apply.

Principles of natural justice are applicable in the absence of statutory provisions authorising their applicability or their observance. Unless the application of principles of natural justice is expressly or impliedly excluded by statutory provisions these principles are always to be implied. It is to be implied that parliament has authorised the applicability and observance of the principles of natural justice in every case.

To which bodies do the principles of natural justice apply?

In Kenya these principles apply so long as a public body has power to determine a question affecting a person’s rights. The principles also apply to bodies in every case involving a question affecting a person’s interest.

Wherever there is a right there is an interest but not *vice versa*. Interest may include other things. Interest may be pecuniary interest or something else and does not necessarily have to be a right.

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In *Mirugi Kariuki v. The Attorney General*, the court of appeal held that the mere fact that the exercise of discretion by a decision making body affects the legal rights or interests of a person makes the principles of natural justice applicable.

These principles apply to administrative bodies that are judicial, quasi-judicial legislative or administrative.

3.3 THE PRINCIPLES/RULES

Broadly the principles are two

1. ***Nemo Judex in causa sua*** – which means that procedures must be free from bias.

2. ***Audi Alteram Partem*** – which means that no person should be condemned unheard i.e.a person should not be denied an opportunity to be heard.

These two principles have been broken down into a number of principles or rules which are as follows:

1. Rule against bias
2. The right to be heard
3. Prior notice
4. Opportunity to be heard
5. Disclosure of information
6. Adjournment
7. Cross examination
8. Giving reasons
9. Legal representation

1. RULE AGAINST BIAS

In summary there can be bias when:

a) There is some direct interest in the matter to be adjudicated; e.g. pecuniary interest;
b) Where short of a direct interest there is a reasonable appearance or likelihood of bias;
c) Where there is actual bias.

In *R v. Hendon Rural District Council ex-parte Chorley*, the court quashed the decision of a Rural District Council allowing some residential property in Hendon to be converted into a garage and restaurant because one of the councillors who was present at the meeting which approved the application to convert the premises was an Estate Agent who was at the same time acting for the owners of the properties. The Court issued ***Certiorari*** to quash the decision of the council on the ground that the agent's interest in the business disqualified him from taking part in the council's consideration of the matter.

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Concerning likelihood of bias, the case is *Metropolitan Properties Ltd v. Lannon* applies. The court quashed the decision of a rent assessment committee reducing rent of a certain flat because the chairman of the rent assessment committee lived with his father in those flats. In this case, the court said;

> "… in considering whether there was a real likelihood of bias, the court does not look at the mind of the Chairman of the tribunal who sits in a judicial or quasi judicial capacity. The Court looks at the **impression** which would be given to other people. Even if he was as impartial as he could be nevertheless, if right minded people would think that in the circumstances there was a real likelihood of bias on his part then he should not sit. And if he does sit, his decision cannot stand. Surmises or conjecture is not enough there must be circumstances from which a reasonable man would think it likely or probable that it would or did favour one side unfairly at the expense of the other".

2. RIGHT TO BE HEARD

This is simply that a concerned person must be given a right to be heard. If an administrative body fails to give a concerned person the right to be heard, whatever decision it makes will be invalidated upon review. The case that illustrates the point is the case of *David Onyango Oloo v.The Attorney General,* where the Commissioner of Prisons purported to deprive Onyango Oloohis sentence remission to which he was entitled under the Prisons Act without giving him an opportunity to be heard. Quashing the decision, Justice Nyarangi stated;

> "… there is a presumption in the interpretation of statutes that the rules of natural justice will apply. In this case the rule in question was the one concerning the right to be heard."

3. PRIOR NOTICE

This rule requires that adequate prior notice be given to a person of any charge or allegation. It simply means that if an administrative body makes a charge it has to give a person against whom allegations have been made adequate notice before a decision is made. Prior notice must be served on the relevant party. The notice must contain sufficient detail to enable the person concerned to know the substance of any charge, allegation or action to be taken against him.

Again the case of *David Onyango Oloo* **applies here. In that case the court also stated**

> "The commissioner of prisons at the very least ought to have done the following acts:
>
> i. Inform the Appellant in writing in a language the Appellant understands the disciplinary offence he is alleged to have committed and the particulars of the offence;
>
> ii. Afford the Appellant an opportunity to be heard in person and to fix reasonable time within which the appellant must submit his written answer."

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4. OPPORTUNITY TO BE HEARD

There is no settled rule as to whether hearing should be oral or written but in all cases one must be afforded a chance to present his case whether oral or written.

5. DISCLOSURE OF INFORMATION

A concerned party must be given all information which the decision maker will rely on to make his judgment. This rule requires that all allegations and reports bearing on a person's case must be disclosed to that person. Failure to do so is fatal to a decision.

In *Ridge v. Baldwin* the House of Lords held that the Chief Constable of Brighton who held an office, from which by statutory regulations he could only be removed on grounds of neglect of duty or inability, could not validly be dismissed in the absence of the notification of the charge and an opportunity to be heard in his defence.

This is one of the key cases in Judicial Review and disclosure of information.

6. ADJOURNMENT

Natural Justice requires that a party be granted adjournment of a hearing of a case if the exigencies require (it does not matter how guilty a person is, if exigencies arise, they must be accorded an adjournment by the administrative body and if they are denied an adjournment and a decision is given, the court will quash such a decision)

Please note that wrongful refusal to adjourn amounts to a denial of a fair hearing and will result in the quashing of a decision. This was stated in the case of *Priddle v. Fisher & Sons.* A heating engineer was denied an adjournment in a case he was supposed to be represented by a trade union representative. The decision of the court arising out of the proceedings in the absence of the applicant was held to be unfair.

7. CROSS EXAMINATION

An opportunity to cross-examine can only be availed if there is an oral hearing i.e. the rule applies to cases where there is an oral hearing. Whenever there is an oral hearing and a party requests to cross-examine, the affected party must be granted an opportunity to cross-examine. If an affected party requests to cross-examine but an opportunity is denied, the decision made can be voided on grounds of breach of principles of natural justice.

Please note that if a party does not ask for a chance to cross-examine, he is precluded from complaining.

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8. GIVING REASONS

Progressively, courts are insisting on giving reasons for a decision as a component for natural justice. (If an administrative body denies you lets say a licence, they must give you the reasons why failure to which you can petition the High Court for a review). In the case of *Padfield v. The Minister for Agriculture Fisheries and Food (1968)*, Lord Reid stated;

> "I cannot agree that a decision cannot be questioned if no reasons are given".

It means that if no reasons are given a decision can be questioned.

9. LEGAL REPRESENTATION

This does not apply in every case but in suitable cases and suitable circumstances, the right to representation by a lawyer or some other person may be part of natural justice. For example in the Liquor Licensing Act, it allows for a person applying for a licence to be represented by an authorised agent in which case he becomes the legal representative before the court.

Where legal representation is necessary, authorised and is requested by a party the right to legal representation must be granted. If denied, a decision may be quashed on grounds of failure to observe the principles of natural justice.

3.4 EFFECT OF BREACH OF PRINCIPLES OF NATURAL JUSTICE

The effect of failure to comply with the rules of natural justice is that any decision or other administrative action taken is null and void and can be invalidated by the courts. Breach of principles of natural justice has been a good ground of judicial review.

Please note that breach of any one of the rules that we have discussed will give rise to judicial review.

JUDICIAL REVIEW REMEDIES

There are only three remedies that the courts can grant for judicial review

- Certiorari
- Prohibition
- Mandamus

Whether the courts will grant one of these rules depends on the circumstances.

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1. CERTIORARI

The word *Certiorari* is a Latin word which simply means **'to be informed'**. Historically it was a royal command or demand for information. The practice was that the sovereign who was the king or the queen upon receiving a petition from a subject complaining of some injustice done to him would state that he wishes to be certified of the matter and then he would order the matter to be brought up to him.

Ordering the matter to be brought up to him will include ordering that the records of the proceedings be brought up to the sovereign. The purpose of calling up the records was in order for the sovereign to quash any decision that has been made after acquainting himself of the matter in other words after being certified of the matter.

Currently, *certiorari* is an order to remove proceedings from an administrative body or an inferior court to the High Court in order to be investigated and if found wanting on any one of the grounds we studied including *ultra vires*, be quashed.

The order can issue against:

1. Administrative tribunals.
2. Inferior courts such as the industrial courts.
3. Local authorities.
4. Ministers of Government.
5. Miscellaneous public bodies exercising public functions.

In *Majid Cockar v. Director of Pensions,* a case between the former Chief Justice Cockar and the Director of Pensions, in computing the pension payable to the CJ the Pensions Department made a mistake in their calculations. The former Chief Justice went to court and upon application for Judicial Review. The court issued the order of Certiorari to quash the decision awarding the former CJ the amount of money as pension.

For *Certiorari* to be issued, indeed for any one of the 3 orders to be issued, a person must be having ***Locus Standi*** which is crucial as you must have the capacity to sue.

A person has capacity to sue by having a sufficient interest in the matter. If you don't have sufficient interest in the matter, the court will not grant you any of the orders.

2. PROHIBITION

The order of Prohibition is one issued by the High Court which prohibits a body (administrative bodies) from continuing proceedings. It will also prohibit a body from continuing to carry out decisions wrongly or wrongfully made.

This order may be issued against:

1. A judicial body acting in an administrative capacity i.e. Industrial Court.
2. An administrative body performing administrative duties or against the government officials.
3. It can be issued to stop a public body from continuing proceedings that are *ultra vires*.
4. It can also be issued to stop an administrative body from continuing to do something in excess of jurisdiction.
5. It can also be used to stop an administration body from abusing their powers.

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In *R v. Electricity Commissioners Ex parte Electricity Joint Committee (1924)* Lord Denning stated as follows;

> "It is available to prohibit administrative authorities from exceeding their powers or misusing them."

Lord Atkin in the same case stated that

> "If proceedings establish that the body complained of exceeded its jurisdiction, by entertaining matters which would result in its final decision being subject to being brought up and quashed on *certiorari*, I think that Prohibition will lie to restrain it from exceeding its jurisdiction."

This illustrates the point that prohibition will lie to restrain an administrative body from doing something wrongly or misusing its power, abuse of power etc.

When one applies for the order of *Certiorari*, one is seeking to quash a decision that has already been made. At the time of application for judicial review, the order you seek the court to quash must be presented to the court by making a photocopy of the order and attaching it to the Application.

With Prohibition, you do not have to attach the copy of the order.

3. MANDAMUS

The order of *Mandamus* is derived from the Latin word "**Mandare"** meaning "**to command"**. It is a court order issued to compel the performance of a public duty where a public body or official has unlawfully refused, declined or otherwise failed to undertake the duty.

Mandamus issues where there is a duty imposed by statute or common law.**The duty must bea public duty**.*Mandamus*will not issue in respect of a duty that is of a private nature even if thebody in question is a public body.

For example where two construction companies agree to undertake some work who agree to resolve any dispute between them by arbitration through the industrial court, the industrial court will be performing a private function and thus the order of *Mandamus* cannot issue.

For *Mandamus* to issue, the Applicant must have made a request for the performance of a public duty which has been refused, declined or ignored.

This means that if a public administrative body refused to do something, you must approach it and request it to perform the function or the courts will not hear you. Unreasonable delay on the part of the public body will be treated as refusal.

The duty must be a **specific duty**. You cannot apply for the order of *Mandamus* for a duty that is general, it must be specific.

Mandamus is used to enforce performance of specific duties and not the exercise of merepowers.

In *Daniel Nyongesa & Others v. Egerton University College (1989),* Nyongesa's exam results were held by the university and when he went to court, the court issued an order of *mandamus* for the court to release the results. Nyongesa had requested the University for his results and they had refused so he applied for an order of *mandamus* to the court and he was granted. There was a specific duty for the university to release the results.

STUDY TEXT

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3.5 CONSTITUTIONAL CONCEPTS

1. SEPARATION OF POWERS

The so called doctrine of separation of powers is a legal framework developed by a French jurist named Montesquieu whose concern to contain the over-concentration of governmental powers in the hands of one person or a body.

This doctrine is a characteristic of Constitutionalism which is the theory of limited government.

According to Montesquieu the only way to create a system of checks and balances was to ensure that governmental powers were devolved.

He developed the so-called classical doctrine of separation of powers. He suggested that:

1. There should be different organs of government i.e. executive, legislature and judiciary.
2. These organs must exercise different functions. The legislature makes the law, the judiciary interprets it and the executive administers.
3. No person should be a member of more than one organ.

According to Montesquieu, such an arrangement would ensure that no single organ exercises unchecked power, however, this framework cannot operate in any country in its pure state, as government does not operate in water-tight compartments.

Montesquieu is credited for having suggested that these ought to be an independent judiciary. Montesquieu's framework is generally effected in many Constitutions of the world.

2. INDEPENDENCE OF THE JUDICIARY

The principle of independence of the judiciary is an integral part of the doctrine of separation of powers. It means that:

i. There should be a distinct organ of government whose function is to administer justice
ii. The organ must operate impartially and in an unbiased manner. It must be disinterested as possible in the proceedings.
iii. The organ must administer justice on the basis of facts and law without fear or favour and without eternal influence.

Independence of the judiciary may be actualized in various ways:

i. By providing security of tenure for judicial officers.
ii. Economic independence i.e adequate financial provisions to judicial officers.
iii. Immunity from court action for actions taking place in the course of judicial proceedings.
iv. Appointment of persons of unquestionable professional and moral integrity

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Independence of the judiciary is critical in that:

i. It promotes the liberty of human beings by checking on the excesses of the state.
ii. It promotes the rule of law.

3.6 ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

These are methods of dispute resolution out of court and include: Arbitration, mediation, negotiation etc.

ARBITRATION

This is an out of court method of settlement of civil disputes by arbitral tribunals which make arbitral awards as opposed to judgments.

The law relating to arbitration in Kenya is contained in the Arbitration Act[2],. Under the Act, an arbitration agreement is an agreement between parties to refer to arbitration all or certain disputes arising between them.

Principles of Natural Justice in Relation to Arbitration proceedings are a fundamental requirement of justice in deciding a dispute between two or more parties.

Firstly, that the arbitrator or the tribunal must be and must be seen to be disinterested and unbiased. Secondly, every party must be given a fair opportunity to present his case and to answer the case of his opponent.

The first principle is embodied in Section 13 of the Arbitration Act which provides that when a person is approached for appointment as an arbitrator he must disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. That duty on the part of the arbitrator is a continuing duty right from the time that he is approached through to the time he accepts appointment, conducts the reference, and renders his award.

So under Section 13(2) the arbitrator is obliged through the arbitral proceedings to disclose without delay such circumstances.

The arbitrator must be on his guard with respect to connections with a party or connections in the subject matter of dispute or connections with the nature of the dispute. And the test that the arbitrator must always bear in mind is whether a reasonable person not being a party to the dispute would think that the connection was close enough to cause the arbitrator to be biased.

An arbitration agreement must be written, it may take the form of a detailed agreement or a clause in the agreement.

The Arbitration Act governs national and international disputes.

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METHODS OF REFERENCE TO ARBITRATION

A dispute may be referred to arbitration by:

1. The parties to the agreement
2. An Act of Parliament
3. A court of law with consent of the parties to the dispute.

APPOINTMENT OF ARBITRATORS OR ARBITUAL TRIBUNAL

Arbitrators may be appointed by:

1. The parties to the dispute
2. A third party as agreed to by the parties
3. The High Court on application

Under section 12 (1) of the arbitration Act, the High Court may appoint an Arbitrator on application if:

a) The parties cannot agree as to who the single arbitrator shall be
b) In the case of two arbitrators, either party has failed to appoint an arbitrator within 30 days of receipt of the parties notice to do so.
c) The two arbitrators fail to appoint a 3rd arbitrator within 30 days of their appointment.

POWERS OF THE ARBITRATOR

1. To determine whether it has jurisdiction to hear the dispute.
2. To provide interim relief or remedies where necessary
3. To demand security from either party
4. To determine the admissibility of evidence
5. To administer oaths
6. To examine persons on oath.

DUTIES OF THE ARBITRATOR

1. Once the arbitrator is pointed, he must enter upon his duties without undue delay. And if the terms of appointment dictate he must make an interim award, however, at the conclusion of the process he is bound to make a final award.
2. The decision of the arbitrator is known as an award. It must be written setting out the reasons for the decisions. It must be by majority and must be signed by all arbitrators. It must specify the date and the place at which it was made.

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RECOURSE TO THE HIGH COURT

Under section 35 (1) of the Arbitration Act, the High Court has jurisdiction to set aside an arbitral award an application by either of the parties.

The award will be set aside if the court is satisfied that:

1. One of the parties to the arbitration agreement had no capacity to enter into it.
2. The arbitration agreement was invalid in law.
3. The party was not offered sufficient notice for the appointment of a arbitral tribunal.
4. The arbitral tribunal was not constituted in accordance with the terms of the agreement.
5. The award relates to a dispute not contemplated by the agreement.
6. The award is contrary to public policy of Kenya.
7. The dispute is incapable of resolution by arbitration.

Once the award is set aside, the parties are free to file the dispute in a court of law. Arbitral proceedings may be terminated in the following ways:

1. The making of the final award
2. Withdrawal of the complaint
3. Mutual consent of the parties.

ADVANTAGES OF ARBITRATION

1. **Cheap:** It is relatively to see a dispute through arbitration hence a saving on cost on thepart of the parties.
2. **Speed:** It is a faster method of dispute resolution in that the diaries of arbitrators aregenerally accommodative.
3. **Convenience:** Arbitral proceedings are conducted at the convenience of the parties interms of venue, time, the law and language applicable.
4. **Informality:** Arbitral tribunals are generally free from technicalities which characterizeordinary courts.
5. **Expertise, knowledge and specialization:** Parties are free to refer their dispute to themost specialized arbitrator in that field.
6. **Privacy / confidentiality:** Arbitral proceedings are conducted in private free from publicscrutiny. The parties enjoy the requisite confidentiality.
7. **Flexibility:** Arbitral tribunals are not bound by previous decisions. This affords them thenecessary room to explore.
8. **It tunes down acrimony:** Arbitral proceedings are less acrimonious and partiesgenerally leave the proceedings closer than they would have been in the case of a court of law.

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DISADVANTAGES OF ARBITRATION

1. Likelihood of miscarriage of justice: Arbitral proceedings may at times not guarantee justice, particularly if the question is complex and the arbitrator is not well versed in law.
2. Arbitral awards have no precedential value i.e. cannot be relied upon in other disputes.
3. Arbitral tribunals exercise unregulated discretion.

NEGOTIATION

"meet and sit down and try and arrive at a conflict resolution without help of a third party"

Negotiation is any form of communication between two or more people for the purpose of arriving at a mutually agreeable solution. In a negotiation the disputants may represent themselves or they may be represented by agents and whatever the case, whether they are represented or not represented, they have control over the negotiation process.

It is basically talking or communicating. It is the two parties alone, without a neutral third party.

There are two extreme styles of negotiating. There is what is referred to as the competitive bargaining style and there is the co-operative bargaining style or hard bargaining and soft negotiating.

COMPETITIVE/ HARD NEGOTIATION

The competitive negotiators are concerned with the substantive results. They advocate extreme positions. They create false issues, they mislead the other negotiator and they even bluff to gain advantage. It is rare that they make concessions and if they do, they do so arguably. They may even intimidate the other negotiator.

ADVANTAGES OF COMPETITIVE NEGOTIATION:

1. The hard negotiator is likely to get a better bargain especially in circumstances where such a negotiator is negotiating with a co-operative negotiator;
2. If a negotiator is a professional negotiator i.e. one who is called upon to negotiate on behalf of parties, he is likely to develop a reputation which will be useful in future negotiations;
3. The competitive negotiator is not open to easy manipulation;
4. A negotiator of that style is also likely to take initiative and to take a lead role in negotiations;

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DISADVANTAGES:

1. The solution that comes out of such hard negotiations is likely to be a fragile one and therefore not long lasting;
2. The other party is likely to come out of the negotiations feeling like maybe they gave too much and this may create ill feelings;
3. The competitive or hard negotiator may by reason of his approach fail to take an opportunity to reach a good deal because of the attitude that he must have his way;
4. It may harm the relationship between the disputants;
5. It may also create misunderstanding by the fact that the interests of the party maybe compromised;
6. The competitive bargainer or negotiator is unlikely to be aligned to the concerns of the other party because the emphasis is no compromise.

COOPERATIVE/ SOFT NEGOTIATION

Cooperative negotiators are more interested in developing a relationship based on trust and cooperation. They are therefore more prepared to make concessions on substantive issues in order to preserve that relationship.

ADVANTAGES

1. Sustaining relationships or good long term relationships;
2. A deal or compromise will be reached when there is a deal to be made;
3. From the perspective of a professional negotiator, it is more likely that people will want to deal with you.
4. A compromise is likely to be reached sooner and to work quickly either to agree or disagree.

DISADVANTAGES

1. A good deal may be lost or the opportunity for a good deal may be lost because the negotiator by the end of the process may feel that they give more than they should have;
2. There is the possibility of manipulation by the other party.
3. The negotiator may be taken advantage of by the other party;
4. In the case of a professional negotiator, a cooperative negotiator may not get a very good name e.g. compromises too much which may not be good for business.

In each of these two styles and based on the mentioned disadvantages, the negotiators are more focussed on their respective positions than with their interests and to try and reap the advantages of both the cooperative and competitive bargaining style.

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Principled negotiations require negotiators to focus on the interests of each of the disputants with the goal of creating satisfactory options for resolution which may be assessed by objective criteria.

Principled negotiation seeks to take advantage of both cooperative and competitive styles and avoid the pitfalls or the disadvantages of the two styles.

MEDIATION

Mediation is a non-binding process in which an impartial third party facilitates the negotiations process between the disputants and it is that impartial third party who is called the mediator. The mediator has no decision making power and the parties maintain the control over the substantive outcome of the mediation.

However, the mediator with the assistance of the parties will control the process and he will with the consent of the parties set and enforce the ground rules for the mediation process. The role of the mediator is not to impose his own solutions and not to even suggest solutions but that the solutions should be suggested and agreed upon by the parties themselves.

The mediator should not descend to the arena but should let the disputants decide how to conduct the negotiations.

OMBUDSMAN

An ombudsman is a person who investigates complaints and attempts to assist the disputants to reach a decision. Usually this is an independent officer of the government or a public or quasi-public body. An ombudsman can be classified as an alternative dispute resolution mechanism.

Ombudsmanship is practiced in Sweden. In Kenya we have a Complaints Commission.

EARLY NEUTRAL EVALUATION (ENE)

This is where the parties to the dispute consult a 3rd party with regard to the dispute. The 3rd party then advises them on the likely outcome of the conflict should it be referred either to the Courts or to other formal means of dispute resolution.

Most Advocates usually carry out ENE.

MINI TRIAL

This can either be judicial or private, and is similar to ENE above.

In a Judicial Mini Trial, the parties are already in Court and they go before a Judge. The synopses of their cases are presented and the judge advises on the likely outcome if the matter was to go to trial.

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Private Mini Trials mostly occur in large organizations where the members (Senior Managers of the Enterprise) receive a summary of the dispute and essentially suggest ways of resolving them.

EXPERT DETERMINATION

This is where the parties to the dispute appoint a third party who makes a binding decision upon hearing the parties. He must be an expert and makes his decision based on such expertise. His decision is binding.

ADJUDICATION

This is where an adjudicator is appointed to settle disputes. He is appointed as a neutral third party entrusted to take initiative in ascertaining the facts and the law relating to the subject matter in question.

His decision is binding and should be made within a short time. He should also be suitably qualified to deal with the subject matter.

TRADITIONAL/ CUSTOMARY DISPUTE RESOLUTION

Each Community has its own e.g. *Njuri Nceke* of the Ameru, *Abagaka B'egesaku* of the Kisii, *Kiama* of the Kikuyu and Luo Council of Elders for Luo

They are recognized by Kenyan Courts just as African Customary Law. The Bomas Draft Constitution recognized them.

CHAPTER SUMMARY

FUNCTIONS/PURPOSES OF ADMINISTRATIVE LAW

1. It ensures proper dispensation of services.
2. It seeks to protect citizens from abuse of power.
3. To keep the powers of government bodies within their legal bounds, so as to protect citizens from their abuse.
4. There are duties placed in public bodies such that another function of the law is to see that the duties are performed

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GROUNDS OF JUDICIAL REVIEW

Courts of Law will intervene in public administration in one or more of the following circumstances i.e. courts of law will review actions of administrative bodies in one or more of the following circumstances:

1. When a body acts *ultra vires*;
2. Unreasonableness;
3. When there is jurisdictional error;
4. When there is an error of law;
5. When there is an error of fact;
6. When there is an abuse of power;
7. When irrelevant considerations governed the making of a decision;
8. When there is bias;
9. When there is unfair hearing;
10. When there is procedural flaw;
11. When there is irrationality
12. When a public official or body acts in bad faith;
13. When there is breach of principles of natural justice.

PRINCIPLES/RULES OF NATURAL JUSTICE

Broadly the principles are two:

1. ***Nemo Judex in causa sua***: This means that procedures must be free from bias.
2. ***Audi Alteram Partem***:This means that no person should be condemned unheard i.e. aperson should not be denied an opportunity to be heard.

These two principles have been broken down into a number of principles or rules which are as follows:

1. Rule against Bias
2. The right to be heard
3. Prior Notice
4. Opportunity to be heard
5. Disclosure of information
6. Adjournment
7. Cross examination
8. Giving reasons
9. Legal Representation

POWERS OF THE ARBITRATOR

1. To determine whether it has jurisdiction to hear the dispute.
2. To provide interim reliefs or remedies where necessary
3. To demand security from either party
4. To determine the admissibility of evidence
5. To administer oaths
6. To examine persons on oath.

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JUDICIAL REVIEW REMEDIES

There are only three remedies that the courts can grant for judicial review

- Certiorari
- Prohibition
- Mandamus

ALTERNATIVE DISPUTE RESOLUTION

These are methods of dispute resolution out of court and include arbitration, mediation, negotiation etc.

ARBITRATION

This is an out of court method of settlement of civil disputes by arbitral tribunals which make 'arbitral awards' as opposed to judgment.

ADVANTAGES OF ARBITRATION:-

i. Cheap.
ii. Speed.
iii. Convenience.
iv. Informality:
v. Expertise, Knowledge and Specialization.
vi. Rivalry/Confidentiality.
vii. Flexibility:
viii. It tones down acrimony:

Other methods of alternative dispute resolution mechanisms

1. Negotiation
2. Mediation
3. Ombudsman
4. Early neutral evaluation
5. Mini trial
6. Expert determination
7. Adjudication
8. Traditional/ customary dispute resolution

CHAPTER QUIZ

1. What are the grounds for judicial review?
2. Name 3 judicial review remedies.
3. List the advantages of arbitration.

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ANSWERS

GROUNDS OF JUDICIAL REVIEW

1. When a body acts *ultra vires*;
2. Unreasonableness;
3. When there is jurisdictional error;
4. When there is an error of law;
5. When there is an error of fact;
6. When there is an abuse of power;
7. When irrelevant considerations governed the making of a decision;
8. When there is bias;
9. When there is unfair hearing;
10. When there is procedural flaw;
11. When there is irrationality
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(Footnotes)

[1] Cap 26 Laws of Kenya
[2] Act Number 4 of 1995

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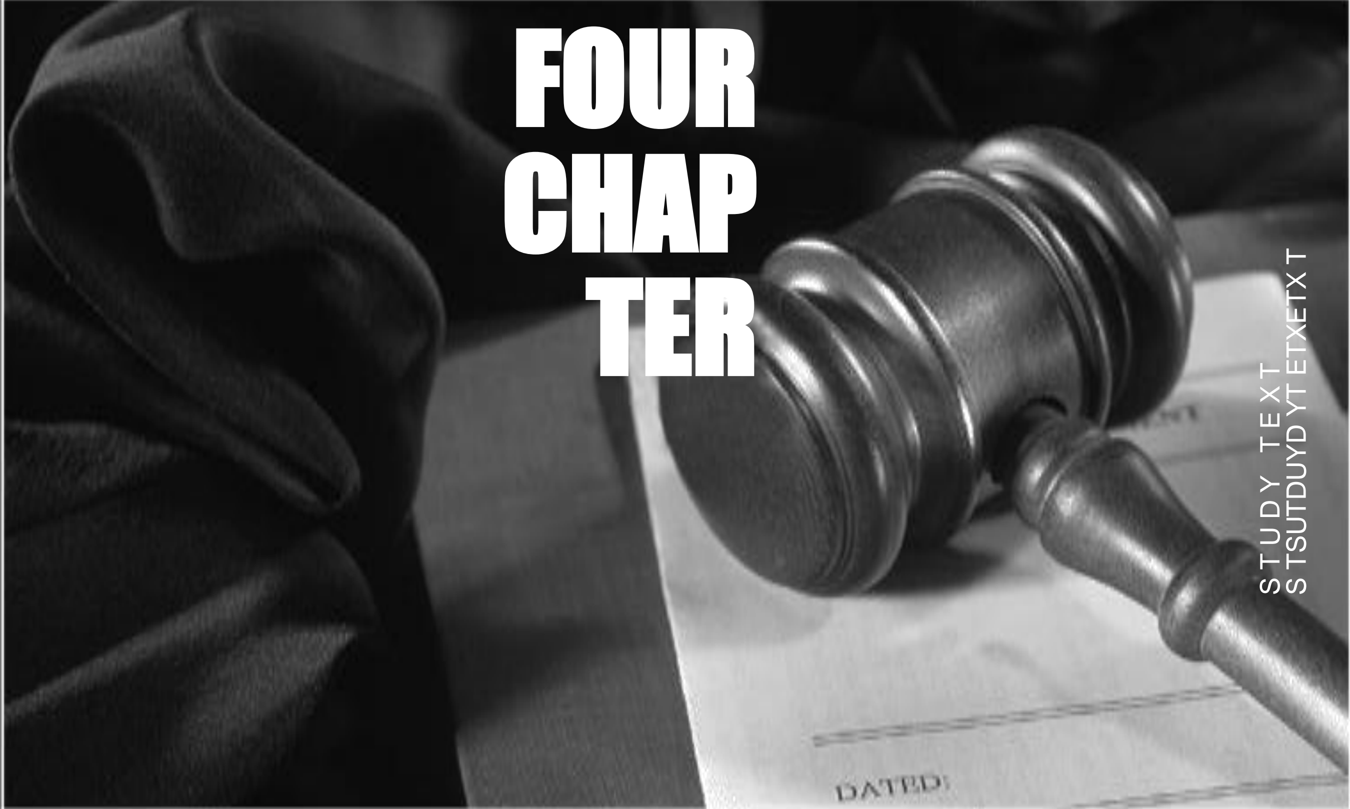

SYSTEMCOURTTHE

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CHAPTER FOUR

THE COURT SYSTEM

▶ OBJECTIVE

To provide the candidate with a broad understanding of the manner in which justice is administered in Kenya.

- Structure, composition and jurisdiction of the courts of appeal, High Court and Subordinate Courts.
- Tribunals; the Rent Tribunal, Business Premises Tribunal, Industrial Courts.
- Judicial Service Commission.
- The role of the Attorney-Generals office.

▶ INTRODUCTION

Kenya has a court structure that operates at different levels. The court at each level has power to deal with certain cases, which is described as the jurisdiction of the court.

The Kenyan court system is based on the Constitution and other Acts of parliament e.g. Magistrates Courts Act, Judicature Act, Kadhis Courts Act etc.

The system consists of both subordinate and superior courts. Whereas the High Court and Court of Appeal are superior courts, all other courts are subordinate courts.

▶ KEY DEFINITIONS

- **Jurisdiction**: refers to the power of a court to hear a particular case
- **Tribunal**:These are bodies established by Acts of parliament to exercise judicial or*quasi*-judicial functions.
- **Arbitration**: This is an out of court method of settlement of civil disputes by arbitraltribunals which make ‘arbitral awards’ as opposed to judgment.
- **Appeal**: A case that has previously been heard by another court or tribunal

▶ EXAM CONTENT

The examiner in this area is mainly concerned with the students understanding of the structure, composition and jurisdiction of the court system in Kenya. In other words the student should understand hoe each court in Kenya is composed and what cases can be brought before it. This chapter has been tested in the following sittings: May 2006;November 2005;May 2005;November 2004; May 2004; November 2003; May 2003; November 2002; May 2002; May 2002; July 2000; May 2000; November 1999; May 1999.

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INDUSTRY CONTENT

This chapter actually gives us a feel of what takes place in courts today. Through it will know exactly which court to file an action. It should however be noted that District Magistrate Court 3 were abolished. Corporal punishment is no longer a form of punishment. Many people are now choosing arbitration due to its perceived advantages.

THE COURT SYSTEM - INTRODUCTION

Kenya's court system is based on the Constitution and other Acts of Parliament e.g. Magistrates Court Act, Judicature Act, Kadhi's Court Act.

The system consists of superior and subordinate courts. Whereas the High Court and court of appeal are superior, all other courts are subordinate.

4.1 JURISDICTION

This is the power of a court to hear or entertain a particular case. Not every court can hear every case. For a court to hear a case, it must have re requisite jurisdiction.

CLASSIFICATION OF JURISDICTION

1. **Original jurisdiction**
   This is the power of a court to hear a case for the 1st time. This is the power of a court to hear a case at the 1st instance e.g. High Court, resident magistrate's court, district magistrate's court, Kadhi's court etc.

2. **Appellate jurisdiction:** This is the power of a court to hear cases on appeal i.e. thecase has previously been heard by another court or tribunal e.g court of appeal, High Court, R.M. court and D.M court 1st class.

3. **Territorial jurisdiction:** This is the power of a court to hear or entertain criminal orcivil cases from within a defined geographical area referred top as judicial district
   e.g. the D.M. court 3rd class can only hear cases from within the district in which it is established. A Kadhi's court can only hear cases from within the province for which it is established.

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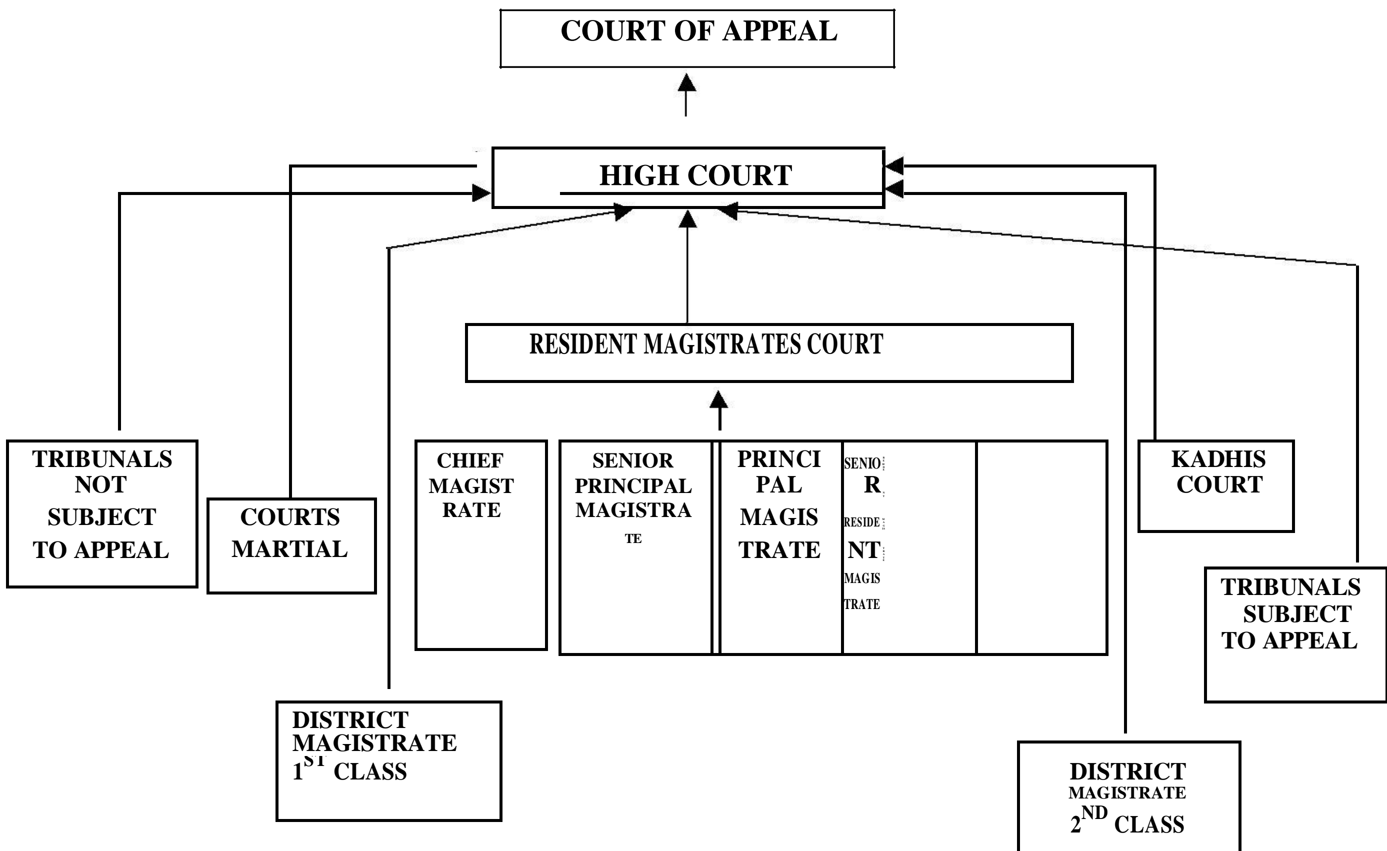
4. **Pecuniary jurisdiction:** This is monetary or financial jurisdiction. It is the power of acourt to entertain civil cases whose value of subject matter does not exceed a specified maximum e.g.

Chief magistrate	Kshs 3,000,000.00
Senior principal magistrate	Kshs 2,000,000.00
Principal magistrate	Kshs 1,000,000.00
Senior resident magistrate	Kshs 800,000.00
Resident magistrate	Kshs 500,000.00

4.2 COURT STRUCTURE



STUDY TEXT

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COURT OF APPEAL

Establishment: It is established by section 64 (1) of the Constitution which provides *interalia* 'there shall be a court of appeal which shall be a superior court of record.' The court wasestablished in 1977 after the collapse of the East African community. It is the Highest Court.

Composition: Judges of the court are known as judges of appeal and the chief justice and suchother number as prescribed by parliament.

Jurisdiction: It is primarily an appellate court with jurisdiction to hear criminal and civil appealsfrom the High Court. However, the court exercises very limited original jurisdiction in that it is empowered to punish; contempt of court and it has the jurisdiction to stay the execution of an order of the High Court pending an appeal.

Decisions of the court of appeal are final. The full court of appeal consists of 5 judges, however, in practice 3 judges sit and decision is by voting.

TYPES OF JUDGEMENTS

3:0 Unanimous judgement.
2:1 Majority judgement.

POWERS OF THE COURT OF APPEAL

1. To determine cases with finality.
2. To frame issues for the determination of the High Court
3. To accept or receive additional evidence only if an application to that effect is sustainable.
4. To order a trial
5. To order a retrial

HIGH COURT

Establishment: It is established by section 60 (1) of the Constitution as a superior court ofrecord. This section provides *inter alia* "There shall be a High Court which shall be a superior court of record."

Composition: Judges of the High Court are known as **puisne judges** and are the chief justiceand such other numbers as prescribed by parliament.

JURISDICTION

The High Court has the most extensive jurisdiction in Kenya.

STUDY TEXT

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ORIGINAL JURISDICTION

Under section 60(1) of the Constitution, the High Court has unlimited original jurisdiction in criminal and civil cases.

APPELLATE JURISDICTION

It entertains criminal appeals from:

1. Resident magistrate's court
2. Courts martial
3. District magistrate's court 1st and 2nd class

It entertains appeals in civil cases from:

1. Resident magistrate courts
2. Kadhi courts
3. District Magistrate's court 1st and 2nd class
4. Tribunals subject to appeal e.g. rent tribunals

OTHERS

a) **Interpretation of the Constitution**
Under section 67 (1) of the Constitution, if the question on the interpretation of the Constitution arises before a subordinate court and the court is of the opinion that it involves a substantial question of the law. The court may refer it to the High Court for interpretation, but must do so if any of the parties to the proceedings so requests.

b) **Enforcement of fundamental rights and freedoms**
Under section 84 (1) of the Constitution, the High Court has original jurisdiction to enforce fundamental rights and freedoms of the individual. It has jurisdiction to provide remedies whenever a person's rights or freedoms have been or likely to be violated.

c) **Presidential and parliamentary election petitions**
The High Court has original jurisdiction to hear and determination presidential and parliamentary election petitions. Under section 10 (1) of the Constitution it has jurisdiction to hear and determine a petition challenging:

1. The nomination of a person to contest a presidential election
2. The election of a president as a member of the National Assembly
3. The election of a person to the office of the President

Under this provision the petitioner must file only one petition.

STUDY TEXT

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Under section 44(1) of the Constitution the High Court has original jurisdiction to hear and determine a petition:

a) Challenging the validity of a person as a member of the national Assembly
b) To determine whether a seat in the National Assembly has become vacant.

d) Admiralty jurisdiction

Section 4(1) of the Judicature Act constitutes the High Court an 'Admiralty court', with jurisdiction to hear and determine civil disputes arising on the high seas, within territorial waters and inland navigable lakes and rivers.

The High Court has jurisdiction to apply international law in the determination of such disputes.

e) Supervisory jurisdiction

Under section 65 (2) of the Constitution, the High Court has jurisdiction to supervise the administration of justice in subordinate courts and tribunals.
It exercises the jurisdiction by making such orders and issuing such writs as it may deem fit.

Such writs include:

1. **Prohibitory order:** This is an order of the High Court restraining a court or tribunal from proceeding with a matter before it. This order may be granted if the court or tribunal is:
   a) Improperly constituted
   b) Disregarding relevant matters
   c) Exceeding its jurisdiction
   d) This order prevents a court or tribunal from exceeding its jurisdiction or ignoring the rules of natural justice.

2. ***Certiorari*:**This is a High Court order to a subordinate court tribunal demanding the production of certified copies of the proceedings and decisions for purposes of quashing the decision. The order may be granted if a decision is arrived at in total disregard of the rules of natural justice or in excess of jurisdiction of the tribunal e.t.c.

3. ***Mandamus*:**This is a High Court order to a tribunal, public of official administrative body or local authority demanding the performance of public duty imposed upon it by statutes. The order compels performance by such bodies where it is unlawfully refused.

4. ***Habeas corpus*:**It literally means 'produce body.' This is an order of the High Court to a detaining authority or body demanding the production of the detainee before the court to show cause why the detainee should not be released forthwith. This order questions the legality of the detention. Its functions to secure the release of detainees in unlawful custody. The order will be granted when a person's right or personal liberty is violated.

PUISNE JUDGES SIT ALONE EXCEPT WHEN

- Entertaining a criminal appeal when 2 judges sit if the chief justice so orders
- Entertaining a Constitutional reference i.e. interpreting the Constitution when uneven number of judges not less than three sits.

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- Entertaining a civil appeal from the Kadhis court when the judge sits either with the Chief Kadhi or two Kadhis.

Decisions of the High Court may be appealed against in the court of appeal.

SUBORDINATE COURTS

Under section 64 (1) of the Constitution, parliament is empowered to create courts subordinate to the High Court including a courts martial.

In exercise of this power, parliament has created:

- Resident magistrate's court
- District magistrate court
- Kadhis court
- Court martial

RESIDENT MAGISTRATE'S COURT

Establishment: It was established by section 3(1) of the Magistrates court Act which provides *inter alia* 'There is hereby established the Resident Magistrate court which shall be a court subordinate to the High Court.'

Composition: The Resident Magistrates court is duly constituted when held or presided over by:

- Chief Magistrate
- Senior Principal Magistrate
- Principal Magistrate
- Senior Resident Magistrate
- Resident Magistrate

STUDY TEXT

JURISDICTION

Under Section 3(2) of the Magistrates Court's Act, the court has jurisdiction to hear cases throughout Kenya.

It entertains both criminal and civil cases. It exercises original and limited appellate jurisdiction.

Criminal jurisdiction

When presided over by the Resident Magistrate, the maximum sentence the court may impose is restricted: fine: Kshs. 20,000, stokes; 24, imprisonment; 7 years

The court is held by the Chief Magistrate, Senior Principal Magistrate, Principal magistrate or the senior Resident magistrate, it has jurisdiction to impose any sentence provided the offence is triable by the court.

It entertains criminal appeals from the District Magistrate Court 3rd class.

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Civil jurisdiction

The civil jurisdiction is subject to pecuniary or monetary restrictions. It exercises original jurisdiction only in civil cases as follows:

Chief magistrate	3,000,000.00
Senior Principal Magistrate	2,000,000.00
Principal Magistrate	1,000,000.00
Senior Resident Magistrate	800,000.00
Resident Magistrate	500,000.00

The Resident Magistrate court has unlimited jurisdiction to hear and determine cases based on African customary law. Decisions of the Resident magistrate's court may be appealed against in the High Court.

DISTRICT MAGISTRATES COURT

Establishment: It is established by section 7 (1) of the Magistrates Court Act which provide*inter alia* 'there is hereby established for each District Magistrate court which shall be a courtsubordinate to the High Court.'

Composition: The court is duly constituted when presided over or held by the District Magistrate1st, 2nd and 3rd class duly appointed by the Judicial Service Commission.

JURISDICTION

Under section 7 (3) the court has jurisdiction throughout the District for which it is established. It entertains both civil and criminal cases. It exercises original and limited appellate jurisdiction.

Civil jurisdiction

Its jurisdiction is subject to financial or pecuniary restrictions as follows:

District magistrate 1st class	Kshs 75,000.00
District magistrate 2nd class	Kshs 75,000.00

The court has a limited jurisdiction to hear and determine civil cases based on African customary law.

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Criminal jurisdiction

It exercise original jurisdiction in criminal cases and the maximum sentence it may impose is restricted by law as follows:

COURT	MAXIMUM FINE	IMPRISONMENT TERM	STROKES
District Magistrate 1st class	20,000	7 years	24
District Magistrate 2nd class	10,000	2 Years	12

KADHI'S COURT

Establishment: It is established by Section 4 (1) of the Kadhis Court Act[1]cap 11 pursuant bySection 66 (3) of the Constitution which provides for the establishment of subordinate courts held by a Kadhi.

Composition: The court is duly constituted when held by the chief Kadhi or Kadhi appointed bythe Judicial Service Commission.

Jurisdiction: It exercises original jurisdiction in civil cases on questions of marriage, divorce,succession or personal status in proceedings in which all parties profess the Muslim faith.

However, the High Court and other subordinate courts have jurisdiction to hear and determine such cases.

The law applied by the Kadhi court is Islamic Law e.g. Law of evidence. All witnesses must be heard without discrimination and the court is obliged to keep a record of its proceedings.

Decisions of the Kadhi's court may be appealed against in the High Court.

COURTS MARTIAL

Establishment: It is established by section 85 (1) of the Armed Forces Act pursuant to section 4 (1) of the Constitution. It is a subordinate court.

Composition: The court consists of a presiding officer who sits with not less than 2 other personsor not less than 4 if an officer is being tried or where the maximum penalty for the offence is death. The court is assisted by a judge / advocate on questions of procedure.

Jurisdiction: It exercises limited, original jurisdiction in criminal cases involving members of thearmed forces and applies military law e.g. disobeying lawful orders, mutiny, and desertion.

The court is empowered to impose the following sentences:

- Fine
- Reprimand
- Reduction of rank
- Dismissal
- Capital punishment
- Imprisonment

Decisions of the court may be appealed against in the High Court. The convict may appeal against conviction or sentence or both.

STUDY TEXT

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TRIBUNALS

These are bodies established by Acts of parliament to exercise judicial or quasi-judicial functions.

Tribunals supplement ordinary courts in the administration of justice.

All tribunals are governed by the principals of natural justice i.e.

a) Person shall be condemned unheard
b) No person shall be a judge in his own case

ADVANTAGES

Tribunals enjoy certain advantages over ordinary courts:

1. **Cheap:** It is relatively cheaper to see a dispute through a tribunal than an ordinary court hence there is a saving on cost.
2. **Policy and other matters:** Tribunals incorporate policy considerations among other matters in their decision making process and therefore arrive at balanced decisions.
3. **Informality:** Tribunals are less technical i.e are free from technicalities of procedure or otherwise which characterize ordinary courts.
4. **Flexibility:** Tribunals are not bound by previous decisions. This gives them the required flexibility to explore in decision-making.
5. **Expert knowledge and specialization:** Tribunals are specialized in that they deal with similar disputes all through. Expertise is built on experience.
6. **Convenience:** Tribunals in certain circumstances sit at the convenience of the parties. They generally use languages familiar to the parties.
7. **Relieve over burdened courts:** Tribunals compliment ordinary courts in the administration of justice by dealing with certain disputes.

DISADVANTAGES

1. Legal representation: May be limited or non- existent
2. Tribunals generally exercise unregulated discretion
3. Decisions of certain tribunals may not be appealed against.

EXAMPLES OF TRIBUNALS

1. Industrial court
2. Rent tribunal
3. Business premises tribunal
4. Insurance appeals tribunal (Insurance Act[2])
5. Land Tribunals (Sec. 9B of the Magistrates Court Act)
6. Capital Markets Tribunal (Capital Markets Act[3])

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INDUSTRIAL COURT

Establishment: It is established by section 14 (1) of the Trade Disputes Act.

Composition: The court consists of a judge appointed by the President. He sits with 2 otherpersons selected by him from a panel of 4 persons appointed by the Minister for Labour in consultation with the Central Organisation of Trade Unions (COTU) and Federation of Kenya Employers. Currently there are 2 industrial court judges.

Jurisdiction: It exercises limited original jurisdiction in relation to industrial disputes e.g. betweenemployees and employers or between employers and their trade union.

Disputes may be referred to the court by the minister for labour or a registered trade union.

Decisions of the court are known as **Awards** and are final. Under section 17 (1) of the Trade Disputes Act, an award cannot be appealed against, stayed, restrained or be reviewed.

An award must be published in the Kenya Gazette whereupon it is effective. The court maintains a register of all collective agreements registered by it.

The essence of the industrial court is to promote industrial harmony.

STUDY TEXT

RENT TRIBUNAL

Establishment: It is established by Section 4 (1) of the Rent Restriction Act[4].

Composition: It consists of the chairman and other persons appointed by the Minister in chargeof Housing. To qualify for appointment as chairman, one must be an advocate of not less than 5 years standing.

One of the other persons appointed by the Minister must be the deputy chairman.

Jurisdiction: It exercises original jurisdiction in civil cases between landlords and tenants ofresidential premises whose monthly rent does not exceed Kshs 2,500.00. Decisions of the Tribunal may be appealed against in the High Court.

POWERS AND FUNCTIONS OF THE RENT TRIBUNAL

1. To assess the standard rent of any premises on its own motion or on application.
2. To determine the date from which such rent is payable.
3. To apportion rent between tenants where tenancy is shared.
4. To facilitate vacant possession of premises to enable the landlord do repairs or erect additional buildings.
5. To facilitate recovery of rent arrears by the land lord.
6. To permit the levy of distress for rent.
7. To employ clerks, valuers and other persons to enable it discharge its obligations.

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BUSINESS PREMISES TRIBUNAL

Establishment: It is established by section 11 (1) of the Land Lord and Tenant (shops, hotelsand catering establishments) Act[5].

Composition: It consists of the chairman and other persons appointed by the Minister forCommerce. The chairman must be an advocate of not less than 5 years standing.

Jurisdiction: It exercises jurisdiction in civil cases between landlords and tenants of commercialpremises where the tenancy is 'controlled.'

Under section 2 (1) of the Act, a controlled tenancy is a tenancy of a shop, hotel or catering establishment which has not been reduced into writing or has been reduced into writing but does not exceed 5 years and contains provision for termination.

Decisions of the tribunal may be appealed against in the High Court.

POWERS AND FUNCTIONS OF THE BUSINESS PREMISES TRIBUNAL

1. To determine whether the tenancy is controlled or not.
2. To determine the rent payable in respect of a controlled tenancy upon application
3. To apportion rent between tenants where a controlled tenancy is shared.
4. To permit the levy of distress for rent.
5. To vary or rescind its own decisions
6. To compel the landlord to compensate the tenant for any loss occasioned by termination of the tenancy.
7. Facilitates vacant possession of the premises.

JUDICIAL SERVICE COMMISSION

Establishment: It is established by Section 68 (1) of the Constitution.

Composition /membership

Under section 68 (1) of the Constitution, the commission consists of:

1. The Chief Justice – Chairman
2. Attorney General
3. 2 persons who are at the time being judges of the High Court and Court of Appeal appointed by the president.
4. Chairman of the Public Service Commission
5. The High Court Registrar as the secretary

POWERS OF THE COMMISSION

1. To act independently, it must not be under the control or directions of any person or authority.
2. To make rules to regulate its procedure

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3. To delegate powers to its members (judges)
4. To act not withstanding a vacancy in its membership.
5. To confer powers and impose duties on public service with the president's consent.

FUNCTIONS OF THE JUDICIAL SERVICE COMMISSION

1. **Administration:** It is the principal administrative organ of the judiciary i.e. administersthe judicial department
2. **Advisory:** It advises the president on the appointment of judges of the High Court andCourt of Appeal. Its vote is purely advisory.
3. **Appointment:** It engages magistrates, High Court registrars, Kadhis and judicial staffe.g. personnel, officers, clerks etc.
4. **Discipline:** It disciplines all judicial staff, magistrates, registrars, Kadhis and other staffof the department.

JUDGES

There are two types of judges namely:

1. Puisne.
2. Judges of appeal.

The office of judge is created by the Constitution.

Appointment

All judges are appointed by the president acting in accordance with the advice of the Judicial Service Commission.

Qualifications

To qualify for appointment as a judge, a person must:

1. Be an advocate of the High Court of not less than 7 years standing.
2. Be or has been a judge of a court with or unlimited jurisdiction in criminal and civil matters in some part of the commonwealth or the Republic of Ireland.
3. Be or has been a judge of a court with jurisdiction to hear appeals from a court with unlimited jurisdiction in criminal and civil maters in some part of the commonwealth or Republic of Ireland.

Once appointed, a judge must take and subscribe to the Oath of Allegiance and such other oath as may be prescribed by law.

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Under section 62 (1) of the Constitution, judges retire at such age as may be prescribed by parliament which currently stands at 74 years.

Judges enjoy security of tenure of office under section 62 (3) of the Constitution, a judge can only be removed from office on the ground of either:

i. Inability to discharge the functions of his office.
ii. Misbehaviour

Provided a tribunal appointed by the President has investigated the allegations as a matter of fact and recommended that the judge be removed.

In the course of investigation, a judge may be suspended from discharging the functions of his office.

The president is bound by the recommendations of the tribunal.

CHIEF JUSTICE

The office of the Chief Justice was created by the Constitution.

Appointment

Under section 61 (1) of the Constitution, the Chief Justice is appointed by the president.

Qualifications

The Constitution does not expressly prescribe the qualifications of the holder of the office of the Chief Justice. However, on appointment, the Chief Justice becomes a judge of the High Court and court of appeal. He is the paramount judicial officer or the Principal judicial functionary.

FUNCTIONS OF THE CHIEF JUSTICE

1. **Administrative functions**
   a) He is the chairman of the Judicial Service Commission
   b) He maintained discipline in the judiciary
   c) Determines where the High Court sits
   d) He appoints the duty judge
   e) Allocates cases to judges.
2. **Judicial functions**
   As a judge of the High Court and Court of Appeal he participates in the adjuratory process in the High Court and may preside over the court of appeal.
3. **Legislative functions**
   The Chief Justice is empowered to make delegated legislation to facilitate administration of justice. The provisions of the Kadhi Courts Act and the Magistrate Courts Act confer upon the law making powers.

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Under section 84 of the Constitution, he is empowered to make law to facilitate the enforcement of fundamental rights and freedoms.

4. **Political functions**
   The chief justice administers the presidential oath to the person elected as president of Kenya.
   He represents the judiciary at state functions.
5. **Legal education and profession**
   The Chief Justice or his representative is the chairman of the council of legal education. He admits advocates to the bar.
   He appoints Commissioners for Oaths and *Notaries* Public.
6. **Enhancement of jurisdiction**
   The Chief Justice enhances the pecuniary jurisdiction of the Resident Magistrates court. He is empowered to enhance the territorial jurisdiction of the District Magistrate Court.

MAGISTRATES

They preside over the Resident and District Magistrate courts.

Appointment

They are appointed by the Judicial Service Commission. To qualify for appointment, one must be an advocate of the High Court. Magistrates retire at the age of 55 years.

HIGH COURT REGISTRARS

These are magistrates who in addition to administration of justice perform administrative functions. They are appointed by the Judicial Service Commission to assist the chief Justice in the administration of the Judicial department. However, there is only one High Court registrar based in Nairobi. He is the custodian of the Roll of advocates.

KADHIS COURT

The office of the Chief Kadhi and Kadhi is created by section 66 (1) of the Constitution. Kadhis preside over Kadhi courts and administer Islamic law only.

Appointment

They are appointed by Judicial Service Commission

To qualify for appointment one must:

a) Profess Muslim faith
b) Possess adequate knowledge of Islamic law applicable to any sect or sects of Muslims which in the opinion of the Judicial Service Commission qualifies him for appointment.

STUDY TEXT

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ATTORNEY GENERAL

Establishment: It is established by section 26 (1) of the Constitution. It is an office in the publicservice.

Appointment: Under section 109 (1) of the Constitution the Attorney General is appointed bythe president.

To qualify for appointment, a person must be an advocate of not less than 5 years standing.

The Attorney General enjoys security of tenure of office.

POWERS OF THE ATTORNEY GENERAL

Under section 26(3) and (4) of the Constitution, the Attorney General has the following powers in relation to criminal cases:

1. To institute and undertake criminal proceedings against any person in any court other than courts-martial for any alleged offence.
2. To take over and continue any criminal proceedings institutes over and undertaken by any other person or authority.
3. To discontinue at any stage before judgment is delivered any criminal proceedings instituted or undertaken by any other person or authority or himself by entering the so-called *nolle prosqui* means ' I refuse to prosecute.'
4. To require the commissioner of police to investigate criminal the Commissioner of Police must oblige and report to the Attorney General.
5. To delegate his functions to other officers in his department.

FUNCTIONS OF ATTORNEY GENERAL

1. Under section 26 (2) of the Constitution, the Attorney General is the principal advisor of the government.
2. Under the Constitution he must act independently.
3. He is an *ex-officio* member of the National Assembly.
4. He drafts all government bills.
5. He is the head of the bar i.e most senior lawyer.
6. He is the public prosecutor.
7. He represents the state in all civil cases.
8. He services the legal needs of other government departments.
9. He is the only *amicus curie* i.e. friend of the court.
10. He is a member of the Judicial service Commission
11. He is a member of the committee of Prerogative of Mercy

The Attorney General retires at such age as parliament may prescribe.

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ADVOCATES

Definition: Under section 2(1) of the Interpretation and General Provisions Act and the AdvocatesAct[6] an advocate is 'any person whose name has been duly entered as an advocate in the Roll of Advocates.'

He has also been defined as a person who has been admitted as an advocate by the Chief Justice.

The law relating to Advocates is contained in the Advocates Act

QUALIFICATIONS FOR ADMISSION

To qualify for admission as an advocate, one must:

1. Be a citizen of Kenya
2. Hold a law degree from a recognized University
3. Satisfy the Council of Legal Education's examination requirement.

PROCEDURE FOR ADMISSION

1. A formal petition must be made to the Chief Justice through the High Court registrar.
2. Copies of the petition must be sent to the Council of Legal Education and the Law Society of Kenya
3. Notice of the petition must be given.
4. The petition must be published in the Kenya Gazette
5. The Chief Justice hears the petition in chambers.
6. The petitioner then takes the oath of office in open court
7. The admitted person then signs the roll of Advocates.

DUTIES OF AN ADVOCATE

1. **Duty to the court:** As an officer of the court, an advocate is bound to assist in theadministration of justice by arguing the law as it is.
2. **Duty of client:** An advocate owes a legal duty of care to his clients. He must argue hisclient's case in the best manner possible.
3. **Duty to his profession:** As a member of a profession, an advocate is bound to maintainthe highest possible standards of conduct and integrity by observing the law and other rules.
4. **Duty to society:** As a member of the society, he is bound to assist in its social, politicaland economic development.

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THE LAW SOCIETY OF KENYA

Establishment: It is established by section 3 of the Law Society of Kenya Act[7], as a bodycorporate by the name Law Society of Kenya. It has perpetual succession, can sue or be sued and has a common seal.

Composition /

Membership It consists of:

a) Practicing advocates
b) Non-practicing advocates
c) Special members
d) Honorary members

The affairs of the society are managed by a Council elected by the members.

Objectives Of The Law Of Society

Under Section 4 of the Law Society of Kenya Act, its objects include:

1. To maintain and improve the standards of conduct and learning of the legal profession.
2. To facilitate acquisition of legal knowledge by members and others.
3. To assist the government and the courts in all matters relating to legal and administration of the law.
4. To represent, protect and assist members of the legal profession in relation to conditions of practice of the law.
5. To assist and protect members of the public in all matters touching or incidental to law.
6. To raise or borrow money for its purposes
7. To acquire land and other property.

CHAPTER SUMMARY

Jurisdiction refers to the power of a court to hear a particular case

Classifications of jurisdiction:-

- Original Jurisdiction
- Appellate Jurisdiction
- Territorial Jurisdiction
- Pecuniary Jurisdiction

Court of appeal:- It is established by sec. 64 (1) of the Constitution that provides, *inter alia,* that 'there shall be a Court of Appeal which shall be a superior court of record.'

High Court:- it is established by sec. 60 (1) of the Constitution as a superior court of record. This

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Section provides that 'There shall be High Court which shall be a superior court of record.'

Subordinate courts:- Section 64 of the Constitution empowers parliament to create subordinate courts including a courts martial.

In the exercise of this power, parliament has created:

i. Resident Magistrates Court.
ii. District Magistrates Court.
iii. Kadhis Court.
iv. Courts martial.

Tribunals:- These are bodies established by Acts of parliament to exercise judicial or quasi-judicial functions.

Advantages of tribunals:

- Cheap
- Incorporate policy considerations among other matters in their decision-making.
- They are less technical.
- Flexibility
- Expert knowledge and specialization
- Convenience
- Relieve overburdened courts

Disadvantages of tribunals:-

- Legal representation may be limited or may not be allowed at all.
- Tribunals generally exercise unregulated discretion.
- Decisions of some tribunals may not be appealed against.

Judicial service commission:- It is established under Section 68 (1) of the Constitution.

Functions of the Judicial Service Commission:

- Administration
- Advisory
- Appointment

There are two kinds of judges namely

- Puisne judges
- Judges of appeal.

CHAPTER QUIZ

QUESTIONS

1) Which is the highest court of the land?
2) Judges of the High Court are known as?
3) What does *habeas corpus* mean?
4) Give an example of an alternative dispute resolution

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CHAPTER QUIZ ANSWERS

1) Court of appeal
2) Puisne judges
3) Produce body
4) Arbitration

SAMPLE EXAMINATION QUESTIONS

QUESTION ONE

May 2000, Question 3

In relation to the Administration of Justice and Law in Kenya, explain the composition and jurisdiction of the Resident Magistrate's Courts. (20 marks)

QUESTION TWO

December 2006, Question 2

a) Explain the Composition and the powers of the Judicial Service Commission. (6 marks)
b) Highlight the powers of the Business Premises Tribunal. (6 marks)
c) Describe the functions of the office of the Attorney General. (8 marks)

QUESTION THREE

December 2005, Question 2

a) Describe the Composition and Jurisdiction of the Court of Appeal. (6 marks)
b) Identify the various orders or writs which the High Court may issue when exercising its supervisory jurisdiction. (4 marks)
c) Describe the principles and presumptions that the courts use in the interpretation of statutes. (10 marks)

QUESTION FOUR

November 2003, Question 2

a) Describe the Composition and Jurisdiction of the High Court of Kenya.(8 marks)
b) Explain the establishment and jurisdiction of the Rent Tribunal. (6 marks)
Describe the role of the office of the Attorney General in the prosecution of criminal offences. (6 marks)

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(Footnotes)

[1] Cap 11 Laws of Kenya.

[2] Cap 487 Laws of Kenya

[3] Cap 485A Laws of Kenya

[4] Cap 296 Laws of Kenya

[5] Cap 301 Laws of Kenya

[6] Cap 16 Laws of Kenya

[7] Cap 18 Laws of Kenya

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CHAPTER FIVE

LAW OF PERSONS

OBJECTIVES

A candidate who reads this subject should be able to understand the following:

- Legal personality
- Types of persons: Natural person, artificial person
- Sole proprietorships
- Partnerships
- Unincorporated associations
- Limited companies

INTRODUCTION

The layman has a different concept of what is meant by the term "person" than the concept that exists in law.

Kenyan law recognizes two persons upon whom its confers rights;

Natural persons: This is the human being who is recognized as a person by law by reason of his characteristics.

Artificial persons: is an abstraction of the law often described as **a juristic person.** It is a metaphysical entity created in contemplation of the law. This person is referred to as a **Corporation** or an **Incorporated Association**.

KEY DEFINITIONS:

- **Corporations:** an association of persons recognized as a legal entity.
- **Limited Liability:** Members cannot be called upon to contribute to the assets of thecorporation beyond a specified sum.
- **Ultra vires:-** The capacity of a company is restricted to transactions set forth in theobjects clause
- **Domicil:-** This is the country in which a person has or is deemed by law to have apermanent home.
- **Nationality:-** This is the legal and political relationship between an individual and thestate or country

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EXAM CONTEXT

The student should be able to make a clear distinction between natural and artificial persons. The examiner is very fond of this chapter and tests it in almost every sitting. A clear understanding of this chapter is thus vital. The following are some of the sittings in which this chapter's questions have appeared: November 2006;May 2006;November 2005;May 2005;November 2004;May 2004;November 2003;May 2003;November 2002;May 2002;November 2001;May 2001;July 2000;November 2000;May 2000

INDUSTRY CONTEXT

This chapter is very much in use today cases like **Macaura** have clearly been used by the insurance industry to show that a company is a legal person and thus can have an insurable interest. Acquisition and loss of citizenship has been based on the methods provided in the chapter.

5.1 LAW OF PERSONS

Kenyan law recognizes two persons upon whom it confers rights and imposes obligations. These persons are:

1. Natural person
2. Artificial person

Natural person: this is the human being who is recognized as a person by law by reason of hischaracteristics.

Artificial person: This is an abstraction of law often described as a juristic person. It is ametaphysical entity created in contemplation of the law.

This person is referred to as a corporation or incorporated association.

CORPORATION OR INCORPORATED ASSOCIATION

This is an association of persons recognized as a legal entity. It is an independent legal existence.

It has own rights and is subject to obligations. It has capacity to own property, contract, sue or be sued and perpetual succession.

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CREATION/FORMATION OF CORPORATIONS

An incorporated association may be brought into existence in any of the following ways:

1. **Registration:** This is a process of incorporation provided by the Companies Act[1]. It is evidenced by a certificate if Incorporation which is the 'birth certificate' of the corporation. Corporations created by registration are Public and Private Companies.
2. **Statute:** Acts of parliament often create incorporated associations. The corporationowes its existence to the Act of Parliament.
3. **Charter:** Under the Universities Act[2], when a private university is granted by charter,by the relevant authority it becomes a legal person of discharging its powers and obligations.

TYPES OF CORPORATIONS

1. Corporations *Sole*

This is a legally established office distinct from the holder and can only be occupied by one person after which he is succeeded by another. It is a legal person in its own right with limited liability, perpetual succession, capacity to contract, own property and sue or be sued. Examples include:

a) Office of the public trustee
b) Office of the Permanent Secretary to the Treasury

2. Corporations Aggregate

This is a legal entity formed by two or more persons for a lawful purpose and whose membership consists of at least two persons. It has an independent legal existence with limited liability, capacity to contract, own property, sue or be sued and perpetual succession. Examples include: public and private companies.

3. Registered Corporations

These are corporations created in accordance with the provisions of Companies Act. Certain documents must be delivered to the Registrar of companies to facilitate registration of the company. These include memorandum of association, articles of association, and statement of nominal capital.

Examples of registered corporations are; public and private companies

4. Statutory Corporations

These are corporations created by Acts of Parliament. The Act creates the association, gives it a name and prescribes the objects. Examples: Kenya Wildlife Services, Agricultural Finance Corporation, Public Universities, Central Bank etc.

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5.Chartered Corporations

These are corporations created by a charter granted by the relevant authority.

The charter constitutes the association a corporation by the name of the charter. e.g. Private universities.

FEATURES OF CORPORATIONS

1. **Legal personality:** A corporation is a legal person distinct and separate from itsmembers and managers. It has an independent legal personality. It is a body corporate with rights and subject to obligations. In *Salomon v. Salomon & Co Ltd (1897),* the House of Lords stated that

   > "…the company is at law a different person altogether from the subscribers to the memorandum".

   The *ratio decidendi* of this case is that when a company is formed, it becomes a legal person, distinct and separate from its members and managers.

2. **Limited liability:** The liability of a corporation is limited and as such members cannot be called upon to contribute to the assets of a corporation beyond a specified sum. In registered companies liability of members is limited by shares or guarantee. Members can only be called to contribute the amount, if any, unpaid on their shares or the amount they undertook to contribute in the event of winding up. This is liability limited by shares and by guarantee respectively.

3. **Owning property:** a corporation has the capacity to own property. The property of a corporation belongs to it and not to the members. The corporation alone has an insurable interest in such property and can therefore insure it as was in the case of *Macaura v. Northern Assurance Co Ltd (1925).* In this case the plaintiff was the principal shareholder and the company owed him £19,000. The Company had bought an estate of trees from him and later converted them to timber. The plaintiff subsequently insured the timber with the defendant company but in his own name. The timber was destroyed by fire two weeks thereafter. The Insurance Company refused to compensate the plaintiff for the loss and he sued. It was held that he wasn't entitled to compensation since he had no insurable interest in the timber.

4. **Sue or be sued:** Since a corporation is a legal person, with rights and subject toobligations, it has the capacity to enforce its rights by action and it may be sued on its obligations e.g. when a wrong is done to a company, the company is the *prima facie* plaintiff.

   It was held in *Foss v Harbottle,* where some directors had defrauded their company but members had resolved in a general meeting not to take any action against them. However, two minority shareholders sued the directors for the loss suffered by the company. The action was struck off on the ground that the plaintiff had no *locus standi* as the wrong in question had been committed against the company.

5. **Capacity to contract:** A corporation has capacity to enter into contracts; be theyemployment or to promote the purposes for which they were created. For example; a company has capacity to hire and fire. It was so held in *Lee v. Lees Air farming Co. Ltd(1961)*

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6. **Perpetual Succession:** Since a corporation is created by law, its life lies in theintendment of law. It has capacity to exist in perpetuity. It has no body, mind or soul. For example, the death of directors or members of a company cannot determine a company's life. It can only be brought to an end through the legal process of winding up.

UNINCORPORATED ASSOCIATIONS

These are associations of persons who come together to promote a common and lawful purpose.

They have no independent legal existence and property if any is jointly owned or is held in trust for the benefit of all members.

The rights of individual members are contained in the Constitution of the association.

Members are personally liable for debts and other liabilities of the association and are liable to lose personal assets if the association is unable to pay its debts (insolvent).

The associations can sue or be sued through their principal officers (chairman, secretary, treasurer).

The law which regulates those associations is the law which regulates the activities they engage in. e.g. Partnerships, Trade Unions, clubs, Welfare Associations, Staff Unions, political parties.

5.2 INCORPORATION

This is a legal process by which a partnership or other form of unincorporated association is converted to a registered company.

It thereupon becomes a legal person in its own right. The most fundamental attribute of incorporation from which all other consequences flow is that when an association is incorporated it becomes a legal person, separate and distinct from its members and managers.

It acquires an independent legal existence. It becomes a body corporate. This was the rule in *Salomon-v- Salomon &co Ltd.*

FORMATION OF A LIMITED COMPANY

This is by registration under the Companies Act. In order to incorporate themselves into a company, those people wishing to trade through the medium of a limited liability company must first prepare and register certain documents. These are as follows:

1. **Memorandum of Association**: This is the document in which the people express *interalia* their desire to be formed into a company with a specific name and objects. The Memorandum of Association of a company is its primary document which sets up its external Constitution and objects.

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Contents of the Memorandum Of Association

a) **Name Clause;** Describes the name of the Company with “Limited” or “Ltd” as the last word thereof for companies limited by Shares or Guarantee.
b) **Registered Office Clause;** States that the registered office of the Company will be situate in Kenya.
c) **Objects Clause;** Sets out the purpose for which the Company is incorporated. It describes the contractual capacity of the Company. It delimits the Company’s contractual capacity.
d) **Capital Clause;** Specifies the capital with which the company proposes to be registered and the division thereof.
e) **Liability Clause;** states whether the member’s liability is limited or unlimited and whether limited by shares or by guarantee.
f) **Association or Declaration Clause;** States the desire of the subscribers to be formed into a company.
g) **Particulars of Subscribers;** Name of the subscribers, postal addresses, occupation, number of shares taken, e.t.c.
h) **Date;** A memorandum must be dated.

2. **Articles of Association**; whereas the memorandum of association of a company sets out its objectives and external Constitution’, the Articles of Association contain the rules and regulations by which its internal affairs are governed dealing with such matters as shares, share capital, company’s meetings and directors among others. The Articles act as the company’s internal constitution

   Both the Memorandum and Articles of Association must each be signed by seven persons in the case of a public company or two persons if it is intended to form a private company. These signatures must be attested by a witness. If the company has a share capital each subscriber to the share capital must write opposite his name the number of shares he takes and he must not take less than one share.

3. **Statement of Nominal Capital** – this is only required if the company has a share capital. It simply states that the company’s nominal capital shall be a specified amount of shillings. The fees that one pays on registration will be determined by the share capital that the company has stated. The higher the share capital, the more that the company will pay in terms of stamp duty.

4. **Declaration of Compliance**: this is a statutory declaration made either by the advocates engaged in the formation of the company or by the person named in the Articles as the director or secretary to the effect that all the requirements of the Companies Act have been complied with. Where it is intended to register a public company, Section 184 (4) of the Companies Act also requires the registration of a list of persons who have agreed to become directors and Section 182 (1) requires the written consents of the Directors.

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These are the only documents which must be registered in order to secure the incorporation of the company. In practice however two other documents which would be filed within a short time of incorporation are also handed in at the same time. These are:

1. Notice of the situation of the Registered Office which under Section 108(1) of the statute should be filed within 14 days of incorporation;
2. Particulars of Directors and Secretary which under Section 201 of the statute are normally required within 14 days of the appointment of the directors and secretary.

The documents are then lodged with the Registrar of companies and if they are in order then they are registered and the Registrar thereupon grants a certificate of incorporation and the company is thereby formed.

Section 16(2) of the Act provides that from the dates mentioned in a certificate of incorporation the subscribers to the Memorandum of Association become a body corporate by the name mentioned in the Memorandum capable of exercising all the functions of an incorporated company.

It should be noted that the registered company is the most important corporation.

5.3 STATUTORY CORPORATIONS

The difference between a statutory corporation (parastatal) and a company registered under the Companies Act is that a statutory corporation is created directly by an Act of Parliament.

The Companies Act does not create any corporations at all. It only lays down a procedure by which any two or more persons who so desire can themselves create a corporation by complying with the rules for registration which the Act prescribes.

TYPES OF REGISTERED COMPANIES

Before registering a company the promoters must make up their minds as to which of the various types of registered companies they wish to form.

1. They must choose between a **limited** and **unlimited company**; Section 4 (2) (c) of the Companies Act states that “a company not having the liability of members limited in any way is termed as an unlimited company.” The disadvantage of an unlimited company is that its members will be personally liable for the company’s debts. It is unlikely that promoters will wish to form an unlimited liability company if the company is intended to trade. But if the company is merely for holding land or other investments the absence of limited liability would not matter.
2. If they decide upon a limited company, they must make up their minds whether it is to be limited by **shares** or by **guarantee**. This will depend upon the purpose for which it is formed. If it is to be a non-profit concern, then a guarantee company is the most suitable, but if it is intended to be a profit making company, then a company limited by shares is preferable.

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3. They have to choose between a **private company** and a **public company**. Section 30 of the Companies Act defines a private company as one which by its Articles;

   (i) Restricts the rights to transfer shares;
   (ii) Limits the number of its members to fifty (50);
   (iii) Prohibits the invitation of members of the public to subscribe for any shares or debentures of the company.

A company which does not fall under this definition is described as a public company.

In order to form a public company, there must be at least seven (7) subscribers signing the Memorandum of Association whereas only two (2) persons need to sign the Memorandum of Association in the case of a private company.

When a partnership or other forms of unincorporated associations are incorporated, it becomes a registered company which may be public or private.

The registered company is the most advanced form of business association in use today.

This is because it enjoys certain advantages not available to partnerships and sole proprietors.

Hence the balance is always tilted towards the company (incorporation). On incorporation, the association becomes a body corporate. It has a legal personality of its own.

ADVANTAGES OF THE REGISTERED COMPANIES

This can also be referred to as **Advantages of Incorporation**:

1. **Limited liability:** Members of a registered company have limited liability; the extent towhich they can be called upon to contribute to the assets of the company in the event of winding up is limited by shares or guarantee. Members are not liable to lose private assets if the company is insolvent.
2. **Perpetual succession:** Since a registered company is created by law, its life lies in theintendment of the law. It has the capacity to exist in perpetuity. This is advantageous where the company's business is prosperous. It also encourages investment on a long-term basis.
3. **Capacity to contract and own property**: A registered company has legal capacity toown property and can enter into contractual relationships set out in the objects clause.
   The company therefore has capacity to invest to enhance profitability.
4. **Sue or be sued:** A registered company has capacity to enforce its rights by court actionand may be sued on its obligations. Members are not bound to sue on behalf of the company and cannot generally be sued for the wrongs of the company.
5. **Wide capital base:** Compared to other forms of business associations, the registeredcompany has the widest capital base by reason of the wide spectrum of membership.
6. **Transferability of shares:** Under section 75 of the Companies Act, the shares or otherinterests of any member of the company shall be moveable property transferable in manner provided by the Articles. Shares in public and private companies are transferable. In public companies, they are freely transferable. The transfer is restricted in private companies under the ambit of Section 30 of the Act. Transferability of shares ensures that company membership keeps on changing from

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time to time and the company could take advantage of the

skills of the members.

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7. **Specialized / qualified management:** companies are managed by directors electedby members in general meeting. Under section 177 of the Companies Act, every private company must have at least **one** director while a public company must have at least **two**. Shareholders have the opportunity to elect qualified persons as directors.
8. **Borrowing by floating charge:** Registered companies are free to utilize the facility offloating charge to borrow. This is the use of floating assets as a security. The charge is equitable and remains dormant until crystallization. A floating charge has several advantages:
   a. It enables a company with no fixed assets to borrow.
   b. It enhances the borrowing capacity of a company with fixed assets.
   c. It does not interfere with the ordinary business of the company.

DISADVANTAGES OF THE REGISTERED COMPANIES

These can also be referred to as Disadvantages of Incorporation;

1. **Formalities:** Companies are subject to too many legal formalities like formation, meetings, accounts, winding up etc.
2. **Publicity:** Companies are subject to undue publicity e.g. a company's documents are open to public scrutiny. Public companies must submit annual accounts. General meetings are held in public. Winding up is conducted in the eyes of the public.
3. **Expenses:** The registered company is the most expensive form of business association to form, maintain or wind up.
4. **Doctrine of *ultra vires*:** The capacity of a company is restricted to transactions set forth in the objects and those that are reasonably incidental thereto. Other transactions are *ultra vires* and therefore null and void.
5. **Corporation tax:** The tax payable by companies is relatively higher. This reduces the amounts of profits available to members as dividend.
6. **Participation in management**: Members other than directors are actively involved in the day-to-day affairs of the company.

5.4 PARTNERSHIP

The law relating to partnership in Kenya is contained in the Partnership Act[3] and the Limited Partnership Act[4].

Definition: Under Section 3(1) of the Partnership Act, "Partnership is the relation which subsistsbetween persons carrying on a business in common with a view of profit"

Elements of the Definition

1. A partnership is an association of persons.
2. There must be a business i.e. some trade, profession or occupation.
3. The business must be carried on in common. That means even the so called Dormant/ Sleeping Partners are deemed to real partner
4. The business must be profit motivated.

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TYPES OF PARTNERSHIPS

Under Kenyan Law there are two types of partnerships, namely:-

1) General
2) Limited

CHARACTERISTICS OF PARTNERSHIP

1. **Membership:** It consists of 2 – 20 members
2. **Personality:** It is an unincorporated association
3. **Utmost good faith:** It is a contract*uberimae fidei*
4. **Agency:** Each partner is agent of every other and the firm.
5. **Sue or be sued:** It can sue or be sued in its registered name
6. **Profit-Motivated:** A partnership is a profit-motivated enterprise.
7. **Liability:** A partner's liability for debts and other obligations of the firm is generallyunlimited.
8. **Death, bankrupt or insanity** may lead to dissolution.

FORMATION OF PARTNERSHIP

The formation of a partnership is not subject to any legal formalities, the agreement between the parties may be:-

a) Oral or by word of mouth.
b) Written with or without seal
c) Implication from conduct of the parties.

However, the partners may on their own accord reduce the basis of their relationship into a formal document detailing the terms and the condition of the association. The document is the **Partnership Deed** or **Agreement or Articles of Partnership**. It is not a legal requirement.

Contents of the Partnership Deed

1. Nature of business
2. Contribution of the partners. (capital)
3. Profit sharing ratio
4. Rules for determining interest on capital
5. Method of calculating goodwill
6. Power of partners
7. Accounts and audit
8. Expulsion of Partners
9. Arbitration etc.

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In the absence of a Partnership Deed, the provisions of the Partnership Act apply.

RULES /PRINCIPLES APPLICABLE IN THE ABSENCE OF A PARTNERSHIP DEED

The rules applicable are contained in Section 28 and 29 of the Partnership Act.

1. Profit and loss are shared equally
2. If a partner incurs liability while discharging the firm's obligations he is entitled to indemnity.
3. If a partner lends money to the firm, he is entitled to interest on the principal at the rate of 6% per annum
4. A partnership can only change its business with consent of all partners
5. A person can only be admitted as partner with consent of all existing partners.
6. A partner is not entitled to interest on capital before the ascertainment of profit.
7. Every partner is entitled to take part in the management of the firm's business.
8. A partner is not entitled to remuneration for taking part in the management of the firms business.
9. The books of account of the firm must be accessible to all parties
10. Under section 29 of the Act, a partner can only be expelled from the firm if the power to do so is expressly vested another partners.

ADVANTAGES OF A PARTNERSHIP

1. **Specialization and division of powers:** Where the association is professionoriented.
2. **Sharing of management:** All partners are entitled to take part in the firm'smanagement.
3. **Wide capital base**: this will assist in pooling together working and investment capital.
4. **Easy to form:** Formation is not subject to many legal formalities.
5. **Flexibility:** Partners are free to change the nature of business, provided all agree.
6. **Sharing of Losses:** Losses and Liabilities are shared amongst the partners therebycushioning the detriment.

DISADVANTAGES OF A PARTNERSHIP

1. Liabilities of partners for debts and obligations of the firm is unlimited i.e. partners are liable to use personal assets if the firm is insolvent.
2. Sharing of profits reduces the amount available to individual partners.
3. A single partner's mistake affects all partners.
4. Disagreements between partners often delay decision-making.
5. Tends to rely on a single partners effort to manage.
6. Death, bankruptcy, or insanity of a partner may lead to dissolution.

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COMPARISON AND CONTRAST BETWEEN COMPANIES AND PARTNERSHIPS

	Companies	Partnerships
Membership	Private company; 2-50 excluding employees. Public company; minimum of 7 persons	2 -20
Legal persons	A company is a corporation i.e. it is a body corporate.	A partnership is unincorporated.
Liability	Liability of members is limited by shares or guarantee	Liability is generally unlimited.
Existence	Have perpetual succession	Death, bankruptcy or insanity of a partner may lead to dissolution.
Ownership of property	Have capacity to own property	Property is jointly held by all partners
Management	By directors elected by members	By the partners themselves
Formalities	Companies are subject to the provisions of the Companies Act	Are not subject to any strict legal formalities.
Agency	Directors are agents when they contract on behalf of the company	Each partner is an agent of every other and the fi rm
Doctrine of *ultra vires*	Companies are subject to this doctrine	Partnerships are not subject to this doctrine
Auditors	Companies must have auditors	Are not obliged to have auditors
Meetings	Must hold A.G.M. every year	Are not obliged to hold any meetings

ILLEGAL PARTNERSHIPS

Certain partnerships are deemed illegal e.g.

1. A partnership formed for an illegal purpose
2. A professional fi rm with unqualifi ed partners
3. A partnership with more than 20 persons. As was the case in *Fort Hall Bakery SupplyCo. V. Fredrick Muigai Wangoe (1959)* where an association of 45 persons purportedto carry on business as a partnership. It had purportedly sued the defendant, a former manager in its name. The action was struck off as the body was not a partnership or company.

In the formation of a partnership, partnership are free to give their fi rm any name which is registerable under the Registration of Business Names Act[5], The name must not mislead the public or be intended to take advantage of an existing business.

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In a partnership, parties may be classified as:-

i. Real and *Quasi*
ii. Minor and Major
iii. Active and dormant / sleeping
iv. Limited and General

RULES FOR DETERMINING THE EXISTENCE OF A PARTNERSHIP

Under Section 4 of the Partnership Act, the following rules are applicable in determining whether a partnership exists;

1. Under Section 4 (a) of the Act, joint tenancy, tenancy in common property or part ownership does not of itself constitute a partnership in respect of the property owned or held.
2. Under Section 4 (b) of the Act, the sharing of gross returns of business not of itself constitutes the person's partners in the business.
3. Under Section 4 (c) of the Act, the receipt by a person of a share of a profit of a business is *prima facie* evidence that he is partner in the business. However, the receipt of an amount which varies or is contingent upon the profit of a business does not constitute one a partner.

In *Davis v. Davis,* it was held that sec. 4 (c) of the Partnership Act is not contradictory. It means that, if the sharing of profit is the only circumstances to be considered and a person receives a share thereof, then he is a partner. However, if other circumstances are to be taken into consideration, the sharing of profit cannot of itself determine whether one is a partner or not.

Under sec. 4 (a) there are several circumstances where persons who are not partners receive an amount contingent upon the profit of the business E.g.

1. Payment of remuneration to servant or agent where the amount varies with the level of profit.
2. Payment of a liquidated debt where the amount payable varies with the profit of the business.
3. Payment for goodwill where the amount is contingent upon the firm profit.
4. Payment of annuity to a widow or child of a deceased partner where the amount varies with the level of profits.

RELATIONS BETWEEN PARTNERS AND THIRD PARTIES

(Liability of Partners)

Under sec. 7 of the Partnership Act, every partner is an agent of each other and the firm. The liability of the partners for debts of the firm is governed by the **Law of Agency**[6]. A partner exercises both real and ostensible authority, and the firm is generally liable for debts arising in the conduct of a partner.

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However, for the firm or other partners to be held liable for the acts of a partner, it must be evident that:

1. The partner was acting in the business of the firm.
2. He was acting in the usual way.
3. He was acting in his capacity as a partner.

In other circumstances a partner would be held personally liable: E.g.

1. If he is prohibited from acting on behalf of the firm.
2. He signs a document without express authority

A 3rd party who has contracted with partnership may sue:-

i. The partner dealt with or
ii. All the partners

If a single partner is sued and his assets cannot make good the firms liability, the other partners cannot be sued. Suing all the partners enables the plaintiff to execute is judgment against all the partners since they are jointly liable.

Liability of a Retiring Partner

Unless otherwise agreed, a retiring partner is only liable for debts and other liabilities upon the date of retirement.

Liability of an Incoming Partner

Unless otherwise agreed, such a party is only liable for debts and other liabilities arising from the date he became a partner.

Liability of a Minor Partner

Under Section 12 of the Partnership Act, a minor partner is not personally liable for debts and other liabilities of the firm. However, his share in the property is liable. Under sec. 13 if a minor partner does not repudiate the partnership during infancy or within a reasonable time after attaining the age of majority, he is personally liable for debts and other liabilities from the date he became a partner.

Liability by Estoppel

A person, who is not a partner, may be held liable as a partner by the equitable doctrine of estoppel. Under Section 18 of the Act, if a person who is not a partner knowingly permits himself to be held out a partner or represents himself as a partner with the firms knowledge and third parties rely upon the representation, he is estopped from denying the apparent partnership and he is liable.

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RELATIONS BETWEEN PARTNERS THEMSELVES (*INTER SE*)

The relationship between partners *inter se* is governed by the agreement between them. However, a partnership agreement is a contract *uberrimae fidei* (contract of the utmost good faith. Each partner is entitled to utmost fairness from the co-partners. The principal of utmost good faith in partnership is expressed the following ways:-

1. A partner with a personal interest in a transaction entered into by the firm is bound to disclose the same.
2. Any secret profit made by a partner must be accounted to the firm.
3. A partner may not compete with the business of the form.
4. A partner can only be expelled from the firm in good faith.

ASSIGNMENT

A partner may assign his interest in the firm either absolutely or as a security for a loan. The person to whom the interest is assigned (assignee) becomes entitled to the assigning partner's share of profit. He however does not become a partner.

Incapacities of an Assignee Partner

1. He cannot demand an account from the partners
2. He cannot take part in the management of the firms business
3. He has no right of access to the limit books of accounts

GOODWILL

This is the relationship between a business and its customer. In *Crutwell V. Lye,* it was held that the Goodwill is the probability of customer frequenting the old place of business after its ownership or management has damaged hands.

It is part of the assets of the firm.

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5.5 DISSOLUTION OF PARTNERSHIP

A partnership may be dissolved with or without the courts intervention.

1. DISSOLUTION OR WINDING UP BY THE COURT

Under sec. 39 of the Partnership Act, a partnership may be wound up by the court on application if it satisfied that:

i) A partner has become a lunatic or is permanently of unsound mind
ii) A partner has become permanently incapable of discharging his functions as a partner.
iii) A party is continuously guilt of wilful breach of the partnership agreement.
iv) A partner has conducted himself on manner unfairly prejudicial to the firm and his continued association is likely to bring the firm's name into disrepute.
v) The firms businesses can only be carried on at a loss.
vi) Circumstances are such that it is just and equitable that the firm be wound up e.g. Disagreement.

2. DISSOLUTION WITHOUT THE COURTS INTERVENTION

1. **Performance**: A partnership dissolves on the accomplishment of the purpose for whichit was formed.
2. **Lapse of time**: A partnership comes to an end on operational of the duration prescribedby the parties.
3. **Mutual agreement**: This is a situation where the parties agree to dissolve the firm. Allpartners must be party to the agreement
4. **Death**: Unless the partnership deed otherwise provides, the death of a partner leads todissolution.
5. **Bankruptcy**: Unless the partnership deed otherwise provides a partnership dissolves ifa partner is declared bankruptcy by a court of competent jurisdiction.
6. **Termination at will or at notice**: Where the duration of the partnership is not specified,it may be dissolved by notice i.e. a partners notice to the others of his intention to have the firm dissolved
7. **Illegality:** If the business of the partnership becomes illegal by reason of change of lawor otherwise, the firm is dissolved.
8. **Charging a partner's interest**: If a partner's interest in the firm is charged by a courtorder for a private debt, the firm is dissolved.

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DISTRIBUTION OF ASSETS

In the dissolution of a partnership, assets are distributed in the following order:

1. Creditors other than parties have priority
2. Creditors who are partners rank next.
3. The balance is distributed between the partners on the basis of their capital contribution
4. The surplus, if any, is distributed between the partners on the basis of the profit sharing ratio.

This is the rule in ***Garner v. Murray*** where, three partners, A, B and C contributed an equal amount of capital but agreed to share profit equally. In dissolution or realization, there was a deficit in C's capital account and C was insolvent and hence unable to make good the deficit.
It was held that before A and B could be paid what was due to them ratably, they had to make good the deficit in C's capital account on the basis of the last agreed balances in their capital accounts.

LIMITED PARTNESHIP

a. The law relating to Limited Partnership is contained in the Limited Partnership Act, This Act creates a hybrid partnership with characteristics of companies. However it is a partnership with the meaning of Section 3(1) of the Partnership Act. The Limited partnership Acts adopts the definition for partnership contained in sec. 3 (1) of the Partnership Act.
b. It is an unincorporated association.
c. Membership consists of 2 – 20 persons.
d. It is profit motivated.

However Limited Partnership differs from a general partnership in certain aspects. The Limited Partnership Act modifies the law of partnerships in the following respects:

1. **Registration:** Under Section 7 of the Limited Partnership Act a limited partnership mustbe registered with the Registrar of companies.
   For this to be done there must be delivered to the Registrar a written memorandum setting out:-
   a. The firm name
   b. General nature of business
   c. Principal place of business
   d. Particulars of limited partners and their contribution
   e. Date of commencement etc. failing which the partnership becomes General.
2. **Composition of Members**: A limited partnership must have at least one generalpartner and one limited partner.
3. **Membership**: A limited liability company may be admitted as a limited partner.
4. **The Limited Partner**: The liability of this partner is limited to the amount of capitalcontributed. He cannot therefore be sued for debts or other liabilities of the firm.

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Under Sec. 5 of their Limited Partnership Agreement; the Limited Partner is subjected to the following incapacities:-

1. He cannot withdraw or receive back his share during the subsistence of the firm.
2. He does not bind the firm
3. He is not deemed to be an agent of the other partners
4. He may not take part in the management of the business and if he does, he becomes a general partner for the duration and may be sued for debts and other liabilities arising.
5. His death, bankruptcy or insanity does not lead to dissolution
6. He cannot dissolve the partnership by notice.
7. A person may be admitted as a partner without the consent of the limited partner.
8. Differences between partners are resolved by a majority of the general partners.
9. The discharging of his interest by a court order for a private debt does not lead to dissolution.
10. However, if a limited partner assigns his share, the assignee becomes a Limited Partner.

5.6 DOMICILE

This is the country in which a person has or is deemed by law to have a permanent home. It is the country of permanent residence.

The law relating to domicile in Kenya is contained in the Law of Domicile Act[7]
This statute codifies the common law on domicile with a few modifications.

TYPES OF DOMICILE

The law of Domicile law recognizes three types of domicile namely:

a. Domicile of origin
b. Domicile of dependence
c. Domicile of chance

1. DOMICILE OF ORIGIN

This is the domicile a person acquires at birth. Sections 3-6 of the Law of Domicile Act sets out the rules / principles governing acquisition of domicile of origin:

a. An infant born legitimate acquires the domicile of the father.
b. An infant born after the father's death acquires the domicile of the father as at the date of death.
c. An infant found without parents (**foundling infant**) is deemed to acquire the domicile of the country in which he is found.
d. An infant legitimated by the marriage of its parents acquires the domicile of the father as at the date of legitimating.

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e. An adopted infant acquires the domicile of the adopter.
f. An infant adopted by spouses acquires the domicile of the husband.
g. Domicile of origin is never lost but may be suspended when a person acquires a domicile of choice.

2. DOMICILE OF DEPENDENCE

This is the domicile of a person who is legally dependant on another.

This domicile changes with that of the other person e.g. the domicile of an adopted infant depends on that of the adopter, while that of a legitimate infant depends on that of the father. Domicile of an infant married woman depends on that of her husband.

3. DOMICILE OF CHOICE

This is the domicile a person acquires by choosing which country to make his permanent home.

Every person of sound mind who has attained the **age of majority** (18 years) has capacity to acquire an independent domicile of choice.

For a person to acquire a domicile of choice, he must:

- Take up actual residence in the country of choice.
- Have the intention of making the country his permanent home.

Once a domicile of choice is acquired, the domicile of origin is suspended but is reverted to when the domicile of choice is lost.

Under the Law of Domicile Act, upon marriage, a woman acquires her husband's domicile.

Under Section 10 (1) of the Act, no person may have more than one domicile at a time and no person shall be deemed to be without domicile.

IMPORTANCE OF DOMICILE

1. It is important to ascertain the domicile of a person as it determines which country's laws govern the validity of a person's will, marriage or divorce.
2. It determines the personal law of a person.

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5.7 NATIONALITY OR CITIZENSHIP

This is the legal and political relationship between an individual and the state or country. It describes one's membership.

Citizens enjoy certain rights and are subject to various obligations e.g. a citizen owes allegiance to the head of state or government.

Citizens may be compelled to perform certain public duties.

Nationals are entitled to vote and have/enjoy the right of protection where they are. The law relating to nationality is municipal or national law.

In Kenya citizenship is provided for by the Constitution and the Kenya Citizenship Act[8] .

ACQUISITION OF NATIONALITY

Under the Constitution of Kenya, a person may become a citizen of Kenya in any of the following ways:

1. Birth
2. Descent
3. Registration
4. Naturalization

NATIONALITY BY BIRTH

A person may become a citizen of Kenya by birth in the following circumstances:

- A person born in Kenya before 11/12/63 became a citizen on 12/12/63 if either parent was born in Kenya.
- A person born in Kenya after 11/12/1963 becomes a citizen of Kenya at birth if either parent is a citizen of Kenya.

NATIONALITY BY DESCENT

A person becomes a citizen of Kenya by descent in the following circumstances:

- A person born outside Kenya before 11/12/1963, became a citizen of Kenya on 12/12/1963 if the father became or would have become a citizen of Kenya by birth but for his death.
- A person born outside Kenya after 11/12/1963 becomes citizen of Kenya at birth if the father is a citizen of Kenya.

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FOREIGNERS AND ALIENS

Foreigners are persons not native or naturalized in the country in question

Aliens are residents born or belonging to another country who have not acquired citizenship bynaturalization.

They may become citizens of Kenya by registration or naturalization.

NATIONALITY BY REGISTRATION

Under the provisions of the Constitution, the following categories of persons may be registered as citizens of Kenya on application to the Minister:

1. A woman married to a citizen of Kenya is entitled on application to be registered as a citizen; the application may be made during the lifetime of her husband.
2. A citizen of the commonwealth who has been lawful and ordinarily resident in Kenya for not less than 5 years.
3. A citizen of any African Country which permits Kenyans to be registered as her own citizen, who has been lawfully and ordinarily resident in Kenya for at least 5 years.
4. A person born outside Kenya but whose mother is a citizen of Kenya.
5. A person born in Kenya before 11/12/1963 if neither parent was born in Kenya.

NATIONALITY BY NATURALIZATION

Any foreigner may become a national of Kenya by naturalization. Acquisition of nationality by naturalization is preceded by a formal application.

Section 93 (1) of the Constitution sets the minimum conditions an applicant must fulfil.

The Minister must be satisfied that the applicant:

1. Has attained the age of 21
2. Is of good character.
3. Has adequate knowledge of the Swahili language.
4. Intends to continue residing in Kenya if naturalized.
5. Has been ordinarily and lawfully resident in Kenya for 12 months immediately preceding the application.
6. Has been ordinarily and lawfully resident in Kenya for a period of 4 years or for periods amounting in the aggregate to not less than 4 years during the 7 years immediately preceding the 12 months in (5) above.

The Minister may grant Certificate **of Naturalization** whereupon the applicant becomes a citizen of Kenya.

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LOSS OF NATIONALITY

A person who is a citizen of Kenya may lose his nationality status in any of the following ways:

1. Renunciation
2. Lapsing
3. Revocation/deprivation

RENUNCIATION

Under section 6 (1) of the Kenyan Citizenship Act, a person who is a citizen of Kenya as well as some other country may renounce his Kenyan citizenship by completing **Form 'L'** on whose registration the person ceases to be a citizen of Kenya.

However, under section 6 (2) of the Act, the Minister may decline to register the renunciation if:

1. It is made during a period of war in which Kenya was engaged.
2. He is satisfied it is contrary to public policy of Kenya.

LAPSING OF NATIONALITY

Under section 97 (1) of the Constitution, a person who on attaining the age of 21 is a citizen of Kenya as well as some other country loses his Kenyan citizenship automatically if he does not within the prescribed duration:

1. Renounce the nationality of that other country.
2. Take the oath of allegiance
3. Make and register a declaration of his intention to continue residing in Kenya.

DEPRIVATION / REVOCATION OF NATIONALITY

A person who is a citizen of Kenya by registration or naturalization may lose his nationality status at the instance of the Minister.

The Minister is empowered to revoke the nationality if any of the grounds set out in section 94 (1) of the Constitution justify.

The grounds include:

1. **Disloyalty/disaffection:** The citizen has shown himself by act or speech to be disloyalor disaffected towards Kenya.

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2. **Trade or communication with alien enemies:** The citizen has during a war in which Kenya was engaged unlawfully traded or communicated with enemies or has engaged in trade or business which to his knowledge was carried on to assist the enemy in the war.
3. **Conviction for criminal offence:** The citizen has within 5 years of registration ornaturalization been convicted for a criminal offence and sentenced to imprisonment for 12 months or more.
4. **Residence outside Kenya:** The citizen has continuously resided outside Kenya for aperiod of 7 years while:
   a. Not in the service of Kenya.
   b. Not in the service of an International Organization of which Kenya is a member.
   c. Not renewing his intention to retain Kenyan nationality with the Kenyan embassy annually.
5. **Fraud/misrepresentation:** The registration or naturalization was obtained by means offraud, false representation or concealment of material facts.

CHAPTER SUMMARY

Corporations: This is an association of persons recognized as a legal entity. It has an independent legal existence

Formation of corporations:

- By Registration
- By Statute
- By Charter

Classifications of corporations:

1. Corporation *Sole*
2. Corporation Aggregate
3. Registered Corporations Statutory Corporations
4. Statutory Corporations
5. Chartered Corporations

Characteristics of corporations:

1. Legal personality
2. Limited Liability
3. Ownership of property
4. Sue or be Sued
5. Capacity to contract
6. Perpetual Succession

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Advantages of registered companies:

1) Limited liability.
2) Perpetual Succession.
3) Capacity to contract and own property
4) Capacity to sue and be sued.
5) Wide capital base
6) Transferability of shares
7) Specialized/Qualified management
8) Borrowing by floating charge

Disadvantages of registered companies:

1. Many Formalities:
2. More Publicity
3. Many Expenses to be incurred.
4. *Ultra vires:* The company cannot do things that are not stated in its objects.
5. Corporation tax: Registered Companies are taxed at a rate of 30%
6. Participation in management is limited. Shareholders are not allowed to participate in management.

Partnerships: Section 3 (1) of the Partnerships Act defines a partnership as '**the relation whichexists between persons carrying on a business in common with a view to profit.'**

Domicile: This is the country in which a person has or is deemed by law to have a permanenthome

The law of domicile act recognizes three kinds of domicile, namely;

- Domicile of origin.
- Domicile of dependence.
- Domicile of choice.

Nationality and citizenship: - This is the legal and political relationship between an individual and the state or country. It describes one's membership

Under the Constitution, a person may become a citizen of Kenya in any of the following ways:

- Birth
- Descent
- Registration
- Registration
- Naturalization

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A person who is a citizen of Kenya may lose his citizenship in any of the following ways:

- Renunciation.
- Lapsing.
- Revocation/Deprivation.

CHAPTER QUIZ

QUESTIONS

1) Give one way in which citizenship may be lost?
2) Kenyan law recognizes which two persons?
3) Which case is authority for legal personality?
4) Which other cases are relevant for an explanation of legal personality?

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CHAPTER QUIZ ANSWERS

1) Renunciation
2) Artificial and Natural persons
3) Salomon v Salomon and company limited.
4) *Macaura v. Northern Assurance Co Ltd (1925), Foss v Harbottle, Lee v. Lees Air farming Co. Ltd (1961)*

SAMPLE EXAMINATION QUESTIONS

QUESTION ONE

May 2000, Question 4

In relation to the Law of Persons, outline 6 consequences of incorporation. (12 marks)

QUESTION TWO

May 2006, Question 3

With reference to the Law of Persons:

i. Distinguish between domicile of origin and domicile of choice. (6 marks)
ii. Specify the conditions that an alien must satisfy before being granted citizenship in your country. (6 marks)

QUESTION THREE

May 2005, Question 2

a) Describe the ways in which a corporation may be established. (4 marks)
b) State and explain the contents of the memorandum of association. (4 marks)
1. Explain the advantages of a private company over a public company. (6 marks)
2. Highlight the circumstances under which a partnership would be dissolved on the application of a partner. (6 marks)

QUESTION FOUR

November 2004, Question 4

a) Define the term “domicile” and citing examples, explain 3 types of domiciles. (10 marks)

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b) Outline the categories of persons eligible to be naturalized as citizens of your country. (5 marks)

c) Under what circumstances a person who is a citizen under naturalization or registration may be deprived of citizenship? (5 marks)

(Footnotes)

[1] Cap 486 Laws of Kenya

[2] Cap 210B Laws of Kenya

[3] Cap 29 Laws of Kenya

[4] Cap 30 Laws of Kenya

[5] Cap 16 Laws of Kenya

[6] Law of Agency is covered in Chapter 9 of this book.

[7] Cap 39 Laws of Kenya

[8] Cap 170 Laws of Kenya

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CHAPTER SIX

THE LAW OF TORTS

▶ OBJECTIVE

To provide the candidate with a broad understanding of the following principles pertaining to the Law of Torts;

- Nature of tortious liability.
- General defenses in the law of tort.
- Negligence.
- Nuisance.
- Tresspass.
- Vicarious liability.
- Occupiers' liability.
- Defamation.
- Limitation of action.

▶ INTRODUCTION

This chapter introduces the reverse of criminal wrongs which are civil wrongs. A tort is a dispute between two persons as opposed to a person and the state. This chapter thus defines what actions constitute torts and what remedies are available.

▶ KEY DEFINITIONS

- **Tort:** It is a civil wrong*other than breach of contract*which gives rise to an action atCommon Law for unliquidated damages or other relief
- **Negligence:** omission to do something which a reasonable man guided upon thoseregulations which ordinarily regulate the conduct of human affairs would do or doing something which a reasonable and prudent man would not have done.
- **Occupier:** a person who has a sufficient degree of control over premises to put himunder a duty of care towards those lawfully upon his premises.
- **Bailor:** A person who owns goods and takes them for bailment
- **Bailee:** A person who takes possession of goods on bailment
- **Bailment:** It is a transaction under which goods are delivered by one party (the bailer)to another (the bailee) on terms, which normally require the bailee to hold the goods and ultimately to redeliver them to the bailor or in accordance with his directions.
- **Tortfeasor:** A person who commits a tort.

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EXAM CONTEXT

This chapter has often been tested. It appears in all the years as from 2000 .The student should be able to explain what a tort is and the various types of torts. In each case the student should be able to establish the various elements of each tort. A general understanding of the defenses is also useful. This chapter has appeared in the following years:-November 2006;May 2006;
November 2005; May 2005; November 2004; May 2004; November 2003; May 2003; November 2002; May 2002; November 2001; May 2001; November 2000; July 2000; May 2000;

INDUSTRY CONTEXT

The law of torts is very applicable in the industry today. Many cases in court today touch on the various torts especially defamation trespass and negligence. The famous Tom Cholomondley case brought to the fore the issue of trespass and the rights an occupier has vis-à-vis the duty owed to the trespasser. Radio presenters such as Caroline Mutoko for kiss FM have also been to court on grounds of defamation. We have also had instances of public nuisance in the Kitengela area as concerns some industrial effluence.

Students also need to grasp the law of torts as it is an emerging area in Kenyan civil litigation.

6.1 THE LAW OF TORTS

WHAT IS A TORT?

A tort is a civil wrong *other than a breach of contract* whose remedy is a common law action for damages or other relief. However, not every wrong is a tort. A single action may give rise to a tort and a crime.

The law of tort protects various personal and proprietary interests.

Tortious liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressable by an action for unliquidated damages.

TORT AND CONTRACT DISTINGUISHED

Tort	**Contract**
The duty is fixed by law	The duty is fixed by the parties
The duty is owed to persons generally	The duty is owed to the parties to the contract
The remedies are few (restricted)	The remedies are far much wider.

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TORT AND CRIME DISTINGUISHED

Tort

It is a wrong redressable by an action for unliquidated damages.

The party suing is an individual or private person.

Crime

It is a wrong the action of which involves punishment.

Almost always the party suing is the state.

THE PARTIES TO A SUIT (CAPACITY / LEGAL LIABILITY IN TORTS)

GOVERNMENT

At common law no action in tort lay against the state (crown) for wrongs expressly authorized by the crown or for wrongs committed by its servants in the course of their employment.

However, under the Government Proceedings Act[1], the Government is liable for tortious acts. Section 4(2) provides; "Subject to the provisions of this Act, the government shall be subject to all those liabilities in tort to which if it were a full person of full age and capacity it would be subject;

i. In respect of torts committed by its servants or agents.
ii. In respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer.
iii. In respect of any breach of duties attaching at common law to the ownership occupation, possession or control of property.

However, Section 13A provides that before one can sue the government he must give a 30 days notice.

Dorset Yatch Co Ltd v Home Office

Facts: An action was brought by owner of property against the home office in respect of damageto his property done by runaway borstal boys. Seven borstal boys ran away one night when the three officers in charge of them were, contrary to instructions, all in bed. They boarded one of the many vessels in the harbour, started it and collided with the plaintiff's yacht, which they then boarded and damaged further. The defendant (Home Office) was held liable for not protecting the plaintiff from the ravages of the borstal boys.

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■ FOREIGN GOVERNMENTS / SOVEREIGNS

Diplomats and foreign sovereign states enjoy absolute immunity to criminal and civil liability before a Kenyan court unless the immunity had been waived by submission to Kenyan Jurisdiction (under the **Vienna Convention on Diplomatic Relations, 1961**).

This applies only where the act was done in the exercise of the sovereignty of the state. Immunity ceases when one engages in private and commercial venture. Immunity can be waived leading to a person being charged.

- **Bankrupts**

May sue or be sued for torts committed.

- **Minors**

After an early period of uncertainty the common law adopted 21 years as the age of majority for most purposes and it remained at this until 1970 when it was reduced by statute to 18 years.[2]

A minor can sue and be sued for tort. A minor can however not sue or be sued in his own name but by his "next friend" (guardian *ad litem*[3]).

In the law of tort there is generally no defense of minority and a minor is as much liable to be sued for his tort as is an adult. In *Gorely v Codd (1967),* the defendant, a 16 ½ year old boy was held liable when he accidentally shot the plaintiff with an air rifle in the course of lurking about.

Minority however may be a defense in an action for the tort of negligence or malice. This is to be inferred from the fact that a young child may well be incapable of the necessary mental state for liability in such torts.

In an action for negligence against a young child, therefore, it is insufficient to show that he behaved in a way which would amount to negligence on the part of the adult. It must be shown that his behaviour was unreasonable for the child of his age.

Parents are not liable for the torts of their children, but in situations where it is established that the child was under control of the parent the commission of the tort by the child will result to liability of the parent.

- **Persons Of Unsound Mind**

Liability depends on whether the person knew what he was doing when he committed the tort. This can be proven by a psychiatrist.

In *Morris v. Mardsen (1952),* the defendant rented a room at a hotel. While there he attacked the manager of the hotel. At that time he was suffering from a disease of the mind. It was established that he knew the nature and quality of his act, but he did not know that it was wrong.

It was held that as the defendant knew that nature and quality of his act, he was liable in tort for assault and battery. It was immaterial that he did not know what he was doing was wrong.

Unsoundness of mind is thus certainly not itself a ground of immunity from liability in tort, and it is submitted that the true question in each case is whether the defendant was possessed of the requisite state of mind for liability in the particular tort in which he is charged.

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- **Husbands And Wives**

Married women can sue and be sued for torts committed according to the 1935 Law Reform (Married women and tort feasors) Act.

The Law *now* recognizes women as *Femme Sole* (having legal capacity to sue and be sued). Under common law the wife was never liable for her torts but her husband was liable for both his torts and those of his wife.

- **Corporations**

A corporation can sue and be sued in its own name for torts committed, but there are some torts which, by their nature, it is impossible to commit against a corporation, such as assault or false imprisonment.

A corporation can sue for the malicious presentation of a winding–up petition or defamation, though the precise limits of the latter are unclear.

Liability of Corporations is however limited. Thus if a servant commits a tort that is *ultra vires* the corporation then the corporation is not liable.

- **Unincorporated Associations**

These cannot sue or be sued for torts committed but they can institute a **representative suit**. The members of the association are not liable for the torts of the association but the individual members are liable for their own torts.

- **Partners**

They are personally liable for their own torts. They can sue and be sued by writing down all the names of the partners and of that partnership.

Each and every partner is liable for a tort committed in the course of the business. It was so held in *Hamlyn v. Houston (1903).*

- **Aliens**

A friendly alien has no disability and has no immunity. An alien enemy is one whose state or sovereign is in war with the sovereign of the state in question. As thus defined an alien enemy unless he is within the realm of license of the sovereign cannot sue in the sovereign's courts.

He can however be sued and can defend an action and if the decision goes against him, he can appeal.

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6.2 GENERAL DEFENCES IN TORT LAW

1. PLAINTIFF'S DEFAULT/CONTRIBUTORY NEGLIGENCE

This defence may be relied upon if the plaintiff is also to blame for his suffering. The defendant must prove that:

i. The plaintiff exposed himself to the danger/risk by act or omission
ii. The plaintiff was at fault or negligent
iii. The plaintiff's negligence or fault contributed to his suffering

This defence doesn't absolve the defendant from liability. It merely reduces the amount of damages payable by the defendant to the extent of the plaintiff's contribution.

This defence is unavailable if the plaintiff is a child of tender years.

If the plaintiffs were to sue and the defendant proved that the plaintiff was on the wrong, that can constitute a defense. Under Common Law, if a person contributed to a tort, that prevented him from suing. It was a complete defence.

The law was however changed by statute under the Common Law Reform Act of 1945. A plaintiff on the wrong can recover as long as he has not contributed to 100% to the tort. Thus if he has contributed 40% he can recover 60%.

2. ACTS OF GOD

Where damage is caused directly by natural circumstances which no human foresight can provide against and of which human prudence is not bound to recognize the possibility, the defense of act of God applies.

For this defense to succeed it must be shown that the act was not foreseeable and that it was unusual.

3. VOLENTI NON FIT INJURIA

This defense is available in circumstances where the plaintiff with full knowledge of the risk voluntarily agrees to undertake the same .The defendant must prove

a) That the plaintiff had actual knowledge of nature and extent of the risk.
b) That the plaintiff agreed to incur the risk voluntarily as was the case in *Tugwell VBurnett.*

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4. NECCESSITY

It may be relied upon if the tort complained of was necessary to protect the society. It is usually relied upon by the state for acts taken to protect the society at large as the interest of the public prevail. (*solus populi suprema lex*)

The critical thing is that the act done has to be reasonable. Necessity is limited to cases involving an urgent situation or imminent peril. The measures taken must be reasonable and this will depend on whether there is human life or merely property in danger.

5. STATUTORY AUTHORITY

This defense may be relied upon by the defendant (usually the State or its agents) if the nuisance is authorized by statute. The defendant has a complete defense only if he can prove that he acted in accordance with the provisions of the Act. Whether the defence succeeds or not depends on the interpretation of the Statute

6.3 SPECIFIC TORTS

1. NEGLIGENCE

In the words of Anderson B in *Blyth v Burmingham Water Works Co*. negligence is the omission to do something which a reasonable man guided upon those regulations which ordinarily regulate the conduct of human affairs would do or do something which a reasonable and prudent man would not have done.

ELEMENTS OF NEGLIGENCE

The tort of negligence consists of three elements which a plaintiff must prove in any action based on negligence.

1. Legal duty of care.
2. Breach of duty.
3. Loss or damage.

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LEGAL DUTY OF CARE

The plaintiff must prove that the defendant owed him a duty of care in the circumstances. The circumstance must have been such that the defendant knew or ought to have known that acting negligently would injure the plaintiff.

Who owes another a legal duty of care?

As a general rule every person owes his neighbour a legal duty of care.

In the words of Lord Atkin in *Donoghue v Stevenson (1932),* a person owes a duty of care to his neighbours. This is the so-called neighbour principal. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour?

The answer seems to be persons who are so closely and directly affected by my acts that I ought to reasonably have them in contention as being so affected when am directing my mind to the acts or omissions which are called into question.

Whether a person owes another a duty of care will depend on whether such a person could reasonably have foreseen injuring the other.

Standard of care

As a general rule the standard of care expected of the defendant is that of a reasonable man of reasonable prudence. This is a person who has the minimum information and knowledge necessary to act reasonably in any situation.

Where professionals and experts are involved the standard of care is that of a reasonably competent professional.

The concept of reasonable man is an artificial concept developed by law to promote objectivity. It is independent of personal subjectivity and prejudices.

Unforeseen plaintiffs

These are circumstances in which a defendant does not owe a plaintiff a duty of care. In such circumstance the plaintiff cannot sustain an action against the defendant irrespective of negligence.

In *Kings v. Phillips* where an expectant mother suffered nervous shock by reason of hearing the son's scream while 70 yard s away, it was held that she could not recover since the defendant driver owed her no legal duty of care.

In *Bourhill v. Young* an expectant mother suffered a nervous shock on hearing a loud band and seeing a pool of blood as a result of an accident caused by a negligently ridden motorcycle. It was that she could not recover since the motorcyclist could not have reasonably foreseen her suffering.

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BREACH OF DUTY

The plaintiff must prove that the defendant acted negligently thereby breaching his legal duty of care. The plaintiff must prove specific acts or omissions the part of the defendant. The plaintiff must adduce evidence to prove his case.

However in certain circumstances negligence is proved without evidence. These cases are referred to as *Res ipsa loquitor* which literally means "it speaks for itself".

This is a rule of evidence by which the plaintiff is deemed to have established negligence on the part of the defendant without adducing any evidence.

Requirements of Res Ipsa

- Absence of explanation; the plaintiff has no evidence on the negligent acts or omissions of the defendant.
- Such a thing does not ordinarily occur when proper care is taken
- The instrument or object which causes the harm was exclusively within the control of the defendant or his servants or his agents.

In *Scott v London and St Catherine's dock* the plaintiff a custom's officer was injured by sugar bags falling on him inside the defendant's warehouse. It was held that the principle of *Res ipsa* applied and he did not have to prove negligence on the part of the defendant.

Effects of Res Ipsa

1. It provides *prima facie* evidence on the part of the defendant
2. It shifts the burden of proof from the plaintiff to the defendant and if the defendant's explanation is credible the plaintiff loses the case

LOSS OR DAMAGE

The plaintiff must prove that as a result of the defendant's breach of duty he suffered loss or damage.

The plaintiff's loss must be traceable to the defendant's breach of legal duty, failing which the plaintiff's damage is deemed to be remote and therefore irrevocable.

The defendant is reasonably liable for any loss which is reasonably foreseeable from his acts or omissions. It was so held in *The Wagon Mound II.*

Question has arisen as to what losses the defendant must have foreseen and courts have taken the view that as long as some loss is foreseeable the defendant is liable for any loss.

In *Bradford v. Robinsons Rental Co. Ltd,* **w**here the plaintiff was exposed to extreme cold and fatigued, in the course of his employment by his employers and as a consequence suffered from frost bite, it was held that the defendants were liable, since his suffering from frost bite was reasonably foreseeable.

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However, the defendant is not liable if the loss or damage suffered is not traceable to the negligent act or omission of the defendant.

DEFENCES TO NEGLIGENCE

1. Contributory negligence

This defense is available in circumstances in which the plaintiff is also to blame for the loss or injury. The defendant must adduce evidence to establish the plaintiff's contribution.

The defendant must prove:-

1. That the plaintiff exposed himself to danger.
2. That the plaintiff was at fault or negligent.
3. That the plaintiff's fault or negligence contributed to his suffering.

Effect of contribution

It reduces the amount of damages recoverable by the plaintiff by the extent of his contribution. However, children of tender years are not guilty of contribution.

2. Voluntary assumption of risk (*volenti non fit injuria*)

This defense is available in circumstances where the plaintiff with full knowledge of the risk voluntarily agrees to undertake the same. The defendant must prove

- That the plaintiff had actual knowledge of nature and extent of the risk
- That the plaintiff agreed to incur the risk voluntarily

In *Dann v Hamilton* the plaintiff had taken a ride on a vehicle driven by a drunken person and his was aware of this fact and as a consequence an accident occurred. The defendant's plea of *volenti* failed since the plaintiff had not consented to incur the risk.

However in *Tugwell v Bunnet* where the defendant's vehicle expressly stated that passengers rode at their own risk and the driver at the material time was drunk to the plaintiff's knowledge but took a ride in the motor vehicle and was injured, the defendant's defense of *volenti* succeeded since the plaintiff appreciated the risk and agreed to incur the same.

3. Statutory authority

If the conduct complained of by the plaintiff is authorized by statute and the defendant has acted in accordance with the provision of the statute the defendant has a complete defense to the plaintiff's action.

However whether or not the defense is complete depends on the interpretation of the statute.

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■ STRICT LIABILITY: THE RULE IN *RYLANDS v. FLETCHER*

Anyone who in the course of non – natural use of his land, accumulates thereon for his own purposes anything likely to do mischief if it escapes is answerable for all direct damage thereby caused.

This is the rule in *Rylands v. Fletcher* where the defendant employed independent contractors to construct a water reservoir on the land, which was separated from the plaintiffs land by adjoining land. In the course the works the contractors came upon some old shafts and passages filled with earth. The contractors did not block them up. Unknown to them, the shafts connected their land with the plaintiff's mines. When the water filled the reservoir, it seeped through the old shafts and into the plaintiff's mines thence flooding them. It was found as a fact that the defendant was not negligent, although the contractors had been. However, although the defendant was neither negligent nor vicariously liable in the tort of his independent contractors, he was held liable by the Court of Exchequer chamber and the House of Lords. The judgment of the Court of Exchequer chamber was delivered by Blackburn J. at P. 279 -280 and it has become a classical exposition of doctrine.

> "We think that the true rule of law is, that the person who for his own purpose brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequences of its escape."

This may be regarded as the 'rule in *Rylands v. Fletcher*'

But what follows is equally important. The court further said:

> "He can excuse himself by showing that the escape was owing to the plaintiff's default; or the act of God: it is unnecessary to inquire what excuse would be sufficient".

The general rule, as above stated, seems to be just in principle.

> "The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from the neighbour's reservoir, whose cellar is invaded by filth of his neighbours or whose habitation is made unhealthy by the fumes and noise and vapours of his neighbours alkali works, is damnified without any fault of his own; and it seems reasonable and just that the neighbour, who has brought something on his own property which was naturally there harmless to others so long as it is confirmed to his own property, but which he knows to be mischievous if it gets on his neighbours should be obliged to make good the damage which ensues if he does not succeed in confining it to his property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences and upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stenches."

Lord Cairns in the House of Lords upheld this judgment but restricted the scope of the rule to where the defendant made a "non-natural use" of the Land.

This decision makes it clear that liability was strict in the sense that the defendant's liability was neither personal nor based on a mere vicarious liability for the negligence of his independent contractors.

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REQUIREMENTS OF THE RULE IN RYLANDS v. FLETCHER 1. THE THING

The rule does not require that the thing should both likely to escape and likely to do mischief on escaping. If this were the case, there would be little difference between the rule in *Rylands v.Fletcher* and negligence. Furthermore, in *Rylands v. Fletcher*, the thing need not be dangerous initself. The most harmless objects may cause damage on escape from a person land.

The rule has been applied to a large number of objects including water, gas, electricity, explosives, oil, vibrations, poisonous leaves of trees, a flag post, a revolving chair at a fair ground, acid smuts from a factory, a car, fire and even at one time gypsies.

In *Musgrove v. Pandelis,* the court applied Blackburn J's test literally where the collected thing did not itself escape but caused the escape of something else. In this case, the defendant was held liable under *Rylands v. Fletcher* for the escape of a fire which started in the engine of his car was found to be an object likely to do mischief if it escaped.

The artificiality of this approach was however rejected in *Mason v. Levy Auto parts* in relation to a fire which began in wooden packing cases stored in the defendants land. The test applied was whether the objects were likely to catch fire and the fire spread outside the defendant's premises. The liability was a strict one if this occurred.

In *A.G. v. Corke* a landowner was held liable under *Rylands v. Fletcher* for permitting the camping on his land of gypsies (caravan-dwellers) who trespassed and committed damage on the neighbouring land. This case was however received general disapproval in applying the rule in *Rylands v. Fletcher* to human beings. The objection has been that 'things' does not include humanbeings and that liability in the above case should have been based on nuisance or negligence.

2. ACCUMULATION

The thing must be brought into the land for the defendant's purposes. The defendant need not own the land into which the thing is brought.

A temporary occupier of land such as a lessee or a person physically present on the land but not in legal occupation of it such as a licensee is equally within the scope of the rule and is liable for damage caused upon escape or a thing he has brought onto the land.

In *Charing Cross Electricity Supply Co-v- Hydraulic Power Company,* the rule applied to one who had the statutory power to lay electricity cables under the highway.

In *Rigby v. Chief Constable of North Amptonshire,* the court stated that the rule applied to cases where the defendant was in no sense in occupation of the land; in this case by firing a canister of gas into the plaintiffs.

The requirement that the thing should be on the land for the purpose of the defendant does not mean that it must benefit the defendant.

In *Smeaton v. Ilford Corporation* it was stated that a local authority which was under a statutory duty to collect sewage collected it for its own purposes within the rule in *Rylands v. Fletcher.*

Where the thing is naturally present on the defendant cannot be liable for its escape under *Rylands-v-Fletcher*. The escape of weeds, rocks and floodwater is thus outside the scope of therule but recent decisions have established possibility of can action in nuisance for such escape.

The accumulation must thus be voluntary.

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3. NON-NATURAL USER OF LAND

This is the most flexible and elusive ingredient of liability. Blackburn J. understood 'natural' to mean things naturally on the land and not artificially created. However uncertainty crept as a result of Lord Cairns qualification that must be 'a non-natural user' of the land.

Through a series of cases, courts have come to look upon 'natural' as signifying something which is ordinary and usual even though it might be artificially instead of non-artificial. Non-natural use of land was explained by the Privy Council in *Richard v. Lothian* as per *Lord Moulton*.

> 'It must be some special use bringing with it increased danger to others and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.'

What is natural is now viewed differently in different cases.

Non-natural use of land is generally constituted by certain activities as the storage on the land in bulk of water, electricity, gas and the collection of sewage by local authorities.

It is however, arguable that many of the above examples should be held to be natural use according to the Privy Council's definitions as being for the general benefit of the community. In *British Celenese Ltd v. A.H. Hunt Ltd,* it was held that the benefit derived by the community fromthe manufacturing of electrical and electronic components made the use of land for such purpose and the storing of strips of metal foil thereon a natural use of the land.

It is thus to be noted that the scope of 'non-natural user' of land has narrowed over the years.

The decision will now depend on the facts of each case. It has been held that generating steam or electricity is not 'non-natural' but that storing of industrial water under pressure, or gas and electricity in bulk is a non-natural use.

4. ESCAPE

There is no liability under the rule unless there is an escape of the substance from the land where it is kept. In *Read-v-Lynns & co Ltd.* the defendants operated on ammunition factory as agents of the Ministry of Supply. The plaintiff was an appointed inspector for the ministry. In the course of carrying out her duties in the factory, an explosion occurred causing her injuries. She based her claim against the defendants on *Rylands-v-Fletcher* making no assertion that the defendants had been negligent. It was held that *Rylands-v- Fletcher* was inapplicable because there had been no escape of the thing that inflicted the injury. The House of Lords defined escape as:

> "Escape from a place where the defendant had occupation and control over land to a place which is outside his occupation or control."

It was stated further in this case that *Rylands-v-Fletcher* **is conditioned by 2 elements;**

a) The condition of escape from the land of something likely to do mischief if it escaped.
b) The condition of non-natural user of the land.

The House of Lords emphasized that the absence of an escape was the basis of their decision in this case.

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5. DAMAGE

Rylands –v-Fletcher is not actionable *per se* and therefore there must be proof of actual damage.This appears to mean actual damage to person or property and it excludes a mere interference with the plaintiff's enjoyment of this land, such as would be a ground in an action in nuisance.

Damage recoverable under the rule is limited to damage to person or property.

In *Hale-v-Jennings Bros,* the court held that an occupier of land was entitled to damages for personal injury under the Rule in *Rylands-v-Fletcher.*

In *Cattle-v-Stocker Waterworks co*, it was held that purely economic loss was not recoverable.

DEFENCES TO THE RULE IN RYLANDS v.

FLETCHER 1. CONSENT OF THE PLAINTIFF

If the plaintiff has permitted the defendant to accumulate the thing the escape of is complained of, then he cannot sue if it escapes.

Implied consent will also be a defence; thus a person becoming a tenant of business or domestic premises that the time when the condition of the adjoining premises occupied by the landlord is such that the happening of the *Ryland v. Fletcher* type is likely to ensue, is deemed to have consented to take the risk of such an event occurring.

In *Kiddle-v-City Business Properties Ltd*, the plaintiff became a tenant of the defendant in a house below the house occupied by the defendant (Landlord). The gutter of the Landlord's house was blocked and when it rained, an overflow of rainwater from the blocked gutter at the bottom of the sloping roof in possession of the Landlord and above the tenant's premises damaged the stock in the tenant's premises. It was held that the Landlord had a defence as the tenant impliedly consented to the risk of rainwater overflowing into his premises.

If the accumulation benefits both the plaintiff and the defendant, the plaintiff may be deemed to have consented to its accumulation e.g. where for the benefit of several occupants' rainwater is accumulated on the roof or a water closet installed or water pipes fitted, the several occupants are deemed to have consented.

On the other hand, the defence is not available as between a commercial supplier of gas in respect of gas mains under the highway. In any event an occupier will not be presumed to have consented to installations being left in a dangerously unsafe state.

2. CONTRIBUTORY NEGLIGENCE (PLAINTIFF'S OWN DEFAULT)

If the damage is caused solely by the act or default of the plaintiff himself or where the plaintiff is contributorily negligent, he has no remedy.

If for instance a person knows that there is danger of his mine being flooded by his neighbors operations on adjacent lands and courts the danger of doing some act which renders the flooding probable, he cannot complain, as stated in *Miles-v-Forest Rock Granite Co.Ltd.*

In *Dunn v. Birmingham Canal & Co*, where the plaintiff worked a mine under the canal of the defendant and had good reason to know that they would thereby cause the water from the canal to escape into this mine, it was held that they could not sue in *Rylands v. Fletcher* when the water actually escaped and damaged their mine. Cockburn C. J. said; "The plaintiff saw the danger, and may be said to have courted it."

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3. ACTS OF THIRD PARTIES (ACTS OF A STRANGER)

Where the occupier of land accumulates things on his land, the rule will not apply if the escape of the thing is caused by the unforeseeable act of a stranger.

In *Rickards v. Lothian* the plaintiff failed in his claim against the defendant where a third party had deliberately blocked up the waste pipe of a lavatory basin in the defendant premises, thereby, flooding the plaintiff's premises.

The basis of the defense is the absence of any nature of control by the defendant over the acts of a stranger on his land and thus the burden is on him to show that the escape was due to the unforeseen act of a stranger without any negligence on his own part.

If on the other hand, the act of the stranger could reasonably have been anticipated or its consequences prevented, the defendant will still be liable.

While it is clear that a trespasser is a 'stranger' for this purpose, other person included in this term depend on circumstances.

The occupier is of course liable for the defaults of these servants in the course of an independent contractor unless it is entirely collateral.

He is liable for the folly of a lawful visitor as well as the misconduct of any member of his family he has control over.

It has also been argued that he ought to be responsible for guests and licensees on his land but a distinction ought to be taken here or it would be harsh to hold an occupier liable for the act of every casual visitor who has bare permission to enter his land and of whose propensities to evil he may know nothing of e.g. an afternoon caller who leaves the garden gate open or a tramp who asks for a can of water and leaves the tap on.

Possibly the test is, "can it be inferred from the facts of the particular case that the occupier and such control over the licensee or over circumstances which made his act possible that he ought to have prevented it? If so, the occupier is liable, otherwise not."

As regards the issue of dangerous elements brought on the owners land by another person, the owner is not liable under the rule as in *Whitemorses v. Standford*

4. ACT OF GOD

Where escape is caused directly by natural causes without human intervention in "circumstances which not human foresight can provide against and of which human prudence is not bound to recognize possibility" the defense of act of God applies and the occupier is thus not liable.

5. STATUTORY AUTHORITY

Sometimes, public bodies storing water, gas, electricity and the like are by statute exempted from liability so long as they have taken reasonable care.

It is a question of statutory interpretation whether, and, if so, to what extent liability under *Ryland-v-Fletcher* has been excluded.

In *Green v. Chelsea Waterworks Co.* a main pipe belonging to a waterworks company which was authorized by parliament to lay the main, burst without any negligence on the part of the company and the plaintiff premises were flooded; the company was held not liable.

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On the other hand, In *Charing Cross Electricity Co v. Hydraulic Power Co.* where the facts were similar, the defendants were held liable. The defendant had no exemption upon the interpretation of their statute.

The distinction between the cases is that the Hydraulic Power Company were empowered by statute to supply water for industrial purposes, that is, they had permissive power but not a mandatory authority, and they were under no obligation to keep their mains charged with water at high pressure, or at all.

On the other hand, the Chelsea water works Company were authorized by statute to lay mains and were under a statutory duty to maintain a continuous supply of water it was an inevitable consequence and damage would be caused by occasional bursts and so by necessary implication the statute exempted them from liability where there was no “negligence’.

The question whether the rule in *Rylands v. Fletcher* applies in all its strictness to local authorities has been considered but not decided.

VICARIOUS LIABILITY

The expression “vicarious liability” signifies liabilities which A may incur to C for damage caused to C by the negligence or other tort of B.

It is not necessary that A should not have participated in any way in the commission of the tort nor that a day owed in Law by A to C shall have been broken.

What is required is that A should stand in particular relationship to B and that B’s tort should be referable in a certain manner to that relation.

The commonest instance in Law is the liability of a master for the torts of his servants. Vicarious liability generally arises from a contract service.

6.4 MASTER-SERVANT RELATIONSHIP

WHO IS A SERVANT?

Since vicarious liability generally arises from a contract of service (“servant”) not a contract of services (“independent contractor”) it is important to determine the indications of a contract of service.

In an often cited statement in *Short v. J & W Henderson Ltd* Lord Thankkerton said that there are four indications of a contract of service;

a) The master’s power of selection of is servant
b) The payment of wages or other remuneration
c) The master’s right to control the method of doing the work, and
d) The master’s right of suspension

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This list has been found helpful in determining whether a master-servant relationship exists but it is not conclusive. It is not possible to compile an exhaustive list of all the relevant considerations. The court stated in *Market Investigation Ltd v. Minister of Social Security (1969)* per Cooke J:

> The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether he hires his own equipment, whether he is own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.

The control test is however not conclusively determinant of master-servant relationship especially when dealing with professionals or men of a particular skill.

In *Morren v. Swinton* the defendants engaged a firm of consultant engineers to supervise the construction of certain sewage works. Under the contract, the defendants were supposed to appoint a resident engineer (to be approved by the consultants) to supervise the works under the general supervision and control of the consultants. The plaintiff was appointed as a resident engineer by the defendant and approved by the consultants pursuant to the terms of the contract. He was paid by the defendant and was entitled to holidays with pay and was liable to be dismissed by the defendants. He was however delegated to the consultants and was under their general supervision and control

Held: Absence of control by the defendant was not necessarily the most important test. Theother factors were enough to show that the plaintiff was clearly employed by the defendant under a contract of service.

It is thus important to state that whether or not a contract of service exists will depend on the general nature of the contract and no complete general test exists. More helpful is the well-known statement of **Denning L. J. in***Stevens v. Brodribb Co. Pty. Ltd.*

> "It is often easy to recognize a contract of service when you see it, but difficult to say wherein the distinction lies. One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of a business, and his work is done as an integral part of the business; whereas under a contract of services, his work, although done for the business, is not integrated into it but is only an accessory to it."

An independent contractor will commonly be paid "by the job" whereas a servant will generally receive remuneration based upon time worked. But a piece worker is still a servant; and a building contractor is under a contract of service notwithstanding that it may contain provisions for payment by time.

Once the Master-servant relationship is established, the master will be liable or all torts committed by the servant in the course of the employment.

a) Hospitals

It has held that radiographers, house surgeons, house time-assistant medical officers and probably staff anesthetics are employees of the hospital authority for various liabilities. But visiting consultants and surgeons are not employees of the hospital and thus the hospital is not liable.

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In *Hillyer v. St-Bartholomew's Hospital* the plaintiff bought an action against the governor of a hospital for injuries allegedly caused to him by negligence of an operating surgeon. The hospital was a charitable body.

Held: That the action was not maintainable. The court further stated that the only duty undertakenby the governors of public hospital towards a patient who is treated in the hospital is to use due care and skill in selecting their medical staff. The relationship of master and servant does not exist between the governors and the physicians and surgeons who give their service at the hospitals (i.e. who are not servant of the hospital.) The court further stated that the nurses and other attendants assisting at the operation cease, for the time being, to be the servant o the governor, in as much as they take their orders during that period from the operating surgeon alone and not from the hospital authorities.

Where there is a contract between the doctor and the patient, the hospital is not liable.

A hospital is thus liable for negligence of doctor and surgeons employed by the hospital authority under a contract of service arising in the course of the performance of their professional duties. The hospital owes a duty to give proper treatment to its patients.

In *Cassidy v. Minister of Health* the plaintiff entered a hospital for an operation of this left hand, which necessitated post-operational treatment. While undergoing the treatment he was under the care of a surgeon who performed the operation and who was a whole-time assistant medical officer of the hospital, the house surgeon and members of the nursing staff, all of whom were employed under a contract of service. At the end of the treatment it was found that his hand had been rendered useless.

Held: The hospital was liable

A hospital may also be liable for breach of duty to patients to provide proper medical service although it may have delegated the performance of that duty to persons who are not its servants and its duty is improper or inadequately performed by its delegate.

An example is where the hospital authority is negligent in failing to secure adequate staffing as where a delegate is given a task, which is beyond the competence of a doctor holding a post of seniority.

b) Hired Servants

A difficult case arises where A is the general employer of B but C, by an agreement with A (whether contractual or otherwise) is making temporary use of B's services.

If B, in the course of his employment commits a tort against X, is it A or C who s vicariously liable to X? It seems that it must be one or the other but not both A&C.

In *Mersoy Docks and Harbour Board v. Coggins and Griffith (Liverpool) Ltd*. A employed B as the driver of a mobile crane. A let the crane to C together with B as driver to C. The contract between A and C provided that B should be the servant of C but was paid by A and A alone had the power to dismiss him. In the course of loading a ship, X was injured by the negligent way in which B worked the crane. At the time of the accident C had the immediate direction and control of the operations to be executed by B and crane e.g. to pick up and move a pieces of cargo, but he had no power to direct how B should work the crane and manipulate its controls.

Held: That A as the general or permanent employer of B was liable to X. The court held thatthere is a very strong presumption that a servant remains to be the servant employer although he may be the servant of the hirer.

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The question whether A or C is liable depends on how many factors; e.g. Who is the paymaster, who can dismiss, how long does the alternative service last, what machinery is employed etc.

The courts have however generally adhered to the view that the most satisfactory test is, who at the particular time has authority to tell B not only what he is to do, but how he is to do it. This is question of fact involving all he circumstances of the case.

c) Loan of Chattels

In *Omrod v. Crosville Motor Services Ltd. (1953)* the owner of a car was attending the Monte Carlo motor rally. He asked a friend to drive his car from Birkernhead to Monte Carlo where they were to have a holiday together. During the journey, on a diverted route, the car was involved in an accident.

Held: At the time of the accident, the car was being used wholly or partially for the owner'spurposes and thus the friend was an agent of the owner and in so far as the friend was liable of negligence, the owner was vicariously liable for his negligence.

6.5 LIABILITY IN RESPECT OF AN INDEPENDENT CONTRACTOR

The employer is generally not liable for torts committed by an independent contractor. The employer is however liable if he is deemed to have committed the tort.

This may occur in the following instances:

1. Whether the employer has authorized the commission of the tort

In many circumstances, the law will attribute to a man the conduct of another being, whether human or animal, if he has instigated that conduct.

He who instigates or procures another to commit a tort is deemed to have committed the tort himself.

In *Ellis v. Sheffield gas Consumers Co* the defendant who had no authority to up the street employed a contractor to open trenches and lay gas pipes along a street.

The contractor carelessly left a heap of stones on the footpath; the plaintiff fell over them and was injured.

Held: the defendants were liable since the contract was to do an illegal act, a public nuisance. Thedecision would have been different had it been lawful for the defendant to dig up the streets.

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2. Torts of Strict Liability

The employer is liable in those circumstances e.g. in *Rylands-v-Fletcher* the employer was held liable for the acts of his independent contractors as this was a case of strict liability.

These in torts of strict liability, the employer will be liable even where the tort e.g. the escape is caused by the negligence of an independent contractor.

In *Terry v. Aston,* the defendant employed an independent contractor to repair a lamp attached to his house and overhanging the footway. As it was not security fastened, the lamp fell on the plaintiff, a passer-by and the defendant was held liable, because: it was the defendant's duty to make the lamp reasonably safe, the contractor had failed to do that. Therefore, the defendant has not done his duty and is liable to the plaintiff for the consequences.

Here liability was strict.

3. Negligence

When there is an element of personal negligence on the part of the employer as to make him liable for the acts of an independent contractor. E.g. Where the employer is negligent or careless in employing an independent contractor for instance, where the contractor is incompetent.

Failure to provide precaution in a contract where there is risk of harm unless precaution is taken can make the employer liable for the tort of the contractor.

In *Robinson v. Beaconsfield Rural Council,* the defendant employed an independent contractor, one hook, to clean out cesspools in their district.

No arrangements were made for the disposal of the deposits of sewage upon being taken from the cesspools by hook. Hook men deposited the sewerage on the plaintiff land.

Held: The defendants had a duty to dispose the sewerage and, on construction of the contract,they had not contract with hook for discharge of this duty (disposing of the sewage) hence they were liable for the acts of the hook's men in disposing it on to the plaintiff land.

4. Where the Duty of Care Is Wide

An example is where the independent contractor is dealing with hazardous circumstances, or works which from their very nature, pose danger to other persons.

In *Holiday v. National Telephone Co,* the defendant, a Telephone Company, was lawfully engaged in laying telephone wires along a street. They passed the wires through tubes, which they laid a trench under the level of the pavement.

The defendants contracted with a plumber to connect these tubes at the joints with lead and solder to the satisfaction of the defendant foreman.

In order to make the connections between the tubes, it was necessary to obtain a flare from a benzoline lamb of applying heat to the lamb. The lamb was provided with a safety valve.

The plumber dipped the lamp into a caldron of melted solder, which was placed over a fire on his footway. The safety valve not being in working order caused the lamb to explore. The plaintiff, who was passing on the highway was splashed by the molten solder and injured.

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Held: The defendant were liable because having authorized the performance of work which fromits nature was likely to involve danger to persons using the highway were bound to take care that those who executed the work for them did not negligently cause injury to such persons.

ESSENTIALS FOR THE LIABILITY OF THE MASTER

For a master to be liable for his servant's torts the tort must have been committed "in the course of employment". An act is done in the course of employment if;

a) It was a wrongful act authorized by the master
b) It was a wrongful and unauthorized mode of doing something authorized by the master.

In *London County Council v. Caltermoles (Garages) Ltd,* the defendant employed a general garage hank, part of whose job involved moving vehicles around the garage. He was only supposed to push the vehicles and not to drive them. On one occasion, he drove a vehicle in order to make room for other vehicles. Whilst doing so, he negligently damaged a vehicle belonging to the plaintiff.

Held: That the negligent act was within the course of the garage hand's employment although hehad carried his duties in an unauthorized manner. His master was thus vicariously liable.

In *Muwonge v. Attorney-General of Uganda,* the appellant's father was killed during a riot. The shot which killed him was fired by a policeman who had seen the appellant's father ran towards a house and had concluded that the appellant's father was a rioter.

Held: The firing of the shot was act done with the exercise of the policeman's duty in which thegovernment of Uganda was liable as a master even though the act was wanton, unlawful and unjustified.

If the act is not done within the course of employment, the master is not liable. In *Twine v. BeansExpress* a van driver employed by the defendant had been expressly forbidden to give lifts tounauthorized persons and a notice to this effect was displayed on the dashboard. The van driver gave a lift to a person who was killed in a subsequent accident due to the negligence of the van driver. The widows of the deceased brought an action against defendant.

Held: The action by the widows failed because the driver was acting outside the course of hisemployment. In this case the act was expressly unauthorized.

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6.6 GENERAL GUIDELINE IN DETERMINING WHETHER AN ACT WAS COMMITTED DURING THE COURSE OF EMPLOYMENT

1. Look at the mode of doing the work the servant is employed to do

In *Century Insurance C v. Northern Ireland Road Transport Board*, one of the respondent's employees was delivering petrol to garage. While the petrol was flowing from the lorry to the tank, he lit a cigarette and negligence threw away the lighted match which caused an explosion damages the appellant's property. The action of the employee was treated as being within the course of employment. On appeal it was held that the respondents were liable for the damage caused for such an action, whilst for the comfort and convenience of the employee could not be treated as isolated act as it was a negligent method of conducting his work.

In *Bayley v. Manchester Sheffield and Lincolnshire Railway* the plaintiff was in a train traveling to Macclesfield and he explained this to the mistakenly believed that the plaintiff was the wrong train (that train was not traveling to Macclesfield) and violently ejected the plaintiff who suffered injuries.

Held: The defendants were liable because the porter was acting within the cause ofemployment.

2. Whether the act was authorized within the limits of time and space e.g. if one is employed to work between 8.00 a.m. and 5.00 p.m., the master is only liable for torts committed within that time frame.

Ruddiman & Company v. Smith, the plaintiff was using the lower room of the defendant's housewhile the defendant used the upper room for carrying on business. In the upper room there was a lavatory. The clerk, after duty, went to the lavatory to wash his hands but on turning on the tap and finding no water, went away without turning the tap off. When water turned on the morning, it overflew into the lower room and damaged the plaintiff goods.

Held: The employer was liable for whether or not the use of the lavatory. Within the scope of theclerk's employment, it was an event incidental to his employment.

In *Storey v. Aston,* the defendant, a wine merchant, sent his car man and clerk to deliver wine and pick up empty bottles. On their way back, they diverted to visit the clerks house in the course of which they negligently knocked down the plaintiff and injure him.

Held: The defendant was not liable for the injury caused by the negligent driving of the car manfor he was, that time, engaged in a new and completely unauthorized journey.

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3. Whether the act was the initiative of the servant or the master had a certain control.

In *Warren v. Henlys Ltd,* erroneously believing that the plaintiff had to drive away from the garage without paying or surrendering coupons for petrol which had been put in the tank of his car, a petrol pump attendant used violent language to him.

The plaintiff paid his bill and gave the necessary coupons and after calling the police, told the attendant that he would report him to his employers.

The pump attendant then assaulted and injured him. In an action for personal injuries against his employers.

It was held that the defendants were not liable for the wrongful act of their employee. Since the act was one of the personal vengeances and was not done in the course of employment; it not is an act of a class which the employee was authorized to do or a mode of doing an act within that class.

In *Poland v. John Parr and Sons,* Arthur Hall, a carter was employed by John Parr. Parr and his son were conveying a wagon with bags of sugar. Arthur, on his way home for dinner was walking else to the wagon. The plaintiff, a schoolboy, was walking home in the same direction with his hand upon one of the bags of sugar.

Honestly and reasonably thinking that the boy was stealing, Arthur gave him a blow on the back of his neck as a result whereof he fell and the wheel of the wagon injured his foot which was amputated.

Held: In the circumstances, the carter had implied authority to make reasonable efforts to protectand preserve the defendants property; that the violence exerted was not so excessive as to take his act outside the scope of authority and that the defendant were liable.

4. Where there is an express prohibition

An express prohibition does not negate liability i.e. a master does not escape liability simply because he had an express prohibition. For liability to be determined, two factors are considered:

i. Whether the prohibition limits the sphere of employment. If it does, the master is not liable for an act done outside the sphere. (*Sphere).*
ii. Where the prohibition deals with the contract within the sphere of employment. If it does, the employer will be liable. *(Mode)*

In *Canadian Pacific Railway Co v. Lockhart* a servant of the appellant Company in disregard of written notices prohibiting employers from using private cars for the purpose of the company's business unless adequately insured, used his uninsured motorcar as a means of execution of work which he was ordinarily employed to do in the course of which he injured the respondent.

Held: The means of transport was incidental to the execution of work, which the servant wasemployed to do and that the prohibitions of the use of an uninsured motorcar merely limited the mode of executing the work, breach of the prohibition did not exclude the liability of the company to the respondent.

In *Rand v. Craig*, Carters were employed by a contractor to take rubbish from certain works to his dump and were strictly forbidden not to hip it anywhere else. Some of the carters, without knowledge of the contractors, and in contravention of their orders took the rubbish to a piece of unfenced land belonging to the plaintiff as it was nearer the works that the dump of contractor.

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Held: The illegal acts complained of where not within the sphere of the carter's employment andconsequently the contractor was not liable for them.

5. Whether the act was a deliberate criminal act

In *Lloyd-v-Grace Smith & Co.,* the plaintiff had sought advice from the defendants, a firm of solicitors, whose managing clerk conducted conveyance work without supervision. He advised the plaintiff to sell some property, fraudulently persuading her to sign certain documents that transferred the property to him. He disposed of it and kept the proceeds.

Held: Even though the fraud had not been committed for the benefit of the employers, neverthelessthey were liable, for the clerk had been placed in position to carry over such work and had acted throughout in the course of his employment.

6.7 OCCUPIERS LIABILITY

This is the liability of an occupier of premises for damage a done to visitors to the premises.

OCCUPIER'S LIABILITY AT COMMON LAW

At common law the duties of an occupier were cast in a descending scale to four different kinds of persons. For example:

a) The highest duty of care was owed by the occupier to one who entered in pursuance of a contract with him e.g. a guest in a hotel. In that case there was an implied warranty that the premises were as safe as reasonable care and skill could make them.

b) A lower duty was owed to the invitee i.e. a person who without any contract entered on business of interest both to himself and the occupier e.g. a customer coming into a shop to view the wares he was entitled to expect that the occupier should prevent damage from unusual danger of which knew or ought to have know.

c) Lower still was the duty of the licensee i.e. a person who entered with the occupiers express or implied permission but without any community of interest with the occupier; the occupiers duty towards him was to warn him of any concealed danger or trap of which he actually knew.

d) Finally, there was the trespasser to whom there was owed only a duty to abstain from deliberate or reckless injury.

Occupiers liability deals with the liability of an occupier of premises and extends to immovable property as open land house, railway stations and bridges as well as movable structures like ships, gangways or even vehicles although lawyers prefer to treat injury in the latter as falling with common law negligence.

Under common law lawful visitors who did not fall under the above classifications of contractual entrants, invitees or licensees were not clearly covered and accidents arising from the premises and affecting such person were commonly governed by the general law of negligence.

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The position of the common law was thought to be unsatisfactory. As lord Denning put it in *Slatter v. Clay Cross Co. Ltd*

> "If a landowner is driving his car down his private drive and meets someone lawfully walking upon it then his is under a duty to take reasonable care so as not to injure the walker; and his duty is the same no matter whether it is his gardener coming up with his plants, a tradesman delivering his goods, a friend coming to tea, or a flag seller seeking a charitable gift"

The law was thus referred to the law reform committee in 1952 as a result of whose report the Occupier's Liability Act 1957 was passed.

MODERN LAW ON OCCUPIER'S LIABILITY

The 1952 Act abolished the common law distinction between invitees, licensees and the substitution for it was a single duty of care owed by the occupier to his **visitors**. The Act treats contractual entrants as a separate category but less significantly than at common law.

The position of the trespasser remained the same under the 1952 Occupier's Liability Act but was subsequently changed by the **Occupiers' Liability Act 1984.**

As before the occupier duties under the Act apply not only to land and buildings but also to fixed and movable structures and they govern his liability in respect of damage to property as well as injury to the person.

OCCUPIER

The duty under the Act is imposed upon the occupier. The word 'occupier' denotes a person who has a sufficient degree of control over premises to put him under a duty of care toward those who come lawfully upon the premises.

An owner in possession is no doubt an occupier, but an owner who has demised the premises to another and parted with possession is not.

An absentee owner may 'occupy' his premises through his servant and thus remain subject to the duty and he may also be subject to it though he was contracted to allow a third party to have the use of the premises.

There may be more than one "occupier' of the same structure or part of the structure.

VISITORS

A visitor is generally a person to whom the occupier has given express or implied permission to enter the premises.

The Act extends the concept of a visitor to include persons who enter the premises for any purpose in the exercise of a right conferred by law for they are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not. This would include a fireman attending a fire or a policeman executing a search warrant.

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Implied permission – this is a question to be decided on the facts of each case and the burden of proving an implied permission rests upon the person who claims that it existed.

Any person who enters the occupier's premises for the purpose of communicating with him will be treated as having the occupier's tacit permission unless he knows or ought to have known that he has been forbidden to enter e.g. by notice 'no hawkers'

The occupier may of course withdraw this implied license by refusing to speak or deal with the entrant but if he does so the entrant has a reasonable time in which to leave the premises before he becomes a trespasser.

The duty owed to a visitor does not extend to anyone who is injured by going where he is expressly or impliedly warned by the occupier not to go as where a tradesman's boy deliberately chooses to go into a pitch dark part of the premises not included in the invitation and falls downstairs there *(Lewis v Ronald).*

Further the duty does not protect a visitor who goes to a part of the premises where no one would reasonably expect him to go.

A person may equally exceed his license by staying on premises after the occupier' permission has expired but the limitation time must be clearly brought to his attention. "The common duty of care requires that the occupier must be prepared for children to be less careful than adults but the special characteristics of children are relevant also to the question of whether they enjoy the statutes of visitors.

In *Glasgous Corporation v. Tayler* it was alleged that a child aged seven had died from eating poisonous berried which he had picked from a shrub in some garden under the control of the corporation.

The berries looked like cherries or large blackcurrants and were of a very tempting appearance to children. It was held that these facts discussed a good cause of action.

Certainly the child had no right to take the berries or even to approach the bush and an adult doing the same thing might as well have become a trespasser but since the object was an 'allurement' the fact of its being let there constituted a breach of the occupiers duty.

COMMON DUTY OF CARE

The common duty of care owed to all visitors as well as an entrant on contract with implied terms is defined as a common duty of care. 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 purpose for permitted to be there.

The Act gives some guidance in applying the common duty of care:

i. An occupier must prepared for children to be less careful than adults; and
ii. An occupier may expect that a person in the exercise of his calling will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.

As to (i) it will be reasonable for the occupier to expect children on his premises unaccompanied but the law is still as was stated before the Act by Delvin J in *Phipps v. Rochesther Corporation,* namely that some of the circumstances which be taken into account in measuring the occupiers obligation is the degree of care for their children's safety which the occupier may assume will be exercised by the parents.

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In this case, the plaintiff a boy aged five was with his sister aged seven and they walked across a large opening, which formed part of a housing estate being developed by the defendants. The defendants had dug a long deep trench the middle of the open space a danger, which was quite obvious to an adult. The plaintiff fell in and broke his leg.

Held: A prudent parent would not have allowed two small children to go alone on the openspace in question or at least he would have satisfied himself that the place held no danger for the children. The defendants were thus not liable.

The judgment of Delvin J squarely placed the primary responsibility for the safety of small children upon their parents, he started:

> "It is their duty to see that such children are not allowed to wander about by themselves or at least to satisfy themselves that the places to which they do allow their children to go unaccompanied are safe for them to go. It would not be socially desirable if parents were as a matter of course able to shelf the burden of walking after their children from their own shoulders to those who happen to have accessible bits of land."

The occupier will have discharged his duty if the place is reasonably safe for a child who is accompanied by the sort of guardian whom the occupier is in all the circumstances entitled to expect him to have with him.

As to (ii) above the general rule is that where an occupier employs an independent contractor to do work, be it of cleaning or repairing on his premises the contractor must satisfy himself as to the safety or condition of that part of the premises on which he is to work

In *Roles v. Nathan (1963)* two chimney sweeps were killed by carbon monoxide gas while attempting to seal up a sweep hole in the chimney of a coke-fired boiler, the boiler being alight at the time.

Held: The occupier was not liable for their deaths. As per Lord Denning M. R.

> "when a house holder calls a specialist to deal defective installation on his promises he can reasonably expect the specialist to appreciate and guard against the danger arising from the defect."

STUDY TEXT

SPECIFIC ASPECT AFFECTING OCCUPIER'S LIABILITY

a) **Warning**
In most cases a warning of the danger will be sufficient to enable the visitor to be reasonably safe and so amount to a discharge by the occupier by duty of care but, if for some reason the warning is not sufficient then the occupier remains liable.

b) **Independent character**
Where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not liable if in all the circumstances if he had acted reasonably in entrusting the work to an independent contractor and had taken such steps as he reasonably ought to in order to satisfy himself that the contractor was competent and that the work had been properly done.
In *Haseldine v Daw (1941)* the plaintiff was going to visit a tenant in a block of flats belonging to the defendant and was injured when the lift fell to the bottom of its shaft as a result of negligence of the firm of engineers employed by the defendant to repair the lift.

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Held: That the defendant having employed a competent firm of engineers to make periodicalinspections of the lift to adjust it and to report on it had discharged the duty owed to the plaintiff whether the plaintiff was an invitee or a licensee.

An occupier must take reasonable steps to satisfy himself that the contractor he employs is competent and if the character of the work permits, he must take similar steps to see that the work has been properly done.

Where the technical nature of the work to be done will require the occupier to employ an independent contractor, he will be negligent if he attempts to do it himself.

6.8 LIABILITY TO TRESPASS

An earlier stated the original common law rule that the occupier was only liable to a trespasser in respect of some wilful act "done with deliberate harm or at least some act done with reckless disregard of the presence of the trespasser" *(Rober Addie & Sons Ltd v Dumbreck (1929)* remained unaffected by the occupiers liability act 1957.

The law underwent substantial alteration and development by the House of Lords in *BritishRailways Board v. Herrrington*

As a result of this case an occupier owed the trespasser a duty of common humanity, which generally speaking was lower than the common duty of care but substantially higher than the original duty. *Herrington's case* was applied by the courts of appeal on a number of occasions without undue difficulty.

The duty owed to a trespasser was eventually clarified by the Occupiers' Liability Act, 1984. Section 1(3) of the act provided that a duty is owed to the trespasser if;

a) The occupier is aware of the danger or has reasonable grounds to believe that it exists.
b) He knows or has reasonable grounds to believe that the trespasser is in the vicinity of the danger concerned or that he may come into the vicinity of the danger and
c) The risk is one against which in all the circumstances of the case he may reasonably be expected to offer the trespasser some protection.

The duty is to take such care as is reasonable in all the circumstances to see that the entrant does not suffer injury on the premises by reason of the danger concerned and it may in appropriate circumstances be discharged by taking such steps as are reasonable to give warning of the danger concerned or to discourage persons from incurring the risk.

The Kenyan law on occupier's liability is governed by **The Occupiers Act[4],** which was enacted in 1963 and revised in 1980. The provisions relate to the occupiers' duty to visitors and entrants on contract.

The Act is silent as regards duty to trespassers and does not incorporate the amendments brought about by the 1984 English Version of the Act. It would thus appear that the Kenyan position as regards liability to trespass is the common law position.

STUDY TEXT

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TRESPASS TO THE PERSON

This is interference with the body of a person. Every person has a right to non-interference with his body. The law of torts evolved 3 torts to protect these right or interest namely; **assault,battery and false imprisonment**

A) ASSAULT

This is an act of the defendant which causes the plaintiff reasonable apprehension of the infl iction of a battery on him by the defendant. It is an act of the defendant which directly and either intentionally or negligently causes the plaintiff immediately to apprehend a contact with the body of the defendant. This tort protects a person from mental anxiety.

Rules of the Tort

1. There must be some apprehension of contact
2. There must be a means of carrying out the threat by the defendant
3. The tort is actionable *per se*.
4. The tort is generally associated with battery
5. Mere words without body movement do not constitute assault.

Assault is constituted by:-

i. A display or show of force
ii. Pointing of a loaded gun
iii. Cursing in a threatening manner

B) BATTERY

This is the intentional and direct application of force to another person. It has been defi ned as any act of the defendant which directly and either intentionally or negligently causes some physical contact with the person or body of the plaintiff without his consent.

As a general rule battery is based on an intentional act and is both a crime and a tort.

Meaning of Force

Any physical contact with the body of the plaintiff or with his clothing is suffi cient to amount to force. There is battery where the defendant shoots the plaintiff from a distance just as much as when he strikes him with his fi st. Mere passive obstruction is however not battery.

In the technical sense however, no physical hurt is necessary, for all forms of trespass are actionable *per se* i.e. without prove of damage.

Where there is express or implied consent to contact the plaintiff can't sue. Life would be diffi cult if all bodily contact was actionable and courts have struggled to fi nd some further ingredient to distinguish battery from legally unobjectionable conduct.

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In *Collins v. Wilcock (1984)* Goff L J stated that apart from specific defenses such as lawful authority in effecting an arrest or prevention of crime, bodily contact was not actionable if it was generally acceptable in the ordinary conduct of daily life.

However, the court of appeal in *Wilson v. Prigle* while not wholly rejecting this approach has laid down that battery involves a 'hostile' touching by the defendant i.e. where he wilfully interferes with the plaintiff inn a way to which he is known to object.

Touching another person in the course of a conversation in or to draw his attention to something is not battery but 'an unwanted kiss is as much actionable as a blow'. (Per Lord Holt C J) *in ColeTurner 1704*

For battery there must be a voluntary act by the defendant intended to bring about the contact with the plaintiff. The battery need not be committed with the person of the person of the defendant.

It is battery to strike the plaintiff by throwing a stone at him. Provided the force used has its effect on the person of the plaintiff's person must be intended by the defendant e.g. it is battery to remove a chair on which the plaintiff is about to sit as a result of which he falls on the ground.

In *Fagan v. Metropolitan Commissioner of Police (1969),* the defendant accidentally drove his car on the foot of a police constable. He then delayed in reversing the car thus preventing the constable from escaping and knowing that the constable's foot was trapped. It was held that he was liable for criminal assault

Where however words take a form of a continuing threat e.g. your money or your life, this seemingly constitutes an assault.

In *Police v. Greaves*, the defendant's threat of committing a knife attack on certain policemen if they should uproot a plot near him or did not leave his premises immediately was held to be assault.

INTENTION

Assault is committed where the plaintiff apprehends the commission of a battery on his person. If the defendant does not intent to commit a battery but induced a belief in the plaintiff's mind that he is about to do so, he is nevertheless liable for assault.

Pointing a loaded gun at a person is of course an assault but if the gun is unloaded it is still assault unless the person at whom it is pointed knows this.

APPREHENSION

Suppose the plaintiff is an unusually fearful person in whom the defendant can induce the fear of an imminent battery though a reasonable man would not have fear in those circumstances, does the defendant commit assault?

The better view is that the test is based upon the subjective intention of both parties thus there is battery if the defendant intends to create fear of commission of a battery whether or not he knows the plaintiff to be a fearful person and the plaintiff actually has this fear.

In *Smith vs. Superintendent of Working Police Station (1983),* the defendant was convicted of criminal assault when he entered the grounds of a private house and stood at the window seriously frightening its occupant who was getting ready for bed.

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The plaintiff must however apprehend a battery thus it is not assault to stand still at the door of a room barring the plaintiff's entry. It would also not be assault to falsely cry 'fire' in a crowded place.

MUST DAMAGES BE PROVED?

Both torts of assault and battery are actionable *per se*. Where the defendant's act has caused no damage the courts may award only nominal damage but the court may also award aggravated damages because of the injury to the feelings of the plaintiff arising from the circumstances of the commission of the tort.

RULES OF BATTERY

1. Absence of the plaintiff's consent
2. The act is based on an act of the defendant mere obstruction is not battery
3. A contact caused by an accident over which the defendant has no control is not battery
4. There must be contact with the person of the plaintiff it has been observed The least touching of another person in anger is battery
5. Battery must be direct and the conduct must follow from the defendant's act
6. The tort is actionable *per se*. The essence of battery is to protect a person from un-permitted contacts with his body. The principal remedy is monetary award in damages.

FALSE IMPRISONMENT

This is the infliction of bodily restraint which is not expressly authorized by law. It's an act which is directly and either intentionally or negligently causes the confinement of the plaintiff within an area limited by the defendant.

This tort protects a person's freedom by making unlawful confinement actionable.

It is possible to commit the tort without imprisonment of a person in the common acceptance of the tort. In fact neither physical contact nor anything resembling prison is necessary.

If a lecturer locks his students in a lecture room after the usual time of dismissal that is false imprisonment. So also is the case where a person is restrained from leaving his own house or part of it or even forcibly detained in a public street. A person is said to be a prisoner if he has no liberty to go freely at all times to all places that he would like to go.

It has been held in *Grainger v. Hill* that imprisonment is possible even if the plaintiff is too ill to move in the absence of restraint.

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■ MAIN INGREDIENTS OF THE TORT

(a) Knowledge of the plaintiff

Knowledge of the restraint is not necessary but may affect the quantum of damages. In *Meeting v. Graham White Aviation Co* the plaintiff was being questioned at the defendants company in connection with certain thefts from the defendants company. He did not know of the presence of two works police outside the room who would have prevented his leaving if necessary.

Held; the defendant was liable for false imprisonment. Arcing L J said
"it appears to me that a person can be imprisoned without his knowing. I think a person can be imprisoned while he is asleep or in a state of drunkenness, while unconscious or while he is a lunatic. Of course the damages might be diminished and would be affected by the question whether he was conscious or not'

(b) Intention and directness

The tort is defined to exclude negligent imprisonment of another person. The tort must be intentional and should be committed directly. Where for reason of lack of intention or directness the plaintiff cannot establish false imprisonment an action in negligence may still be available.
In *Sayers v. Badour U.D.C* the plaintiff became imprisoned inside the defendant's toilet because of negligent maintenance of the door lock by the defendant's servants.

In trying to climb out of the toilet she fell and was injured. She recovered damages from the defendant because it was a reasonable act on her part to escape from a situation in which the defendant by his negligence had placed her.

An action for false imprisonment would not have been available because there was no direct act of imprisonment.

(c) The restraint must be complete

There must be a total restraint placed upon the plaintiff's freedom of action In *Bird v Jones* the defendant closed off the public footpath over one side of a bridge. The plaintiff wishing to use the footpath was prevented by the defendant. In the plaintiffs action one of the questions that was necessary to decide was whether the defendant's act amounted to false imprisonment.

Held: It did not since the defendant has not placed a total restraint on the plaintiff. The blocking of a part of a public highway might be a public nuisance for which the plaintiff could bring an action in tort if he could show special damage arising from. Provided the area of restraint is total it does not seem to matter that it is very large.
There has been a difference of opinion between the court of appeal and the lower court the circumstances in which a person already the lawfully imprisoned in a prison may be regarded as falsely imprisoned.

In *R v. Deputy Governor of Prison*, there was an agreement that imprisonment under intolerable conditions would amount to false imprisonment. The Court Of Appeal however required knowledge of those conditions by the defendant but the lower courts thought that a defense would exist here under the provisions of the prisons Act.

There is of course false imprisonment where a prisoner is detained beyond the legal date of his release. *(Cowell v. Corrective Services Commissioner)*

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RULES OF THE TORT

1. The tort must be intentional
2. It is immaterial that the defendant acted maliciously
3. The restraint or confinement must be total. However, it need not take place in an enclosed environment
4. It has been observed every confinement of a person is an imprisonment whether it be in a common prison, private house or in the stocks or even forcibly detaining one in the public
5. The boundary of the area of confinement is fixed by the defendant. The barriers need not be physical. A restraint affected by the assertion of authority is sufficient.
6. The imprisonment must be direct and the plaintiff need not have been aware of the restraint
7. The tort is actionable *per se.*
8. The principal remedy is a monetary award in damages.

6.9 PROTECTION OF CHATTELS OR GOODS

Owners of goods are entitled to enjoy their possession and control and their use without any interference. To protect goods the common law developed 3 torts namely;

- Detinue
- Trespass to goods
- Conversion

STUDY TEXT

DETINUE

This is the unlawful detention of goods. It is the oldest tort relating to the protection of the chattels and protects possession of goods by the owner. The plaintiff must prove:-

i. Right to immediate possession
ii. That the defendant detained the goods after the plaintiff demanded their return. The plaintiff is entitled to damages for the detention.

TRESPASS TO GOODS

This is the intentional or negligent interference of goods in possession of the plaintiff. This tort protects a party interest in goods with regard to retention their physical condition and invariability.

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TYPES/FORMS OF TRESPASS

1. Taking a chattel out of the possession of another
2. Moving a chattel
3. Contact with a chattel
4. Directing a missile to a chattel

RULES/REQUIREMENTS OF THE TORT

1. The trespass must be direct
2. The plaintiff must be in possession of the chattel at the time of interference
3. The tort is actionable *per se*
4. The principal remedy is a monetary award in damages

The defenses available to this tort include:-

1. Plaintiff's consent
2. Necessity
3. Mistake

6.10 CONVERSION

This is the intentional dealing with goods which is seriously inconsistent to possession or right to possession of another person. This tort protects a person's interest in dominion or control of goods.

The plaintiff must have possession or the right to immediate possession. However, a bailee of goods can sue 3rd parties in conversion so can a licensee or a holder of a lien or a finder. Any good or chattel can be the subject matter of conversion. There must be physical contact resulting in interference with the goods.

ACTS OF CONVERSION

i. Taking goods or disposing; it has been observed that to take a chattel out by another's possession is to convert it or seize goods under a legal process without justification is conversion.
ii. Destroy or altering
iii. Using a person's goods without consent is to convert them
iv. Receiving: the voluntary receipt of another's goods without consent is conversion.

STUDY TEXT

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However, receiving of another's goods in certain circumstances is not actionable for example goods received;-

i. In a market overt; the purchaser acquires a good title
ii. Estoppel; if the true owner of the goods is by his conduct denying the sellers the right to sell, the buyer acquires a good title to the goods
iii. Goods received from a factor or a mercantile agent
iv. A negotiable instrument received in good faith
v. Goods received from a person who has a voidable title before the title is avoided
vi. Dispositon without delivery - a person who sells another goods without authority but without delivering them to the buyer converts them
vii. Disposition and delivery - A person who sells another's goods without authority and delivers the same to the buyer is guilty of conversion
viii. Mis-delivery of goods a carrier or a warehouse man who delivers the goods to the wrong person by mistake is guilty of conversion
ix. Refusal to surrender another's goods on demand

The principal remedy available is a monetary award in damages and the plaintiff is entitled to the value of the goods he has been deprived. The value s determined as per the date of conversion.

If the plaintiff suffers a pecuniary loss as per the result of the conversion he is entitled to special damages.

6.11 DEFAMATION

Defamation is the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right- thinking members of the society generally or tends to make them shun or avoid him.

Defamation is sometimes defined simply as the publication of a statement which tends to bring a person "into hatred, contempt or ridicule"; but this is not quite exact for a statement may possibly be defamatory even if it does not excite in reasonable people feelings quite so strong as hatred, contempt or ridicule and the definition is defective in omitting any reference to the alternative of tending to shun or avoid him.

This addition is necessary, for falsely imputing insolvency or insanity to a man is unquestionably defamation, although, far from tending to excite hatred, contempt or ridicule, it would rouse only pity and sympathy in the minds of reasonable people, who would nevertheless be inclined to shun his society.

The tort of defamation is of 2 kinds:

- Libel
- Slander

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DIFFERENCES BETWEEN SLANDER AND LIBEL

In libel – the defamatory statement is made in some permanent form such as writing, printing,and pictures

In slander – The statement is made in spoken words or in some other transient form whethervisible or audible such as gestures or inarticulate but significant sounds.

It has been stated that Slander is addressed to the ear while Libel is addressed to the eye. This distinction is however not accurate because Slander can as well be addressed to the eye as in the case of defamatory gestures whereas libel can be addressed to the ear as in the case of *Youssoupoff v. M.G.M Picture Ltd* where Slesser L.J. stated that:

> "There can be no doubt that so far as the photographic part of the exhibition is concerned, that is a permanent matter to be seen by the eye, and is proper subject of an action eye, and is the proper subject of an action for Libel."

Thus the 'talking' film, though generally addressed to the ear, was in permanent form thus making it a Libel.

There are however clear differences between Libel and Slander;

1. Libel is defamation in permanent form whereas Slander is defamation in transient form.
2. Libel is not merely actionable as a tort but is also a criminal offence whereas Slander is a civil wrong only.
3. All cases of Libel are actionable *per se* but Slander is only actionable on proof of actual damage with 4 exceptions under the Defamation Act, which are actionable **per se**.

CASES OF SLANDER THAT ARE ACTIONABLE PER SE:

1. Imputation of a Criminal Offence

Where the defendant makes a statement, which imputes a criminal offence punishable with imprisonment under the Penal Code, then such Slander will be actionable *per se*. There must be a direct imputation of the offence and not merely a suspicion of it and the offence must be punishable by imprisonment in the first instance.

If the Slander goes into details of the offence, it is not actionable *per se* if the details are inconsistent with another.

2. Imputation of a contagious or infectious disease

This is actionable *per se* as it is likely to make other people to shun associating with the plaintiff.

This exception always includes sexually transmitted diseases and in olden times the diseases of plague and leprosy.

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3. Imputation of unfitness, dishonesty or incompetence in any office, profession, calling, trade or business held or carried on by the plaintiff at the time when the Slander was published

This is the most important exception under the Defamation Act, 1952 (English) Section2 provides "in an action of Slander in respect to words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of publication, it shall not be necessary to allege or prove special damage whether or not the words are spoken of the plaintiff in the way of his office, calling, trade or business."

It follows that any words spoken of a man which are reasonably likely to injure him in his office, profession, calling, trade or business will be actionable *per se*. It matters not how humble the office may be, so long as it is lawful.

4. Imputation of unchastity or adultery of any woman or girl

Words spoken and published which impute unchastity or adultery to any woman or girl shall not require proof of special damage to render them in actionable.

In *Kerr v. Kennedy,* the court was of the opinion that the term "unchastity" includes lesbianism.

ESSENTIALS OF DEFAMATION GENERALLY

Whether defamation consists of Libel or Slander the following requisites are common to both, and must be proved by the plaintiff.

i. The words must be defamatory
ii. They must refer to the plaintiff
iii. They must be maliciously published.

1. THE WORDS MUST BE DEFAMATORY

A defamatory statement is one which has a tendency to injure the reputation of the person to which it refers. The statement is judged by the standards of the ordinary right thinking members of the society and the test is an objective one.

It is no defence to say that the statement was not intended to be defamatory, a tendency to injure or lower the reputation of the plaintiff is enough and a statement may be defamatory although no one to whom it is published believes it to be true.

Abuse

Mere insult or vulgar abuse does not amount to defamation.

The manner in which the words were spoken and the meaning attributed to them by the hearers is however important in determining whether the words are defamatory or simply abusive.

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In *Penfold v. West Cote (1806)* the defendant called out "why don't you come out you black guard, rascal, scoundrel, pen-fold, you are a thief," it was left to the jury to decide whether the general abusive words accompanying 'thief' reduced 'thief' itself to a mere abuse. The jury gave a verdict that the term 'you are a thief' was not a mere abuse but was defamatory.

The speaker of words must thus take the risk of his hearers construing them as defamatory and not simply abusive and the burden is upon him to show that a reasonable man would not have understood them as defamatory.

Interpretation

In interpreting a defamatory statement, the meaning attached to it is not necessarily the meaning with which the defendant published it but that which is or may be reasonably given by the person to whom it is published.

The fact that the defendant did not intend to lower the reputation of the plaintiff is immaterial, so long as the statement has a defamatory meaning to those whom he makes it. On the other hand, a defamatory purpose will not render the defendant liable if the statement has no defamatory significance to those it is published.

A statement is *prima facie* defamatory when its natural, obvious and primary meaning is defamatory. Such a statement is actionable unless its defamatory significance is explained away successfully. The burden of such an explanation rests upon the defendant.

Innuendo

The words which the plaintiff complains may be defamatory in the light of facts and circumstances known to persons to whom they were published.

An *innuendo* may thus make words, which are not otherwise defamatory in the natural and ordinary meaning, to be defamatory. The burden is on the plaintiff to prove the meaning, which he understood by persons having knowledge of particular facts.

In *Tolley v. Fry and Sons Ltd (1931)* the plaintiff, a famous amateur golfer, was caricatured by the defendant, without his knowledge or consent in an advertisement of their chocolate bar which depicted him with a packet of it protruding from his pocket, the excellence of which, was likened in some doggerel verse, to the excellence of the plaintiff's drive. The plaintiff had let his portrait exhibited for advertisement, that he had thus prostituted his reputation as a famous amateur golfer. It was held that the caricature, as explained by the evidence, was capable of being thus constructed; for golfers testified that any amateur golfer who assented to such advertisement may be called upon to resign his membership of any reputable club.

Knowledge of the *innuendo* by the defendant is immaterial and the defendant is nevertheless liable for a statement he believes to be innocent but is in fact defamatory by reason of facts unknown to him but known to the persons to whom he makes it.

In *Cassidy v. Daily mirror Newspapers Ltd (1929)* the defendants published in their newspapers a photograph of one Cassidy and Miss X together with the words "Mr. Cassidy, the race-horse owner, and miss X, whose engagement has been announced." Mrs. Cassidy was, and was known among her acquaintances, as the lawful wife of Mr. Cassidy although she and Cassidy were not living together. The information on which the defendants based their statement was derived from Cassidy alone and they made no effort to verify it form other sources. Mrs. Cassidy

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sued for Libel, the *innuendo* being that Cassidy was not her husband but lived with her in immoral cohabitation. It was held that the *innuendo* was established and that as the publication conveyed to reasonable persons as an aspersion (attack) on the plaintiff's moral character, she was entitled to damages.

2. THE WORDS MUST REFER TO PLAINTIFF

The defamatory statement must be shown to refer to the plaintiff. A court has power to dismiss an action on the ground that no reasonable person could conclude that the plaintiff should be identified with the person mentioned in the statement complained as a defamatory.

If the plaintiff is mentioned by name, there is usually no difficulty. It is however sufficient in such a case the statement was understood, even by one person, to refer to the plaintiff, even though it remained hidden to all others.

The question is not whether the defendant intended to refer to the plaintiff but is whether any person to whom the statement was published might reasonably think that the plaintiff was referred to. In *Hulton v. Jones (1910),* a newspaper published by a humorous account of a motor festival at Dieppe in which one Artemus Jones displayed as a churchwarden at Peckham was accused of living with a mistress in France. The writer of the article was ignorant of the existence of any person by the name as that of a fictitious character in the article. However, there was in fact a barrister named Artemus Jones, who was not a church warden, did not live at Pekham and had not taken part in the Dieppe festival. He sued for libel. His friends swore that they believed the article to refer to him. It was held that the newspaper was responsible for libel. On appeal to the
House of Lords stated that:

> "The decision was unanimously affirmed by the House of Lords who held further that if reasonable people would think the language to be defamatory of the plaintiff, it was immaterial that the defendants did not intend to defame him."

In *Newstead v. London Express Newspapers Ltd,* the court of appeal carried *Hulton-v- Jones* further in the two dimensions. They held that:

> "The principle applies where the statement truly relates to a real person A, and is mistakenly but reasonably thought to refer to another real person B."

Absence of negligence on the defendant's part is relevant only in the sense that it may be considered by the jury in determining whether reasonable people would regard the statement as referring to the plaintiff; otherwise it is no defence.

In *Newsteads case*, the defendant published an account of a trial of bigamy of Harold Newstead a 30-year-old Camber well barman but it was untrue of the plaintiff, Harold Newstead, aged 30 years, who was a hairdresser in Camber well. It was held that the defendants were liable as reasonable persons would have understood the words to refer to the plaintiff.

STUDY TEXT

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Defamation of a Class

A problem arises where a defamatory statement referred to a class to which the plaintiff belongs. The test is the same i.e. would a sensible ordinary person identify the plaintiff as the person defamed?

In *Eastwood v. Holmes,* **Willes J** stated:

> "If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there was something to point to the particular individual."

The question of whether an individual can sue in respect of words, which are directed against a group, or body or class of persons generally, was considered by the House of Lords in *Knuppfer v. London express Newspaper Ltd (1944)* and the law may be summarized as follows:

1. The question is whether the words are published 'of the plaintiff' in the sense that he can be said to be personally pointed at.
2. Normally where the defamatory statements is directed to a class of people no individual belonging to the class is entitled to say that the words were spoken of him. As per Lord Porter, 'no doubt it is true to say that a class cannot be defamed as a class, nor can an individual be defamed by a general reference to the class to which he belongs.'
3. Words which appear to apply to a class may be actionable if there is something in the words, or the circumstances under which they were published which indicates a particular plaintiff or plaintiffs.
4. If the reference is to a limited class or group e.g. trustees, members of a firm, tenants of a particular building etc so that the words can be said to refer to each member, all will be able to sue.
5. Whether there is any evidence on which the words can be regarded as capable of referring to the plaintiff is a question of law for the judge. If there is such evidence then it is a question of fact whether the words lead reasonable people who know the plaintiff to the conclusion that they do refer to him.

In *Anson v. Stuart,* a newspaper paragraph stated, 'this diabolical character, like Polyphemus the man eater, has but one eye, and is well known to all persons acquainted with the name of a certain noble circumnavigator.' It was clear that the plaintiff was the person indicated on this giving proof that he had one eye and bore a name similar to that of Anson, the famous admiral.

3. THE WORDS MUST BE 'MALICIOUSLY' PUBLISHED

Publication is communication of the words to at least one person other than the person defamed.

Communication to the plaintiff himself is not enough for defamation constitutes injury to ones reputation, and reputation is what other people think of a man, not his own opinion of himself.

It is normally said that the words must be published maliciously but this is purely formal, and is usually inserted in the plaintiff's statement of claim for the purpose of inflating damages where there has been spite of deliberateness. Express statements made in the sense of spite or ill motive will usually defeat the defenses of fair comment and qualified privilege.

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Communication between spouses about a 3rd party is not publication. This is explained by the fiction of unity between husband and wife. A communication by a third party to one spouse about the other is however publication.

By dictating a defamatory letter to his secretary, an employer commits Slander. If the secretary reads it back to him or hands over the typed copy, she is not making a fresh publication.

A statement not heard by the recipient because e.g. he is deaf or he does not understand the language is not treated as having been published nor is a person liable if a 3rd party on his own initiative hears or sees the defamatory matter.

However he will be liable for the statement which he intended a 3rd party to know or should have foreseen might come to his attention.

In *Huth v. Huth,* opening a letter sent through a butler out of curiosity and in breach of his duties was held not to amount to publication by the defendant. However, per Lord Reading:

> "There would have been publication by the defendant if the letter, whether sealed or unsealed, had not been marked "private" and had been opened and read by the plaintiff's correspondence clerk in the course of his duty. A defendant should anticipate that a husband might open his wife's letters and equally a letter addressed to a businessman may be opened by a secretary and therefore the defendant and will thus be responsible for the resulting publication unless the letter was clearly marked 'personal' or 'private'."

The burden of proof of publication is on the plaintiff but in many circumstances this burden is eased by certain rebuttable presumptions of fact e.g. an open postcard or a telegram message is deemed to have been published to those who would, in the ordinary course of transmission, normally see it.

Spoken words are deemed to have been published to people within earshot.

6.12 REPETITION OF A STATEMENT

One who respeats a defamatory statement made by another person is liable for the repetition and this constitutes a fresh publication even though the person does not know that the statement is defamatory.

However, the original maker of the statement is liable for such re-publication if he has authorized it or if it seems reasonably foreseeable.

In *Eglantine Inn Ltd v. Smith*, the printers were held liable on this principle because they clearly envisaged the distribution of the defamatory matter among the public and could, therefore be deemed to have authorized it. Every repetition is a fresh publication that gives rise to fresh cause of action against each successive publisher.

In *Vizentally v. Mudle's select library Ltd,* the owners of a circulating library were held liable for allowing people to read some books which the publisher had asked them to return as they might contain defamatory matter.

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DEFENCES OF DEFAMATION

1. UNINTENTIONAL DEFAMATION

Under common law, the fact that the maker of a statement was unaware of the circumstances making it defamatory does not absolve him from liability. The Defamation Act seeks to redress this situation by enabling the defendant to make an 'offer of amends' for the innocent defamation.

Under the Act, words shall be treated as innocently published in relation to another person if and only if:

1. The publisher did not intend to publish them of and concerning that other person, and did not know of circumstances by virtue of which they might be understood to refer to him; or
2. The words were not defamatory on the face of them, and the publisher did not know of circumstances by virtue of which they might be understood to be defamatory of that person, in either case, the publisher has exercised all necessary care in relation to the publication.

The Defamation Act provides further that an offer of amends is an offer;

a) In any case to publish or join in the publication a suitable correction and apology;
b) Where copies of a document or record containing the words have been distributed by or with the knowledge of the person making the offer, to take such steps as are reasonably practicable on his part to notifying persons to whom copies have been so distributed that the words are alleged to be defamatory of the party aggrieved.

If the offer of amends is acceptable by the party aggrieved, and duly performed, no proceedings for Libel or Slander may be taken or continued by that party making the offer in respect of the publication in question.

If the offer of amends is not accepted by the party aggrieved, then it is a defence in any proceedings by him for the Libel or Slander to prove that:

i. The words were published innocently in relation to the plaintiff
ii. The offer was made as soon as it practicable after the defendant received notice that they were or might be defamatory to the plaintiff; and
iii. The words were published without malice.

This provision of the Defamation Act is said to have mitigated the rigidity of Common Law only partially as an offer of amends has so many qualifications and technical requirements that it is unlikely that it will avail many defendants.

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2. CONSENT AND ASSUMPTION OF RISK

If the plaintiff expressly or impliedly assents to the publication of the matter which is true on the face of it, the defendant is not liable; and this is so even if it appears that some persons may interpret the statement in a sense much more prejudicial to the plaintiff that is warranted by the plain meaning of the words.

In *Cookson v. Harewood,* **Scrutton L.J said**

> "If you get a true statement and an authority to publish the true statement, it does not matter in the least what people will understand it to mean."

The defence of consent has been regarded as an instance of voluntary assumption of risk (*volentinon fit injuria*). This defence was upheld in *Chapman v. Elsemele* where the plaintiff by being amember of the Jockey Club was deemed to have consented to publication of a report in the Jockeys Journal.

3. JUSTIFICATION OR TRUTH

The plaintiff does not have to prove that the statement complained of was false. On the contrary the burden is on the defendant to prove that the statement was true.

Truth is a defense because the law will not permit a person to recover damages in respect of any injury to a character, which he either does not have or ought not to posses.

The defendant must establish the truth of the precise charge that has been made which is ultimately a matter of interpretation of the facts.

In *Wakley v. Cooke,* the defendant called the plaintiff a 'Libelous Journalist.' He proved that the plaintiff had been found liable for Libel once. The court took the view that these words did not mean that the plaintiff was held liable on one occasion but mean that the Journalist habitually libelled people. The defence of truth accordingly failed.

The defendant must justify the statement by showing that it was substantially accurate. The standard of proof for jurisdiction is the normal civil one of balance of probabilities, but as is other civil cases, the seriousness of the defendant's allegation may be taken into account in determining whether he has discharged that burden.

The defence will not fail if the truth of several charges is not established provided that having regard of the truth of the remaining charges, the charge not proved does not materially injure the plaintiff's reputation.

In *Alexander v. North Eastern Railway*, the defendant published a statement that the plaintiff had been sentenced to a fine of 1 to 3 weeks imprisonment. They justified this by proving that he had actually been sentenced to a fine of 1 or 2 weeks imprisonment. The statement was held to be substantially true.

One difference between the defence of justification and the defenses of fair comment and qualified privilege is that even malice on the part of the defendants does not deprive him of the defence of justification.

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The defence of justification is a dangerous defence if the defendant fails to prove the truth of the statement he has made he may end up paying aggravated damages as insisting that a statement is true without proving amounts of fresh publication hence fresh defamation.

In *Broadway Approvals Ltd v. Odhams press Ltd,* **per Davis L.J;**

> "A plea of justifications should not, of course be made unless the defendant has evidence of the truth of the statement."

4. FAIR COMMENT

This defence stems from the belief that honest and fair criticism is indispensable in every freedom loving society. The law weighs the interest of the plaintiff against the freedom of speech and it is for the judge to rule whether any comment was called for in particular situation and to say whether the statements are of facts or opinions, and if they are opinions, whether they are honest and fair.

The requirements of this defence are as follows:

1. Public interest

The matter commented on must be of public interest.

In *London Artist Ltd v. Litler* **per Lord Denning M.R**

> "Whenever a matter is such as to affect people at large so that they may be legitimately interested in or concerned at what is going on or what may happen to them or to others than it is a matter of public interest on which everyone is entitled to make fair comments. The reference to people at large should not be taken to suggest that if the statement complained of refers to one person or a few persons, it can never be of public interest."

Matters of government, National and Local Management of public and religious institutions, the conduct of foreign policy and even the behaviour of holders of public office are matters of public interest.

2. The comment must be an opinion on true matters

Fair comment is available only in respect of expression of opinion. In fair comment it is not necessary to prove the truth of the comment, but that the opinion was honestly held.

The defence of fair comment only lies on facts which are proved to be true, and on statements of facts not proved to be true but which were made on the privileged occasion.

The comment itself need not be true, though. It must be honestly made, but the facts upon which the comment itself need not be true unless they are privileged.

If the facts are untrue, the defendant will not succeed in fair comment merely by proving that his comment is honestly made.

In *Merivale v. Carson*, it was held that a defendant who implied that a play was adulterous could not rely on this as a fair comment where the court found as a fact that adultery was not dealt with in the play.

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Sometimes it is diffi cult to differentiate a statement of facts and a comment e.g. a statement that x was drunk last night and his behaviour was disgraceful – such a statement is of opinion. If X's behaviour after drinking was in fact disgraceful, then it is a statement of fact. If however, the second statement is a statement of opinion, then it is the subject of a fair comment.

Every statement must be taken on its merits. The same words may be a statement of facts or an opinion depending on the context. To say that "A is a disgrace of human nature" is an allegation of fact. But to say "Y murdered his father and is therefore a disgrace to human nature," the latter words are plainly a comment on the former.

3. The comment must be fair

The comment must be honest and not actuated by malice. For comment to be fair it must fi rst be based upon true facts in existence when the comment was made.

One cannot invent untrue facts about another then comment on them. The fair comment may however be based on an untrue statement which is made by some people upon a privileged occasion e.g. a statement of a witness in the course of judicial proceedings, and properly attributed to him. The comment held should however be based on the untrue statement of another person, not the person making the comment.

In assessing fairness, it is important that the defendant honestly holds is opinion. It is not for the court to substitute its own judgment as to what is fair.

The test given by Lord Esher M.R. in *Merivale v. Carson* **was:**

> "Would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism said of the work which is criticized."

4. Absence of malice

The defence will be defeated by proof of malice, which here means, "evil motive or spite."

In *Thomas v. Bradbury, Agnew & co Ltd*, the court of appeal held that a book reviewer for punch magazine was hostilely motivated against the plaintiff's books facts which are evident not only by the review he wrote but also by his behaviour in the witness box. His behaviour displayed malice which negated the plea of fair comment.

5. PRIVILEGE

There are two categories of privilege:

1. Absolute privilege
2. Qualifi ed privilege

1. Absolute Privilege

A privileged statement may be defi ned as one which is made in such circumstances as to exempt one from the rule that a person attacks the reputation of another at his own risk.

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A statement is said to be absolutely privileged when it is of such a nature that no action will lie for it, however false or defamatory it may be and even though it is made maliciously. The defence is available in the following cases:

a) Any statement made in the course of and with reference of **judicial proceedings** by any judge, jury, party, witness or advocate.
b) Fair and accurate report in any newspaper of proceedings heard before any court.
c) Any statement made in **parliament** by a member of parliament
d) Reports, papers, votes and proceedings published by the order and / or under the authority of the National Assembly.
e) Communication made by one **officer of state** to another in the course of his offi cial duty.
f) Communication between an **advocate and his client** in connection with litigation.
g) Communication between **husband and wife**.

2. Qualified privilege

It is limited in scope.

When an occasion of qualifi ed privilege exists, a person, provided he is not actuated by malice is entitled to make defamatory statements about another. Like absolute privilege, here the right freedom of speech prevails over the right of reputation but only to a limited extent.

The statement must be made honestly and without any indirect or improper motives. Qualifi ed privilege is thus an intermediate case between absolute privileges but only to a limited extent.

The statement must be made honestly and without any indirect or improper motives. Qualifi ed privilege is thus an intermediate case between absolute privilege and absence of privilege.

The general principle is that the statement is protected if it is fairly made by a person in the discharge of some public or private duty whether legal or moral or in the conduct of his own affairs in maters where his interest is concerned.

No complete list of such occasion is possible but it is generally agreed that the main instances are:

a) Statements made in the performance of a duty;

A statement is conditionally privileged if this is made in the performance of any legal, social or moral duty, imposed upon the person making it.

The privilege is that of the publisher, the person to whom the statement is published needs no privilege because he commits no tort. Never the less it is essential that the person to whom the statement is made has a corresponding interest or duty to receive it. This is not to say that both parties must have a duty or both an interest; one may have an interest and the other a duty.

The duty need not be the one enforceable by law, it is suffi cient that by the moral standards of right conduct prevalent in the community, the defendant lay under an obligation to say what he did. It is not enough that he believed himself to be under such duty / obligation; it is for the judge to decide whether on facts such a duty existed.

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A father or a near relative may warn a lady as to the character of the man whom she proposes to marry *(Todd v. Hawkins)*. In *Watt v. Longsdon*, the defendant, a company director, informed the chairman of the board of directors of his suspicion that the plaintiff, an employee of the company, was misbehaving with women. He also informed the plaintiff's wife.

Held: That the communication to the Chairman was privileged but not to the wife foralthough she had an interest in hearing about the allegation, the defendant had no moral or social duty to inform her.

b) Statements made in protection of an interest

Even when there is no duty to make the statement, it is nevertheless privileged if it is made in the protection of some lawful interest of the person making it, e.g. if it is made in the defence of his own property or reputation but here also there must be a reciprocity i.e. there must be an interest to be protected on one side and a duty to protect that interest on the other.

In *Adam v. Ward,* the plaintiff made a complaint in the House of Commons against the General Scobell containing charges of a wounding character. The General Scobell, as he was compelled to do by regulations referred the matter to the Army council which after investigations found that the attack was unjustifiable. The army council ordered the defendant to publish in the newspaper a letter to the General Scobell vindicating him and also containing statements defamatory of the plaintiff. The plaintiff sued.

Held: The occasion of publication was privileged and that the privilege was not destroyed either by the number of people whom the publication might reach or by reason of the fact that the publication contained matter defamatory of the plaintiff had publicity attacked the character of the defendant.

In *Osborn v. Boutler*, where some brewers answered a complaint by a publican of the poor quality of their beer by voicing a suspicion that the publican had watered the beer, it was held that the latter publication was covered by privilege.

The same principle is applicable even when the interest of the defendant is merely the general interest which he possesses in common with all others in the honest and efficient exercise of public officials of duties entrusted to them.

Thus any member of public may make charges of misconduct against any public servant and the communication may be privileged, but the charge must be made to the proper person, i.e. those who have a corresponding interest. A communication to the wrong person e.g. a publication to the world at large in a newspaper or otherwise is an excess of privilege and the privilege will thereby be lost.

c) Fair and accurate reports of parliamentary proceedings

This qualified privilege protects the advantage of publicity against any private injury resulting from the publication. It is not limited to newspaper reports and covers other reports e.g. Broadcast reports. In order to qualify as fair and accurate the report does not have to be a full précis of the debate; a 'parliamentary sketch' may properly select those portions of the debate, which will be of public interest. What matters is whether the report is fair and accurate in so far as the debate concerned the plaintiff's reputation.

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d) Communication between advocate and client

This is covered by both qualified and absolute privilege. Professional communication between an advocate and client in connection with litigation is absolutely privileged as was held in *More v. Weaver.*

Other communications which have nothing to do with litigation e.g. the drawing of a client's will are covered by qualified privilege. The general restriction is that the communication has to be a professional one for it to be privileged and also that the relationship of advocate – client must be proved.

What passes between and advocate and a client if the relationship has been established is privileged if, within a very wide and generous ambit of interpretation, it is fairly referable to the relationship, or, put in another way, per Lord Atkin in *Minter v. Priest.*;

> "If it consists of personal communications passing for the purpose of getting or giving professional advice."

This would exclude a piece of gossip intersected by the client in a conversation on, say, land registration e.g. "have you heard that Jones has run off with Mrs. Brown?"

6.13 MALICE

The defence of a qualified privilege is negated by malice. Malice means the presence of improper motive or even gross and unreasoning prejudice.

A statement is malicious if it is made for some purpose other than the purpose for which the law confers the privilege.

In *Horrocks v. Lowe* the court stated that malice destroys the privilege and leaves the defendant subject to the ordinary law by which a mistake, however reasonable, is no defence.

The law requires that a privilege shall be used honestly, but not that it should be used carefully.

LIMITATION OF ACTIONS

Causes of actions are not enforceable in perpetuity, they must be enforced within the duration prescribed by law failing which they become statute barred.

The Limitations of Actions Act[5] prescribes the duration within which causes of action must be enforced in Kenya. For example:

Cause of Action	Years
Breach of Contract	6
Negligence	3
Defamation	1
Rendering an Account	6
Prescriptive Rights	20
Enforcing a judicial award	6
Enforcing a judgement	12
Recovery of rent	6
Recovery of land	12

The purpose of the Limitation of Actions Act in fixing the duration is to facilitate the administration

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of justice by ensuring that cases are heard as and when they occur. The duration also ensures that cases are decided on the best available evidence. It also ensures that the hearing of cases is spread out.

When does time start running?

As a general rule it starts running from the date a cause of action arises e.g the date of a breach of contract or the date when the accident occurred. However, the running of time may be postponed in certain circumstances:

a) When the prospective defendant is the president or is exercising the functions of the office of the president, time starts running when he ceases to hold office or stops exercising the functions or dies, whichever comes first.
b) If the prospective defendant or plaintiff is an infant/ minor, time starts running when he attains the age of majority (18 years) or dies, whichever comes first
c) If the prospective plaintiff is a person of unsound mind, time starts running when he becomes of sound mind or dies, whichever comes first.
d) If the prospective plaintiff is labouring under mistake, fraud or ignorance of material facts, time starts running when he ascertains the true position or when a reasonable person would have so ascertained.
When time starts running, it generally runs through and the action becomes statute-barred in which case the defendant escapes liability.
However, a statute barred action may be proceeded with “with leave of the court” if the court is satisfied that the delay was justifiable after considering the circumstances of the case.

CHAPTER SUMMARY

WHAT IS A TORT?

A tort is a civil wrong whose remedy is a common law action for damages or other relief (not every wrong is a tort). A single action may give rise to a tort and a crime.

The law of tort protects various personal and proprietary interests.

GENERAL DEFENCES IN TORT LAW

1. Plaintiff’s default/contributory negligence
2. Act of god
3. Volenti non fit injuria
4. Necessity and private defense
5. Statutory authority

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ESSENTIALS OF DEFAMATION GENERALLY

Whether defamation consists of Libel or Slander the following requisites are common to both, and must be proved by the plaintiff.

1. The words must be defamatory
2. They must refer to the plaintiff
3. They must be maliciously published.

DEFENCES OF DEFAMATION

1. Unintentional defamation
2. Consent and assumption of risk
3. Justification or truth
4. Fair comment

The requirements of this defence are as follows:

a. Public interest
b. The comment must be an opinion on true matters
c. The comment must be fair
d. Absence of malice

5. Privilege
   There are two categories of privilege:
   a) Absolute privilege
   b) Qualified privilege

REQUIREMENTS OF THE RULE IN *RYLANDS v. FLETCHER*

1. The thing
2. Accumulation
3. Non-natural user of land
4. Escape
5. Damage

DEFENCES TO THE RULE IN *RYLANDS v. FLETCHER*

1. Consent of the plaintiff
2. Contributory negligence (plaintiff's own default)
3. Act of third parties (act of a stranger)
4. Act of god
5. Statutory authority.

ELEMENTS OF NEGLIGENCE

The tort of negligence consists of three elements which a plaintiff must prove in any action based on negligence.

a) Legal duty of care.
b) Breach of duty.
c) Loss or damage.

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DEFENCES TO NEGLIGENCE

1. Contributory negligence
2. Voluntary assumption of risk (*volenti non fit injuria*)
3. Statutory authority

CHAPTER QUIZ

1. Name atleast 5 torts
2. List 4 defences to torts.
3. What are the main elements of the tort of Negligence?

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CHAPTER QUIZ ANSWERS

1. Types of Torts

1. Negligence.
2. Defamation.
3. Trespass.
4. Vicarious liability.
5. Nuisance.

2. Defences to torts

1. Plaintiff's default/contributory negligence
2. Act of god
3. Volenti non fit injuria
4. Necessity and private defense
5. Statutory authority

3. Elements of negligence

There are 3 elements which a plaintiff must prove in any action based on negligence:

a) Legal duty of care.
b) Breach of duty.
c) Loss or damage.

SAMPLE EXAMINATION QUESTIONS

QUESTION ONE

a) Explain the legal principle in the rule in *Rylands v. Fletcher*
b) Explain the defenses available to a person sued in an action brought against him under this rule
c) Jambazi sneaked into Green's compound with the intention of breaking into his car and stealing a radio cassette. As he was walking towards the car park he fell into a pitch which Green had dug to construct a water reservoir's a result Jambazi was seriously injured. Jambazi now seeks your legal advice as to whether he can sue Green. State the legal principles available to the above facts and advise Jambazi

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QUESTION TWO

With reference to Occupier's Liability act

a) Define an occupier
b) Explain its main provisions in relation to a person visiting premises
c) Advice an occupier whose employee, a window cleaner was injured when a window pane was a shattered
d) Outline the general defenses available to the occupier against liability to a trespasser

QUESTION THREE

a) Indicate the ways in which a tort of conversion may be committed
b) Explain the legal principles applicable in each of the cases listed below;
   i. B entered into C's land to recover a time rabbit that belonged to B's children
   ii. H pasted a poster on D's wall advertising a disco dance competition meant for raising funds for a local charity
   iii. F cut down the branches of a mango tree belonging to G his neighbour which had extended to his land. He picked the ripe mangoes from the fallen branches and gave all of them to the children in his vicinity.

QUESTION FOUR

a. Discuss the legal principles which govern limitations of actions in tort
b. Distinguish between trespass and conversion
c. Explain the circumstances under which trespass to persons would be justified under law

(Footnotes)

[1] Cap 40 Laws of Kenya

[2] By the Family Law Review Act of 1969

[3] A person appointed by the court to protect a minor's interests in proceedings affecting his interests (such as adoption, wardship, or care proceedings). They are currently referred to as children's guardians.

[4] 34 Laws of Kenya

[5] Cap 22 Laws of Kenya

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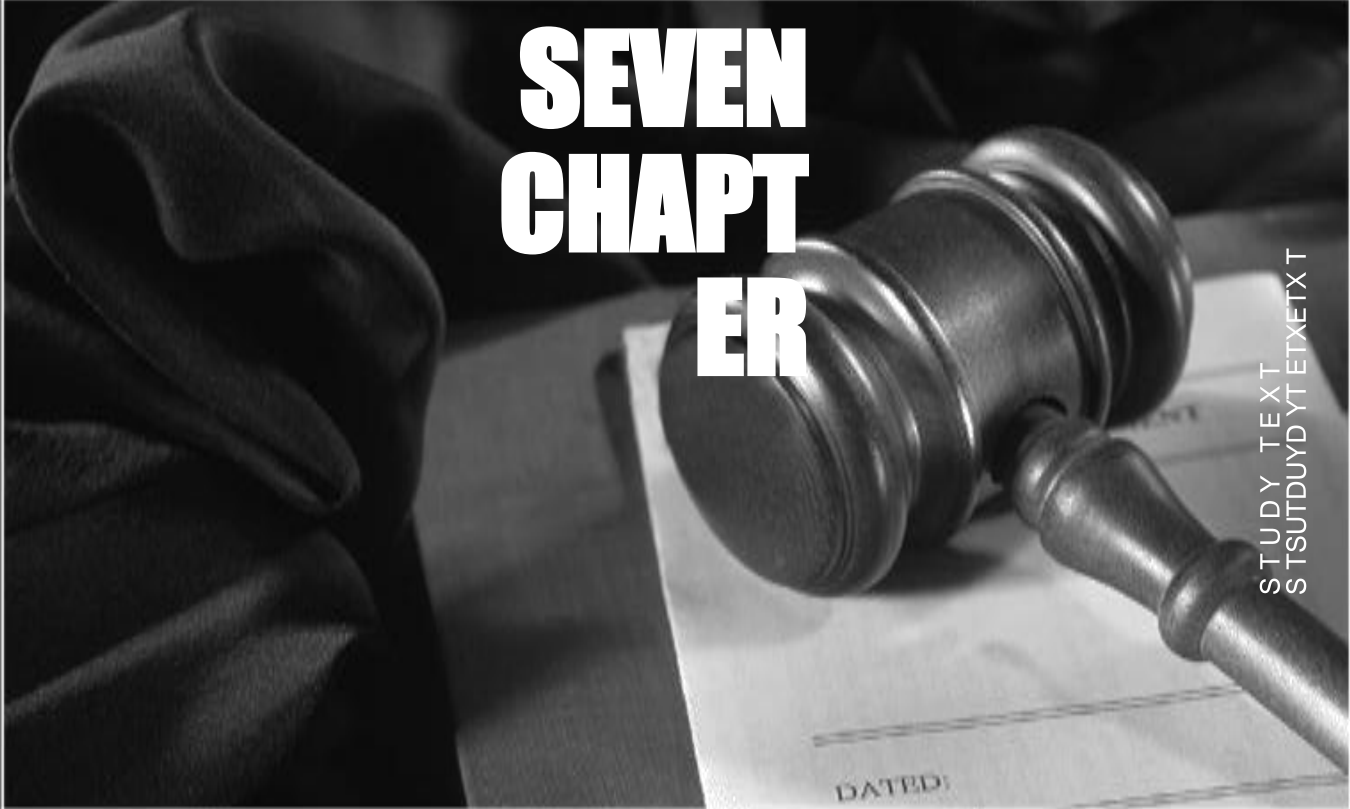

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CHAPTER SEVEN

THE LAW OF CONTRACT

▶ OBJECTIVE

To provide the candidate with a broad understanding of the following concepts pertaining to the Law of Contract;

- The nature of a contract.
- Formation of a contract.
- Classification of Contracts.
- Terms of contract; Exemption clauses, conditions and warranties.
- Vitiating factors; mistake, misrepresentation, duress and undue influence.
- Privity of contract.
- Termination and discharge of a contract.
- Remedies for breach of contract.
- Limitations of actions.

▶ INTRODUCTION

This chapter deals with the formalities that are involved before a contract comes into existence. It then looks at the terms of contract, vitiating factors and the eventual termination or discharge of a contract.

▶ KEY DEFINITIONS:

- **Offer:** an unequivocal and clear manifestation by one party of its intention to contractwith another.
- **Unequivocal:** clear, definite and without doubt
- **Invitation to treat:** This is a mere invitation by a party to another or others to makeoffers or bargains. The invitee becomes the offeror and the invitor becomes the offeree. A positive response to an invitation to treat is an offer.
- **Acceptance:** This is the external manifestation of assent by the offeree.
- **Revocation:** This is the withdrawal of the offer by the offeror.
- **Consideration:** It has been defined as “an act or promise offered by the one party andaccepted by the other party as price for that others promise.”
- **Estoppel:** It a doctrine that is to the effect that where parties have a legal relationshipand one of them makes a new promise or representation intended to affect their legal relations and to be relied upon by the other, once the other has relied upon it and changed his legal position, the other party cannot be heard to say that their legal relationship was different.
- **Conditions:** This is a term of major stipulation in a contract. If a condition is breached,it entitles the innocent party to treat the contract as repudiated and to sue in damages.

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- **Warranties:** This is a minor term of a contract or a term of minor stipulation. If breached, it entitles the innocent party to sue in damages only as the contract remains enforceable and both parties are bound to honour their part of the bargain.
- **Merchantable quality:** Fit to be offered for sale. Reasonably fit for the buyer's purposes
- **Privity of contract:** This doctrine is to the effect that only a person who is party to a contract can sue or be sued on it.
- **Void:** Lacking legal force.
- **Voidable:** Capable of being rescinded or voided.
- ***Caveat emptor:*** It literally means "buyer beware" This is a Common Law principle to the effect that in the absence of fraud or misinterpretation, the seller is not liable if the goods sold do not have the qualities the buyer expected them to have.
- ***Quantum meruit:*** This literally means "**as much as is earned or deserved".**This is compensation for work done. The plaintiff is paid for the proportion of the task completed.
- **Breach of contract:** A failure to perform some promised act or obligation
- **Frustration of contract:** A contract is said to be frustrated when performance of the obligations becomes impossible, illegal or commercially useless by reason of extraneous circumstances for which **neither party** is to blame.
- **Damages:** it is a monetary award by court to compensate the plaintiff for the loss occasioned by the breach of contract.
- ***Ex-gratia* Sum:**- a free-sum, one not required to be made by a legal duty
- ***In futuro:*** -in future:
- **Unilateral Mistake*:***This is a mistake as to the identity of one of the parties to the contract. Only one party is mistaken and the mistake is induced by the other party.
- **Misrepresentation:** This is a false representation. It is a false statement made by a party to induce another to enter a contractual relationship.
- **Duress: -** actual violence or threats thereof

▶ EXAM CONTEXT

Whether we know it or not we all contract at some point in time in one way or another. This therefore is a chapter that most exam questions will be centred on to ensure that the student clearly can explain from the formation to discharge of a contract. **It's of high importance tounderstand the various concepts brought out in this chapter.** *The candidate also has tobe aware that case law is absolutely paramount in tackling problem questions*. This chapter inan analysis of the years from 2000 has featured in each sitting as follows:-11/06; 05/06; 11/05;
05/05; 11/04; 05/04; 11/03; 05/03; 11/02; 05/02; 11/01; 05/01; 07/00; 11/00; 05/00

▶ INDUSTRY CONTEXT

As indicated earlier we all contract whether consciously or sub consciously. The bulk of the day to day contracts we make do not have all the formalities and are merely agreements. Contract law is therefore a very vital chapter as most persons and companies contract on a daily basis. A detailed knowledge of this chapter will make the candidate appreciate the machinations behind the procedures and rules of contracts and assist in the ascertainment of a realization of their own rights and the remedies available incase of breach of contract.

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7.1 THE LAW OF CONTRACT

A contract may be defined as a legally binding agreement made by 2 or more parties. It has also been defined as a promise or set of promises a breach of which the law provides a remedy and the performance of which the law recognizes as an obligation.

The most important characteristic of a contract is that it is enforceable. The genesis of a contract is an agreement between the parties hence a contract is an enforceable agreement. However, whereas all contracts are agreements, all agreements are not contracts.

TYPES OF CONTRACTS

Contracts may be classified as:

1. Written / specialty contracts
2. Contracts requiring written evidence
3. Simple contracts
4. Contracts under seal

STUDY TEXT

1. WRITTEN CONTRACTS

These are contracts which under the law must be written, that is embodied in a formal document e.g. hire purchase agreement, contract of marine insurance, contract of sale of land.

Contracts under seal: this is a contract drawn by one party, sealed and sent to the party/parties for signature. Such a contract requires no consideration e.g. a lease agreement, mortgage, and charge.

2. CONTACTS REQUIRING WRITTEN EVIDENCE

These are contracts which must be evidenced by some notes or memorandum.

Contents of the note / memorandum:

1) A description of the parties sufficient to identify them.
2) A description of the subject matter of the contract
3) The consideration (value)
4) Signature of the parties

Examples include; contracts of insurance other than marine, contract of guarantee.

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3. SIMPLE CONTRACTS

These are contracts whose formation is not subject to any legal formalities. The contract may be:

- Oral
- Written
- Partly oral and written
- Implied form conduct of the parties

Examples include; contract of sale of goods, partnership agreement, and construction contracts.

ELEMENTS OF A CONTRACT

These are the constituents or ingredients of a contract. They make an agreement legally enforceable. These elements are:

d. Offer
e. Acceptance
f. Capacity
g. Intention
h. Consideration
i. Legality
j. Formalities, if any

SOURCES OF LAW OF CONTRACT

Under section 2 (1) of the Law of Contract Act, Cap 23, the sources of law of contract are:

1. Substance of common law
2. Doctrines of equity
3. Certain Statutes of General Application
4. Other Acts of the Kenyan Parliament

7.2 CREATION / FORMATION OF CONTRACTS

A contract comes into existence when an **offer** by one party is unequivocally **accepted** by another and both parties have the requisite **capacity**. Some **consideration** must pass and the parties must have **intended** their dealings to give rise to a **legally binding agreement**. The purpose of the agreement must be **legal** and any necessary **formalities** must have been complied with.

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THE OFFER

An offer has been defined as: an unequivocal manifestation by one party of its intention to contract with another. The party manifesting the intention is the **offeror** and the party to whom it is manifested is the **offeree**.

RULES / CHARACTERISTICS OF AN OFFER:

1. An offer may be oral, written or implied from the conduct of the offeror.
2. An offer must be communicated to the intended offeree or offerees. An offer remains ineffective until it is received by the offeree.
3. An offer must be clear and definite i.e. it must be certain and free from vagueness and ambiguity. In *Sands v. Mutual Benefits* as well as in *Scammell and Nephew Ltd v. Ouston*, it was held that words used were too vague and uncertain to amount to an offer.
4. An offer may be conditional or absolute. The offeror may prescribe conditions to be fulfilled by the offerer for an agreement to arise between them.
5. The offeror may prescribe the duration the offer is to remain open for acceptance. However, the offeror is free to revoke or withdraw his offer at any time before such duration lapses e.g. in *Dickinson v. Dodds*, the defendant offered to sell a house to the plaintiff on Wednesday 10/06/1874 and the offer was to remain open up to Friday 12th at 9.00 am. However on the 11th of June, the defendant sold the house to a 3rd party. The plaintiff purported to accept the offer of Friday morning before 9.00 am. It was held that there was no agreement between the parties as the defendant had revoked his offer by selling the house to a 3rd party on June 11th. A similar holding was made in *Ruoutledge v. Grant,* where the defendant's offer was to remain open for 6 weeks but he revoked or withdrew it after 4 weeks. It was held that there was no agreement between the parties.
6. The offeror may prescribe the method of communication of acceptance by the offeree. If he insists on a particular method, it becomes a condition.
7. An offer may be general or specific i.e. it may be directed to a particular person, a class of persons or the public at large. In *Carlill v. Carbolic Smoke Ball Co*, the defendant company manufactured and owned a drug name the "Carbolic Smoke Ball" which the company thought was the best cure for influenza, cold and other diseases associated with taking cold water. The company put an advertisement in a newspaper to the effect that a £100 reward would be given to any person who contracted influenza or related diseases after taking the smoke ball as prescribed i.e. 2 tablets, 3 times a day for 2 weeks. The advertisement further stated that the company had deposited £1000 with the Alliance Bank on Reagent Street as a sign of their sincerity in the matter. Mrs. Carlill who had read the advertisement bought and took the Smoke balls as prescribed but contracted influenza. The company rejected her claim and she sued. The company argued that the advertisement;
   a. Was nothing but mere salestalk
   b. Was not an offer to the whole world
   c. Was not intended to create legal relations

The Court of Appeal held that though the wording of the advertisement was unclear, it amounted to an offer to the whole world and the person who fulfilled its conditions, contracted with the company hence Mrs. Carlill was entitled to the £100 reward.

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EXAMPLES OF OFFERS

1. Public transport: as was the case in *Wilkie v. London Passenger Transport Board.*
2. Bidding at an auction as was the case in *Harris v. Nickerson.*
3. Submission of a tender
4. Application for employment

An offer must be distinguished from an Invitation to treat.

INVITATION TO TREAT

This is a mere invitation by a party to another or others to make offer or bargain. The invitee becomes the offeror and the invitor becomes the offeree. A positive response to an invitation to treat is an offer.

Examples of invitation to treat

1. **Advertisement of sale by auction:** At common law, an advertisement to sell goods or other property by public auction is an invitation to treat. The prospective buyer makes the offer by bidding at the auction and the auctioneer may accept or reject the offer.

   It was so held in *Harris v. Nickerson* where a commission agent had sued as auctioneer for failure to display furniture he had advertised for sale by auction. It was held that there was no contractual relationship between the parties as the advertisement was merely an invitation to treat and as such, the auctioneer was not liable.

2. **Sale by display:** At common law, the display of goods with cash price tags is an invitation to treat. The prospective buyer makes the offer to buy the items at the stated or other price which the shop owner may accept or reject. In *Fisher-v-Bell*, the defendant was sued for 'offering for sale' a flick knife contrary to the provision of the Offensive Weapons Act. The defendant had displayed the knife in a shop with a cash price tag. Question was whether he had offered the knife for sale. It was held that he had not violated the Act as the display of the knife was an invitation to prospective buyers to make offers.

3. **Sale by self-service:** At common law, a sale by self-service is an invitation to treat. Prospective buyers make offers by conduct by picking the goods from the shelves and the offer may be accepted or rejected at the cashier's desk. The offeror is free to revoke his offer to buy the goods at any time before reaching the cashiers desk. In *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd (1952)*. The defendant owned and operated a self-service store which stocked among other things, drugs which under the provisions of the Pharmacy and Poisons Act (1933) could only be sold with the supervision of the registered pharmacist. The defendant's pharmacist was stationed next to the cashier's desk. The plaintiff society argued that the defendant had violated the Act as the pharmacist was not stationed next to the shelves where the drugs were displayed. Question was at what point a sale took place. It was held that the defendant had not violated the provisions of the Act as its pharmacist was stationed next to the cashier's desk where the actual sale took place. This case is authority for the proposition that in a sale by self-service, a sale takes place at the cashier's desk. A similar holding was made in *Lasky v. Economy Grocers Ltd.*

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TYPES OF OFFERS

1. Cross offers

This is a situation where a party dispatches an offer to another who has sent a similar offer and the two offers cross in the course of communication. No agreement arises from cross offers for lack of consensus between the parties. The parties are not at *ad idem.*

2. Counter offer

This is a change, variation or modification of the terms of the offer by the offeree. It is a conditional acceptance. A counter offer is an offer in its own right and if accepted an agreement arises between the parties.

Its legal effect is to terminate the original offer as in *Hyde v. Wrench (1840),* the defendant made an offer on June 6th to sell a farm to the plaintiff for £1,000. On 8th June, the plaintiff wrote to the defendant accepting to pay £950 for the farm. On 27th June, the defendant wrote rejecting the £950. On 29th June the plaintiff wrote to the defendant accepting to pay £1,000 for the farm.

The defendant declined and the plaintiff sued for specific performance of the contract. It was held that the defendant was not liable as the plaintiff's counter offer of £950 terminated the original offer which was therefore not available for acceptance by the plaintiff on 29th June as the defendant had not revived it.

A counter offer must however be distinguished from a request for information or inquiry.

Request for information:

An inquiry which does not change terms of the offer. The offeree may accept the offer before or after inquiry is responded to as was the case in *Stevenson-v-Mc Lean*, where the defendant had offered to sell 3,800 tonnes of iron to the plaintiff at £ 40 per tonne and the offer was to remain open from Saturday to Monday. On Monday morning, the plaintiff telegraphed the defendant inquiring on the duration of delivery. The defendant treated the inquiry as a counter offer and sold the iron to a third party. The plaintiff subsequently accepted the offer but thereafter received the defendant's notice of the sale to the 3rd party. The plaintiff sued in damages fro breach of contract. It was held that the defendant was liable.

3. Standing offer

A standing offer arises when a person's tender to supply goods and service to another is accepted. Such acceptance is not an acceptance in the legal sense. It merely converts the tender to a standing offer for the duration specified if any. The offer is promising to supply the goods or services on request and is bound to do so where a requisition is made.

Any requisition of goods or services by the offeree amounts to acceptance and failure to supply by the offerer amounts to a breach of contract.

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As was the case in *Great Northern Railway Co Ltd v. Witham*. The plaintiff company invited tenders for the supply of stores for 12 months and Witham's tender was accepted. The company made a requisition but Witham did not supply the goods and was sued. It was held that he was liable in damages for breach of contract.

In standing offer, the offeror is free to revoke the offer at any time before any requisition is made, unless the offeror has provided some consideration for the offeror to keep the standing offer open.

This consideration is referred to as '**an option'.** This is an agreement between an offeror and the offeree by which an offeree agrees to keep his offer open for a specified duration. In this case, the offeror cannot revoke the offer.

In a standing offer, if no order to requisition is made by the offeree within a reasonable time, the standing offer lapses.

TERMINATION OF OFFERS

A contractual offer may come to an end or terminated in any of the following ways:

1. REVOCATION

This is the withdrawal of the offer by the offeror. At common law, an offer is revocable at any time before acceptance.

Rules of revocation of offers

1. An offer is revocable at any time before it becomes effectively accepted. It was so held in *Paybe v. Cave.* In *Dickinson v. Dodds*, the sale of the house by the defendant to a 3rd party revoked his offer to the plaintiff.
2. Notice of revocation must be communicated to the offeree. However, such communications need not to be effected by the offeror. It suffices, if communicated by a 3rd party as was the case in *Dickinson v. Dodds.*
3. An offer is revocable even in circumstances in which the offeror has promised to keep it open to a specified duration, unless an option exists, as was the case in *Dickinson v.Dodds.*
4. Revocation becomes legally effective when notice is received by the offeree.
5. An offer is irrevocable after acceptance. It was so held in *Byrne v. Van Tienhoven.*
6. In unilateral contracts, an offer is irrevocable if the offeree has commenced and continues to perform the act which constitutes acceptance.
7. A bid at an auction is revocable until the hammer falls.

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2. REJECTION

An offer terminates if the offeree refuses to accept the same, the refusal may be express or implied from the conduct of the offeree e.g. silence by the offeree amounts to a rejection as was the case in *Felthouse v Bindley*.

3. COUNTER OFFER

This is a change or variation of the terms of the offer by the offeree. It is a form of rejection. The legal effect of a counter offer is to terminate the original offer as was the case in *Hyde v.Wrench.*

4. LAPSE OF TIME

If an offer is not accepted within the stipulated time and not revoked earlier, it lapses on expiration of such duration. Where no duration is specified, the offer lapses on expiration of reasonable time. What is reasonable time is a question of fact and varies from case to case.

In *Ramagate Victoria Hotel Ltd v. Montefiore*_in early 6/1864, the defendant made an offer to purchase 40 shares of the plaintiff company, the offer was not accepted until November by which time the defendant had given up. The company sued for the value of the shares, the defendant pleaded that the offer had not been accepted within a reasonable time. It was held that the defendant was not liable as the offer had lapsed fro non-acceptance within a reasonable time.

A similar holding was made in *Virji Khimji v Chatterbuck* The defendant ordered timber from the plaintiff and indicated that it be supplied as soon as possible. The plaintiff did not respond but delivered the timber. 4 ½ months later, the defendant refused to take delivery and was sued. It was held that he was not bound to take delivery as his offer had lapsed for non- acceptance within a reasonable time.

5. DEATH

The death of the offeror or offeree before acceptance terminates an offer. However, the offer only lapses when notice of death of the one is communicated to the other.

6. INSANITY

The unsoundness of mind of either party terminates an offer. However, the offer only lapses when notice of the insanity of the one is communicated to the other.

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7. FAILURE OF A CONDITION SUBJECT TO WHICH THE OFFER WAS MADE

These are conditional offers. If a condition or state of affairs upon which an offer is made fails, the offer lapses. In *Financings Ltd v. Stimson*, the defendant opted to take up a vehicle on hire purchase terms. He completed the hire purchase application form and paid a deposit. This form constituted his offer. He took delivery of the vehicle but returned it to the showroom after 2 days for some minor rectification. The vehicle was stolen from the showroom and when recovered it was badly damaged by reason of an accident. The defendant refused to take delivery or pay installments and was sued. He pleaded the state of the vehicle. It was held that he was not liable as his offer had lapsed. This offer was conditional upon the motor vehicle remaining in substantially the same condition as it was before and since its condition had changed, his offer had lapsed.

ACCEPTANCE

This is the external manifestation of assent by the offeree. It gives rise to an agreement between parties. In legal theory, an agreement comes into existence at the subjective moment when the minds of the parties meet. This moment is referred to as *Consensus ad idem* (meeting of minds).

However, this subjectivity must be externally manifested by the offeree for the agreement to arise. Acceptance may be oral, written or implied from the conduct of the offeree.

RULES OF ACCEPTANCE

1. **Acceptance may be oral, written or implied from the conduct of the offeree.** In *Carlill v. Carbolic Smoke Ball Co*, acceptance by Mrs. Carlill took the form of her conductby purchasing and consuming the smoke balls. In *Brogden v. Metropolitan Railway Co,* where it was held that the 1st load of coal supplied by Brogden constituted acceptance of the defendants offer to supply the coal and hence there was an agreement between the parties.

2. **The offeree must have been aware of and intended to accept the offer:** A personcannot accept an offer whose existence he is unaware of. In *Crown-v-Clarke*, the Australian government offered £1,000 to any person who volunteered information leading to the arrest and conviction of the killers of 2 police officers. Any accomplice who gave information would be pardoned. Clarke, who was aware of the murder gave the information and the killers were arrested and convicted. However, he made it clear that he had given the information to clear his name. It was held that he was not entitled to the reward as he had given the information for a different purpose and therefore had not accepted the offer.

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3. **Acceptance must be unconditional and unqualified:** The offeree must accept the offer in its terms, any variation or modification of the offer amounts to a conditional acceptance which is not an acceptance as was the case in *Hyde v. Wrench* where the plaintiff modified the defendant's offer of £1,000 to £ 950.

4. **An offer must be accepted within the stipulated time if any or within a reasonable time failing which it lapses.** As was the case in *Ramsgate Victoria Hotel v. Montefoire,* where the defendant's offer made in June was not accepted until November by which time had elapsed. A similar holding was made in *E.A Industries Ltd v. Powyslands.*

5. **Acceptance must be communicated to the offeror in the prescribed method if any or an equally expeditions method.** Where no method of communication is prescribed, the method to apply depends on the type of offer and the circumstances in which the offer is made.

6. **As a general rule, silence by the offered does not amount to acceptance**, it was so held in *Felthouse v. Bindley.* The plaintiff intended to buy a house owned by a nephew named John who had no objection. The plaintiff intended to buy it or £30 15p. He wrote to Jon stating 'if I hear no more about him, I consider the horse mine at that price.' John did not respond but 6 weeks later he gave the horse to the defendant for sale but instructed him not to sell the particular horse. It was sold by mistake. The plaintiff sued the auctioneer in damages for conversion. Question was whether there was a contract of sale between the plaintiff and John. It was held that there was no contract as John had not communicated his acceptance of the offer.

7. **Where parties negotiate by word of mouth in each others presence, acceptance is deemed complete when the offeror hears the offeree's words of acceptance.** It was so held in *Entores Ltd v. Miles Far East Corporation* , where Lord Denning observed that there was no contract between the parties until the offeror hears the words.

8. Where parties negotiate by **telephone,** acceptance is deemed complete when the offeror hears the offeree's words of acceptance. It was so held in *Entores Ltd v. Miles Far East Corporation.*

9. Where parties negotiate by **telex** acceptance is deemed complete when the offeree's words of acceptance are received by the offeror. It was so held in *Entores v. Miles Far East Corporation.*

10. In **unilateral offers**, commencement and continuation of performance constricts acceptance. During performance, the offeror cannot revoke the offer but to do so if performance is discontinued as was the case in *Errington v. Errington and Woods.*
A father bought a house where the son and daughter in-law lived by paying a deposit of £250 and raising the balance by a loan from a Building society. He promised to transfer the house to them if they paid all installments as and when they fall due. The £250 would be a gift to them.
They commenced payment of the installments but stopped before the entire sum had been paid. The father was compelled to pay the remaining installments. He declined the transfer of the house to them. It was held that he was not bound to do so as they had discontinued payments' of the installments.

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11. In **standing offers**, a specific order or requisition by the offeree constitutes acceptance and the offerer is bound as was the case in *Great Northern Railway Co. v. Witham.*
12. An offer to a **particular/specific person** can only be accepted by that person for an agreement to arise. It was so held in *Boulton v. James.*
13. An offer to a **class of persons** can only be accepted by a member of that class for an agreement to arise. It was so held in *Wood v. Lecktrick*.
14. An offer to the **general public** may be accepted by any person who fulfils its conditions. As was the case in *Carlill v. Carbolic Smoke Ball Co.*
15. The postal rule of acceptance:
    Where the offeror expressly or impliedly authorizes the offeree to communicate acceptance by post, acceptance is deemed complete when the letter is posted whether it reaches its destination or not. It was so held in *Byrne v. Van Tienhoven and Co Ltd*.

a) Express authorization:

These are circumstances in which the offeror expressly permits the offeree to communicate acceptance by post. As was the case in *Adams v. Lindsell*, on **2/9/1817,** the defendant offered to sell to eth plaintiff a quantity of wood on certain terms and required a response 'in the course of post.' The plaintiff received the letter on **5/9/1817** and posted an acceptance. On **8/9/1817** the defendant posted a letter revoking the offer. The plaintiff's letter of acceptance was received on **9/9/1817**. It was held that there was a contract between the parties as the plaintiff had posted the letter of acceptance by the time the defendant purported to revoke the offer. Hence, the revocation was ineffective.

b) Implied authorization:

There are circumstances in which the offeror by implication authorized the offeree to communicate acceptance by post.

In *Household Fire Insurance Co.-v-Grant,* the defendant offered to buy 100 shares to the plaintiff company. The offer was communicated by post. The Company allotted the shares to him and the company secretary made out the letter of allotment which was posted but never reached the defendant who was subsequently sued for the amount due on the shares. He denied liability on the ground that the company had not communicated its acceptance. However, it was held that since the company had posted the letter of acceptance, there was a contract and the defendant was liable. In *Henthorn v. Fraser,* X made an offer to Y to take up a lease. On the following day between noon and1 pm, X posted a letter withdrawing the offer which was received by Y at 5pm. At 3.50pm on the same day, Y had posted a letter accepting the offer. The letter was read by X on the following day. It was held that there was a contract between parties which came into existence at 3.50pm when Y posted the letter of acceptance.

The purported revocation at 5pm had no effect.

In *Byrne v. Van Tienhoven and Co Ltd* on 1/10 the defendant made an offer to sell to eth plaintiff 1000 boxes of tin plates but on 8/10 the defendant posted letter revoking the offer. The same was received on 15/10. On 11/10 the plaintiff telegraphed the defendant an acceptance which he confirmed by a letter posted on 15/10. It was held that there was a contract between the parties which come into existence on 15/10 when the letter of acceptance was posted.

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c) **No authorozation:**
If the offeror does not expressly or implied authorizes the offeree to use the post but the offeror uses the post, acceptance is deemed complete when the letter of acceptance is received by the offeror.

16. If the offeror instructs his **messenger** to deliver to him the letter of acceptance in any from the offeree, acceptance is deemed complete when the letter is handed over to the messenger.
17. Acceptance need not be communicated to the offeror where such communication is expressly or impliedly **waived**. This was the case in *Carlill v. Carbolic Smoke BallsCo*, where Mrs. Carlill was not required to communicate the fact of purchase andconsumption of the Smoke balls.
18. Acceptance need not be communicated to the offeror where it makes the form of conduct. This was the case in *Brogden v. Metropolitan Railway co Ltd*.

Once an offer is accepted, an agreement arises between the parties as there is consensus between them. Offer and acceptance constitutes the foundation of a contractual relationship. They do not constitute a contract as a contract must be characterized by other elements.

INTENTION TO CREATE LEGAL RELATIONS

In addition to offer and acceptance, an agreement must be characterized by intention. The parties must have intended to create legal relations. Intention is one of the basic elements of a contract as common law. An agreement is unenforceable unless the parties thereto intended such a consequence.

Ascertainment of intention:

To determine whether parties intended to create legal relations, courts consider;

1. Nature or type of agreement i.e. whether commercial or business and domestic or social.
2. The circumstances in which the agreement was entered into. These two factors demonstrate whether the parties intended to contract.

a) Business or commercial agreements;

In considering such agreements, courts proceed from the presumption that the parties intended to create legal relations.

STUDY TEXT

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1. Advertisements

These are intended to promote sales of the advertiser. They have a commercial objective. In *Carlill v. Carbolic Smoke Ball Co. Ltd,* the company had manifested an intention to create legal;relations by stating that it had deposited £1,000 with Alliance Bank Regent Street. Hence Mrs Carlill was entitled to the £100 as she had contracted with the company.

2. Employment agreements

These are commercial agreements intended to impose legal obligations on the parties thereto.

In *Edwards v. Skyways Ltd,* the plaintiff was a former employee of the defendant company as a pilot and was declared redundant but promised on *ex-gratia* sum. He provided consideration for the promise.

By reason of many other redundancies, the company was unable to make good the promise to Edwards who sued. It was held that he was entitled to the sum as this was a business agreement intended to create legal relations.

The court was emphatic that this was not a domestic agreement.

However, the circumstances in which a commercial or business agreement is entered into may show that the parties did not intend to create legal relations and this would be the case where **honour clauses** or **honourable pledge clauses** are used.

This is a clause in agreement to the effect that the parties do not intend to create legal relations.

It denies the agreement legal intention thereby converting it to a gentleman's agreement binding in honour only.

Such an agreement is unenforceable in law as was the case in *Rose & Frank v. CromptonBrothers* where the agreement between the two companies contained an honour clause, but oneof them purported to enforce the agreement.

The court of Appeal held that it was unenforceable as the honour clause had denied it legal intention.

A similar holding was made in *Jones-v-Vernon Pools Ltd* where the agreement had an honour clause.

It was observed that whenever an agreement contained an honour clause, the plaintiff was obliged to trust the defendant as the agreement cannot be enforced by court of law.

b) Domestic or social agreements

Courts proceed on the presumption that the parties did not intend to create legal relations.

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1. Agreement between husband and wife

Such agreements are generally not intended to impose upon the parties any rigid obligations.

In *Balfour v Balfour*, the defendant was a civil servant in Sri Lanka. At the time, he and his wife were in Britain on holiday.

His wife fell ill and it became clear that she was not in a position to accompany him back to Sri Lanka.

He promised to send her 30 pounds per month for the duration they would remain apart. He did not and the wife sued.

It was held that her action was not sustainable as the parties had not intended to create a legal relationship. A similar holding was made in *Gould v Gould.*

2. Agreements between Parent and Child

Such an agreement is ordinarily not intended to be a contract but a working relationship.

In *Jones v. Pandervatton*, the plaintiff persuaded her daughter to leave a well paying job to study Law in Britain, she was promised a maintenance allowance as she studied. She reluctantly agreed. In the meantime, the plaintiff bought a house where the defendant lived as part of the maintenance. Before the daughter completed her studies, the 2 quarreled and the mother sought to evict her from the house. She argued that there was a contract between them.

However it was held that the parties had not intended to create legal relations and the mother was entitled to evict her.

However the circumstances in which a domestic or social agreement is entered into may show that the parties intended to create legal relations.

Such intentions may be collected from the words used by the parties, their conduct and the circumstances of the agreement;

1. Agreement between husband and wife

Such an agreement may be forced if the parties have manifested an intention to contract. E.g. in *McGregor v McGregor,* a husband and wife sued each other for assault but later resolved to withdraw the cases but live apart. The husband promised to pay a weekly sum as maintenance while the wife promised to maintain the children.

The husband was in arrears for 6 weeks and the wife sued. It was held that her action was sustainable as the parties had manifested an intention to contract. A similar holding was made in *Merrit v Merrit.*

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2. Other Social Agreements

Such agreements may be enforced if the parties if the parties have manifested an intention to contract. In *Simpkins v. Pays,* the defendant owned a house where she lived with a grand daughter; the plaintiff was a paying boarder (a lodger).

The three took part in a Sunday newspaper competition. All entries were made in the defendant's name. However, there were no rules on payment of postage.One week's entry won £750.

The plaintiff claimed 1/3 of the sum. The defendant argued that this was a pastime activity not intended to create legal relations.

However the court held that the plaintiff was entitled to 1/3 of the sum as the parties had manifested an intention to contract.

A similar holding was made in *Parker v. Clark.*

Case law demonstrates that an agreement is legally unenforceable unless the parties to it intend such a consequence.

7.3 CAPACITY

In addition to consensus and intention, a contract must be characterized by capacity. This is the legal ability of a party to enter into a contractual relationship. For an agreement to be enforceable as a contract the parties must have had the requisite capacity.

As a general rule, every person has a capacity to enter into any contractual relationship.

However, in practice, the law of contract restricts or limits the contractual capacity of certain classes of persons namely;

1. Infants or minors.
2. Drunken persons.
3. Persons of unsound mind.
4. Corporations.
5. Undischarged bankrupts.

1. CONTRACTUAL CAPACITY OF INFANTS OR MINORS

Under Section 2 of the Age of Majority Act[1], an infant or minor is any person who has not attained the age of 18.

Contracts entered into by an infant are binding, voidable or void depending on their nature and purpose.

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1. BINDING CONTRACTS

These are legally enforceable contracts; the infant can sue or be sued on them. Both parties are bound to honour their obligations.

These contracts fall into 4 categories;

a. Contracts for the Supply of “Necessaries”

Under section 4 (2) of the Sale of Goods Act necessaries mean goods suitable to the condition in life of such an infant or minor and to his actual requirement at the time of sale and delivery.

In *Nash v. Inman,* the defendant was an infant college student. Before proceeding to college, his father bought him all the necessary clothing material.

However, while in college, he bought additional clothing material from the plaintiff but did not pay for them and was sued.

His father gave evidence that he had bought him all the necessary clothing material. It was held that he was not liable as the goods were not necessaries when supplied.

b. Contracts for the Supply of “Other Necessaries”

These are necessaries other than those covered by Section 4 (2) of the Sale of Goods Act. E.g. Legal services, transport to and from work, lodging facilities etc.

An infant is bound by any contract for the supply of such necessaries. Under the Sale of Goods Act, whenever an infant is supplied with necessaries, he is liable to pay not the agreed price but what the court considers as reasonable.

3. Educational Contracts

An infant is bound by a contract whose purpose is to promote his education or instruction.

c. Contracts for Beneficial Service

These are beneficial contracts of service. Case law demonstrates that an infant can sue or be sued and is bound by contracts whose object is to benefit him as a person.

In *Doyle v. White City Stadium*, the plaintiff was a qualified infant boxer. He applied to join the British Boxing Board and was granted a license.

One of the rules of the body empowered it to withhold payment of any price money won if a boxer was disqualified in a competition.

The plaintiff was disqualified on one occasion and the Board withheld payment. The plaintiff sued. Question was whether the plaintiff was bound by the contract between him and the Board.
It was held that he was as in substance it was intended to benefit him hence the money was irrecoverable.

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A similar holding was made in *Chaplin V. Leslie Fremin (Publishers) Ltd.* Where the plaintiff, an infant had engaged the defendant to write a book for him. He subsequently discontinued the transaction. It was held that the contract was binding as it was intended to benefit him.

A similar holding was made in *Clements v. London and North Western Railway Co.*

2. VOIDABLE CONTRACTS

Certain contracts entered into by an infant are voidable i.e. the infant is entitled to repudiate the contract during infancy or within a reasonable time after attaining the age of majority.

By avoiding the contract, the infant escapes liability on it. The infant cannot be sued on the contract during infancy. These contracts confer upon the infant a long term benefit. Examples include: Partnership agreements, lease or tenancy agreement and contract for the purchase of shares.

Under Section 12 of the Partnership Act, an infant partner is not liable for debts and other liabilities of the partnership during infancy since the contract is voidable at his option.

However under Section 13 of the Act, if the infant does not avoid the contract during infancy, or within a reasonable time after attaining the age of majority, he is liable for debts and other obligations of the firm from the debt he became partner.

In *Davis v. Beynon-Harris* where an infant had taken up a lease but failed to repudiate the contract during infancy or within a reasonable time thereafter, it was held that he was liable under the contract.

3. VOID CONTRACTS

Under the provisions of the Infants Relief Act (1874) which applies in Kenya as a statute of general application, certain contracts entered into by infants are void. These are contracts which the law treats as nonexistent. They confer no rights and impose no obligations on the parties.

Theses contracts are;

1. All accounts stated with infants: These are debts admitted by an infant. The infant cannot be sued on such admission.
2. Contracts for the supply of goods other than necessaries.
3. Money lending contracts: An infant is not bound to repay any monies borrowed from a 3rd party as the contract is void. However if the infant repays, the amount is irrecoverable.

In *Leslie Ltd. V. Sheil,* the defendant, an infant borrowed £400 from the plaintiff, a money lending firm in 2 lots of £200 each and was liable to pay £475 inclusive of the interest but failed to do so and was sued.

The plaintiff argued that it was entitled to damages for misrepresentation as the defendant had fraudulently misrepresented his age.

It further argued that the defendant had received the money on its behalf. It was held that the amount was irrecoverable as the contract was void by reason of the **Infants Relief Act 1874.**

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Since a money lending contract was void, any security given by the infant is also void and therefore unenforceable by the lending party. It was so held in *Valentini v. Canali.*

If an infant uses monies borrowed under a void contract to purchase necessaries, the lending party is in Equity put into the shoes of the party supplying the necessaries and can sue the infant for the recovery of the amount borrowed as was used to purchase the necessaries.

This is the principle of **subrogation** as was explained in *In re: National Permanent Benefits Building Society Ltd.*

Question has arisen as to whether an infant can ratify contracts made during infancy after he has attained the age of majority. Any such purported ratification or adoption has no legal effect.

2. CONTRACTUAL CAPACITY OF DRUNKEN PERSONS

A contract entered by a drunken person is voidable at his option by establishing that:

1. He was too drunk to understand his acts.
2. The other party was aware of his condition.

By avoiding the contract, the person escapes liability on it. In *Gore v. Gibson,* the defendant was sued on a bill of exchange he had signed and endorsed. He pleaded that when he did so he was too drunk to understand what he was doing and that the plaintiff was aware of his condition.

It was held that he was not liable as the contract was voidable at his option by reason of the drunkenness.

If a contract entered into by a person when drunk is ratified by him when sober it is no longer voidable as was the case in *Mathews v Baxter* where the defendant had contracted to sell a house to the plaintiff. When sued he pleaded drunkenness.

However it was held that he was liable as the plaintiff proved that he had subsequently ratified the transaction while sober.

Under Section 4 (2) of the Sale of Goods Act, if a drunken person is supplied with necessaries he is liable to pay a reasonable price.

3. CONTRACTUAL CAPACITY OF PERSONS OF UNSOUND MIND

A contract entered into by a person of unsound mind is voidable at his option by establishing that:

1. He was too insane to understand his acts.
2. The other party was aware of his mental condition.

By avoiding the contract the party escapes liability on it. In *Imperial Loan Co. Ltd v Stone*, the defendant was sued on a promissory note he had signed. He argued that at the time, he was insane and therefore incapable of comprehending the nature or effects of his acts and that he was not liable on the promissory note as the contract was voidable by reason of insanity.

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In the words of Lopes L.J. "In order to avoid a fair contract on the ground of insanity, the mental capacity of the one contracting must be known to the other contracting party. The defendant must plead and prove not merely his insanity but the plaintiff's knowledge of that fact and unless he proves these 2 things he cannot succeed."

If a contract entered into by a person of unsound mind is ratified by him when he is of sound mind it ceases to be voidable.

Under Section 4 (2) of the Sale of Goods Act, if a person of unsound mind is supplied with necessaries, he is liable to pay a reasonable amount.

4. CONTRACTUAL CAPACITY OF UNDISCHARGED BANKRUPTS

These are persons who have been declared bankrupt by a court of competent jurisdiction. There capacity to contract is restricted by the provisions of the Bankruptcy Act[2].

5. CONTRACTUAL CAPACITY OF CORPORATIONS

These are artificial persons created by law, either by the process of registration or by statute. The capacity of the corporations to contract is defined by law e.g. a statutory corporation has capacity to enter in transactions set out in the statute as well as those reasonably incidental thereto.

Other transactions are **ultra vires** and therefore null and void. The contractual capacity of a registered company is defined by the object clause of the memorandum. At common law a registered company has capacity to enter into transactions set forth in the objects and those that are reasonably incidental to the attainment or pursuit of such objects.

It was so held in *Ashbury Railway Carriage and Iron Co. v. Riche* as well as in *Attorney Generalv. Great Eastern Railway Co*

Other transactions are *ultra vires* (beyond the powers of) the company and void. Transactions within the powers of a company are said to be *intra vires* a company.

An *ultra vires* transaction cannot be ratified and any purported ratification has no legal effect. It was so held in *Ashbury's Case*.

7.4 CONSIDERATION

In addition to consensus, capacity and intention, an agreement must be characterized by consideration to be enforceable as a contract. At Common Law, a simple contract is unenforceable unless supported by some consideration. Consideration is the bargain element of a contract.

It is nothing but mutuality. It has been defined as **"an act or promise offered by the one partyand accepted by the other party as price for that others promise."**

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Judicial Definitions

In the words of Lush J. in *Currie v. Misa,* "a variable consideration may consist of some right, interest, profit or benefit accruing to the one party or some loss, forbearance, detriment or responsibility given, suffered or borne by the other."

In the words of Patterson J in *Thomas v. Thomas* "consideration means something which is of some value in the eye of the law moving from the plaintiff. It may be some benefit to the defendant or detriment to the plaintiff but at all events it must be moving from the plaintiff."

Consideration is whatever the promisee gives or provides to buy the promisors promises. By so doing the promisee becomes party to the contract. Consideration takes various forms. In *Carllilv. Carbolic Smoke Ball Co*, it took the form of detriment i.e. swallowing of the smoke balls by Mrs.Carllil. In *Patel v. Hasmani*, it took the form of forebearance to sue.

TYPES OF CONSIDERATIONS

Consideration may be **executory** or **executed** but must not be **past.** However in certain circumstance past consideration may support a contractual claim.

1. Executory Consideration

Consideration is executory where the parties exchange mutual promises. Neither of the parties has performed its part of the contract. The whole transaction is in future.

Executory consideration is good to support a contractual claim. E.g. purchase of goods on credit for future delivery.

2. Executed Consideration

Consideration is executed where a party does an act to purchase the others promise. The act may be partial or total performance of the party's contractual obligation. It is good consideration to support a contractual claim.

3. Past Consideration

Consideration is past where a promise is made after services have been rendered. There is no mutuality between the parties. Past consideration is generally not good to support a contractual claim.

In *Roscorla v. Thomas,* the plaintiff had just bought a horse from the defendant and as he was leading it away, the defendant assured him that it was a good horse free from any vice.

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The statement turned out to be untrue and the plaintiff sued for damages. It was held that the defendants promise was unenforceable by the plaintiff as consideration was wholly past.

A similar holding was held in *In re McArdles Case* where Mrs. McArdles spent £488 improving and decorating the house they lived in at no ones request. The house belonged to Mrs. McArdles husband's father and was to be sold after her mother-in-law's death. The beneficiaries of the estate signed a document promising Mrs. McArdle £488 when the estate was distributed.

However no payment was made and Mrs. McArdle sued. It was held that the promise was unenforceable as consideration was past.

In certain circumstances, past consideration is sufficient to support a contractual

claim. These are exceptions to the general rule:

1. Acknowledgement of a statute barred debt

Under the Limitation of Actions Act, Cap 32 Laws of Kenya, a debt becomes statute barred after 6 years. In such a case, the debtor is not bound to repay. However, a written acknowledgement of the debt by the debtor is enforceable by the creditor though consideration is past. It was so held in *Ball v. Hasketh* and *Heyling v. Hasting.*

2. Negotiable Instruments

One of the characteristics of negotiable instruments e.g. cheques, bills of exchange, promissory notes, share warrants e.t.c. is that past consideration is good to support any action on the instrument.

A holder of a negotiable instrument can sue on it even though he has not given consideration provided a previous holder gave some consideration.

This exception is contained in Sec 27(1) of the Bills of Exchange Act[3], and was relied upon to enforce an action in *Lombard Banking Co. Ltd v. Gandhi and Patel*.

3. Rendering of Services on request

Where services are rendered by a party, at the express or implied request of another in circumstances that give rise to an implied promise to pay, a subsequent promise to pay for the services is enforceable.

The law takes the view that the rendering of the services and the promise to pay are an integral part of the same transaction.

In *Lampleigh v. Brathwait* the defendant had killed a man named Patrick. He requested the plaintiff to secure pardon for him from the king. The plaintiff exerted himself and made a number of trips to see the king and ultimately secured the pardon. The defendant promised to pay him £100 for the trouble, a promise he did not honour and was sued.

He argued that the plaintiff had not provided consideration for his promise to pay. However it was held that the promise was enforceable as it was inseparable from the request for the services. A similar holding was made in *Re Casey Patents Ltd.*

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RULES OF CONSIDERATION

1. Mutual love and affection is not sufficient consideration

It was so held in *Thomas v. Thomas.* Mr. Thomas had expressly stated that if he died before his wife, she was free to use his house as long as she remains unmarried. His brothers who later became executors of his estate knew of this wish.

After his death, Mrs. Thomas remained in his house and unmarried. After the death of one of the executors, the other sought to evict Mrs. Thomas from the house. She sued the late husband's estate. It was held that the husbands promise was enforceable as she had provided consideration by way of the £1 she paid for every year she lived in the house.

The love she had for the late husband was not sufficient consideration but the £1 she paid every year was..

2. Consideration must be legal

The act or promise offered by the promise must be lawful as illegal consideration invalidates the contract.

3. Consideration must not be past

As a general rule, past consideration is not good to support a contractual claim as exemplified by the decisions in *Re McArdles case* and *Roscorla v. Thomas.*

However, in certain circumstances, past consideration is sufficient to support a contractual claim, as indicated above.

4. Consideration must be real

This rule means that consideration must be something of value in the eyes of the law. It means that consideration must be sufficient though it need not be adequate.

This rule means that as long as something valuable in law passes, the promise is enforceable. It means that the law does not concern itself with the economics of a transaction.

It means that the courts of law do not exist to correct bad bargains. In *Thomas v. Thomas*, the £1 Mrs. Thomas paid per year was sufficient consideration.

However if the consideration is too low in comparison and there is evidence of a mistake, misrepresentation, duress or undue influence, the courts may intervene.

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5. Consideration must flow from the plaintiff/ promise

This rule means that the person to whom the promise is made provides consideration and by so doing there is a bargain between the parties or mutuality.

By providing consideration, the promise becomes party to the transaction. In *Thomas v. Thomas*, Patterson J was emphatic that "consideration must at all times flow from the plaintiff."

The rule that consideration must flow from the plaintiff is referred to as **The Doctrine of Privityof Contracts.**

THE DOCTRINE OF PRIVITY OF CONTRACTS

This doctrine is to the effect that only a person who is party to a contract can sue or be sud on it. It means that only a person who has provided consideration to a promise can sue or be sued on it.

It means that a stranger to consideration cannot sue or be sued even if the contract was intended to benefit him. It was so held in *Scruttons Ltd v. Midland Sillicones Ltd*. In *Price Easton*, X agreed to pay the plaintiff a sum of money if Y did some work for him. Y rendered the services to X but X did not honour the promise to pay.

The plaintiff sued to enforce the promise. It was held that the promise was unenforceable as the plaintiff was not a party to the transaction. He had provided no consideration.

A similar holding was made in *Dunlop v. Selfridge* as well as in *Tweddle v. Atkinson*.

However in certain circumstances, persons who are not party to a contract or who have not provided consideration may sue or be sued on it.

These are exceptions to the Doctrine of Privity of Contracts

i) **Agency**
In an agency relationship, the agent contracts on behalf of the principal. The principal is not directly involved in the transaction. However the principal may sue or be sued on a contract entered into by the agent. This exception is more apparent than real as in law the agent represents the principal.

ii) **Legal Assignment**
Under the provisions of the ITPA[4] if a creditor assigns his debt to another person in a legal assignment the assignee becomes entitled to sue the debtor as if he were the original creditor.

iii) **Negotiable Instruments**
A holder of a negotiable instrument can sue on it in its own name not withstanding the absence of consideration provided a previous holder of the instrument gave some consideration.

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iv) Trust

This is an equitable relationship whereby a party expressly impliedly or constructively holds property on behalf of another known as the beneficiary. In certain circumstances, the beneficiary can sue or be sued under a trust.

v) Third Party Insurance

Under the provisions of the Insurance (Motor Vehicles Third Party Risks) Act[5], , victims of motor vehicle accidents are entitled to compensation by Insurance companies for injuries sustained from the use of motor vehicles on the road.

However the insurer is only liable if the motor vehicle was in the hands of the insured or some authorized driver.

If the authorized driver pays the amount due to the victim for the injury, such amount is recoverable from the insurer but through the insured as was the case in *Kayanja v. NewIndia Insurance Co. Ltd.*

vi) Restrictive Covenants (Contracts running with land)

In certain circumstances, certain rights and liabilities attached to land are enforceable by or against subsequent holders of the land. This is particularly the case in the law of leases.

6. Consideration must be something in excess of a public duty owed by the plaintiff

This rule means that performance by the plaintiff of a public duty owed by him is not sufficient consideration for a promise to pay.

In *Collins v. Godefroy,* the defendant was involved in a civil case and the plaintiff had given evidence in the matter but was reluctant to do so in future. The defendant promised him 6 pounds if he continued giving evidence which he did.

The defendant did not honour his promise and was sued. Question was whether the plaintiff had provided consideration for the defendants promise to pay.

It was held that the promise was unenforceable as the plaintiff had not provided consideration but had merely performed a public duty.

However anything in excess of a public duty amounts to consideration. In *Glassbrook Brothersv. Glamorgan County Council,* the defendant owned a mine and at the material time the workerswere on strike. The defendant requested the plaintiff to provide a stationary guard to protect the mine and promised to pay for the services. The plaintiffs who are not bound to provide a stationary guard provided the service but were not paid.

In an action to enforce the promise, it was held that the plaintiffs were entitled to payment as they had done more than the duty required and had therefore provided consideration.

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7. Consideration must be something in excess of an existing contractual obligation

This rule means that performance by the plaintiff of an existing contractual obligation is not sufficient consideration for a promise. In *Stilk v. Myrik*, the defendant who was a ship captain entered into a contract with his crew members to assist him on a journey from Britain to the Baltic Sea and back. In the course of the journey, 2 sailors deserted.

The captain promised to share their wages between the remaining crew members a promise he did not honour and was sued. It was held that the crew members were not entitled to the extra pay as they had not provided consideration.

They had merely performed an existing contractual obligation. However, doing something in excess of a contractual obligation constitutes consideration.

In *Hartley v. Ponsonby* where in the course of a journey, a substantial number of crew members deserted and a promise for extra pay was made, it was held that they were entitled to the pay as they had done more than a contractual obligation.

The willingness to expose themselves to danger for longer hours constituted consideration for the promise.

8. Payment of a lesser sum on the day in satisfaction of a larger sum is not sufficient consideration for the creditors promise to accept such sum in full settlement for the debt.

This is referred as the **"Rule in*Pinnels Case (1602)*".** Cole owed Pinnel 8 pounds payable on 11th November 1600. However on 1st October 1600, Pinnel requested Cole to pay 5 pounds which he agreed to accept in full settlement of the debt. Subsequently, Pinnel sued Cole for the balance. The case was decided on a technical point of pleading and Cole was held liable for the balance.

This rule was applied in *Foakes v. Beer (1884).* However in certain circumstances, payment of a smaller sum extinguishes the entire debt.

These are exceptions to the rule in Pinnel's Case:

1. If the lesser sum is paid in advance and the creditor accepts the same in full settlement of the debt.
2. If the lesser sum is paid in the form of an object which the creditor accepts in settlement thereof. In **Pinnel's Case**, Brian C.J. observed, "but the gift of a horse, hawk or robe, is sufficient consideration.
3. If the lesser sum is paid in addition to an object which the creditor accepts.
4. If the lesser sum is at the creditor's request paid at a different place.
5. Where the lesser sum is paid in a different currency and the creditor accepts the same in full settlement thereof.

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6. Where the lesser sum is paid by a third party. In *Welby v. Drake*, the defendant owed the plaintiff 18 pounds and was unable to pay. The defendant's father paid the plaintiff 9 pounds which he accepted in full settlement of the debt but subsequently sued for the balance. It was held that the promise was enforceable as it was made to a 3rd party.
7. If a debtor enters into an arrangement with his creditors to compound his debts, whereby he promises to pay part of the amount due to each of the creditors who in turn promise mot to sue the debtor or insist on full payment, the lesser sum paid by the debtor extinguishes the entire debt.

The mutual promises by the parties constitute consideration.

7.5 DOCTRINE OF PROMISSORY OR EQUITABLE ESTOPPEL

This doctrine was developed by equity to mitigate the harshness of the common law rule of consideration. It is an equitable intervention which modifies the rule of consideration.

The Doctrine was explained by Lord Denning in *Combe v. Combe.* It is to the effect that where parties have a legal relationship and one of them makes a new promise or representation intended to affect their legal relations and to be relied upon by the other, once the other has relied upon it and changed his legal position, the other party cannot be heard to say that their legal relationship was different. The party is estopped from denying its promise.

For the doctrine of estoppel to apply the following conditions are necessary:

1. A legal relationship between the parties.
2. A new promise or representation in intended to be relied upon.
3. Reliance upon the representation.
4. Change in legal position as a result of the reliance.
5. It would be unfair not to estop the maker of the representation.

The Doctrine of Promissory Estoppel is often referred to as **"The Rule in the High Trees Case."**

In *Central London Property Trust v. High Trees House Ltd*, the plaintiff owned a block of flats which it leased to the defendant for 99 years at 2500 pounds per year. After the outbreak of the 2nd world war, it became clear that the defendant was not in a position to pay the agreed rent as most of the flats were unoccupied. The plaintiff promised to accept half of the rent as long as the war continued.

By the end of 1945, all the flats were occupied. The plaintiff sued for the defendant to be compelled to pay:

1. The full rent.
2. The arrears.

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The defendant argued that it was inequitable (unfair) for the plaintiff to claim the arrears. It was held that whereas it was fair for the defendant to pay the full rent, it was unfair to claim the arrears as the plaintiff had made a promise which the defendant had reliede upon and changed its legal position.

The plaintiff was estopped from insisting on the arrears.

The doctrine of equitable estoppel applies in East Africa

In *Century Automobile v. Hutchings Biemer Ltd,* the defendant took a lease of the plaintiff's premises which was terminable by a 3 month notice of either party. The defendant intended to make alterations to the building but feared doing so only for the lease to be terminated. The plaintiff promised not to terminate the lease in 4 years time.

As a consequence, the defendant spent 800 pounds on the alterations but 8 months later the defendant received the plaintiff's notice of termination but refused to honour it and was sued.

The defendant pleaded estoppel. The plaintiff was estopped from evicting the defendant as it had made a promise which the defendant had relied upon and changed its legal position.

A similar holding was made in *Commissioner of Lands v. Hussein*.

EFFECTS OF ESTOPPEL

The Doctrine of Promissory estoppelestoppel is a modification of the Common Law rule of consideration in that it enables a person who has not provided consideration to a promise to enforce it if he has relied upon it and changed his legal position.

It is argued that the principal weakness of the Doctrine of Promissory Estoppel is that it is defensive and not offensive. It can only be relied upon by the defendant as a defence. However, the so called Doctrine of Proprietary Estoppel which is based on ownership can be used both as a shield and as a sword. Courts however have observed that there is no distinction between promissory and proprietary estoppel.

7.6 TERMS / CONTENTS OF A CONTRACT

Parties negotiating a contract make many statements some of which are intended to be terms while the others are mere representations. Whereas terms form the content of the contract, representations are mere inducements and if false they are referred to as misrepresentations and may affect the contract.

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Whether a statement was intended to be a term or representation is a question of fact and courts are guided by the following rules or presumptions in so ascertaining:

1. **Time Gap:** If the duration between making the statement and the conclusion of thecontract is long, it is presumed to be a representation and if short it is deemed to be a term.
2. **Guarantee:** If a party to the negotiations appears to guarantee its statements, they arepresumed to be terms.
3. **Special Knowledge:** If either of the parties has special knowledge in relation to thesubject matter of the contract, its statements are presumed to be terms. In *Oscar Chess*
   Ltd v. Williams, Williams sold a 2nd hand car to the plaintiff. The registration book showedthat it was a 1948 model while in fact it was a 1939 car. Williams had no means of ascertaining the truth. The plaintiff sued in damages for the untrue statement. However it was held that since the statement was innocently misrepresented, the plaintiff had no action in damages.

However in *Dick Bently Productions Ltd v. Harold Smith motors Ltd,* the plaintiff intended to buy a motor vehicle from the defendant and was informed that the vehicle in question had had a replacement engine and gearbox and had only done 20,000 miles. In fact nothing had been replaced and it had done over 100,000 miles.

The plaintiff sued in damages for the untrue statement. It was held that the untrue statement was a term of the contract as the defendant was a motor dealer and was therefore liable in damages for the misrepresentation.

Terms of a contract may be:

1. Express or
2. Implied

1. EXPRESS TERMS

These are the oral and written terms agreed upon by the parties. Written terms prevail over oral terms. If contractual terms are written, oral evidence is generally not admissible to vary or explain the written terms.

However, such evidence is admissible to prove that:

1. The contract was subject to a particular trade usage or custom.
2. The parties had not incorporated all the terms into the document.
3. The parties had agreed to suspend the agreement until some event occurred

If handwritten, printed and typed terms contradict, the handwritten terms prevail as they are a

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better manifestation of the parties' intentions. It was so held in *Glynn v. Margetson.*

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2. IMPLIED TERMS

These are terms which though not agreed to by the parties, are an integral part of the contract. Theses terms may be implied by statutes or by a court of law.

A. Terms implied By Statutes

Certain statutes imply terms in contracts entered into pursuant to their provisions. These terms become part of the contract.

Terms implied in Sale of Goods contracts by the Sale of Goods Act

The Sale of Goods Act implies both conditions and warranties in contracts of Sale of goods unless a different intention appears.

CONDITIONS

a) **Right to sell**
Under Section 4 (a) of the Act there is an implied condition that the seller of goods shall have the right to sell when property in the goods is to pass.

b) **Correspond to description**
Under Section 5 of the Act, in a sale by description there is an implied condition that the goods shall correspond to the description.

c) **Fitness for purpose**
Under Section 16(a) of the Act, where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to rely on the sellers skill and judgement, there is an implied condition that the goods shall be reasonably fit for that purpose.

d) **Merchantable Quality**
Under Section 16 (b) of the Act, where goods are bought by description from a person who deals in such goods in the ordinary course of business whether a seller or manufacturer, there is an implied condition that the goods will be of merchantable quality.

e) **Sale by Sample**
Under Section 17(1) of the Act, in a sale by sample, the following conditions are implied:
1) The bulk shall correspond with the sample in quality.
2) The buyer shall be afforded a reasonable opportunity to compare the bulk with the sample.
3) That the goods shall be free from any defects rendering them unmerchantable.

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WARRANTIES

1) **Quiet Possession**
   Under Section 14 (b) of the Act there is an implied warranty that the buyer shall have and enjoy quiet possession of the goods.

2) **Free from Charge or encumbrance**
   Under Section 14 (c) of the Act there is an implied warranty that the goods shall be free from any charge or encumbrance not made known to the buyer when the contract was made.

B. Terms Implied By Courts of Law

Courts of law reluctantly imply terms in contracts as it is the duty of the parties to agree as to what the contractual terms shall be.

However in certain circumstances, courts are called upon to imply terms in contracts and do so for 2 reasons:

a) To give effect to the intentions of the parties.
b) To facilitate commercial transactions or give business efficiency.
   Courts of law imply terms in contracts on the basis of:
   1. The reasonable by stander test.
   2. Trade usages and customs.

1. Reasonable By-Stander Test

Under this test a court will imply into a contract any term which a reasonable person overhearing the contract being made would have implied.

In *Hassan Ali Issa v. Jeraj Produce Shop*, the plaintiff repaired the defendant's motor cycle. However, the defendant did not collect the repaired item until after 1 year. The plaintiff demanded repair and storage charges.

The defendant refused to pay storage charges on the ground that it had not been agreed. The plaintiff threatened to sue the defendant. As a consequence, the defendant wrote a cheque for both amounts but it was dishonoured. The plaintiff sued.

It was held that the defendant was liable tom pay storage charges. The court implied into the contract a term that if a repaired item is not collected within a reasonable time, The party undertaking storage is entitled to reasonable storage charges.

In the *Moorcock Case,* the parties had agreed that the plaintiffs ship could unload at the defendant's jetty situated upstream the River Thames. During low tide as the ship sailed towards the jetty it grounded and was damaged. The jetty owner was held liable for damage.

The court implied the term that the passage to the jetty was reasonably safe for the ship.

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2. Trade Usages & Customs

A court of law may imply a trade usage or custom into a contract if it is proved that the transaction was subject to it. The party relying on the trade custom must prove that:

1. The custom exists.
2. Is certain.
3. Is reasonable.
4. Is known to the parties.
5. The parties had not exempted the custom from their transaction. It was so held in *HalilalShah and Champion Shah v. Standard Bank Co. Ltd.*

In *Fluery and King v. Mohamed Wali & Another,* the plaintiff bought 1000 handkerchiefs from the defendants and the same were delivered in batches of 30. The plaintiff took delivery but sued the defendant for a reduction in the purchase price. It was proved that in Zanzibar there was a trade usage that handkerchiefs bought in bulk were supplied in dozens.

The court implied the custom into the contract and held that the plaintiff was entitled to the reduction in the price as he had to unpack and repack the pieces in dozens.

Contractual terms may be **conditions, warranties or innominate terms.**

1. CONDITIONS

This is a term of major stipulation in a contract. It runs to the root of the contract. It is part of the central theme of the contract. If a condition is breached, it entitles the innocent party to treat the contract as **repudiated** and to **sue in damages as** was the case in *Poussard v. Spiers andPond.* A singer was engaged to play the leading role in a French Opera from the beginning of theseason but owing to illness she was unable to take up her role during the first 1 week forcing the organizers to engage a substitute and consequently rejected the singer's services who sued.

It was held that the organizers were entitled to treat the contract as repudiated as the singer had broken a major term of the contract.

A condition may be express or implied in a contract.

2. WARRANTIES

This is a minor term of a contract or a term of minor stipulation. It is a peripheral or collateral term that does not run into the root of the contract. If breached, it entitles the innocent party to sue in **damages only** as the contract remains enforceable and both parties are bound to honour theirpart of the bargain.

In *Bettini v. Gye,* an actress was engaged to perform in concerts and theatres from the beginning of performances. However she additionally agreed to appear for 6 days in advance for rehearsal but appeared for only 3 days.

The organizers purported to treat the contract as repudiated. It was held that the contract was subsisting as the agreement to appear for rehearsals was a collateral term.

A similar holding was made in *Kampala General agency Ltd. V. Modys (EA) Ltd* where the parties had agreed to buy a large quantity of cotton deliverable at Saroti.

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However the seller took the cotton to another town named Aloi where the buyer had a cotton ginnery. The buyer refused to take delivery on the ground that the misdelivery was a breach of a condition. However, it was held that it was a breach of a warranty and the buyer was only entitled to damages.

3. INNOMINATE TERMS

These are terms of a contract categorized as neither conditions nor warranties. The breach of such terms may be attended by trivial or grave consequences.

The remedy available depends on the nature, effect and consequence of the breach.

It was so held in *Hong Kong Fur Shipping Co. v Kawasaki Kisen Kaisha* where a ship was chartered for 24 months but was unavailable for use during the 1st 20 weeks. The charterer sued alleging that the unavailability of the vessel was breach of a condition. However it was held not to be.

7.7 EXEMPTION OR EXCLUSION CLAUSES (Limiting or Excluding clauses)

The theory of freedom of contract assumes that parties are free to contract with one another and can protect their own interests.

It assumes parity in contractual bargains which is not necessarily the case. The stronger party may insert terms favourable to it. This is the genesis of exemption clauses.

An exemption clause is a clause inserted in a contract by the stronger party exempting, itself from liability or limiting the extent of any liability arising under the contract.

These clauses are common in standard form contracts e.g. conveyance of goods, hire purchase agreements contracts of insurance etc.

These clauses are justified on the theory of freedom of contract.

For an exemption clause to be given effect, the court must be satisfied that it was an integral part of the contract.

It must have been incorporated into the contract. In *L'estrange V. Graucob (1934)* the plaintiff bought an automatic cigarette vending machine from the defendant.

The terms of the agreement were written in a document entitled sale agreement.

Some of the clauses were in a very small print and the plaintiff signed the document without reading.

One clause exempted the defendant from liability if the machine turned out to be defective.

It worked for only a few days. The plaintiff sued and the defendant relied on the exemption clause in the agreement.

It was held that the defendant was not liable as the document contained the terms of the contract and the plaintiff had signed the same and was therefore bound.

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INCORPORATION OF EXEMPTION CLAUSES IN CONTRACTS

An exemption clause may be made part of a contract: -

a. By signature
b. By notice

1. INCORPORATION BY SIGNATURE

If a document signed by the parties to a contract contains an exemption clause, the court must be satisfied that: -

a. The document contained the terms of the contract between the parties
b. It was signed by the party affected voluntarily

Signature *prima facie* means acceptance. A party cannot after signing a document argue that it did not read, understand or that the print was too small. It was so held in *L'Estrange V. Graucob*.

However if there is evidence that the signature was procured by fraud or misrepresentation of the contents of the document the signature is voidable at the option of the innocent party.

As was the case of *Curtis v. Chemical Cleaning & Dyeing Co.* the plaintiff took a wedding dress to the defendant shop for cleaning and was given a document to sign. She requested the shop assistant to explain to her the contents and was informed that the document exempted the company from liability for any damage caused to the decorations of the dress.

She signed the document without reading. Her dress was damaged and stained. She sued the company which relied on the exemption clause which excluded it from liability for any damage.

The plaintiff pleaded that the contents of the document had been misrepresented to her and hence the signature, it was held that the signature was voidable at her option and the company was liable.

2. INCORPORATION BY NOTICE

What the exemption clause is not contained in a document requiring any signature, the court must be satisfied that the party affected by the clause was aware of its existence when the contract was entered into.

As was the case in *Parker v. South Eastern Railway Co.* The plaintiff had left in luggage at a railway station luggage office and was given a ticket containing the words **"see back".**

At the back was a clause exempting the company from liability for lost luggage.

The plaintiff's luggage was lost and he sued. The company relied on the exemption clause.

It was held that the company was not liable as it had brought the exemption clause to the plaintiff's notice who was therefore bound.

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However, a belated notice of an exemption clause has no effect on the contract as it is not part of it. In *Olley v. Malborough Court* the plaintiff had booked in a hotel and paid for a weeks board, she was given a key to her room where there was a notice exempting the hotel from liability for lost items. The notice was behind the door.

Guests were requested to deposit valuable with the manageress of the hotel. During her absence a stranger opened the room and stole her expensive clothing. She sued. The hotel relied on the exemption clause in the room.

It was held that the hotel was liable as the exemption clause was brought to the plaintiffs notice after the contract had been concluded.

A similar holding was made in *Lougher v. Kenya Safari Lodges and Hotels Ltd.* Where the plaintiff who was a guest in a hotel was injured near the swimming pool next to which was a notice exempting the hotel from liability for injuries sustained by persons near the swimming pool.

It was held that the hotel was liable as the exemption clause was not part of the contract.

It should be noted that at common law exemption clauses contained in tickets or receipts issued offer payment of a sum of money are not deemed to be part of the contract as the ticket or receipts is evidence of payment and not the basis of the contract.

In *Thomton v. Shoehane Parking Co. Ltd.* The defendant operated an automated parking lot. Motorists had to insert coins to obtain a receipt so as to access the parking lot.

Behind the receipt was a notice exempting the defendant from liability for injuries sustained within the parking lot.

The plaintiff who had accessed the parking lot in the ordinary manner was injured and sued.

The defendant relied on the exemption clause on the ticket. However it was held that the defendant was liable as the clause had not been incorporated into the contract.

A similar holding was made in the case of *Chappletton v. Barry UDC*

STUDY TEXT

RULES RELATING TO ENFORCEMENT OF EXCLUSION / EXEMPTION CLAUSES

For a court of law to give effect or consider the effect of an exemption clause it must be satisfied that the exemption clause was an integral part of the contract. Since exemption clauses are generally unfair to the weaker party, Courts have evolved rules which to some extent ensure that the unfairness is mitigated.

1. An exemption clause must have been incorporated into the contract either by notice or signature. The party affected must have been aware of the exemption clause when the contract was entered into.
2. If contractual terms are contained in a document, it must be evidence that the document was the basis of the contract and was signed by the parties voluntarily as was the case of *L'Estrange v. Graucob.*
3. For an exemption clause to be given effect it must be clear and definition free from vagueness or ambiguity. In the event of any ambiguity the clause is interpreted ***contraproferentes.*** This is the ***Contra Proferentem*** **Rule**of interpretation under whichclauses are interpreted restrictively against the party relying on them. As was the case

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in *Omar Sale v. Besse and Co. Ltd*. Where in a contract of sales of goods, the seller exempted itself from liability for breach of 'warranties'. It breached an implied condition in the Sale of Goods Act.

A question was whether the term warranties included conditions. It was held that since the term warranties were vague. It had to be interpreted restrictively against the seller and therefore did not include conditions. Hence the seller was liable.

4. As a general rule, only person's privy to a contract can take advantage of an exemption clause in the contract. It was so held in *Scruttons Ltd. v. Midland Silicones ltd.*

   In *Halal Shipping Co. v. SBA and Another,* a contract of carriage of goods by sea exempted the carrier from liability for any damage to the good in the course of transit. The good were damaged in the course of unloading from the ship and the plaintiff sued. The carrier relied on the exemption clause and escaped liability. The unloading company purported to rely on the same clause. It was held that it could not do so as it was not party to that contract and was therefore liable.

5. A court of law would generally not give an exemption clause effect if doing so enable the party evade what amounts to be the fundamental obligation of the contract or a fundamental breach. This rule is based on the premise that every contract has a fundamental obligation to be discharged and a party must not use an exemption clause to evade such obligation.

   In *Karsales (Harrow) Ltd v. Wallis* the defendant inspected a vehicle and decided to take it on Hire Purchase terms. To facilitate the transaction, the vehicle was sold to the plaintiff for hiring to the defendant. The defendant completed the Hire purchase application form and paid a deposit. The form contained a clause to the effect that "no condition or warranty that the vehicle is roadworthy or fit for any purpose is implied herein".

   One day, the defendant saw a vehicle outside his house which resembled the vehicle in question. However on scrutiny he discovered it was a mere shell in that the cylinder head was broken, all valves were burnt and 2 pistons were broken. The vehicle could not move. The defendant refused to take delivery or pay installments and was sued. He pleaded the condition of the vehicle. The plaintiff relied on the clause exempting it from liability. It was held that though the exemption clause was part of the contract. It could not be given effect as to do so would have enabled the plaintiff evade a fundamental obligation of the contract, as it had contracted to sell a vehicle. But exempted itself from liability if the subject matter turned out not to be a vehicle at all.

   The party arguing that a fundamental breach has been committed must prove it and must seek judicial redress within a reasonable time.

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7.8 VITIATING ELEMENTS (FACTORS AFFECTING CONTRACTS)

These are circumstances which interfere with the enforceability of a contract. They have a negative effect on contracts.

They may render a contract void or avoidable. A void contract is unenforceable while avoidable contract is enforceable unless avoided.

These factors include: -

1. Misrepresentation
2. Mistake
3. Duress
4. Undue influence

1. MISREPRESENTATION

This is a false representation. It is a false statement made by a party to induce another to enter into a contractual relationship.

It renders the contract avoidable at the option of the innocent party. However

for the innocent party to avoid the contract, it must be proved that: -

1. The statement in question was false in a natural particular i.e. it was untrue in whatever it referred to.
2. The statement was more than a mere puff or sales talk. Whether a statement is a puff or a misrepresentation depends on what a reasonable person could deem it to be.
3. The statement was one of fact not opinion. As a general rule opinion does not amount to misrepresentation. It was so held in *Edington v. Fitzmaurice.* However an opinion may amount to misrepresentation if: -

- The maker does not honestly hold that opinion
- The opinion purports to be based on certain facts within the maker's knowledge but whose truthfulness he does not verify.

4. The false statement was intended to be relied upon by the representer (recipient).
5. The false statement was in fact made by the other party to the contract. As a general rule, omission, silence or non-disclosure does not amount to misrepresentation. However it may: -
   a. In contracts of utmost good faith e.g. insurance
   b. In confidential relationships
   c. Where disclosure is a statutory requirement
   d. Where the statement made is half true
   e. If the statement was true when made but turns false due to changes in circumstances before the contract is concluded but the maker does not disclose its falsity as was the case in *With v. O'flanagan*.

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6. The false statement influenced the party's decision to enter into the contract. The party must show that the false statement was made before or when the contract was concluded. However the false statement need not have been the only factor the party has considered.

   In *Andrews v. Mockford;* where the plaintiff had relied on untrue statement in a company's prospectus, issued by the defendants it was held that the defendants were liable in damages for the statements as the plaintiff had relied on them.

7. The false statement was innocently, fraudulently or negligently made.

A) INNOCENT MISREPRESENTATION

A statement is deemed to be innocently misrepresented if the maker honestly believed in its truth though it was false and had no means of ascertaining that it was false as was the case in *OscarChess v. Williams* where the defendant had no means of ascertaining that the year of registrationof the vehicle was incorrect.

It *Alkerhielm v. De Mare* where the defendants who were directors of a company issued a prospectus stating that 1/3 of the company shares had been taken up in Denmark which was not true at the time.

It was held that the shares would be taken up in Denmark. A similar holding was made in *Derryv. Peek.*

If innocent misrepresentation is proved, the innocent party may either:-

1. Apply for rescission of the contract
2. Sue for indemnity for any direct financial loss occasioned by the representation as was the case in *Whittington v. Seale-Hayne* where the defendant had innocently misrepresented the sanitary condition and habitation of his premises to the plaintiff who as a consequence took a lease to carry on the business of poultry breeding. The premises were not in a sanitary condition and mere unfit for human habitation. Some of the defendant's poultry died while others lost value this farm manager was taken ill and the premises were declared unfit for habitation. The defendant spent money putting it in a habitable condition, and paid outstanding rates. It was held that we could only recover the direct financial loss suffered.

B) FRAUDULENT MISREPRESENTATION

A statement is deemed to be fraudulently misrepresented if the maker:

a) Has knowledge that it is false
b) Makes it carelessly and recklessly
c) Does not believe in its truth

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This test of fraud was formulated in *Derry v. Peek.* In *Andrew v. Mockford* where the defendants had issued a prospectus containing untrue statements and the plaintiff applied for 50 shares and was allowed the same but subsequently sued the defendants in damages for fraudulent misrepresentation. It was held that the defendants were liable as they were aware of the falsity of the statements

A similar holding was made in *Bartholomew v. Petronilla.*

Remedies for fraudulent misrepresentation are either: -

i. Action for rescission of contract.
ii. Damages for the fort of deceit.

C) NEGLIGENT MISREPRESENTATION

A statement is deemed to be negligently misrepresented if the maker has both means of capacity of ascertaining its falsity but fails to do so.

The maker is deemed negligent as a reasonable person in such circumstances would have so ascertained.

However, for negligent misrepresentation to be relied upon, it must be proved that: -

1. **There was a special relationship between the maker and recipient of the statements hence the maker owed the recipient a legal duty of care.**
   It was so held in *Hedley Byrene and Co. ltd. V. Heller and Partners Ltd.* A customer of the defendant bank approached the plaintiff bank for some guarantees. The plaintiff bank wrote to the defendant seeking to show the credit worthiness of the defendant customers.

   The defendant bank in 2 letters written on a 'without responsibility basis' confirmed that their customer was credit worthy.
   The plaintiff extended the guarantee but due to the customer's uncreditworthiness, the plaintiff suffered loss of £19,000.
   The plaintiff sued. It was held that though the defendant bank was negligent it was not liable as the information had been given on a 'without prejudice / responsibility basis".

2. **That the party suffered loss of a financial nature.**

   In *Kirimu Estate (UG) Ltd. v. K.G. Korde* the plaintiff company instructed the defendant (a lawyer) to value a piece of land for it.
   The defendant gave a figure without the assistance of a proper valuation of the estate. The figure was far above the market value and the company sued in damages for negligent misrepresentation.

   It was held that the defendant was liable to pay the difference in value by reason of negligence.

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2. MISTAKE

There are two types of mistakes viz:

- Mistake of law
- Mistake of fact

As a general rule a mistake of law does not affect a contract however, a mistake of foreign law may affect a contract. Mistakes of facts affected contractual relationships.

A mistake is said to be misapprehension of a fact or factual situation. It is an erroneous assumption.

Mistake of fact that effect contracts are generally referred to as operative mistakes and the law recognizes various types of operative mistakes:

a) Common
b) Mutual
c) Unilateral
d) Mistakenly signed documents
e) Mistake as to quality of subject matter

1. COMMON MISTAKE

This is a mistake as to the existence or ownership of the subject matter. Both parties make the same mistakes. Each party understands the others intention but both are mistaken about some underlying fundamental fact. Common mistake rendered void in two circumstances:

Cases of Res Exinta: These are circumstances in which parties about the subject matter.This circumstance is contained in sec 8 of the sale of goods Act which provides where there is a contract for the sale of specific goods which without the seller's knowledge have perished the contract is void.

In *Couturier V. Hastle* the parties entered into a contract for the sale of a large quantity of corn which at the time was supposed to be on transit to Britain from Greece but unknown to the parties the ship captain had sold the corn in Tunisia due to overheating and fermentation.

It was held that the buyer was not liable to pay the price as the contract was void for common mistake as the subject matter did not exist.

A similar holding was made in *Lessie Anderson V. Vallabdos Khalidas Company* where parties had contracted to buy and sell a quality of gunny bags but unknown to them the bags had been destroyed by fir.

It was held that the contract was void for common mistake.

Case of Res Sua: These are circumstances in which parties are mistaken about the ownershipof the subject matter. The party purporting to buy is the legal owner but both are unaware of the fact. The purported seller has no title to pass hence the purported contract is void. It was so held in *Bingham V. Bingham.*

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2. MUTUAL MISTAKE

This is a mistake to the subject matter of contract. It arises when parties misunderstand each other or at cross purposes. No agreement arises between them for lack of consensus ad idem.

However, not very misunderstanding constitutes a mutual mistake; it depends on what a reasonable person would deem the circumstances to be.

In *Raffle V. Wichelhause* the parties enter in into a contract for the sell of cotton to be shipped to the U.K. on board the peerless from the port of Bombay. Unknown to the parties there were two ships by the name peerless at the port of Bombay. One sailed in October and the other in December.

While the buyer meant the October ship the seller referred to the December one. The cotton was shipped by the December vessel and the buyer refused to take delivery.

It was held that he was not bound as the contract was void for mutual mistake.

3. UNILATERAL MISTAKE

This is a mistake as to the identity of one of the parties to the contract. Only one party is mistaken and the mistake is induced by the other party.

Unilateral mistake arises where a fraudulent person misrepresent his identity to another so as to obtain goods on credit or other favourable terms which he then sells to a bona fide 3rd party who takes without notice of the fraud.

The dispute is usually between the original owner of the goods and the bonafide purchaser.

The original owner is entitled to the goods or their value by establishing that the contract between him and the fraudulent person was void for unilateral mistake.

The party must prove that: -

i. It dealt with a person other than the one it intended to deal with.
ii. The person it dealt with was aware of that fact.
iii. The identity of the person, the party intended to deal with was fundamental to the contract.

By proving these facts the party establishes that the contract was void.

In *Cundy v. Lindsay and Co. Ltd.* A fraudulent person known as Blenkarn ordered goods from Lindsay and Co. Ltd his signature resembled that of a company named Blenkiron and Co. Lindsay and Co. had heard of Blenkinron and Co but had not dealt with them. Blenkarn had quoted an address on the same street as Blenkiron and Co. Thinking that they were dealing with Blenkiron and Co. Lindsay and Co. dispatched the goods to the address. Blenkarn took delivery and sold them to Cundy. Lindsay and Co. sued Cundy in damagers of conversion. It was held that they were entitled to damages as Cundy had no title to the goods like Blenkarn before him as the contract was void.

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A similar holding was made in *Ingram and other v. Little* where three sisters advertised the sale of a vehicle.

A fraudulent person introducing himself as Mr. Hutchinson for offered to take it for £717 but paid by cheque which the sisters initially refused.

He introduced himself to P.G.M Hutchinson and gave an address which one of the sisters confirmed with a local post office.

They accepted the cheque which was subsequently dishonoured by which time the car had been sold to the defendant.

The plaintiffs sued the defendant for the car. It was held that they were entitled to it as the contract between them and the fraudulent person was void for unilateral mistake.

This decision contrasts with that in *Phillips v. Brooks Ltd.* Where a fraudulent person known as North entered Phillips shop and selected goods valued at £3,000 including a ring.

He offered to pay by cheque which Phillips refused. He then introduced himself as Sir George Bullough and gave a London address which Phillip confirmed with the directory.

Having satisfied himself, Phillips let Mr. North have the ring in return for the cheque which was dishonoured by which time the ring had been pledged with Brooks Ltd for a loan. Phillips sued for the return of the ring. It was held that he was not entitled to it as there was no mistake.

The court was of the view that he had dealt with the person he intended to deal with.

4. DOCUMENTS MISTAKENLY SIGNED

This is a mistake as to the nature of the contract; it arises when a party to a contract signs the wrong document.

Such a mistake does not render the contract void but avoidable at the option of the party.

To avoid the contract, the party must prove that: -

a. The document signed was fundamentally different from the one the party thought it was signing.
b. The party was neither careless nor negligent when it signed the document.

By proving these facts, the party establishes the plea of *non-est factum* which literally means this is not my deed. Unless these facts are proved, the contract cannot be avoided as was the case in **Gallie V.Lee and Anor.**

5. MISTAKE AS TO QUALITY OF SUBJECT MATTER

This mistake arises when one of the parties to the contract is mistaken about the quality of the subject matter of the contract.

Such a mistake renders the contract voidable at the option of the innocent party.

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3. DURESS

At common law duress means actual violence or threats thereof.

It exists where a contractual relationship is procured by actual violence on the person or threats thereof.

The party is compelled or coerced to contract. For the most part, duress consists of threats.

Duress was developed by the common law with a very narrow scope. It renders a contract voidable at the option of the innocent party.

For the contract to be avoided, the innocent party must prove that:-

- The threat was intended to cause fear, injury or loss of life
- The threat was directed to his person or body as opposed to his property. It was so held in *Altee v. Backhouse.* A threat directed at the body of a member of the party's household amounts to duress
- The threat was illegal e.g. a threat to sue, prosecute or cause imprisonment for no reasonable cause. A threat to enforce once legal rights does not amount to duress. It was so held in *Hassan Ali Issa v. Jeraj Produce Shop* where the defendant had alleged that the cheque had been written under duress in that the plaintiff had threatened to sue if repair and storage charges were not paid. It was held that the threat did not amount to duress.
  In *Friedberg Seelay v. Klass* the defendants gained access to the plaintiff's house and threatened not to leave unless she sold her jewels to them.

4. UNDUE INFLUENCE

It is said to exist where a party dominates the other persons will thereby inhibiting its exercise of an independent judgement on the contract.

One party thus exercises overwhelming influence over the other. Undue influence was developed by equity with a fairly wide scope.

It renders a contract voidable at the option of the innocent party. Undue influence renders a contract voidable in the following circumstances;

1. Where parties have a special relationship

E.g. parent-child, advocate-client, doctor-patient, trustee-beneficiary, religious leader-disciple; undue influence is **presumed** in favour of the weaker party. It is the duty of the stronger party to show that the weaker party made an independent decision on the contract. e.g. he had an advocate of his own.

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In *Ottoman Bank Co. Ltd. v. Mawani,* the plaintiff bank extended a loan to a business owned by the defendant's father and the defendant guaranteed the amount. The fathers business was unable to pay the loan and the bank sued so to enforce the guarantee. Evidence that the defendant was still under the control of the father. He worked in the fathers firm and had no independent source of income. It was held that he wasn't liable on the guarantee as it was voidable at his option for the father's undue influence.

2. When parties have no special relationship

The party pleading undue influence must **prove** it by evidence. The circumstances must be such that the party did not make an independent judgement on the transaction, as was the case in *Williams v. Bayley,* where the defendant entered into a contract promising to pay monies withdrawn from a bank by the son. The banker had made it clear that if no arrangement was arrived at, the defendant's son would be prosecuted for the offence. When sued the defendant pleaded the banker's undue influence. It was held that he was not liable as the contract was voibale at his option.

3. Unconscionable bargains

These are unfair bargains. They are transactions entered into in circumstances in which one party takes advantage of its position to procure the deal. Such transactions are voidable at the option of the innocent party. The concept of unconscionable bargains was developed by equity courts as an extension of the doctrine of undue influence and was explained by Lord Dening in *David C. Builder ltd. v. Rees.*

In *Lloyds Bank Co. Ltd v. Bundy,* the plaintiff bank extended a loan to a business owned by the defendant's son. The defendant guaranteed the loan to the tune of £1,000 but the bank required further guarantee. He extended it to £6,000. His lawyer informed him that it would be unwise to extend the guarantee further. The defendant owned a house with £10,000. An official of the plaintiff bank visited the defendant and procured a further guarantee of up to £11,000. The sons business collapsed and the bank sought to enforce the guarantee against the father who pleaded that it was unconscionable. It was held that the guarantee was voidable at the option of the defendant as it was unfair.

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7.9 RESCISSION

The essence of this remedy is to restore the parties to the position they were before the contract.

It is an equitable remedy whose award is discretional.

The remedy may be availed whenever a contract is vitiated by misrepresentation.

However the right to rescind a contract is lost in various ways: -

1. **Delay:** A contract cannot be rescinded if a party has slept on its right for too long as "delay defeats equity". In *Leaf v. International Galleries Ltd.*, where the plaintiff purported to rescind a contract after 5 years. It was held that the remedy was not available on account of delay.

2. **Affirmation:** A party loses the right to rescind a contract if it expressly or by implication accepts the contract.

3. **Third party rights:** A contract cannot be rescinded after 3rd party rights have arisen under it, as this would interfere with the rights of a person who was not privy to the original contract.

4. ***Restitutio in integrum* not possible:** Rescission is not available if the parties cannot be restored to the position they were before the contract. E.g. if one of the parties is a company and it has gone into liquidation.

7.10 ILLEGALITY

The term illegality does not necessarily mean that a criminal offence is involved.

It means that the contract in question is unenforceable as it is injurious to the public or is inconsistent with the public good.

An illegal contract is un-enforceable. This is because for an agreement to be enforceable, it must have been entered into for a lawful purpose.

A contract may be declared, illegal by statutes or a court of law.

a) Contracts declared illegal by Statutes

Under the employment act, wages or salaries are payable in money or moneys worth. A contact to pay wages or salary in kind is illegal and void. Such a contract is said to be illegal as formed and is unenforceable.

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b) Contracts declared illegal by courts of law (contracts illegal at common law)

Long before statutory intervention, courts had declared money contracts illegal for being contrary to public policy e.g.

i) A contract to commit a crime, tort or fraud.

Such a contract is illegal and unenforceable as it is a contrary to public policy to commit crimes, torts or fraud in *Bigos v. Boustead* where the object of the contract was to violate the English Exchange control regulations; it was held that the contract was illegal and unenforceable.

ii) Contracts prejudicial to public safety.

These are contracts which promote harmful activities in a country or its neighbours. E.g. a contract to finance rebels in a country or coup plotters, assisting alien enemies.

iii) Contracts prejudicial to the administration of justice.

These are contracts which interfere with the judicial process e.g.

a. A contract to stifle prosecution of an alleged crime.

b. Champerty agreements: This is a contract whereby a party provides financial assistance to another involved in a civil case so as to share the amount awarded by the court. Such a contract is illegal and unenforceable.

c. Maintenance: this is a contract whereby a party provides financial assistance to another to enable him sue a 3rd party for no reasonable course. Such a contract facilitates the harassment of a party by another through the courts. It is illegal and unenforceable.

iv) Contracts to defraud state revenue.

A contract whose object is to deny the state whether central government or local government revenue by way of evading tax is illegal and unenforceable.

In *Miller v. Karlnski,* the plaintiff who was an employee of the defendant for a £10 per week salary had agreed that the amount deducted from the salary as tax was refundable as an allowance. In an action to recover the refund, it was held that it was irrecoverable as the object of the contract was to defraud the state revenue.

v) Contracts liable to promote corruption in public.

Such a contract is unenforceable as corruption is contrary to public policy. In *Parkinson v. College of Ambulance and Another,* the secretary of a charitable organization informed that plaintiff that it was on to it. The plaintiff gave £3,000 but was not knighted as only the King could bestow the title. In an action to recover the sum, it was held that it was irrecoverable as the contract was illegal.

vi) Contracts liable to promote sexual immorality

These are contracts ***contra bonos mores*** (contrary to good morals). Such a contract is unenforceable on account of illegality. The contract may be illegal as performed. In *Pearce v. Brooks* the plaintiff owned a beautiful horse drawn carriage which he rent to the defendant for 12months at stated charges. The plaintiff knew that the defendant was a prostitute and intended to use the carriage to solicit influential customers. In an action to enforce payment of the hiring charges, it was held that that contract was

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unenforceable as it was illegal as performed as its purpose was to promote sexual immorality.

vii) A contract based on an illegal contract is also an illegality of the other contract.

EFFECTS OF ILLEGALITY

An illegal contract is said to be 'beyond the pale of law'. Such a contract is unenforceable it creates no rights and imposes no obligations on the parties. Neither party is bound to perform. Money or assets changing hands under an illegal contract is irrecoverable as gains and losses remain where they have fallen.

However such money or assets may be recovered in certain circumstances;

i. Where either party repents/ regrets the illegality before the contract is substantially performed.

ii. Where the parties are not in ***pari delicto*** (not equally to blame for the illegality), the less blameworthy party may recover.

iii. If the owner of the money or asset establishes title thereto without relying upon the illegal contract. As was the case in *Amar Singh v. Kulubya*, where a piece of land had changed hands under an illegal; contract but the plaintiff established his title.

7.11 VOID CONTRACTS

These are contracts which the law treats as non existent, they are generally unenforceable. However, if a contract is only void but not illegal some rights may be enforced by exception. A contract may be declared void by statute or a court of law.

1. CONTRACTS VOID BY STATUTE

Under the Employment Act, a contract to pay wages or salary in kind is null and void. Under the Gaming Act, 1845, wagering contracts are void. A **wager** is a contract whereby 2 persons or groups of persons with different views on the outcome of some uncertain event agree that some consideration is to pass between them depending on the outcome. Such a contract is void.

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2. CONTRACTS VOID AT COMMON LAW (COURTS OF LAW)

These are contracts declared void by courts of law for being contrary to public policy e.g.

a) **Contract to oust the jurisdiction of the court.**
This is a contract which purports to deny the parties the right to seek judicial redress.

b) **Contracts prejudicial to the status of marriage.**
This is a contract which interferes with the marriage institution. E.g.
   a. Marriage brokerage contracts.
   b. Contracts whose tendency is to encourage separation.

3. CONTRACTS IN RESTRAINT OF TRADE

This is a contract by which a persons future liberty to engage in a profession or trade in a particular manner or with particular persons is voluntarily or involuntarily restricted e.g. An employee covenant not to work for a business rival or set up a similar business after leaving employment. At Common Law, a contract in restraint of trade is *prima facie* void for being contrary to public policy.

However, such a contract may be enforced if it is proved that:

1. The restraint was reasonably necessary to protect the interests of the restraining party.
2. The restraint was reasonable to the party being restrained.
3. The restraint was not injurious to the public.

Contracts in restraint of trade may be voluntary or involuntary.

a) **Voluntary Restraints**
These are restraints agreed to by the parties to the contract e.g.
   1. Restraints accepted by employee.
   2. Restraints accepted by the seller of business.
   3. Restraints accepted by a seller or distributor of goods.

1. RESTRAINTS ACCEPTED BY EMPLOYEE

The employee covenants not to work for a business rival after leaving employment or not to setup a similar business next door. Such a restraint is *prima facie* void. In *Putsman v. Taylor,* the defendant who was an employee in a tailoring business, covenanted not to work for the plaintiffs business rival in some 3 defined areas of the city of Birmingham within 3 years of leaving employment.

He worked in one of them within the 3 years and the plaintiff applied for an injunction to retrain him from doing so and the court granted the same on the ground that the restraint was reasonable to the parties.

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In *Attwood V. Lamont*, the defendant was employed in a tailoring business as head of the cutting department; he covenanted not to set up a tailoring business within a radius of 10 miles from the employers business.

He established a business outside the 10 miles but all his customers were from within the 10 miles.

The former employers sued for an injunction to restrain him from doing so. It was held that the restraint was unenforceable as it was too worded and hence unreasonable to the defendant.

A world wide restraint to an employed may be enforced it reasonable to the parties and can only be effective if enforced on a worldwide basis.

As was the case in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition (1984)* Mr. Nordenfelt was the only manufacturer of a special gun and ammunition. He sold the business to company for £287.500.

2 years later the company merged with another to from the defendant company which employed Mr. Nordefelt at a salary of £2,000 per year.

The contract of employment provided that Mr. Nordenfelt was not to engage in gun or ammunition business anywhere in the world for 25 years and would not compete with the company in any may for 25 years.

The House of Lords held that whereas the restraint not to engage in the in the Gun business was reasonable and therefore enforceable; the restraints not compete with the company for 25 years was unreasonable and could not be enforced.

In *Kores Manufacturing Co. v. Kolok Manufacturing Co.* two companies dealing in similar products covenanted not to employ former employees. The defendant engaged a former employee of the plaintiff within the 5 hours.

The plaintiff sued for an injunction to restraint the defendant. It was held that the restraint is not enforceable as it was unreasonable to the parties.

2. RESTRAINT ACCEPTED BY VENDORS OF BUSINESS

The seller of a business may covenant not to set up a similar business next door, this may be necessary to protect the buyer's business.

Such a restraint is void common law.

However, it may be enforced if the cost is satisfied that having regard to the type or nature of business, duration of the restraint, area covered and other circumstances, the restraint is reasonable to the parties.

In *Dias v. Souto,*the defendant sold a business situate on the Island of Zanzibar, it specialized in merchandise for the expatriate community.

He covenanted not to set up similar business within the Zanzibar protectorate. He established a similar business on the Island of Pemba.

The plaintiff applied for an injunction to restrain him from doing so. The court enforced the restraint on the ground that it was reasonable.

This decision was based on the specialized nature of the plaintiff business.

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3. RESTRAINT ACCEPTED BY THE SELLERS OR DISTRIBUTORS OF GOODS (SOLUS AGREEMENT)

a A seller or distributor may enter in to a contract with a wholesaler or manufacturer which restricts his acquisition of goods, trading hours etc. The restraint is often referred to as **Solus Agreements and they include:**

1. **Tying Covenant.**
   The seller undertakes to purchase all his products from a particular wholesaler or manufacturer; this is in return for certain discounts.

2. **Compulsory Trading Covenant.**
   The seller covenants to keep his business open for reasonable hours everyday.
3. **Continuity Covenants.**
   The seller takes to extract similar covenants form the person who purchases the business from him.

Such restraints are *Prima Facie* **void but may be enforced by a court of law if reasonable to the parties and not injurious to the public.**

b) Involuntary restraints

These are restraints imposed by trade associations and professional bodies on their members. They are involuntary in character.

Such restraints are *Prima Facie* void but may be enforced if reasonable to the parties and are not injurious to the public.

KENYAN POSITION

In Kenya contracts in restraint of trade are governed by the Contracts In Restraint of Trade Act[6], Under sec. 2 of the Act, a contract in restraint of trade is binding and enforceable in law.

However, the High Court may on application by the affected party declare the contract void if it is satisfied that having regard to:-

1. Nature or type of business
2. Duration of the restraint
3. Area covered by the restraint
4. All the circumstances of the case, the restraint is unreasonable in that it affords more protection than is necessary to protect the party's interests or is injurious to the public.

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7.12 CONTRACTS *UBERRIMA FIDEI*

These are contracts of the "utmost good faith". In the contract of sale of goods, the seller is not bound to disclose anything to the buyer in relation to the subject matter. The operative principle is **caveat emptor** which literally means "Buyer beware".

A buyer takes the goods as they are, however, in contracts of the utmost good faith, both parties are bound to disclose material facts within its actual and presumed knowledge failing which the contract is voidable at the option of the innocent party. E.g.

1) **Insurance Contracts**
2) **Partnership Agreements**

7.13 FORMALITIES

In addition to the basic elements of a contract certain contracts are subject to certain formalities, which must be complied with for the agreement to be legally enforceable. The formalities includes:

1. REQUIREMENT OF WRITING

Some contracts must be embodied in a formal document e.g. Hire Purchase Agreement, contract of Marine Insurance

2. REQUIREMENT FOR WRITTEN EVIDENCE

Some contracts must be evidenced by some note or memorandum which must contain:-

a. Description of the parties
b. Description of the subject matter of the contract
c. The Consideration
d. Signature of the parties

E.g. Contracts of Guarantee, Contracts of Insurance other than Marine.

3. REQUIREMENT OF CONSENT

Under sec. 6 of the Land Control Act[7], a contract for the sale of agricultural land must be consented to by the Land Control Board of the district in which the land is located failing which the contract is unenforceable.

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The consent must be applied for within 6 months of the agreement failing which the contract is void.

However, the president is empowered to exempt a transaction from the requirement of consent on application by the parties.

4. REQUIREMENT OF SIGNATURE

A contract entered into with the government must be signed by the Revenue Officer of the ministry or some other duty authorized person failing which the contract is enforceable.

These statutory formalities may be justified on various policy grounds;

a. They promote certainly in transactions
b. Others enhance genuiness and acceptability of contracts.
c. Some formalities perform educative functions E.g. Contents of a Hire Purchase Agreement.
d. Other formalities facilities state intervention private transactions e.g. requirement of consent of the Land Control Board.

The formalities of writing and requirement of written evidence are intended to prevent found, however, it is possible for a party to perpetrate fraud by insisting that the requisite formalities have not been complied with.

To prevent such injustice, equity developed the doctrine of Part Performance.

7.14 THE DOCTRINE OF PART PERFORMANCE

The doctrine is to the effect that where parties have entered into an oral agreement and before the formalities of writing are complied with one of the parties does something in furtherance of the agreement, the other party cannot be heard to say that there was no agreement between them.

This doctrine was developed by equity and is now contained in the *proviso* to sec. 3 of the Law of Contract Act. Under the *proviso*, Part performance may consist of: -

a) Entry into a party's premises before the formalities is complied with.
b) Continuation of possession before the formalities is complied with.

In *Credit Finance Corporation v. Ali Mwakasanga,* the defendant opted to take a truck on Hire Purchase terms; he completed the application form, paid a deposit and took delivery of the truck. Subsequently, the plaintiff alleged that there was no contract between them as it had not signed its part of the contract. However, it was held that the defendant's conduct amounted to part performance and hence there was a contract between them.

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7.15 DISCHARGE OF CONTRACT

A contract is said to be discharged, when the obligation created by it ceases to bind the parties who are now freed from performance.

However, whether a party is liable or not after discharge, depends on the method of discharge.

A contract may be discharged in the following ways:-

1. Express agreement
2. Performance
3. Breach
4. Impossibility or Doctrine of Frustration
5. Operation of Law.

1. DISCHARGE BY EXPRESS AGREEMENT

A contract may be discharged by agreement if the parties thereto expressly agree to discharge the contract. The mutual promises constitute consideration to support the discharge.

Discharge by agreement justifi ed on the premise that whatever is created by agreement may be extinguished by agreement.

Discharge by agreement may be bilateral or unilateral

a) Bilateral Discharge

If neither performs its part of the contract, the obligation are said to be executory and the discharge is bilateral as both parties agree not to perform. The mutual promises constitute consideration.

b) Unilateral Discharge

If either of the parties has wholly or partially performed its part of the contract, the obligations are said to be executed and the discharge is unilateral.

The party that has performed discharges the other from performance.

Unilateral discharge may take any of the following 3 forms: -

a. **Contract under Seal;** Such a contract binds the parties and does not requireconsideration.
b. **Novation:** This is the substitution of the old contract with a new one. The old contractis thereby discharged.
c. **Accord and satisfaction:** This is the purchase of a release from an obligationwhether contractual or otherwise not by performance but the provision of new or extra consideration which is consideration which is accepted by the other party to discharge the contract. The party that has not performed provides the new consideration which is accepted by the other party. The new consideration is the satisfaction and its acceptance by the other party is accord.

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2. DISCHARGE BY PERFORMANCE

A contract is discharged by performance if both parties perform their mutual obligations as agreed. Each party must have performed its party.

Medieval common law insisted that discharge by performance was only possible if parties had performed their obligations precisely and exactly.

This is the common law **Doctrine of Precise and Exact** which is to the effect that parties must honour their contractual obligations to the letter.

Every aspect of the contract must be performed. It has been observed that it is a fundamental principle of law that contractual obligations be performed precisely and exactly.

The Doctrine of precisely and exact is exemplified by the decision in *Cutter V. Powell.*

Mr. Cutter agreed to assist Powell, a ship captain as a second matter on a journey from Jamaica to Liverpool, the ship sailed on August 2nd, and Cutter died on September 20th, 19 days before the ship was due at Liverpool. Mrs. Cutter sued for compensation for the work done by Mr. Cutter, it was held that nothing was payable by the defendant as Mr. Cutter had not performed the contract precisely and exactly. This case demonstrates that strict application of the doctrine of precise and exact occasion's unjust enrichment.

Common Law admitted exceptions to the doctrine of precise and exact to mitigate its harshness. These are circumstances in which parties will be compensated for work done (*quantum meruit*) or discharged even though they have not performed precisely and exactly.

EXCEPTIONS:

These are the cases for granting *quantum meruit* which are the exceptions to the doctrine of precise and exact

1. Divisible contracts

Although there is a presumption that the contract ought to be viewed in its entirety, some contracts are by their mature divisible and performance of part thereof entitles the party to payment for work done. E.g. Contract of carriage of goods payable per tonne. The carrier is entitled to payment for the quantity carried but may be sued for not carrying the entire quantity as was the case in *Ritchie v. Atkinson* where a contract of carriage of goods, the shipper carried less than the agreed quantity. It was held that the shipper was entitled to payment on *Quantum Meruit* (for work done).

2. Substantial performance

If a party has substantially performed its part of the contract, it is entitled to payment for work done. Whether a contract is substantially performed is a question is a question of fact.

In *Mershides Mehta and Co. v. Baron Verhegen*, the defendant engaged the plaintiff to construct a house for him and the contractual price was payable by installments.

After completion of the house, the defendant refused to pay the last instalment on the ground that the house has some structural defects.

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The plaintiff sued. It was held that the plaintiff was entitled to the instalment less the amount due defendant may likely to spend to correct the defect.

This decision was based on the fact the plaintiff had substantially performed its part of the contract

3. Partial Performance If Accepted

If a party to a contract has expressly or by implication agreement to pay for partial performance, the party performing is entitled to payment for work done.

In *Sumpter v. Hedges,* defendant engaged the plaintiff to construct 2 houses and stables at cost of £565.

The plaintiff abandoned the house after putting up structures valued at £333, the defendant was compelled to complete the houses, subsequently, the plaintiff sued for compensation work done.

It was held that he was not entitled to payment as the defendant had not expressly or by implication agreed to pay for partial performance.

4. Prevented Performance

If a party is ready and willing to perform its part of the contract is prevented from doing so or by the other or the others fault, such party is entitled to payment on *quantum meruit.*

In *Planche v. Colburn,* the defendant engaged the plaintiff to write a book for him about himself for £100.

After the plaintiff had done the initial research and written part of the book, the defendant discontinued the writing, the plaintiff sued.

It was held that he was entitled to£50 for work done.

5. Frustration of Contracts

A contract is said to be frustrated when performance of the obligations becomes impossible, illegal or commercially useless by reason of extraneous circumstances for which neither party is to blame.

Frustration of contract terminates it and discharges the parties from performance.

6. Time of Performance

Contractual obligations must be performed within the prescribed time if any or within a reasonable time.

If the contract specifies the date of performance, time is said to be of the essence of the contract and non-performance thereof damages the contract.

This was the case in *Panesar v. Popat* the defendant ordered furniture to be delivered on April 30th. However, it was not ready by this date, the defendant extended the delivery date to May 10th but the furniture was not ready where upon he cancelled the transaction. The furniture was

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not ready where upon he cancelled the transaction. The furniture was delivered on May 12th; the defendant refused to take delivery and was sued. It was held that he was not bound to do so as time was of the essence of the contract and the plaintiff had failed to perform.

3. DISCHARGE BY IMPOSSIBILITY OR DOCTRINE OF FRUSTRATION

Medieval common law was based on the principle of absolute contractual obligations. Under this principle, parties to a contract must perform their obligations failing which damages are payable by the party in the default.

In *Paradine v. Jane* the plaintiff leased a piece of land to the defendant for purposes of farming, however, after the contract, a hostile German army invaded the country and occupied the region in which the land was situate.

The defendant could not farm the land or put it into any economic use. When sued for the lease charges, the defendant pleaded his inability to use the land.

However, he was held liable since the contract had not provided that he would be discharged if it became impossible to use the land.

This case demonstrates that the Common Law did not originally recognize the doctrine of frustration.

The Doctrine is an exception to the principle of absolute contractual obligations.

FRUSTRATION OF CONTRACT

A contract is said to be frustrated if performance of the obligation is rendered impossible, illegal or commercially useless by unforeseen or extraneous circumstances for which neither party is to blame. When a contract is frustrated, it terminates and the parties are discharged

The Doctrine of Frustration may be justified on various grounds: -

1. **Implied Term Theory.**
   It is argued that in every contract, there is an implied term that should such an event occur the parties will be discharged

2. **Just and Reasonable solution Theory.**
   It is only fair that the parties will be discharged.

3. **Disappearance of Foundation Theory**
   It is argued that when a contract is frustrated, its foundation disappears.

4. **Change of Obligation Theory**It's argued that when a contract is frustrated, theobligations of the parties change hence the need to discharge the contract.

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CIRCUMSTANCES IN WHICH A CONTRACT MAY BE FRUSTRATED

1. Destruction of Subject Matter

If the subject matter of the contract is destroyed before performance and neither of the parties is to blame, the contract is frustrated.

It must be evident that the subject matter was the foundation of the contract.

The destruction need not be total but must affect the commercial characteristics of the subject matter.

In *Taylor v. Caldwell,* the defendant had hired the plaintiff's hall to conduct a musical concert at specified charges, before the day of the first concert, the hall was destroyed by fire and neither of the parties was to blame.

In an action by the plaintiff to recover hiring charges, it was held that they were irrecoverable as the destruction of the hall frustrated the contract and thereby discharged the parties.

2. Non-occurrence of an event

If a contract is based on a particular event or state of affairs to obtain at a particular time, its non-occurrence frustrating the contract and discharges the parties.

However, for the contract to be frustrated, it must be evident that the event or state of affairs was the only foundation of the contract.

In *Krell v. Henry (1903),* the defendant had hired a room in the plaintiff house to enable him view Royal Procession of the coronation of King Edward VII. However, the king was taken ill before the coronation and the ceremony was cancelled.

It was held that the hiring charges were irrecoverable as the cancellation of the ceremony frustrated the contract and discharged the parties.

However, if a contract has more than one foundation the disappearance of one does not frustrate it as the other is capable of performance. As was the case in *Herne Bay Steamboat Co. v.Hutton*

3. Illegality

If performance of contractual obligations becomes illegal by reason of change of law or otherwise the parties are discharged as there is no obligation to perform that which has become illegal.

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4. Death or Permanent Incapacitation

In contracts of personal service or performance e.g. employment, the death or permanent incapacitation of a party frustrates the contract and discharges the parties as the obligations are not generally transferable.

5. Government Intervention

If a policy act or regulation make it impossible for a party to complete its contractual undertaking the contract is frustrated and the parties discharged e.g. refusal to grant a licence as was the case in *Karachi Gas Company v. Isaaq* where the government refused to grant an export licence in respect of certain pipes to be exported to Karachi. When sued, the defendant relied on the government refusal to grant the licence. However, it was held that the contract had not been made to obtain the licence

A contract would be frustrated if a government takes possession of the subject matter or stops the transaction, as was the case in *Metropolitan Water Board V. Dick Kerr and Co.* In July 1914, the respondent entered into a contract to construct a dam for the appellant within 6 years subject to an extension. However, sometimes in early 1916, a government minister ordered the respondent to stop the contract and dispose of its equipment and the respondent complied. It was held that the minister's act frustrated the contract and thereby discharged the respondent.

6. Superveving Events

These are events that delay performance and thereby change the commercial characteristics of the contract. The change must be fundamental. As a general rule, additional expenses do not frustrate a contract; however, they may if they render the transaction commercially useless.

In *Tsakiroqlou and Co. Ltd v. Noble Thorl GMBH,* the parties entered into a contract for the purchase of a large quantity of Groundnuts to be shipped from Port Sudan to Humburg, the supplier contemplated using the Suez Canal but which by the time of performance had been closed as a consequence the groundnuts were not supplied. When sued, the supplier argued that the alternative route was too expensive and hence the contract had been frustrated. It was held the contract had not been frustrated as; -

1. The additional expenses were recoverable from the buyer
2. The contract had no time limit.
3. The longer route could not damaged the commercial characterizes of the groundnuts

The supplier was liable in damages. In *Victoria Industries Ltd V. Lamanbhai Brothers,* the parties contracted to buy and sell a quantity of corn maize to be shipped from Jinja to Mwanza and transported by rail to Dar-es-salam for export.

The East Africa Railways and Harbours Corporation had agreed to ship and rail the maize to Dar.

However, subsequently, the corporation declined to do so and the seller was unable to supply the maize.

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When sued, the seller pleaded that the contract had been frustrated by the change of heart of the corporation as there was no alternative route to the coast.

It was held that the supplier was not liable as the contract had been frustrated.

However, a contract is not frustrated if:-

1. Either of the parties is to blame for the occurrence or non-occurrence of an event
2. The event is expressly provided for in the contract.

EFFECTS/CONSEQUENCES OF FRUSTRATION (ADJUSTMENT OF THE RIGHTS OF PARTIES ON FRUSTRATION)

Frustrated contracts in Kenya are governed by the Law Reform (Frustrated Contracts) Act, 1943 which applies in Kenya as a statute of general application by reason of the schedule to the Law of Contract Act.

Under this Act, when a contract is frustrated:-

1. It is terminated
2. Money pad is recoverable
3. Money payable ceases to be payable
4. If a party has suffered loss by reason of performance, the court may order the other to pay to such party a sum of money
5. If a party has derived benefit other than financial, the court may order such party to pay to the order a sum of money which must be less than the benefit it so derived.

☐ 4. DISCHARGE BY BREACH OF CONTRACT

Breach of a contract does not discharge it; it gives the innocent party an opportunity to treat the contract as repudiated or as existing.

If it treats the contract as existing, it is bound to honour its part however, if treats it as repudiated it is not bound to do so.

Breach of contract may be:-

a) Anticipatory
b) Actual

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1. ANTICIPATORY BREACH OF CONTRACT

This is a situation where a party to a contract expressly or by implication intimates to the other in advance its intention not to perform on the date of performance. Evidence must clearly suggest breach of contract.

The innocent parties take any of the following steps:-

a) Sue in Damages

The party must prove the anticipatory breach of the contracts well as its willingness to perform its part of the contract.

In *Frost V. Knight* where the defendant had contracted to marry the plaintiff after his father's death but married another person during the lifetime of the plaintiff 's father, it was held that the defendant was liable in damages for anticipatory breach of the contract.

b) Wait for the party to perform by the due date.

The innocent party may opt to afford the other party a chance to perform its part of the contract, however, if the contract is in the meantime frustrated, the innocent party loses all remedies as was the case in *Avery V. Bowden.*

c) Sue for the Decree of Specific Performance.

The innocent party may apply for the equitable remedy of specific performance to compel the other party to for the equitable remedy of specific performance to compel the other party to perform its part of the contract and the same may be granted if circumstances justify as was the case in *Hasham Jiwa V. Zenab* where parties entered into a contract for the sale of a piece of land but the defendant repudiated the same before the date of completion and the plaintiff applied for specific performance. The court granted the order and the defendant were compelled to perform.

Where a contract is breach in anticipation, the innocent person is not bound to mitigate its loss.

2. ACTUAL BREACH OF CONTRACT

This entails the non-performance of a party's obligation on the due date or tendering defective performance.

The innocent party may treat the contract as repudiated if the breach is fundamental to the contract as was the case *in Poussard V. Spiers and Pond* where the plaintiff's non-appearance from the beginning of the season entitled the defendant to treat the contact as having come to an end.

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5. DISCHARGE BY OPERATION OF LAW

Discharge of the operation of law entails the discharge of parties form their contractual obligations at the instance of the law. The parties are freed by law.

Such a discharge may take place in the event of:-

1. **Merger**
   This is the incorporation of the items of a simple contract into a subsequent written agreement between the parties. The simple contract is discharged by the operation o the law.
2. **Death**
   In contract of personal service or performance, the death of a party discharges the contract.
3. **Lapse of Time**
   If time is of the essence of the contract and a party fails to perform within the prescribed time, the contract is terminated, as was the case in *Panesar V. Popat*

7.16 REMEDIES FOR BREACH OF CONTRACT

When a contract is breached, the innocent party is contractual rights are violated and the party has a cause of action known as breach of contract which entitles it to a remedy.

Remedies for breach of contracts are:-

- Common Law and
- Equitable

Whereas Common Law remedies comprise damages only, Equitable remedies include:

- Injunction
- Rescission
- Specific performance
- Account
- Tracing
- Quantum Mernit
- Winding Up
- Appointment of Receiver

Before 1873, Common Law remedies could only be availed by the Common Law Courts while equitable remedies were only available in the Lord Chancellors Courts. The 2 categories of remedies differ in that whereas common law remedies are awarded “as right” equitable remedies are awarded as discretional.

It is for the Court to decide whether the circumstances justify the remedy.

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DAMAGES (monetary compensation)

This is the basic Common Law remedy; it is a monetary award by the court to compensate the plaintiff for the loss occasioned by the breach.

Its objective is to place the plaintiff to the position he would have been had the contract been performed.

Damages for breach of contract may nominal or substantial.

1. Nominal Damages

This is an amount awarded by the court to show that a party's rights have been violated but no loss was occasioned or the party was unable to prove loss.

2. Substantial Damages

This is an amount by the court as the actual loss suffered or as the amount the court is willing to recognize as direct consequences of the breach f the contract.

RULES ON THE ASSESSMENT AND PAYMENT OF DAMAGES

1. The purpose of a monetary award in damages is to compensate the plaintiff for the loss suffered. Damages as a remedy are **compensatory** in nature.

2. The **loss or damage suffered by the plaintiff must be proved**, the plaintiff must show that but for the defendant's breach the loss would not have been occasioned. There must be a *nexus* or link between the breach of contract and the plaintiff's loss failing which the damages are said to be too remote and therefore irrecoverable.

   In *Hadley V. Baxendale,* the plaintiff owned a mill whose crankshaft was broken and required replacement the following day, however there was undue delay by the defendant during which time the mill remained closed. The plaintiff sued for loss of profit. It was held that the defendant was not liable for the lost profit as the same could not be traced to the delay in the delivery of the crankshaft. . The plaintiff's loss was too remote and irrecoverable.
   This case is authority to the proposition that the defendant is only liable for such loss or damage as is reasonably foreseeable in the ordinary course of events.

3. If a party has **special knowledge** in relation to the contract but fails to act on it and the other party suffers loss, the party is liable for the loss, as was the case in *VictoriaLaundry (Windsor)Ltd. V. Newman Industries Ltd,* where the plaintiff Company wanted toexpand it's business as well as take advantage of certain lucrative. To do so it required a large boiler which the defendant company agreed to deliver in June. The plaintiff had by letter notified the defendant the urgency with which the boiler was required. The boiler was not delivered until November by which time the plaintiff company lost money from the contract. In an action against the defendant for the loss, it was held that the defendant was liable.

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A similar holding was made in *The Heron II.* The appellant, a ship owner agreed to ship the respondent's sugar from Constanza to Basra. The appellate knew that respondent was a sugar merchant and that there was a sugar market at Basra. By reason of a detour, the ship arrived 9 days later at Basra, by which time the price of sugar had dropped and the respondent made a loss of £4,011. In an action to recover the same, it was held that the appellant was liable.

4. **Mitigation of Loss:** This principle is to the effect that when a breach of a contract occurs, it is the duty of the innocent party to take reasonable steps to reduce the loss it is likely to suffer from the breach. This duty is imposed upon the innocent party by law. If the party fails to mitigate its loss the amount by which loss ought to have been reduced is irrecoverable. In *Harris V.Edmonds,* it was held that where the charterer of a ship failed to provide cargo in breach of contract, the ship captain was bound to accept cargo from other person's at competitive rates.

   Whether or not the innocent party has acted reasonably in mitigating its loss is a question of fact. In *Musa Hassan V. Hunt and Another,* the appellant had contracted to buy all the milk produced by the respondent for one year. On one occasion, the appellate refused to take delivery of the milk on the ground that it was unfit for human consumption; the respondent proved that it was fit for human consumption.
   After the refusal the respondent converted the milk to ghee and casein which fetched a lower price than milk. The appellant argued that the respondent had not acted reasonably in mitigating the loss .It was held that the respondent had acted reasonably.

5. **Liquidated damages and penalties:** Parties to a contract may beforehand specify the amount payable to the innocent party in the event of a breach .The sum specified may be: Liquidated damages or a Penalty

   If the sum is a genuine pre–estimate of the loss likely to be suffered by the innocent party, it is awarded by the court without proof of the actual loss and it is referred to as **liquidated damages**

   In *Wallis v. Smith,* it was held that liquidated damages are an amount which represents almost the actual loss occasioned and is awarded irrespective of the actual loss.
   If the sum has no relation to the actual loss, but is intended to compel performance or it is a sum to be forfeited by the party in default it is regarded as a **penalty** .A penalty is generally extravagant it covers but does not access loss.

   Penalties cannot be awarded by the court, the court assess the amount payable by applying the rules of assessment of damages.

   Whether the sum is liquidated damages or penalties depends on the intention of the parties .In making the determination, court are guided by certain presumptions and rules.

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PRESUMPTIONS OR RULES FOR DISTINGUISHING LIQUIDATED DAMAGES AND PENALTIES

According to Lord Dunedin in *Dunlop Pneumatic Tyre Co.Ltd v. New Garage and Motor Co.* The following presumptions assist in the determination:

1. If the sum specified by the parties is extravagant and unconscionable it is deemed to be a penalty.
2. If the sum payable for the non-payment of another is greater it is deemed to be a penalty.
3. If a single lump sum is payable on the occurrence of one or several or all events, some of which occasion serious or minor loss it is deemed to be a penalty.
4. If the sum is payable on the occurrence of only one event it is deemed to be liquidated damages.
5. The categorization of the sum by the parties as “liquidated damages” or “Penalty” ‘is not binding the court.
6. The fact that a precise pre-estimation of loss is problematic does not necessarily mean that the sum specified is a penalty
7. As a general rule, exemplary or punitive damages are not awarded for breach of contracts.

EQUITABLE REMEDIES (DISCRETIONAL) UT

1. SPECIFIC PERFORMANCE

The decree of specific performance is a court order which compels a party to perform its contractual obligations as previously agreed.

It compels a party to discharge its contractual obligation.

It orders performance without an option to pay damages. It is an equitable remedy manifesting the equitable maxim that equity **acts in personam**[8]**.**

Specific performance may be granted in circumstance in which

1. Monetary compensation inadequate
2. The subject matter is unique or has rare characteristics e.g. land

The award of specific performance is discretional on the basis of established principles of equity:

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a) **Delay**

The innocent party must seek judicial redress at the earliest possible instance as delay defects equity. The remedy is not available if the innocent party has slept on its rights for too long.

b) **Clean Hands**

The innocent Party must approach the court free from blame as he who comes to equity must do so with clan hands. Evidence of mistake misrepresentation or duress disentitles the party the remedy

c) **Hardship to the dependent**

Specific performance will not be decreed if it is likely to subject the defendant to undue hardship as he who seeks equity must do equity and equality is equity.

d) **Performance and Supervision**

Specific performance cannot be decreed if is impossible for the defendant to perform or where performance requires contract supervision. This is because court of law are reluctant to make ineffectual orders and do not have the mechanism to supervise performance.

e) **Mutuality**

As a general rule, specific performance will not be grantedif it would not have been granted were the positions of the parties interchanged. This is because equality is equality

f) **Nature of Contract**

Specific performance will not be granted in contracts of personal service or performance e.g. employment as this is likely to perpetrate injustice. However, the remedy may be granted where a contract is breached in anticipation as was the case in *Jiwa V. Zenab.*

A court of law may decline to decree Specific Performance if;

1. The contract is one of personal service e.g. employment.
2. The contract is revocable by the party against whom an order of specific performance is sought.
3. The contract is specifically enforceable in part only. Where the court cannot grant specific performance of the contract as a whole, it will not interfere.
4. The contract is incapable of being performed i.e. impossibility. Courts are reluctant to make ineffectual orders.
5. Performance of the contract requires constant supervision.
6. The decree is likely to subject the defendant to severe or undue hardship.
7. The contract in question was obtained by unfair means.

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2. INJUNCTION

This is a court order which either restrains a party from doing or continuing to do a particular thing or compels it to undo what it has wrongfully done. It is an equitable remedy whose award is discretional and may be granted in circumstance in which: -

1. Monetary compensation is inadequate
2. It is necessary to maintain the *status quo*

TYPES OF INJUNCTION

They may be classified as:-

i. Prohibitory and Mandatory
ii. Interim or temporary and permanent

1. Prohibitory injunction

This is a court order which restrains a party from doing or continuing to do a particular thing.

2. Mandatory injunction

It is a court order which compels a party to put right what it has wrongly done. It is restorative in character.

3. Temporal or Interim Injunction

It is court order whose legal effect is restricted to a specified duration on the expiration of which it lapses. However, it may be extended by the court on application by the plaintiff but can also be lifted on application of the defendant.

4. Permanent or Perpetual Injunction

This is a court order whose legal effect is permanent.

Whether or not an injunction is awarded is the court's discretion, in light of which the court takes into consideration certain principles e.g. delay, clean hands, hardship to defendant etc.

However for the order to be granted, the plaintiff must prove that: -

a. It has a *Prima Facie* case with a high probability of success
b. If the order is not granted the plaintiff is likely to suffer irreparable injury**.**

If the court is in doubt it must decide the case on "a balance of convenience." It was so held in *Annielo Giella V. Casman Brown Co. Ltd.*

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3. RESCISSION

The essence of this remedy is to restore the parties to the position they were before the contract.

It is an equitable remedy whose award is discretional.

The remedy may be availed whenever a contract is vitiated by misrepresentation.

However the right to rescind a contract is lost in various ways:-

1. **Delay:** A contract cannot be rescinded if a party has slept on its right for too long as“delay defeats equity”. In *Leaf V. International Galleries Ltd*., where the plaintiff purported to rescind a contract after 5 years, It was held that the remedy was not available on account of delay.
2. **Affirmation:** A party loses the right to rescind a contract if it expressly or by implicationaccepts the contract.
3. **Third party rights:** A contract cannot be rescinded after 3rs party rights have arisenunder it, as this would interferes with the rights of a person who was not privy to the original contract.
4. **Restitution in integrum not possible:** Rescission is not available if the parties cannotbe restored to the position they were before the contract. E.g. if one of the parties is a company and it has gone into liquidation.

4. QUANTUM MERUIT

This literally means “**as much as is earned or deserved”**

This is compensation for work done. The plaintiff is paid for the proportion of the task completed.

The remedy has its origins in equity and its award is discretional. It may be granted where: -

1. The contract does not specify the amount payable.
2. The contract is divisible
3. The contract is substantially performed
4. Partial performance is accepted
5. A party is prevented from completing it undertaking.

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7.18 LOSS OF REMEDY (LIMITATION OF ACTION)

When a person's legal or equitable rights are violated, he is said to make a cause of action e.g. breach of contract, negligence, nuisance etc.

Causes of actions are not enforceable in perpetuity.

The law prescribes the duration within which causes of action must be enforced.

The **Limitation of Action Act** prescribes the duration within which causes of action must be enforced. If not enforced within the prescribed time the action becomes statute barred and is unenforceable.

E.g. a breach of contract must be enforced within 6 years.

Negligence	3 years	Assault	3 years
Nuisance	3 years	Battery	3 years
Defamation	1 year	False Imprisonment	3 years
Recovery of rent	6 years		
Recovery of land	12 years		
Enforcing an arbitral award or court order	6 years		

The prescription of the duration within which a cause of action must be enforced may be the duration within which a cause of action must be enforced may be justified on policy grounds.

It ensures that justice is administered on the basic of the best available evidence. It ensures that disputes are settled as and when they occur.

WHEN DOES TIME STARTING RUNNING

As a general rule, time starts running on the date the cause of action accrues or arises.

However the running of time may be postponed in certain circumstances e.g

1. If the prospective plaintiff is an **infant or minor**, time starts running when it attains the age of the majority or dies whichever occurs first.
2. If the prospective plaintiff is of **unsound mind**, time starts running when he becomes of unsound mind or dies whichever comes first.
3. If the prospective plaintiff is labouring under **ignorance, fraud or mistake** time starts running when he ascertains the fact or when a reasonable person would have ascertained.
4. If the prospective defendant is the president, time starts running when he leaves office or dies whichever occurs first.

When time starts running, it generally runs through and the action becomes statute barred. However, a statute barred action may be enforced with leave of the court if it is proved that the failure to sue was justified.

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CHAPTER SUMMARY

Contract may be defined as a legally binding agreement made between two or more parties.

The English common law classifies contracts into:

- Written contracts / specialty contracts
- Contracts requiring written evidence
- Simple contract

There are certain procedures put in place for a contract to be formed. These procedures enable enforceability of the contract.

These elements are:-

- Offer
- Acceptance
- Capacity
- Intention
- Consideration
- Legality
- Formalities if any

Implied terms:- These are terms that though not agreed to by the parties are an integral part of the contract. These terms may be implied by statute or by a court of law.

A void contract is unenforceable while a voidable contract is enforceable unless avoided.

These factors include

1. Misrepresentation
2. Mistake
3. Duress
4. Undue influence

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1. Misrepresentation

A contract may be discharged on the following ways:

a) Express agreement
b) Performance
c) Breach
d) Impossibility or doctrine of frustration
e) Operation of law

Remedies for breach of contract are common law and equitable whereas common law remedies comprise damages only, equitable remedies include:

a) Injunction
b) Tracing
c) Account
d) Specific Performance
e) Rescission
f) Winding up for Cos
g) Quantum Merit
h) Appointment of receiver e.t.c.

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CHAPTER QUIZ

1) An offeror is also called?
2) Name the types of offers
3) What warranties are implied in a contract of sale
4) Consideration may not be past but may be

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CHAPTER QUIZ ANSWERS

1) Proposer
2) Cross; counter and standing
3) Quiet possession and free from encumbrances
4) Executory

SAMPLE EXAMINATION QUESTIONS

QUESTION ONE

July 2000 – Pilot Paper, Question 4

When parties enter into a contract it is virtually impossible for them to include express terms to cover every eventuality. Explain the circumstances under which:

a) The courts,
b) The Statutes,

Will imply terms into the contract. (10 marks)

QUESTION TWO

November 2007, Question 4

Describe the circumstances under which the right to rescind a contract would be lost by the parties to the contract. (10 marks)

QUESTION THREE

June 2007, Question 1

a) Explain the meaning of privity of a contract. (4 marks)
b) Outline the exceptions to the Doctrine of Privity of a Contract. (6 marks)

QUESTION FOUR

December 2006, Question 4

a) Identify the rules which govern the doctrine of consideration. (6 marks)
b) Explain the circumstances under which a court of law could decline to grant the decree of Specific Performance as a remedy for breach of contract. (8 marks)
c) Outline the circumstances under which money paid under a contract marred with illegality would be recoverable. (6 marks)

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(Footnotes)

[1] Cap 33 Laws of Kenya

[2] Cap 53 Laws of Kenya

[3] Cap 27 Laws of Kenya

[4] The Indian Transfer of Property Act (1882)

[5] Cap 405 Laws of Kenya

[6] Cap 24 Laws of Kenya

[7] Cap 302 Laws of Kenya

[8] Against the person. This is as compared to an action in *rem* which is as against a thing or property

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GOODSOFSALE LAW

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CHAPTER EIGHT

SALE OF GOODS LAW

▶ OBJECTIVE

To provide the candidate with a broad understanding of the following principles pertaining to Sale of Goods Law;

- Nature of the contract.
- Formation of the contract.
- Terms of the contract.
- Transfer of property in goods.
- Rights and duties of the parties.
- International contracts of sale.

▶ INTRODUCTION

This chapter aims to introduce the student to principles relating to the law on the sale of goods, distinguish sale of goods from other forms of transferring goods. It also includes the duties and remedies available to both the buyer and seller under a sale of goods contract.

▶ KEY DEFINITIONS

Section 2 (1) of the Sale of Goods Act provides the following definitions regarding different elements involved in a sale of goods contract.

- Action - includes counterclaim and set-off;
- Buyer - means a person who buys or agrees to buy goods;
- Contract of sale - includes an agreement to sell as well as a sale;
- Delivery - means voluntary transfer of possession from one person to another.
- Document of title to goods - includes a bill of lading, dock warrant, warehouse-keeper's certificate or warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented;
- Fault - means wrongful act or default;
- Future goods - means goods to be manufactured or acquired by the seller after the making of the contract of sale;
- Goods - includes all chattels personal other than things in action and money, and all emblements, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under a contract of sale;
- Plaintiff - includes a defendant counterclaiming;
- Property - means the general property in goods, and not merely a special property;

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- Quality of goods - includes their state or condition;
- Sale - includes a bargain and sale as well as a sale and delivery;
- Seller - means a person who sells or agrees to sell goods;
- specific goods - means goods identified and agreed upon at the time a contract of sale is made;
- Warranty - means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of the contract of sale, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

▶ EXAM CONTEXT

The sale of goods contract is an important feature in the transaction of business. Students are required to understand the principles underlying a sale of goods contract including when the transfer of goods is said to have taken place and the remedies available to the parties to the contract. This chapter in an analysis of the years from 2000 has featured in each sitting as follows: July 2000, May 2003, May 2000, May 2005.

Only after a valid contract has arisen can one approach the intricacies of sale of goods. As such students ought to have a proper mastery on the Law of Contract to be able to grasp this topic.

▶ INDUSTRY CONTEXT

In the business world the transfer of goods is governed by the sale of goods contract. It is important to distinguish between sale of goods and other forms of conveying, such as barter trade, bailments, hire purchase, pledges, supply of services and gifts. The distinction is important as it sheds light on the resolution of disputes if they go to court.

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8.1 SALE OF GOODS LAW

The main law relating to sale of goods in Kenya is contained in the Sale of Goods Act[1],

This Act came into force on Oct 1 1931.It is a carbon copy of the English Sale of Goods Act, 1893. It codifies the law governing sale of goods.

There are 3 sources of Law in the Sale of Goods;

1. **Sale of Goods Act Cap 31 Laws of Kenya** – it is fashioned after the English Sale ofGoods statute of 1893. It is basically a carbon copy of the English Statutes.

2. **Case Law** – This has grown arising from court decisions. Case Law is massive. Tounderstand case law as a source of law, one needs to understand the legal methods. A decision in any given case depends on the hierarchy of decisions.

3. **Relevant case law that predates 1893 English Act on Sale of Goods**.Its importanceis that on points that are not specifically covered by provisions of The Sale of Goods Act Cap 31 then the provisions made prior to 1893 are valid and can be relied on.

THE CONTRACT OF THE SALE OF GOODS

Under sec 3(1) of the Act, a contract of sale of Goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called a price.

A contract of sale of goods may be a sale or agreement to sell. In the sale, property in the goods passes to the buyer when the contract of sale is made.

In an agreement to sell, property passes either on the fulfilment of a particular condition or on the expiration of the specified duration.

A contract of sale of goods may be entered into by one part owner and another and may be conditional or absolute.

There are 8 transactions that resemble Sale of Goods contract but are not a sale of goods contract.

1. Contract of Barter or Exchange.
2. Contract of Gifts
3. Contract of Bailment
4. Contract of Hire Purchase
5. Contract of Loan on Security of goods
6. Contract of Supply of services
7. Contract of Agency
8. Contract of Licences of intellectual property such 'sales' of computer software and patents.

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1. SALE OF GOODS DISTINGUISHED FROM BARTER

In a sale of goods contract or in any sale, there must be a consideration and in the case of sale of Goods it must meet all the criteria of a contract. The consideration must be money consideration.

The term Goods is defined to exclude money in the Act.

Barter Exchange is a contract where goods are exchanged for goods or where the consideration is anything but money. No money is involved in barter. It is a valid contact but it is not a Sale of Goods Contract because it does not entail money. You cannot buy money but you can exchange one currency for another. There are occasions when money as a collector's coin can be sold so long as it has ceased to be legal tender. You can exchange the collector's coins for money.

2. SALE OF GOODS DISTINGUISHED FROM GIFT

Gift is transfer of property without any consideration. It is not binding unless it is made by adeed i.e. in writing. It is not easy to distinguish gifts from sale of goods.

Esso Petroleum Limited V. Commissioners of Customs & Excise [1976] The Esso petrol stationput out on the signboard the following advert "free gift of a coin bearing the likeness of a footballer to anyone buying 4 gallons of petrol." The Defendant bought petrol from this petrol station and when the petrol station was required to pay taxes by the Customs Department, the argument was whether this transaction consisted a sale of goods or a gift. Their Lordships were confused "Although the transaction was not a gift, in as much as the garage was contractually bound to supply coins to anyone buying 4 gallons of petrol… but it was not a sale of goods contract either.

It was not a sale of goods and it was not a gift. Getting the coin there was no money involved the consideration. There was no intention to create legal relationship between Esso and the customers. In substance it was a collateral contract existing alongside a contract for the sale of petrol."

If there were a Sale of Goods, then the company would have been liable to pay taxes.

3. SALE DISTINGUISHED FROM BAILMENT

A bailment is a transaction under which goods are delivered by one party (the bailor) to another (the bailee) on terms, which normally require the bailee to hold the goods and ultimately to redeliver them to the bailor or in accordance with his directions. The property in the goods is not intended to pass and does not pass on delivery, though it sometimes be the intention of the parties that it should pass in due course, as in the case of the ordinary hire-purchase contract. But where goods are delivered to another on terms which indicate that the property is to pass at once, the contract must be one of sale and not bailment.

In bailment, the goods are delivered by the bailor to the bailee on terms which normally require the bailee to hold the goods and ultimately deliver those goods in accordance with the instructions of the bailor. There is no intention in bailment that property in ownership is to pass from the bailor

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to the bailee. The bailee only has custody for a small fee to take care. The bailee is empowered to sell the goods only for purposes of recouping the demurrages.

In *Chapman Bros v. Verco Bros & Co. Ltd [1933],* farmers delivered bags of wheat to a company carrying on business as millers and wheat merchants. The wheat was delivered in unidentified bags which were identical to those in which other farmers delivered wheat to the company. The terms of the transaction required the company to buy and pay for the wheat on request by the farmer or failing such a request, on a specified date, to return an equal quantity of wheat of the same type; but there was no obligation to return the identical bags. Although the contract referred to the company as 'stores', it was held by the Australian High Court that this transaction was necessarily one of sale as the property passed to the company on delivery. Property must pass even if not at once. That is the nature of transaction and this transaction seems inconsistent with the possibility of a bailment.

The question was whether this was a sale of goods contract in terms of the ownership of the bags. The court held it to be an agreement of sale within Section 2 (1) of Cap 31

One of the difficulties is that where goods are given to the buyer before the buyer has paid for those goods, where this happens, then we say that he is a buyer in possession because the seller has agreed to transfer the property.

In conversion if you went to a car dealer who allowed you to test drive it but instead of test driving it you advertised by putting adverts on the car, that is behaviour inconsistent with the owner's wishes and you will be converting.

4. SALE OF GOODS DISTINGUISHED FROM HIRE PURCHASE

Contracts of hire-purchase resemble contracts of sale very closely and, indeed, in practically all cases of hire-purchase the ultimate sale of the goods are (in a popular sense) the real object of the transaction. A contract of hire-purchase is a bailment of the goods coupled with an option to purchase them which may or may not be exercised. Only if and when the option is exercised is there a contract of sale.

A contract of Hire Purchase is a bailment of goods coupled with an option to purchase those goods. That option may or may not be exercised. Only after the option has been exercised does hire purchase become sale of goods contract. In a sale of goods contract there is no option to acquire property of goods you have no option of whether to retain goods or not but in Hire Purchase you have the option to become the owner of the goods by exercising the option of paying the nominal fee.

You are given possession and enjoyment of the goods before you finish payment and even before you have expressed your intentions to own. The risk in Hire Purchase there is the intention that if the hirer opts to own the goods, they can become owners but in Sale of Goods there is no option of owning or not owning, you pay for the goods you own them. Possession is usually after payment.

The owner of the goods in Hire Purchase undertakes the risk that the seller transfers or agrees to transfer to the buyer and by virtue of possession of the goods the owner of the goods takes the risk that the owner may sell the goods to a third person and the only safe area is with durable goods such as a car where to sell the car again you need to transfer the logbook.

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The fear of a financier is that having given possession or documents of title in durable goods then any disposition by the person who has acquired possession with consent of the owner if they sell the goods to another person who is without notice and for value, the 2nd buyer acquires better title than the first buyer.

5. SALE OF GOODS DISTINGUISHED FROM A LOAN ON SECURITY OF THE GOODS

This is a transaction that is designed to enable someone 'A' who owns some goods to borrow money from 'B' and give possession of those goods to the money-lender. The goods can only be reclaimed upon completion of repaying the loan. This transaction does not mean that the person borrowing the money has delivered the goods to the money-lender but only delivers the goods to the money lender to hold as security. He has not sold the goods but has only given them to operate as security. The understanding is that A will retain possession of the goods and the borrower will repay the lender capital plus the agreed interest and lastly the borrower will have the right to take back the goods if he has repaid or paid all the claims by the lender to him. The lender has no right at all to resell the goods unless the borrower has defaulted. This transaction differs from hire-purchase contract which is designed to enable a person to acquire goods on credit. A loan on security is designed to enable someone who already owns goods to borrow money on the security of the goods.

6. SALE OF GOODS DISTINGUISHED FROM CONTRACT OF SUPPLY OF SERVICES

Historically contracts for supply of services were divided into two:

1. Contracts for Skill and labour
2. Contracts for labour and material.

It was also assumed that the applicable law was not the Sale of Goods Law for example services of a lawyer. When you contract a lawyer to draw a will, you pay for the services of the lawyer making the will but you receive a document which is incidental. The contract is for the services of making a will and the document that you receive is incidental.

In the United Kingdom until 1954, the law required that contracts for sale of goods of £10 or more be evidenced in writing. If the goods were valued at over £10, it had to be in writing for services there was no value limit.

A contract in which one party is to manufacture goods and then supply the same as a finished product. Is it a contract in Sale of Goods or is it a contract for services?

A more general reason why it may be necessary to distinguish between a contract of sale of goods and a contract for services is simply that provisions of the Sale of Goods Act do not in general apply to contracts for services. The other reason concerns the implied duties of the seller or supplier as to the quality and fitness of the goods or services supplied.

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If the contract was for the supply of services only then, insofar as the services themselves were concerned, the supplier's duties were generally duties of due care only where in the contract for sale of goods the duties remain, prima facie duties of strict liability, that is to say the seller is responsible for defects in the goods, even in the absence of negligence.

For supply of services, you apply the law of torts and the measure is reasonable care. The test in supply of services is due or reasonable care but in Sale of Goods, goods are of a particular perceivable quality. They are tangible.

The test for deciding whether a contract falls into the one category or the other is to ask what is 'the substance' of the contract. If the substance of the contract is the skill and labour of the supplier, then the contract is one for services, whereas if the real substance of the contract is the ultimate result – the goods to be provided, then the contract is one of sale of goods.

The law of Sale of Goods was developed and has developed as a consumer protection mechanism. It came in to bridge the gap between the seller and the buyer. The seller is supposed to have more knowledge than the buyer and the buyer is no longer bound by 'caveat emptor'.

Goods must be fit for the purpose. The sale of goods law was meant to bridge the gap in terms of product knowledge between the seller and the buyer.

Cap 31 has been overtaken by technological development. It is difficult for the buyer to know all the information about for instance a computer just by looking at it. The protection has to keep pace with the changes and buyers cannot keep up.

Robinson V. Graves [1935]

The issue in this case was the distinction between sale of goods and supply of services. The contract here was one whereby an artist agreed to paint a portrait of his client's wife. It would appear that such a transaction should be regarded as one of sale. In the event however this transaction was held as one for services and in reaching this conclusion, the court sought to identify the prime purpose of the contract. In the often quoted words of LJ Greer:

> "If the substance of the contract … is that skill and labour have to be exercised for the production of the article and … it is only ancillary to that that there will pass from the artist to his client or customer some material in addition to the skill involved in the production of the portrait, that does not make any difference to the result, because the substance of the contract is the skill and experience of the artist in producing the picture."

This case lays down an elastic test of this nature for distinguishing contracts of sale from contracts for skill and labour, and a similar approach may sometimes be justified here.

7. SALE OF CONTRACT DISTINGUISHED FROM PATENTS

Items of intellectual property such as copyrights, patents and trademarks are not 'personal chattels or corporeal movables and so fall outside the definition of goods although goods may exist which embody these intellectual property rights. In modern times, an important point, not yet wholly resolved, is whether computer software may constitute 'goods' within the meaning of the Act. Software is normally embedded in some physical form, such as disks or as part of a package in which it is sold along with computer hardware, that is computer or computer parts. It is protected as a literary work by the law of copyright.

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Usually only the medium in which the software is embedded, e.g. a disk is sold. The copyright in the software remains in the software house which developed it. The software house licences the user to make working copies of the disks and to load the software into a computer, acts which otherwise would be infringements of copyright. Software can also, of course, be delivered on-line subject to licensing terms.

The question as to whether or not a supply of computer software is a sale of goods was answered by the Court of Appeal in *Beta Computers (Europe) Ltd v. Adobe Systems (Europe) Ltd.* The Defendant had ordered from the pursuer by telephone a standard computer package to upgrade its existing software. The software was delivered in a package, which bore the words 'Opening the Informix S.I. software package indicates your acceptance of these terms and conditions'. These were the terms and conditions of Informix's copyright licence, Informix being the proprietor of the software. The defendant did not return, and sued for payment of the price. The pursuer argued that it was not concerned with the terms of the licence imposed by the authors of the software.

The defender argued that acceptance of the licence conditions was an implied suspense of its agreement with the pursuer. Lord Penrose held that the supply of proprietary software for a price was a single contract sui generis though it contained elements of contracts such as sale of goods and the grant of a licence. It was an essential feature of such a contract that the supplier undertook to make available to the purchaser both the medium on which the program was recorded and the right to access and use the software. There could be no consensus ad idem until the conditions of use stipulated by the copyright owner were produced and accepted by the parties, which could not occur earlier than the tender of those conditions to the purchaser. Furthermore, whether the tender of software subject to conditions for use was regarded as a breach of a previously unconditional contract, or as being subject to a suspensive condition entitling the purchasers to reject if the conditions for use were unacceptable, or as made when there was no concluded contract, the defender was entitled to reject.

8. SALE & AGENCY

Distinction between a Sales of Goods Contract and a contract of agency is a difficult one. For example where A asks B a commercial agent, to obtain goods for him from a supplier or from any other source, and B complies by sending the goods to A, it may well be a fine point whether this is a contract under which B sells the goods to A, or is a contract under which B acts as A's agent to obtain the required goods from other sources. In an agency contract there may be privity of contract between the buyer and the agent's supplier, which will enable action to be brought between them. On the other hand, if it is a sale, there will be no privity between the buyer and the seller's own supplier.

The duties of a commission agent are less stringent than those of a seller and, in the event of a breach of contract; the measure of damages may also be different. Thus if a seller delivers less than he is bound to under the contract, the buyer can reject the whole, but if despite his best endeavours, a commission agent delivers less than his principal has ordered he has committed no breach of contract and the principal is bound to accept whatever is delivered. Should the commission agent deliver goods of the wrong quality he will only have to pay as damages the actual loss suffered by the buyer but should a seller be guilty of such a breach he may have to pay damages for the buyer's probable loss of profit. The contract is not a Sale of Goods.

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FACTORS OR ELEMENTS OF THE DEFINITION

1. **Seller**- Under sec 2(1) of the Act, this is a person who sells or agrees to sell goods.
2. **Property** –This is the general property in goods or ownership. It signifies the bundle ofrights that a person has in relation to a subject matter .Eg. Right to use, misuse and to dispose
3. **Goods**- Under sec 2(1) of the Act, goods includes
   a. All chattels personal other than things in action and money
   b. And all implements
   c. Industrial growing crops
   d. Things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale

   Classification/Types Of Goods
   a. Specific or Ascertained and Unascertained
   b. Existing and Future Goods

   Specific or Ascertained Goods
   These are indentified and agreed upon by the parties at the time when the contract of sale is made. Other goods are unascertained

   Existing Goods
   These are goods owned a possessed by the seller when the contract of sale is made. Future Goods
   These are goods to be manufactured or acquired by the seller after the contract of sale is made.
4. **Buyer:** Under sec 2(1) of the Act, buyer means a person who buys or agrees to buygoods
5. **Price:** This is the consideration that passes from the buyer to the seller to support thecontract of sale of goods. The consideration must be monetary which distinguishes a contract of sale of goods form related transactions. E.g. Contracts of exchange or butter, contracts for skills and labour and materials.

In *Aldridge v. Johnson* where bullocks were being exchanged for quarters of barley and the difference in the values were payable in money, it was held that the contract was one of sale of goods.

A similar holding was made in *Lee v. Griffin* where a doctor agreed to make 2 sets of false teeth for a client at a price exceeding £10. The contract was held to be one of sale of goods.

However in *Robinson v.Graves* where an artist was engaged to paint a portrait for £ 250, the contract was held to be one for skill and labour as the payment was for the person's skill.

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Ascertainment or Determination of Price

Under sec. 10 of the Sale of Goods Act, in a contract of sale of Goods, price is determined or fixed:-

1. By the contract itself
2. In the manner thereby agreed
3. By the course of dealing

If the price is not so fixed, the buyer pays a reasonable price.

8.2 CAPACITY

Under sec. 4 (1) of the Act, Capacity for enter into a contract of sale of Goods is governed by the General Law of contract. However, if an infant, drunken person or a person of unsound mind is supplied with necessaries, he is liable to pay a reasonable price.

FORMALITIES

A contract of sale is not subject to any legal formalities under Sec. 5 (1) of the Act, the contract may be:-

a) Oral
b) Written with or without seal
c) Partly oral and partly written
d) Implied from the conduct the parties

However under sec. 6(1) of the Act, a contract of sale of Goods of Kshs. 200 and above is unenforceable unless: -

1. The buyer has accepted part of the goods and actually received the same or
2. The buyer has given something in concert to bind the contract.
3. It is evidenced by some note or memorandum signed by the parties.

VOID CONTRACTS OF SALE OF GOODS

Certain contracts of sale of goods are void:-

1. Under Sec. 8 of the Act, where there is a contract for the sale for the specific goods which without the seller's knowledge have perished at the time the contract is made, the contract is void.
2. Under sec. 9 of the Act, where there is an agreement to sell specific goods which

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subsequently perish without the fault of either party before risk passes the buyer, the agreement is avoided.

3. Under sec. 11(1) of the Act, where in an agreement to sell specific goods, price is to be fixed by the valuation of a 3rd party who fails to do so, the agreement is avoided.

IMPLIED TERMS

The Sale of Goods Acts implies both conditions and warranties in Sale of Goods of Contracts unless a different intention appears on the part of the parties

These are terms which though not agreed to by the parties, are an integral part of the contract. Theses terms may be implied by statutes or by a court of law.

A. Terms implied by Statutes

Certain statutes imply terms in contracts entered into pursuant to their provisions. These terms become part of the contract.

Terms implied in Sale of Goods contracts by Sale of Goods Act.

The Sale of Goods Act implies both conditions and warranties in contracts of Sale of goods unless a different intention appears.

CONDITIONS

1. **Right to sell**
   Under Section 4 (a) of the Act there is an implied condition that the seller of goods shall have the right to sell when property in the goods is to pass.

2. **Correspond to description**
   Under Section 5 of the Act, in a sale by description there is an implied condition that the goods shall correspond to the description.

3. **Fitness for purpose**
   Under Section 16(a) of the Act, where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to rely on the sellers skill and judgement, there is an implied condition that the goods shall be reasonably fit for that purpose.

4. **Merchantable Quality**
   Under Section 16 (b) of the Act, where goods are bought by description from a person who deals in such goods in the ordinary course of business whether a seller or manufacturer, there is an implied condition that the goods will be of merchantable quality.

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5. **Sale by Sample**

Under Section 17(1) of the Act, in a sale by sample, the following conditions are implied:

a. The bulk shall correspond with the sample in quality.
b. The buyer shall be afforded a reasonable opportunity to compare the bulk with the sample.
c. That the goods shall be free from any defects rendering them unmerchantable.

WARRANTIES

1. **Quiet Possession**
Under Section 14 (b) of the Act there is an implied warranty that the buyer shall have and enjoy quiet possession of the goods.

2. **Free from Charge or encumbrance**
Under Section 14 (c) of the Act there is an implied warranty that the goods shall be free from any charge or encumbrance not made known to the buyer when the contract was made.

2. Terms Implied By Courts of Law

Courts of law reluctantly imply terms in contracts as it is the duty of the parties to agree as to what the contractual terms shall be.

However in certain circumstances, courts are called upon to imply terms in contracts and do so for 2 reasons:

a) To give effect to the intentions of the parties.
b) To facilitate commercial transactions or give business efficiency.

Courts of law imply terms in contracts on the basis of:

- The reasonable by stander test.
- Trade usages and customs.

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8.3 TRANSFER OR PASSING OF PROPERTY

When does property in goods pass from the seller to the buyer?

Under Sec. 2(1) of the sale of Goods Act, property means the general property in goods or ownership. It signifies the rights a person has in relation to a subject matter. It is important to ascertain when property in goods passes from the seller to the buyer for the following reasons:

1. It is the purpose of the contract of sale of Goods that property passes to the buyer.
2. It determines when risk passes to the buyer and hence the party liable in the extent of loss or destruction.
3. It determines what remedies are available to the seller e.g. The seller cannot sue for the price before property in the goods passes to the buyer.

Property in goods passes to the buyer at different times in different contracts hence the passage of property is governed by various rules or principles.

RULES RELATING TO THE PASSING OF PROPERTY

1. **Sale of Unascertained Goods**: Under Sec. 18 of the Act, In a Sale of Unascertainedgoods, property passes to the buyer when the goods are ascertained.
   Categories of Unascertained Goods
   i. Goods to be manufactured by the seller.
   ii. Crops to be grown by the seller.
   iii. Purely generic goods.
   iv. An unidentified portion of a special bulk or whole.

2. **Sale by Reservation:** Under sec. 21 of the Act, in a Contract for the sale of Specific Goods or where goods are subsequently appropriated to the contract, but the seller reserves the right of disposal until a certain condition is fulfilled, property in the goods will pass to the buyer when the condition is fulfilled.

3. **Sale by Auction**: Under Sec. 58 of the Act, in a Sale of Auction, property passeswhen the Auctioneer announces its completion by the fall of the hammer or in any other customary manner.

Rules Governing Sale by Auction

1. If goods are offered in lots, each lot is deemed to be the subject matter of a separate contract.
2. If the right of the seller to bid is not expressly reserved, he cannot bid or do so through another person.
3. A sale by auction may be the subject to an agreed price

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A sale by auction may expressly reserve the right of the seller to bid. In which case he may do so at the auction.

4. **Unconditional Sale of Specific Goods in a deliverable state.** Property passes whenthe contract is concluded.
5. **Sale of Specific goods not in a deliverable State:** Where specific goods, the subjectmatter of the contract, are to be put in a deliverable state, property passes when they are so put and the buyer is notified.
6. **Sale of specific goods to be weighed, measured, tested etc.** Under sec. 20 of the Act, if specific goods are to be weighed, measured, tested or that other thing is to be done for the purpose of determining the price, property passes when the thing is done and the buyer is notified.
7. **Sale by approval or On Sale or Return:** Under sec. 20 of the Act, where goods aredelivered to the buyer by approval or on sale or return or on such other term, property in them passes to the buyer: -
   a. When he signifies his acceptance or approved to the seller.
   b. When he does any act adopting the transaction e.g. selling goods.
   c. When he retains the goods even after expiration of the stipulated or reasonable time without signifying his rejection.
8. **Sale by description:** Under Section 20 of the Act in a sale of future goods by Description,property to the buyer when: -
   a. Goods of that description
   b. In a deliverable state
   c. Are unconditionally appropriated to the contract.
   d. By the seller with consent of the buyer or the buyer with the consent of the seller.

To **unconditionally appropriate** means making the goods, the subject matter of the contract irrevocably.

ACCEPTANCE OF GOODS

Under Section. 36 of the Act, a buyer is deemed to have accepted goods if:-

1. He intimates to the seller his acceptance
2. He does any act in relation other goods which is inconsistent with the sellers ownership
3. He retains the goods after the expiration of the stipulated or reasonable time without intimating his rejection.

TRANSFER OF TITLE BY A NON-OWNER (NEMO DAT QUOD NON HABET)

At Common Law, a sale of goods by a non-owner is incompetent. As it is contrary to the principle of ***Nemo dat*** i.e. one cannot give what he has not.

It means that a seller cannot give to the buyer a better title to the goods than he himself has. The principle of *Nemo dat* was developed by the Common Law to protect the true owners of goods.

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However, its strict application interferes with commercial transaction in that the *bona fide* purchaser cannot acquire a god title if the seller had none.

In the words of Lord Denning in Bishop *Gate Motor Finance Corporation v. Transport BrakesLtd,*

> "… Two principles have competed at Common Law. The first is *Nemo dat*, that a person cannot give a better title to the buyer than he has in the goods. The second is that a *bona fide* purchaser for value without notice acquires or good title."

The law has attempted to reconcile these principles by upholding *Nemo dat* as the general rule but admitting exceptions to protect the *bona fide* purchaser.

In *Cundy v. Lindsay and Co. Ltd,* the principle of *Nemo dat* was upheld where Blenkan acquired no title for the goods and hence had none to pass to Cundy.

The principle of *Nemodat* is now contained in sec 23 (1) of the Sale of Goods Act which provides *inter alia*

> "Where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title than the seller had."

However, the *Nemodat* principle is subject to various exceptions. These are circumstances in which a seller can give a better title to the buyer than he has in the goods.

Exceptions:-

1. **Estoppel**: - Under sec. 23(1) of the Act, a non-owner can pass a good title if the trueowner is by his conduct precluded from denying the seller's authority to sell. This is the equitable doctrine of estoppel. If the true owner of goods makes it appear that some other person is the owner, the true owner is estopped from denying the apparent ownership of the other.

2. **Sale by Mercantile Agent or Factor**: Under the Factors Acts, 1859, a sale by a factor,passes a good title. A factor is a mercantile agent who is entrusted with possession of goods and who sells in his own name. A factor passes a good title, even if he has no authority to sell provided he sells the goods: -
   a. In his capacity as mercantile agent
   b. In the ordinary course of business
   c. To a *bona fide* purchase for value without notice.
   d. Of which he has possession of with the owner's consent.

   3. Resale by Seller in Possession: Under Sec. 26(1) if the seller who has alreadysold goods but retains their possession or documents of title, sells them to a 3rd party who takes in good faith for value without notice of the previous sale, the seller passes a good title.

4. **Sale by buyer in Possession:** Under Sec. 26(1) of the Act, where seller who hasbought or agreed to buy goods, obtains their possession or documents of title with the seller's consent before title passess to him and as a consequence he transfers them to a *bona fide* purchaser who takes them in good faith and with notice of the original seller's lien on the goods, he passes a good title.

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5. **Sale Under voidable title:** Under Sec. 24 of the Act, if the seller's title is voidable buthe sells the goods before his title is avoided, to a buyer who takes in good faith for value and without notice of the seller's defective title, he passes a good title. This was the case in *Phillips v. Brooks* as well as *Lewis v. Avery*

6. **Sale Under Statutory Power:** A sale made in exercise of a power conferred by an Actof parliament passes a good title e.g. Sale by a :-
   a. Liquidator Under the Companies Act
   b. Sale by a chargee under the Registered Land Act or Mortgagee under the I.T.P.A.
   c. Sale under the Disposal of Uncollected Goods Act

7. **Sale Under Common Law Power:**
   Under Section 23 (2) (6) of the Act a sale made in pursuant to an order of a court of competent jurisdiction passes a good title in accordance with the provisions of Section 23(2) (b) of the Act.

8. **Sale in Market Overt:** At Common Law, sale in market overt passed a good title to thebuyer provided he took the gook the goods in good faith, for value and without notice of any defect in the seller's title. Market Overt has been defined as an open, public and legally constituted market. Before 1994, every shop in the city of London was market Overt and all goods sold under defective title conferred good title to the buyers provided the buyer took in good faith and the sale took place in public place. Market Overts in the U.K. were created by statute, charter or arose from prescription. This is the oldest exception to the principle of *Nemo Dat* but does not apply in Kenya.

8.4 DELIVERY

Under section 2(1) of the act, delivery is the voluntary transfer of possession from one person to another, delivery of goods may take various forms: -

1. Physical transfer of the goods.
2. Delivery of the means of control e.g. keys.
3. Delivery of the documents of title.
4. Delivery to a common carrier.
5. Delivery by atonement: This is a situation where a seller of goods retains them as bailor for the buyer.

RULES OF DELIVERY

1. Whether it is for the seller to transmit the goods to the buyer or for the buyer to take delivery at the seller's premises depends on the agreement between the two.
2. Unless otherwise agreed, the cost of and incidental to putting the goods into a deliverable state is borne by the seller.
3. Unless otherwise agreed the place of delivery is the seller's place of business if not then his residence.

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4. Where specific goods are in some other place known to both parties, that other place is the place of delivery
5. If the goods are in the hands of a 3rd party, delivery is complete when the 3rd party notifies the buyer that he holds the goods on his behalf.
6. If the seller is bound to transmit, the goods to the buyer, he must do so within the stipulated time if any or within a reasonable time.
7. Delivery by common carrier is *Prima Facie* complete when the goods are handed over to the carrier.
8. If the seller delivers **less** goods, the buyer may reject them or accept and pay at he contract rate
9. If the quantity delivered is **more**, the buyer may reject the goods, or accept those included in the contract or accept all and pay at the contract rate.
10. If the goods delivered are **mixed** with those of a different description, the buyer may: -
    a. Reject the goods.
    b. Accept those included in the contract
11. Unless otherwise agreed, the buyer is not bound to accept delivery by instalment
12. Where delivery is by instalment to be paid for separately and the seller makes one or more defective deliveries or the buyer refuses to take delivery or pay for one or more instalment whether such breach entitles the innocent party to treat the contract as repudiated or is severable depends on the terms of the contract and the circumstances of the case.
13. If the buyer rejects the goods as of right, he is not bound to return the same to the seller but must notify him the fact of rejection.

8.5 CAVEAT EMPTOR

It literally means “buyer beware” This is a Common Law principle to the effect that in the absence of fraud or misinterpretation, the seller is not liable if the goods sold do not have the qualities the buyer expected them to have. A buyer buys goods as they are.

The principle was developed by the Common Law to protect manufacturers by ensuring that their goods were sold irrespective of their quality. Sellers of goods at Common Law would not guarantee anything about the goods unless a buyer demanded a warranty. However, these principles turned out to be very harsh to the consumers and exception had to be developed.

The Doctrine of *Caveat Emptor* is now contained in sec. 16 of the sale of Goods Act which provides *Inter-alia*:

> “There is no implied warrantee or condition as to the quality of fitness for any particular purpose of goods supplied under a contract of Sale.”

However the doctrine has been modified by way of exceptions to protect consumers.

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Exceptions to *Caveat Emptor* include the **Conditions** and **Warranties** Implied by the Sale of Good Act E.g.

1. In a sale by description, the goods must correspond to the description
2. Sec. 16 (a) implies the Condition of Fitness for purpose
3. Under Sec. 16 (b) it implied that good should be of merchantable quality.
4. In a sale by sampleit is implied that:-
   a. The bulk shall correspond with the sample in quality
   b. The buyer shall be afforded a reasonable opportunity to compare the bulk and sample.
   c. The goods shall be free from my defect rendering them unmerchantable

However, the effectiveness of these exceptions in protecting consumer in doubtful in that:-

1. Parties are free to contract outside the implied terms.
2. The stronger party may use exemption clauses in the contract.
3. The condition of fitness for purpose is not implied if the goods are sold under a patent or other trade name.
4. The condition as to merchantable quality is not implied if the buyer has examined the goods but failed to detect defects which such examination ought to reveal.

The Doctrine of *Caveat Emptor* also applies under the provision of the Hire Purchase Act.

OBLIGATIONS/DUTIES OF THE PARTIES

The contract of Sale of goods imposes upon the parties certain obligations:

■ DUTIES OF THE SELLER

1. **Put the goods into a deliverable state**-The seller is bound to ensure that the goodsare in a condition in which the buyer is bound to take delivery when the contract is made and unless otherwise agreed, the cost of doing so is borne by the seller.
2. **Pass a good title**- It is the duty of the seller to pass a clean title to the buyer failingwhich he is liable in damages. This is because under sec14 (a) of the Act, there is an implied condition that the seller shall have the right to sell the goods when the property is to pass.
3. **Deliver the goods:** Under Section 28 of the Act, it is the duty of the seller to deliver thegoods to the buyer
4. **Supply goods of the right quality:** The seller is bound to ensure that the quality ofthe goods supplied is consistent with the terms of the contract. This is the principle of ***Caveat emptor*** and its exceptions
5. **Supply goods of the right quantity** –The seller must deliver goods of the quantityagreed to by the parties.

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If fewer goods are delivered the right buyer is entitled to:

a. Reject the goods
b. Accept and pay at the contract price

If more goods are delivered, the buyer may:

d. Reject the goods
e. Accept those included in the contract
f. Accept all and pay at the contract rate

DUTIES OF THE BUYER

1. **Take delivery-**Under sec 28 of the Act, it is the duty of the buyer to take delivery ofgoods, the subject matter of the contract, failure to which he is liable in damages pursuant to section 50 of the Act.

2. **Pay the price-**Under section 28 of the Act; it is the duty of the buyer to pay the price ofthe goods failure to which the seller may maintain an action against him for the price pursuant to section 49 of the Act.

The duty of the buyer to take delivery and pay the price and that of the seller to deliver the goods should be concurrent i.e. the seller must be ready and willing to give possession of the goods in exchange for the price and the buyer must be ready and willing to take possession and pay the price.

8.6 REMEDIES FOR BREACH OF CONTRACT

Rights and Remedies of the Unpaid Seller

Under Sec. 39 of the Act, a seller s deemed to be unpaid if:-

1. The whole of the purchase price has not been paid or tendered.
2. The bill of exchange or other negotiable instrument received as conditional payment is dishonoured.

Remedies of the unpaid seller fall into 2 broad categories namely:

i) Real
ii) Personal

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■ REAL REMEDIES

These are remedies against the goods and are enforceable without any court action. Under Sec. 40 (1) and (2) these remedies are: -

1. Rights of *lien* (retention of the goods)
2. Right of *stoppage in transitu*
3. Rights of Re-sale
4. Rights to withhold delivery

These remedies are often referred to as self-help or extra juridical remedies and demonstrate the extent to which the Sale of Goods Act champions the interests of the seller.

1. Unpaid Sellers *Lien*

This is the right of unpaid seller in possession of the buyer's goods to retain them as a security for the price. The lien is possesory in nature and is dependent on possession which must be lawful and continuous.

It is particular since the seller can only retain the goods for which payment is due.

Under Section 41 of the Act, the unpaid seller's *lien* is exercisable in the following circumstances:

a) Where goods have not been sold on credit
b) Where goods have been sold on credit but the term of credit has expired.
c) If the buyer becomes insolvent

Loss of Lien

The unpaid seller losses the right to retain the buyer's goods in the following ways: -

1. By waiver thereof
2. If the buyer or his agents obtain lawful possession of the goods.
3. If the seller delivers the goods to a common carrier for transmission to the buyer without reserving the right of disposal.
4. Payment for goods.

An unpaid seller is entitled to exercise a *lien* on the buyers goods in his possession even if the has made part delivery and the goods may be in his possession or that of his agent.

2. Stoppage *in transitu*

This is the right of unpaid seller who has already parted with possession of the goods to resume the same as long as the goods are still in the course of transit to the buyer. The exercise of this right enables the seller to resume possession of the goods. The rights are exercisable by the seller only if the buyer becomes insolvent.

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Under sec. 45(1) of the Act, goods are deemed to be in the course of transit from the time they are delivered to a common carrier to such a time as the buyer or his agent obtain possession.

Under Sec. 4(11) of the Act, the right of *stoppage intransitu* may be exercised in any of the following. Ways: -

1. Taking actual possession of the goods
2. Giving notice of the sellers claim to the party in possession. Such notice may be given to the person in possession pr his employer.

>>> **Loss of the Right of Stoppage**

The seller right of stoppage *intransitu* will be defeated or is lost when transit ends. Transit ends if:-

a) The buyer or his agent intercepts the goods before arrival at the agreed destination
b) Upon arrival the carrier notifies the buyer or his agents that he holds the goods on his behalf.
c) The carrier wrongfully neglects or refuses to deliver the goods to the buyer or his agents.

3. Rights of Resale

Under sec. 47 and 48 of the Act on unpaid seller in possession of the buyer's goods is entitled to re-sell them to recover the price. A re-sale of the goods by the seller passes a good title to the buyer in the following circumstances:

1. Where the goods are of a perishable nature.
2. Where the right to resale is expressly reserved by the contract
3. When the seller notifies the buyer his intention to resale the goods but the buyer does not pay or tender the price within a reasonable time.

4. Rights to Withhold Delivery

Under Sec. 40(2) of the Act where property in the goods has not passed to the buyer, the seller has the rights to withhold their delivery to the buyer.

PERSONAL REMEDIES

These are remedies against the buyer and are enforceable by court action namely: -

i) Action for Price
ii) Damages for non-acceptance

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1. Action for price

This right of the unpaid seller is exercisable in 2 circumstances:

a. Under sec 49(1) of the Act where property in the goods has already passed to the buyer who wrongly neglects or refuses to pay for them, the seller may maintain an action against him for the price

b. Under sec 49(11) of the Act where the price is payable on a certain day irrespective of delivery, but the buyer wrongfully neglects or refuses to pay the same, the seller may maintain an action against him for the price.

The seller's action for price is an action for the liquidated sum.

2. Damages for Non – Acceptance

Under sec 50(1) of the Act, if the buyer wrongfully neglects or refuses to take delivery of goods, the seller may maintain an action against him in damages for non-acceptance and the amount recovered is the estimated loss directly and naturally resulting from the breach of contract.

REMEDIES OF THE BUYER

1. Damages for Non-Delivery

Under sec 51(1) of the Act, if the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against him in damages for non-delivery and the amount recoverable is the estimated loss directly and naturally resulting from the breach of contract in the ordinary cause of events.

2. Specific Performance

Under sec 52(1) of the Act, if the seller wrongfully neglects or refuses to deliver specific goods, the buyer may maintain an action for the decree of specific performance which the court may grant if circumstances justify.

3. Damages for the Breach of warranties

Under sec 53(1) of the Act, if the buyer is compelled or agrees to treat breaches of conditions by the seller as breaches of warranties he loses the right to treat the contract as repudiated hence any breach of warranty entitles the buyer to an action in damages

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4. Recovery of price

Under sec 54 of the Act, if the buyer has already paid for the goods, but the same are unavailable, he is entitled to maintain an action for the price as consideration for the payment has totally failed.

5. Rejection of Goods

The buyer is entitled to reject the goods delivered by the seller in certain circumstances without incurring any liability. E.g.:

1) If the quantity delivered is greater than that contracted for
2) if the quantity delivered is less than than that contracted for
3) Where the goods delivered are mixed with goods of another description.

A buyer may reject the goods and repudiate the contract:

i. If the seller delivers more goods than the quantity contracted for.
ii. If the seller delivers less goods than the quantity contracted for.
iii. If the seller delivers by installments contrary to the terms of the contract.
iv. If the seller delivers goods mixed with those of a different description.

The buyer may lose the right to reject the goods:

i. If he has accepted the goods and given something in earnest to bind the contract.
ii. If the duration, if any, prescribed by the contract has lapsed.
iii. If no duration is prescribed by the contract but reasonable time has lapsed.

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CHAPTER SUMMARY

A contract of sale of Goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called a price.

There are two warranties implied in a sale of goods:

a) Quiet possession
b) Free from charge or encumbrance

Remedies of the unpaid seller fall into 2 broad categories namely:

i) **Real Remedies**
   a) Rights of lien retention of the goods
   b) Right of stoppage in transit
   c) Rights of Re-sale
   d) Rights to withhold delivery

ii) **Personal Remedies**
   a) Action for Price
   b) Damages for non-acceptance

Remedies of the buyer are:

1. Damages for Non-Delivery.
2. Specific Performance
3. Damages for the Breach of warranties.
4. Recovery of price.
5. Rejection of Goods.

There are 8 transactions that resemble Sale of Goods contract but are not a sale of goods contract.

1. Contract of Barter or Exchange.
2. Contract of Gifts
3. Contract of Bailment
4. Contract of Hire Purchase
5. Contract of Loan on Security of goods
6. Contract of Supply of services
7. Contract of Agency
8. Contract of Licences of intellectual property such 'sales' of computer software and patents.

DUTIES OF THE SELLER

1. Put the goods into a deliverable state
2. Pass a good title
3. Deliver the goods
4. Supply goods of the right quality
5. Supply goods of the right quantity

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DUTIES OF THE BUYER

5. Take delivery
6. Pay the price

CHAPTER QUIZ

1. What is a sale of goods contract? What are it's elements?
2. What are the remedies available to an unpaid seller?
3. List the conditions and warranties implied in a sale of goods contract?

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ANSWERS TO CHAPTER QUIZ

1. A contract of sale of Goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called a price.
2. Real remedies and Personal remedies.

3. **1. Terms implied in Sale of Goods contracts by Sale of Goods Act.**
   The Sale of Goods Act implies both conditions and warranties in contracts of Sale of goods unless a different intention appears.

CONDITIONS

1. **Right to sell:** Under Section 4 (a) of the Act there is an implied condition that the seller of goods shall have the right to sell when property in the goods is to pass.
2. **Correspond to description:** Under Section 5 of the Act, in a sale by description there is an implied condition that the goods shall correspond to the description.
3. **Fitness for purpose:** Under Section 16(a) of the Act, where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to rely on the sellers skill and judgement, there is an implied condition that the goods shall be reasonably fit for that purpose.
4. **Merchantable Quality:** Under Section 16 (b) of the Act, where goods are bought by description from a person who deals in such goods in the ordinary course of business whether a seller or manufacturer, there is an implied condition that the goods will be of merchantable quality.
5. **Sale by Sample:** Under Section 17(1) of the Act, in a sale by sample, the following conditions are implied:
   a. The bulk shall correspond with the sample in quality.
   b. The buyer shall be afforded a reasonable opportunity to compare the bulk with the sample.
   c. That the goods shall be free from any defects rendering them unmerchantable.

WARRANTIES

1) **Quiet Possession:** Under Section 14 (b) of the Act there is an implied warrantythat the buyer shall have and enjoy quiet possession of the goods.
2) **Free from Charge or encumbrance:** Under Section 14 (c) of the Act there is animplied warranty that the goods shall be free from any charge or encumbrance not made known to the buyer when the contract was made.

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SAMPLE EXAMINATION QUESTIONS

QUESTION ONE

July 2000 – Pilot Paper, Question 6

a) Explain the meaning of the rule "*Nemo dat quod non habet*" as stipulated in the Sale of Goods Act. (6 marks)
b) Explain the main exceptions to the rule. (14 marks)

QUESTION TWO

May 2000, Question 7

a) Explain the remedies available to an unpaid seller against;
   i. The goods; (6 marks)
   ii. The buyer under the Sale of Goods Act. (4 marks)
b) In relation to the Sale of Goods Act, explain the circumstances when;
   i. A buyer may reject the goods and repudiate the contract. (6 marks)
   ii. The buyer may lose the right to reject the goods. (4 marks)

QUESTION THREE

May 2005, Question 3

a) Highlights the essentials of a contract for the sale of goods. (4 marks)
b) Explain the rules that govern delivery of goods as stipulated in the Sale of Goods Act. (8 marks)
c) Describe the remedies available to the buyer for a breach of a contract for the sale of goods. (8 marks)

QUESTION FOUR

May 2003, Question 5

a) In a contract of sale of goods;
   i. Explain 4 categories of unascertained goods. (8 marks)
   ii. Explain the duties of the buyer towards the seller. (4 marks)

STUDY TEXT

(Footnotes)

[1] Cap 31 Laws of Kenya

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CHAPTER NINE

LAW OF AGENCY

OBJECTIVE

To provide the candidate with a broad understanding of the following principles relating to the Law of Agency;

- Nature and creation of agency.
- Types or Classification of Agents.
- Authority of the agent.
- Rights & Remedies of the Parties.
- Termination of Agency.

INTRODUCTION

The law of agency deals with the principles that govern the relationship between a principal and his agent. The term agency refers to a delegation of duties to another party by a principal. The agent also has rights that arise from this relationship.

KEY DEFINITIONS

Agency: A legal relationship that exists between two people where the agent isconsidered by law to represent another known as the principal in such a way as to affect the principles legal position in relation to 3rd parties.

Agent: A person to whom the principal de legates duties.

Trust: An equitable relationship whereby a party known as trustee expressly, impliedlyor constructively holds property on behalf of another as beneficiary.

Bailment: A contract whereby a party known as Bailor delivers goods to another known asbailee with specific instructions that the goods be dealt with in a particular manner

EXAM CONTEXT

This area has been tested severally; the student is required to be well versed with the principles of agency law and the rights and obligations arising from the relationship. This has been tested in the following years: - November 2007, December 2005, May 2005, and November 2004.

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INDUSTRY CONTEXT

Agents are an important part of the business world. A large number of transactions are conducted by agents on behalf of their principals and the law on agency has developed several principles governing this relationship. Issues to deal with third party rights arise and as such this topic will assist the candidates to be able to understand and appreciate this tripartite arrangement in the business world.

8.1 LAW OF AGENCY

The law relating to agency in Kenya is contained in the Factors Act 1889 and the common law as modified by the doctrines of equity.

Agency may be defined as a legal relationship that exists between a person called the agentis considered by law to represent another known as the principal in such a way as to affect the principal's legal position in relation to 3rd parties.

It has also been defined as a relationship where a party expressly or implied consents that the other should represent him and the other consents to do so.

Although consent is essential in ascertaining whether agency subsists or not, the relationship may and does exist without consent of the parties. The basis of agency is authority which is the power of the agent to affect the principal's legal position in relation to 3rd parties.

CHARACTERISTICS OF AGENCY

1. The agent performs a service for the principal
2. The agent represents the principal
3. Acts of the agent affects the legal position of the principal

The agency relationship differs from trusts and bailment.

TRUST

This is an equitable relationship whereby a party known as trustee expressly, impliedly or constructively holds property on behalf of another as beneficiary.

It is similar to agency in that:

1. Some of the duties of the trustee are similar to those of the agent e.g Must act in good faith and avoid conflict of interest.
2. Some of the remedies available to the beneficiary against the trustee are available to the principal against the agent e.g account

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However, they differ in that:

1. Whereas most agencies are contractual, trusts are not
2. Whereas the principal's action against the agent for fraud is limited by the Statute of Limitation, an action by the beneficiary against the trustee has no time limitation.

BAILMENT

This is a contract whereby a party known as bailor delivers goods to another known as bailee with specific instructions that the goods be dealt with in a particular manner or be returned as soon as the purpose for which they were bailed is accomplished.

Bailment includes:

1. Deposit or storage for safe storage
2. Contract of hiring
3. Pledge
4. Contract for work or repair
5. Carriage of goods

It differs from agency in that:

1. The bailee does not represent the bailor
2. Acts of the bailee do not affect the legal position of the bailor

CREATION OF AGENCY

Once an agency relationship is created, an agent comes into existence .An agency relationship may come into existence in the following ways;

1. By agreement, contract or appointment
2. By ratification
3. By estoppel
4. By necessity
5. By presumption or from cohabitation

1. AGENCY BY AGREEMENT

This agency arises when parties mutually agree to create it. Their minds must be at *ad idem* and both parties must have the requisite capacity .The purpose of the relationship must be legal.

As a general rule, no formalities must be complied with however, an agent appointed for the purpose of signing documents in the principal's absence must be appointed by a deed known as the **Power Of Attorney**

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The contract of agency may be express or implied from the conduct of the parties.

2. AGENCY BY RATIFICATION

Ratification - This is the adoption or confirmation by a party of a contract previously entered intoby another purporting to do so on his behalf.

Agency by ratification arises after the "agent" has acted. It comes into existence when the person on whose behalf the agent purported to act and without whose authority he acted adopts the transaction as if there had been prior authorization .By ratifying the transaction the agents authority is backdated to the date of the transaction.

Ratification by the principal;

1. Creates the agency relationship
2. Validates the transaction entered into by the agent
3. Relieves the agent from any personal liability.

The principal of ratification of agency was applied in the case of *Bolton Partners v. Lambert*.

However, for agency by ratification to arise, the following conditions are necessary:

1. The agent must have purported to act for a principal.
2. The agent must have had a competent principal i.e. there was a natural or juristic person who could have become the principal
3. The principal must have had capacity to enter into the transaction when the agent did as well as when he ratified it
4. The transaction entered into by the agent must be capable of ratification i.e. it must not have been illegal or void
5. The principal must ratify the transaction within a reasonable time.
6. The principal must have been aware of the material facts affecting the transaction
7. The principal must ratify the contract in it's entirely.

3. AGENCY BY ESTOPPEL

This agency is created by the equitable doctrine of estoppel. It arises where a party by word or conduct, represents another 3rd parties as his agent and the 3rd parties deal with the agent .The other party is estoppel from denying the apparent agency.

Agency by estoppel arises in circumstances: -

1. Where the parties have no relationship but one of them represents the other as agent and 3rd parties rely upon the representation.
2. Where an agency relationship exits between the parties but the principal represents the agent as having more authority.

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Requirements for Agency by Estoppel

The conditions necessary were laid down in *Ramas Case* must exist: -

a) A representation by word or conduct intended to be acted upon
b) Reliance upon the representation by the representee
c) Change in legal position as a result of the reliance
d) It would be unfair not to estop the representor

In *Freeman and Lockyer v. Backhurst Park Ltd* the Articles of Association of the defendant company created the position of Managing Director but at the material time, none had been appointed. However one director with knowledge of the others purported to act as Managing Director, he engaged in the plaintiff firm to work for the company. However, the company refused to pay for the services rendered and the firm sued. The company argued that it was not liable as the director was not its Managing Director and hence had no authority to contract on its behalf. It was held that the company was liable as it had represented this director as its Managing Director and 3rd parties replied upon the representation. It was estopped from denying his apparent authority.

4. AGENCY OF NECESSITY

This is a category of agency created by law in circumstances of necessity where one party is deemed to have acted as an agent of another.

Agency of necessity arises in 2 circumstances namely:

a. Commercial.
b. Domestic.

1. Commercial Agency of Necessity

According to Lord Simon in *China Pacific case,* commercial agency arises where a party is in possession of another's goods whether perishable or not and an emergency arises requiring immediate action in relation to the goods and it is impossible for the party in possession to seek instruction from the other.

This was also the case in *Couturier v Hastie.*

The party must therefore act in good faith as owner. For the agency to arise, these conditions are necessary:

1. There must be a genuine emergency necessitating action in relation to the goods.
2. It is impossible for the party in possession to seek instructions from the owner.
3. The party in possession must act in good faith for the benefit of the other party.

2. Domestic Agency of Necessity

At Common Law a deserted wife is regarded as an agent of necessity with authority to pledge her husband's credit for necessaries.

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For the agency to arise, the following conditions are necessary:

1. The wife must have been deserted by the husband.
2. She must be free from blame.
3. Her authority is restricted to pledging her husband's credit for necessaries.

What are "necessaries" is a question of fact and varies from case to case. In *Nanyuki GeneralStores v. Patterson,* the appellant had sold goods to Mrs Patterson valued at Kshs. 3552. She hadpledged Mr. Patterson's credit who at the time was in prison. The appellant sued Mrs. Patterson for the sum alleging that she had not contracted with her as an agent since:

a. Her husband was in prison.
b. Some of the goods (groceries and liqour) were not necessaries.

However the Court of Appeal held that she had contracted as an agent as she was married and the goods were necessaries.

5. AGENCY BY PRESUMPTION OR COHABITATION

This is another category of agency presumed by law. It is presumed where a man and woman are living together in circumstances which portray them as husband and wife, the woman is presumed to be an agent and can pledge the man's credit for necessaries. Marriage is not essential for the agency to arise.

However, the following conditions are necessary:

1. **Cohabitation:** The two persons must be living together as husband and wife. It was soheld in *Jolly v. Rees.*
2. **Domestic establishment:** The persons living together in a domestic establishment inthe presumption of agency to arise. In *Debenham v. Mennon* where the parties were cohabiting in a hotel, it was held that the presumption of agency could not arise and the woman was liable.
3. **Necessaries:** The woman's authority is restricted to pledging a man's credit fornecessaries.

The agency does not arise if:

1) The woman contracts personally.
2) The man has expressly/implicitly instructed the woman not to pledge his credit
3) The goods pledged are not necessaries
4) The parties have stopped cohabiting by divorce.
5) The parties have separated by mutual agreement and the woman is provided for.
6) The trades people extend credit to her personally.
7) She's prohibited from pledging credit.

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8.2 TYPES OR CLASSIFICATION OF AGENTS

1. **General Agent**: He is an agent engaged to perform a particular task or transaction onbehalf of the principal in the ordinary course of his business, trade or profession as an agent.
2. **Special Agent**: This is an agent whose authority is restricted to the performance of aparticular act not being in the ordinary course of his business, trade or profession. Both types derive their authority from the terms of appointment.

Specific Agents:

a. **Broker**: This is a mercantile agent who has neither possession of goods nor documents of title but who is engaged to make bargains or contracts. He is described as a mere negotiator.

b. **Factor**: This is a mercantile agent who is entrusted with possession and sells the goods in his own name.

c. **Auctioneer**: This is a mercantile agent who is licensed by the state to sell goods and other property by public auction. He may or may not be entrusted with possession but is an agent of both parties.

d. ***Del Credere* agent**: This is a mercantile agent who in return for an extra commission known as *commission del credere*, guarantees solvency of a 3rd party with whom the principal contracts. He undertakes to indemnify the principal if the 3rd Party fails to pay the amount due on the contract. A *del credere* agency is a contract of indemnity. The agent may or may not be entitled with possession or documents of title.

e. **Ship Captain or Master**: This is a mercantile agent with powers over a ship and its cargo and in case of necessity becomes an agent of necessity.

8.3 SCOPE OF THE AGENCY RELATIONSHIP (THE CONCEPT OF AUTHORITY)

The principal is only liable if the agent was acting within the scope of his authority. Authority implies permission to do or engage in a particular act. It differs from power which is a legal concept. Whereas authority creates power, power may exist without authority. Though the two concepts are at times used interchangeably, they are not the same.

In certain circumstances, the agent has power but no authority e.g. an agent of necessity. Authority is the ability of the agent to effect the principal's legal position in relation to 3rd parties.

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TYPES OF AUTHORITY

There are 3 types of authority an agent may have namely:

a. Real or Actual.
b. Ostensible or Apparent.
c. Presumed.

a. Real / Actual Authority

This is the authority which the agent has been given by the principal under the contract between them. The authority may be **express, implied, customary or usual**.

a) **Express Authority**: It is the authority given to the agent by the principal in writing or byword of mouth. If in writing, it is interpreted restrictively.

b) **Implied Authority**: It is the agent's authority implied from the nature of the businessor transaction which the agent is engaged to transact. It is the authority reasonably necessary to accomplish express authority.

c) **Customary or Usual Authority**: It is the agent's authority implied from the customs,usage and practices of the transaction or business. It is the authority which every agent
in a particular business or profession is deemed to have and 3rd parties dealing with such agents expect such authority. It is a category of implied authority. Agents created by agreement or ratification exercise real or actual authority.

b. Apparent/Ostensible Authority

It is the authority which the agent has not been given by the principal but which he appears to have by reason of the principal's conduct. It is therefore apparent. Its scope is determined by the conduct of the principal. It is the authority exercised by agency created by estoppel.

c. Presumed Authority

It is a category of authority created by law and which an agent is deemed to have in certain circumstances. It is not given to the agent nor is it based on the principal's conduct. It is given by operation of the law. It is agency created by necessity or cohabitation.

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8.4 LIABILITY FOR BREACH OF CONTRACT

If an agent with no authority to act warrants the same to a 3rd party who relied on the representation and suffers loss or damage, the 3rd party may have an action in damages against the agent for breach of authority.

Authority coupled with interest

It is a situation whereby the principal who is indebted to the agent gives the agent authority as a security for a debt. The agent has a personal interest in the relationship. In such a case the agent's authority lies irrevocable by the principal.

8.5 OBLIGATIONS OF THE AGENCY

DUTIES OF THE AGENT

1. **Performance**: The agent must perform his obligation if the agency is contractual. He isnot bound to perform if the agency is not created by agreement or where the undertaking is illegal or void.

2. **Obedience:** The agent is bound to obey the principal's instructions. This means that hemust act within the scope of his authority.

3. **Care and skill:** The agent must exhibit a degree of care and skill appropriate tothe circumstances. In ordinary transactions, the degree of care and skill is that of a reasonable man, if engaged as a professional the degree is that of a reasonably competent professional.

4. **Respect for principal's title or estoppel:** The agent must respect the principal's titleto any property he holds on the principal's behalf. He cannot deny that the principal has title thereto. However if a 3rd party has a better title and the agent issued, he is entitled to plead ***jus tertii*** (the other person has a better title).

5. **Account:** The agent is bound to explain to the principal the application of money orgoods that come into his hands during the relationship. The account must be complete and honest.

6. **Personal Performance or non-delegation:** The agent must perform the undertakingpersonally as this is consistent with the maxim *delagatus non potest delegare* "Delegates must not delegate". If an agent delegates in violation of this principle, the principal is liable for any loss or liability arising. However, this maxim is subject to various exceptions where the delegates can delegate:

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i. Where it is authorized by the contract between the parties.
ii. Where it is authorized by law.
iii. Where it is authorized by trade usage or customs.
iv. Where it is effected with the principal's knowledge.
v. Where it is reasonably necessary for performance.
vi. Where special skill is required.
vii. In case of an emergency.

7. **Bonafide:** As a fiduciary, an agent is bound to act in good faith for the benefit of theprincipal. His actions must be guided by the principle of utmost fairness.

8. **Keep the principal informed:** The agent must ensure that the principal is well awareof the transactions entered into.

9. **Secrecy/ Confidentiality:** The agent must not disclose his dealings with the principalto 3rd parties without the principal's consent.

10. **Separate Accounts:** The agent must maintain separate accounts of his money orassets and those of his principal. This is necessary for accountancy purposes.

11. **Disclosure:** The agent is bound to disclose any personal interest in contracts madeon behalf of the principal. He must disclose any secret profit made, failing which he is bound to account the same to the principal. The phrase "secret profit" refers to any
financial advantage enjoyed by a **fiduciary**[1] over and above his entitlement by way of remuneration e.g. bribe, secret commission or a benefit accruing from the use of information obtained in the course of employment. An agent may retain a secret profit if he discloses the same to the principal. If an agent makes a secret profit without disclosure, the principal is entitled to:
a. Refuse to remunerate the agent for services rendered.
b. Sue for the secret profit under an action for money had and received.

DUTIES OF THE PRINCIPAL

1. **Remuneration:** It is the duty of the principal to remunerate the agent for the servicesrendered. This duty may be express or implied. The agent must earn his remuneration by performing the undertaking. However, it is immaterial that the principal has not benefited from the performance. However the principal is not bound to remunerate the agent if:

a. He has acted negligently.
b. He has acted in breach of the terms of the contract.
c. He has made a secret profit without disclosure.

2. **Indemnity:** It is the duty of the principal to compensate the agent for loss or liabilityarising. However, the principal is only liable for loss or liability arising while the agent was acting within the scope of his authority.

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8.6 RIGHTS AND REMEDIES OF THE PARTIES

REMEDIES OF THE PRINCIPAL

If an agent is errant the principal has the following remedies:

1. **Dismissal:** The principal is entitled to dismiss the agent for misconduct. If the agent has acted fraudulently, the principal has a complete defence against remuneration or indemnity of the agent for any loss or liability arising.

2. **Right to sue or court action:** The principal may institute certain actions against the agent where appropriate:
   a. If an agent has acted in breach of contract, the principal has an action in damages.
   b. If an agent has acted negligently, the principal has an action in damages for negligence.
   c. If an agent fails to hand over money or assets to the principal the principal has an action in damages for conversion for money had and received.
   d. To ascertain what the agent has in possession the principal has an action for an account
   e. If the agent is declared bankrupt or his assets are mixed with those of the principal, the principal has an action in tracing to facilitate recovery of the same.

REMEDIES OF THE AGENT

1. **Right to sue:** If the principal fails to remunerate or indemnify the agent, the agent hasan action in damages for breach of contract.

2. **Right of *lien*:** An agent in possession of the principal's goods is entitled to retain themas security for any obligation owed by the principal. However for the agent to exercise a *lien*, the following conditions are necessary:

   a. He must have lawful possession of the goods.
   b. He must have obtained possession in his capacity as agent.
   c. The goods must have been delivered to the agent for a purpose connected with the *lien* i.e. the agent can only retain the goods in respect of which the principal's obligation arose.

3. **Right of *stoppage in transitu*:** An agent who has parted with possession of goods isentitled to resume the same if the goods are still in the course of transit to the principal, thereby enabling him to exercise a *lien* on them.

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4. **Withhold the passing of property:** Where property in the goods has not passed to theprincipal, the agent is entitled to withhold the passage to compel the principal to honour any obligation owing.

LIABILITY OF THE PRINCIPAL

As a general rule, the principal is liable for breaches of contract and torts committed by the agent within the scope of his authority. The principal may also be held liable for crimes committed by the agent in certain circumstances e.g.

4. Crimes of strict liability.
5. Where the principal uses the agent to commit crimes.

In agency relationships, the principal may be **named, disclosed or undisclosed**.

- A principal is named if his identity is disclosed to the 3rd party.
- He is disclosed if his existence is made known to the 3rd party
- He is undisclosed if his existence is not made known to the 3rd party.

As a general rule, the principal is generally liable whether disclosed or undisclosed and may sue or be sued by the 3rd party. However if an agent signs a contract without disclosing the agency, the principal cannot sue or be sued on it. It was so held in *Schuk v. Anthony.*

PERSONAL LIABILITY OF THE AGENT

Though the principal is generally liable for the acts of the agent, in certain circumstances the agent is personally liable;

These are exceptions to the general rule:

1. Where the agent expressly or impliedly consents to personal liability.
2. Where the agent negligently or recklessly fails to indicate the agency.
3. Where the agent executes a deed in its own name.
4. Where the agent represents himself as the principal.
5. Where the agent exceeds his authority.
6. Where the principal does not exist nor has no capacity as was the case in *Kelner v.Baxter.*
7. Where an agent executes a deed in the principal's absence in circumstances in which his appointment was not by deed.

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8.7 PAYMENT TO THE AGENT

Question has arisen as to whether payment to the agent discharges the 3rd party's obligation to the principal. As a general rule paying the agent does not discharge the 3rd party as the contracting parties are the 3rd party the principal. Hence the 3rd party must discharge all obligations owned to the principal. However, in certain circumstances payment the agent for the goods or services discharges the 3rd party e.g.

1. If the agent has the principal authority to accept payment
2. If the agent no authority to accept payment but pays it over the principal
3. If the agent represents himself as the principal
4. If a 3rd partly pays the agent for the principal's goods sold by the agent to enforce his rights.

8.8 SETTLEMENT WITH THE AGENT

If a 3rd party conducts itself so as to create on impression to the principal that the agent has fulfilled all the principal's obligations to the 3rd party and as a consequence the principal settles with the agent, the 3rd party cannot thereafter be heard to say that there was an unfulfilled obligation.
However whether or not the principal is liable to such 3rd party depends on the party's conduct.

8.9 TERMINATION OF AGENCY

An agency relationship may terminate in any of the following ways: -

1. Agreement

Where the relationship is consensual, the parties therefore may enter into a new agreement to discharge the agency. Their mind must be *ad idem*

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2. Withdrawal of Consent

This is termination of agency at the option of other party. The agent may renounce the relationship while the principal may revoke the same. However, agency is irrevocable if: -

a) The agent has exercised his authority in full.
b) The agent has incurred personal liability
c) The agent authority is coupled with interest

3. Death of Either Party

The death of principal or agent ends the agency relationship. This is because the obligations of agency are confidential and not transferable.

4. Performance

Execution of the agent's authority in full terminates the relationship as the obligation has been discharged. The contract if any is discharged by performance.

5. Lapse of Time

An agency relationship terminates on expiration of the duration stipulated or implied by trade usage or custom.

6. Insanity

The unsoundness of mind of either party terminates the agency relationship since the party loses its contractual capacity.

7. Bankruptcy of the Principal

The declaration of bankruptcy of the principal by a court of competent jurisdiction terminates the agency relationship.

8. Frustration of Contract

Agency related by agreement or contract comes to an end when the contract is frustrated.

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9. Destruction of Subject Matter

If the foundation of agency whether contractual or not is destroyed, the relationship terminates.

10. Cessation of Emergency

Agency of necessity comes to an end when the circumstances creating the emergency cease and the party in possession is in a position to seek instructions from the owner.

11. Cessation of Cohabitation

Agency by presumption from cohabitation comes to an end when the parties cease to cohabit, whether voluntarily, judicial separation or by a decree of divorce.

CHAPTER SUMMARY

An agency relationship may come into existence in the following ways;

1. By agreement, contract or appointment
2. By ratification
3. By estoppel
4. By necessity
5. By presumption or from cohabitation

Types of agents:

1. General Agent
2. Special Agent
3. Specific Agent
   a) Broker
   b) Factor
   c) Auctioneer
   d) Del Credere agent
   e) Ship Captain or Master

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Agency may be terminated by:

1. Agreement
2. Withdrawal of Consent.
3. Death of Either Party.
4. Performance
5. Lapse of Time
6. Insanity
7. Bankruptcy of the Principal
8. Frustration of Contract
9. Destruction of Subject Matter
10. Cessation of Emergency
11. Cessation of Cohabitation

DUTIES OF THE AGENT

1. Performance
2. Obedience
3. Care and skill
4. Respect for principal's title or estoppel
5. Account
6. Personal Performance or non-delegation
7. Bonafide
8. Keep the principal informed
9. Secrecy/ Confidentiality
10. Separate Accounts
11. Disclosure

DUTIES OF THE PRINCIPAL

1. Remuneration
2. Indemnity

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CHAPTER QUIZ

1. Define agency.
2. How may an agency relationship arise?
3. Define bailment.
4. What are the requirements for agency by estoppel to arise?

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CHAPTER QUIZ ANSWERS

1. A legal relationship that exists between a person where are called the agent is considered by law to represent another known as the principal in such a way as to affect the principles legal position in relation to 3rd parties.
2. Agreement, contract or appointment Ratification Estoppel Necessity Presumption of cohabitation
3. A contract whereby a party known as bailor delivers goods to another known as bailee with specific instructions that the goods be dealt with in a particular manner or be returned as soon as the purpose for which they were bailed is accomplished.
4. The conditions necessary were laid down in **Ramas Case**:-
   a) A representation by word or conduct intended to be acted upon
   b) Reliance upon the representation by the representee
   c) Change in legal position as a result of the reliance
   d) It would be unfair not to estop the representer

SAMPLE EXAMINATION QUESTIONS

QUESTION ONE

November 2007, Question 7 (a)

In relation to the law of agency, outline the following;

i. Meaning of an undisclosed principal. (2 marks)
ii. Liability of an undisclosed principal. (2 marks)

QUESTION TWO

December 2005, Question 5

a) Explain the duties of an agent to his principal. (6 marks)

QUESTION THREE.

May 2005, Question 8

Explain the circumstances under which an agent may be held personally liable for contracts made on behalf of his principal. (10 marks)

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QUESTION FOUR

November 2004, Question 7

a) Distinguish between a special agent and a general agent. (4 marks)

b) Ratification is where the principal adopts an unauthorized act of his agent as his own. What are the conditions which must be fulfilled for the ratification to be effective? (8 marks)

What are the duties of a principal towards the agent? (8 marks)

(Footnotes)

[1] A person, such as a trustee, who holds a position of trust or confidence with respect to someone else and who is therefore obliged to act solely for that person's benefit.

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PURCHASEHIRE LAW

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CHAPTER TEN

HIRE PURCHASE LAW

▶ OBJECTIVE

To provide the candidate with a broad understanding of the following principles relating to Hire Purchase Law;

- Nature of the contract.
- Formation of the contract.
- Terms in the Hire Purchase Agreement.
- Rights and duties of the parties.
- Termination of the Hire Purchase Agreement.

▶ INTRODUCTION

This chapter deals with the law on hire purchase. It looks at the provisions of the Hire Purchase Act, the requirements for a valid hire purchase agreement and the rights and duties available to the parties to the agreement.

▶ KEY DEFINATIONS

1. **Hire Purchase Price:** This is the total sum payable by the Hirer under the Hire Purchaseagreement so as to purchase the goods. It includes any deposit payable.
2. **Contract of Guarantee**: This is a contract made at the expression or implied request ofthe Hirer under which a 3rd party guarantees the performance of the Hires obligations.
3. **Owner**: This is a person who lets or has let goods to a hirer under a Hire Purchaseagreement.
4. **Hirer**: This is a person who has taken goods from owner under a Hire Purchaseagreement.

▶ EXAM CONTEXT

The exam seeks to examine the students on their understanding of the principles of Hire Purchase. It has been examined in the following years:- May 2000, November 2001, November 2003.

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▶ INDUSTRY CONTEXT

Hire purchase is regularly used by various individuals as a method of purchasing goods on credit while paying them back in agreed installments.

10.1 HIRE PURCHASE LAW

The law relating to the Purchase in Kenya is contained in the Hire Purchase Act[1], .The Act was enacted in 1968 and came into force on 2nd November, 1970. It was a Private member's Bill based on the English Hire Purchase Act, 1965.

The Kenyan Hire Purchase Law is governed by the principles of the English common law as modified by the Hire Purchase Act.

At common law a hire purchase agreement is defined as a contract for the delivery of goods under which the Hirer is granted an option to purchase the goods. The agreement is a hybrid form of bailment and contract in that it is neither a simple bailment nor a contract of sale but combines elements of both.

The original position at common law is that there are no formal requirements for a hire purchase agreement. An oral agreement is valid and binding. The question of capacity to enter into a hire purchase agreement is governed by the normal rules of contract law and because the hire purchase agreement is a form of bailment; it only applies to goods as defined in the Sale of Goods Act. The terms of a hire purchase agreement must be stated with certainty and precision so as to enable the court to ascertain the intention of the parties. The parties to the agreement must reach consensus *ad idem*.

If the dealer fraudulently completes a document signed in blank by the hirer, then no valid hire purchase contract results.

Should the nature of the document which the hirer signs be misrepresented to him so that he signs in the belief that it is something essentially different from what it is the hirer can plead ***non est factum*** (it is not my deed or it is not my act) and therefore escape liability. If there isa change in the condition of the goods between the time of the offer and acceptance, again no valid agreement comes into force.

In the case of an agreement between the dealer and the hirer without the intervention of a finance company, a legally binding hire purchase agreement comes into existence when the dealer posts a letter of acceptance to the hirer or delivers the goods.

Where the finance company finances the transaction, although the dealer is supplying the goods, the owner of the goods at the relevant time is the finance company. The hirer therefore contracts with a finance company when he enters into a hire purchase agreement. Thus there must be acceptance by the finance company and communication of that acceptance to the hirer which is normally done by posting him a copy of the agreement showing execution by the company.

A hire purchase transaction has been described as a triangular transaction with the Dealer and the Hirer at the bottom and the Finance company at the top.

The question arises as to the effect of the delivery of goods by the dealer to the hirer before

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acceptance by the finance company. As far as the obligations of the hirer are concerned, until acceptance of his proposal by the finance company the hirer holds the goods as a bailee of the dealer. Such bailment can be terminated at the will of the dealer or the hirer. It however continues until the finance company purchases the goods from the dealer and executes the hire purchase agreement. When this is done, the bailment as between the dealer and the hirer terminates and is replaced by the hire purchase agreement between the finance company and the hirer.

The hirer thereafter holds the goods as a bailee of the finance company under the terms of the Hire Purchase Agreement. Should the finance company refuse to accept the transaction, the bailment between the dealer and the hirer or is terminable by the dealer.

Before the finance company executes the hire purchase proposal the hirer in possession of the goods owes the dealer a duty to take reasonable care of the goods, the breach of which gives the dealer a right of action under the tort of negligence or if wilful damage is caused to the goods then trespass to goods. If the finance company refuses to accept the transaction the hirer could be held liable in *quasi* contract to pay the dealer a reasonable charge for the use of the goods.

Pending acceptance of the transaction by the finance company the hirer can use the goods at will as bailee if there are no restrictions agreed between him and the dealer. The dealer at that stage does not owe the hirer any contractual duty as to fitness of the goods or their suitability because there is no contract between them but simply a loan of the goods. Should however the hirer be injured, due to defects in the goods, which the dealer knows or ought to know, the hirer can maintain an action in tort for negligence.

The liability of the finance company for the condition of the goods does not start until it has entered into a higher purchase agreement.

Note that hire purchase agreements must not be impossible to perform, contain a mistake on the part of either party or be illegal.

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10.2 SCOPE OF THE ACT

Under sec. 3 of the Act, the rules laid down by the statute regulate Hire Purchase transaction whose Hire Purchase price does not exceed Kshs. 300,000. However, this limitation does not apply where the Hirer is a body Corporate.

10.3 HIRE PURCHASE AGREEMENT

This is agreement for the bailment of goods under which the bailee may buy the goods or under which properly in the goods may or will pass to the bailee.

Parties to the agreement are the owner and the hirer. The Hirer has the option to purchase the goods. It is a contract of Hiring. Under Sec. 6(2) of the Act, a Hire Purchase agreement must be registered with the Registrar of Hire Purchase with 30 days of its execution.

A Hire Purchase agreement differs from a credit and a conditional sale.

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10.4 CREDIT SALE

This is a contract of sale of goods whereby the purchase price is payable by 5 or more installments. Property in the goods passes to the buyer when the 1st instalment is paid. It differs from a Hire Purchase Agreement in that: -

1. It is a contract of Sale
2. Property in the goods passes to the buyer when the 1st instalment is paid.

Conditional Sale

This is a contract of sale of goods, whereby, whereby part of the purchase price is payable by installments. Property in the goods pass the buyer when the condition(s) subject to which the sale is made is fulfilled.

10.5 PROVISIONS RELATING TO THE HIRE PURCHASE AGREEMENT

Under sec. 6 (1) of the Act, before the Hire Purchase Agreement is entered into the owner is bound to notify the prospective Hirer in a prescribed from the cash price of the goods. However, the owner is not bound to do so of:

a. The Hirer has selected the goods or similar goods by reference to a catalogue stating the Cash Price OR
b. The goods or similar goods from which the selection was made stated the cash price.

Under sec. 6(2) of the Act, the Hire Purchase agreement must be written.

CONTENTS OF THE AGREEMENT

1. A description of the parties.
2. A description of the goods.
3. The cash and Hire Purchase price.
4. Number of Installments.
5. Amount and when payable.
6. It must be signed by the Hirer and by or on behalf of the owner.
7. Rights of the Hirer.

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10.6 REGISTRATION OF THE HIRE PURCHASE AGREEMENT

Sec.4 (1) of the Hire Purchase Act establishes the Registry of Hire Purchase. This is a public office which may be held by the Registrar, Assistant or Deputy Registrar.

Under sec. 5(1) of the Act every Hire Purchase agreement must be delivered to the Registrar for registration **within 30 days** of its execution. However the Registrar is empowered to extend the duration if satisfied that the non-presentation of the agreement was: - Inadvertent or there was a sufficient cause.

The Registrar may refuse to register a Hire Purchase Agreement if: -

1. It is not in the English Language
2. It is presented after 30 days of its execution
3. Stamp duty or Registrar fee payable has not been paid

Under sec. 5(3) of the Act, on registration of the agreement, the registrar issues a certificate of Registration which is *prima facie* evidence of its content.

Registration of Hire purchase, serves a double purpose: -

1. It protects 3rd party who may purport to buy the goods from the Hirer.
2. It is a revenue generation mechanism for the state.

EFFECTS OF NON-REGISTRATION

Under sec. 5(4) of the Act, if a Hire Purchase Agreement is not registered: -

1. The agreement cannot be enforced by any person against the Hirer.
2. Any contract of guarantee made in relation to the Hire Purchase Agreement is also unenforceable.
3. The owner cannot enforce the right to repossess the goods from the Hirer.
4. Any security given by the Hirer under the Hire Purchase Agreement or by the guarantor under the contract of guarantee is unenforceable.

10.7 PROTECTION OF THE HIRER

The Hire Purchase Act makes half–hearted attempts to protect or safeguard the hirer's interests.

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It adopts or employs 3 mechanisms:

1. Contents of the Hire Purchase Agreement
2. Implied Terms
3. Repossession of Goods

1. CONTENTS OF THE HIRE-PURCHASE AGREEMENT

Under sec 7 of the Hire –Purchase Act, the following provisions are deemed **void** if contained in a hire purchase agreement.

1. A provision which allows the owner or his agent to enter upon any premises to repossess the goods let under a H.P Agreement.
2. A provision whose effect is to relieve the owner from liability for such entry
3. A provision which excludes or limits the Hirer's right to terminate the H.P Agreement pursuant to sec 12(1)
4. A provision which imposes upon the Hirer greater liability for terminating the H.P Agreement than is imposed by sec 12(1) of the Act.
5. A provision which deems persons acting on behalf of the owner in the formation or conclusion of the Hire Purchase Agreement as agents of the hirer.
6. A provision whose effect is to relieve the owner from liability for acts of person acting on his behalf in relation to the formation or conclusion of the Hire Purchase Agreement.

2. IMPLIED TERMS

The Hire Purchase Act implies both conditions and warranties in all Hire Purchase Agreements.

Conditions

1. **Right to sell** - Under Sec8 (1) (a) of the Act, there is an implied condition that the ownerwill have the right to sell the goods when the property is to pass.
2. **Merchantable Quality -** Under sec 8(1) (d) of the Act, unless the goods are secondhand and the agreement so provides, there is an implied condition that they would be of merchantable quality.
3. **Fitness for Purpose** - Under Section 8 (2) of the Act, where the hirer expressly or byimplication makes known to the owner the particular purpose for which the goods are , there is an implied condition that the goods would be reasonably fit for the purpose.
4. A condition may be implied by any other law.

Warranties

1. **Quiet Possession** – Under sec 8 (1) (b) of the Act, there is an implied warranty that thehirer will have and enjoy quite possession of the goods.
2. **Free from charge or encumbrance** - Under sec8(1)(c) of the Act, there is an impliedwarranty that the goods shall be free from any charge or encumbrance in favour of a third party when property is to pass.
3. A warranty may be implied by any other law.

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3. REPOSSESSION OF GOODS

Under sec 15 (1) of the Act, if at any time 2/3 of the hire purchase price has been paid by the hirer or any other person on his behalf, the owner cannot repossess the goods otherwise than by court action. This provision was intended to protect the hirer from Common Law practice of "snatch back" underwhich the owner will reposes the goods at any time.

If the owner repossess the goods in contravention of this section;

1. The hire purchase agreement terminates
2. The hirer is discharged from all liability under the agreement
3. The hirer is entitled to recover all sums paid under the agreement or the contract of guarantee.
4. The guarantor is entitled to recover any sum paid under the contract of guarantee or under the security given.

The section does not adequately protect the hirer in that:

1. The hirer must pay too much to be protected by the section.
2. Property in the goods does not pass to the hirer even after paying 2/3 of the hire purchase price
3. The court may still order the repossession of the goods

10.8 OBLIGATIONS OF THE HIRE PURCHASE AGREEMENT

The hire purchase agreement imposes legally binding obligations on the owner and the hirer. Each party is bound to observe its duties.

Duties of the Owner

1. **Notice of cash Price**: Under se. 6(1) it is the duty of the owner to notify the prospective Hirer the cash price of the gods in prescribed form.
2. **Furnish Copy**: Under sec. 6(2) (d) of the Act, within 21 days of execution of the Hire Purchase Agreement, the owner must send a copy thereof to the Hirer.
3. **Deliver the goods:** It is the duty of the owner to put the Hirer in possession of thegoods let under a Hire Purchase.
4. **Indemnity:** It is the duty of the owner to compensate the Hire for any loss or liabilityarising by reason any defects in the goods or Hire.
5. **Disclosure of defects:** the owner is bound to disclose to the hirer any defects in thegoods or in his title

Duties of the Hirer

1. **Reasonable care-** It is the duty of the hirer to exercise reasonable care in relation to thegoods let under a hire purchase agreement. However the hirer is not liable for ordinary wear and tear.
2. **Take Delivery-**The hirer is bound to take delivery of the goods under hire purchaseagreement.

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3. **Pay Installments-**The hirer is bound to pay the installments as and when they fall due.This duty does not deny him the right to terminate the agreement in accordance with sec 12(1) of the Act.
4. **Continue Hiring-**It is the duty of the hirer to continue hiring the goods for the agreedduration. This obligation does not deny the hirer the right to terminate the agreement.
5. **Notice of change of location of goods-**It's the duty of the hirer to inform the ownerany change in the location of the goods. Under Section 10 (1) of the Act, goods let under hire purchase agreement cannot be removed from Kenya without the owner's written consent.

10.9 TERMINATION OF THE HIRE PURCHASE AGREEMENT

Under sec 12(1) of the Act, the hirer may at the time before the final instalment falls due, terminate the hire purchase agreement. This right is exercisable by:

1. Giving a written notice of termination
2. Returning the goods to the owner.

Once the hirer exercises this right, the **minimum payment** or **depreciation clause** comes into operation in which case the hirer must pay;

1. All installments due up to the date of termination.
2. The amount by which one half of the hire purchase price exceeds the total amount paid or such lesser amounts as the agreement may provide.

If the hirer has not taken reasonable care of the goods, he is reliable in damages under sec 12(3) of the Act, the hirer must at his own expense return the goods to the premises from which delivery was taken.

However if the goods are returned elsewhere by reason of the owners change of location, any additional expenses are recoverable from the owner.

10.10 COMPLETION OF HIRE PURCHASE AGREEMENT

Under sec. 13 (1) of the Act, the Hirer may at anytime give a written notice to the owner of his intention to compete the purchase of goods by tendering the amount due on a specified date whereupon he becomes entitled to do so.

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The right of the Hire to complete the Hire Purchase Agreement is exercisable in two circumstances:

1. During the continuance of the Agreement
2. Within 28 days of repossession of the goods by the owner in which case the Hirer must pay: -
   a) The amount due inclusive of interest
   b) Reasonable repossession, repair, maintenance and storage charges.

RIGHTS OF THE HIRER

1. He is entitled to be notified in a prescribed form the cash price of the goods.
2. He is entitled to a copy of the Hire Purchase Agreement within 21 days of the execution of the agreement.
3. He is entitled to Indemnity for any loss or liability arising by reason of any defect in the goods or of title.
4. He is entitled to quiet possession of the goods let under the Hire Purchase Agreement
5. He is entitled to damages for any breach of contract by the owner
6. He has the right to terminate the Hire Purchase Agreement at any time before the final instalment falls due.
7. He is entitled to complete the Hire Purchase Agreement pursuant to the provisions of sec. 13

CHAPTER SUMMARY

CONTENTS OF THE HIRE PURCHASE AGREEMENT

1. A description of the parties.
2. A description of the goods.
3. The cash and Hire Purchase price.
4. Number of Installments.
5. Amount and when payable.
6. It must be signed by the Hirer and by or on behalf of the owner.
7. Rights of the Hirer.

DUTIES OF THE OWNER

1. Notice of cash Price
2. Furnish Copy
3. Deliver the goods
4. Indemnity

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DUTIES OF THE HIRER

1. Reasonable care
2. Take Delivery
3. Pay Installments
4. Continue Hiring Notice of location of goods

RIGHTS OF THE HIRER

1. He isentitled to be notified in a prescribed form the cash price of the goods.
2. He is entitled to a copy of the Hire Purchase Agreement within 21 days of the execution of the agreement.
3. He is entitled to Indemnity for any loss or liability arising by reason of any defect in the goods or of title.
4. He is entitled to quite possession of the goods let under the Hire Purchase Agreement
5. He is entitled to damages for any of contract by the owner
6. He has the right to terminate the Hire Purchase Agreement at any time before the final instalment fall due.
7. He is entitled to complete the Hire Purchase Agreement pursuant to the provisions of Section 13

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CHAPTER QUIZ

1. What is a hire purchase agreement?
2. Define how the hire purchase agreement may be terminated.
3. List the duties of the hirer.
4. Define the obligations under the hire purchase agreement.

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CHAPTER QUIZ ANSWERS

1. Hire purchase agreement is an agreement for the bailment of goods under which the bailee may buy the goods or under which properly in the goods may or will pass to the bailee.
2. Giving a written notice of termination
   Returning the goods to the owner.
3. Reasonable care
   Take Delivery
   Pay Installments
   Continue Hiring
   Notice of location of goods
4. The hire purchase agreement imposes legally binding obligations on the owner and the hirer

SAMPLE EXAMINATION QUESTIONS

QUESTION ONE

May 2000, Question 6

a) Explain 5 implied conditions and warranties in a Hire Purchase Agreement. (10 marks)

b) Explain how a hire purchase agreement differs from;

   i. A credit Sale Agreement. (6 marks)

   ii. A Conditional Sale Agreement. (4 marks)

QUESTION TWO

November 2003, Question 7

a) Distinguish between the seller's right of lien and the right of stoppage in transit. (8 marks)

b) Explain the legal consequences of non-registration of a hire purchase agreement. (4 marks)

QUESTION THREE

November 2001, Question 2

Under Section 7 of the Hire Purchase Act Cap 507, Laws of Kenya, certain provisions are deemed void if contained in a Hire Purchase Agreement. Identify and explain 5 such provisions.

(5 marks)

(Footnotes)

[1] Cap 507 Laws of Kenya

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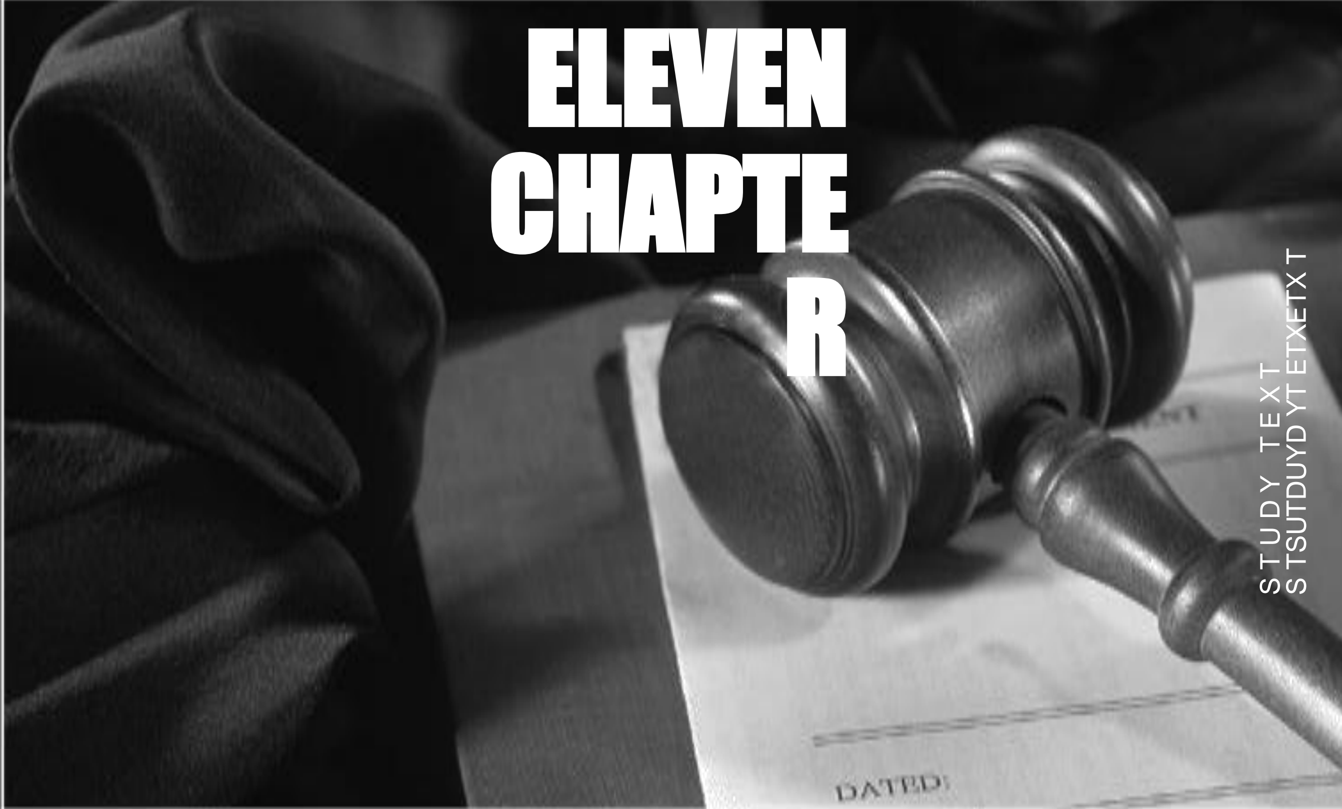

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CHAPTER ELEVEN

LAW OF INSURANCE

▶ OBJECTIVE

To provide the candidate with a broad understanding of the following concepts pertaining to the Law of Insurance;

- Nature of the contract
- Formation of the contract
- Principles of Insurance.

▶ INTRODUCTION

Insurance is an important part of modern life. Individuals and businesses take out insurance to protect themselves from loss that may occur due to damage to property or loss of life.

▶ DEFINITION OF KEY TERMS AND PHRASES

Insurance: a contract whereby a person undertakes to pay a premium so as to be paid a sum ofmoney upon the occurrence of the event insured against.

Insured: the person who takes out a cover and promises to pay a money consideration. **Insurer**:

the party that undertakes to pay out compensation if the event insured against occurs.

Insurable interest: the interest a person has in the subject matter which he stands to loose inthe event of its loss or destruction

Indemnity: is a contract whereby the insured takes out a policy on the understanding that whenloss occurs he will be indemnified for loss

Subrogation: It means that after indemnifying the insured, the insurer becomes entitled to all thelegal and equitable rights in respect to the subject matter previously exercisable by the insured.

Reinstatement: This is the repair or replacement of the subject matter in circumstances in whichit may be re-instated.

Premium: Payment made by insured to insurer.

Risk: It is the chance of loss, the probability of loss or the probability of any outcome differentfrom the one expected.

Double Insurance: This is a situation whereby a party takes out more than one policy on thesame subject matter and risk with different insurers but where the total sum insured exceeds the value of the subject matter.

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Proximate clause: An insurer is only liable where loss is proximately caused by an insured riskand not liable where the risk is excepted Under this principle, the proximate and not the remote cause is to be looked to. (*causa proxima non remota spectatur*)

Policy: Written contract or certificate of insurance.

Wagering Contract: Betting contract.

▶ EXAM CONTEXT

Insurance has been an important topic in the study of law and has been tested in the following years:- November 2007, May 2001, and December 2000.

▶ INDUSTRY CONTEXT

Insurance is an integral part of modern life and of conducting business in the modern world. There are various important principles underlying insurance and which the student is expected to understand in depth.

11.1 LAW OF INSURANCE

WHAT IS INSURANCE?

This is a contract whereby a party known as the insurer undertakes, in consideration for a sum of money known as premium paid by the insured, to pay a sum of money or its equivalent on the happening of a specified future event.

The insurance contract is a contract like any other, but with particular peculiar principles. The insurable interest should be beyond the control of either party and there must be an element of negligence or that there is uncertainty. Contracts dealing with uncertain future events are either alieatory, contingent or speculative. In insurance risk exists *in priori*, whether or not we insure. However in a wager/stake/ gamble there is no insurable interest.

It has been observed that the contract of insurance is basically governed by rules which form part of the general law of contract. But equally, there is no doubt that over the years, it has attracted many principles of its own to such an extent that it is perfectly proper to speak of the Law of Insurance.

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Problem of Definition

As a general rule statutes dealing with the regulation of insurance business do not or have not defined the contract of insurance to obviate the danger of excluding contracts within or that should be within their scope. However a definition is essential as insurance business is closely regulated.

In the words of **Ivamy, General Principles of Insurance**,

"A contract of insurance in the widest sense of the term may be defined as a contract whereby one person called the insurer undertakes in return for the agreed consideration called the premium, to pay to the other person called the assured, a sum of money or its equivalent on the happening of a specified event"

In the words of **John Birds,** in his book, **Modern Insurance Law,**

"It is suggested that a contract of insurance is any contract whereby one party assures the risk of an uncertain event which is not within his control happening at a future time, in which event the other party has an interest and under which contract the first party is bound to pay money or provide its equivalent if the uncertain event occurs."

In the words of **Channel J**, in *Prudential Assurance CO. Ltd v. Inland Revenue Commissioner[1904].*

"A contract of insurance then must be a contract for the payment of a sum of money or for some corresponding benefit such as the rebuilding of a house or the repairing of a shape to become due on the happening of an event, which event must have some amount of uncertainty about it and must be of a character more or less adverse to the interest of the person effecting the insurance"

The Judge further observed that, " it must be a contract whereby for some consideration usually but necessarily for periodical payments called premiums, you secure yourself some benefit usually but not necessarily the payment of a sum of money upon the happening of some event"

Lord Clerk in *Scottish Amicable Heritage Securities Association Ltd v. Northern Assurance Co[1883].*

"It is a contract belonging to a very ordinary class by which the insurer undertakes in consideration of the payment of an estimated equivalent beforehand to make up to the assured any loss he may sustain by the assurance of an uncertain contingency."

ESSENTIALS OF AN INSURANCE CONTRACT

1. Agreement

For a contract of insurance to exist, there must be an agreement under which the insurer is legally bound to compensate the other party or pay the sum assured [premium]. This is the consideration that passes between the parties to support the transaction. It is asserted that premium is the considerations which the insurers receive from the insured in exchange for their undertaking to pay the sum assured in the occurrence of the event insured against. Any consideration sufficient to support a simple contract may constitute a premium in a contract of insurance.

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2. Uncertainty

The insurance contract is aleatory, contingent or speculative as it deals with uncertain future events. For an event to be Insurable it must be characterized by some uncertainty. In the words of Channel J in *Prudential Assurance Co. Ltd v. Inland Revenue Commissioner* "then the next thing that is necessary is that the event should be one which involves some amount of uncertainty. There must be either some uncertainty whether the event would ever happen or not, or if the event is one which must happen at some time or another, there must be uncertainty as to the time at which it would happen"

3. Insurable Interest

The insurable event must be of an adverse nature .i.e. the insured must have an Insurable interest in the property, life or liability which is the subject of the insurance. Insurable interest is said to be the pecuniary or financial interest which is at stake or in danger if the subject matter is not insured. It is a basic requirement for the contract of insurance.

4. Control

The insurable event must be beyond the control of the party assuring the risk as it was held in *Re Sentinel Securities P.L.L*

5. Accidental or Negligent Loss

Insurance can only be effected where loss is accidental in nature or is a consequence of a negligent act or omission. Loss occasioned by intentional acts does not qualify for indemnity or for payment of the sum assured. It was so held in *Toxleth v Hampton.*

6. Risk

This is the central problem that insurance attempts to address. It is understood to mean that in a given situation, there is uncertainty about the outcome and a possibility exists that the outcome would be unfavorable. Risk has been defined as the chance of loss, the probability of loss or the probability of any outcome different from the one expected. It is a condition in which there is a possibility of an adverse deviation from a desired outcome that is expected or hoped for. For individual proposes, risk is measured by the probability of loss as the individual hopes that it would not occur.

The probability that it could occur is used to measure the risk. However, where a large number of exposure units- policies- exist, it is possible to predict the probability of loss which is the probability of an adverse deviation from the expected outcome. The standard deviation is used

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as a measure of risk. The higher the probability of loss the greater the risk as the greater the possibility of loss the greater the probability of a deviation from what is hoped for.

Risk differs from peril and hazards. A peril is the cause of loss while a hazard is a condition that may create or increase the chance of a loss arising from a given peril

11.2 ELEMENTS OF INSURANCE

1. **Parties:** The parties to an insurance contract are the insurer ad the insured.
2. **Premium:** This is the consideration which passes from the insured to the insurer to support the contract.
3. **Risk:** This is the probability or chance of loss, it is the probability of an outcome adverse to what is expected or hoped for. Insurance is one of managing risk. In an insurance contract, risk exists *in priori* while in a wagering contract risk is created by the contracted. It was so held in *Robertson V. Hamilton*
4. **Uncertainty:** For insurance to exist there must be uncertainly as to whether the event will ever occur and if it must occur there must be uncertainty as when it was so held in *Prudential Assurance Company V. Inland Revenue Commission*
5. **Insurable Interest:** This is the monetary or pecuniary interest which a person has in subject matter which he is likely to lose should the risk occur. The interest may be legal or equitable
6. **Control:** The insurable event must be beyond the control of either party.
7. **Negligence:** Insurance is only sustainable where loss is likely to be accidental or a consequence of a negligent act or omission.

11.3 PARTIES TO AN INSURANCE CONTRACT

Insurer: This is the person who undertakes to pay the sum assured or indemnity when theinsured event occurs. To carry on insurance business in Kenya, a person must be a body corporate (company) licensed by the Commissioner of insurance to do business.

Insured: This is the person who takes out insurance cover, he is the person who pays thepremium and may be a natural or artificial person. The insured must have an insurable interest in the subject matter of insurance.

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11.4 THE CONTRACT OF INSURANCE

A contract of insurance comes into existence when an offer by the proposer is accepted by the insurer.

The proposer makes the offer by completing and submitting to the insurer the **proposal form.** This form seeks information in relation to: -

1. Particulars of the proposer
2. Particulars of the subject matter
3. Circumstances affecting the risk and
4. The history of attachment of the risk

The proposer signs a declaration at the bottom of the form to the effect that the answers given constitute the bases of the contract between him and the insurer. The declaration is referred to as "Basis of Contract Clause". Submission of the proposal form to the insurer constitutes the formal offer by the proposer. The insurer is not bound to accept the offer. However, he may as he assesses the risk, extend temporal cover to the proposer.

COVER NOTE

This is the name given to the temporal cover extended to the proposer by the insurer in the interim period between submissions of the proposal form and its formal acceptance or rejection. It may be a detailed document setting out the terms and conditions of indemnity or may be simple letter from the company.

The issue of a cover note may be justified on 2 grounds:

1. It is argued that insurance is formal and rigid hence time is of the essence before cover is extended
2. It is necessary to extend immediate cover to the proposer since the subject matter is exposed to risk.

If risk attaches/arises during currency of the cover note, the proposer recovers in accordance with the terms of the cover note, if formal, or on the basis of the policy applied for:

Cover notes generally last for 30 days.

ACCEPTANCE OF THE PROPOSAL FORM

The insurer is not bound to accept the proposers offer, however, if the accepted, it signifies a contractual relationship between the two. The insurer may signify acceptance of the proposal form;

1. By formal communication
2. By conduct

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3. Issue of the policy
4. Acceptance and retention of premium raises a presumption of acceptance of the proposal form.

11.5 COMMENCEMENT OF INSURANCE COVER

As a general rule, cover commences at the time and date specified by the cover note or policy. However, if neither is specific as to the time, cover commences at the beginning of the next full day and a full day is a period of 24 consecutive hours from midnight.

11.6 TERMINATION OF INSURANCE CONTRACT

An insurance contract may come to an end or terminate in any of the following ways:-

1. **Payment of Indemnity** or the sum assured in the event of total loss. In the case of partial loss, reinstatement does not terminate the policy.
2. **Mutual agreement:** The parties may at any time agree to terminate the contract at the instance of the insured. In property insurance, the insured becomes entitled to the surrender value of the policy. In life policies, if the insured has been a *bona fide* insured for 3 years he is entitled to 75% of all premium paid inclusive of any bonuses and interests payable.
3. **Breach of condition or warranty:** The insurer is entitled to apply for cancellation of the policy if the proposer breached a condition or warranty to procure the policy e.g. Misreprentation or non-disclosure of material facts.
4. **Lapse of time:** Indemnity contract or property Insurance lapse after one year. It is the duty of the insured to renew cover.
5. **Operation of law:** These are circumstances which render the maintenance of the policy impossible e.g Winding up or Liquidation of the insurer.
6. **Sale** of the subject matter

11.7 CLASSIFICATION OF INSURANCE CONTRACTS

Insurance contracts may be classified on the basis of:-

1. **The event insured:** The category of insurance derives its name from the event e.g.fire, burglary, marine, fidelity, motor etc.
2. **The Interest Insured:** The classification places contracts in 3 categories namely: -
   a. Personal Insurance e.g. Life Insurance
   b. Property Insurance
   c. Liability Insuring e.g. NSSF, NHIF, 3rd Party Motor Insurance

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3. **Nature of the Contract**: -
   a. Indemnity
   b. Non-Indemnity

   Indemnity is a contract whereby the insured takes out a policy on the understandingthat when loss occurs he will be compensated for the loss. This is property insurance e.g. Fire, burglary, marine.

   Non-Indemnity contract is a contract whereby a party known as the insured takes outa policy to secure the payment of a sum of certain in money when risk attaches e.g. life insurance.

6. **Whether Private or Social**: private insurance is optional while voluntary, social orcompulsory insurance is a statutory requirement e.g. 3rd party Motor Insurance.
7. Basis of the Programme:
   a. Insurance
   b. Reinsurance: This is a contract in which an insurer insures himself with re-insureragainst the risks he has insured against. It may be voluntary or compulsory.

11.8 PRINCIPLES OF INSURANCE

The Principles includes:-

1. Insurable Interest
2. Utmost good faith (Non-disclosure)
3. Indemnity
4. Subrogation
5. Salvage
6. Re-instatement
7. Contribution and Apportionment
8. Proximate Cause
9. Abandonment
10. Average Clause
11. 3rd Party Insurance

1. INSURABLE INTEREST

This is the financial or monetary interest at stake or in danger if the subject matter is not insured.
It is the interest a person has in the subject matter which he stands to lose in the event of its loss or destruction.

Insurable interest is a basic requirement of any contract of insurance unless it can be and is lawfully waived. At a general level this means that the party to the insurance contract who is the insured or policy holder must have a particular relationship with the subject matter with the insurance whether that be, “a life or property or a liability to which he might be exposed”

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Every of insurance contract requires an insurable interest to support it, otherwise it is invalid. This was held in *Anctil Vs Manufacture Life Insurance Co. [1899]*

Insurable interest is essentially the pecuniary or proprietary interest which is at stake or in danger should the insured opt not to take out an insurance policy on the subject matter. It is the interest which the insured stands to lose if the risk attaches.

The classical definition of insurable interest was given by Lawrence J in *Lucena v. Crawford[1806]* "A man is interested in a thing to which an advantage may arise or prejudice happen fromthe circumstances which may attend it… and whom it imported that its condition as to safety or other quality should continue, interest does not necessarily imply a right to the whole or a part of a thing, nor necessarily and exclusively that which may be subject of privation, but the having some relation to, or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment or prejudice to the person insuring, and where a man is so circumstanced with respect to matters exposed to certain risks or damages, or to have a moral certainty of advantage or benefit but those risks or dangers, he may be said to be interested in the safety of the thing".

In *Lucena v. Crawford (1806)* it was observed that a person has an insurable interest in a subject matter if he stands to gain by its continued existence and stands to lose in the event of its destruction.

To ascertain whether a person has insurable interest in subject matter, courts employ the following rules: -

1. There must be a direct relationship between the insured and the subject matter.
2. The insured bears any loss or liability arising
3. The insured must have a legal or equitable interest /right in the subject matter
4. The insured's interest/right must be capable of financial/pecuniary estimation or qualification.

Who has an Insurable Interest?

Every person who has a legal or equivalent interest/right in a subject matter has an insurable interest therein. Every person has an insurable interest in his life.

Under Section 94 (2) of the Insurance Act[1], the following people have insurable interest in the lives of the other:

1. A wife in the life or the husband
2. A husband in the life of his wife. In *Grifith Vs Fleming [1909]* it was held that a husband has an insurable interest in the life of his wife and vice versa.
3. A parent or a guardian of a child below 18 years in its life to the extent of the funeral expenses
4. An employer in the life of the employee to the extent of the services rendered. In *Hebdonv. West (1863),* it was held that an employer has an insurance interest in his employeesto the extent of the services rendered and an employee has an insurable interest in the life of an employer to the extent of their relationship.
5. A creditor in the life of the debtor to the extent of the debt. In *Thomas v. ContinentalCreditors (1976),* it was held *inter alia* that a creditor has an insurance interest in the lifeof the debtor to the extent of the debt.
6. A dependant for maintenance or education in the life of the provider

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Time of Insurable Interest

1. In Indemnity contracts e.g. fire, marine, burglary etc. it must exist at the time of loss.
2. In life Insurance, it must exist when the contract is entered into.

Insurable interest creates a direct relationship between the insured ad the subject matter. It gives insured the necessary ***locus standi*** to enforce the contract. However it has also been used by insurers to escape liability.

2. NON-DISCLOSURE / UTMOST GOOD FAITH

The duty to disclose exists throughout the negotiation period. It generally comes to an end when the proposal form is accepted. It was so held in *Lishman V. Northern Marine Insurance Co.*

Effect of Non-Disclosure

The non-disclosure of a material fact by either partly renders the contract voidable at the option of the innocent party. In *London Assurance Company V. Mansel (1879)* when responding to a question in the proposal form, the proposer stated that no other insurer had declined to take his risk; in fact 2 companies had previously declined to insure him. Subsequently, the insurer sought to avoid the contract on the ground of non-disclosure of a material fact. It was held that the contract was voidable at the option of the insurer for the concealment of material fact. A similar holding was made in *Horne v.Poland (1922)*

Although the contract of insurance is one of the utmost good faith certain matters need not be disclosed e.g.:

a) Provisions and propositions of law
b) Unknown facts as was the case in *Joel v. Law Union and crown Insurance Company*
c) Facts known by other party
d) Matters of public notoriety as was the case in *Bates V.Hemitt.*

3. INDEMNITY

This principle means that when loss occurs, it is the duty of the insurer to restore the insured to the position he was before the loss. The insurer must so far as money can do; put the insured to the position he was before the loss. Idemnity means that there should be no more or no less than *restitutio in integrum.*

Indemnity is a basic principle in property insurance; it has its justifications in equity in that in its absence the insured is likely to benefit from the contract.

In the words of Brett L.J in *Castellain v. Preston,*

> "The insured is to be fully indemnified but is never to be more than fully identified".

The principle of indemnity ensures that it is the duty of the insurer to ascertain whether there are circumstances which reduce, diminish or extinguish the loss as they have a similar effect on the

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amount payable by the insurer for the loss. E.g. if the tortfeasor makes good the loss, the insurer is not liable to indemnify the insured as was the case in *Darell v. Tibbitts,* where a house was destroyed by fire through tenants negligence but the tenant made good the loss. It was held that the insurer was not liable under the policy.

The principle of indemnity is given effect by the subordinate principles e.g: Subrogation, Salvage, re-instatement, contribution and appointment etc.

4. SUBROGATION

This means that after the insurer has indemnified the insured, he steps into the shoes of the insured in relation to the subject matter.

It means that after indemnity the insurer becomes entitled to all the legal and equitable rights respect the subject matter previously exercisable by the insured.

Subrogation facilitates indemnity by ensuring that the insured does not benefit from the contract.
It is an inherent and latent characteristic of the contract of indemnity that becomes operative after full indemnity.

The insurer cannot under subrogate rights recover more than the amount payable as indemnity as was the case in *Yorkshire Insurance company Ltd. v. Nisbett Shipping Co.*

5. SALVAGE

This is the recovery by the insurer of the remains of the subject matter after indemnity. It is part of subrogation and facilities indemnity. It is justified on the premise that the amount paid by the insurer as indemnity includes the value of the remains.

6. RE-INSTATEMENT

This is the repair or replacement of the subject matter in circumstances in which it may be re-instated. Most indemnity policies confer upon the insurer an option to pay full indemnity or re-instate the subject matter.

The insurer must exercise his option within a reasonable time of notification of loss and is bound by his option. If the insurer opts to re-instate, the subject matter must be re-instated to the satisfaction of the insured.

Any loss or liability arising in the course of re-instatement is borne by the insurer. The economic effect of re-instatement is to benefit the insurer by ensuring that he only pays full indemnity where the re-instatement is not possible.

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7. DOUBLE INSURANCE

This is a situation whereby a party takes out more than one policy on the same subject matter and risk with different insurers but where the total sum insured exceeds the value of the subject matter.

8. CONTRIBUTION AND APPORTIONMENT

If an insured has taken out more that one policy on the same subject matter and risk with different insurers and loss occurs, the twin principles of contribution and appointment apply: -

a) If the insured claims from all the companies at the same time, they apportion the loss between themselves on the basis of the sums insured. Each insurer bears part of the loss. This is the "**Principle of Apportionment"**

b) If one of the insurers makes good the total liability to the insured, such insurer is entitled to recover the excess payment from the other insurers. This is the "**Principleof Contribution".** This principle is to the effect that an insurer who has paid more thathis lawful share of the loss is entitled to receive the excess from the other insurer.

The principle of contribution is equitable. An insurer is only entitled to contribution if the following conditions exist;

1. There must have been **more than one policy** on the same subject matter and risk.
2. The policies must have been taken out by or on behalf of the **same person**
3. The policies must have been issued by **different insurers**
4. The policies must have all been in force when loss occurs
5. All the policies must have been legally binding agreements
6. None of the policies must have exempted itself from contribution.

The twin principles of contribution and apportionment facilitate indemnity.

9. ABANDONMENT

This is the surrender by the insured of the remains of the subject matter for full indemnity. It entails the giving up the *res* (residue) to the insurer for indemnity. This principle has its widest application in Marine Insurance but generally applies in case of: -

1. Partial Loss
2. Constructive total loss.

The insured must notify the insurer of his intention to abandon the subject matter. However, it is for the insurer to determine whether or not abandonment is applicable. If the insurer opts to pay full indemnity, it signifies the sufficiency of the insured's notice and it is an admission of liability.
The insurer becomes entitled to the remains of the subject matter.

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10. PROXIMATE CAUSE

An insurer is only liable where loss is proximately caused by an insured risk and not liable where the risk is excepted. The principle of proximate cause protects the insurer from undue liability. Under this principle, the proximate and not the remote cause is to be looked into. *(Causa proximanon remota spectatur)*

The proximate cause of an event is the cause to which the event is attributable. It is the cause which is more dominant direct, operative and efficient in giving rise to the event.

Courts have not developed any technical test of ascertaining what the proximate cause of an event is. They rely on common place tests of the reasonable man and that among competing causes, one must be more dominant that the rest. The proximate cause need not be the last on the chain but must be the must operative in occasioning the loss.

11. AVERAGE CLAUSE

This is a clause in an insurance policy to the effect that if the subject matter is under insured and partial less occurs, the insurer is only liable for a proportion of the loss and where loss is minimal the insurer liability is extinguished. This clause ensures that subject matter is insured at its correct value.

12. THIRD PARTY INSURANCE

A person can insure himself against the risks of incurring liabilities to third parties. Under the Insurance (Motor Vehicles Third Party Risks) Act, every driver of a motor vehicle is required to be insured against liability in respect of death or bodily harm to a person caused by the use of the vehicle on the road. Under the Act, it is an offence to use a motor vehicle on the road without having in force an insurance policy in respect of injuries to third parties. The policy is only considered valid when a certificate of insurance has been issued.

This is Insurance against risks to people other than those that are parties to the policy. It is illegal to use, or allow anyone else to use, a motor vehicle on a road unless there is a valid insurance policy covering death, physical injury, or damage caused by the use of the vehicle. It also covers any liability resulting from the use of a vehicle (or a trailer) that is compulsorily insurable.

A judgement against the insured in respect of any liability arising for causing death or bodily harm can be enforced against the insurer. The insurance companies are not allowed to insert conditions that would terminate third party insurance on the happening of a given event because if it is allowed, the victims of road accidents will suffer tremedous hardships.

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CHAPTER SUMMARY

Insurance is a contract whereby a party known as the insured undertakes in consideration for a sum of money known as premium paid by the insured to pay a sum of money or its equivalent on the happening of a specified future event

ESSENTIALS OF AN INSURANCE CONTRACT

1. Agreement
2. Uncertainty
3. Insurable interest
4. Control
5. Accidental or negligent loss
6. Risk

Parties to an insurance contract are:

1. The insurer
2. The insured

COVER NOTE

This is the name given to the temporal cover extends to the proposer by he insurer in the interim period between submissions of the proposal form and its formal acceptance or rejection

PRINCIPLES OF INSURANCE

The Principles includes:-

1. 3rd party insurance.
2. Insurable Interest
3. Utmost good faith (Non-disclosure)
4. Indemnity
5. Subrogation
6. Salvage
7. Re-instatement
8. Contribution and appointment
9. Proximate Cause
10. Abandonment
11. Average

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CHAPTER QUIZ

1. What is insurable interest?
2. Give the essentials of a valid insurance contract?
3. What is double insurance?

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CHAPTER QUIZ ANSWERS

1. It is the interest a person has in the subject matter which he stands to lose in the event of its loss or destruction.
2. Agreement
   Uncertainty
   Insurable
   interest Control
   Accidental or negligent loss
   Risk.
3. Double insurance is a situation whereby a party takes out more than one policy on the same subject matter and risk with different insurers but where the total sum insured exceeds the value of the subject matter.

SAMPLE EXAMINATION QUESTIONS

QUESTION ONE

November 2007, Question 3

a) Explain the meaning and significance of the principle of double insurance. (6 marks)
b) Outline the consequences of non-disclosure of material facts in a contract of insurance. (8 marks)

QUESTION TWO

May 2001, Question 8

a) In relation to the law governing insurance, explain 5 basic principles of insurance. (10 marks)

QUESTION THREE

December 2000, Question 8

a) **"**A contract of insurance is a contract of "*Uberrimae fidei*" (utmost good faith)**".** Explain this statement. (6 marks)

(Footnotes)
[1] Cap 487 Laws of Kenya

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CHAPTER TWELVE

NEGOTIABLE INSTRUMENTS

▶ OBJECTIVE

To provide the candidate with a broad understanding of the following principles pertaining to Negotiable Instruments;

- Nature and characteristics.
- Negotiability and transferability.
- Types: Cheques, promisory notes, bills of exchange.
- Rights and obligations of the parties.

▶ INTRODUCTION

This chapter endeavors to explain what negotiable instruments are and gives examples of them. It also gives the rights and duties of the various instrument holders.

STUDY TEXT

▶ KEY DEFINITIONS

- **Unconditional**: -Absolute where no conditions are attached as to payment
- **Drawer: -** the person who draws the bill demanding payment
- **Drawee**: - the person to whom the bill is draw
- **Discounting**: -receipt of the amount of the bill from a bank or financial institution lessthe discount for the unexpired duration
- **Endorsement**: - This is the signing or executing a bill by a party for the purpose ofnegotiating it to another
- **Dishonour -** Failure to honour a bill of exchange
- **Notaries Public –** An advocate, who attests or certifies deeds and other documentsand notes or protests dishonoured bills of exchange.
- **Cheque -** A bill of exchange drawn on a banker payable on demand.

▶ EXAM CONTENT

The examiner when testing this chapter tests the student's understanding on rights and duties of the different instrument holders. A clear understanding of the various parties and their respective rights and duties is important. This chapter has appeared in the following years: November 2006;May 2006;November 2005;May 2005;November 2004;May 2004;November 2003;May 2003;November 2002; May 2002;November 2001;May 2001;November 2000;July 2000;May 2000.

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INDUSTRY CONTENT

This chapter is very useful especially in the banking industry. Various people have taken banks to court for failing to observe their duties. In the leading Kenyan case on duty of confidentiality is *Intercom services limited and 4 others v Standard chartered bank limited (2002)* the bank was accused of being in breach of confidentiality as the bank had made a report to the fraud investigation department of the central bank of Kenya. That report resulted in the freezing of the plaintiff's account. The court confirmed indeed there is a duty of confidentiality but went on to observe that the duty is not absolute.

12.1 NEGOTIABLE INSTRUMENTS

What is a negotiable instrument?

This is a document which represents money and the title in passes to a *bona fide* transferee free from only defect. It is a *chose* in action. Negotiable instruments are transferable by reason of law or trade usage or custom.

Characteristics of Negotiable Instruments

1. Consideration is presumed to have been provided i.e. past consideration is good consideration.
2. A *bona fide* transferee of a negotiable instrument need not be notified before it is negotiated.
3. A holder for value can sue on it in his own name.
4. If payable to the bearer, it is negotiable by delivery.
5. If payable to the order of specified person, it is negotiable by endorsement/ endorsement and delivery.
6. The party liable on a negotiable instrument needs to be notified before it is negotiated.

Examples Include: Cheques, bills of exchange, promissory notes, share warrants, dividend warrants, bearer debentures etc.

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12.2 BILL OF EXCHANGE

The law relating to Bills of Exchange in Kenya is contained in the Bill of Exchange Act[1]. This statute is a carbon copy of the English Bills of Exchange Act, (1882). It codifies the law relating to bills of exchange.

Section 3(1) of the Bills of Exchange Act defines a **Bill of Exchange** as: An unconditional order in writing addressed by one person to another, signed by the person giving it requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to the bearer.

ELEMENTS OR ESSENTIALS OF THE DEFINITION

1. It is an unconditional written order i.e. Not a request.
2. Addressed by person to another
3. It must be signed by the person giving it
4. It demands payment of a sum certain in money.
5. The sum must be paid on demand or at a fixed or determinable future time.
6. The sum is payable to a specified person, his order or the bearer.

PARTIES TO A BILL OF EXCHANGE

Parties to a bill of exchange are the drawer and the drawee. **The drawer** is the person who draws the bill demanding payment. The **drawee** is the person to whom the bill is drawn. This is person to pay the amount due. The person to whom the amount is paid the **payee**.

TYPES / CLASSIFICATION OF BILLS

Bills of Exchange may be classified on the basis of: -

1. **To Whom Payable:** A bill may be bearer or order. A **bearer bill** is a bill payable tothe holder or bearer of the instrument. An **order bill** is a bill payable to the order of a specified person.
2. **Where drawn and a payable:** An **inland bill** is a bill as bill drawn and payable withinEast Africa. Any other bill is **foreign**.
3. **When payable:**
   a. **Sight bill: -** This is bill payable on demand
   b. **Usance bill**: This is bill payable at a fixed or determinable future time.
4. **Whether transferable or not: -**
   a. **Transferable bill**: - This is a bill which is capable of being negotiated by oneperson to another
   b. **Non-transferable bill**: - This is a bill which contains a stipulation prohibitingtransfer.

A bill drawn and signed by the drawer is referred to as **draft** and must be presented to the drawee for acceptance.

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RULES RELATING TO REPRESENTATION OF BILLS FOR ACCEPTANCE

1. The bill maybe presented by the drawee or his agent-
2. It must be presented at a reasonable hour on a business day.
3. It must be presented to the drawee and if dead, to his personal representative.
4. If the drawee has been declared bankrupt, the bill must be presented to him or to his trustee in bankruptcy.
5. If trade custom and usage permits, it may be done thought the post.
6. However, presentation of a bill for acceptance will dispensed with if:

i) The drawee is a fictitious person.
ii) It cannot be effected even with the exercise of reasonable diligence.

ACCEPTANCE OF A BILL

This is the signification by the drawee of his assent to the bill. Acceptance of a bill may be **general or qualified.**

1. In **General acceptance,** the drawee accepts the bill in its tenor i.e. without any qualification.

2. **Qualified Acceptance:** This acceptance whereby the drawee modifies or varies thebill in various ways: -

a) **Conditional:** Where the drawee specifies a condition subject to which the bill ispayable.
b) **Partial:** The drawee accepts to pay part of the sum.
c) **Local:** The drawee accepts to pay the bill at a specified place.
d) **Time:** The drawee changes the time of payment
e) Acceptance by some but not all drawers.

The drawer is not bound to accept a qualified acceptance. However, if he does, he is bound by its terms.

Once a bill is accepted, it becomes a proper bill, capable of being discounted or negotiated.

Discounting a bill: it is the receipt by the payee of the amount of the bill from a bank or financialinstitution less the discount for the unexpired duration. The bank becomes the payee.

Negotiation of bills: Under section 31 (1) of the Act, a bill is negotiated when it is transferredfrom one person to another in such a manner as to constitute the transferee as the holder thereof.
A bill may be negotiable in 2 ways namely:

- Delivery
- Endorsement and Delivery

Bearer Bills are negotiable by delivery. Order bills are negotiable by endorsement and delivery.

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ENDORSEMENT OF BILLS

This is the signing or executing a bill by a party for purpose of negotiating it to another. The party so doing is the endorser while the party to whom it's endorsed is the endorsee.

Characteristics of an Endorsement

1. It must be written on the face of the bill, on its reverse side or on a copy where acceptable or slip of paper attached to the bill. This paper is referred to as an *allonge.*
2. It must be signed by the endorser
3. It must be an endorsement of the entire bill.
4. If payable to the order of two or more endorsers who are not partners, all must endorse unless either of them has authority to endorse in favour of all.
5. The endorsement may be blank, special, conditional or restrictive

Types of Endorsements

1. **Blank:** This endorsement which does not specify the endorsee. It converts an order bill to a bearer bill.
2. **Special:** This is an endorsement which specifies the person to whom or to whose order, the bill is payable.
3. **Conditional:** This is an endorsement which either exempts the endorser from liability if the bill is dishonoured or makes payment of the bill subject to a specified condition.
4. **Restrictive:** This is an endorsement which prohibits further negation of the bill. It constitutes the endorsee as the payee who cannot negotiate the bill any further.

PARTIES TO A BILL OF EXCHANGE

1. **Holder for Value:** This is a holder of a bill, who has provided valued consideration onit or who is deemed to have so provided the same.
2. **Holder in due course:** Under Section 29(1) of the Act, a person is deemed to be aholder of a bill in due course if he holds a bill which is: -
   a. Complete and regular on the face of it
   b. Before it is overdue
   c. In good faith from and for value
   d. Without notice of any previous dishonour
   e. Without notice that the person who negotiated it to him had a defective title
3. **Accommodating Party:** Under Section 28 (1) of the Act, an accommodation partyis person who has signed a bill of exchange as drawer, endorsee or acceptor without receiving value thereon but for the purpose of lending his name to another party. However, such party is liable to a holder for value.
4. **Referee in Case of Need:** Under Section 15 of the Act, a referee in case of need is aperson whose name is inserted in a bill by the drawer or endorsed to whom the payee may resort to in the event of its dishonour by non-acceptance or non-payment.

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RIGHTS OF A HOLDER OF A BILL

1. A *bona fide* holder acquires a defect-free title
2. Right to sue on it in his own names
3. Right to negotiate the bill unless the lost endorsement is restrictive.

DUTIES OF THE HOLDER

a) It is the duty of the drawer to present the bill to the drawee for acceptance
b) It is the duty of the payee to represent the bill to the acceptor for payment.
c) In the event of the dishonour of a bill, it is the duty of the payee: -
   i) To notify the party the fact of dishonour
   ii) To have the bill noted and or protested

PRESENTATION OF A BILL FOR PAYMENT

On maturity of a bill, it must be presented to the acceptor for payment. Its presentation is governed by the following rules: -

a) If payable on demand, it must be presented within a reasonable time of acceptance or negotiation.
b) If payable in future, it must be presented on the date it falls due or within three days of grace.
c) It may be presented by the payee or his agent.
d) It must be presented to the acceptor at the agreed place i.e. his place of business or residence.
e) It must be presented to the acceptor, however, if dead to his personal representative.
f) If the acceptor has been declared bankrupt it must be presented to him or his trustee in bankruptcy
g) It must be presented at a reasonable hour on a business day
h) If trade custom or usage permits, presentation may be effected by post.

If on presentation, the amount is paid by or on behalf of the acceptor, the bill is discharged. However, presentation for payment maybe dispensed with if it is impossible to secure the same even with exercise of reasonable diligence. If the acceptor cannot be found or payment is refused the bill is said to be dishonoured.

DISHONOURED BILLS

A bill is said to be dishonoured if:-

1. Presentation for payment is exercised by law
2. Payment is refused.

It is the duty of the payee to notify the party liable the fact of the dishonour and to have it noted and or protested.

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RULES RELATING TO NOTICE OF DISHONOUR

1. The notice may be given by or on behalf of the payee
2. It my be given in the agent's or the payee's name
3. The notice may be oral or written
4. If written it need not signed
5. It must be given within a reasonable time of the dishonour
6. Return of the dishonoured bill is sufficient notice.
7. It must be given at a reasonable time on a business day.
8. If effected by post it is effective when the letter is posted.

NOTING A BILL

Once a bill is dishonoured, the payee must present it to *notaries public* who re-presents it to the acceptor for payment and if payment is refused, the notaries *public* indicates the date on the bill and later specifies the dishonour in his register by entering the words used by the acceptor in the refusal. This is referred to as **Noting the Bill.**

PROTESTING A BILL

This is the formal declaration by *notaries public* attesting the fact of dishonour of a bill. It is conclusive evidence of the dishonour. A protest note must disclose and contain: -

1. The person for and against whom it is made
2. Reason for the protest
3. Date and Place of the protest
4. Particulars of the *notaries public*

The dishonoured bill or a copy thereof must be attached.

DISCHARGE OF A BILL

A bill of exchange is said to be discharged when all rights on it are extinguished.

However, a party may still be held liable on it depending on the method of discharge.

A bill may be discharged in any of the following ways: -

1. **Payment in due course**: If the bill is paid by or on behalf of the acceptor at or aftermaturity, it is discharged and parties freed.

2. **Acceptor - holder Maturity (Merger):** If the acceptor of a bill becomes the payee ofright, at or after maturity, the bill is discharged.

3. **Renunciation or waiver:** Under Section62 (1) of the Act, if the holder of a bill at orafter maturity unconditionally and absolutely renounces his right against the acceptor,

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the bill is discharged. The renunciation must be written and the bill must be returned to the acceptor.

4. **Cancellation:** Under Section 63 (1) of the Act, if a bill is intentionally cancelled by thepayee or his agent, and the cancellation is apparent thereon, the bill is discharged. An unintentional cancellation does not discharge a bill.

5. **Material Alteration:** Under Section 64(1) of the Act, a material alteration on a billdischarges all the parties not privy to the alteration. Under Section 64 (2) a material alteration comprises a change in amount payable, time of payment, date and place of payment.

6. **Non-presentation:** Under Section 45(1) of the Act, the non-presentation of a bill forpayment as prescribed by law discharges the drawer and endorsers.

12.3 PROMISSORY NOTES

Under Section 84 (1) of the Bill of Exchange Acts, a promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person or bearer.

Characteristic/Elements/Essential of the Definition

1. It is an unconditional written promise made by a person to another
2. It must be signed by the maker
3. It contains a promise to pay a sum certain in money.
4. The sum is payable on demand or at a fixed or determinable future time.
5. The sum is payable to a specified person, his order or the bearer

Under Section 85(1) of the Act, a promissory note remains incomplete until it is delivered to the promisee. If a note is drawn by two or more persons, all are jointly and severally liable on it. Once a note is delivered to the promisee, it may be negotiated to other persons or it may be discounted.

A promissory note differs from a bill of exchange in that: -

1. It is a promise to pay made by the debtor It does not require presentation for acceptance nor does it require acceptance. However, it is a negotiable instrument capable being negotiated by one person to another in commercial transactions.

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CHEQUES

Under Section 74(1) of the Bill of Exchange Act, a cheque is a bill of exchange drawn on a banker, payable on demand. It is a negotiable instrument negotiable by delivery or by endorsement and delivery. It differs from a bill of exchange in various ways: -

1. It can only be drawn on a banker
2. It is payable on demand
3. It does not require acceptance
4. Non-presentation does not discharge it
5. It is less negotiable
6. It may be crossed generally or specially
7. Notice of dishonour is not necessary

TYPES / CLASSIFICATION OF CHEQUES

Cheques may be classified on the mode of payment and to whom payable:

1. **Bearer cheque:** This is a cheque whose proceeds are payable to the holder.
2. **Order Cheque:** This is a cheque whose proceeds are payable to specified person orhis order.

Whereas a bearer cheque is negotiable by delivery an order cheque is negotiable by endorsement or delivery.

3. **Open Cheque:** This is a cheque whose proceeds are payable across the counter.
4. **Crossed Cheque:** Is a cheque that contains two parallel transverse lines on its face withor without account. A crossing is an instruction to the banker not to pay the proceeds across the counter.

TYPES OF CROSSING

A cheque may be crossed generally or specially:

1. **General Crossing:** Consist of two parallel transverse lines on the fact of the cheque with or without the words “and Co.” “Account payee” “Not negotiable” etc. A cheque crossed generally may be crossed specially by the drawee,
2. **Special Crossing**: Consists of two parallel transverse lines of the face of the chequewith the name of the banker in told.

BANKER-CUSTOMER RELATIONSHIP

There is a simple contractual relationship between the banker and customers. It is a debtor-creditor relationship which imposes upon the parties certain legally binding obligations.

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DUTIES OF THE CUSTOMER

1. **Duty of Care:** The customer is bound to the exercise reasonable care when drawingcheques to guard against alterations. The banker is not liable for any loss arising if the customer has failed to exercise reasonable care.
   In *London Joint Stock Bank v. Macmillan & Arthur*, A clerk of M draw a cheque for M's is signature and indicating the amount payable as £2 in figures but not in words. M signed the cheque, the clerk added 2 figures to the two to make it £120 and stated the amount in words. The customer subsequently sued the banker for the loss. It was held that the bank was not liable as M had failed to exercise reasonable care.

2. **Notice of irregularities:** The customer is bound to notify the banker of any irregularitiesaffecting the accounts e.g. forgeries or unauthorized which the customer is estopped from relying on the irregularity.
   As was the case *Greenwood v. Martins Bank* where a husband had noticed that his wife had withdrawn monies from his account by forging signature but to avoid publicity, he did not notify the bank. Subsequently his wife shot herself dead. He then notified the bank of the irregularities. The House of Lords hold that the bank was not liable as the customer had failed to notify if of the irregularity. He was estopped from relying on it.

DUTIES OF THE BANKER

Paying Bank: This is the banker on which the cheque is drawn. It is the banker liable for theamount.

Collecting Bank: This is the bank in which the cheque is deposited for payment.

1. **Duty of Care:** The banker is bound to exercise reasonable care and skill in his dealingswith the customer. The standard of care and skill is that of a reasonably competent banker. If the banker fails to exercise such care and skill, the customer has an action in damages for any loss arising for professional negligence.
2. **Professional Advice:** The banker is bound to give the customer professional adviceon request. He is bound to give advice on investments as and when requested failing which he is liable in damages.
3. **Duty to Honour Cheques:** The banker is bound to honour all cheques drawn by thecustomers provided: -
   a. The cheque is complete and regular on the face of it
   b. The customer's account has sufficient funds
   c. The cheque is presented at a reasonable hour on a business hour and business day.
   d. The payee identifies himself to he satisfaction of the banker.
   e. If a banker fails to honour a cheque in breach of this duty, the customer has an action in damages.
4. **Duty of Secrecy:** The banker is bound to maintain confidentially in his dealings with customer. He must not discuss to 3rd parties any information which comes to him in the course of his dealings with the customer. The duty of secrecy was laid down in *Tournier v. National Provincial and Union Bank of England* which the English Court of Appealinsisted of the upholding of the duty. However the court was emphatic that the duty may be qualified in certain circumstance where personal information relating to the customer
   may be discharged to 3rd parties e.g.
   a. Where disclosure is provided for by the law

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b. Where the banker has the customer convent to disclose
c. Where disclosure is necessary in the public interest
d. What it is necessary to protect the banker

5. **Duty not to pay without Authority:** The banker must not pay any monies out of thecustomer's account without his express or implied authority failing which he is liable in damages for breach of duty. However, banker losses his authority to pay in various ways: -
   a. Countermand of payment: This is an express instruction by the customer to his banker not to honour a particular cheque
   b. If the banker has notice of the customer's death
   c. If the banker has notice of the customers' unsoundness of mind
   d. If the banker has notice of presentation of a bankruptcy petition against the customer in court.
   e. If the cheque is irregular e.g. amounts in words and figures do not tally.
   f. If the customer's account has been frozen by a court order.
   g. If the cheque is presented before time (post dated cheque) or after six months (stale cheque)
   h. If the payee has no title thereto
   i. The customer's account has insufficient funds
   j. The customer has since closed his account.

12.4 CONTRACT OF GUARANTEE AND CONTRACT OF INDEMNITY

CONTRACT OF GUARANTEE

This is a contract whereby a party referred to as the guarantor or surety undertakes to be secondarily or collaterally responsible for the monies or acts of anther known as the principle debtor. The undertaking is made to the creditor.

A contract of guarantee is a tripartite agreement. In a debtor – creditor relationship, the guarantor makes the undertaking to the creditor for the benefit of the principal debtor.

TYPES OF GUARANTEE

1. **Sole Guarantee:** This is a contract of guarantee whereby the guarantor's liability isrestricted to a single transaction.
2. **Continuing Guarantee:** It is a contract of guarantee under which the guarantors to aseries of transactions. This type of guarantee terminates on the death of the guarantor provided the notice is made know to creditor as was the case in *Bradbury V. Morgan.* The guarantor is also free to revoke the guarantee at any time.
3. **Fidelity Guarantee:** It is a contract of guarantee whereby a person guarantees thehonesty good behaviour of another purpose of employment.

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CHARACTERISTICS OF CONTRACT OF GURANTEE

1. It consists of 3 parties namely the guarantor, creditor and the principal debtor.
2. The guarantor's liability is secondary or collateral
3. The guarantor has no interest in the transaction between the parties.
4. The contact must be evidenced by some note or memorandum.

The guarantor is only liable if the principal debtor is unable to honour his obligation. If two or more persons guarantee the same transaction(s) they are referred to as co-guarantors and are jointly liable for any liability arising. However if a co-guarantor makes god the liability, he has a right of contribution against other co-guarantors.

If the creditor discharges a co-guarantor, all are discharged.

RIGHTS OF THE GUARANTOR

1. He is entitled to demand that the creditor sues the debtor for the amount due.
2. He is entitled to demand that the debtor pays the amount to relieve him from liability
3. If sued by the creditor he is entitled to rely on any self-help of or counter claim available to the principal debtor.
4. In a fidelity guarantee he is entitled to demand the seeking of an employee in the event of dishonesty.
5. If he pays the amount due he becomes entitled to all the rights the creditor had against the debtor to recover the amounts **(Subrogative rights)**
6. If a co-guarantor makes good the liability he has the right of contribution against the co-guarantors.

DISCHARGE OF THE GUARANTOR

The guarantor may be discharged in any of the following ways:-

1) Payment of the amount due by the debtor or fulfilment of the obligation arising.
2) If the creditors action against the debtor becomes statute barred.
3) If the transaction between the credit and the principal debtor becomes illegal by reason of change of law or otherwise.
4) Revocation of the guarantee by the guarantor
5) Death of guarantor
6) Variation of the terms of the contract without the guarantor's consent
7) If it is established that the guarantee was obtained by fraud, misrepresentation or concealment of material facts.
8) Failure by the creditor to take steps that was necessary to protect his own interest.
9) Discharge of a co-guarantor discharges all.

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CONTRACT OF INDEMNITY

This is a contract whereby a party referred to as indemnifier undertakes primary responsibility for particular act. The undertaking is made to the party to be indemnified. The contracts of two parties and examples include: -

1) Contract of *del credere* agency
2) Property Insurance

A contract of indemnity differs from the contract of guarantee in that:-

1. It consists of two parties namely the indemnifier and the party to be indemnifiers.
2. The indemnifier's responsibility is primary.
3. The indemnifier has a direct interest in the transaction.

12.5 BAILMENT

This is a contract whereby a party referred to as Bailor delivers goods to another known as Bailee with specific instructions that the goods be dealt with in a particular manner to be returned as soon as the purpose for which they were bailed is accomplished.

Bailment involves goods and is for the most part contractual whereas possession changes hands, ownership does not. However, in certain circumstances, physical possession does not change hands since the person who becomes the bailor was in possession of the goods in some capacity. Such a bailment is referred to as a **bailment by attonement.**

Types of Bailment

1. Hiring e.g. Hire Purchase Agreement
2. Storage or Safe Custody of goods
3. Pledger or Pawn: - This is the use of goods as a security for a loan whereby the goods are delivered to the lender as security and retains them until the debt is fully paid. By paying the debt, the borrower reclaims the goods.
4. For repair or work to be done
5. Carriage of goods from place to place

DUTIES OF THE PARTIES

1. BAILOR

1. He is bound to deliver the goods to the bailee for purposes of the transaction
2. He must disclose any defects in the goods or in the title
3. He is bound to indemnify the bailee for loss or liability arising by reason of defects in the goods or of title

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2. BAILEE

3. To take delivery of the goods, the subject matter of the bailment.
4. To deal with the goods only for the purpose for which for which they were bailed.
5. Take reasonable care of the goods.
6. Insure the goods in his custody.
7. Return the goods to the bailor as soon as the purpose for which they were bailed is accomplished

A contract of bailment terminates when the purpose for which they were bailed is accomplished or when the bailor deals with the goods in a manner inconsistent with the bailment

12.6 LIEN

This is a right conferred upon a party by law or trade usage or custom in certain circumstances and is exercisable as a security for the fulfilment of an obligation owned by another.

Types of Lien

1. Possessory lien
2. Equitable lien
3. Maritime

1. POSSESSORY LIEN

This is the right of a party in possession of another's goods to retain them as a security for the fulfilment of an obligation. The lien is dependent on possession which must be lawful and continuous and is enforceable without any court action.

Possessory Lien may be **general or particular.**

- **a. General Lien-**This is a possessory lien which entitles the party in possession to retainthe goods for the fulfilment of any obligation owned by the owner .e.g An advocate has a general lien on a clients documents for any unpaid fees.
- **b. Particular Lien-**This is a possessory lien which entitles the party in possession toretain the goods for the fulfilment of the particular owning e.g price of the goods held.
  An unpaid seller's lien is particular in nature.

2. EQUITABLE LIEN

This is the right of a party to have certain property in particular manner e.g. in the dissolution of a partnership every partner is entitled to have the firms assets applied in the 1st instance in the payment of its debts and liabilities and is enforceable by court action.

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3. MARITIME LIEN

This is the right of a party to have a ship or its cargo sold and the proceeds applied in a particular manner e.g a ship captain and crew members have an equitable lien in relation to unpaid usage. This lien is independent of possession and is enforceable by court action.

Termination of Lien

A lien may come to an end in any of the following ways:

1. Discharge of the obligation owing
2. Mutual agreement between the parties
3. Dealing with the goods in a manner inconsistent with the lien.
4. Waiver by the party entitled to the right.

12.7 LETTER OF HYPOTHECATION

This is a document given by the debtor to the creditor as a security when chattels are used as collateral .The document constitutes evidence of the chattels mortgage. The debtor retains possession and ownership of the security but under the terms of the letter, the creditor is entitled to confiscate and sell the security in the event to the default by the debtor. The document must be executed by the arties and attested to by at least one witness if not, if, only binds the parties thereto.

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SUMMARY OF CHAPTER

A negotiable instrument is a document which represents money and title in it asses a bonafide transferee form from any defect. It is a clause in action.

CHARACTERISTICS OF NEGOTIABLE INSTRUMENTS

1. Consideration is presumed to have been provided i.e. past consideration is good consideration.
2. A bonafide transferee of a negotiable instrument acquires a god title.
3. A holder for value can use on it in his own name
4. If payable to the bearer it is negotiable by delivery if payable to the order of a specified person it is negotiable by endorsement and delivered.
5. The party liable on a negotiable instrument need not be notified before it is negotiated
6. Examples include: cheques, bills of exchange, promissory notes, shares warrants, dividend warrants, bearer debentures etc.

A bill of exchange as “an unconditional order in writing by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to the order if a specified person or to the bearer.”

BILLS OF EXCHANGE MAY BE CLASSIFIED ON THE BASIS OF:

1. To whom payable
2. Where drawn and payable
3. When payable
4. Whether transferable or not

Cheque: is a negotiable instrument negotiable by delivery or by endorsement and delivery. Cheques may be classified on the mode of payment and to whom payable:

1. Bearer cheque
2. Order cheque
3. Open cheque
4. Crossed cheque.

DUTIES OF THE CUSTOMER

1. Duty of care.
2. Notice of irregularities.

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DUTIES OF THE BANKER

1. Duty of care.
2. Professional advice.
3. Duty to honour cheques.
4. Duty of Secrecy.
5. Duty not to pay without authority.

CHAPTER QUIZ

1) Who are the parties to a bill of exchange
2) Acceptance may be
3) Crossings may either be
4) Name a duty owed by a customer to the banker

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CHAPTER QUIZ ANSWERS

1) Drawer and drawee
2) General or qualified
3) General or special
4) Duty of care

SAMPLE EXAMINATION QUESTIONS

QUESTION ONE

July 2000 – Pilot Paper, Question 7

a) In relation to the Law governing Negotiable Instruments, explain 4 types of endorsements that may be made on a bill of exchange. (8 marks)

QUESTION TWO

May 2006, Question 6

a) Explain the meaning of the term "holder" in relation to a bill of exchange and outline the duties of a holder of a bill of exchange. (10 marks)

QUESTION THREE

May 2003, Question 7

a) Outline the ways in which a Bill of Exchange may be discharged. (6 marks)
b) Outline the characteristics of a promissory note. (6 marks)
c) Explain the various forms of a qualified acceptance of a bill of exchange. (8 marks)

QUESTION FOUR

November 2001, Question 8

a) State and explain the duties of a bailee in a bailment contract. (6 marks)
b) What are the circumstances under which a principal may be stopped from revoking an agent's authority? (4 marks)

(Footnotes)

[1] Cap 27 Laws of Kenya

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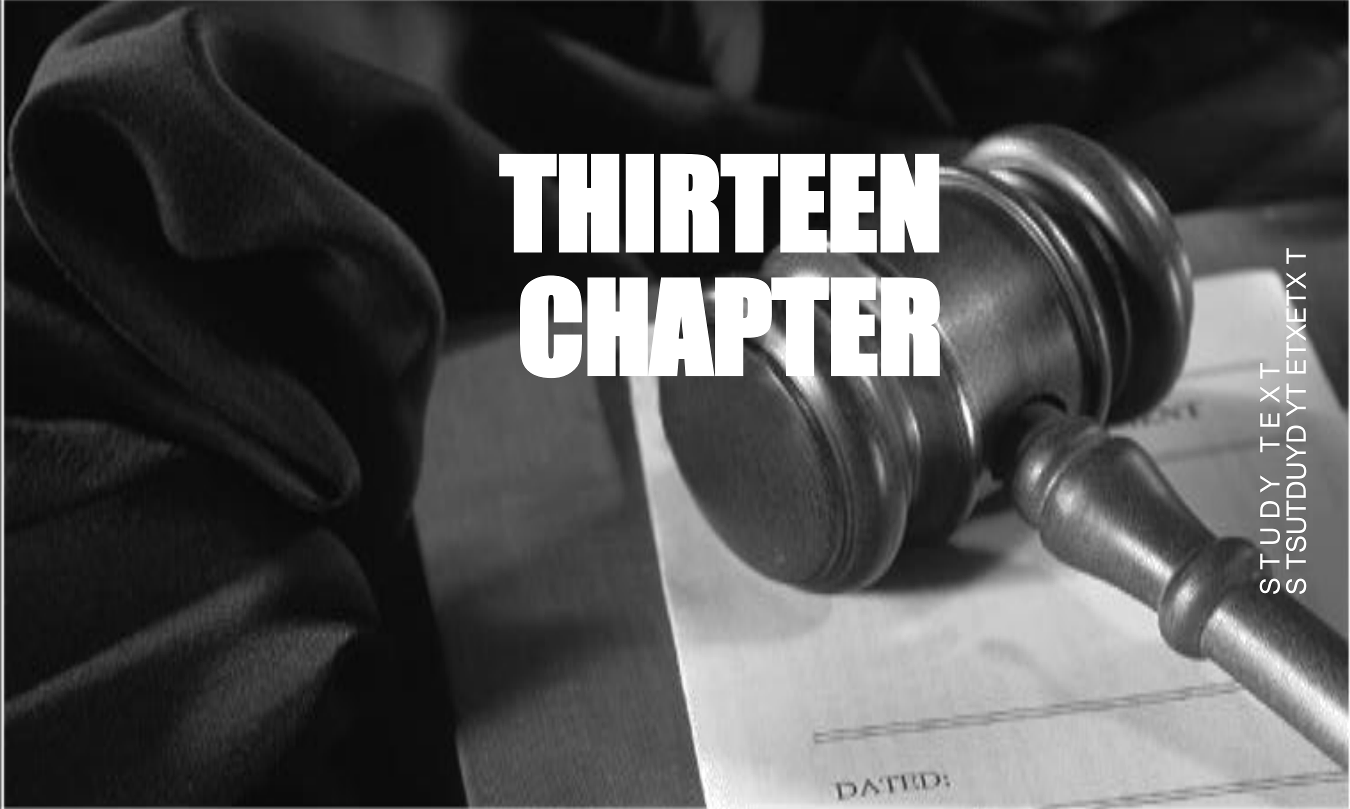

THIRTEEN
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CHAPTER THIRTEEN

THE LAW OF PROPERTY

▶ OBJECTIVE

To provide the candidate with a broad understanding of the following concepts relating to the Law of Property:

- Definition of property (Real and personal property: movable and immovable property: intellectual and intangible property, trademarks, copyrights and patents)
- Ownership of property.
- Freehold and leasehold interest.
- Leases.
- Mortgages and charges.
- Foreclosure.
- Rights and restrictions on another's property.

▶ INTRODUCTION

Ownership of property in Kenya is important. There are several forms of property ownership which are provided for by the law. Property owners have several rights and privileges assigned to them. However, these rights are qualified by certain rights such as the Government's right of compulsory acquisition of property for public use.

▶ DEFINITION OF KEY TERMS

Freehold estates confer a bundle of rights exercisable for an indefinite

duration **Leasehold –** estates held for a specified duration of time.

Tenant – an individual who rents land from the owner for his own use.

Land - Those parts of the surface of the earth that are capable in law of being owned and are withinthe court's jurisdiction. Ownership of land includes the airspace above it and the subsoil below, including mines and minerals (whether or not owned separately from the surface), buildings, and most interests in land. Chattels fixed to the land so that they become part of it are also treated in law as land, under the maxim *quicquid plantatur solo, solo cedit.*

Landlord – the owner of property who rents it out to another for a fee.

Charge - an interest in land as a security for the payment of money/ monies or the fulfilment ofany condition.

Mortgage - a mortgage is a conveyance of land or assignment of chattels as security for paymentof a debt or the discharge of some other obligation for which it is given

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Intangible property - Property that has no physical existence: choses in action and incorporealhereditaments.

Intellectual property - Intangible property that includes patents, trade marks, copyright, andregistered and unregistered design rights.

Copyright - The exclusive right to reproduce or authorize others to reproduce artistic, dramatic,literary, or musical works.

Trade marks - A distinctive symbol that identifies particular products of a trader to the generalpublic. The symbol may consist of a device, words, or a combination of these.

Patent - The grant of an exclusive right to exploit an invention.

▶ EXAM CONTEXT

This is an important topic which the student is required to understand fully and apply to situations that may arise. It has been examined in the following sittings: Dec 2005, Nov 2001, Nov 2004, and May 2004.

▶ INDUSTRY CONTEXT

Forms of property ownership are important in the sale and acquisition of property. It is also important to be knowledgeable about the various legal documents that are required for ownership or transfer of property to be valid. The student is also required to know the rights, privileges and duties of property owners.

Intellectual Property is an emergent area of law which the individual student has to grasp. The legal regime governing intangible property rights will assist in the neo-business world where inventions, innovations, works of art and trade names have to be protected to prevent unjust enrichment. Regulators such as Kenya Industrial Property Institute (KIPI) should be made aware to the students as well as the procedure of acquiring the said protection.

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13.1 THE LAW OF PROPERTY

Property law is concerned with the bundle of rights a person may have on land. Such rights may be exclusive or otherwise.

Property law defines the range of functions a person may exercise in a given situation at a given time. It confers proprietary rights and imposes obligations on owners/holders of land.

Land includes physical strata, water all things growing on it, buildings or other things permanently annexed on the land.

Common law conception of land is based on the maxim ***cujus est solum*** which literally means that land encompasses more than just the soil. It includes all things found in the aerospace above and the geospace below. Land includes all the permanent fixtures. The common law conception of fixture is expressed by the maxim ***Quic Quid plantatur solo solo codit*** which literally means whatever is attached to land belongs to the land.

At common law, fixtures were deemed to be part of the land and could not be removed. However, this principle was modified and certain categories of fixtures could be removed e.g.

- Trade fixtures to enable a tenant carry out his trade
- Ornamental and domestic features if they did not cause substantial damage to land
- Agricultural fixtures could be removed from 1948

The common law principles of applies in Kenya's property law, however it has been modified by statute law e.g. The Water Act,[1] The Mining Act, The Way leaves Act[2] and The Agriculture Act.

STUDY TEXT

13.2 POSSESSION AND OWNERSHIP

Whereas **ownership** signifies title or a bundle of rights exercisable with respect to the subject matter, **possession** is the mere right to hold and may be actual or constructive.

Ownership confers proprietary rights.

However, in certain circumstances, possession may confer the right to use.

Ownership of land may take three forms:

1. Sole ownership
2. Joint ownership
3. Common ownership

SOLE OWNERSHIP

The land in question is owned by one person who exercises all the rights in relation to it

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JOINT OWNERSHIP

A situation where property is owned by two or more persons. It enjoys all the characteristics of a single owner. Proprietors have no individual shares in the property. Joint ownership is characterised by four unities namely:

- **Unity of title**
  All the persons derive title from the same title
- **Unity of possession**
  All the persons are entitled to each and every part of the land. They have the same rights to use any part of the land.
- **Unity of interest**
  All the owners own a similar interest in nature, extend and duration
- **Unity of time**
  The interest of the owners commences at the same time

Jus Accresscendi / Right of ownership

Means that when a proprietor or owner dies, his interest vests in the survivors. In a joint ownership, interest in the property cannot be disposed off by will or by intestacy. At common law, if joint owners die together, the younger is deemed to have survived the older

COMMON OWNERSHIP

This is the ownership of separate but undivided shares in the land. It does not confer the right of survivorship and a common owner can transfer his share to others with consent of the other owners. Common ownership terminates when the land is sold or partitioned

13.3 INTEREST IN LAND

It may take any of the three forms:

1. Estate
2. Servitude
3. Encumberances

ESTATE IN LAND

An estate in land may be freehold or leasehold.

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FREEHOLD ESTATE

Confers a bundle of rights exercisable for an indefinite duration. It may be acquired by inheritance or otherwise. The rights it confers can be transmitted to future generations.

Freehold estates include;

- Free simple
- Free tail
- Absolute proprietorship

1. FEE SIMPLE

This is the largest freehold estate a person can have on land at common law. It confers the largest quantum of rights. It confers unrestricted right to use, misuse and to dispose. In the event of death, the rights are transmitted to the person entitled to inherit the estate failing which it ***escheats*** to the state. No conditions are attached as to its inheritance. Holder can dispose it bydeed or by will, wholly or in part, conditionally or unconditionally.

The holder of a fee simple is entitled to commit waste on the land. Waste may be:

a) Ameliorating waste - Consists of acts which improve the value of land.
b) Permissive waste - Consists of acts not detrimental to land
c) Voluntary waste - Consists of acts detrimental to land
d) Equitable waste - This is wanton destruction of land.

Creation of Fee Simple

This estate may be created by:

i. **Grant**:- if it is transferred by one person to another
ii. **Inheritance**: - if inherited from a deceased
iii. **Enfranchisement**; - applies to agricultural leases where the government on expirationof the term of the lease, converts it to a freehold estate

2. FEE TAIL

A freehold estate which confers a life interest on the holder. Descends only to specified persons. Confers the right to determine the person or persons entitled to inherit. The estate is generally created by inheritance

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3. ABSOLUTE PROPRIETORSHIP

Created by Sections 27 & 28 of The Registered Land Act CAP 300.

Section 27 provides *inter alia* upon registration, the owner acquires all the rights and privileges associated with such ownership. These rights include right to use, misuse or dispose. The rights of the registered holder cannot be defeated unless as provided for by the Act. The person to whom the land is registered becomes the absolute owner to the exclusion of all others. This estate is illustrated by the decision in *Obiero V. Opiyo.* The registration terminates all customary rights previously exercisable on the land.

Creation of Absolute Proprietorship

i. Registration after Adjudication
ii. Conversion from other registers
iii. Transfer
iv. Inheritance
v. Consolidation

EXAMPLES OF FEE SIMPLE

- **Life Estate**
  An estate which lasts for the life of the grantee and is created by inheritance. Death of the grantee terminates his interest

- **Estate Pur Autre Vie**
  An estate in the life of another. It lasts for the life of that other person and lapses on his death. May be created by Express Grant or Assignment
  It is a freehold estate but reverts to the grantor when the person dies. Person on whose life the state is measured is the *Cesqui que.*

LEASEHOLD ESTATE (Tenancy)

Lease refers to a transaction which creates the relationship of landlord and tenant between thegrantor and grantee. The formal document by which this is done is a lease.

Leasehold is the quantum of rights which a lease grants to the lease. It is a secondary interestin land derived from a primary interest. Confers upon the leasee / tenant exclusive possession of another land.

STUDY TEXT

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CHARACTERISTICS OF TENANCIES/ LEASES

1. **Exclusive possession**
   A tenancy confers upon the grantee/ tenant the right to hold the interest to the exclusion of all others. Means that no other person has an equal right to it. It was so held in *Helcht V. Morgan*.
2. **Defined premises**
   The premises to which the tenancy or lease refers must be defined or ascertained. It must be identifiable by reference to the agreement. It was held in *Heptulla V. Thakore.*
3. **Certain period**
   A lease must commence at and exist for a certain period or for a period capable of being ascertained. It was so held in *Marshalls V. Berridge*
4. **Scope of grant or Quantum of Rights**
   The bundle of rights conferred by a lease must be definite or capable of being defined. The leasee must know the rights exercisable under the lease.

TYPES OF TENANCIES OR LEASES

- **Fixed Tenancy**
  A tenancy created for a fixed duration. Its commencement and termination must be specified. Such a lease determines when the duration expires
- **Periodic tenancy**
  Tenancy / lease which continues indefinitely from a period to period e.g. 1 year. Such a lease may be express or implied. Its duration is not specified and it may arise if a fixed period tenant remains in possession and continues to pay rent.
- **Tenancy at will**
  Tenancy whereby the tenant occupies premises on the terms that either party may determine the relationship at any time. The tenancy terminates in the event of death of either party or committing an act inconsistent with the tenancy.
- **Tenancy at sufferance**
  Arises whenever a fixed period tenancy holds over or remains occupation without the landlord's consent. This tenancy is created by operation of law. If landlord accepts rent, it becomes a periodic tenancy. However, the tenant may be ejected at any time without notice.
- **Service tenancy**
  Created to enable the tenant perform a particular service. The occupation is necessary for performance of the service; however the tenancy terminates on determination of employment.

Under the **Law of Contact Act CAP 23**, a lease or tenancy must be evidenced by some note or memorandum hence the creation of a lease is subject to formalities. Under the Indian Transfer of Property Act (**ITPA)***,* a tenancy exceeding 1year must be registered. Under the **RegisteredLand Act***,*a tenancy exceeding 3years must be registered. An unregistered lease will only bindthe parties to it. It is VOID as against 3rd parties.

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OBLIGATIONS OF THE PARTIES

A tenancy/ lease imposes upon the parties certain legally binding obligations.

DUTIES OF LANDLORD/LESSOR/GRANTOR:

1. **Duty not to derogate from the grant**
   He must not do anything inconsistent with the tenancy or lease. These are acts likely to render the premises unfit for the purpose for which they were rented.
2. **Duty to ensure quiet enjoyment**
   The landlord, his servants and agents must not interfere with the tenant's enjoyment of the premises. Tenant is entitled to peaceful occupation without unlawful interference or interruption.
3. **Duty to grant premises fit for purposes**
   Landlord must ensure that the premises let are fit for the particular purpose for which it is let.
4. **Duty to suspend or adjust rent**
   If the premises or part thereof is destroyed/ damaged without the tenants negligence rendering it wholly or partially unfit for occupation or use, the lessor is bound to suspend or adjust rent depending on the nature of damage until the premises are rendered fit for use or occupation.
5. **Duty to repair**
   As a general rule, it is the duty of the lessor to repair the roof, main walls, main drains, common passages and installations. This duty is statutory if only part of a building is let
6. **Duty to put the tenant in possession**
   The lessor is bound to hand over to the lessee, the mains which enable him enter into occupation.

DUTIES OF TENANT/LESSEE/GRANTEE:

1. **Duty To Pay The Rent Reserved**
   It is obligation of lessee to pay the rent as agreed. Such rent is payable irrespective of occupation.
2. **Duty To Pay Rates And Taxes**
   Lessee is bound to pay all rates and taxes except where the landlord is under statutory obligation to pay.
3. **Duty Not To Commit Waste**
   Lessee is duty bound not to commit waste i.e. he must not do anything which reduces the value of the premises. Fixed term tenants are liable for voluntary and permissive waste.
4. **Duty not to transfer, sublet or part with possession**
   As a general rule, the lessee must not transfer, sublease or charge the premises without the lessor's written permission.
5. **Duty To Permit Landlord To View The Premises**
   It is the duty of the lessee to enable the landlord appreciate the condition of the leased premises. The obligation is generally implied where the lessor is bound to repair the premises.

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6. **Duty To Make Reparation For Any Breach**
   The lessee is bound to repair and make good any defect or breach of agreement for which he is to blame. Reparation must be made within reasonable time as may be specified by a notice given by the lessor.
7. **Duty To Make Material Disclosure**
   The lessee is bound to inform the lessor of any external interference by third parties or of any action he is about to take which affects the value of the premises
8. **Duty Not To Erect Fixtures**
   The lessee must not, without the lessor's consent erect any permanent structures on the property. However, structures erected for agricultural purposes are permissible
9. **Duty To Put The Landlord In Possession**
   It is the lessee's duty on expiration of the lease to put the lessor in possession of the leased premises.

If a tenant is guilty of breach of terms of the lease e.g. non-payment of rent, landlord has an action in damages or may distress the tenant pursuant to the provisions of the Distress for Rent Act[3].

TERMINATION OF TENANCIES/LEASES

A tenancy agreement may terminate in the following ways:-

- **By Notice**
  Applicable where the tenancy is for a fixed duration or where either party desires to terminate the leases before the duration expires. The notice must sufficiently indicate the parties intention to terminate the lease.
- **Lapse Of Time/ Expiration Of Time**
  A fixed period tenancy terminates on expiration of the duration
- **Forfeiture**
  This is the right of the lessor to re-enter the premises and there-by prematurely determine the lease in the event of certain breaches. The lessor may do so pursuant to a forfeiture clause or in accordance with the provisions of the ITPA or Registered Land Act e.g. If the lessee is bankrupt or insolvent or upon the winding up of the company
- **Surrender**
  The giving up by the tenant, to the landlord, of the leased premises. Express surrender must be made in a prescribed form
- **Merger**
  Under the ITPA and Registered Land Act, a lease determines if the lessee or some other person becomes entitled to the property as of right. A merger must be express.
- **Enlargement Or Conversion**
  A lease determines if it is converted into some other interest e.g. freehold in accordance with the law.
- **Frustration**
  As a general rule the doctrine of frustration does not apply lease agreements. However, a lease is terminable by frustration if the property or part therefore is rendered unusable.
- **Disclaimer**
  This is the right of the lessee/tenant to disclaim the lease. He can only do so if authorised by statute. On doing so the lease terminates.

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A **Lease differs from a Licence** in that traditionally, licence is permission given by the occupier of land which without creating an interest in the land allows the licensee to do some act which would otherwise be a trespass.

A licence does not confer the right to exclusive possession of the land. It is a mere permission by a party to another to enter upon the licensor's land. It does not require any writing or registration and is not transferrable

13.4 SERVITUDES

These are rights in *alieno solo*i.e. a right conferring a power on another's land for the benefit of the right holder or his estate.

At common law, servitudes include:-

(i) Easements
(ii) Profit *apprendre*
(iii) Restrictive covenants

EASEMENTS

A right attached to a parcel of land which allows the proprietor of the land either

- To use the land of another in a particular manner
- To restrict its use to a particular extent.

An easement may be positive or negative. It is positive if it authorises the use of another's land in a particular way. It is negative if is restricts that other in the use of his land.

CHARACTERISTICS OF AN EASEMENT

1) **There must be a dominant and a servient tenement**
There can be easement properly so-called only if there be both a servient and a dominant tenement. An easement must be connected with the dominant tenement.

2) **Dominant and servient tenement must be owned/ occupied by different persons**
This is because an owner cannot have an easement over his land. It has been observed that in order to obtain an easement over land, you must not be the possessor of it for you cannot have the land itself and also an easement over it.

3) **Easement must accommodate the dominant Tenement**
What this requires is that the right accommodates and serves the dominant tenement and is reasonably necessary for the better enjoyment of that tenement.

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4) **Easement must be capable of forming the subject matter of the grant**
This characteristic means that the easement must be capable of being granted by deed hence there must be:-
- A capable grantor
- Capable grantee
- The right must be sufficiently definite
- Right must be of a nature capable of being granted.

An easement differs from a licence in that it is a **proprietory interest** attached to the land. It differs from a lease in that **it does not confer possessory rights over the land**.

CREATION OF EASEMENTS

An easement may be acquired in the following ways:

1. **Express Grant**
A situation where the grantor expressly confers the right to the grantee in prescribed form which must specify the nature of the interest, duration and other conditions or limitations.
2. **Statute**
An easement may be granted by an Act of Parliament to facilitate the discharge of a statutory obligation.
3. **Prescription**
Under the Limitation of Actions Act, 20 years of continuous use of another's land grants an easement to the user. The use must have been uninterrupted.

TERMINATION OF EASEMENTS

1. **Lapse Of Time**
Under the Registered Land Act, an easement terminates on expiration of the prescribed duration.
2. **Occurrence Of An Event**
The Registrar of lands is empowered to cancel the registration of an easement on application by the party affected by any breach of its terms
3. **Unity Of *Seisin***
Acquisition of full ownership of both the dominant and servient tenements by the grantee or some other person destroys the easement.
4. **Merger Of Interest**
Under the Registered Land Act, an easement terminates if the dominant and servient tenement are vested in the same person provided the tenements are combined under one title and registered as such.
6. **Release or Abandonment**
A grantee may by executing a deed abandon the easement to the grantor thereby terminating the same.

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7. **Judicial Discharge**
Under Section 98 of the Registered Land Act, the court is empowered on application by an interested party to order termination of an easement if satisfied that there is reasonable cause to do so.

13.5 PROFIT APPRENDRE

The right to take something off another's land.

It is the right to go on the land of another to take particular substance from that land, whether the soil or products of the soil. A profit enables the grantee to take something capable of ownership from grantor's land.

If a profit is enjoyed by others, it is referred to as **profit in common/common.** If it is enjoyed to the exclusion of others it is a **several profit**. If a profit is attached to the land, it is said to be a **profit apportionment.**

A profit may be created or acquired by:

1. Express grant
2. Prescription by law

May be terminated by:

1. Release/Abandonment
2. Unity of *Seisin*

13.6 RESTRICTIVE COVENANT

An agreement by which a proprietor or land owner undertakes to restrict the use of his land in a particular manner for the benefit of some other land. Such an agreement may arise between two landlords or tenants owning or occupying adjoining properties. The covenants are created by agreements which are registerable under the law.

They are terminable by mutual consent.

13.7 ENCUMBERANCES

These are rights in *alieno solo* which constitute burdens on the property. They are generally of a temporal character. Encumbrances are either mortgages or charges.

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13.8 MORTGAGES

In the words of Lindley J in **Santley V. Wilde (1859)** a mortgage is a conveyance of land or assignment of chattels as security for payment of a debt or the discharge of some other obligation for which it is given

CHARACTERISTICS OF A MORTGAGE

- Conveyance of the title to the mortgage
- A proviso for reconveyance on payment
- The right of redemption

The law relating to mortgages and charges in Kenya is contained in the Indian Transfer of Property Act, Registered Land Act and Equitable Mortgages Act.

Under Registered Land act, A Charge is an interest in land as a security for the payment of money/ monies or the fulfilment of any condition.

STUDY TEXT

TYPES OF MORTGAGES

The ITPA recognises the following types of mortgages:

1. **Simple mortgage**
   A mortgage transaction whereby without delivering possession of the mortgaged property, the borrower binds himself to pay the mortgagee and agrees that in the event of non-repayment, the mortgagee shall have the rights to sell the property and the proceeds applied in the payment of the mortgaged money.

2. **Mortgage by conditional sale**
   A mortgage transaction whereby the borrower ostensibly sells mortgaged property to the mortgagee on condition that the event of default, the sale becomes absolute or in the event of payment the sale becomes void.

3. **Usufructuary mortgage**
   The lender (mortgagee) takes possession of the mortgaged property and uses the proceeds to repay himself.

4. **English Mortgage**
   The borrower binds himself to repay the mortgaged money on a specific date and transfers the mortgaged property to the mortgagee subject to a re-transfer upon repayment of the mortgaged money.

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5. **Anomalous Mortgage**
   Created by Section 98 of the ITPA. The rights of the parties and other terms and conditions of the transaction are determined by the mortgaged instrument.

6. **Equitable Mortgage**
   Created by the Equitable Mortgages Act CAP 291. The borrower deposits his title deed with the mortgagee but without delivering possession of the mortgaged property.

DUTIES OF MORTGAGORS AND CHARGORS

1. To repay the principal sum and interest
2. To pay all taxes and rates
3. To honour previous obligations if the charge or mortgage is a subsequent transaction
4. To keep the premises in repair
5. To insure the property in the joint names of the parties
6. To farm according to the rules of good husbandry in case of agricultural land.
7. To honour the terms of the lease if the property is a lease.

These obligations terminate upon the discharge of the charge or mortgage or on cancellation of the transaction by the registrar

REMEDIES OF MORTGAGES AND CHARGES

1. **Foreclosure**
   A Court order which denies the borrower the right to redeem his security. The remedy may be availed by the court after the mortgage debt is due but before redemption. It is provided for by section 67 of the ITPA

2. **Appointment Of Receiver**
   A mortgagee/ chargee is empowered to appoint a receiver to take over the security given by the borrower to facilitate payment of the debt. Exercisable in circumstances in which the lender has the right foreclose. A charge may appoint a receiver if there is a default which continues for one month or if the borrower does not honour a demand notice in three months. The amount recovered by the receiver must be applied to pay rates and taxes, prior mortgages, any commission payable, insurance premium, interest payable under charge/mortgage

3. **Statutory Power Of Sale**
   The power of mortgagee or charge to sell the mortgaged property in the event of default by the borrower. This right is exercisable if:-

   a) There is no contrary provision in the mortgaged instrument
   b) Borrower's signature has been attested to by an advocate
   c) Notice to pay the amount has been served upon the borrower who has not responded in three months time or interest has in arrears for 2months. The monies realised must be applied to pay prior encumberances, expenses of the sale, mortgage or charge, subsequent encumberances if any.

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4. **Consolidation**

   The equitable right of a chargee holding several charges to insist that all be redeemed together. This right is only exercisable if:-
   i. The mortgages had been executed by the same borrower
   ii. The charges are held by the same chargee
   iii. There has been default in respect to all of them
   iv. The securities are still in existence
   v. The right to consolidate is expressly reserved by the instruments
5. **Suit On Personal Covenant**

   The right of a chargee or mortgagee to sue the borrower in the event of default. It is an action for recovery of the amount lent. The right is exercisable if: -
   i. The mortgagee/ borrower has executed a personal covenant to repay
   ii. Security provided is destroyed by a wrongful act or default by the borrower
   iii. The borrower has refused to deliver possession to a mortgagee who is so entitled.

RIGHT OF REDEMPTION

This is the right of the borrower to recover his security from the mortgagee/chargee. The right is recognised by common law and equity. During the contractual period of the transaction, the borrower has the legal right to redeem by paying the amount due at any time.

If the amount is not paid within the contractual period, the borrower loses the legal right to redeem but has an equitable right to redeem which must be exercised within a reasonable time as it is conferred by equity. The equitable right to redeem is only exercisable after the legal right to redeem is exhausted.

In law the borrower has unrestricted equitable right to redeem his security. Any provision in a mortgage or charge purporting to deny the borrower the equitable right to redeem is void. This right must not be subjected to any conditions by the charge or mortgagee.

However, the equitable right to redeem is lost when the property is sold or a foreclosing order is made by the court. The right of redemption is exercisable by

- Any person having an interest in the property
- An executor or a signee
- A guarantor
- A judgement creditor

The equitable right to redeem must be distinguished from **equity of redemption** which is the residual interest in property conveyed to the chargee or mortgagee which is retained by the borrower. This interest is extinguished on foreclosure.

The equity of redemption enables the borrower exercise equitable right to redeem.

STUDY TEXT

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13.9 INTELLECTUAL PROPERTY RIGHTS

These are rights awarded by society to individuals or organizations rincipally over ccreative works. They give the creator the right to prevent other from making unauthorized use of their property for a limited period of time.

13.10 PATENT

It is the certificate that a person gets from the patent office after one has made an invention. It is the relationship that exists between an inventor on one hand or patentee and the patent office, the estate or society.

It is a juridical relationship between an inventor or patent owner on one hand and on the other hand the patent office or the state or society in general. The inventor is that person who has brought out a new process or a new invention. A patent owner is the person who holds the rights.

It is a government authority or licence to an individual or organisation conferring a right or title for a set period especially for the sole right to make, use or sell some invention

The state here is Kenya and the office is the Kenya Industrial Property Institute (KIPI).

STANDARD/CRITERIA FOR PATENTRY

1. The invention must be novel/ new
2. The invention must constitute an inventive step and must not be obvious
3. The invention must be industrially applicable and useful
4. The invention must not be excluded by statute

In Kenya the inventor must apply to **KIPI** and the patent may be grante or declined. If a patent is granted, there should be an application to register it whereby the patentee must disclose the patent to the state.

Patents are granted for a limited period of time, mostly 20 years under TRIPS (The Trade Related Intellectual Property convention)

A patent may be obtained/owned by a natural or juristic person.

Under section 17 of the Science and Technology Act[4] inventions made by scientists in research institutions established under the Act (e.g KEMRI) are patented in favour of the research institute and not the individual inventor but the inventor must be named as per section 33 of the Industrial Property Act[5].

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COMPULSORY ACQUISITION

This may be done by the government where:

χ) The patentee has refused to work the patent
δ) The patentee has refused to licence other persons to work the patent on equitable terms
ε) The owner of the patent has been promptly and adequately compensated

The inventor's employer may also own a patent regarding the employee's invention but the invention must have occurred in the course and within the scope of the employment.

THE PATENTEE'S RIGHTS

1. To be granted a patent, subject to the substantive and procedural legal requirements
2. Exclusive rights to make, import, sell, offer for sale or use the product which is covered by the patent
3. The rights to exclude all other persons from dealing with the patent
4. The right to exploit the patent through contractual licensing and assignment
5. The right to receive royalties in the event of compulsory licensing

OBLIGATIONS OF THE PATENTEE

1. Disclose the invention to KIPI
2. Give information concerning foreign corresponding applications and grants
3. Duty to pay the prescribed fees
4. Obligation to refrain from unfair, abusive and uncompetitive terms and provisions in contractual terms and licences, assignments or patent applications

PATENT INFRINGEMENT

This is the unauthorized use of or dealing with a patented product or process contrary to the interests of the patentee, with or without his consent, licence or permission

It is conduct which goes against the claims as stated in the patent application and in particular, the final grant.

A case on patent infringement may be brought by the patentee or his personal representative.

Defences to Patent Infringement

1. That the invention had been published and therefore lacked novelty
2. Absence of specificity in the claims i.e. the claims are not specific enough
3. Non-patentability of the subject matter because of exclusions

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Remedies

2. Injunctions
3. Damages
4. Account of profits
5. Delivery up – an order that requires the defendant to deliver up all infringing material including all equipment and contraptions

Criminal Sanctions

They are available under the Intellectual Property Act and the Trade Marks Act. They may take the form of fines, imprisonment and forfeiture (delivery-up)

Section 109 of the Industrial Property Act declares infringement of patents to be criminal and one would be liable to a fine of between Kshs. 10,000 and 50,000 or a jail term of between 3 and 5 years or both.

Fundamental Weaknesses in the Enforcement of Criminal Sanctions

- Lacklustre government attitude towards IP and IP rights
- General public ignorance
- Lack of resources
- Limited knowledge by judges and magistrates

13.11 COPYRIGHT

These are economic rights given to creators of literary and artistic works including the right to reproduce the work, make copies therefrom, perfom or display the work publicly

Copyright law is intended to protect and to reward original expressions embodied in tangible material or fixed form. In the first category an idea does not infringe copyright but once it is expressed in some form, then it becomes tangible when expressed, you don't only have the idea in your head you have expressed it and its somehow in fixed form. Not everything that is new is copyright protected unless they are original expressions and are in original form.

Subject matter of copyrights

Subject matter of copyright is divided into two broad categories

1. Primary works - Known as works of original authorship. These include literary works (poems, softwares, sermons), artistic work (sculptures, paintings, maps and musical works)

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2. Secondary Works – sometimes called neighbouring related or allied works. They include: performances, audio-visual works (films, cinemas, broadcasts, sound recordings etc)

Rules of copyright

1. It subsists automatically upon the creation of the work. It need not be granted or registered
2. It governs both primary and secondary works.
3. The subject matter must be original;
   - It originates from the author and no one else
   - It is not a copy
   - The work embodies skill, judgement, labour and effort
4. Ideas in the mind don't count as copyright.

Duration of copyright

The Copyright Act[6] in Kenya grants Copyrights to the Copyright owners. It subsists for the life of the owner plus 50 years. In case of sound records, they compute 50 years after the year in which the first recording was made.

The problem with duration is that most computer programs have a very short life span and there is no need of protecting them for 50 years plus.

For anonymous works, Copyright subsists for the duration starting from the year of publication which is strictly 50 years but if the author decides to disclose his identity before he dies, then it will persist for his lifetime and then another 50 years after the author's death. These are called pseudononymous works.

COPYRIGHT INFRINGEMENT

This is the dealing with a work controlled by copyright in a manner contrary to the interests of the owner of the copyright without the owner's consent, authority, licence or permission.

The defendants conduct must be seen as to contravene the reserved rights to reproduce, communicate to the public, broadcast and perform the work.

PROOF OF COPYRIGHT INFRINGEMENT

1. There must be similarity –the issue is that similarity is a matter of fact and similarity is difficult in music.
2. There must be evidence of access – is there evidence that one person accessed the work of another? Dates are required.
3. The material copied must itself be copyrightable

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DEFENCES TO COPYRIGHT INFRINGEMENT

1. Copyright does not subsist in the work i.e. if it is not original and its plain news or plain facts.
2. Fair dealing: this is defined under Section 26(1) of the Copyright Act 2001 as where one uses a work for criticism or review, private use.
3. Consent – be it written or verbal
4. Public Interest – if the copyright is used for the benefit of the public

REMEDIES TO COPYRIGHT INFRINGEMENT

1. Injunction
2. Damages
3. Account of profit
4. Delivery-up
5. Search and seizure

Compulsory licencing

In certain circumstances, the state may order the copyright owner to licence the work if it is important in the public interest e.g. health/ educational interest

This may be used where the owner has only produced or licenced a few copies, is charging exorbitantly or has refused to licence it on reasonable terms

The copyright owner is entitled to compensation at the going market rates.

13.12 TRADE MARKS

This is any word or sign used to indicate the co-relation between goods and services and the owner. It is a distinctive symbol that identifies particular products of a trader to the general public. The symbol may consist of a device, words, or a combination of these.

A Trademark can be anything i.e. combination of names, combination of colours, designs all these can make a trademark.

Trademarks are IP rights granted in order to distinguish goods and services of one trade mark owner to those of his competitors.

Trade marks are also closely related to trade marks, certification marks, collective marks, domain names and service marks.

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Examples of trade marks

1. Signs and signatures
2. Letters or numerals
3. Smell, scents or olfactory marks
4. Coloured marks used in words and letters
5. Available signs or sound marks e.g. songs, musical notes and cellular tunes
6. Three dimensional signs e.g. Toyota logo and Mercedes sign etc
7. Headings and titles e.g on products or papers

Trade marks must be registered for them to be protected. However, notorious marks, famous/ well-known marks may be protected even if unregistered e.g. the McDonald's sign.

The proprietor of a trade mark must use it to continue enjoying protection.

Trade marks can exist infinitely but one has to renew his registration after certain periodic times such as seven-ear intervals.

Registration procedure

Applicants are required to send a written application to the Registrar in the prescribed

form. The application must be accompanied by a power of attorney where applicable

The registrar will then advertise that there is a n application for a trade mark and that he will accept a notice of opposition i.e. an opposition to the registrar of trade marks which must be filed within 60 days from the date of the advertisement.

Use of Trademark

1. To distinguish the goods of one traded from those of another.
2. It refers to a particular quality more so like designer quality, like Gucci, Channel etc, the trademarks are associated with quality.
3. Trademark protects the investment of the inventor, labour capital and goodwill, this attribute has been questioned that it has no legal basis.
4. Identifying the origin of a product i.e when you see Omo you associate it with Unilever. This issue has become redundant in scholarly terms because of the issue of franchising e.g. Nandos in Kenya makes different tasting chicken from the Nandos in South Africa.
5. To promote the marketing and sale of a product when one has a trademark.

Trade Mark Infringement

This is the use of a Trade Mark in the Trade Mark sense without licence or approval of the trade mark owner.

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Defences

1. Lack of title to the trade mark
2. Non- registration of the trade mark – this applies where the trade mark doesn't have notoriety i.e. the trade mark is not famous or that the trade mark hasn't developed goodwill.
3. Non – Use of the Trade Mark – this applies where one hasn't used the trade mark of has used it but not in the trade mark sense
4. Confusion – the defendant may argue that plaintiff's trade mark is likely to cause confusion i.e. it is neither distinctive nor capable of distinguishing the products
5. Innocence – it's not an absolute defence because one is deemed to have constructive notice by reason of the mark being registered

Remedies

1. Damages
2. Account of profit
3. Destruction of the infringing material
4. Self help remedies where the proprietor of a trade mark takes out an advertisement and promotional campaigns.

CHAPTER SUMMARY

Ownership of land may take the form of freehold or leasehold.

Freehold estates are estates which confer a bundle of rights exercisable for an indefinite duration.

Lease refers to a transaction which of itself creates a relationship of landlord and tenant between the grantor (the Landlord) and the grantee (the tenant).

Encumbrances are generally rights in *alieno solo* but constitute burdens on the property they are subject to and are temporal in character

Ownership signifies the title or a bundle of rights exercisable with respect to the subject matter, possession is the mere right to hold and may be actual or consecutive.

There are 3 types of ownership namely sole ownership, joint ownership and common ownership.

Interest in land may take the form of an **estate, servitude or encumbrance.**

CATEGORIES OF PROPRIETORSHIP

These three categories of proprietorship pose peculiar problems, for example, concurrent proprietorship may be either:-

i. Joint
ii. Common
iii. By entities

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An estate may be created by:

i. By grant.
ii. Enfranchisement
iii. Absolute proprietorship

Characteristics of tenancies or leases

(a) Exclusive possession
(b) Defined Premises
(c) Certain period
(d) Scope of grant

Types of tenancies

(a) Fixed period tenancies
(b) Periodic tenancies
(c) Tenancy at will
(d) Tenancy at sufferance
(e) Service tenancy

Tenancies may be terminated by

(a) By Notice
(b) Expiration (lapse of) or effluxion of time.
(c) Forfeiture
(d) Surrender
(e) Merger
(f) Conversion

A mortgage is a conveyance of land or an assignment of chattels as security for the payment of a debt or the discharge of some other obligation for which it is given.

Types of mortgages are

(a) Simple mortgages
(b) Mortgage conditional sale
(c) Usufractuary mortgage
(d) English mortgage
(e) Anomalous mortgage
(f) Equitable mortgage

CHAPTER QUIZ

1. What is a mortgage?
2. Give the types of ownership.
3. Give the various forms of interest on land that may occur.
4. List the types of tenancies.

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CHAPTER QUIZ ANSWERS

1. A mortgage is a conveyance of land or an assignment of chattels as security for the payment of a debt or the discharge of some other obligation for which it is given.
2. Ownership of land may take the form of freehold or leasehold.
3. Estate, servitude or encumbrance.
4. (a) Fixed period tenancies
   (b) Periodic tenancies
   (c) Tenancy at will
   (d) Tenancy at sufferance
   (e) Service tenancy

SAMPLE EXAMINATION QUESTIONS

QUESTION ONE

December 2005 Question 8

a) In relation to the law of property
   i. Enumerate the characteristics of a joint tenancy
   ii. State the various ways in which a lease agreement may be determined
b) Distinguish between the following
   i. Real property and personal property
   ii. Legal interests and equitable interests

QUESTION TWO

November 2001 Question 5

a) Describe the various ways in which co- ownership in property may be terminated
b) Explain the characteristics of easements
c) Karanja had been a tenant in Wamalwa's house for the last three months the parties had executed a lease for a period of one year. However, Wamalwa is aggrieved as Karanja broke all the doors in the house following several fights with his wife.

Wamalwa now seeks your advice on the various ways he may terminate the lease agreement and lawfully evict Karanja. Advice Wamalwa

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QUESTION THREE

November 2004 Question 3

In relation to law of property

a) Distinguish between ownership and possession
b) Explain the ways in which ownership may be acquired
c) Distinguish choses in action from choses in possession and give examples of each

QUESTION FOUR

May 2004 Question 5

a) In relation to the law of property summarize the implied covenants by a landlord in a lease agreement
b) A lease agreement usually contains implied terms on the part of the lessor and lessee. State the terms implied on the part of the lessee

Wambura, a rich but illiterate freehold owner of property has leased his property for a number of years to Wanyonyi.Wambura wishes to repossess the property for his own use and seeks to know the various ways in which lease may be terminated. Advice him.

(Footnotes)

[1] Cap 372 Laws of Kenya
[2] Cap 292 Laws of Kenya
[3] Cap 293 Laws of Kenya
[4] Cap 250 Laws of Kenya
[5] Act No. 3 of 2001
[6] Act No. 12 of 2001

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CHAPTER FOURTEEN

STUDY TEXT

ANSWERS TO SAMPLE EXAMINATION QUESTIONS

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CHAPTER FOURTEEN

ANSWERS TO SAMPLE EXAMINATION QUESTIONS

CHAPTER ONE

QUESTION ONE

May 2000, Question 1

Distinguish the following;

i) Law and Morality (2 marks)

It is a sense of judgement between rights and wrong by reference certain standards developed by society over time.

It consists of standards of behavior widely used by a society consists of prescriptions of society. It consists of rules regulating to conduct.

However, morality is not enforceable Non- compliance with morality attracts sanctions of the society.

Rules of law are binding and enforceable and have sanctions in all cases.

Wrongs in society are contraventions of law or law or morality or both However, the law incorporates a significant proportion of morality.

Such morality becomes part of the law. E.g. killing a person is immoral as well as a crime so is theft.

However, certain wrongs in society contravene morality but not the laws e.g. disrespect, failure to provide for parents, failure to rescue a drumming person e.t.c.

ii) Public and Private Law (2 marks) Public law

It consists of those fields or branches of law in which the state has a direct interest as the sovereign.

It is concerned with the constitution and functions of the various organizations of government including local authorities, their relations with each other and the citizenry e.g. – Criminal law

- Constitutional Law
- Administrative Law

Public Law asserts state sovereignty

Private law

It consists of those branches of law in which the state has no direct interests as the state / sovereign.

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It is concerned with the legal relationships between persons in ordinary transaction e.g.

a) Law of contract
b) Law of property
c) Law if succession
d) Law of marriage
e) Law of torts

iii) Substantive Law and Procedural Law, (2 marks) Substantive law

It consists of the rules themselves as opposed to the procedure on how to apply them.

It defines the rights and duties of parties and prescribes remedies e.g. The Law of torts, succession, contract, marriage e.t.c.

If defines offenses and prescribed punishment e.g. Penal Code

Procedural law

This is adjectival law. It consists of the steps or guiding principles or rules of practice to be complied with in the administration of justice or in the application of substantive law

NB: The evidence Act Cap 80 is both substantive and procedural

iv) *Ratio Decidendi* and *Obiter Dicta* (2 marks)

Ratio Decidendi

The principle or proposition formulated by the judge is referred to as *ratio decidendi* (reason for decision.) *ratio decidendi* literally means 'reason for decision.'

It is a principle or proposition of law based on the material facts of the case. It disposes off the case before the court. It is the binding part in a precedent or earlier decision. It covers a group of fat situations with those of the instant case as the minimum.

Obiter dicta

These are by the way stateme4tns of law or facts made by a judge in the course of judgment. They do not dispose off the case before the court. They have no binding force; however they may be relied upon by advocates in subsequent cases as persuasive authority in subsequent cases.

These statements of *obiter dicta* strengthen or reinforce the decision of the court.

QUESTION TWO

December 2006, Question 1

Define the term "Law" and state the main purpose of Law. (6 marks)

Law can be defined as: A body of binding rules of human conduct prescribed by human beings for the obedience of human beings.

Functions/Purposes of Law

1. It promotes peaceful coexistence/ maintenance of law and order/ prevents marching.
2. It is a standard setting and control mechanism Law sets standards of behaviour, conduct e.t.c.

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3. It protects rights and enforces duties by providing remedies whenever these rights or duties are not honored.
4. Facilitating and affecting private choice. It enables persons to make choice and gives them legal effect. This is best exemplified by the law of contracts, marriage & succession.
5. It resolves social conflicts. Since conflicts are conflicts are inevitable, the rule of law facilitates their resolution by recognizing the conflicts and providing the necessary resolution mechanism.
6. It controls and structures public power. Rules of law various organs of govt and confer upon them the powers exercisable by them. The law creates a limited govt. This promotes good governance, accountability and transparency. It facilitates justice in society.

QUESTION THREE

December 2000, Question 1

Describe the various branches of civil law (10 marks)

CIVIL LAW

It is concerned with the rights and duties of parties i.e. individual and corporations as well as remedies e.g. or branches of civil law include:-

- Law of contract
- Law of torts
- Law of property
- Law of Marriage
- Law of succession

QUESTION FOUR

May 2003, Question 1

b) Write explanatory notes on the following;

i) Supremacy of the Constitution (3 marks)

SUPREMACY OF THE CONSTITUTION

The supremacy of the constitution as source of law is manifested in various ways:-

1) All other laws derive their validity from the constitution
2) Proclaims its supremacy. Section 3 of the constitution provides inter alia (among other things) “The constitution is the constitution of the Republic of Kenya and shall lake the force of law throughout Kenya , if any other law is inconsistent with this constitution, this constitution will prevail and the other law shall to the extent of its inconsistency be void”

The phrase “any other law” used in sec 3 of the constitution was interpreted in *Okunda andAnother v. R (1970)* to mean any other law be it international or national.

In this case, the high court was called upon to determine which law was superior between the constitution of Kenya and the official secrets Act of the E.A. community. The court was of the view that section 3 places beyond doubt the pre-eminent character of the constitution.

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1. Organs of government: The constitution creates the principle and other organs of government.The legislature, Executive and the judiciary owe their existence to the constitution. Additionally the constitution creates other bodies and offices e.g.

- The electoral commission
- Judicial service commission
- Public services commission
- Offices of the AG, Auditor General and the commissioner of police are created by the constitution

2. Amended procedures: The constitution has a special amendment procedure. At the Sec 47 (1) of the constitution, parliament is empowered to alter the constitution. However a Bill, seeking to alter the constitution must be supported by not less than 65% of all the members of parliament excluding the ex-officio members during the 2nd and 3rd readings.

3. Fundamental rights and freedoms: The constitution of Kenya, guarantees the fundamentalrights and freedoms of the individual Cap 5 of the constitution is devoted to the rights and freedoms which are exercisable, subject to:-

a. The rights and freedoms of others
b. Public interest

ii) The rule of law (3 marks)

THE RULE OF LAW

The concept of the Rule of Law is a framework developed by Dicey on the basis of the English Legal system. It is also described as the due process.

According to Dicey, rule of law comprises 3 distinct conceptions namely;

1. **Absolute supremacy or predominance of regular law;** this means that all acts of theState are governed by law. It means that a person can only be punished for disobedience to law and nothing else.
2. **Equality before the law;** means equal subjection of all persons before the law. It meansthat no person is exempted from obeying the law. All classes of persons are subjected to the same judicial process.
3. **The law or the constitution is a consequence and not the source of rights;** meansthat the law is a manifestation of the will of the people.

c) Identify the factors that may undermine the rule of law in a country. (4 marks)

Factors Undermining Rule of Law:

1. Excessive power of executive
2. Nondependent judiciary
3. Corruption
4. Selective prosecution
5. Civil unrest
6. Ignorance of law

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CHAPTER TWO

QUESTION ONE

July 2000 – Pilot Paper

Define Statute Law and discuss its advantages (10 marks) Statutes Law / Legislation / Acts Of Parliament

This is law made by parliament directly in exercise of the legislative power conferred upon it by the constitution. The product of parliament's legislative process is an Act of Parliament e.g. Mining Act.

Section 3(1) (b) of the judicature Act recognizes legislation or statues law as a source of law of Kenya by the words "All other written laws". These words encompass:

1. Certain Acts of the UK Parliament applicable in Kenya.
2. Certain Acts of the Indian Parliament applicable in Kenya
3. Acts of the legislative council
4. Acts of the Parliament of Kenya.

Statute law legislation is a principal source of law applicable throughout Kenya. It must be consistent with the constitution. It is the most important source of law.

Advantages of Statutes Law

1. **Democratic:** Parliamentary law making is the most democratic legislative process. Thisis because parliaments the world over consists of representatives of the people they consult regularly. Statute Law therefore is a manifestation of the mill of the people.
2. **Resolution of legal problems:** Statute Law enables society to resolve legal problemsas and when they arise by enacting new statutes or effecting amendments to existing Law.
3. **Dynamic:** Statute Law enables society to keep pace with changes in other fields e.g.political, social or economic. Parliament enacts statutes to create the necessary policies and the regulatory framework.
4. **Durability:** Statute Law consists of general principals applicable at different times indifferent circumstances. It has capacity to accommodate changes without requiring amendments.
5. **Consistency / Uniformity:** Statute Law applies indiscriminating i.e. it regulates theconduct of all in the same manner and any exceptions affect all.
6. **Adequate publication**: Compared to other sources of Law, statute Law is the mostwidely published in that it must be published in the Kenya Gazette as a bill and as a
   Law. Additionally, it attracts media attention
7. It is a superior source of law in that only the constitution prevails over it.

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Explain each of the following rules of Statutory Interpretation;

Noscitur a sociis **(3 marks)**

This rule literally means that a word or phrase is known by its companions.

It is to the effect that words of doubtful meanings derive their colour and precision from the words and phrases with which they are associated.

Ejusdem Generis **(3 marks)**

This rule is applied to interpret words of the same genus and species.

It is to the effect that where general words follow particular words in the statute, the general words must be interpreted as being limited to the class of persons or things designated by the particular words.

The rule was explained in *R.-v-Edmundson* and was applied in *Evans-v-Cross* to interpret the provisions of the Road Traffic Act (1930).

Mischief Rule (Rule in Heydons Case (1584) **(4 marks)**

This is the oldest rule of statutory interpretation. Under this rule, the court examines the statutes to ascertain the defect it was intended to remedy so as to interpret the statute in such a manner as to suppress the defect.

The rule was explained by Lord Coke in **Heydon's case (1584).** According to the judge, 4 things must be discerned and discussed:

1. What was the common law before the making of the Act
2. What was the mischief and defect for which the law did not provide
3. What remedy has parliament resolved i.e. appointed to cure the disease
4. What is the true reason for the remedy

The judge shall give such construction as shall advance the remedy and suppress the mischief.

The mischief rule was applied in *Smith-v-Hughes (1961)* to interpret the provisions of the Street Offences Act 1959.

Under the act, it was a criminal offense for a prostitute to 'solicit men in a street or public place.'

In this case the accused had tapped on a balcony rail and hissed at men as they passed by below.

The Court applied the mischief rule and found her guilty of soliciting as the purpose of the act was to prevent solicitation irrespective of the venue.

The mischief rule was also applied by the Court of Appeal fro Eastern Africa in New great company of **India-v- Gross and Another (1966**), to interpret the provisions of the insurance ("motor vehicles third party risks) Act.

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QUESTION TWO

May 2000, Question 2 b)

b) Explain 8 sources of law in Kenya (16 marks)

1. **Constitution;** This is a body of basic rules and principles by which a society hasresolved to govern itself or regulate its affairs. It contains the agreed content of the political system and the basic structures of government e.g. Executive, Legislature and the Judiciary.
2. **Legislation or Statute Law;** This is law made directly by parliament in exercise of itslegislative power conferred upon it by the constitution.
3. **Delegated Legislation;** It is also referred to as subordinate, indirect or subsidiarylegislation. It is law made by parliament indirectly. These are by-laws, orders, rules, regulations or proclamations made by subordinate bodies e.g. local authorities, professional bodies, government ministers and statutory bodies in exercise of delegated legislative powers conferred upon them by parliament through an Enabling or Parent Act.
4. **Statutes of General Application;** These are certain statutes enacted by the UKparliament to regulate the conduct of the inhabitants of the UK generally. They are recognized as a source of law of Kenya by Section 3 of the Judicature Act. Their application as a source of law is qualified.
5. **Common Law;** May be described as a branch of the law of England which wasdeveloped by the ancient common law courts from the customs, usages and practices of the English people. It is an unwritten source of law whose application is qualified by
   Section 3(1) (c) of the Judicature Act.
6. **Equity;** Equity ordinarily means fairness or justice. It is that branch of the law ofEngland which was developed by the various Lord Chancellors Courts to supplement
   the Common Law. It developed to mitigate the harshness of the Common Law. It application is qualified by Section 3(1) (c) of the Judicature Act.
7. **Case Law or Judge Made Law;** These are principles or propositions of law madeby judges when deciding cases before them which are applied in subsequent similar cases. Judges make laws when they formulate or enunciate principles or propositions of law where none existed or in doubtful situations which are applied in subsequent similar cases. This source is recognized by Section 3 of the Judicature Act and has wide application.
8. **African Customary Law;** African Customary Law is based on customs, usages andpractices of the various ethnic groups of Kenya. These customs and usages generally lack universality and so is African Customary Law. A custom embodies a principle of utility or justice. However, not all local customs may be relied upon by courts of law in the settlement of disputes. A good local custom must be reasonably consistent with written law and must have been observed openly since time immemorial. It is recognized by
   Section 3 (2) of the Judicature Act.

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QUESTION THREE.

November 2007, Question 2

a) Identify the disadvantages of case law as a source of law (6 marks)

DISADVANTAGES OF CASE LAW

1. **Rigidity:** Strict application of*stare decisis*renders a legal system inflexible or rigid andthis generally interferes with the development of law.
2. **Bulk and complexity:** Since stare decisis is based on judicial decisions and manydecisions have been made, it tends to be bulky and there is no index as to which of these decisions are precedent. Extraction of the *ratio decidendi* is a complex task.
3. **Piecemeal:** Law-making by courts of law is neither systematic nor comprehensive innature. It is incidental. Principles or propositions of law are made in bits and pieces.
4. **Artificiality in law (over-subtlety):** when judges in subsequent cases attempt todistinguish indistinguishable cases, they develop technical distractions or distinctions without a difference. This makes law artificial and renders the legal system uncertain.
5. **Backward learning:** Judges or courts are persuaded / urged to decide all cases beforethem in a manner similar to past decisions. It is contended that this practice interferes with the ability of a judge to determine cases uninfluenced by previous decisions.

b) State 4 maxims of equity that developed to supplement the inadequacies of common law. (6 marks)

The Maxims of Equity include:

1. He who seeks equity must do equity
2. He who comes to equity must come with clean hands
3. Equity is equality (Equality is equity)
4. Equity looks to the intent or substance rather than the form
5. Equity looks upon as done that which ought to be done
6. Equity imputes an intent to fulfill an obligation
7. Equity acts in personam
8. Equity will not assist a volunteer (Equity favours a purchaser for value without notice)
9. Equity will not suffer a wrong to be without a remedy (Where there is a wrong there is a remedy for it) *Ibi jus ibi remedium*
10. Equity does not act in vain
11. Delay defeats equity
12. Equity aids the vigilant and not the indolent (*Vigilantibus non dorminentibus jurasubveniunt*)

QUESTION FOUR

June 2007, Question 7

a) Distinguish between the following;

i) Common Law and Equity (6 marks)

Common Law; May be described as a branch of the law of England which was developed bythe ancient common law courts from the customs, usages and practices of the English people. It is an unwritten source of law whose application is qualified by Section 3(1) (c) of the Judicature

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Equity; Equity ordinarily means fairness or justice. It is that branch of the law of England whichwas developed by the various Lord Chancellors Courts to supplement the Common Law. It developed to mitigate the harshness of the Common Law. It application is qualified by Section
3(1) (c) of the Judicature Act.

ii) Statute Law and Judicial Precedent (6 marks)

Statutes Law / Legislation / Acts Of Parliament

This is law made by parliament directly in exercise of the legislative power conferred upon it by the constitution. The product of parliament's legislative process is an Act of Parliament e.g. Mining Act.

Sec 3(1) (b) of the judicature Act recognizes legislation or statues law as a source of law of Kenya by the words "All other written laws". These words encompass:

1. Certain Acts of the UK Parliament applicable in Kenya.
2. Certain Acts of the Indian Parliament applicable in Kenya
3. Acts of the legislative council
4. Acts of the Parliament of Kenya.

Statute law legislation is a principal source of law applicable throughout Kenya. It must be consistent with the constitution. It is the most important source of law.

Judicial Precedent*(Stare Decisis***)**

Stare decisis literally means 'decision stands'. It is a system of administration of justice wherebyprevious decisions are relied upon in subsequent similar cases.

It is to the effect that each court in the Judicial Hierarchy is bound by principles established by decisions of courts above it in the Hierarchy and courts of co-ordinate jurisdiction are bound by their own previous decisions if the 2 cases have similar material facts.

Case law is only a source of law where the cases have similar legal points. The doctrine of judicial precedent applies both horizontally and vertically.

b) Explain the discretionary remedies available in equity. (8 marks)

a) Prohibitory order: This is an order of the high court restraining a court or tribunal fromproceeding with a meter before it. This order may be granted if the court or tribunal is:

i. Improperly constituted
ii. Disregarding relevant matters
iii. Exceeding its jurisdiction
iv. This order prevents a court or tribunal from exceeding its jurisdiction or ignoring the rules of natural justice.

b) Certiorari: This is a high court order to a subordinate court tribunal demanding the productionof certified copies of the proceedings and decisions for purposes of quashing the decision.

The order may be granted if a decision is arrived at in total disregard of the rules of natural justice or in excess of jurisdiction of the tribunal e.t.c.

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c) Mandamus: This is a high court order to a tribunal, public of official administrative body orlocal authority demanding the performance of public duty imposed upon it by statutes. The order compels performance by such bodies where it is unlawfully refused.

d) Habeas corpus: It literally means 'produce body.' This is an order of the high court to adetaining authority or body demanding the production of the detainee before the court to show cause why the detainee should not be released forthwith. This order questions the legality of the detention. It's functions to secure the release of detainees in unlawful custody. The order will be granted when a person's right or personal liberty is violated.

CHAPTER FOUR

QUESTION ONE

<u>**May 2000, Question 3**</u>

In relation to the Administration of Justice and Law in Kenya, explain the composition and jurisdiction of the Resident Magistrate's Courts. (20 marks)

RESIDENT MAGISTRATE'S

COURT Establishment

It was established by section 3(1) of the Magistrates court Act cap10 which provides *inter a lia* 'There is hereby established the Resident Magistrate court which shall be a court subordinate to the high court.'

Composition

The Resident Magistrates court is duly constituted when held or presided over by:

- Chief Magistrate
- Senior Principal Magistrate
- Principal Magistrate
- Senior Resident Magistrate
- Resident Magistrate

Jurisdiction

Under Section 3(2) of the Magistrates Court Act, the court has jurisdiction to hear cases throughout Kenya.

It entertains both criminal and civil cases. It exercises original and limited appellate jurisdiction.

Criminal jurisdiction

When presided over by the Resident Magistrate, the maximum sentence the court may impose is restricted: fine: Kshs, 20,000, stokes; 24, imprisonment; 7 years

The court is held by the chief magistrate, Senior Principal Magistrate, Principal magistrate or the senior Resident magistrate, it has jurisdiction to impose any sentence provided the offence is triable by the court.

It entertains criminal appeals from the District Magistrate Court 3rd class.

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Civil jurisdiction

The civil jurisdiction is subject to pecuniary or monetary restrictions. It exercises original jurisdiction only in civil cases as follows:

Chief magistrate	Kshs 3,000,000.00
Senior Principal Magistrate	Kshs 2,000,000.00
Principal Magistrate	Kshs 1,000,000.00
Senior Resident Magistrate	Kshs 800,000.00
Resident Magistrate	Kshs 500,000.00

The Resident Magistrate court has unlimited jurisdiction to hear and determine cases based on African customary law. Decisions of the Resident magistrate's court may be appealed against in the high court.

QUESTION TWO

December 2006, Question 2

a) Explain the Composition and the powers of the Judicial Service Commission.
(6 marks)

JUDICIAL SERVICE COMMISSION

Establishment

It is established by section 68 (1) of the constitution.

Composition /membership

Under section 68 (1) of the Act, the commission consists of:

i. The Chief Justice – Chairman
ii. Attorney General
iii. 2 persons who are for the time being judges of the high court and court of appeal appointed by the president.
iv. Chairman of the public service commission
v. High court registrar as secretary

POWERS OF THE COMMISSION

1. To act independently, must be under the control or directions of any person or authority.
2. To make rules to regulate its procedure
3. To delegate powers to its members (judges)
4. To act not withstanding a vacancy in its membership.
5. To confer powers and impose duties on public service with the president's consent.

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FUNCTIONS OF THE JUDICIAL SERVICE COMMISSION

1. **Administration:** It is the principal administrative organ of the judiciary i.e. administersthe judicial department
2. **Advisory:** It advises the president on the appointment of judges of the high court andcourt of appeal. Its vote is purely advisory.
3. **Appointment:** It engages magistrates, high court registrars, Kadhis and judicial staffe.g. personnel, officers, clerks etc.
4. **Discipline:** It disciplines all judicial staff, magistrates, registrars, kadhis and other staffof the department.

b) Highlight the powers of the Business Premises Tribunal. (6 marks)

BUSINESS PREMISES

TRIBUNAL Establishment

It is established by section 11 (1) of the Land Lord and Tenant (shops, hotels and catering establishments) Act Cap 301.

Composition

It consists of the chairman and other persons appointed by the Minister for Commerce. The chairman must be an advocate of not less than 5 years standing.

Jurisdiction

It exercises jurisdiction in civil cases between landlords and tenants of commercial premises where the tenancy is 'controlled.'

Under section 2 (1) of the Act, a controlled tenancy is a tenancy of a shop, hotel or catering establishment which;

Has not been reduced into writing or has been reduced into writing but does not exceed 5 years and contains provision for termination.

Decisions of the tribunal may be appealed against in the high court.

POWERS AND FUNCTIONS OF THE BUSINESS PREMISES TRIBUNAL

1. To determine whether the tenancy is controlled or not.
2. To determine the rent payable in respect of a controlled tenancy upon application
3. To apportion rent between tenants where a controlled tenancy is shared.
4. To permit the levy of distress for rent.
5. To vary or rescind its own decisions
6. To compel the landlord to compensate the tenant for any loss occasioned by termination of the tenancy.
7. Facilitates vacant possession of the premises.

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c) Describe the functions of the office of the Attorney General. (8 marks)

FUNCTIONS OF ATTORNEY GENERAL

1. Under section 26 (2) of the constitution, the Attorney General is the principal advisor of the government.
2. Under the constitution he must act independently.
3. He is an ex-officio member of the National Assembly.
4. He drafts all government bills.
5. He is the head of the bar i.e most senior lawyer.
6. He is the public prosecutor.
7. He represents the state in all civil cases.
8. He services the legal needs of other government departments.
9. He is the only *amicus curie* i.e. friend of the court.
10. He is a member of the Judicial service Commission
11. He is a member of the committee of Prerogative of Mercy.

The Attorney General retires at such age as parliament may prescribe.

QUESTION THREE

December 2005, Question 2

a) Describe the Composition and Jurisdiction of the Court of Appeal (6 marks)

COURT OF APPEAL

Establishment

It is established by Section 64 (1) of the constitution which provides inter alia 'there shall be a court of appeal which shall be a superior court of record.' The court was established in 1977 after the collapse of the east African community. It is the high court.

Composition

Judges of the court are known as judges of appeal and the chief justice and such other number as prescribed by parliament.

Jurisdiction

It is primarily an appellate court with jurisdiction to hear criminal and civil appeals from the high court. However, the court exercises very limited original jurisdiction in that it is empowered to punish; contempt of court and it has the jurisdiction to stay the execution of an order of the high court pending an appeal.

Decisions of the court of appeal are final. The full court of appeal consists of 5 judges, however, in practice 3 judges sit and decision is by voting.

3:0 Unanimous judgement.

2:1 Majority judgement.

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POWERS OF THE COURT

1. To determine cases finally
2. To frame issues for the determination of the high court
3. To accept or receive additional evidence only if an application to that effect is sustainable.
4. To order a trial
5. To order a retrial

b) Identify the various orders or writs which the High Court may issue when exercising its supervisory jurisdiction. (4 marks)

a) Prohibitory order: This is an order of the high court restraining a court or tribunal fromproceeding with a meter before it. This order may be granted if the court or tribunal is:

a) Improperly constituted
b) Disregarding relevant matters
c) Exceeding its jurisdiction
d) This order prevents a court or tribunal from exceeding its jurisdiction or ignoring the rules of natural justice.

b) Certiorari: This is a high court order to a subordinate court tribunal demanding the productionof certified copies of the proceedings and decisions for purposes of quashing the decision.

The order may be granted if a decision is arrived at in total disregard of the rules of natural justice or in excess of jurisdiction of the tribunal e.t.c.

c) Mandamus: This is a high court order to a tribunal, public of official administrative body orlocal authority demanding the performance of public duty imposed upon it by statutes. The order compels performance by such bodies where it is unlawfully refused.

d) Habeas corpus: It literally means 'produce body.' This is an order of the high court to adetaining authority or body demanding the production of the detainee before the court to show cause why the detainee should not be released forthwith. This order questions the legality of the detention. Its functions are to secure the release of detainees in unlawful custody. The order will be granted when a person's right or personal liberty is violated.

c) Describe the principles and presumptions that the courts use in the interpretation of statutes. (10 marks)

<u>RULES / PRINCIPLES / CANNONS OF INTERPRETATION</u>

<u>1. Literal Rule:</u>This is the primary rule of statutory interpretation. It is to the effect that wherethe words of statute are clear and exact, they should be given their literal or natural, dictionary or plain meaning and sentences should be accorded their ordinary grammatical meaning. However, technical terms and technical legal terms must be given their technical meanings.

This rule was explained *in R.-v- City London Court Judge*. Under this rule, no word is added or removed from the statute.

<u>2. Golden rule:</u>This rule is to some extent an exception to the literal rule.

It is applied by courts to avoid arriving at an absurd or repugnant or unreasonable decision under the literal rule.

Under this rule, a court is free to vary or modify the literal meaning of a word, phrase or sentence as to get rid of any absurdity.

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The rule was explained in *Becke-v-Smith (1836)* as well as in *Grey-v-Pearson* and was applied in *R-v-Allen* to interpret the provision of the offences Against the Person Act (1861). It was also applied in *Independence Automatic Sales Co Ltd –v- Knowles and Foster* to interpret the word 'book debt' used in section 95 of the Company act 1948.

The court interpreted it to mean all debts of the company which ought to have been entered in the books in the ordinary course of business whether or not they were so entered.

3. <u>Mischief rule (rule in Heydon's Case (1584)):</u>This is the oldest rule of statutory interpretation.Under this rule, the court examines the statutes to ascertain the defect it was intended to remedy sos as to interpret the statute in such a manner as to suppress the defect.

The rule was explained by Lord Coke in **Heydon's case (1584).** According to the judge, 4 things must be discerned and discussed:

1. What was the common law before the making of the Act
2. What was the mischief and defect for which the law did not provide
3. What remedy has parliament resolved i.e. appointed to cure the disease
4. What is the true reason for the remedy

The judge shall give such construction as shall advance the remedy and suppress the mischief.

The mischief rule was applied in *Smith-v-Hughes (1961)* to interpret the provisions of the Street Offences Act 1959.

Under the Act, it was a criminal offense for a prostitute to 'solicit men in a street or public place.'

In this case the accused had tapped on a balcony rail and hissed at men as they passedby below.

The Court applied the mischief rule and found her guilty of soliciting as the purpose of the act was to prevent solicitation irrespective of the venue.

The mischief rule was also applied by the Court of Appeal fro Eastern Africa in New great company of *<u>India-v- Gross and Another (1966)</u>*, to interpret the provisions of the insurance ("motor vehicles third party risks) Act.

<u>4. Ejus dem generis Rule:</u>This rule is applied to interpret words of the same genus andspecies.

It is to the effect that where general words follow particular words in the statute, the general words must be interpreted as being limited to the class of persons or things designated by the particular words.

The rule was explained in *<u>R.-v-</u>Edmundson* and was applied in *Evans-v-Cross* to interpret the provisions of the Road Traffic Act (1930).

<u>5. Noscitur a sociis:</u>This rule literally means that a word or phrase is known by itscompanions.

It is to the effect that words of doubtful meanings derive their colour and precision from the words and phrases with which they are associated.

<u>6. Expressio unius est exclusio ulterius:</u>This rule literally means that the expression of onething excludes any other of the same class. This rule is to the effect that where a statute uses a particular term without general terms the statutes application is restricted to the instances mentioned.

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7. Rendendo singular singulis;This rule is to the effect that words or phrases variously usedin a statute must be accorded the same meaning throughout the statute.

8. A statute must be interpreted as a whole: This rule is to the effect that all words, phrasesand sentences must be given their due meaning unless meaningless. All conflicting clause must be reconciled unless irreconcilable.

9. Statutes in*pari materia*:The interpretation of one statute is used in the interpretation ofanother related (similar) statute.

PRESUMPTIONS

In the construction of statutes or acts of parliament, courts of law are guided by certain presumptions, some of which include:

1. The statute was not intended to change or modify the common law
2. The statute was not intended to interfere with individual vested rights.
3. The statute was not intended to affect the crown or residency.
4. The statute was not intended to apply retrospectively.
5. The statute was not intended to be inconsistent with international law.
6. The statute was not intended to have extra-territorial effect.
7. An accused person is innocent until proven guilty.

QUESTION FOUR

November 2003, Question 2

a) Describe the Composition and Jurisdiction of the High Court of Kenya. (8 marks)

HIGH COURT

Establishment

It is established by section 60 (i) of the constitution as a superior court of record. This section provides inter alia'There shall be a high court which shall be a superior court of record.'

Composition

Judges of the high court are known as PUISNE and are the chief justice and such other numbers as prescribed by parliament.

Jurisdiction

The high court has the most extensive jurisdiction in Kenya.

Original jurisdiction

Under Section 60(i) of the constitution, the high court has unlimited original jurisdiction in criminal and civil cases.

Appellate jurisdiction

It entertains criminal appeals from:

1. Resident magistrate 's court
2. Courts martial
3. District magistrate's court 1st and 2nd class

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It entertains appeals in civil cases from:

1. Resident magistrate courts
2. Kadhi courts
3. D.M. court 1st and 2nd class
4. Tribunals subject to appeal e.g. rent tribunals

Others

a) Interpretation of the constitution.

Under Section 67 (1) of the constitution, if the question on the interpretation of the constitution arises before a subordinate court and the court is of the opinion that it involves a substantial question of the law. The court may refer it to the High Court for interpretation, but must do so if any of the parties to the proceedings so requests.

b) Enforcement of fundamental rights and freedoms.

Under Section 84 (1) of the constitution, the High court has original jurisdiction to enforce fundamental rights and freedoms of the individual. It has jurisdiction to provide remedies whenever a person's rights or freedoms have been or likely to be violated.

c) Residential and parliamentary election petitions.

The High court has original jurisdiction to hear and determination presidential and parliamentary election petitions. Under Section 10 (1) of the constitution it has jurisdiction to hear and determine a petition challenging:

1. The nomination of a person to contest a presidential election
2. The election of a president as a member of the National Assembly
3. The election of a person to the office of the President

Under his provision the petitioner must file only one petition. Under section 44(1) of the constitution the high court has original jurisdiction to hear and determine a petition;

- Challenging the validity of a person as a member of the national Assembly
- To determine whether a seat in the National Assembly has become vacant.

d) Admiralty jurisdiction

Section 4(1) of the Judicature Act constitutes the High court an 'Admiralty court', with jurisdiction to hear and determine civil disputes arising on the high seas, within territorial waters and inland navigable lakes and rivers.

The high court has jurisdiction to apply international law in the determination of such disputes.

e) Supervisory jurisdiction

Under section 65 (2) of the constitution, the high court has jurisdiction to supervise the administration of justice in subordinate courts and tribunals.

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It exercises the jurisdiction by making such orders and issuing such merits as it may deem fit. Such merits include:

a) Prohibitory order
b) Certiorari
c) Mandamus
d) Habeas corpus

b) Explain the establishment and jurisdiction of the Rent Tribunal (6 marks)

RENT TRIBUNAL.

Establishment

It is established by section 4 (1) of the Rent Restriction Act cap 296.

Composition

It consists of the chairman and other persons appointed by the Minister for Housing. To qualify for appointment as chairman, one must be an advocate of not less than 5 years standing.

One of the other persons appointed by the Minister must be the deputy chairman.

Jurisdiction

It exercises original jurisdiction in civil cases between land lords and tenants of residential premises whose monthly rent does not exceed Kshs 2,500.00. Decisions of the Tribunal may be appealed against in the High court.

POWERS AND FUNCTIONS OF THE RENT TRIBUNAL

1. To assess the standard rent of any premises on its own motion or on application.
2. To determine the date from which such rent is payable.
3. To apportion rent between tenants where tenancy is shared.
4. To facilitate vacant possession of premises to enable the land lord do repairs or erect additional buildings.
5. To facilitate recovery of rent arrears by the land lord.
6. To permit the levy of distress for rent.
7. To employ clerks, valuers and other persons to enable it discharge its obligations.

c) Describe the role of the office of the Attorney General in the prosecution of criminal offences. (6 marks)

Under Section 26(3) and (4) of the constitution, the Attorney General has the powers in relation to criminal cases:

1. To institute and undertake criminal proceedings against any person in any court other than courts-martial for any alleged offence.
2. To take over and continue any criminal proceedings institutes over and undertaken by any other person or authority.
3. To discontinue at any stage before judgment is delivered any criminal proceedings instituted or undertaken by any other person or authority or himself by entering the so called *nolle prosequi* means ' I refuse to prosecute.'
4. To require the commissioner of police to investigate criminal the Commissioner of Police must oblige and report to the Attorney General.
5. To delegate his functions to other officers in his department.

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CHAPTER FIVE

QUESTION ONE

May 2000, Question 4

In relation to the Law of Persons, outline 6 consequences of incorporation. (12 marks)

Consequences of Incorporation

1. **Legal personality:** A corporation is a legal person distinct and separate from its membersand managers. It has an independent legal personality. It is a body corporate with rights and subject to obligations. In *Salomon-v-Salomon & Co Ltd (1897)* the House of Lords stated that 'the company is at law a different person altogether or from the subscribers to the memorandum. The *ratio decidendi* of this case is that when a company is formed, it becomes a legal person, distinct and separate from its members and managers.
2. **Limited liability:** The liability of a corporation is limited members cannot be calledupon to contribute to the assets of a corporation beyond a specified sum. In registered companies liability of members is limited by shares or guarantee. Members can only be called to contribute the amount if any unpaid on their shares or the amount they undertook to contribute.
3. **Owning the property:** a corporation has the capacity to won property. The propertyof a corporation belongs to it and not to the members. The corporation alone has an insurable interest in such property and can therefore insure it as was in the case of *Macaura-v- Northern Assurance Co Ltd (1925)*.In this case the plaintiff was the principleshareholder and the company owed him $19,000. The company had bought an estate of trees from him and later converted them to timber. The plaintiff subsequently insured the timber with the defendant company but in his own name. The timber was destroyed
   by five 2 weeks thereafter. The Insurance Company refused to compensate the plaintiff for the loss he sued. It was held that he wasn't entitled to compensation he had no insurable interest in the timber.
4. **Sue or be sued:** Since a corporation is a legal person, with rights and subjectto obligations, it has capacity to enforce its rights by action and maybe sued on its obligations e.g. when a wrong is done to a company the company is the *prima facia*.
   It was held in *Foss-v-Harbottle* where some directors had defrauded their company but members had resolved in general meeting not to take any action against them. However, 2 minority shareholders sued the directors for the loss suffered by the company. The action was struck off the ground that the plaintiff had no *locus standi* as the wrong in question had been committed against the company.
5. **Capacity to contract:** A corporation has capacity to enter into contracts; be theyemployment or to promote the purposes for which they were created. Fro example; a company has capacity to hire and fire. It was so held in *Lee-v- Lees Air farming Co. Ltd(1961)*
6. **Perpetual Succession:** Since a corporation is created by law, its created by law, its lifelies in the intendment of law. It has capacity to exist in perpetuity. It has no body, mind or soul. For example, the death of directors or members of a company can only be brought to an end through the legal process of winding up.

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QUESTION TWO

May 2006, Question 3

With reference to the Law of Persons;

a) Distinguish between domicile of origin and domicile of choice. (6 marks)

DOMICILE OF ORIGIN

This is the domicile a person acquires at birth. Sections 3-6 of the law of Domicile Act sets out the rules / principles governing acquisition of domicile of origin:

a. An infant born legitimate acquires the domicile of the father.
b. An infant born after the father's death acquires the domicile of the father as at the date of death.
c. An infant found without parents (foundling infant) is deemed to acquire the domicile of the country in which he is found.
d. An infant legitimated by the marriage of its parents acquires the domicile of the father as at the date of legitimating.
e. An adopted infant acquires the domicile of the adopter.
f. An infant adopted by spouses acquires the domicile of the husband.
g. Domicile of origin is never lost but may be suspended when a person acquires a domicile of choice.

DOMICILE OF CHOICE

This is the domicile a person acquires by choosing which country to make his permanent home.

Every person of sound mind who has attained the age of majority (18 years) has capacity to acquire an independent domicile of choice.

For a person to acquire a domicile of choice, he must:

Take up actual residence in the country of choice.

Have the intention of making the country his permanent home.

Once a domicile of choice is acquired, the domicile is suspended but is reverted to when the domicile of choice is lost.

Under the law of domicile Act, upon marriage, a woman acquires her husband's domicile.

Under section 10 (1) of the Act, no person may have more than one domicile at a time and no person shall be deemed to be without domicile.

b) Specify the conditions that an alien must satisfy before being granted citizenship in your country. (6 marks)

Under the provisions of the constitution, the following categories of persons may be registered as citizens of Kenya on application to the Minister:

a) A woman married to a citizen of Kenya is entitled on application to be registered as a citizen; the application may be made during the lifetime of her husband.
b) A citizen of the commonwealth who has been lawful and ordinarily resident in Kenya for not less than 5 years.

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f) A citizen of any African Country which permeated Kenyans to be registered as her own citizen, who has been lawfully and ordinarily resident in Kenya for at least 5 years.
g) A person born outside Kenya but whose mother is a citizen of Kenya.
h) A person born in Kenya before 11/12/1963 where neither parent was born in Kenya.

Any foreigner may become a national of Kenya by naturalization. Acquisition of nationality by naturalization is preceded by a formal application.

Section 93 (1) of the constitution sets on the minimum constitution an applicant must

fulfill. The Minister must be satisfied that the applicant:

a) Has attained the age of 21
b) Is of good character.
c) Has adequate knowledge of the Kiswahili language.
d) Intends to continue residing in Kenya if naturalized.
e) Has been ordinarily and lawfully resident in Kenya for 12 months immediately preceding the application.
f) Has been ordinarily and lawfully resident in Kenya for a period of 4 years or for period amounting in the aggregate to not less than 4 years during the 7 years immediately proceeding the 12 months above.

The Minister may grant a certificate of naturalization when the applicant becomes a citizen of Kenya.

QUESTION THREE

May 2005, Question 2

a) Describe the ways in which a corporation may be established (4 marks) Creation / Formation Of Corporations

An incorporated association may be brought into existence in any of the following ways:

Registration: This is a process if incorporation provided by the company's Act.

It is evidenced by a certificate if Incorporation which is the 'birth certificate' of the corporation. Corporations created by registration are Public and Private Companies.

Statute: Acts of parliament often create incorporated associations. The corporation owes itsexistence to the Act of Parliament.

Charter: Under the Universities Act, when a private university is granted by charter, by therelevant authority it becomes a legal person of discharging its powers and obligations.

b) State and explain the contents of the memorandum of association. (4 marks)

1. **Name Clause;** Describes the name of the Company with "Limited" or "Ltd" as the lastword thereof for companies limited by Shares or Guarantee.
2. **Registered Office Clause;** States that the registered office of the Company will besituate in Kenya.
3. **Objects Clause;** Sets out the purpose for which the Company is incorporated. Itdescribes the contractual capacity of the Company. It delimits the Company's contractual capacity.

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4. **Capital Clause;** Specifies the capital with which the company proposes to be registeredand the division thereof.
5. **Liability Clause;** states whether members liability is limited or unlimited and whetherlimited by shares or by guarantee.
6. **Association or Declaration Clause;** States the desire of the subscribers to be formedinto a company.
7. **Particulars of Subscribers;** Name of the subscribers, postal addresses, occupation,number of shares taken, e.t.c.
8. **Date;** A memorandum must be dated.

a) Explain the advantages of a private company over a public company.(6 marks)

1. Subscribers are in a position to control membership.
2. Transfer of shares is restricted, members determine who may join.
3. It is the best vehicle for family business.
4. It is subject to less statutory formalities e.g. need not publish annual accounts or hold the statutory meeting.
5. Entitled to commence business on the date of incorporation.

c) Highlight the circumstances under which a partnership would be dissolved on the application of a partner. (6 marks)

1. A partner has become a lunatic or is permanently of unsound mind.
2. A partner is permanently incapable of discharging his obligations as a partner.
3. A partner is continuously guilty of willful breach of the partnership agreement.
4. The partnership business can only be carried on at a loss.
5. Circumstances are such that it is just and equitable that the partnership be dissolved.
6. A partner has behaved in a manner unfairly prejudicial to the firm and his continued association is likely to bring the firms name into disrepute.

QUESTION FOUR

November 2004, Question 4

a) Define the term "domicile" and citing examples, explain 3 types of domiciles. (10 marks)

DOMICILE

This is the country in which a person has or is deemed by law to have a permanent home. It is the country of permanent residence.

The law relating to domicile in Kenya is contained in the Law of Domicile Law cap 39.

This statute codifies the common law on domicile with a few modifications.

TYPES OF DOMICILE

The law of Domicile law recognizes three types of domicile namely:

a. Domicile of origin
b. Domicile of dependence
c. Domicile of chance

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1. DOMICILE OF ORIGIN

This is the domicile a person acquires at birth. Sections 3-6 of the law of Domicile Act sets out the rules / principles governing acquisition of domicile of origin:

a. An infant born legitimate acquires the domicile of the father.
b. An infant born after the father's death acquires the domicile of the father as at the date of death.
c. An infant found without parents (foundling infant) is deemed to acquire the domicile of the country in which he is found.
d. An infant legitimated by the marriage of its parents acquires the domicile of the father as at the date of legitimating.
e. An adopted infant acquires the domicile of the adopter.
f. An infant adopted by spouses acquires the domicile of the husband.
g. Domicile of origin is never lost but may be suspended when a person acquires a domicile of choice.

2. DOMICILE OF DEPENDENCE

This is the domicile of a person who is legally dependant on another.

This domicile changes with that of the other person e.g. the domicile of an adapted infant depends on that of the adopter, while that of a legitimate infant depends on that of the father.

Domicile of an infant married woman depends on that of her husband.

3. DOMICILE OF CHOICE

This is the domicile a person acquires by choosing which country to make his permanent home.

Every person of sound mind who has attained the age of majority (18 years) has capacity to acquire an independent domicile of choice.

For a person to acquire a domicile of choice, he must:

Take up actual residence in the country of choice.

Have the intention of making the country his permanent home.

Once a domicile of choice is acquired, the domicile is suspended but is reverted to when the domicile of choice is lost.

Under the law of domicile Act, upon marriage, a woman acquires her husband's domicile.

Under section 10 (1) of the Act, no person may have more than one domicile at a time and no person shall be deemed to be without domicile.

b) Outline the categories of persons eligible to be naturalized as citizens of your country. (5 marks)

Any foreigner may become a national of Kenya by naturalization. Acquisition of nationality by naturalization is preceded by a formal application.

Section 93 (1) of the constitution sets on the minimum constitution an applicant must fulfill.

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The Minister must be satisfied that the applicant:

1. Has attained the age of 21
2. Is of good character.
3. Has adequate knowledge of the Kiswahili language.
4. Intends to continue residing in Kenya if naturalized.
5. Has been ordinarily and lawfully resident in Kenya for 12 months immediately preceding the application.
6. Has been ordinarily and lawfully resident in Kenya for a period of 4 years or for period amounting in the aggregate to not less than 4 years during the 7 years immediately proceeding the 12 months above.

The Minister may grant a certificate of naturalization when the applicant becomes a citizen of Kenya.

c) Under what circumstances may a person who is a citizen under naturalization or registration be deprived of citizenship? (5 marks)

A person who is a citizen of Kenya by registration or naturalization may lose his nationality status at the instance of the minister.

The Minister is empowered to revoke the nationality if any of the grounds set out in section 94 (1) of the constitution justify.

The grounds include:

1. **Disloyalty / disaffection:** The citizen has shown himself by act or speech to be disloyalor disaffected towards Kenya.
2. **Trade or communication with alien enemies:** The citizen has during a war in which Kenya was engaged unlawfully traded or communicated with enemies or has engaged in trade or business which to his knowledge was carried on to assist the enemy in the war.
3. **Conviction for criminal offence:** The citizen has within 5 years of registration ornaturalization been convicted for a criminal offence and sentenced to imprisonment for 12 months or more.
4. **Residence outside Kenya:** The citizen has continuously resided outside Kenya for aperiod of 7 years while:
   i. Not in the service of Kenya.
   ii. Not in the service of an International organization of which Kenya is a member.
   iii. Not renewing his intention to retain Kenyan nationality with Kenyan embassy annually.
5. **Fraud misrepresentation:** The registration or naturalization was obtained by means offraud, false representation or concealment of material facts.

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CHAPTER SIX

QUESTION ONE

a) Explain the legal principle in the rule in *Rylands v. Fletcher*

This is the rule of strict liability.

The principle in this rule is a person who for his own purpose brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable fro all the damage which is the natural consequences of its escape."

This rule was formulated in *Rylands v Fletcher* where an employee was held liable for the negligence of an independent contractor.

For this rule to apply certain conditions are necessary:

- Non-natural user
- Bringing, collecting and keeping things
- Things must be capable of causing mischief if they escape
- Things must have escaped
- Interference with the plaintiff's use of his land

b) Explain the defenses available to a person sued in an action brought against him under this rule

1. Consent of the plaintiff

If the plaintiff has permitted the defendant to accumulate the thing the escape of is complained of, then he cannot sue if it escapes.

Implied consent will also be a defense; thus a person becoming a tenant of business or domestic premises that the time when the condition of the adjoining premises occupied by the landlord is such that the happening of the ***Ryland-v-Fletcher*** type is likely to ensue, is deemed to have consented to take the risk of such an event occurring.

2. Contributory Negligence (Plaintiff's own default)

If the damage is caused solely by the act or default of the plaintiff himself or where the plaintiff's contributory negligent, he has no remedy.

3. Act of third Parties (Act of a Stranger)

Where the occupier of land accumulates things on his land, the rule will not apply if the escape of the thing is caused by the unforeseeable act of a stranger.

4. Act of God

Where escape is caused directly by natural causes without human intervention in "circumstances which not human foresight can provide against and of which human prudence is not bound to recognize possibility" the defense of act of God applies and the occupier is thus not liable.

5. Statutory Authority

Sometimes, public bodies storing water, gas, electricity and the like are by statute exempted from liability so long as they have taken reasonable care. It is a question of statutory interpretation whether, and, if so, to what extent liability under **Ryland-v-Fletcher** has been excluded.

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c) Advise Jambazi

The legal principle applicable in this case is whether an occupier owes a common duty to a trespasser

Under the provisions of occupier liability Act an occupier owes all invitees a common duty of care to ensure that they are reasonably safe in using the premises for purposes for which they are invited or permitted to be there

Under the provisions of occupier liability act an occupier owes no common duty of care to trespassers .However the occupier must not injure the trespasser

In this case it is evident that Jambazi is a thief and that's why he sneaked into Green's compound. He is for all purposes a trespasser

My advice to Jambazi is that he has no actionable claim against Green for the injuries as Green owes him no common duty of care. He has no one to blame.

QUESTION TWO

a) Define an occupier

The word 'occupier' denotes a person who has a sufficient degree of control over premises to put him under a duty of care toward those come lawfully upon the premises. An owner in possession is no doubt an occupier, but an owner who has demised the premises to another and paired with possessions.

b) Explain its main provisions in relation to a person visiting premises

A visitor is generally a person to whom the occupier has given express or implied permission to enter the premises. The act extends the concept of a visitor to include persons who enter the premises for any purpose in the exercise of a right conferred by law for they are to be treated as permitted by the occupier to be there for that purpose, whether they infact have his permission or not his would include a fireman attending a fire or a policeman executing a search warrant.

Implied permission – this is a question to be decided on the facts of each case and the burden of proving an implied permission rests upon the person who claims that it existed. Any person who enters the occupier's premises for the purpose of communicating with him will be treated as having the occupier tacit permission unless he knows or ought to have known that he has been forbidden to enter e.g. by notice 'no hawkers'

The occupier may of course withdraw this implied license by refusing to speak or deal with the entrant but if he does so the entrant has a reasonable time in which to leave the premises before he becomes a trespasser.

The duty owed to a visitor does not extend to anyone who is injured by going where he is expressly or impliedly warned by the occupier not to go as where a tradesman's boy deliberately chooses to go into a pitch dark part of the premises not included in the invitation and falls downstairs there *(Lewis v Ronald(1909)*

Further the duty does not protect a visitor who goes to a part of the premises where no one would reasonably expect him to go. A person may equally exceed his license by staying on premises after the occupier' permission has expired but the limitation time must be clearly brought to his attention. "The common duty of care requires that the occupier must be prepared for children to be less careful than adults but the special characteristics of children are relevant also to the question of whether they enjoy the statutes of visitors.

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In *Glasgow Corporation v Tayler (1922)* it was alleged that a child aged seven had died from eating poisonous berried which he had picked from a shrub in some garden under the control of the corporation. The berries looked like cherries or large blackcurrants and were of a very tempting appearance to children. It was held that these facts discussed a good cause of action.

Certainly the child had no right to take the berries or even to approach the bush and an adult doing the same thing might as well have become a trespasser but since the object was an 'allurement' the fact of its being let there constituted a breach of the occupiers duty.

c) Advice an occupier whose employee, a window cleaner was injured when a window pane was a shattered

This problem is not based on occupier's liability as such .It based on the liability of an employer for injuries sustained by an employee in the course of his employment.

The occupier in this case is not liable for the injuries sustained by the window

cleaner. The employer is liable for not providing protective clothing to the employee.

The occupier's liability is based on the common law.

d) Outline the general defenses available to the occupier against liability to a trespasser

An occupier owes a trespasser no common duty of care

A trespasser injured in a person's premises has no actionable claim against the occupier

The question appears to be founded on the assumption that a trespasser has the same remedies as a visitor. The occupier may rely on the following defenses:-

1. Consented to the risk *(volenti non fit injuria)*
2. The occupier had given adequate warning of the danger
3. Liability was excluded by the contract between the parties
4. The injury is a consequence of the faulty execution of a task by a competent independent contractor and the occupier has satisfied himself that the contractor had discharged the same reasonably

QUESTION THREE

a) Indicate the ways in which a tort of conversion may be committed

i. Taking goods or disposing; it has been observed that to take a chattel out by another's possession is to convert it or seize goods under a legal process without justification is conversion.
ii. Destroy or altering
iii. Using a person's goods without consent is to convert them
iv. Receiving: the voluntary receipt of another's goods without consent is conversion.
However, receiving of another's goods in certain circumstances is not actionable for example goods received;-
v. In a market overt; the purchaser acquires a good title
vi. Estoppel; if the true owner of the goods is by his conduct denying the sellers the right to seek the buyer acquires a good title to the goods
vii. Goods received from a factor or a mercantile agent
viii. A negotiable instrument received in good faith

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ix. Goods received from a person who has a voidable title before the title is avoided
x. Disposition without delivery-a person who sells another goods without authority but without delivering the to the buyer convert them
xi. Disposition and delivery-A person who sells another's goods without authority and delivers the same to the buyer is guilty of conversion
xii. Mis-delivery of goods a carrier or a warehouse man who delivers the goods to the wrong person by mistake
xiii. Refusal to surrender another's goods on demand

b) Explain the legal principles applicable in each of the cases listed below;

(i)

The entry by B into C's land is unauthorized the reason for the entry not withstanding and amounts to trespass to land. It evident that B has made an intrusion on C's land there is direct infringement of the plaintiff's possession

C has an action in damages against B and since the tort of trespass to land is actionable par se C is not obliged to prove any damage.

C's action is based on the premise that B's entry into the land was unjustified .Judicial authority on this point is very clear i.e. a person cannot justify entering the land of another against his will for the purpose of reclaiming anything that has escaped from its enclosure.

(ii)

The pasting of the poster by H on D's wall amounts to trespass to land for which D has an action in damages. This is because the wall in question is part of D's land and the pasting of the poster on the wall was a direct infringement of the plaintiff's possession. At common law it is trespass to place anything on or in land in the possession of another.

(iii)

The overhanging branches on F's land constituted the tort of nuisance which is not actionable per se

In this case F was entitled to cut down the overhanging branches of the mango tree to abate the nuisance. But F did something more he gave away all the ripe mangoes from the fallen branches to children.

The legal principle in this case is that whereas the branches overhanging F's land amounted to nuisance and F did the needful work by cutting them down the ripe mangoes from the tee belonged to G and giving them away amounted to conversion for which G has an action against him in damages.

This position is consistent with the common law which postulates that where overhanging branches of fruit trees extend beyond the boundary of the owner's land, a neighbor though entitled to lop the overhanging branches is guilty of the tort of conversion should he appropriate the fruit growing thereon.

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QUESTION FOUR

a) Discuss the legal principles which govern limitations of actions in tort

LIMITATION OF ACTIONS

When a person's legal or equitable rights are violated he is said to have a cause of action e.g. breach of contract, negligence, nuisance etc. causes of action aren't enforceable in perpetuity the law prescribes the duration within which causes of action must be enforced. The limitation of Actions Act cap 22 prescribes the duration within which causes of actions must be enforced.

If not enforced within the prescribed time the action becomes statute barred and is unenforceable e.g. Breach of contract must be enforced within six years; Negligence – 3 years; Nuisance – 3 years; Defamation – 1 year; Assault – 3years; Battery – 3years; False imprisonment – 3 years; Recovery of rent – 6 years; Recovery of land – 12 years, Enforcing an arbitral award or a court order – 6 years.

The prescription of the duration within which a cause of action must be enforced may be justified on policy grounds. It ensures that justice is administered on the basis of the best available evidence. It ensures that disputes are settled as when they occur.

When does time start running? As a general rule time starts running on the date the cause of action accrues.

However, the running of time may be postponed in circumstances e.g.

1. If the prospective plaintiff is an infant or minor time starts running when it attains the age of majority or dies whichever occurs first.
2. If the prospective plaintiff is of unsound mind time starts running when he becomes of sound mind or dies whichever comes first.
3. If the prospective plaintiff is laboring under ignorance, fraud or mistake time starts running when he ascertains the facts or when a reasonable person would have ascertained.
4. If the prospective defendant is the President or exercising the functions of the office of the president time starts running when he leaves office or dies whichever comes first.

When time starts running it generally runs via and the action becomes statute barred. However, a statute barred action may be enforced with leave of court if it is proved that the failure to sue was justifiable.

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b) Distinguish between trespass and conversion

Trespass to goods	Conversion
• This is the intentional or negligent interference of goods in possession of the plaintiff. This tort protects a party' interest in goods with regard to retention their physical condition and invariability.	• This is the intentional dealing with goods which is seriously inconsistent to possession or right to possession of another person. This tort protects a person's interest in dominion or control of goods. The plaintiff must have possession or right to immediate possession.
• It interferes with possession	• The plaintiff must have either possession or right to immediate possession
• It must be direct	• There must be an intentional conduct resulting in an interference with the goods of the plaintiff.
• It is actionable per se	• Any chattel can be the subject matter of conversion
• Examples include scratching the panel of a coach, removing a tyre from a car or the car itself from a garage	• It is not actionable par se
• The principle remedy is monetary compensation	• Acts of conversion include dispossessing, using, destroying, altering, receiving, refusal to deliver, disposition and delivery.

c) Explain the circumstances under which trespass to persons would be justified under law

a) If the person was acting in defense of his person
b) If the person was stopping a breach of the peace
c) If the person was preventing the commission of a crime and used reasonable force
d) If the person was effecting or assisting in the lawful arrest of offenders or suspects
e) If the person was acting in aid of officers of the law
f) If the person was in such as to be dangerous to himself and others
g) If the person was administering reasonable chastisement in the exercise of parental or other authority
h) If the person was exercising authority of a shipmaster
i) If the plaintiff had consented
j) If the person was acting in defense of his property

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CHAPTER SEVEN

QUESTION ONE

July 2000 – Pilot Paper, Question 4

When parties enter into a contract it is virtually impossible for them to include express terms to cover every eventuality. Explain the circumstances under which:

- **a) The courts,**
- **b) The Statutes,**

Will imply terms into the contract (10 marks)

IMPLIED TERMS

These are terms which though not agreed to by the parties, are an integral part of the contract. Theses terms may be implied by statutes or by a court of law.

A. Terms implied By Statutes.

Certain statutes imply terms in contracts entered into pursuant to their provisions. These terms become part of the contract.

1. Terms implied in Sale of Goods contracts by Sale of Goods Act.

The Sale of Goods Act implies both conditions and warranties in contracts of Sale of goods unless a different intention appears.

CONDITIONS

1. **Right to sell**
   Under Section 4 (a) of the Act there is an implied condition that the seller of goods shall have the right to sell when property in the goods is to pass.
2. **Correspond to description**
   Under Section 5 of the Act, in a sale by description there is an implied condition that the goods shall correspond to the description.
3. **Fitness for purpose**
   Under Section 16(a) of the Act, where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to rely on the sellers skill and judgement, there is an implied condition that the goods shall be reasonably fit for that purpose.
4. **Merchantable Quality**
   Under Section 16 (b) of the Act, where goods are bought by description from a person who deals in such goods in the ordinary course of business whether a seller or manufacturer, there is an implied condition that the goods will be of merchantable quality.
5. **Sale by Sample**
   Under Section 17(1) of the Act, in a sale by sample, the following conditions are implied:
   a) The bulk shall correspond with the sample in quality.
   b) The buyer shall be afforded a reasonable opportunity to compare the bulk with the sample.
   c) That the goods shall be free from any defects rendering them unmerchantable.

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WARRANTIES

1) Quiet Possession

Under Section 14 (b) of the Act there is an implied warranty that the buyer shall have and enjoy quiet possession of the goods.

2) Free from Charge or encumbrance

Under Section 14 (c) of the Act there is an implied warranty that the goods shall be free from any charge or encumbrance not made known to the buyer when the contract was made.

2. Terms Implied By Courts of Law

Courts of law reluctantly imply terms in contracts as it is the duty of the parties to agree as to what the contractual terms shall be.

However in certain circumstances, courts are called upon to imply terms in contracts and do so for 2 reasons:

a) To give effect to the intentions of the parties.
b) To facilitate commercial transactions or give business efficiency.

Courts of law imply terms in contracts on the basis of:

1. The reasonable by stander test.
2. Trade usages and customs.

1. REASONABLE BY-STANDER TEST

Under this test a court will imply into a contract any term which a reasonable person overhearing the contract being made would have implied.

In *Hassan Ali Issa v. Jeraj Produce Shop*, the plaintiff repaired the defendant's motor cycle. However, the defendant did not collect the repaired item until after 1 year. The plaintiff demanded repair and storage charges.

The defendant refused to pay storage charges on the ground that it had not been agreed. The plaintiff threatened to sue the defendant. As a consequence, the defendant wrote a cheque for both amounts but it was dishonoured. The plaintiff sued.

It was held that the defendant was liable tom pay storage charges. The court implied into the contract a term that if a repaired item is not collected within a reasonable time. The party undertaking storage is entitled to reasonable storage charges.

In the *Moorcock Case,* the parties had agreed that the plaintiffs ship could unload at the defendant's jetty situated upstream the River Thames. During low tide as the ship sailed towards the jetty it grounded and was damaged. The jetty owner was held liable for damage.

The court implied the term that the passage to the jetty was reasonably safe for the ship.

2. TRADE USAGES & CUSTOMS

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A court of law may imply a trade usage or custom into a contract if it is proved that the transaction was subject to it. The party relying on the trade custom must prove that:

1. The custom exists.
2. Is certain.
3. Is reasonable.
4. Is known to the parties.
5. The parties had not exempted the custom from their transaction. It was so held in *HalilalShah and Champion Shah v. Standard Bank Co. Ltd.*

In *Fluery and King v. Mohamed Wali & Another*, the plaintiff bought 1000 hand kerchiefs from the defendants and the same were delivered in batches of 30. The plaintiff took delivery but sued the defendant for a reduction in the purchase price. It was proved that in Zanzibar there was a trade usage that handkerchiefs bought in bulk were supplied in dozens.

The court implied the custom into the contract and held that the plaintiff was entitled to the reduction in the price as he had to unpack and repack the pieces in dozens.

QUESTION TWO

November 2007, Question 4

Describe the circumstances under which the right to rescind a contract would be lost by the parties to the contract. (10 marks)

The right to rescind a contract is lost in various ways:-

1. **Delay:** A contract cannot be rescinded if a party has slept on its right for too long as“delay defeats equity”. In leaf V. International Galleries Ltd., where the plaintiff purported to rescind a contract after 5 years. It was held that the remedy was not available on account of delay.
2. **Affirmation:** A party loses the right to rescind a contract if it expressly or by implicationaccepts the contract.
3. **Third party rights:** A contract cannot be rescinded after 3rs party rights have arisenunder it, as this would interferes with the rights of a person who was not privy to the original contract.
4. **Restitution in integrum not possible:** Rescission is not available if the parties cannotbe restored to the position they were before the contract. E.g. if one of the parties is a company and it has gone into liquidation.

QUESTION THREE

June 2007, Question 1

a) Explain the meaning of privity of a contract. (4 marks)

THE DOCTRINE OF PRIVITY OF CONTRACTS

This doctrine is to the effect that only a person who is party to a contract can sue or be sued on it. It means that only a person who has provided consideration to a promise can sue or be sued on it.

It means that a stranger to consideration cannot sue or be sued even if the contract was intended

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to benefit him. It was so held in *Scruttons Ltd v. Midland Sillicones Ltd.* In Price Easton, X agreed to pay the plaintiff a sum of money if Y did some work for him. Y rendered the services to X but X did not honour the promise to pay.

The plaintiff sued to enforce the promise. It was held that the promise was unenforceable as the plaintiff was not a party to the transaction. He had provided no consideration.

A similar holding was made in *Dunlop v. Selfridge* as well as in *Tweddle v. Atkinson.*

However in certain circumstances, persons who are not party to a contract or who have not provided consideration may sue or be sued on it.

b) Outline the exceptions to the Doctrine of Privity of a Contract. (6 marks)

These are exceptions to the Doctrine of Privity of Contracts:

1. Agency

In an agency relationship, the agent contracts on behalf of the principal. The principal is not directly involved in the transaction. However the principal may sue or be sued on a contract entered into by the agent. This exception is more apparent than real as in law the agent represents the principal.

2. Legal Assignment

Under the provisions of the ITPA if s creditor assigns his debt to another person in a legal assignment the assignee becomes entitled to sue the debtor as if he were the original creditor.

3. Negotiable Instruments

A holder of a negotiable instrument can sue on it in its own name no withstanding the absence of consideration provided a previous holder of the instrument gave some consideration.

4. Trust

This is an equitable relationship whereby a party expressly impliedly or constructively holds property on behalf of another known as the beneficiary. In certain circumstances, the beneficiary can sue or be sued under a trust.

5. Third Party Insurance

Under the provisions of the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405, victims of motor vehicle accidents are entitled to compensation by Insurance companies for injuries sustained from the use of motor vehicles on the road.

However the insurer is only liable if the motor vehicle was in the hands of the insured or some authorized driver.

If the authorized driver pays the amount due to the victim for the injury, such amount is recoverable from the insurer but through the insured as was the case in *Kayanja v. New India Insurance Co.Ltd.*

6. Restrictive Covenants (Contracts running with land)

In certain circumstances, certain rights and liabilities attached to land are enforceable by or against subsequent holders of the land. This is particularly the case in the law of leases.

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QUESTION FOUR

December 2006, Question 4

a) Identify the rules which govern the doctrine of consideration. (6 marks)

RULES OF CONSIDERATION

1. Mutual love and affection is not sufficient consideration:

It was so held in *Thomas v. Thomas.* Mr. Thomas had expressly stated that if he died before his wife, she was free to use his house as long as she remains unmarried. His brother who later became executors of his estate knew of this wish.

After his death, Mrs. Thomas remained in his house and unmarried. After the death of one of the executors, the other sought to evict Mrs. Thomas from the house. She sued the late husband's estate. It was held that the husbands promise was enforceable as she had provided consideration by way of the 1 pound she paid for every year she lived in the house.

The love she had for the late husband was not consideration.

2. Consideration must be legal

The act or promise offered by the promise must be lawful as illegal consideration invalidates the contract.

3. Consideration must not be past

As a general rule, past consideration is not good to support a contractual claim as exemplified by the decisions in *Re McArdles* case and *Roscorlar v. Thomas.*
However, in certain circumstances, past consideration is sufficient to support a contractual claim.

4. Consideration must be real

This rule means that consideration must be something of value in the eyes of the law. It means that consideration must be sufficient though it need not be adequate.

This rule means that as long as something valuable in law passes, the promise is enforceable. It means that the law does not concern itself with the economics of a transaction.

It means that the courts of law do not exist to correct bad bargains. In *Thomas v. Thomas*, the 1 pound Mrs. Thomas paid per year was sufficient consideration.

However if the consideration is too law in comparison and there is evidence of a mistake, misrepresentation, duress or undue influence, the courts may intervene.

5. Consideration must flow from the plaintiff/ promise

This rule means that the person to whom the promise is made provides consideration and by so doing there is a bargain between the parties or mutuality.

By providing consideration, the promise becomes party to the transaction. In Thomas v. Thomas, Patterson j was emphatic that "consideration must at all times flow from the plaintiff."

The rule that consideration must flow from the plaintiff is referred to as **The Doctrine of Privityof Contracts.**

6. Consideration must be something in excess of a public duty owed by the plaintiff

This rule means that performance by the plaintiff of a public duty owed by him is not sufficient consideration for a promise to pay.

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In *Collins v. Godefroy* the defendant was involved in a civil case and the plaintiff had given evidence in the matter but was reluctant to do so in future. The defendant promised him 6 pounds if he continued giving evidence which he did.

The defendant did not honour his promise and was sued. Question was whether the plaintiff had provided consideration for the defendants promise to pay.

It was held that the promise was unenforceable as the plaintiff had not provided consideration but had merely performed a public duty.

However anything in excess of a public duty amount to consideration. In *Glassbrook Brothersv. Glamorgan County Council,* the defendant owned amine and at the material time the workerswere on strike. The defendant requested the plaintiff to provide a stationery guard to protect the mine and promised to pay for the services. The plaintiffs who are not bound to provide a stationery guard provided the service but were not paid.

In an action to enforce the promise, it was held that the plaintiffs were entitled to payment as they had done more than the duty required and had therefore provided consideration.

7. Consideration must be something in excess of an existing contractual obligation.

This rule means that performance by the plaintiff of an existing contractual obligation is not sufficient consideration for a promise. In *Stilk v. Myrik*, the defendant who was a ship captain entered into a contract with his crew members to assist him on a journey from Britain to the Baltic Sea and back. In the course of the journey, 2 sailors deserted.

The captain promised to share their wages between the remaining crew members a promise he did not honour and was sued. It was held that the crew members were not entitled to the extra pay as they had not provided consideration.

They had merely performed an existing contractual obligation. However, doing something in excess of a contractual obligation constitutes consideration.

In *Hartley v. Ponsonby* where in the course of a journey, a substantial number of crew members deserted and a promise for extra pay was made, it was held that they were entitled to the pay as they had done more than a contractual obligation.

The willingness to expose themselves to danger for longer hours constituted consideration for the promise.

8. Payment of a lesser sum on the day in satisfaction of a larger sum is not sufficient consideration for the creditors promise to accept such sum in full settlement for the debt.

This is referred as the **"Rule in*Pinnels Case (1602)*".** Cole owed Pinnel 8 pounds payable on 11th November 1600. However on 1st October 1600, Pinnel requested Cole to pay 5 pounds which he agreed to accept in full settlement of the debt. Subsequently, Pinnel sued Cole for the balance. The case was decided on a technical point of pleading and Cole was held liable for the balance.

This rule was applied in *Foakes v. Beer (1884).* However in certain circumstances, payment of a smaller sum extinguishes the entire debt.

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These are exceptions to the rule in *Pinnel's Case*:

1. If the lesser sum is paid in advance and the creditor accepts the same in full settlement of the debt.
2. If the lesser sum is paid in the form of an object which the creditor accepts in settlement thereof. In *Pinnel's Case*, Brian C.J. observed, "but the gift of a horse, hawk or robe, is sufficient consideration.
3. If the lesser sum is paid in addition to an object which the creditor accepts.
4. If the lesser sum is at the creditor's request paid at a different place.
5. Where the lesser sum is paid in a different currency and the creditor accepts the same in full settlement thereof.
6. Where the lesser sum is paid by a third party. In *Welby v. Drake*, the defendant owed the plaintiff 18 pounds and was unable to pay. The defendant's father paid the plaintiff 9 pounds which he accepted in full settlement of the debt but subsequently sued for the balance. It was held that the promise was enforceable as it was made to a3rd party.
7. If a debtor enters into an arrangement with his creditors to compound his debts, whereby he promises to pay part of the amount due to each of the creditors who in turn promise mot to sue the debtor or insist on full payment, the lesser sum paid by the debtor extinguishes the entire debt.
   The mutual promises by the parties constitute consideration.

b) Explain the circumstances under which a court of law could decline to grant the decree of Specific Performance as a remedy for breach of contract. (8 marks)

A court of law may decline to decree Specific Performance if;

1. The contract is one of personal service e.g. employment.
2. The contract is revocable by the party against whom an order of specific performance is sought.
3. The contract is specifically enforceable in part only. Where the court cannot grant specific performance of the contract as a whole, it will not interfere.
4. The contract is incapable of being performed i.e. impossibility. Courts are reluctant to make ineffectual orders.
5. Performance of the contract requires constant supervision.
6. The decree is likely to subject the defendant to severe or undue hardship.
7. The contract in question was obtained by unfair means.

c) Outline the circumstances under which money paid under a contract marred with illegality would be recoverable. (6 marks)

i. Where either party repents/ regrets the illegality before the contract is substantially performed.
ii. Where the parties are not in *pari delicto* (not equally to blame for the illegality), the less blameworthy party may recover.
iii. If the owner of the money or asset establishes title thereto without relying upon the illegal contract. As was the case in *Amar Singh v. Kulubya,* where a piece of land had changed hands under an illegal; contract but the plaintiff established his title.

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CHAPTER EIGHT

QUESTION ONE

July 2000 – Pilot Paper, Question 6

a) Explain the meaning of the rule "*Nemo dat quod non habet"* as stipulated in the Sale of Goods Act. (6 marks)

Nemo Dat Quod Non Habet (Transfer Of Titles By A Non-Owner)

At Common Law, a sale of Goods by a non-owner is incompetent. As it is contrary to the principle of **Nemo dat** i.e. one cannot give what he has not.

It means that a seller cannot give to the buyer a better title to the goods than he himself has. The principle of Nemodat was developed by the Common Law to protect the true owners of goods.

However, its strict application interferes with commercial transaction that the bona fide purchaser cannot acquire a good title if the seller had none.

In the words of Lord Denning in *Bishop Gate Motor Finance Corporation V. Transport BrakesLtd,* "2 principles have competed at Common Law. The first is Nemodat, that a person cannotgive a better title to the buyer than he has in the goods. The 2nd is that a bona fide purchase for value without notice acquires or good title.

The law has attempted to reconcile this principles by upholding Nemo dat as the general rule as the general rule but admitting exceptions to protect the bona fide purchaser.

In *Cundy V. Lindsay and Co. Ltd,* the principle of Nemodat was upheld Blenkan acquired no title for the goods and hence had non to pass to Cundy.

The principle of Nemodat is non contained in sec 23 (1) of the sale of Goods Act which provides *inter alia* "Where goods are sold by a person who s not the owner thereof and who does not sellthem under the authority or with he consent of the owner , the buyer acquires no better title than the seller had."

However, the Nemodat principle is subject to various exceptions. These are circumstances in which a seller can give a better title to the buyer than he has in the goods.

b) Explain the main exceptions to the rule. (14 marks) Exceptions:-

1. **Estoppel**: - Under sec. 23(1) of the Act, a non-owner can pass a good title if the trueowners is by his conduct produced form denying the seller's authority to sell. This is the equitable doctrine of estoppel. If the true owner of goods makes it appear that some other person is the owner, the true owner is estoppel from denying the apparent ownership of the other.
2. **Sale by Mercantile Agent or Factor**: Under the Factors Acts, 1859, a sale by a factor,passes a good title. A factor is a mercantile agent who is entrusted with possession of goods and who sells in his own name. In *Kapadia v. Laxmidar***.** It was indirectly held that the factors Act, was applicable in Kenya as a statute of general application on. A factor passes a good title, even if he has no authority to sell provided he sells the goods:-
   a) In his capacity as mercantile agent
   b) In the ordinary course of business

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c) To bona fide purchase for value without notice.
d) He has possession of the goods with the owner's consent.

3. **Resale by Seller in Possession:** Under Sec. 26(1) if the seller who has already sold goods but retains their possession or documents of title, sells them to a 3rd party who takes in good faith for value without notice of the previous sale. The seller passes a good faith.
4. **Sale by buyer in Possession:** Under Sec. 26(1) of the Act, where seller who hasbought or agreed to buy good obtain their possession or document s of title with the seller's consent before title possess to him and as a consequence he transfer them to a bona fide purchases who takes in good faith and with notice of the original seller lien on the goods, he passes a good title.
5. **Sale Under voidable title:** Under Section 24 of the Act, if the sellers title is voidablebut he sells the goods before his title is avoided, to a buyer who takes in good faith for value and without notice of the seller's defective title, he passes a good title. As was the case in *Phillips v. Brooks* as well as *Lewis v. Aveny*
6. **Sale Under Statutory Power:** A sale made in exercise of a power conferred by an Actof parliament passes a good title e.g. Sale by a :-
   i. Liquidator Under the Companies Act
   ii. Sale by a charge under the Registered Land Act or Mortgagee under the I.T.P.A.
   iii. Sale under the Disposal of Uncollected Goods Act
7. **Sale Under Common Law Power:** Under Sec. 23 (2) (6) of the Act a sale madein pursuant to an order of a court of Competent Jurisdiction passes a good title in accordance with the provisions of Sec. 23(2) (b) of the Act.
8. **Sale in Market Over:** At Common Law , Sale in market overt passed a good faith titleto the buyer provided he took the gook the goods in good faith for value and without notice of any defect in the seller's title. Market Overt has been defined as an open,
   public and legally constituted market. Before 1994, every shop in the city of London was market Overt and all goods sold under defective title conferred good title to the buyers provided the buyer took in good faith and the sale took place in public place. Market Overts in the U.K. were created by statute, charter or arose from prescription. This is the oldest exception to the principle of Nemo Dat but does not apply in Kenya.

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QUESTION TWO

May 2000, Question 7

a)Explain the remedies available to an unpaid seller against;

a. The goods; (6 marks)
b. The buyer under the Sale of Goods Act. (4 marks)

Rights and Remedies of the Unpaid Seller

Under Sec. 39 of the Act, a seller s deemed to be unpaid if:-

a) The whole of the purchase price has not been paid or tendered.
b) The bill of exchange or other negotiable instrument received as conditional payment is dishonoured.

Remedies of the unpaid seller fall into 2 broad categories namely:

i. Real
ii. Personal

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REAL REMEDIES

These are remedies against the goods and are enforceable without any court action. Under Sec. 40 (1) and (2) these remedies are:-

iv. Rights of lien retention of the goods
v. Right of stoppage in transit
vi. Rights of Re-sale
vii. Rights to withhold delivery

These remedies are often referred to as self-help or extra Juridical remedies and demonstrate the extent to which the sale of goods Act champions the interests of the seller.

PERSONAL REMEDIES

These are remedies against the buyer and are enforceable by Court Action namely:-

i. Action for Price
ii. Damages for non-acceptance

REAL REMEDIES

1. Unpaid Sellers Lien

This is the right of unpaid seller in position of the buyer's goods to retain them as a security for the price. The lieu is possess in nature and is depended on possession which must be lawful and continuous.

It is particular since the seller can only retain the goods for which payment is due.

Under Section 41 of the Act, the unpaid seller's lien is exercisable in the following circumstances:-

a) Where goods have not been sold on credit
b) Where goods have been sold on credit but the term of credit has expired.
c) If the buyer becomes insolvent

1. Loss of Lien

The unpaid seller losses the right to retain the buyer's goods in the following ways:-

i. By waiver thereof
ii. If the buyer or his agent obtain lawful possession of the goods.
iii. If the seller delivers the goods to a common Carrier for transmission to the buyer without reserving the right of disposal.
iv. Payment for goods.

An unpaid seller is entitled to exercise a lieu on the buyers goods in his possession even if the has made part delivery and the goods may be in his possession or that of his agent.

2. Stoppage in Transit

This is the right of unpaid seller who has already parted with possession of the goods to resume the same as long as the goods are still in the course of transit other buyer. The exercise of this right enables the seller to resume possession of the goods. The rights are exercisable by the seller only if the buyer becomes insolvent.

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Under sec. 45(1) of the Act, goods are deemed to be in the cause of transit from the time they are delivered to a common carrier to such a time as the buyer or his agent obtain possession.

Under Sec. 4(11) of the Act, the right of stoppage in transit may be exercised in any of the following. Ways:-

i. Taking actual possession of the goods
ii. Giving notice of the sellers claim to the party in possession. Such notice may be given to the person in possession pr his employer.

Loss of the Right of Stoppage

The seller right of stoppage in transition will be defeated or is lost when transit ends. Transit ends if:-

i. The buyer or his agent intercepts the goods before arrival at the agreed destination
ii. Upon arrival the carrier notifies the buyer or his agents that he holds the goods on his behalf.
iii. The carrier wrongfully neglects or refuses to deliver the goods to the buyer or his agents.

3. Rights of Resale.

Under sec. 47 and 48 of the Act on unpaid seller in presence of the buyer's goods is entitled to re-sell them to recover the price. Under Sec. a re-sale of the goods by the seller passes a good title to the buyer in the following circumstances;

i. Where the goods are of a perishable nature.
ii. Where the right to resale is expressly reserved by the contract
iii. When the seller notifies the buyer his intention to resale the goods but the buyer does not pay or tender the price within a reasonable time.

4. Rights to With-hold Delivery

Under Sec. 40(2) of the Act where property in the goods has not passed to the buyer, the seller has the rights to withhold their delivery to the buyer.

PERSONAL REMEDIES

1. Action for price.

This right of the unpaid seller is exercisable in 2 circumstances:

i. Under sec 49(1) of the Act where property in the goods has already passed to the buyer who wrongly neglects or refuses to pay for them , the seller may maintain an action against him for the price
ii. Under sec 49(11) of the act where the price is payable on a certain day irrespective of delivery ,but the buyer wrongfully neglects or refuses to pay the same .The seller may maintain an action against him for the price.

The seller action for price is an action for the liquidated sum.

2. Damages for Non –Acceptance.

Under sec 50(1) of the Act, if the buyer wrongfully neglects or refuses to take delivery of goods, the seller may maintain an action against him in damages for non-acceptance and the amount recovered is estimated loss directly and naturally resulting in the ordinary course of things from the breach of contract.

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REMEDIES OF THE BUYER

1. Damages for Non-Delivery.

Under sec 51(1) of the Act, if the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against him in damages for non-delivery and the amount recoverable is the estimated loss directly and naturally resulting from the breach of contract in the ordinary cause of events.

2. Specific Performance

Under sec 52(1) of the act, if the seller wrongfully neglects or refuses to deliver specific goods, the buyer may maintain an action for the decree of specific performance which the court may grant of circumstances justify.

3. Damages for the Breach of warranties.

Under sec 53(1) of the Act, if the buyer is compelled or agrees to treat breaches of conditions by the seller as breaches of warranties he losses the right to treat the contract as repudiated hence any breach of warranty entitles the buyer to an action in damages

4. Recovery of price.

Under sec 54 of the Act, if the buyer has already paid for the goods, but the same are unavailable, he is entitled to maintain an action for the price as consideration for the payment has totally failed.

5. Rejection of Goods.

The buyer is entitled to reject the goods delivered by the seller in certain circumstances without incurring any liability. E.g.

i. If the quality delivered is greater or less than contracted OR
ii. Where the goods discovered are mixed with goods of another description.

b) In relation to the Sale of Goods Act, explain the circumstances when;

i) A buyer may reject the goods and repudiate the contract. (6 marks)

i. If the seller delivers more goods than the quantity contracted for.
ii. If the seller delivers less goods than the quantity contracted for.
iii. If the seller delivers by installments contrary to the terms of the contract.
iv. If the seller delivers goods mixed with those of a different description.

ii) The buyer may lose the right to reject the goods. (4 marks)

i. If he has accepted the goods and given something in earnest to bind the contract.
ii. If the duration, if any, prescribed by the contract has lapsed.
iii. If no duration is prescribed by the contract but reasonable time has lapsed.

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QUESTION THREE

May 2005, Question 3

a) Highlights the essentials of a contract for the sale of goods. (4 marks)

a. There contract has 2 parties i.e. the buyer and the seller. The seller sells or agrees to sell while the buyer buys or agrees to buy the goods.
b. Transfer or passing of property from the seller to the buyer. Property in goods must pass from the seller to the buyer.
c. It always involves goods e.g. personal chattels, emblements, industrial growing crops e.t.c.
d. It is characterized by price. This is the consideration provided by the buyer to support the contract. It must be monetary in character.
e. The contract may be oral, written or implied from conduct of the parties.
f. Both parties must have the requisite capacity.

b) Explain the rules that govern delivery of goods as stipulated in the Sale of Goods Act. (8 marks)

RULES OF DELIVERY

1. Whether it is for the seller to transmit the goods to the buyer or for the buyer to take delivery at the seller's premises depends on the agreement between the two.
2. Unless otherwise agreed, the cost of and incidental to putting the goods into a deliverable state is borne by the seller.
3. Unless otherwise agreed the place of delivery is the seller's place of business if none of his residence.
4. Where specific goods are in some other place known to both parties, that other place is the place of delivery
5. If the goods are in the lands of a 3rd party, delivery is complete when the 3rd party notifies the buyer that he holds the goods on his behalf.
6. If the seller is bound to transmit, the goods to the buyer, he must do so within the stipulated time if any or within a reasonable time.
7. Delivery by common carrier is Prima Facie complete when the goods are handed over to the carrier.
8. If the seller delivers less goods, the buyer may reject them or accept and pay at he contract rate
9. If the quantity delivered is more, the buyer may reject the goods, or accept those included in the contract or accept all and pay at the contract rate.
10. If the goods delivered are mixed with those of a different description, the buyer may:-
    i. Reject the goods.
    ii. Accept those included in the contract
11. Unless otherwise agreed, the buyer is not bound to accept delivery by installment
12. Where delivery is by installment to be paid for separately and the seller makes one or more defective deliveries or the buyer refuses to take delivery or pay for one or more installment whether such breach entitles the innocent party to treat the contract as repudiated or is severable depends on the terms of the contract and the circumstances of the case.
13. If the buyer rejects the goods as of right, he is not bound to the same to the seller but must notify him the fact of rejection.

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c) Describe the remedies available to the buyer for a breach of a contract for the sale of goods. (8 marks)

REMEDIES OF THE BUYER

1. Damages for Non-Delivery.

Under sec 51(1) of the Act, if the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against him in damages for non-delivery and the amount recoverable is the estimated loss directly and naturally resulting from the breach of contract in the ordinary cause of events.

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The buyer is entitled to reject the goods delivered by the seller in certain circumstances without incurring any liability. E.g.

a) If the quality delivered is greater or less than contracted OR
b) Where the goods discovered are mixed with goods of another description.

A buyer may reject the goods and repudiate the contract.

i. If the seller delivers more goods than the quantity contracted for.
ii. If the seller delivers less goods than the quantity contracted for.
iii. If the seller delivers by installments contrary to the terms of the contract.
iv. If the seller delivers goods mixed with those of a different description.

The buyer may lose the right to reject the goods.

i. If he has accepted the goods and given something in earnest to bind the contract.
ii. If the duration, if any, prescribed by the contract has lapsed.
iii. If no duration is prescribed by the contract but reasonable time has lapsed.

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QUESTION FOUR

May 2003, Question 5

a) In a contract of sale of goods;

i. **Explain 4 categories of unascertained goods.** **(8 marks)**
1. Goods to be manufactured by the seller.
2. Crops to be grown by the seller.
3. Purely genetic goods.
4. An unidentified portion of a special bulk or whole.

ii. Explain the duties of the buyer towards the seller. (4 marks)

DUTIES OF THE BUYER

1. **Take delivery-U**nder sec28 of the Act, it is the duty of the buyer to take delivery of goods,the subject matter of the contract failure to which he is liable in damages pursuant to section 50 of the Act.
2. **Pay the price-**Under section 28 of the Act; it is the duty of the buyer to pay the price ofthe goods failure to which the seller may maintain an action against him for the price pursuant to section 49 of the Act.

Under section 2A of the Act, the duty of the buyer to take delivery and pay the price and that of the seller to deliver the goods should be concurrent i.e. the seller must be ready and willing to give possession of the goods in exchange for the price and the buyer must be ready and willing to take possession and pay the price.

CHAPTER NINE

QUESTION ONE

November 2007, Question 7 (a)

In relation to the law of agency, outline the following;

a) **Meaning of an undisclosed principal.** **(2 marks)**
This is the principal whose existence is not disclosed to the 3rd party. The 3rd party is therefore unaware of the agency relationship.

b) **Liability of an undisclosed principal.** **(2 marks)**
As a general rule, the principal is liable on contracts entered into by the agent whether he is disclosed or undisclosed. The 3rd party is entitled to sue the principal as soon as he discovers his existence. However, if the agent executes a deed in his own name without disclosing the agency, the undisclosed principal is not liable on it.

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QUESTION TWO

December 2005, Question 5

a) Explain the duties of an agent to his principal. (6 marks)

DUTIES OF THE AGENT

1. **Performance**: The agent must perform his obligation if the agency is contractual. He is not bound to perform if the agency is not created by agreement or where the undertaking is illegal or void.
2. **Obedience:** The agent is bound to obey the principal's instructions. This means that he must act within the scope of his authority.
3. **Care and skill:** The agent must exhibit a degree of care and skill appropriate to the circumstances. In ordinary transactions, the degree of care and skill is that of a reasonable man, if engaged as a professional the degree is that of a reasonable competent professional.
4. **Respect for principal's title or estoppel:** The agent must respect the principal's title to any property he holds on the principal's behalf. He cannot deny that the principal has title thereto. However if a 3rd party has a better title and the agent issued, he is entitled to plead **jus tertii** (the other person has a better title).
5. **Account:** The agent is bound to explain to the principal the application of money or goods that come into his hands during the relationship. The account must be complete and honest.
6. **Personal Performance or non-delegation:** The agent must perform the undertaking personally as this is consistent with the maxim "Delegates must not delegate". If an agent delegates in violation of this principle, the principal is liable for any loss or liability arising. However, this maxim is subject to various exceptions where the delegates can delegate:

   i. Where it is authorized by the contract between the parties.
   ii. Where it is authorized by law.
   iii. Where it is authorized by trade usage or customs.
   iv. Where it is effected with the principal's knowledge.
   v. Where it is reasonably necessary for performance.
   vi. Where special skill is required.
   vii. Incase of an emergency.

7. **Bonafide:** As a fiduciary, an agent is bound to act in good faith for the benefit of the principal. His actions must be guided by the principle of utmost fairness.
8. **Keep the principal informed:** The agent must ensure that the principal is well aware of the transactions entered into.
9. **Secrecy/ Confidentiality:** The agent must not disclose his dealings with the principal to 3rd parties without the principal's consent.
10. **Separate Accounts:** The agent must maintain separate accounts of his money or assets and those of his principal. This is necessary for accountancy purposes.
11. **Disclosure:** The agent is bound to disclose any personal interest in contracts made on behalf of the principal. He must disclose any secret profit made, failing which he is bound to account the same to the principal. The phrase "secret profit" refers to any financial advantage enjoyed by a fiduciary(agent) over and above his entitlement by way of remuneration e.g. bribe, secret commission or a benefit accruing from the use of information obtained in the course of employment. An agent may retain a secret

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profit if he discloses the same to the principal. If an agent makes a secret profit without disclosure, the principal is entitled to:

i. Refuse to remunerate the agent for services rendered.
ii. Sue for the secret profit under an action for money had and received.

QUESTION THREE

May 2005, Question 8

Explain the circumstances under which an agent may be held personally liable for contracts made on behalf of his principal. (10 marks)

1. If the agent has expressly or impliedly consented to personal liability.
2. If the principal does not exist or has no capacity to contract.
3. If the agent had represented or held himself out as the principal.
4. If the agent has exceeded his authority i.e. breach of warranty or authority.
5. If the agent has executed a document ordered in his name.
6. If the agent signs a negotiable instrument in his own name.

QUESTION FOUR

November 2004, Question 7

a) Distinguish between a special agent and a general agent. (4 marks)

General Agent: He is an agent engaged to perform a particular on behalf of the principal in theordinary course of his business, trade or profession as an agent.

Special Agent: This is an agent where authority is restricted to the performance of a particularact not being in the ordinary course of his business, trade or profession. Both types derive their authority from the terms of appointment.

b) Ratification is where the principal adopts an unauthorized act of his agent as his own. What are the conditions which must be fulfilled for the ratification to be effective?

(8 marks)

For agency by ratification to arise, the following conditions are necessary;

1. The agent must have purported to act for a principal.
2. The agent must have had a competent principal i.e. There was a natural or juristic person who could have become the principal
3. The principal must have had capacity to enter into the transaction when the agent did as well as when the agent did as well as when he ratifies
4. The transaction entered into by the agent must be capable of ratification i.e. it must not have been illegal or void
5. The principal must ratify the transaction within a reasonable time.
6. The principal must have been aware of the material facts affecting the transaction
7. The principal must ratify the contract in it's entirely.

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c) What are the duties of a principal towards the agent? (8 marks)

DUTIES OF THE PRINCIPAL

1. **Remuneration:** It is the duty of the principal to remunerate the agent for the servicesrendered. This duty may be express or implied. The agent must earn his remuneration by performing the undertaking. However, it is immaterial that the principal has not benefited from the performance. However the principal is not bound to remunerate the agent if:
   a. He has acted negligently.
   b. He has acted in breach of the terms of the contract.
   c. He has made a secret profit without disclosure.

2. **Indemnity:** It is the duty of the principal to compensate the agent for loss or liabilityarising. However, the principal is only liable for loss or liability arising while the agent was acting within the scope of his authority.

CHAPTER TEN

QUESTION ONE

May 2000, Question 6

a) Explain 5 implied conditions and warranties in a Hire Purchase Agreement. (10 marks) Implied Terms

The Hire Purchase Act implies both conditions and warranties in all Hire Purchase Agreements.

CONDITIONS

1. **Right to sell**: Under Section 8 (1) (a) of the Act, there is an implied condition that theowner will have the right to sell the goods when the property is to pass.
2. **Merchantable Quality:** Under Section 8(1) (d) of the Act, unless the goods are secondhand and the agreement so provides. There is an implied condition that they would be of merchantable quality.
3. **Fitness for Purpose**-Under sec8(2) of the act ,where the hirer expressly or by implicationmakes known to the owner the particular purpose for which the goods are acquired , there is an implied condition that the goods would be reasonably fit for the purpose.
4. A condition may be implied by any other law.

WARRANTIES

1. **Quite Possession** – Under Section 8 (1) (b) of the Act, there is an implied warranteethat the hirer will have and enjoy quite possession of the goods.
2. **Free from charge or encumbrance-** Under Section 8(1) (c) of the Act, there is animplied Warranty that the goods shall be free from any charge or encumbrance in favour of the third party when property is to pass.

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3. A warranty may be implied by other law.

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b) Explain how a hire purchase agreement differs from;

i) A Credit Sale Agreement. (6 marks)

CREDIT SALE

This is a contract of sale of goods whereby the purchase price is payable by 5 or more installments. Property in the goods passes to the buyer when the 1st installment is paid. It differs from a Hire Purchase Agreement in that:-

1. It is a contract of Sale
2. Property in the goods passes to the buyer when the 1st installment is paid.

ii) A Conditional Sale Agreement. (4 marks)

CONDITIONAL SALE

This is a contract of sale of goods, whereby, whereby part of the purchase price is payable by installments. Property in the goods pass the buyer when the condition(s) subject to which the sale is made is fulfilled.

QUESTION TWO

November 2003, Question 7

a) Distinguish between the seller's right of lien and the right of stoppage in transit. (8 marks)

Unpaid Sellers Lien

This is the right of unpaid seller in position of the buyer's goods to retain them as a security for the price. The lieu is possess in nature and is depended on possession which must be lawful and continuous.

It is particular since the seller can only retain the goods for which payment is due.

Under Section 41 of the Act, the unpaid seller's lien is exercisable in the following circumstances:-

i. Where goods have not been sold on credit.
ii. Where goods have been sold on credit but the term of credit has expired.
iii. If the buyer becomes insolvent.

Loss of Lien

The unpaid seller losses the right to retain the buyer's goods in the following ways:-

i. By waiver thereof
ii. If the buyer or his agent obtain lawful possession of the goods.
iii. If the seller delivers the goods to a common Carrier for transmission to the buyer without reserving the right of disposal.
iv. Payment for goods.

An unpaid seller is entitled to exercise a lieu on the buyers goods in his possession even if the has made part delivery and the goods may be in his possession or that of his agent.

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Stoppage in Transit

This is the right of unpaid seller who has already parted with possession of the goods to resume the same as long as the goods are still in the course of transit other buyer. The exercise of this right enables the seller to resume possession of the goods. The rights are exercisable by the seller only if the buyer becomes insolvent.

Under sec. 45(1) of the Act, goods are deemed to be in the cause of transit from the time they are delivered to a common carrier to such a time as the buyer or his agent obtain possession.

Under Sec. 4(11) of the Act, the right of stoppage in transit may be exercised in any of the following. Ways:-

i. Taking actual possession of the goods
ii. Giving notice of the sellers claim to the party in possession. Such notice may be given to the person in possession or his employer.

Loss of the Right of Stoppage

The seller right of stoppage in transition will be defeated or is lost when transit ends. Transit ends if:-

a) The buyer or his agent intercepts the goods before arrival at the agreed destination
b) Upon arrival the carrier notifies the buyer or his agents that he holds the goods on his behalf.
c) The carrier wrongfully neglects or refuses to deliver the goods to the buyer or his agents.

b) Explain the legal consequences of non-registration of a hire purchase agreement. (4 marks)

EFFECTS OF NON-REGISTRATION

Under Section 5(4) of the Act, if a Hire Purchase Agreement is not registered;-

1. The agreement cannot be enforce by any person against the Hirer.
2. Any contract of guarantee made in relation to the Hire Purchase Agreement also enforceable.
3. The owner cannot enforce the right to repossess the goods from the Hirer.
4. Any security given by the Hirer under the Hire Purchase Authority or by the guarantor under the contract of guarantee is unenforceable.

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QUESTION THREE

November 2001, Question 2

a) Under Section 7 of the Hire Purchase Act Cap 507, Laws of Kenya, certain provisions are deemed void if contained in a Hire Purchase Agreement.

Identify and explain 5 such provisions. (5 marks)

1. A provision which authorizes the owner or any person acting on his behalf to enter upon any premises for purposes of taking possession of goods let under a hire purchase agreement.
2. A provision which relieves the owner from liability for such entry.
3. A provision which restricts or denies the hirer the right to terminate the hire purchase agreement.
4. A provision which imposes greater liability upon the hire for terminating the hire purchase agreement than is imposed by Section 12 (1) of the Act.
5. A provision to the effect that any person acting on behalf of the owner in relation to the formation or conclusion of the hire purchase agreement is deemed to be the agent of the hirer.
6. A provision which relieves the owner from liability for acts or defaults of any person acting on his behalf in connection with the formation or conclusion of a hire purchase agreement.

CHAPTER ELEVEN

QUESTION ONE

November 2007, Question 3

a) Explain the meaning and significance of the principle of double insurance. (6 marks)

DOUBLE INSURANCE

This is a situation whereby a party takes out more than one policy on the same subject matter and risk with different insurers but where the total sum insured exceeds the value of the subject matter.

b) Outline the consequences of non-disclosure of material facts in a contract of insurance. (8 marks)

NON-DISCLOSURE / UTMOST GOOD FAITH

The duty to disclose exists throughout the negotiation period. It generally comes to an end when the proposal form is accepted. It was so held in *Lishman v. Northern Marine Insurance Co.*

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EFFECT OF NON-DISCLOSURE

The non-disclosure of a material fact by either partly renders the contract voidable at the optionof the innocent party.

In *London Assurance Company V. Mansel (1879)* which responding to a question in the proposal form, the proposer started that no other insurer had declined to take his risk, in fact 2 companies had previously declined to insure him.

Subsequently, the insurer sought to avoid the contract on the ground of non-disclosure of a material fact .It was held that the contract on the ground of non-disclosure of a material fact.

It was held that the contract was voidable at the option of the insurer for the concealment of material fact.

A similar holding was made in *Horne V.Poland (1922)*

Although the contract of insurance is one of the utmost good faith.

Certain matters need not be disclosed e.g.:

1. Provision and proposition of law
2. Unknown facts as was the case in *Joel v. Law Union* and crown Insurance Company
3. Facts known by other party
4. Matters of public notoriety as was the case in *Bates v. Hemitt.*

QUESTION TWO

May 2001, Question 8

a) In relation to the law governing insurance, explain 5 basic principles of insurance. (10 marks)

1. NON-DISCLOSURE / UTMOST GOOD FAITH.

The duty to disclose exists throughout the negotiation period. It generally comes to an end when the proposal form is accepted. It was so held in *Lishman V. Northern Marine Insurance Co.*

EFFECT OF NON-DISCLOSURE

The non-disclosure of a material fact by either partly renders the contract voidable at the optionof the innocent party .In *London Assurance Company V. Mansel(1879)* which responding to a question in the proposal form ,the proposer started that no other insurer had declined to take his risk ,in fact 2 companies had previously declined to insure him .Subsequently ,the insurer sought to avoid the contract on the ground of non-disclosure of a material fact .It was held that the contract on the ground of non-disclosure of a material fact.

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2. INDEMNITY

This principle means that when loss occurs, it is the duty of the insurer to restore the insured to the position he was before the loss .The insurer must so far as money can do put the insured to the position he was before the loss.Idemnity means that there should be no more or no less than *Restitutio in integrum*

Indemnity is a basic principle in property insurance; it has its justifications in equity in that in its absence the insured is likely to benefit from the contract.

In the words of Brett L.J in *Castellain v Preston,* the insured is to be fully indemnified but is never to be more than fully identified. The principle of indemnity ensures that the insured, it is he duty of the insurer to ascertain whether there are circumstances which reduce, diminish or extinguish the loss as they have a similar effect on the amount payable by the insurer for the loss. E.g. if the tort reason makes good the loss, the insure is not liable to indemnify the insured as was the case in *Darell V. Tibbitts,* where a house was destroyed by fire through in the tenants negligence but the tenant made good the loss. It was held that the insurer was not liable under the policy.

The principle of indemnity is give effect by the subordinate principles e.g.: Subrogation, Salvage, re-instatement, contribution and appointment etc.

3. SUBROGATION

This means that after the insurer has indemnified the insured he steps into the shoes of the insured in relation to the subject matter.

It means that after indemnity the insurer becomes entitled to all the legal and equitable rights respect the subject matter previously exercisable by the insured.

Subrogation facilitates indemnity by ensuring that the insured does not benefit from the contract.
It is an inherent and latent characteristic of the contract of indemnity but becomes operative after full indemnity. The insurer cannot under subrogate rights recover more than the amount payable as indemnity r was the case in *Yorkshire Insurance company Ltd. v Nisbett Shipping Co.*

4. SALVAGE

This is the recovery by the insurer of the remains of the subject matter after indemnity. It is part of subrogation and facilities indemnity. It is justified on the premise that the amount paid by the insurer as indemnity includes the value of the remains.

5. RE-INSTATEMENT

This is the repair opt replacement f the subject matter in circumstances in which it may re-instated. Most indemnity policies confer upon the insurer an option to pay full indemnity or re-instate the subject matter.

The insurer must exercise his option within a reasonable time of notification of loss and is bound by his option. If the insurer opts to re-instate, the subject matter must be re-instated to the satisfaction of the insured.

Any loss or liability arising in the course of re-instatement is borne by the insurer. The economic effect of re-instatement is to benefit the insurer by ensuring that he only pays full indemnity where the re-instatement is not possible.

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6. DOUBLE INSURANCE

This is a situation whereby a party takes out more than one policy on the same subject matter and risk with different insurers but where the total sum insured exceeds the value of the subject matter.

7. CONTRIBUTION AND APPORTION

If an insured has taken out more that one policy on the same subject matter and risk with different insurers and loss occurs, the twin principle of contribution and appointment apply:-

i. If the insured claims from all the companies at the same time, they apportion the loss between themselves on the basis of the sums insured. Each insurer bears part of the loss. This is the "**<u>Principle of Apportionment"</u>**
ii. If one of the insurers makes good the liability to the insured, such insurer is entitled to recover the excess payment from the other insurers. This is the "**<u>Principle ofContribution".</u>**This principle is to the effect that an insurer who has paid more that hislawful share of the loss is entitled to receive the excess from the other insurer.

The principle of contribution is equitable. An insurer is only entitled to contribution if the following conditions exist;

i. There must have been more than one policy on the same subject matter and risk.
ii. The policies must have been taken out by or on behalf of the same person
iii. The policies must have been issued by different insurers
iv. The policies must have been in force when loss occurs
v. All the policies must have exempted itself from contribution
vi. None of the policies must have exempted itself from contribution.

The twin principle of contribution and apportionment facilitate indemnity.

8. ABANDONMENT

This is the surrender by the insured of the remains of the subject matter for full indemnity. It entails the giving up the <u>res</u> to the insurer for indemnity. This principle has its widest application in Marine Insurance but generally applies in case of:-

1. Partial Loss
2. Constructive total loss.

The insured must notify the insurer his intention to abandonment the subject matter. However, it is for the insurer to determine whether or not abandonment is applicable. If the insurer opts to pay full indemnity. It signifies the sufficiency of the insured's notice and it is an admission of liability. The insurer becomes entitled to the remains of the subject matter.

9. PROXIMATE CAUSE ((Causa Proxima non remota Spectatur)

An insurer is only liable where loss is proximately cause by an insured risk and not liable where the risk is excepted. The principle of proximate cause protects the insurer from liability. Under this principle, the proximate and not the remote cause is to be looked to.

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The proximate cause of an event is the cause to which the event is attributable, It is the cause which is more dominant direct, operative and efficient in giving rise to the event.

Courts have not developed any technical test of ascertaining what the proximate cause of an event is. They rely on common place common place tests of the reasonable man n that among completing causes, one must be more dominant that the rest. The proximate cause need not be the last on the chain but must be the must operative in occasioning the loss.

10. AVERAGE CLAUSE

This is a clause in an insurance policy to the effect that if the subject matter is under insured and partial loss occurs, the insurer is only liable for a proportion of the loss and where loss is minimal the insurer liability is extinguished. This clause ensures that subject matter is insured at its correct value.

QUESTION THREE

December 2000, Question 8

a) "A contract of insurance is a contract of "*Uberrimae fidei*" (utmost good faith)". Explain this statement. (6 marks)

The contract of insurance is the **locus classicus** illustration of the so called Contracts Uberrimae fidei i.e. utmost good faith.

Non-disclosure / utmost good faith

The duty to disclose exists throughout the negotiation period. It generally comes to an end when the proposal form is accepted. It was so held in *Lishman v Northern Marine Insurance Co.*

EFFECT OF NON-DISCLOSURE

The non-disclosure of a material fact by either partly renders the contract voidable at the optionof the innocent party .In *London Assurance Company v Mansel (1879)* which responding to a question in the proposal form ,the proposer started that no other insurer had declined to take his risk ,in fact 2 companies had previously declined to insure him .Subsequently ,the insurer sought to avoid the contract on the ground of non-disclosure of a material fact .It was held that the contract on the ground of non-disclosure of a material fact.

It was held that the contract was voidable at the option of the insurer for the concealment of material fact .A similar holding was made in *Horne v Poland (1922)*

Although the contract of insurance is one of the utmost good faith.

Certain matters need not be disclosed e.g.:

1. Provision and proposition of law
2. Unknown facts as was the case in *Joel v Law Union* and crown Insurance Company
3. Facts known by other party

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CHAPTER TWELVE

QUESTION ONE

July 2000 – Pilot Paper, Question 7

a) In relation to the Law governing Negotiable Instruments, explain 4 types of endorsements that may be made on a bill of exchange. (8 marks)

TYPES OF ENDORSEMENTS

Blank: This endorsement which does not specify the endorsee. It converts an order to a bearerbill.

Special: This is an endorsement which specifies the person to whom or to whose order, the billpayable.

Conditional: This is an endorsement which either exempts the endorser from liability if the billis dishonored or makes payment of the bill subject to a specified condition.

Restrictive: This is an endorsement which prohibits further negation of the bill. It constitutes theendorsee, the payee who cannot negotiate the bill.

QUESTION TWO

May 2006, Question 6

a) Explain the meaning of the term "holder" in relation to a bill of exchange and outline the duties of a holder of a bill of exchange. (10 marks)

RIGHTS OF A HOLDER OF A BILL

a) A bona fide holder acquires a defect-free title
b) Right to sue on it in his own names
c) Right to negotiate the bill unless the lost endorsement is restrictive.

DUTIES OF THE HOLDER

a) It is the duty of the drawer to present the bill to the drawee for accepts
b) It is the duty of the payee to represent the bill to the bill the acceptor for payment.
c) In the event of the dishonour f a bill, it is the duty of the payee:-
   i. To notify the party the fact of dishonour
   ii. To have the bill noted and / or professional

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QUESTION THREE

May 2003, Question 7

a) Outline the ways in which a Bill of Exchange may be discharged. (6 marks)

DISCHARGE OF A BILL

A bill of exchange is said to be discharged when all rights of action on it are extinguish.

However, a party may still be held liable on it depending on the method of discharge.

A bill may be discharged in any of the following ways:-

1. **Payment in due course**: If the bill is paid by or on behalf of the acceptor at o raftermaturity, it is discharged and parties freed.
2. **Acceptor the holder at maturity (Merger):** If the acceptor of a bill becomes the payeeof right, at or after maturity, the bill is discharged.
3. **Renunciation or waiver:** Under sec.6 (1) of the Act, if the holder of a bill at or aftermajority unconditionally and absolutely renounces his right against the acceptor, the bill is discharged. The remuneration must be written or the bill must be presented to the acceptor.
4. **Cancellation:** Under sec. 63 (1) of the Act, if a bill is intentionally cancelled by thepayee or his agent, and the cancellation is apparent thereon, the bill is discharged. An unintentional cancellation does not discharge a bill.
5. **Material Alteration:** Under Sec. 64(1) of the Act, a material attention of a bill dischargesall the parties not privy to the alteration. Under sec. 64 (2) material alteration comprises a change in amount payable, time of payment, date place of payment.
6. **Non-presentation:** Under sec. 45(1) of the Act, the presentation of a bill for asprescribed by law discharges the drawer and endorsers.

b) Outline the characteristics of a promissory note. (6 marks)

CHARACTERISTIC/ELEMENTS/ESSENTIAL OF THE DEFINITION

1. It is an unconditional written promise made by a person to another
2. It must be signed by the maker
3. It contains on engagement to pay a sum certain in money.
4. The sum is payable an demand or at a fixed or determinable future time.
5. The sum is payable to a specified person his order or the bearer

c) Explain the various forms of a qualified acceptance of a bill of exchange. (8 marks)

Qualified Acceptance: This acceptance whereby the drawee modifies or varies the bill invarious ways:-

a) **Conditional:** Where the drawee specifies a condition subject to which the bill ispayable.
b) **Partial:** The drawee accepts to pay part of the sum.
c) **Local:** The drawee accepts to pay the bill at a specified place.
d) **Time:** The drawee changes the time of payment
e) Acceptance by some but not all drawers.

The drawer is not bound to accept a qualified acceptance. However, if he does, he is bound by its items. If he rejects the acceptance, the amount becomes payable.

Once a bill is accepted, it becomes a proper bill, capable of being disconnected or negotiated.

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CHAPTER THIRTEEN

QUESTION ONE

December 2005 Question 8

a) In relation to the law of property

i) Enumerate the characteristics of a joint tenancy

It is a situation where property is owned by two or more persons. Joint tenancy is characterized by the four unities

i. Unity of title- all the person derive titles from the same title
ii. Unity of possession- all the persons are entitled to each and every part of the land I.e. they have a similar right to use the land
iii. Unity of interest- all the owners hold interests of a similar nature
iv. Unity of time- the interest of the owners must rest at the same time

Joint proprietorship is characterized by the principle of *Jus accressendi*i.e. the right of survivorship. It means that when one proprietor or owner dies his interest vests in the survivors. The deceased's interest in the property cannot be disposed off by will or intestacy.

At common law if the joint owners or proprietors die together the younger is deemed to have survived the older.

ii) State the various ways in which a lease agreement may be determined

(a) By Notice

This method is applicable where

(1) The tenancy does not prescribe a date for termination or
(2) Either party intends to terminate the lease before the agreed period. In the case of periodic tenancy, the length of notice is one half the duration.

The notice must be appropriate and sufficient to manifest intention to terminate the lease. The notice may be given to the landlord or his agent or through registered post.

The notice must relate to the entire premise demised. The lease determines on the expiration of the notice.

(b) Expiration (lapse of) or effluxion of time.

All fixed term leases generally terminate upon expiration of such time. Under Section 64 (1) (a) of the Registered Land Act, a lease determines "where the period of a lease has expired."

(c) Forfeiture

This is the right of the landlord or lessor, in the event of certain breaches, to re-enter the demised premises and thus prematurely terminate the lease.

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The right is only exercisable:

1. Pursuant to a forfeiture clause. Generally, leases contain clause specifying the breaches for which the landlord may re-enter the premises.
2. Pursuant to statutory, in the absence of an express stipulation.

Under section 56 (1) of the Registered Land Act and Section 111 (g) of the ITPA the right is exercisable if the lessee:

i. Commits any breach of: or omits to perform an express or implied condition.
ii. Is adjudicated bankrupt
iii. Being a company goes into liquidation
iv. Becomes insolvent

Written notice of forfeiture must be given. Such notice must specify the breach and the remedy required. Under the Registered Land Act, the right of forfeiture is only exercisable if the tenant fails to make money compensation.

However, a landlord entitled to forfeit the lease is deemed to have waived his right to do so by:

i. Acceptance of rent which has become due since the forfeiture
ii. Distress for rent
iii. Any other act showing intention to treat the lease as subsisting.

The right is exercisable by either:

i. Peaceable entry if the premises is empty
ii. An action for ejectment.

The effect of forfeiture of a lease is to determine every sub-lease and every other interest appearing in the register relating to the lease.

<u>(d)Surrender:</u>This is the giving up by the tenant to the landlord of his interest in the premises.Express surrender is effective. The surrender must be made in a prescribed form executed by the tenant. Surrender may be implied where the tenant gives up possession and the landlord assumes possession in circumstances which show that the relationship has been terminated.

(e) <u>Merger;</u>Under Section 111 (d) of the ITPA, a lease of immovable property determines inthe case of interests of the lease and the lessor in the whole of the property become vested at the same time in one person in the same right. Under Section 44 of the Registered Land Act, mergers must be express.

(f) <u>Conversion:</u>A lease determines if the lessee converts the lease to some other interest, e.g.freehold by due compliance with tile law.

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b) Distinguish between the following

i) Real property and personal property

Real property signifies interest in land, immovable, traditionally could be restored to the owner

Personal property: this is personality or movables sometimes said to be chattels or chattels real. Traditionally not recoverable if dispossessed

ii) Legal interests and equitable interests

Legal interest is a right to over the land of another e.g. easement, legal mortgage

It is an interest which is capable of subsisting or being conveyed or created at law it is enforceable against everyone

Equitable interest this is an interest recognized only by equity only and enforceable against all others except a *bona fide* purchaser of a legal interest without notice of the equitable interest, examples include restrictive covenants.

QUESTION TWO

a) Describe the various ways in which co- ownership in property may be terminated

i. Partition of the land concerned
ii. Transfer to a third party
iii. Union in sole tenant becomes vested in one person
iv. Severance i.e. conversion of a joint tenancy to a tenancy in common

b) Explain the characteristics of easements

i. There must be a dominant and servient tenement
ii. The easement must accommodate the dominant tenement
iii. The dominant and servient tenements must be owned or occupied by different persons
iv. The easement must be capable of forming the subject matter of the grant e.g. there must be a capable grantor or grantee.

c) Advice Wamalwa

The problem is based on the ways in which a landlord and a tenant may terminate a lease

i. Lapse of time: wait for effluxion of the duration prescribed
ii. Forfeiture: Wamalwa is entitled to re-enter the premises to determine the lease prematurely by reason of Karanja's breach.

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QUESTION THREE

In relation to law of property

a) Distinguish between ownership and

possession Ownership

i. Confers certain basic rights over the property for example rights to exclusive use, possession, misuse and disposition
ii. The proprietor may part with possession by choice
iii. It is a question of law

Possession

i. This is the mere fact of holding or controlling the property
ii. It does not generally confer proprietary rights
iii. It is a question of fact

b) Explain the ways in which ownership may be acquired

1. Asserting ownership over things not previously owned by any other person
2. Adverse possession
3. Purchase from a previous owner
4. Without the owner's consent e.g. by court order
5. Inheritance
6. Intestacy

c) Distinguish choses in action from choses in possession and give examples of each

Chose in action

i. These are intangible rights which can only be enforced by a court order
ii. They are not capable of physical possession

Chose in possession

These are tangible things or subject matter capable of physical possession e.g. land, motor vehicles e.t.c.

QUESTION FOUR

a) In relation to the law of property summarize the implied covenants by a landlord in a lease agreement

1. To put the tenant into possession
2. Not to derogate form grant
3. Ensure the premises are fit for the purpose for which it is let
4. Ensure quiet possession by the tenant
5. Maintain the main walls passages and roof e.t.c(duty to repair)
6. To suspend or adjust rent if the premises or part thereof is rendered unusable or other wise by reason of the tenant's negligence

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b) A lease agreement usually contains implied terms on the part of the lessor and lessee. State the terms implied on the part of the lessee

Terms implied on the part of the lessee include;

1. Duty to pay the rent reserved
2. Duty to pay rates and taxes
3. Duty not to commit waste
4. Duty not to transfer, change, sub-let or part with possession.
5. Duty to permit the Landlord view the condition of premises
6. Duty to make reparation for any breach
7. Duty to make material disclosures
8. Duty not to erect fixtures
9. Duty to put the landlord in possession

c) Advise Wambura

A tenancy relationship may be brought to an end or terminates in the following ways:

(a) By Notice

This method is applicable where

(1) The tenancy does not prescribe a date for termination or
(2) Either party intends to terminate the lease before the agreed period. In the case of periodic tenancy, the length of notice is one half the duration.

The notice must be appropriate and sufficient to manifest intention to terminate the lease. The notice may be given to the landlord or his agent or through registered post.

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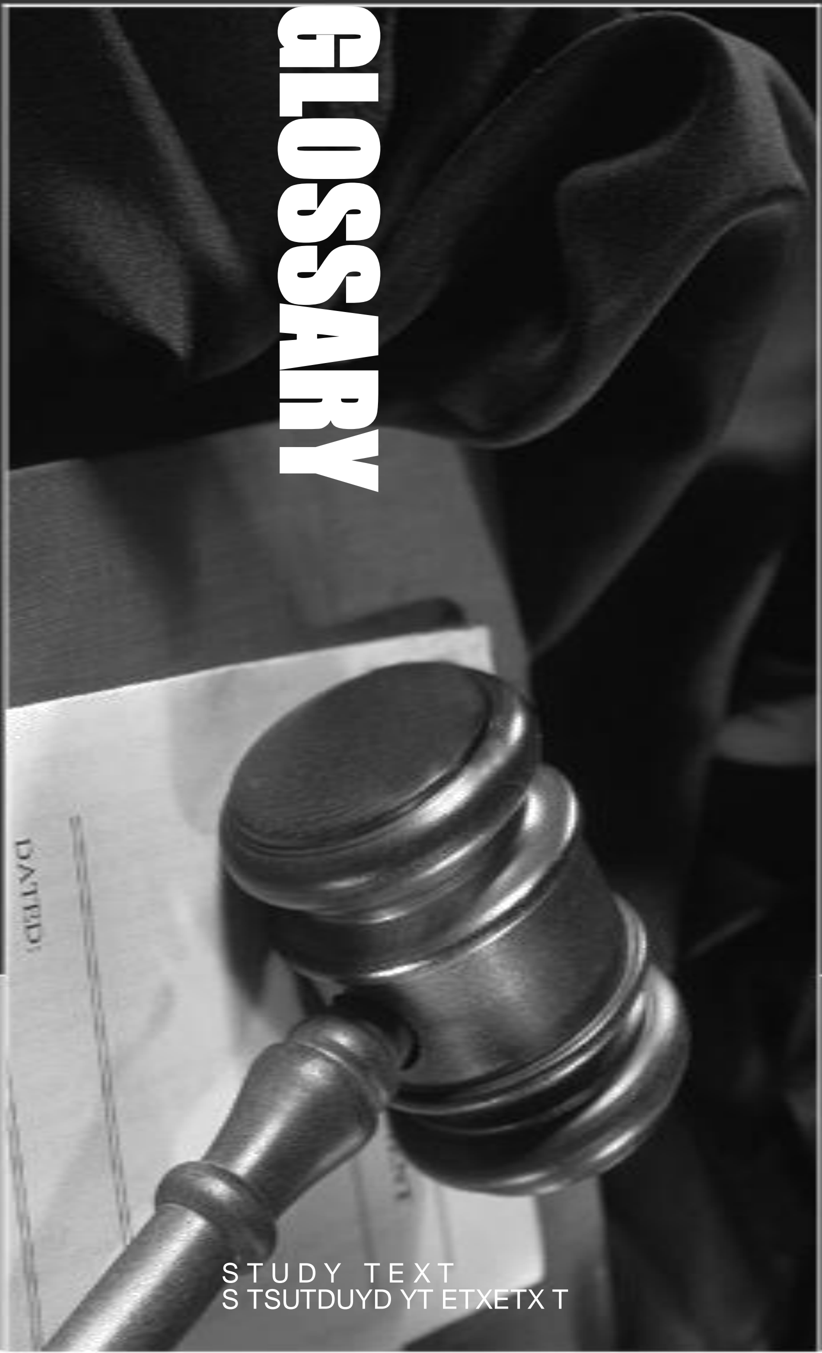

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GLOSSARY

- **Accused:** a suspect is charged with a crime
- **Anarchy**: Refers to a condition of lawlessness
- **Appeal**: A case that has previously been heard by another court or tribunal
- **Arbitration**: This is an out of court method of settlement of civil disputes by arbitral tribunalswhich make 'arbitral awards' as opposed to judgment.
- **Bailee:** A person who takes possession of goods on bailment
- **Bailor:** A person who owns goods and takes them for bailment
- **Bill**: A draft law or legislation.
- **Binding Precedent:** This is an earlier precedent which binds the court before which it isrelied upon e.g. a precedent set by the Court of Appeal is binding on the High Court.
- **Cause of action**:When a person's civil or private rights are violated
- **Certiorari: P**roduction of certified copies of the proceedings and decisions for purposes of quashing the decision
- **Common law**: a branch of the law of England which was developed from customs, usages and practices of the English people
- **Constitutionalism**: The theory of limited government
- **Corporations:**an association of persons recognized as a legal entity.
- **Declaratory Precedent:** This is an application of an existing principle of law in a subsequent similar case
- **Defendant:** A person who is alleged to have committed a wrong or one against whom a cause of action is brought.
- **Delegated legislation**: - law made by parliament indirectly
- **Discounting**:receipt of the amount of the bill from a bank or financial institution less the discount for the unexpired duration
- **Dishonour**: Payment is refused
- **Distinguishing precedent:** this is a subsequent decision of a court which effectively distinguishes the earlier precedents. It is a precedent in its own right
- **Domicile:**This is the country in which a person has or is deemed by law to have a permanent home**.**

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- **Drawee**: the person to whom the bill is draw
- **Drawer:** the person who draws the bill demanding payment
- **Duress**: actual violence or threats
- **Endorsement**: This is the signing or executing a bill by a party for the purpose of negotiatingit to another
- ***Ex-gratia*** Sum: - free-sum
- ***In futuro***:in future
- **Jurisdiction**: refers to the power of a court to hear a particular case
- **Jurisprudence:** The study of the nature of Law
- **Law**: is a body of rules or principles recognized and applied by the state in the administrationof justice.
- **Limited Liability:**Members cannot be called upon to contribute to the assets of thecorporation beyond a specified sum.
- **Mandamus:** The order compels performance by such bodies where it is unlawfully refused or delayed.
- **Morality**: it is a sense of judgment between right and wrong by reference to certain standards developed by society over time
- **Nationality:** This is the legal and political relationship between an individual and the state or country
- **Negligence:** Omission to do something which is a reasonable man guided upon those regulations which ordinarily regulate the conduct of human affairs would do or doing something which a reasonable and prudent man would have done.
- **Occupier:** a person who has a sufficient degree of control over premises to put him under a duty of care towards those lawfully upon his premises."
- **Offer**: an unequivocal and clear manifestation by one party of its intention to contract with another.
- **Original Precedents:** This is a principle or proposition of law formulated by the court. It is the law-creating precedent.
- **Persuasive precedent:** This is an earlier decision relied upon in a subsequent case to persuade the court to decide the case in the same manner e.g. a High Court decision used in the Court of Appeal or a decision handed down by a court in another country.
- **Plaintiff:** An aggrieved arty or one who brings a cause of action
- **Precedent:** An earlier decision of a court

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- **Private law:** It consists of those branches of Law in which the state has no direct interest as the state/sovereign.
- **Public law:** It consists of those fields or branches of law in which the state has a direct interest as the sovereign.
- **Right:** An entitlement
- ***Stare decisis***; stand by the decision
- **Trial**: A judicial examination of evidence to decide if a person is guilty of a crime or not.
- **Tribunal**:These are bodies established by Acts of parliament to exercise judicial or quasi-judicial functions.
- **Tort:** It is a civil wrong which gives rise to an action at Common Law for unliquidated damages
- **Tortfeasor:** - A person who commits a tort.
- ***Ultra vires***: Latin term which means beyond powers
- **Unconditional**: Absolute where no conditions are attached as to payment
- **Unwritten law: -**These are rules of law that are not codified or contained in any formal document
- **Written law:** This refers to codified law

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