

BUSINESS LAW

PART 1

CPA SECTION 1

CCP SECTION 1

CS SECTION 1

STUDY TEXT

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TOPIC 1

ELEMENTS OF THE LEGAL SYSTEM

NATURE PURPOSE AND CLASSIFICATION OF LAW

MEANING OF LAW

Law, simply put, refers to the set of rules which guide our conduct in the society and is enforceable by the state via public agencies.

Law in its general sense tends to be as a result of the necessary relations arising from the nature of things. In this sense all things have their laws. Humans, material world, superior beings and even animals all have their own laws. Simply put, the nature of these relationships tends to determine the nature of the laws.

But the intelligent world is far from being so well governed as the physical. This is because intelligent beings are of a finite nature, and consequently liable to error; and on the other, their nature requires them to be free agents. Hence they do not steadily conform to their primitive laws.

Law in general is human reason, inasmuch as it governs all the inhabitants of the earth: the political and civil laws of each nation ought to be only the particular cases in which human reason is applied.

According to the oxford dictionaries law can be defined as; The system of rules which a particular country or community recognizes as regulating the actions of its members and which it may enforce by the imposition of penalties

NATURE OF LAW

The different schools of thought that have arisen are all endeavors 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.

- **Natural law** theory asserts that there are laws that are immanent in nature, to which enacted laws should correspond as closely as possible. This view is frequently summarized by the maxim: an unjust law is not a true law, in which 'unjust' is defined as contrary to natural law.
- **Legal positivism** is the view that the law is defined by the social rules or practices that identify certain norms as laws
- **Legal realism-** it holds that the law should be understood as being determined by the actual practices of courts, law offices, and police stations, rather than as the rules and

doctrines set forth in statutes or learned treatises. It had some affinities with the sociology of law.

- **Legal interpretivism-** is the view that law is not entirely based on social facts, but includes the morally best justification for the institutional facts and practices that we intuitively regard as legal.

Generally speaking law has the following characteristics

1. It is a set of rules.
2. It regulates the human conduct
3. It is created and maintained by the state.
4. It has certain amount of stability, fixity and uniformity.
5. It is backed by coercive authority.
6. Its violation leads to punishment.
7. It is the expression of the will of the people and is generally written down to give it definiteness.
8. It is related to the concept of 'sovereignty' which is the most important element of state.

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
7. 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.

CLASSIFICATION 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.

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

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

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
- The Criminal Procedure Code

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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

Sources identified by the Constitution and the Kadhis Court Act

Islamic law

Sources identified by the Hindu Marriage and Divorce Act¹ and The Succession Act²

Hindu law

Sources of law of Kenya may be classified as:

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

THE CONSTITUTION

A Constitution is a public document, which regulates the relations between the state and its citizens as well as the relations between the organs of the state.

This is a body of the basis rules and principles by which a society has resolved to govern itself or regulate its affairs. It contains the agreed contents at the political system. A Constitution sets out the basic structure of government.

The Constitution of Kenya is a source of law from which all other laws derive their validity. Any law which conflicts or is inconsistent with the Constitution is void.

Article 2 (4) of the Constitution provides " any other law is inconsistent with the Constitution, the Constitution shall prevail and the other law shall be to the extent of the inconsistency, he void".

Any law which is inconsistent can be passed if only the Constitution is first amended by the votes of not less than 65% of all the members of the National Assembly and supported by Presidential assent.

ISSUES ADDRESSED IN THE CONSTITUTION OF KENYA.

The Constitution of Kenya 2010 covers the following matters:

1. That the people of Kenya are the sovereign i.e. all powers are derived from the people
2. The supremacy of the Constitution.
3. The republic. That Kenya is an independent state with an organized government.
4. Bill of rights. It contains the fundamental rights and freedoms
5. Citizenship, i.e. how one acquires and losses citizenship.
6. Leadership and integrity under chapter six of the Constitution i.e. how morals play a central role in leadership.
7. Representation of the people.
8. Separation of powers i.e. how the three organs of the state operate under different heads. This includes; the Legislature, Executive, and the Judiciary.
9. Devolved governments. There is a central and county government.
10. Matters of public finance.
11. Amendment of the Constitution.

Supremacy of the Constitution

- Supremacy of the Constitution is provided for under Article 2.
- All other sources of law derive their validity from the Constitution and are therefore required to be consistent with all provisions of the constitution
- Any source of law if inconsistent with the Constitution is null and void to the extent of its inconsistency.
- Any act or omission in contravention of the Constitution is invalid.
- The Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
- No person may claim or exercise State authority except as authorized under the Constitution.
- The validity or legality of the Constitution is not subject to challenge by or before any court or other state organ.
- The Constitution is also supreme since it outlines the governing structure of a country and defines the various organs of the government.

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ADMINISTRATIVE LAW

MEANING OF 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.

FUNCTIONS OF ADMINISTRATIVE LAW

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

1. **Ministerial functions;** Examples of Ministerial Functions are those functions carried out 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.

2. **Administrative functions:** these are the functions carried out by public officials and public 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.
3. **Legislative functions:** These include the function of making or creating subsidiary legislation. The responsibility of legislative functions is on the respective Ministers". The duty of making by-laws is also the respective ministers.
4. **Judicial functions:** These primarily involve the functions of determining claims or disputes 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 fundamentally judicial 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.

DOCTRINE OF SEPARATION OF POWERS

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.

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THE COURT SYSTEMS

ESTABLISHMENT, STRUCTURE, COMPOSITION AND JURISDICTION OF COURTS

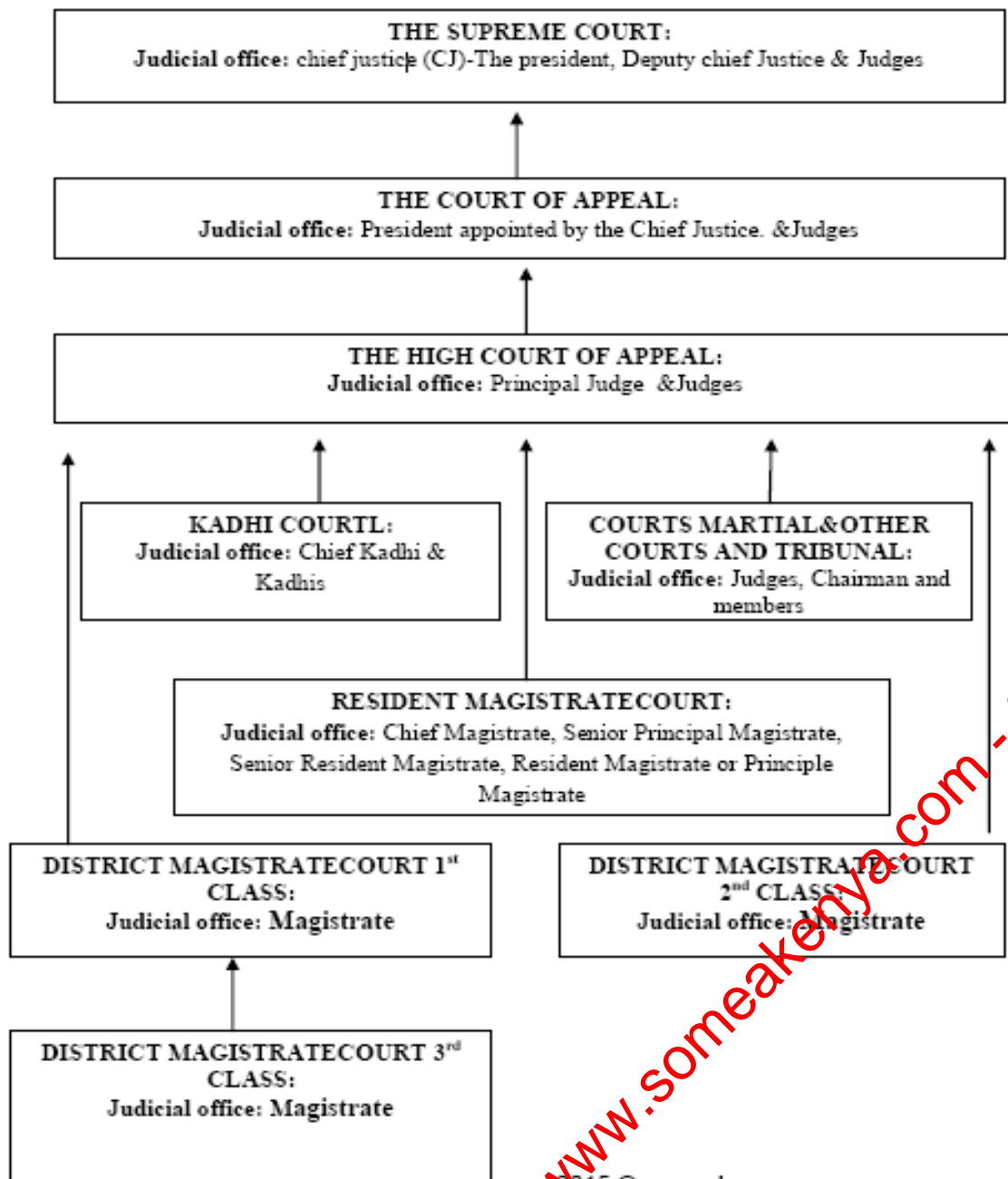
The Courts operate two levels: Superior Courts and Subordinate Courts. The important aspects in the Structure of Courts are:

- i. The structure – The hierarchy or levels of Courts.
- ii. Establishment – The composition or who presides in that Court.
- iii. Jurisdiction – The powers of different Courts to hear and determine disputes.

Jurisdictions are either Geographical / territorial limits of their powers or Functional powers (to hear Original matter, Appellate matter or both matters or subject matter (whether it is civil or criminal justice) or Pecuniary (the range of monetary or financial value of subject matter).

The figure illustrates the structure and explains the hierarch of the Courts as it is today in Kenya.

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The arrow on the figure shows the hierarchy of courts in Kenya. There are two levels of courts Superior Court (consist of Supreme Court, Court of Appeal and High Court) and Subordinate Courts (Resident Magistrate Court, Kadhi Courts, Court Martials, Tribunals, District Magistrate Courts Classes 1st, 2nd and 3rd.) The arrows show flow of appeal from one level to the next. The arrows represent flow of appeals in both civil and criminal appeals except criminal appeals from District Magistrate class III which go to Resident Magistrates courts. District Magistrate courts are situated in all the districts except of District Magistrate Class III which in some sparsely populated Districts especially North Eastern Part of Kenya where their powers have been delegated by the Chief Justice to the District Officers through notices in the

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ALTERNATIVE DISPUTES RESOLUTION

Alternative dispute resolution (ADR) includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. It is a collective term for the ways that parties can settle disputes, with the help of a third party.

GENERAL PRINCIPLES OF ADR

The following principles shall apply in Alternative Dispute Resolution (ADR) implemented for contested cases:

1. **Voluntary**

The parties usually must agree to submit their dispute to mediation or early neutral evaluation. an alj, however, may require parties to attend facilitated workshops, settlement conferences, or meet with a neutral to explore the feasibility of mediation.

2. **Timeliness**

ADR should shorten, not prolong, proceedings. but even if a negotiated settlement takes longer, the result may be more beneficial to all.

3. **Good faith**

Those who engage in adr should do so in an attempt to reach agreement--not to delay or secure tactical advantage.

4. **Confidentiality**

Most ADR processes require confidentiality so that the parties' fundamental interests can be explored.

Benefits and disadvantages

ADR has several advantages over litigation:

- Suitable for multi-party disputes
- Lower costs
- Likelihood and speed of settlements
- Flexibility of process
- Parties' control of process
- Parties' choice of forum
- Practical solutions
- Wider range of issues can be considered
- Shared future interests may be protected
- Confidentiality
- Risk management

However, ADR less suitable than litigation when there is:

- A need for precedent
- A need for court orders
- A need for interim orders
- A need for evidential rules

- A need for enforcement
- Power imbalance between parties
- Quasi-criminal allegations
- Complexity in the case

There are three main types of dispute resolution currently in use:

1. Arbitration
2. Mediation
3. Negotiation

Advantages of resolving commercial disputes

- a) Resolving a commercial dispute provides an opportunity to:
- b) Remedy an unwanted commercial situation
- c) Present your side of the argument
- d) Remedy an injustice
- e) Learn lessons about the way your business is run
- f) Appear strong, principled and magnanimous.

Disadvantages of resolving commercial disputes

There are few drawbacks to actually resolving disputes, but during the process some or all of the following problems might arise:

- a) Financial expense
- b) Increased stress and pressure
- c) Senior executives' time being taken up by the dispute
- d) Bad publicity

Options for resolving your dispute

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 Act². 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.

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TOPIC 2

LAW OF PERSONS

Introduction

A person is defined as an entity or being which is recognized by law as having certain defined rights and obligations. Such an entity or being is said to be a legal person. Legal persons are divided into two namely;

- a) Artificial persons
- b) Natural persons

An entity which is recognized as a person is said to have a legal personality. i.e. it has attributes which are recognized by law as constituting a person. Examples include human beings (natural persons) and corporations (artificial persons). These have legal personality to the extent that they each have their own rights and obligations recognized by law

NATURAL PERSONS

Discussed below are the provisions of the law of persons on various natural persons.

(a) Minors

A minor is also known as an infant. He is a person who is below the age of majority. A person who has attained the age of majority is a major or an adult. The Age of Majority Act (Cap 33) provides that a person shall be of full age and cease to be under any disability by reason of age on attaining the age of eighteen years.

The infants can sue and be sued in tort. The age of criminal responsibility is at the age of eight years. An infant is not eligible to vote until he has attained the age of eighteen years and whose name appears on the register of voters (Section 43(1). Constitution of Kenya). An infant can own personal property. As regards the immovable property, an infant's name can be entered in the register as the owner of registered land (Section 113(1) of the registered Land Act (Cap 300).

With exception of this right, an infant cannot own immovable property.

Minority is a disability in the sense that there are certain things which a minor cannot do or be made liable for e.g. a minor cannot get a driving license.

Special rules governing the minors in respect of contracts, property, succession, liability in torts and other areas of law, will be dealt with in their respective places in the chapters that follow.

Legitimation

A legitimate child is a child who is born within the wedlock (lawfully married) of the parents. On the other hand, an illegitimate child is a child who is born outside wedlock. Legitimation is the process by which an illegitimate child becomes legitimated. It is brought by the subsequent marriage of the parents of a child who was born illegitimate. Thus, if A and B, being unmarried, beget a child C, C is an illegitimate child; but if A and B subsequently get married, C is said to be legitimated and he thereby becomes a legitimate child.

The Legitimacy Act (Cap 145) provides that an illegitimate child can be legitimated by the subsequent marriage of his parents. Section 5 of this Act provides that an illegitimate person after becoming legitimate is entitled to take any interest:

- a) In the state of an intestate dying after the date of legitimation, or
- b) Under any dispute coming into operation after the date of legitimation; or
- c) By descent under an entailed interest created after the date of legitimation

He is treated as legitimate person as he had been legitimate. There is only one limit to this right i.e, when property devolves on children and the question of seniority arises, a legitimated person is deemed to have been born on the date of his legitimation.

Under the Law of Succession (Cap 160), the term child also includes an illegitimate child. This in effect gives an illegitimate child the same claim on his father's estate as a legitimate child. Under the customary law, an illegitimate child has the same rights as a legitimate child.

Adoption

Adoption is the process by which parental rights are transferred from the natural parents of a child to other persons authorized by law. An infant can be adopted so that the relationship between the child and the adopter is similar to that of the parent and child. The adoption is governed in Kenya by the Adoption Act (Cap 143).

An adoption order has the effect of vesting in the adopter all rights, duties, obligations and liabilities which were previously vested in the parent(s) or guardian(s) of the adopted child. And after adoption, the adopter becomes responsible for the custody, maintenance and education of the adopted child, and he has a right to consent or dissent to the marriage of the adopted child. Indeed, the adopted child is much in the same position as a child born to the adopter in lawful wedlock even in matters of family settlements and inheritance. The infant who is adopted will have also the same rights to the adopter's property as if he were his real child.

A resident magistrate's Court has the jurisdiction to hear and issue adoption orders where all the consents required, have been given and where the adoption case is straight-forward. In other cases, the High Court makes Adoption Orders. Any person aggrieved by the making or refusal of an adoption order can appeal to the Court of Appeal.

Guardianship

An infant's interests are normally protected by his parents. Where an infant has no parent there is need for a guardian to play this role. An infant whose interests are looked after by a guardian is known as a ward. The law relating to the guardianship and custody of infants is contained in the Guardianship of Infants Act (Cap 144).

Section 3 of the Act provides that:

1. On the death of the father of an infant, the mother shall be the guardian of the infant, either alone or jointly with any guardian appointed by the father. When no guardian has been appointed, the court may appoint a guardian to act jointly with the mother.
2. On the death of the mother of an infant, the father shall be the guardian of the infant, either alone or jointly with any guardian appointed by the mother. When no guardian has been appointed, the court may appoint a guardian to act jointly with the father.
3. Where an infant has no parent, no guardian of the person and no other person having parental rights with respect to it, the court, on the application of any person may appoint the applicant to be the guardian of the infant.

The court may remove guardians, if it is deemed to be in the welfare of the infants. The court has the supervisory powers of control over a guardian.

A guardian exercises control over an infant and is responsible for his education, maintenance and welfare. For example, before an infant between the ages of sixteen and eighteen years can marry, the consent of the guardian is required. A guardian has power over the estate and the person. The guardian must have regard to the welfare of his ward.

b) Mentally Disordered Persons

A mentally disordered person is also known as a person of unsound mind. Like a minor, he lacks capacity to do certain things. The insanity affects a person's legal capacity on many ways. The law recognizes that such persons may be exploited or taken advantage of and that some measure of protection is required.

The mental Treatment Act (Cap 248) provides some measure of protection, treatment, care of mentally disordered persons and the custody and the management of the property of such persons.

A mentally disordered person is subject to certain disabilities. These are as under:

- a) He does not have the right to vote.
- b) A marriage contracted by any person of unsound mind is not valid [Matrimonial Causes Act Chapter 152, Section 14(1) (f)].
- c) Insanity is a defense to a prosecution for any crime, although the accused must prove that he was insane at the time the crime was committed.

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TOPIC 3

LAW OF TORT

Introduction

Tort is a civil wrong which according to Sir F. Pollock defined as; an act which causes harm to a determinate person whether intentionally or not, not being a breach of a duty arising out of a person relationship or contract and which is either contrary to the law, or an omission of a specific legal duty, or violation of an absolute right.

1. Prof. P H Winfield, Tortious Liability arises from 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.
2. Sir John Salmond defined Tort as a civil wrong for which the remedy is common law action for unliquidated damages and which is not exclusively the breach of contract or the breach of trust or other merely equitable obligation.

From the definition we can conclude the following characteristics about tort

1. Tort is a private wrong, which infringes the legal right of an individual or specific group of individuals.
2. The person, who commits tort is called "tort-feasor" or "Wrong doer"
3. Tort litigation is compoundable i.e. the plaintiff can withdraw the suit filed by him.
4. Tort is a specie of civil wrong.
5. Tort is other than a breach of contract
6. The remedy in tort is unliquidated damages or other equitable relief to the injured.

Note; Liquidated damages should be distinguished from unliquidated damages.

Liquidated damages- this is a specified amount of compensation. The law is usually clear on what the liable party pays or the parties themselves have already agreed to the compensation

Unliquidated damages- this kind of compensation is unspecified and the court will rely on the nature of the case to determine it.

NATURE OF TORT

This liability arises once there is a breach of duty which is primarily fixed by the law. Generally the plaintiff has to prove that he suffered harm and there was violation of his legal rights. Some actions, however, are actionable per se, i.e, without proof of injury, e.g. trespass to land.

The liability and remedy of a party in torts will depend on the following general principles

1. Damnum sine injuria (harm without legal injury)

This basically means the *causing of damage without the violation of a legal right*. Such a case is not a valid claim in the court of law. The fact that the man is injured by another man's act does not by itself constitute a cause of action; this may be even if the injury-causing act is intentional or deliberate. A violation of the legal right is required in order for a valid cause of legal action to exist.

In *mogul steamship company v. mc Gregory gow and company*, where a number of steamship companies conspired and drove another tea-carrier company out of business by offering lesser rates. Even though the plaintiff was financially injured, the House of Lords ruled that the other companies were entitled to indulge in such competitive practices and therefore there was no cause of action.

2. injuria sine dumno

This refers to a situation where one suffers a violation of his legal rights without actual injury or damage, e.g. trespass to land

In such instance the person is entitled to remedy.

In, *Ashbay Vs. White*, the defendant, a returning officer at a voting booth, wrongfully refused to register a duly tendered vote of the plaintiff, who was a qualified voter. The candidate for whom the vote was sought to be tendered was elected. So no loss was suffered by the plaintiff for rejection of his vote.

The Court held that violation of the plaintiff's right was an injury to him for which he must have a remedy without proof of actual damage.

Tortious liability can also be determined on the basis of the fault principles. In this case it is necessary to establish some fault on the part of the wrongdoer before he can be made liable. Fault principle is determined in three ways;

- **Intention**- where one does a wrongful act intending the consequences
- **Recklessness**- doing an act without regarding the consequences
- **Negligence**- this is doing something that a reasonable person would not do, or omitting an action that a reasonable person would do.

GENERAL DEFENSES IN TORTS

If one sues the other claiming that the other person has violated his rights and in so doing has committed a tort, then certain defenses are available to the defendant. The extent to which they apply against different torts, may, however, differ. Some of the defenses which can be used in torts are:

1. Volenti non Fit Injuria
2. Inevitable Accident
3. Act of God
4. Self-defence
5. Mistake.
6. Necessity
7. Statutory Authority
1. **Volenti Non Fit Injuria**

This refers to 'voluntary taking of a risk'. It's when a person chooses to be in the situation that causes the injury. For example, suppose you are a spectator at a cricket match, the batsman hits a six, and the ball lands on your head, then you cannot claim for compensation either from the stadium authorities or the batsman because when you took a seat in the stadium, you accepted the risks while sitting in the stadium. Therefore if the defendant can prove that the plaintiff voluntarily put himself in that situation, he can escape liability.

The most important thing to remember is that the action must be voluntary i.e. with the informed consent of the relevant person.

There are two things which should be established in order to use this defense.

- a) That the plaintiff knew or could have expected the risks involved in such a situation.
- b) That the person agreed by a statement or conduct, to suffer the consequence of the risk without force or compulsion or threat.

Khimji v. Tanga Mombasa Transport Co. Ltd. (1962).

The plaintiffs were the personal representatives of a deceased who met his death while traveling as a passenger in the defendant's bus. The bus reached a place where the road was flooded and it

was risky to cross. The driver was reluctant to continue the journey but some of the passengers, including the deceased, insisted that the journey should be continued. The driver eventually yielded and continued with some of the passenger, including the deceased. The bus got drowned together with all those aboard it. The deceased's dead body was found the following day.

Held: The plaintiffs' action against the defendants could not be maintained because the deceased knew the risk involved and assumed it voluntarily and so the defence of volenti non fit injuria rightly applied.

Apart from instances like those of the above case, the defence of 'volenti' has been pleaded in a number of situations, including the followings:

1. A passenger injured by the act of a driver whom he knew to be under the influence of drink at the material time.

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TOPIC 4

LAW OF CONTRACT

DEFINITION OF CONTRACT

A contract is an agreement of promises which is legally binding or enforceable by law.

According to Salmond a contract is an “agreement creating and defining obligations between the parties.”

According to Sir William Anson, “A contract is an agreement enforceable at law made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.

Sir William Anson further observes as follows: “As the law relating to property had its origin in the attempt to ensure that what a man has lawfully acquired he shall retain, so the law of contract is intended to ensure that what a man has been led to expect shall come to pass; and that what has been promised to him shall be performed.”

Based on the above definition a contract exist when there is

1. an agreement
2. the agreement is enforceable by the law

The law of contract imposes an obligation to the parties involved to see that they have performed their promise, failure to do so attracts legal implications. This usually involves compensating the aggrieved party once the party responsible has been found liable for the act or omission.

CLASSIFICATION OF CONTRACTS

Contracts may be of various types. These may be classified as under:-

1. Express and Implied Contract

An express contract is one in which the parties specifically agree about the nature and terms of their relationship. There is then said to be an express agreement. For example, if A agrees to sell his goods to B for KSH. 10,000/= and B agrees to buy the goods at that price, there is said to be an express contract for the sale of goods at an agreed price.

On the other hand, there is no specific agreement in an implied contract. The conduct of the parties, as well as all the surrounding circumstances, must be taken into account in order to ascertain whether or not a contract exists. Thus where A hires a taxi and boards it there is an implied contract that the taxi man shall convey A up to his destination and that A shall pay such fare as is usually paid for that trip.

2. Unilateral and Bilateral contracts

A Unilateral Contract is one in which only one party is bound. It is a rare type of contract which arises, for instance, where there is an offer of a reward. Thus, if 'A' offers a reward to anyone who will recover his lost property, no one is bound to recover the lost property but 'A' himself is bound to give the promised reward to anyone who might recover the property.

Most contracts are bilateral. A bilateral contract is one in which both parties are bound. Thus, if A agrees to sell his goods to B and B agrees to buy them at a stated price, both parties are bound.

A is bound to deliver the goods to B and B is bound to accept them to pay the price.

3. Valid, Void and Voidable Contracts.

A **valid contract** is an agreement enforceable by law. An agreement becomes enforceable by law when all the essentials of a valid contract discussed above are present. A void contract is an agreement which is not binding or enforceable by law. This is because it has no legal effect at all and is, therefore, not binding on any of parties. A contract is rendered void in certain cases where both parties were mistaken, where it is prohibited by law or where it is entered without consideration e.t.c.

A **voidable contract** is one which is enforceable by law at the option of one of the parties. Usually a contract becomes voidable when this consent of one of the parties to the contract is obtained by undue influence, or misrepresentation. Such a contract is voidable at the option of the aggrieved party of the party whose consent was so caused.

Where there is a **voidable contract**, the party entitled to avoid it must do so within a reasonable time. This may be done by A notifying the other party, B, that he (A) does not intend to be bound by the contract. Where it is not feasible to give notice, e.g. where B is a rogue whose whereabouts are not known A can still effectively terminate the contract by doing everything possible to show that he does not intend to be bound by the contract. It is sufficient, for instance, to make a report to the police.

Car and Universal Finance Co. V. Caldwell (1965)

X bought a car from the defendant and paid by cheque. X took the car with him. The cheque bounced the next day, but X had disappeared. The defendant reported the matter

to the police and the Automobile Association, requesting them to recover the car. Subsequently, X sold the car to Y, who knew X's title to be defective. Y in turn resold the car to the plaintiffs, who bought in good faith.

Held: By setting the police and Auto mobile Association in motion, the defendant had clearly shown that he intended to resend the contract; this meant that the ownership of the car reverted to him and therefore Y had no title to pass to the plaintiffs. The defendant was therefore entitled to recover the car from the plaintiffs.

The right to avoid the contract is lost if the innocent party, upon discovering the true facts, subsequently affirms it. It is also lost where an innocent third party had acquired an interest in the subject matter of the contract, which is likely to be affected by the avoidance of the contract.

Newtons of Wembley, Ltd. V. Williams (1965)

X bought a car from the plaintiff and paid by cheque. He took the car with him. The cheque was dishonoured, but in the meantime X had disappeared. X subsequently resold the car to the defendant, who bought in good faith. The plaintiff sought to recover the car from the defendant.

Held: Title to the car had passed to the defendant; it could not therefore be recovered by the plaintiff.

Notes: The facts in the above two cases are similar. In *Caldwell's Case* the car was recovered because the innocent purchaser acquired it from a seller who had no title since the contract had already been rescinded; the seller had bought from X in bad faith. On the other hand, in *Williams's Case* the car could not be recovered because the innocent purchaser has acquired it, in good faith, from a person who had right to sell it.

There are many other instances of voidable contracts, e.g. contracts entered, into under a unilateral mistake, duress or undue influence as well as minors' contracts.

4. Specialty Contracts and simple Contracts.

A specialty contract is also known as a *contract under seal*. It is an instrument in writing signed and sealed by the party to be bound by it and delivered by him to the person for whose benefit it was made. Thus, writing, signature, sealing and delivery are the four essential characteristics of this type of contract, of which a Deed is the best example (e.g. a Deed of Conveyance under which property is transferred by one person to another). "Delivery" is used here not in the sense of physical delivery; what is required is an intention to be bound; *Vincent V. Premo Enterprises Ltd. (1969)*. If A executes a deed conveying his property to B, with an expressed intention that he is to be thereby bound, A will be bound even if the deed was never physical delivered to B. A central feature of this type of contract is that its validity is independent of consideration i.e. B need not have furnished anything of value as pre-condition for enforcing A's promise.

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TOPIC 5

SALE OF GOODS

Introduction

Businesses and consumers are usually free to contract on whatever terms they see fit. However, contracts involving sales of goods can be subject to a range of statutory provisions. It is important to distinguish between sale of goods and other forms of conveying, such as barter trade, bailment, 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.

NATURE OF THE CONTRACT

A contract of sale of Goods can be defined as contract in which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called a price.

Property means the general property in goods, and not merely a special property.

These contracts can be separated into two:

- A. **Sale contract** – goods passes to the buyer once the contract is concluded
- B. **Agreement to sell**- goods or property passes on the fulfillment of a particular or upon the expiration of a specified condition

Sale of good should be distinguished from the following transaction

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 Agency
7. Contract of Licenses of intellectual property such „sales“ of computer software and patents.
8. Contract of Supply of services

The difference will in most cases be in money consideration called *price* and the condition in which property comes to pass

The following should be clearly understood when it come to understanding the nature of sale of goods contracts

1. **Seller**- This is the person who sells or agrees to sell goods.

2. **Property** –This is the general property in goods or ownership. It signifies the bundle of rights that a person has in relation to a subject matter .Eg. Right to use, misuse and to dispose
3. **Goods-** this is includes
 1. All chattels personal other than things in action and money
 2. And all implements
 3. Industrial growing crops
 4. Things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale

Types of Goods

1. Ascertained/Specific goods and Unascertained
2. Existing and Future Goods

Specific or Ascertained Goods

These are goods that have specifically been indentified and agreed upon by the parties at the time when the contract of sale is made. Other goods which haven't been identified are unascertained goods

Existing Goods

These are goods owned or possessed by the seller at the time 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-** This is the person who buys or agrees to buy goods
5. **Price-** This is the consideration that passes from the buyer to the seller to support the contract of sale of goods. The consideration must be monetary.

Note

In a contract of sale of Goods, price is determined or fixed:-

- a) By the contract itself
- b) In the manner thereby agreed
- c) By the course of dealing

If the price is not so fixed, the buyer pays a reasonable price.

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TOPIC 6

HIRE PURCHASE CONTRACTS

NATURE OF HIRE PURCHASE CONTRACT

Definition of hire purchase

This is a contract by which goods are delivered to a person who agrees to make periodical payments by way of hire, with an option of buying the goods after the started hire installments have been paid.

The goods may be returned to the owner at any instance before the option is exercised, on payment of sum stated in the contract. Until the option is exercised there is no guarantee to buy the goods.

These contracts thus contain three parts;

1. Contract of bailment- under which the hirer obtains possession of the goods yet the goods remain in the ownership of the owner
2. Option which entitle the hirer to purchase the goods or hire them
3. Contract of sale which makes the hirer the owner of goods already in his/her possession

DIFFEENCES BETWEEN HIRE PURCHASE AND CONDITIONAL SALE/CREDIT SALE

Hire purchase differs from credit sale agreement and conditional sale in the following ways;

It is important to distinguish hire purchase from credit sale agreement and conditional sale. While all three involve payment via installments, they however differ from higher purchase in the following sense;

Credit sale agreement - This makes it the customer's legal obligation to buy in that;

1. It is a contract of sale
2. The property in goods passes to the buyer as soon as the 1st installment is made

Conditional sale- This contract makes it the buyer's obligation to buy but property in goods passes to the buyer only if the conditions that form the subject matter of the sales have been fulfilled.

Hire purchase and other instalment sales

The hire-purchase transaction is intended to protect the owners title to the goods should the hirer (the buyer) decide to sell them to a third party who buys in good faith before full installments is paid.

It is worth noting that this differs from sale of goods act in which if the buyer is in possession of the goods, with the consent of the seller, sells them to a third party who buys in good faith then property passes to the third party.

Hire purchase therefore gives two options, i.e.

- i. purchase the goods or
- ii. return them.

Helby v. Matthews (1895)

The owner of a piano agreed to let it on hire, the hirer to pay rent on monthly installments, on the terms that the hirer might terminate the hiring by returning the piano to the owner but remain liable for all arrears of hire. Also that the piano should remain property of the owner but if the hirer had paid punctual monthly installments, the piano should become his property. The hirer after having paid a few installments pledged the piano to a pawn broker.

Held; the hirer was under no legal obligation to buy but had an option to either return the piano or become its owner by payment in full. Therefore, he had not "bought it" and the owner could therefore recover it from the pawn broker.

PROVISIONS RELATING TO HIGHER PURCHASE

1. Before the Hire Purchase Agreement is entered into the owner is bound to notify the prospective Hirer the cash price of the goods.
However, the owner is not bound to do so if:
 - a. The Hirer has selected the goods or similar goods by reference to a catalogue stating the Cash Price
 - b. The Hirer selected the goods or similar goods from a selection which stated the cash price.
2. The Hire Purchase agreement must be written.

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TOPIC 7

AGENCY

Meaning

“An agent is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such is done, or who is represented, is called the principal”. The contract which creates the relationship of ‘principal’ and ‘agency’ is called an ‘agency’ thus where A appoints B to buy ten bags of sugar on his behalf, A is the ‘principal’ and B is the ‘agency’ and the contract between the two is the ‘agency’ if, pursuant to the contract of agency, the ‘agent’ purchases the bags of sugar from C, a wholesale dealer, direct contractual relations are brought into existence.

Under a contract of agency the agent is authorized to establish privity of contract between the principal (his employer) and a third party. As such as the function of a third party. In a way Therefore an agent is merely a connecting link. After entering into a contract on behalf of the principal with third party, the agent drops out and ceases to be a party to the contract and the contract binds the principal and the third party as if they have made it themselves

Characteristics of agency

1. The agent performs a service for the principal
2. The agent represents the principal
3. Acts of the agent affect the legal position of the principal the agency relationship differs from trusts and bailment.

TYPES OF AGENTS

1. **General Agent:** He is an agent engaged to perform a particular task or transaction on behalf 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 a particular 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.

DISTINGUISHING AGENCY FROM TRUST 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

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.

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TOPIC 8

PARTNERSHIPS

Introduction

Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.

Characteristics of partnership

1. Membership-The logical minimum number in partnership is 2 with a maximum of 20.
2. It is not an incorporated association
3. Each partner is an agent of the other in the firm
4. It can sue or it can be sued its registered name
5. It exists with an aim of making profit
6. A partner's liability to debts and obligations of the firm is generally unlimited
7. Death, insanity or bankrupt of partners may lead to dissolution

In a partnership, partners may be classified as:-

1. Real and Quasi
2. Minor and Major
3. Active and dormant / sleeping
4. Limited and General

Advantages of partnership

Some of the advantages of partnership as a form of business include;

1. There are easy to form since they don't require many legal formalities
2. Business resources are easy to acquire through contribution from the partners
3. In case of professional firms there is specialization of labour
4. Losses are shared among the partners
5. Management duties are shared among the partners

Disadvantages

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.

FORMATION OF LIFE

The formation of a partnership is not subject to any legal formalities, the agreement between the parties may take any of the following forms;

1. Oral or by word of mouth.
2. Written with or without seal
3. Implied 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 however, a legal requirement for them to do so.

Contents of a partnership deed

If the partners decide to register the partnership they will be required to have a partnership deed. Such document will contain the following;

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. Procedure for settlement of disputes

Consequences of Non Registration of a Partnership Form of Business Organization

If the firm is not registered then it will suffer the following limitations

1. It cannot enforce its claims against a third party in a court of law
2. It cannot file legal suits against any of its partners
3. Partners of an unregistered firm cannot file any suit to enforce a right against the firm
4. A partner of an unregistered firm cannot file a suit against other partners.

Non registration however does not affect the following rights of a firm;

- a. The right of a partner to sue for the dissolution of the firm or for the accounts of a dissolved firm or to enforce any right or power to realize the property of a dissolved firm
- b. The power of an official assignee or receiver to realise the property of an insolvent partner
- c. The rights of the firm, or its partners, having no place of business

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TOPIC 9

INDEMNITY AND GUARANTEE

NATURE OF THE CONTRACTS

INDEMNITY CONTRACT

In the contract of Indemnity, a person agrees to rescue another person who is a party of some other contract and come across any loss out of the same. The loss can be incurred from the act of any party or by any means in that contract.

Indemnity contract includes two parties namely; *Indemnifier* and *Indemnity holder*. The person who is promising to pay compensation is called Indemnifier and the person who's loss is compensated is called Indemnity holder.

- **Example:** There is a contract between X and Y according to which X has to sell a tape recorder (which is selected) to Y after three months. On the next day of their contract Z has come to X and has insisted on selling the same tape recorder to him (Z). Here Z is promising to compensate X for any loss faced by X, due to selling the tape recorder to Z. X has agreed. Now the contract which has got formed between X and Z is called indemnity contract, where Z is indemnifier and X is indemnity holder.
- **Example:** A and B are in the contract of Indemnity. B is in a contract with C regarding a sum of Ksh 10000/-. According to the contract of indemnity between A and B, A agrees to rescue B from any consequence that occurs from the contract of B's of Ksh 10000/- with C.

Types of Indemnity

The indemnities are of two types;

1. The Express Contract of Indemnity
2. The Implied Contract of Indemnity

Express Contract of Indemnity: When the contract of indemnity is written or orally consented, then such indemnity contracts are said to be Express Contract of Indemnity.

Example: A and B are into the contract of Indemnity. A agrees to reimburse the loss incurred by B from a contract with C of some so-called amount.

Implied Contract of Indemnity: When the contract of indemnity is applied by a statute or by a common law that is in existence, then such indemnity contracts are said to be Implied Contract of Indemnity.

Example: A and B are agent and principal. A has to supply goods to B for his business. A supplied goods but B did not want them and denied taking the same. A can sell the goods and if he incurs any loss while selling them, then B has to make good the loss of A and the statute or the common law will ensure the same.

GUARANTEE CONTRACT

When one person signifies to perform the contract or discharge the liability incurred to the third party, on behalf of the second party, in case he fails, then there is a contract of guarantee. In this type of contract, there are three parties, i.e. The person to whom the guarantee is given is Creditor, Principal Debtor is the person on whose default the guarantee is given and the person who gives guarantee is **Surety(Guarantor)**.

Three contracts will be there, first between the principal debtor and creditor, second between principal debtor and surety, third between surety and the creditor. The contract can be oral or written. There is an implied promise in the contract, that the principal debtor will indemnify the surety for the sums paid by him as an obligation of the contract provided they are rightfully paid. The surety is not entitled to recover the amount paid by him wrongfully.

- **Example:** Y is in need of ksh.. 10000/-. Upon guarantee by Z, Y has got the amount from X. Here X, Y and Z are creditor, principal debtor and surety respectively.
- **Example:** Here we have another example of the contract of guarantee, Mr. kamau takes a loan from the bank for which Mr. Njoroge has given guarantee that if Kamau default in the payment of the said amount he will discharge the liability. Here Njoroge plays the role of *surety*, Kamau is *principal debtor* and Bank is the *creditor*.

Types of guarantee

1. **Sole Guarantee:** This is a contract of guarantee whereby the guarantor's liability is restricted to a single transaction.
2. **Continuing Guarantee:** It is a contract of guarantee under which the guarantors to a series 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 the honesty good behaviour of another purpose of employment

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TOPIC 10

INSURANCE

NATURE OF THE CONTRACT

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.

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 aleatory, 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.

Parties to the contract

Insurer: This is the person who undertakes to pay the sum assured or indemnity when the insured event occurs. To carry on insurance business in Kenya, a person must be a body corporate (company) licensed by the Commission of insurance to do business.

Insured: This is the person who takes out insurance cover, he is the person who pays the premium and may be a natural or artificial person. The insured must have an insurable interest in the subject matter of insurance.

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.

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.

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

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.

FORMALITIES OF THE CONTRACT

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.

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TOPIC 11

NEGOTIABLE INSTRUMENTS

NATURE AND CHARACTERISTICS

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 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.

TYPES: CHEQUES, PROMISORY NOTES, BILLS OF EXCHANGE

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 or his 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 with or 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 cheque with 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 credit or relationship which imposes upon the parties certain legally binding obligations.

DUTIES OF THE CUSTOMER

1. **Duty of Care:** The customer is bound to the exercise reasonable care when drawing cheques 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.

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TOPIC 12

THE LAW OF PROPERTY

This is the law 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 cuius 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 Act² and The Agriculture Act.

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

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

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

INTEREST IN LAND

It may take any of the three forms:

1. Estate
2. Servitude
3. Encumbrances

ESTATE IN LAND

An estate in land may be freehold or leasehold.

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. FREE 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 by deed 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 expiration of 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

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.

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