COMMERCIAL LAW

CPA PART I

CPA SECTION 1
CCP SECTION 1
CS SECTION 1

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MEANING OF LAW, NATURE AND PURPOSE 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.

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.

CLASSIFICATION OF LAW

Law may be classified as:

1. Written and Unwritten.
2. Municipal (National) and International.
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

**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 of law 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 the Constitution, an accused person is presumed innocent until proven or pleads guilty.
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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

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.
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.
- It gives the functions of the various arms of the government and clearly indicates the separation of powers.
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ADMINISTRATIVE LAW

Meaning
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 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. 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.
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THE COURT SYSTEMS

THE STRUCTURE

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 hierarchy of the Courts as it is today in Kenya.
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 Martial, 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 Province Kenya where their powers have been delegated by the Chief Justice to the District Officers through notices in the Kenya Gazette. This structure of the courts is based on the provisions of the Constitution, the Magistrates Court Act (Cap. 10), the Kadhis Court Act (Cap. 11) and the Armed Forces Act (Cap. 199) Laws of Kenya.
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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.

ARTIFICIAL PERSONS

Artificial persons may be corporations or unincorporated associations.

a) Corporations
A corporation may be defined as an association of persons bound together for a sole particular object, usually carry on business with a few of profit. In other words, a corporation is an artificial person created with by law with capital divided into transferable shares and with limited or unlimited liability possessing a common seal and perpetual succession. The corporation has, therefore, a legal personality of its own distinct from that of its members. The individual members have rights and liabilities of their own apart from those of the corporation. The corporate body is different in that it has perpetual succession, it never dies and has a common seal by which to authenticate its acts. The members may change, but the corporate body does not.

Types of Corporation
There are basically two types of corporation: corporation sole and corporation aggregate. The two differ both in the manner of their creation as well as their membership and also in their operation.

i. Corporation sole
Corporation sole is one which consists of one human member at a time, such member being the holder of an office which is held in succession by one person at a time. Some corporations’ sole are creatures of the common law, e.g., the office of a bishop. There cannot be more than one bishop in a ’diocese at the same time and when a particular bishop dies as an individual, his office never dies and continues in existence with another bishop as a successor. Other corporation sole are created by constitution or any Act of Parliament e.g., the Office of the President or the Office of the Public Trustee.

ii. Corporation Aggregate
Most corporations are corporations aggregate. These consist of two or more members at the same time. Basically, there are two types of corporation aggregate operating in Kenya. These are statutory corporations and registered companies.
Creation of Corporations
A corporation can be created in the following to ways:

(a) By act of parliament
The corporations can be created by the Act of Parliament in Kenya. The state corporations are created by this method. The main examples of such corporations are: Kenya railways, Kenya airways, Kenya Meat Commission, Pyrethrum Board of Kenya, Coffee Board of Kenya e.g. Such corporations owe their legal existence to a statute. A statue creating the corporation gives it a name, stipulates its composition, and prescribes its powers and duties. The powers of these corporations are limited to those which are expressly conferred by the acts. The powers of statutory corporation can be extended or limited by statutes. These can be also dissolved by statutes. The statutory corporations are legal persons. They can sue and be sued. They can buy and sell property.

(b) By registration under companies act
The registered companies are created by registration under the companies act. These are also know as limited company comes into existence by complying with the provision of the companies act (cap 486) a limited company may either be private or public limited company. A private limited company can be registered by two or more persons but it is not allowed to call upon the public for funds in the form of shares or debentures. A public limited company can be registered by seven or more persons and it can offer its shares to the general public freely.

In Kenya, the limited companies are formed according to the companies act (Chapter 486).

UNINCORPORATED ASSOCIATIONS
An incorporated association is one which has no corporate status is one which has no corporate status i.e. it has no legal personality and cannot, therefore, own property or enter or enter into contracts or sue or be sued in its own name. Such associations include clubs, societies, trade unions, partnerships e.t.c. These associations consist of groups of individuals. The property owned by such associations is regarded as the joint property of all members although this property is held on the behalf of all members by trustees. Any contract entered into by a member on behalf of the association is regarded as the contract of that member. If a committee has committed a tort then the committee members are responsible.

a. Partnerships
Partnerships are incorporated associations. In Kenya all partnership are formed in accordance with partnership act (Cap 29). Section 3(1) of this act defines partnership as the relationship which subsists between in common with a view of profit. In a partnership business, two or more persons jointly run a business. The liability of the individual partner is unlimited unless the partnership agreement provides for any limitation. A partnership consists of not more than twenty persons except in certain cases e.g. practicing solicitors, professions accountant and members of the stock exchange where this figure may be exceeded. Normally, the number of partners in a partnership business varies from two to five. In the case of banking business, the number of partners is limited to ten.
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TOPIC 2

LAW OF TORT

Meaning of Tort
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.

**MALICE**

In tort malice come out in two ways;

(a) The intentional doing of some wrongful act without proper excuse

(b) To act with some collateral or improper motive.
It is the second that is usually referred to and it is worth noting that in torts in that sense malice becomes irrelevant in tort, i.e. if a person has a right to do something then his motive in doing it is irrelevant.

*Bradford Corporation v Pickles (1895)*
The defendant extracted water in undefined channels with the result that the water supply to the plaintiffs’ reservoir was reduced. The defendant’s motive in doing this was to force the plaintiffs to buy his land at his price. The action failed, as the defendant had a right to extract the water. As he had such a right, his motive, even if malicious, was irrelevant.

**There are two groups of exceptions to this basic principle:**

1. Where malice is an essential ingredient of the tort, for example, in malicious prosecution, the plaintiff must prove not only that the defendant had no grounds for believing that the plaintiff was probably guilty, but also that the defendant was activated by malice. The reason for this requirement is that policy in this area favours law enforcement over individual rights. The result of the requirement is that there are few successful cases of malicious prosecution.

2. There are also torts where malice may be relevant to liability. For example, in nuisance malice may convert what would have been a reasonable act into an unreasonable one.

*Christie v Davey (1893)*
Plaintiff and defendant lived in adjoining houses. The plaintiff gave music lessons and this annoyed the defendant. In retaliation the defendant banged on the wall and shouted while the lessons were in progress. The plaintiff was held to be entitled to an injunction because of the defendant’s malicious behaviour.

**VICARIOUS LIABILITY**

Generally each person is liable for his or her own torts. There are circumstances however, that another person may be held liable for torts committed by another. This is referred to as vicarious liability. This mostly tend to occur in employment scenarios

The following must exist to establish liability;
1) There must be a master/servant relationship between the parties concerned
2) The servant must have been acting in the course of employment at the material

**Who exactly is a servant?**

Masters/Employers will only be liable for the torts of their employees/servants. They will not usually be liable for the torts of their independent contractors. It is therefore necessary to establish the status of the tortfeasor.
The control test

In this case a servant is defined as someone over whom the master has control over, i.e. someone employed over a contract of service. While an independent contractor is someone who is under a contract for service in which case such a person work using their own judgement.

In Collins v Hertfordshire, Hilbery J said: "The distinction between a contract for services and a contract of service can be summarized in this way: In one case the master can order or require what is to be done, while in the other case he can not only order or require what is to be done, but how it shall be done."

The nature of the employment test

One accepted view is that people who have a 'contract of service' (an employment contract) are employees, but people who have a 'contract for services' (a service contract) are independent contractors.

What is “course of employment?”

An acts done under the course of employment where it is proved to have been authorized by the master.
An employer will usually be liable for
   a) Wrongful acts which are actually authorised by him.
   b) Acts which are wrongful ways of doing something authorised by the employer, even if the acts themselves were expressly forbidden by the employer

Limpus v. London General Omnibus Co. 1862
A bus driver racing to a stop to collect passengers deliberately obstructed the driver of a bus of a rival company, overturning the latter's vehicle.
The bus driver had been given instructions against obstructing other buses.
**Held:** The defendants were liable. The driver was acting within the course of his employment at the time; it was immaterial whether his act was forbidden.

The master is only liable if the tort was committed in the course of employment. See the following case;

Storey v. Ashton (1869)
A driver took a different route to make a frolic of his own. On this way he caused an accident because of his negligence. Held; No liability of the company, though this was just a little detour, the driver was carrying out his own business.
**Note:** Not every detour taken by the drive will usually take him out of the course of employment because some may be necessary. The circumstances surrounding the case should be considered too.
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TOPIC 3

LAW OF CONTRACT

DEFINITION AND NATURE 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.

Essential of Valid Contract
The essential elements of valid contract as follows:

1. **Offer and acceptance**- There must be a ‘lawful offer’ and a ‘lawful acceptance’ of the offer, thus resulting in an agreement. The adjective ‘lawful’ implies that the offer and acceptance must satisfy the requirements of the Contract Act in relation thereto.

2. **Intention to create legal relation**- There must be an intention among the parties that the agreement should be attached by legal consequences and create legal obligations. Agreements of social or domestic nature do not contemplate legal relations, and as they do not give rise to a contract e.g. an agreement to dine at a friend’s house or a promise to buy a gift for wife are not contracts because these do not create legal relationship. In commercial agreements an intention to create legal relations is presumed. Thus, an agreement to buy and sell goods intends to create legal relationship is a contract provided other requisites of valid contract are present.
3. **Lawful Consideration** - Consideration has been defined as the price paid by one party for the promise of the other. An agreement is legally enforceable only when each of the parties to it gives something and gets something. The something given or obtained is the price for the promise and called consideration.

4. **Capacity of parties** - The parties to an agreement must be competent to contract, otherwise it cannot be enforced by a court of law. In order to competent to contract, the parties must be of the age of majority and of sound mind and must not be disqualified from contracting by any law to which they are subject.

5. **Free Consent** - Free consent of all parties to an agreement is another essential element of a valid contract. ‘Consent’ means that the parties must have agreed upon the same thing in the same sense. There is absence of ‘free consent’; if the agreement is induced by

   (i) coercion,
   (ii) undue influence,
   (iii) fraud,
   (iv) Mis-representation, or
   (v) Mistake.

6. **Lawful object** - For the formation of a valid contract, it is also necessary that the parties to an agreement must agree for a lawful object. The object for which the agreement has been entered into must not be fraudulent or illegal or immoral or opposed to public policy or must not imply injury to the person or property of another.

7. **Possibility of Performance** - Another essential feature of a valid contract is that it must be capable of performance. If the act is impossible in itself, physically or legally, the agreement cannot be enforced at law.

All the above elements must be present. If one or more elements are absent then the contract may be void, voidable or unenforceable.

**CLASSIFICATION OF TYPES 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 convex A up to his destination and that A shall pay such fare 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.


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 of where it is entered without consideration e.t.c.

A voidable contract is one which is enforceable by law of 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 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 no 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 Automobile Association in motion, the defendant had clearly shown that he intended to rescind 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.

A **simple contract** is an agreement, express or implied, which gives rise to legal obligations. A simple agreement may be in writing or agreed orally, or even be implied from the conduct of parties. A simple contract may be made also made partly orally and partly in writing.

In England, conveyances of land or leases of land for periods of more than three years, transfers of British ships and gratuitous promises must be under seal.
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TOPIC 4

SALE OF GOODS LAW

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.

Definition

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

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 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.

**Formalities**

A contract of sale may be:
   a) Oral
   b) Written with or without seal
   c) Partly oral and partly written
   d) Implied from the conduct the parties
The Capacity for one to 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.

**Void contracts of sale of goods**

Certain contracts of sale of goods are void:

i. 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.

ii. Where there is an agreement to sell specific goods which subsequently perish without the fault of either party before risk passes the buyer, the agreement is avoided.

iii. 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.

**TERMS OF SUCH CONTRACTS (IMPLIED TERMS)**

The terms in these contracts can be classified as conditions and warranties. Since express terms are dependent upon the contracting parties we shall look at implied terms.

Implied terms are terms which though not expressly agreed to by the parties, are an integral part of the contract.

These terms may be implied by **statutes** or by a **court of law**.

**TERMS IMPLIED BY STATUTES**

**CONDITIONS**

1. Seller has the right to sell the goods when property in the goods is to pass.

2. In case of sale by description the goods shall correspond to the description. This condition applies where the sale is solely by description. If the buyer sees the actual goods before the sale then it cannot be relied upon:

*Harrington & Leinster v Christopher Hull Fine Art (1991)*

The claimant purchased a painting from the defendant for £6,000. The painting was described in an auction catalogue as being by German impressionist artist Gabrielle Munter. Both the buyers and the sellers were London art dealers. The sellers were not experts on German paintings whilst the buyers specialised in German paintings. The purchasers sent their experts to inspect the painting before agreeing to purchase. After the sale the buyers discovered that the painting was a fake and worth less than £100. They brought an action based on s.13 Sale of Goods Act in that the painting was not as described.
Held: By sending their experts to inspect the painting this meant the sale was no longer by description. S.13 only applies to goods sold by description and therefore the buyers had no protection.

Note: this is simply concerned with description and not quality as was made clear in:

Re Moore & Landauer (1921)
A contract for the sale of 3,100 tins of peaches described the tins as being packed in cases of 30. When they arrived the tins were packed in cases of 24 although the agreed overall number of tins was supplied.

Held: The purchaser was entitled to reject the goods as they were not as described.

3. 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 seller’s skill and judgment, there is an implied condition that the goods shall be reasonably fit for that purpose.

4. 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. in a contract for sale by sample there is an implied term-
   - That the bulk will correspond with the sample in quality
   - That the goods will be free from any defect, making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample.

WARRANTIES

1. The goods are free from any undisclosed charge or encumbrance.

2. The purchaser will enjoy quiet possession of the goods. This acts as an ongoing assurance that no one will interfere with the buyer’s right to possess or use the goods.

Microbeads v Vinhurst Road Markings (1975)
The claimant purchased some road marking machines from the defendant. After the purchase a third party was granted a patent right in the machines. This meant the claimant could not use the machines unless they were granted a license to do so. There was no breach of condition as at the time of the sale the seller had the right to sell the goods. However, there was a breach of warranty in that the buyer could not enjoy quiet possession of the goods.

TERMS IMPLIED BY COURTS OF LAW

Courts of law is usually reluctant to imply terms in contracts as it is the duty of the parties to agree as to what the contractual terms shall be.

There are circumstances however, that courts are called upon to imply terms in contract reasons being:
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TOPIC 5

GENERAL PRINCIPLES OF CONSUMER CREDIT

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

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 is 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 them 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.

**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 hire 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.

**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.

**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.
REGISTRATION OF HIRE PURCHASE AGREEMENT

Sec. 4 (1) of the Hire Purchase Act in Kenya establishes the Registry of Hire Purchase. This is a public office which may be held by the Registrar, Assistant or Deputy Registrar.

As per 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 at times extend the duration.

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

Registration of Hire purchase, serves two purposes:
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

In the event that the agreement is not registered the following will occur;

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.

PROTECTION OF THE HIRER

The hire purchase act attempts to protect the hirer for exploitation through the following ways;

1. Making some Contents of the agreement to be void if used
2. Implied terms of the agreement
3. Repossession of goods
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TOPIC 6

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 with 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 known 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.

**Characteristics of contract of guarantee**

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 contract must be evidenced by some note or memorandum.
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TOPIC 7

PARTNERSHIPS

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
d. The right of a third party to sue the unregistered firm or its partners
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TOPIC 8

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 a 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 Commissioner 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.

FORMATION 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.

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
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TOPIC 9

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 bugs of sugar on his behalf, A is the ‘principal and B is the ‘agency’ and the contract between the two is the ‘agency if, pursuance of the contract of agency, the ‘agent’ purchase the bags of sugar from C, a wholesale dealer are brought into direct contractual relations.

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 parties. 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 bind 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 affects the legal position of the principal the agency relationship differs from trusts and bailment.

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.

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.

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 into by 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
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TOPIC 10

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/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 chequewith the name of the banker in told.

Banker-customer relationship

There is a simple contractual relationship between the banker and customers. This 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 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 irregularities affecting 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 the amount.

**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 dealings with 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 advice on 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 the customers 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 his 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 Appeal insisted 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
   b. Where the banker has the customer consent 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 the customer’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
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TOPIC 11

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 *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 Act2 and The Agriculture Act.

POSSSESSION 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. Encumberances

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. 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 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.

Creation of Absolute Proprietorship

   i. Registration after Adjudication
   ii. Conversion from other registers
   iii. Transfer
   iv. Inheritance
   v. Consolidation
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TOPIC 12

RESOLVING COMMERCIAL DISPUTES

Definition

A commercial dispute is any disagreement between two businesses, usually regarding a contract (a legally binding agreement). Although the agreement is normally oral or in writing, contracts can also exist when nothing has been said or written by the parties to it: these are implied contracts. Other types of commercial dispute not covered by contracts include libel against a business (excludes employment law issues and Employment Tribunals).

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 Act. 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.

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.
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