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NATURE OF CONTRACTS IN KENYA

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2 General Principles of the Law of Contract

2.1 Nature of Contracts

Legal relations in commercial transactions are invariably based on agreement between two or more parties, whose corresponding promises bind them in law to act in performance of their respective obligations. The earnest pact between them constitutes a contract under which they acquire rights enforceable at law.

The corresponding rights and obligations of the parties are derived from a set of promises on defined terms to which they must adhere to ensure complete and perfect performance. The terms by which the parties are bound may be express or implied from either their conduct or by statute. Failure or refusal by one party to perform his obligations under the contract confers upon the offended party the right of action to either enforce complete performance or to recover compensation for loss or damage arising from the offending breach. In the alternative, the innocent party may elect to withhold performance of his part in the bargain and treat the contract as repudiated.

The binding effect of a contract depends on its very nature and the defining elements that common law recognizes as essential to its existence. A contract may be defined as "… an agreement enforceable at law, made between two or more persons, under which rights are acquired by one or more, to act, or forbearance on the part of the other, or others."

A contract is comprised of a set of promises the breach of which attracts legal consequences and appropriate remedies. To attract legal attention and enforcement, the agreement must be intended to create legally binding relations. It must be of the nature whose performance the law recognizes as a duty and the discharge of which cannot be avoided without lawful excuse or legal consequences.

It must be borne in mind, though, that not all agreements are legally binding. Not every set of corresponding promises exchanged by parties is intended to bind them in law so that performance or breach are attended by legal consequences. For instance, gratuitous promises, social invitations, gentlemen's agreements or domestic arrangements cannot be enforced against the promisor because they lack the requisite intention to create legally binding relations, consideration and formal validity requisite in legally enforceable contracts. In contrast, they are based on moral obligations and amount to mere social conventions. Whether or not an agreement is legally binding depends on whether it satisfies the essentials of a valid contract.

Understandably, in the course of family life, many agreements are made, which are never intended to be the subject of enforcement at law or otherwise attended by legal consequences. For example, the promise of a gift or social favour to a friend or close relation, such as a spouse, child, or parent, does not bind the promisor though made in exchange for a corresponding promise without the intention to be legally bound. If, for example, a husband arranges to make a monthly allowance to his wife for her personal enjoyment, neither would normally be taken to contemplate legal relations.[23]

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[23] *Balfour v Balfour* [1919] 2 KB p.571.

In *Balfour v Balfour*, the defendant was a civil servant stationed in Ceylon. His wife alleged that, while they were both in England on leave, and when it had become clear that she could not again accompany him abroad because of her health, he had promised to pay her Thirty Pounds a month as maintenance during the time that they were thus forced to live apart. She sued for breach of this agreement. The Court of Appeal held that no legal relations had been contemplated and that the wife's action must fail. The evidence showed that the parties to this domestic arrangement had not designed a binding contract. In the court's view, the alleged agreement did not constitute a legal contract. It was only an ordinary domestic agreement, which could not be sued upon.

Likewise, an offer and an acceptance of hospitality do not constitute a binding contract. Agreements of this kind amount to mere social invitations and are not contracts enforceable at law. This is because the parties did not intend that performance or breach thereof be attended by legal consequences. For example, where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality, it cannot be suggested in ordinary circumstances that those agreements result in a legally binding relationship.

2.2 Types of Contracts

Contracts differ in form and nature. They may be generally classified into three main categories, namely, (a) written contracts; (b) contracts requiring written evidence; and (c) simple contracts. For example, hire-purchase agreements and contracts for transfer or other disposition of land or immovable property must be in writing. Contracts of guarantee or for sale of goods at a price in excess of two hundred shillings must be evidenced by a memorandum in writing. Otherwise, there is no specific form in which contracts may be entered into. They may be formulated (i) wholly in writing; (ii) orally, or partly orally and partly in writing; or (iii) implied from the conduct of the parties or from the custom or trade usage in the particular trade or profession.

2.3 Essential Elements of a Valid Contract

2.3.1 Introduction

The validity of a contract is not only dependent upon its form and content, but also on certain factors attributable to the parties. If validly made, an agreement must meet basic legal requirements if the rights and obligations created thereunder are to be enforced. A contract is enforceable by either party only if it satisfies all the fundamental elements essential to its validity. These are discussed below.

2.3.2 Offer and Acceptance

A contractual relationship is initiated by one party extending an offer to the other to accept his proposition either (a) in accordance with the terms of the offer; or (b) on such other terms as the parties may eventually agree. Ultimately, for the agreement to be binding, there must be an offer and a corresponding acceptance. An offer may be described as a proposal that, if accepted by another according to its terms, will create a binding agreement.[24] One party to the contract (called "the offeror") must have made a firm and definite offer to a particular person (called "the offeree") or to the public at large, and the other must have accepted it.

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[24] Crawford ML *Law and the Life Insurance Contracts* (7th edn Richard D Irwin Inc USA 1994) p.34.

An offer which is capable of being converted into an agreement by acceptance must consist of a definite promise to be bound; provided that certain specified terms are accepted. The offeror must have completed his share in the formation of the contract by finally declaring his readiness to undertake an obligation upon certain conditions, leaving to the offeree the option of acceptance or refusal.[25]

The offeror must demonstrate a definite commitment to be bound by his offer in response to which the offeree may (a) reject the offer, in which case it cannot be subsequently revived by the offeree and thereafter purported to be accepted by him on any terms; (b) make a counter-offer, which in itself amounts to a rejection of the original and the making of a new offer in his own terms; or (c) accept the offer in its terms and thereby create a legally binding contract.

For it to be of legal effect on acceptance, an offer must be expressed in definite terms. It differs from an invitation to treat, i.e., an invitation to make an offer. An offer to negotiate, or an expression of intention, or an advertisement, is not an offer but an invitation to treat. In other words, it is a mere inducement for offers or offers to receive offers. An inquiry in response to an advertisement or other expression of intention to sell an article or to give services in specified terms is not in itself an acceptance that binds any of the parties until a definite offer is made by the respondent and accepted by the offeree in the specified terms.

Where goods are exhibited in a shop window or inside a shop with a price attached, the display does not constitute an offer to sell at that price[26] since the buyer is not bound to offer the amount displayed. He may wish to bargain and offer to buy the goods at a lower price or on other terms not previously contemplated by the dealer. In effect, the display is merely an invitation to treat; an offer to receive offers. No sale is contracted until the buyer's offer to buy is accepted by the acceptance of the price money.

The effect of an invitation to treat and of the subsequent offer and acceptance was demonstrated in *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd*. The defendants' shop consisted of a self-service system with a chemist's department under the control of a registered pharmacist. The chemist contained various drugs, medicines and substances included in Part 1 of the poisons list compiled under the Pharmacy and Poisons Act, 1933 (UK). These were on shelves in packages or other containers with the price marked on each. The pharmacist in the control of the department supervised that part of every transaction involving the sale of a drug (which took place at the cash desk) with the authority to prevent the removal of any drug from the premises.

The plaintiff brought an action alleging that the provisions of the Act requiring the sale of poisons included in Part 1 of the poisons list to be effected by or under the supervision of a registered pharmacist were infringed by the defendants. The court held that the display of the articles, though coupled with an invitation to the customer to select and take any that he wished to buy from the shelves, did not amount to an offer by the defendants to sell, but merely to an

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[25] Cheshire GC, Fifoot CHS and Furmston MP *Law of Contract* (11th edn Butterworths London 1986) p.29.

[26] *Pharmaceutical Society of Great Britain v Boots Cash Chemists* (*Southern*) *Ltd* [1952] 2 QB p.795; [1952] 2 All ER p.456.

invitation to the customer to make an offer to buy: and that offer was made and accepted at the cashier's desk. Accordingly the sale was effected under the supervision of a registered pharmacist as required under the Act.

In his judgment, Lord Goddard CJ correctly observed:

"…it is a well-established principle that the mere exposure of goods for sale by a shopkeeper indicates to the public that he is willing to treat and does not amount to an offer to sell. I do not think I ought to hold that that principle is completely reversed merely because there is a self-service scheme, such as this, in operation."[27]

The effect of the exposure or display is that the customer is informed that he may himself select an article and bring it to the shopkeeper with a view to buying it. If the shopkeeper expresses his willingness to sell, only then is a binding contract for sale completed. In other words, the offer is an offer by the customer to buy and there is no offer to sell. The customer brings the goods to the shopkeeper to see whether he will sell or not. If he does, he accepts the customer's offer. Otherwise, he is not bound to conclude a contract with anybody who may bring the goods to him. The mere fact that a customer picks up a bottle of medicine from the shelves in this case does not amount to an acceptance of an offer to sell. It is an offer by the customer to buy, and there is no sale effected until the buyer's offer to buy is accepted by the acceptance of the price.[28]

In an auction, the customer's bid constitutes an offer which the auctioneer is free to accept or reject. Before completion of the sale, bidders may announce or withdraw their respective bids, which do not by any means bind the auctioneer. The contract of sale is completed when the auctioneer accepts a particular bid and announces its completion by the fall of the hammer or in some other customary manner. Until such announcement is made, any bid may be retracted.[29] According to Lord Kenyon, the auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by a fall of the hammer. Every bid is nothing more than an offer on one side, which is not binding on either side till it is assented to. Once an offer is accepted, it cannot be withdrawn, and any purported withdrawal amounts to rescission or breach of contract.

To be effective and binding on the offeror, acceptance must be unequivocal and communicated to him. It takes effect from the moment at which it is received. Although it may be express or otherwise construed from the conduct of the offeree, it must be unconditional. Conditional acceptance amounts to a counter-offer and impliedly constitutes a final rejection of the original offer.[30] Any purported acceptance that is conditional in terms is therefore ineffectual, unless the proposed contract is completed on different or additional terms subsequently agreed between the parties. In order to consummate an agreement, acceptance must meet and correspond with the terms and conditions of the offer in every respect.[31]

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[27] ibid at p.801.

[28] ibid at p.802.

[29] *Payne v Cave* [1789] 3 Term Reat p.148.

[30] *Khaled and others v Athanas Brothers* (*Aden*) *Ltd* [1968] EA p.31.

[31] *Masha v Tol Ltd* [2003] 2 EA p.580.

An offer remains open to acceptance for the period (if any) specified by the offeror and terminates automatically at the expiration of the stipulated period. It may, however, be withdrawn at any time before acceptance and the notice of revocation communicated to the offeree. Any purported acceptance after termination or withdrawal is ineffectual because the condition as to the time within which it should be accepted would not be met. If no period of acceptance is stipulated, the offer remains open for a reasonable period, depending on the circumstances of each case.

To form a contract, the acceptance must be unconditional. It must manifest assent by the person to whom the offer was made to the exact terms of the offer without more. An attempt to impose new conditions converts the acceptance into a counter-offer by which the offeror is not bound unless he assents to the new terms introduced by the offeree. The acceptance must manifest a positive intention on the part of the offeree to be bound by the terms of the offer. In other words, silence does not amount to acceptance, although acceptance need not be expressly communicated to the offeror as long as the offeree does something to signify acceptance of the offer made to him. Performance of an act in response to and in accordance with the terms of an offer constitutes acceptance. In this sense, the existence of a contract is said to be inferred from the conduct of the parties.

2.3.3 Consideration

In order to bind the other, a party must pay the agreed price in return for the promise or undertaking by that other to discharge the obligations imposed on him under the contract. The "price" need not be pecuniary in nature as long as it confers some value or benefit to the offeror. It may consist of corresponding promises without payment of any money from one party to the other.

To be enforceable, a contract that satisfies all the other essential elements must be supported by sufficient consideration, unless it is of the nature that the law does not require to be supported by consideration. For instance, the special nature of contracts of bailment is recognized by common law, which imposes duties on the bailee as a matter of course in the absence of consideration to support his undertaking in relation to the goods bailed. Similarly, contracts of guarantee or other contracts under deed, which are known as specialty contracts, do not require consideration to reciprocate the guarantee or undertaking furnished under deed.

Consideration is furnished by conferring a benefit in return for a promise or compensation for a detriment suffered or incurred by the other party. Simply put, it is the price paid for the promise or the value for which the promise is enforceable. Consideration need not be adequate as long as it consists of some economic value or benefit accruing to either of the parties, and may comprise a corresponding or reciprocal promise.

Consideration may take the form of a "…right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the

other."[32] In law, a promise to forbear is a good consideration and actual forbearance at the request, express or implied, of the defendant is also a good consideration to support a contract.[33]

According to Lord Blackburn in *Bolton v Madden*,
"An executory agreement, by which the plaintiff agrees to do something on the terms that the defendant agrees to do something else, may be enforced if what the plaintiff had agreed to do is either for the benefit of the defendant or to the trouble or prejudice of the plaintiff."[34]

Consideration differs in form and nature and may be categorized as either executory or executed. This depends on what one party gives or does in return for the other's reciprocal promise. Consideration is said to be executory when the defendant's promise is made in return for a counter-promise from the plaintiff. On the other hand, it is said to be executed when the promise is made in return for the performance of an act.[35] In other words, consideration is executory where the transaction is to be carried out in the future and when nothing has yet been done to fulfil the mutual promises comprising the bargain. An example is where a reward is promised for the return of a lost piece of jewellery.

In every case, the corresponding promises or acts must be related and forming part of the same transaction. However, where a party makes a further promise subsequent to, and independent from, the transaction, it is of no effect and must be regarded as a mere expression of gratitude for past favours, which does not bind the the parties in contract. The subsequent promise is of no legal effect notwithstanding the fact that the promisor may have been induced to give the new promise in relation to the previous agreement. The subsequent and independent promise is, strictly speaking, made without consideration and upon past consideration. Accordingly, it is of no binding effect.

To be binding, the act must be done at the promisor's request. The parties must have understood that the act in question was to be remunerated further by the payment or the conferment of some other benefit. The payment or conferment of a benefit must have been legally enforceable had it been promised in advance. Moreover, it is the intention of the parties that prevails in every one of such cases, provided that valid and sufficient consideration is given to bind them in contract. The same principle applies where a simple contract is validly varied by a subsequent agreement of the parties. To be enforceable, the variation agreement must also be supported by consideration.[36]

In every contract, the following rules of consideration must be satisfied to effectively bind the parties:

(a) Consideration must be real though not adequate. In other words, the measure or the comparative value of the corresponding promise is immaterial in determining sufficiency and

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32 *Currie* v *Misa* [1875] LR 10 Exch p.153.

33 *Crears v Hunter* [1887] LR 19 QBD p.341 (CA).

34 *Bolton v Madden* [1873] LR 9 QB p.55.

35 Cheshire GC, Fifoot CHS and Furmston MP *Law of Contract* (11th edn Butterworths London 1986) p.71.

36 *Brollo Kenya Ltd v Ondatto and others* [1989] KLR p.553.

validity of consideration. Therefore, apparent unfairness of an agreement cannot in itself invalidate it.

(b) It must not be past. Both the price given in return for a corresponding promise must form part of the same transaction. The promise and the price for which it is obtained must relate to the same bargain.

(c) It must move from the promisee to the promisor. In effect, only he could sue on a promise who had paid the price of it. In other words, there must be privity of contract between the parties. In the words of Wightman J, "no stranger to the consideration can take advantage of a contract although made for his benefit."[37] As observed by Whightman J, a stranger to the consideration of a contract may maintain an action upon it only if he stands in such a near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration. [38] Although the consideration must move from the party entitled to sue upon the contract, natural love and affection is not a sufficient consideration for a promise upon which an action may be maintained.

(d) It must be lawful. An agreement made in pursuance of an unlawful object creates no rights or obligations, and is unenforceable at law.

(e) It must be in excess of an existing contractual or other legal obligation. Performance by a party of an obligation imposed upon him by a prior contract, common law or statute, does not constitute sufficient consideration to support an agreement made independently of that other contract or legal duty. To be enforceable, the subsequent promise must be supported by sufficient consideration separately given independent of a prior legal obligation imposed on the promisee.

In *Rajabali Nasser Rattansi v Albert Israel*, the appellant sold certain goods to the respondent. The respondent, claiming among other things that he had been overcharged for certain of the goods, refused to make payment of part of the purchase money to the extent of KShs 5 000. In return for the respondent's promise to pay the outstanding balance, the appellant promised to facilitate the export of some soap for the respondent. The respondent did not pay the KShs 5 000. The court held that the respondent's refusal to pay being frivolous and vexatious and not *bona fide*, there was no consideration for the appellant's promise to facilitate the export of the soap. In any case, the stated balance constituted an existing contractual obligation, which the respondent was bound to discharge without any enforceable duty on the part of the appellant to do more than he was obligated to in the previous contract.[39]

2.3.4 Intention to Create Legal Relations

Parties will only be bound in contract if their transaction was intended to create legally binding relations. Intention is the core of every contract. The mutual intention of the parties to be bound in contract may be (a) expressed in their oral or written agreement; (b) inferred from their conduct or course of dealing in similar transactions; or (c) inferred from the custom or usage in trade or profession in which they are engaged. Their intention may also be presumed or inferred from the very nature of the transaction in question. In commercial agreements, for instance, it will always be presumed that the parties intended to create legal relations and make a binding contract, unless there are sufficient grounds to rebut the presumption by showing that the parties intended to be bound in honour only, as is usually the case in domestic arrangements and social conventions or offer of hospitality.

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[37] *Tweddle v Atkinson* [1861] 1B and S p.393 at p.398.

[38] ibid at p.397.

[39] *Rajabali Nasser Rattansi v Albert Israel* (1953) 20 EACA p.127.

In the absence of an agreement to the contrary, every commercial relationship is presumed to be founded on such intention as was illustrated in *Carlill v Carbolic Smoke Ball Company*. The defendants, the proprietors of a medical preparation called "the carbolic smoke ball", issued an advertisement in which they offered to pay £100 to any person who contracted influenza after having used one of their smoke balls in a specified manner and for a specified period. On the faith of the advertisement, the plaintiff bought one of the balls and used it in the manner and for the period specified but nevertheless contracted influenza. The defendants had declared that they had deposited £1 000 with their bankers to show their sincerity.

In defence of the plaintiff's claim, the company pleaded that no legal relations were ever contemplated. According to the defendant company, the advertisement was a mere puff; a mere statement by the defendants of the confidence they reposed in their remedy; a promise in honour. The Court of Appeal rejected this plea. The fact of the deposit was cogent evidence that the defendants had contemplated legal liability when they issued the advertisement and intended to be bound by the consequences of their advertisement in relation to the outcome of the use by any person of their preparation.[40] In such and every case, the governing test as to the binding effect of a contract is the parties' intention.

2.3.5 Contractual Capacity

In principle, the legal standing or status of a party is crucial to the making of an enforceable contract. In order to be obligated under or by virtue of a contract, the parties must be competent to create legally binding relations. This competence is commonly referred to as contractual capacity. Contractual capacity is in law directly related to the age, legal status or mental condition of the parties. The term "status" refers to legal recognition of a "person" as being competent to create relations enforceable at law. For instance, an unincorporated association or a company in formation attracts no such legal recognition. This is because it is not a corporate entity capable of deriving rights or obligations in contract.

As a general rule, every person is in law presumed to be competent to enter into contracts with the exception of those who, due to age, legal status (such as bankruptcy) or mental infirmity, do not have capacity to enter into legally binding relations.

Contracts entered into by minors or persons of unsound mind are either void or voidable at the instance of the contractor who lacks capacity, and are not enforceable. As respects age, the Age of Majority Act, 1974 fixes the age of majority at Eighteen years below which a person lacks capacity to enter into a legally binding contract other than a contract for necessaries. Contracts entered into by minors are governed by the Infants Relief Act, 1874 (UK), which is a statute of general application in Kenya. Such contracts are subject to common law as modified by the Act.

Under the applied 1874 Act, (a) **contracts for loan and accounts stated;** and (b) contracts for necessaries, are declared to be absolutely void as against a minor. Accounts stated are statements in acknowledgement of debts, which cannot be enforced against an infant. It is immaterial that the acknowledgement is made in writing after the infant has become of age. Even

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[40] *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB p.256.

on attaining the age of majority, an infant cannot effectively ratify a contract entered into during his infancy regardless of the terms thereof, unless the purported act of "ratification" is made pursuant to a subsequent agreement binding on terms distinct from those upon which the original contract was made. Even so, the subsequent agreement is unlikely to be legally binding in so far as it is based on past consideration.

The 1874 Act, which was designed primarily to protect infants from unscrupulous traders and moneylenders, states the legal position in no uncertain terms. Under the mandatory provisions of section 2, no action shall be brought to charge any person upon any promise made after full age to pay debts contracted during infancy or upon any ratification made after full age of any promise or contract made during infancy whether there shall or shall not be any new consideration for such promise or ratification after full age.[41] In other words, fresh consideration does not validate or render enforceable an agreement that was *void ab initio*. In addition, the Betting and Loans (Infants) Act, 1892 (UK) enhances this protection by prohibiting enforcement of any negotiable instrument given by an infant for the purpose of rendering the agreement or subsequent ratification effective.

Section 1 of the 1874 Act renders void (a) any guarantee given by an infant or in respect of contracts entered into by infants for the repayment of money lent or to be lent; or (b) for goods (other than necessaries) supplied or to be supplied. The same applies to a mortgage of land or chattels mortgage executed by him as security for the repayment of money lent. The effect of the Act is that infants cannot be held liable under or sued upon contracts for loans, accounts stated with them or contracts of guarantee or for goods (other than necessaries), as they are rendered void by statute. On the other hand, an infant can sue upon such contracts except as against another infant. For instance, where an infant lends money to an adult, he can recover it by civil action. This means that money paid for goods by an infant under an absolutely void contract ought to be recoverable by him as being money had and received to his use.

In contracts for goods other than necessaries, the minor or person of unsound mind is bound to pay a reasonable price. "Necessaries" are defined in section 4 of the Sale of Goods Act Revised 1964 (1931) as "goods suitable to the condition in life of such infant or minor or other person and to his actual requirement at the time of the sale and delivery." These include articles and services fit to maintain the infant in the station of life in which he moves.[42]

By definition, the Act lays down a two-fold test as (a) to suitability in relation to the condition in life of the infant; and (b) to his actual requirement at the time the contract of sale (and delivery) is made. Alderson B defined necessaries in *Chapple v Cooper* as "… things without which an individual cannot reasonably exist." They include, among other things, "food, raiment (clothing), lodging … instruction in art or trade, intellectual, moral and religious information, the assistance and attendance of others …"[43]

In *Chapple v Cooper*, the action was brought by the plaintiff, an undertaker, to recover from the defendant, a widow under the age of Twenty-one years, the sum of £21 1S being the expenses of the funeral of her late husband, which was ordered by her. The plaintiff's claim was

[41] The Infants Relief Act, 1874 (UK) s 2.

[42] Cheshire GC, Fifoot CHS and Furmston MP *Law of Contract* (11th edn Butterworths London 1986) p.411.

[43] *Chapple v Cooper* [1844] 13 M and W p.252 at p.258.

contained in a declaration for work and labour and materials found on the grounds that they were necessaries. To this, the defendant pleaded infancy and contended that the funeral expenses of her husband could not be considered as necessaries for her. On the authorities, the court held that a decent burial of a spouse or children was part of a person's own rights and may be classed as a personal advantage, and reasonably necessary to him. Accordingly, he may make a binding contract for it.

In his considered judgment, Alderson B observed that

"… an infant can contract so as to bind himself in those cases where it is necessary for him to have the things for which he contracts; or where the contract is, at the time he makes it, plainly and unequivocally for his benefit."[44]

The suitability of the goods sold and delivered to a minor depends on his or her social environment and standing in society. Variations in the circumstances of different minors in this regard suggests that what is suitable to the condition in life of, and actually required by, one infant might be extravagant to another. In order to bind an infant in any case, the contract in issue must be in the interest and for the benefit, but not to the prejudice, of the infant.

Notably, not all contracts made for the benefit or for the interest of an infant will be binding. A trading contract, for instance, is not binding on an infant however much it may be in his interest or for his benefit. In *Cowern v Nield*, it was held that an infant hay and straw dealer was not liable to repay the price of a consignment of hay that he had failed to deliver. The plaintiff's case was that he had ordered some hay and clover from the defendant, that the hay had never been delivered and that he refused to take delivery of the clover because it was rotten. He sought to recover from the defendant the proceeds of a cheque which he had given to the defendant in payment for the hay and clover.[45]

As an exception to the general rule, an infant is bound under a contract where he acquires an interest of a permanent nature, such as leasehold or other proprietary interest in immovable property. Where the interest so acquired comprises a leasehold in respect of lodging premises, the nature of the services contracted with the infant fits the definition of "necessaries" as defined in *Chapple v Cooper*. Likewise, a voidable contract (as opposed to one that is void *ab initio*) is binding on him if he does not repudiate it within a reasonable time after becoming of age. It is then presumed that he has had adequate time to consider whether or not to affirm or repudiate the contract. Upon repudiation, he is entitled to recover money paid pursuant to the contract where there is total failure of consideration. However, an infant is not liable under a negotiable instrument to which he becomes a party under any circumstances. Likewise, he is not liable at common law for deceit if he induces another person to contract with him by false misrepresentation to the effect that he has attained the age of majority. This means that he cannot be sued in tort or for money or goods so obtained.

On the other hand, an infant is not entitled to gain benefits by fraud to the prejudice of the other party. The equitable doctrine of restitution requires that traceable benefits so gained be dislodged if still in the possession of the fraudulent infant. Moreover, a void contract confers no

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[44] *Chapple v Cooper* [1844] 13 M and W p.252 at p.258.

[45] *Cowern v Nield* [1912] 2 KB p.419.

rights or benefits on any of the contracting parties regardless of their status. As a cardinal rule, the party guilty of the fraud or misrepresentation in question cannot retain property or material benefits received under a void transaction.

The test of capacity in relation to insane and drunken persons is whether, at the time of contracting, the party was suffering from such a degree of mental disability that he was incapable of knowing or understanding the nature of the contract. The contract is voidable at the instance or option of the disabled party. However, it must be proved that the fact of mental disability was or ought to have been known to the other contracting party. On the other hand, a contract made during his lucid interval is binding notwithstanding knowledge by the other party of his mental disorder. In any event, a mentally disordered person is liable for necessaries supplied to him or to his wife and must pay a reasonable price therefor.[46]

2.3.6 Legality of the Contract

In order to be legally binding, the object of a contract must be lawful. Accordingly, a contract rendered illegal by common law or by statute confers no rights capable of being enforced. Neither does it obligate the other party to perform his part of the bargain. It originates no rights or obligations capable of being enforced by any of them.

Where the object of the legislature is to expressly or implicitly prohibit and vitiate the contract, the rights purported to be conferred thereby cannot be enforced. Neither can any party be entitled to claim any benefits anticipated to accrue from the performance by the other of any corresponding obligations imposed thereunder. In other words, the transaction in issue is of no legal effect.

A contract is *void ab initio* and illegal as formed where its own creation is prohibited, and neither party can acquire rights thereunder. On the other hand, it may be lawfully formed but performed in a manner prohibited by statute. Where the contract is lawful in its inception but is executed illegally, all contractual rights and remedies are withheld from the party in violation of statute.[47] On the other hand, all the appropriate remedies are available to the innocent party as long as he was not privy to or condoned the illegality. For the illegality to vitiate the contract, the offending incident in the course of performance must adversely affect the core of the contract.[48]

Examples of contracts rendered illegal by common law on grounds of public policy (or merely inexpedient or void) include

(a) an agreement whose object is to commit a crime or a tort, or to defraud a third party;

(b) a contract that is sexually immoral and reprehensible;

(c) a contract to the prejudice of public safety;

(d) a contract to defraud the revenue;

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[46] The Sale of Goods Act Revised 1964 (1931) s 4(1).

[47] Cheshire GC, Fifoot CHS and Furmston MP *Law of Contract* (11th edn Butterworths London 1986) p.337.

[48] *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB p.267 at p.522.

(e) a contract prejudicial to the administration of justice, or one that tends to corruption in public life;

(f) a contract to lend money to an alien enemy;

(g) an agreement to import liquor or other intoxicating substances into a country where prohibition is in force;

(h) an agreement in restraint of trade (i.e., one in which a worker is restricted by a covenant in restraint of trade to exploit his skills as and where he will, or to obtain employment, or to carry on business, in direct competition with his immediate former employer).

2.3.7 Consensus Ad Idem

Genuine consent is crucial to the validity of a contract. To be legally bound, the parties must have entered into the contract of their free will since the resulting contractual obligations are self-imposed. Their agreement would have no binding force unless it is based on genuine consent of all the parties. In effect, the exclusive task of a court in contract cases is to discover what the parties have agreed and give effect to it, except in cases of mistake, duress or illegality.[49] The notion of consensus presupposes the absence of unilateral mistake, coercion or undue influence, which would vitiate the contract.

Every contract derives its effect from the intention of the parties. For this reason, duress or undue influence negatives mutual intention. If pleaded and proved, duress, undue influence, or other illegality, would be a valid defence to a claim in contract.[50]

2.4 Privity of Contract

In general terms, "privity" means the relationship that exists between two or more persons as a result of their participation in some transaction or event. Privity of contract refers to the legal relationship that exists between the parties to a contract. The obligations imposed by, and the rights or benefits accruing from, their relationships do not affect third parties not privy to the contract.

The Common law doctrine of privity dictates that only the parties to a contract can sue and be sued on it: it can neither confer rights nor impose liabilities on others not privy thereto. Under the doctrine, "no-one may be entitled to or bound by the terms of a contract to which he is not an original party"[51] even if made for his own benefit. In effect, a stranger to the consideration cannot take advantage of the contract although made for his benefit.[52] In other words, a contract cannot confer rights or impose obligations arising out of it on any person except the parties to it.[53]

The doctrine of privity does not recognize a claim of rights acquired for a third party (*Jus Quaesitum Tertio*) other than in exceptional cases, such as in contracts of agency under which an

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49 Cheshire GC, Fifoot CHS and Furmston MP *Law of Contract* (11th edn Butterworths London 1986) p.13.

50 *Hassanali Issa and Co v Jeraj Produce Store* [1967] EA p.555 at p.560.

51 Cheshire GC, Fifoot CHS and Furmston MP *Law of Contract* (11th edn Butterworths London 1986) p.437.

52 ibid at p.440.

53 *Muchendu v Waita* [2003] KLR p.419.

agent can bind an undisclosed principle in a contract made on the principal's behalf. The doctrine is founded on the premise that a contract is an intimate, if not the exclusive, relationship between the parties who have made it with the intent and purpose of excluding others from its binding effect or benefits.

As a general rule, a third party is neither entitled to any benefits nor liable under the contract except in the following special cases, namely,

(a) an undisclosed principle may enforce rights and benefits accruing to him and sue under a contract made on his behalf by his agent;

(b) third parties may enforce benefits accruing to them under certain insurance policies;

(c) a third party payee or endorsee may sue on a negotiable instrument notwithstanding the fact that he is not the original payee named in the instrument;

(d) a beneficiary may sue under a trust to which he is not party;

(e) executors of a will or administrators of an estate may sue on a contract entered into by the deceased in their capacity as personal representatives of his estate;

(f) an assignee may enforce rights originally acquired by the assignor in a contract to which the assignee was not privy; and

(g) an agent appointed under a contract of agency may create legal relations between his principal and a third party.

2.5 Contents of the Contract

2.5.1 Introduction

As a general rule, the history preceding the execution of a contract, and any discussions or assurances in that regard, are superseded by the subsequent written contract, which becomes the exclusive memorial of the parties' agreement. Consequently, no extrinsic evidence is admissible to contradict, vary, add to or subtract from the terms of the contractual document.[54] On the other hand, contracts contain terms by which the parties are bound but which are not necessarily confined to those that are expressly agreed upon or appear on its face.

In addition to express terms, the parties may have negotiated against a background of trade custom, commercial or local usage, whose implications they have tacitly assumed as incorporated in their bargain. To concentrate solely upon their express language may be tantamount to minimizing or distorting the extent of their rights and liabilities with the consequential effect of eroding the efficacy of the transaction. Thus, evidence of custom may be admitted to lend meaning and expediency to the contract. Similarly, additional terms and consequences may have been implied and annexed by statute to particular contracts, which will operate despite the parties' ignorance, or even contrary to their intention. Likewise, courts may read into a contract some further term which alone make it effective, and which the parties must be taken to have omitted by pure inadvertence.

The contents of the contract emerge from a variety of sources and may be summed up as follows, namely,

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54 *Muthuuri* v *National Industrial Credit Bank Ltd* [2003] KLR p.145.

(a) terms expressly incorporated by the parties into the contract (whether in writing, or orally, or partly orally and partly in writing);

(b) **terms implied from trade custom, commercial or local usage;**

(c) terms implied by statute;

(d) terms implied from the conduct of the parties;

(e) t**erms inferred or presumed by the courts to be essential or efficacious to the contract;**

2.5.2 Express Terms

The law prescribes no formality for the creation of a binding contract. A contract may be made wholly by word of mouth, or wholly in writing, or partly by word of mouth and partly in writing. However, not all words written or spoken by the parties constitute terms of a contract. Some expressions may be (a) mere representations or expressions of intention; or (b) merely intended to induce the other party to accept the offer to transact. If the contract is wholly in writing, the discovery of what was written must be confined to the four corners of the document in which the parties chose to enshrine their agreement. Neither of them may subsequently adduce oral evidence to show that their intention has been omitted or misstated in the contractual document.

It is a cardinal rule, the parole evidence rule, that

"… parol evidence cannot be admitted to add to, vary or contradict a deed or other written instrument. As observed by Lawrence J, "… parole evidence will not be admitted to prove that some particular term which had been verbally agreed upon had been omitted (whether by design or otherwise) from a written document constituting a valid and operative contract between the parties."[55]

As explained by Spry JA, it is presumed that, by drawing the deed, the parties intended to be bound in no terms other than those contained in the instrument to which they subscribe their hands. This is premised on the general rule that where the contract is in writing and its terms are clear and unambiguous, no extrinsic evidence may be called to add to or detract from it.[56] Consequently, an agreement which is by law required to be in writing cannot be varied by oral representations or stipulations.[57]

Variation of an existing contract involves an alteration as a matter of contract of the contractual relations between the parties. The variation, if agreed upon, must be supported by consideration and the parties must be *ad idem*. If, on the other hand, the agreement is mere *nudum pactum*, it would give no cause of action for breach, particularly if its effect was to give a voluntary indulgence to the other party.[58]

2.5.3 Implied Terms

[55] *Jacobs v Batavia and General Plantations Trusts* [1924] 1 Ch p.287 at p.295.

[56] *Damodar Jinabhai and Co. Ltd and another v Eustace Sisal Estates Ltd* [1967] EA p.153 at p.159.

[57] *Kinyanjui and another v Thande and another* [1995-98] 2 EA p.159.

[58] *Kenya Breweries Ltd v Kiambu General Transport Agency Ltd* [2000] 2 EA p.398.

In principle, "a written contract cannot be amended by an implied stipulation unless it can be said to be mutually intended and necessary to give business efficacy to the contract."[59] This means that extrinsic evidence may be given of surrounding facts other than evidence of negotiations, which is not admissible to vary the terms of the written contract. Extrinsic evidence may also be given to explain latent ambiguity in a contract, but will not be admitted to explain any patent or obvious ambiguity.[60] Otherwise, courts will not make contracts for the parties, but will only give effect to their clear intention.[61]

In *Morgan v Griffith*, it was held that evidence was admissible to prove a verbal collateral agreement made in consideration of one of the parties executing a deed under seal; provided that such verbal agreement did not add to, vary or contradict the terms of the deed itself.[62] To be admissible, the verbal agreement in issue must be collateral to the written instrument in the sense that it is independent of and does not in any way add to, vary or contradict any of the terms contained in the contractual instrument.

The parole evidence rule safeguards the intention of the parties from distortion by subsequent evidence introduced by any of the parties with the intention of either avoiding liability under the contract as made or of avoiding perfect performance on his part. It binds the parties to both the content and form of the contract and prevents them from introducing fresh material not previously considered to be part of the terms by which they agreed to be bound.

2.5.4 Terms Implied from the Custom or Usage of Trade or Profession

A contract is not an isolated act, but an incident in the conduct of business or in the framework of some more general relation and that it may be set against a background of usage familiar to those who engage in similar negotiations, and which may be supposed to govern the language of a particular agreement. In addition to the express terms, there may be others imported into the contract from its context.

The same rule applies to contracts in other transactions of life in which known usages have been established and prevailed. This has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intend to be bound, but a contract with reference to those known usages. To be implied in any case, the custom or usage must not contradict the express terms of a contract but rather be consistent with and reinforce them. In any event, mercantile usage, however extensive, should not be allowed to prevail if contrary to positive law.[63]

2.5.5 Terms Implied by Statute

Apart from the terms expressly agreed between the parties or implied by trade custom, commercial or local usage, certain contracts, such as contracts for sale of goods, may be subject to statutory regulation to the extent that specific conditions or warranties may be

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59 I*bid at p.403.*

60 *Damodar Jinabhai and Co. Ltd and another v Eustace Sisal Estates Ltd* [1967] EA p.153 at p.159.

61 *Osman v Mulangwa* [1995-98] 2 EA p.266.

62 *Morgan v Griffith* LR 6 Ex p.70; ` LR 8 Ch p.856.

63 *Goodwin* v *Roberts* [1875] LR 10 Exch p.337 at p.357.

implied into them unless excluded by express agreement where the Act permits such exclusion.

2.5.6 Terms implied from the conduct of the parties

Implication of terms into a contract is not confined to statute or courts. The conduct of the parties may in itself constitute a positive indication of the terms by which they intend to be bound. It is not unusual for parties to a contract to act in such a manner as would imply an intention that their conduct binds them to the extent that it suggests a tacit albeit manifest undertaking on either or all of them to do some thing in return for the other's promise. For example, when a buyer selects an item and silently presents it to the seller along with money sufficient to cover the displayed price, it is implied from his conduct that he offers to purchase the item at the price indicated on the tag. The seller's acceptance of the money tendered or paid by the buyer creates a binding contract to sell the goods in question at that price. It is immaterial that the parties do not exchange any communication since their conduct is sufficient to infer a binding agreement.

2.5.7 Terms inferred or presumed by the courts to be essential or efficacious to the contract

Courts play a significant role in determining the contents of a contract and in giving effect to its business efficacy.[64] To do so, the courts may in any class of contracts imply a term in order to repair an intrinsic failure of expression. The judge may imply a further term to implement the parties' presumed intention and thereby give business efficacy to the contract.

In *Campling Bros and Vanderwal Ltd v United Air Services Ltd* , the court upheld the general principle at common law that a term can only be implied if it is necessary in the business sense to give efficacy to the contract.[65]

In an earlier decision in *Reigate v Union Manufacturing Company*, Scrutton LJ observed that

"A term can only be implied if it is necessary in the business sense to give efficacy to the contract, that is if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties: 'what will happen in such a case?' they would both have replied: 'of course so and so will happen; we did not trouble to say that; it is too clear."[66]

According to Lord Pearson in *Trollope and Colls Ltd v North-West Metropolitan Regional Hospital Board*,

"An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: It is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: It must have been a term that went without saying, a term necessary to give business efficacy to

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64 *Campling Bros and Vanderwal Ltd v United Air Services Ltd* (1952) 19 EACA p.155.

65 ibid.

66 *Reigate v Union Manufacturing Company* (*Ramsbottom*) [1918] 1 KB p.592 at p.605.

the contract, a term which, although tacit, formed part of the contract which the parties made for themselves."[67]

2.6 Conditions and Warranties

2.6.1 Introduction

While the foregoing customary, statutory or judicial implications may be as important as the terms expressly adopted by the parties, not all of the terms of the contract are of equal importance. They may be classified into conditions and warranties depending on their gravity or on their general effect on the contract, and on the consequences of non-performance. One undertaking may be regarded as of major importance, the breach of it entitling the injured party to end or repudiate the contract; the breach of another, though demanding compensation, may leave the contract intact. Therefore, a condition, which goes to the root and is of the essence of the contract, is so fundamental to the contract that its breach gives the aggrieved party the right to treat the contract as repudiated. On the other hand, breach of a warranty entitles the injured party to sue for damages. A warranty is a term that is collateral to the main purpose of the contract.

2.6.2 Conditions

Not all express obligations created by a contract are of equal importance. In this regard, it is the prerogative of the parties in each case to set their own value on the particular terms that they impose upon each other and the weight they intend to attach to every circumstance in their bargain. It is open to them to indicate expressly the consequences to be attached to any particular breach. To the ends of their intention, terms of the contract may be distinguished by the familiar dichotomy of conditions and warranties, a mode of classification that is by no means universal to all types of contracts. The term "condition" has many meanings and may refer to either a term that is part of the obligation itself, or an external fact subject to, and upon which, the existence or operation of the main obligation depends.

2.6.3 Types of Conditions

Conditions in the sense of external factors upon which the existence, or operation, of the contractual obligations depend may be classified into two, namely, (a) conditions precedent; and (b) conditions subsequent. The first of the two categories takes the form of facts or events which must take place before the contract takes effect. The intention of the parties is that its operation is to be postponed until the specified event takes place. On the other hand, the occurrence of a specified event comprising a condition subsequent may cancel a contract which has already come into effect.

A condition precedent attaches to a contract of sale where a purchaser agrees to buy some equipment only if it satisfies a certain test. On the other hand, the purchaser to revive the whole transaction in certain circumstances may conclude the sale with reservation of the right. In practice, agreements are often made which are expressed to be "subject to" some future event, or performance. Where the agreement is subject to contract, there is no contract at all, and the parties agree not to be bound until some future event (such as the execution of a formal

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[67] *Trollope and Colls Ltd v North-West Metropolitan Regional Hospital Board* [1973] 2 All ER p.260 at p.268; [1973] 1 WLR p.601 at p.609.

contract),, which cannot take place without the concurrence of both parties or because the condition is uncertain.[68] In other words, even if the parties were *ad idem* as to the terms which are to go into the agreement, neither party is bound until the agreement of sale has been executed by both of them.[69] To illustrate, the expression "subject to the terms of a lease" (or "subject to a contract of lease") means "subject to the terms to be contained in a lease executed by the lessor" and, therefore, implies that a lease has to come into existence and has to be executed by the lessor before any binding agreement is reached.[70]

A condition precedent is a stipulation expressly agreed upon by the parties that the contract shall not be binding unless the specified condition is fulfilled. In effect, failure on the part of any party to fulfil a condition precedent invalidates the contract.[71]

An express stipulation that payment for building works would become due upon satisfaction and approval of the employer operates as a condition precedent to the right of payment. Accordingly, the employer could not refuse to pay if the work was completed in such a way that he ought reasonably to be satisfied with it.[72]

On the other hand, a contract that has validly come into existence may also contain a condition that it shall terminate upon the occurrence of some event commonly referred to as a condition subsequent. A condition subsequent is an express condition in a contract that the contract shall cease to be binding on the happening of a specified event, though valid and binding at the onset. For example, a condition in a contract for the sale of goods that entitles the purchaser to exercise the option to return them if, on putting them to the intended use, he is dissatisfied with them in relation to quality and fitness for purpose, is a condition subsequent. Its occurrence renders the contract voidable at the instance of the aggrieved party.

Similarly, the duty of an employer to pay for technical services under a contract for maintenance and repair of machinery may be conditional to successful repair. Successful operation of the equipment under repair is said to be a condition subsequent which, if attained, would bind the employer to make payment under the contract.

2.7 Exclusion Clauses

A contract may also contain clauses with provisions which purport to exclude or limit the liability of one of the parties in certain circumstances. These are common in standard form contracts and in contracts which contain rules for the protection of consumers. Exclusion clauses

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68 Cheshire GC, Fifoot CHS and Furmston MP *Law of Contract* (11th edn Butterworths London 1986) p.140.

69 *Melina F de Ellis* v *Emil Stotzky* (1949) 16 EACA 65.

70 *Raingold* v *Bromley* [1931] 2 Ch 307 at 316.

71 *Wagichingo v Gerald* [1988] KLR 406.

72 *Ujagar Singh v HA Murray* (1950) 17 EACA p.8.

may be viewed as either defining the obligations of, or providing defences to the promisor. The courts will uphold them if (a) the particular document relied on as containing notice of the excluding or limiting term is an integral part of the contract; and (b) it must have been intended as a contractual document and not as a mere acknowledgement of payment, such as a receipt, or invoice, which is not a contractual document.

Certain conditions contained in a ticket purporting to exclude or limit the defendant's liability for personal injuries and damage suffered by the plaintiff have been found to be unenforceable in, among other cases, *Chapelton v Barry UDC*.[73]

The plaintiff, who wished to hire a deck chair on a beach, went to a pile of deck chairs belonging to the defendant council near to which was displayed a notice in the following terms: "Barry Urban District Council. Cold kna Hire of chairs 2 pence per session of three hours." The notice went on to state that the public were requested to obtain tickets for their chairs from the chair attendants and that those tickets should be retained for inspection.

There was nothing on the notice relieving the defendant council from liability for any accident or damage arising out of the hire of a chair. The plaintiff obtained two chairs from the attendant for which he paid 4 Pence and received two tickets therefor. He glanced at the tickets and slipped them into his pocket and had no idea that they contained any conditions. On one side of the ticket were the words: "Barry Urban District Council. Cold Knap Chair ticket 2 Pence. Not transferable," with half hours printed on the side of the ticket. On the other side of the ticket were the words: "Available for three hours. Time expires where indicated by cut-off and should be retained and shown on request. The council will not be liable for any accident or damage arising from the hire of the chair".

The plaintiff put the chairs up in the ordinary way on a flat part of the beach, and then sat down on a chair which gave way, the canvass having come away from the top of the chair. In an action against the defendants, the county court judge found that the accident was due to the negligence of the defendants, but that the defendants were exempted from liability as the plaintiff had sufficient notice of the special contract printed on the ticket. On appeal, it was held that the ticket was a mere voucher or receipt for the money paid for the hire of the chair, and that the conditions upon which the local authority offered to hire out the chairs were those contained in the notice put up near the pile of chairs, and that as that notice contained no limitation of liability for any accident or damage arising from the hire of the chairs, the local authority were liable to the plaintiff.[74]

As a general rule, if a document is to be regarded as an integral part of the contract, it must next be seen if it has or has not been signed by the party against whom the excluding or limiting term is pleaded. Anything done to signify acceptance of such a term binds the parties. In every case, reasonable notice of the term designed to limit the defendant's liability in any event must be given to the plaintiff before the contract is concluded. Any attempt to introduce a limiting term by notice given after the contract is made is of no legal effect.

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[73] *Chapelton v Barry UDC* [1940] 1 ALL ER p.356.

[74] ibid.

The general rule is that a belated notice is valueless.[75] In *Olley v Marlborough Court Ltd,* the court observed that (a) the terms of the notice in the bedroom were not incorporated in the contract between the defendants and the plaintiff since the plaintiff had not seen it until after she had been accepted as a guest; and (b) even if it had been incorporated in the contract, its terms were not sufficiently clear to exempt the defendants from liability for negligence.[76]

The plaintiff, who was a guest at the defendant's hotel, left for some four hours, locking the door of her room and leaving the key on the rack in the reception office. On her return, she found the key missing and various articles stolen from her room. A notice limiting liability under the Innkeepers Liability Act, 1863 (UK) was displayed in the reception office. The defendants contended that they received the plaintiff into the hotel subject to the terms contained in a notice exhibited in her bedroom, clause 1 of which stated:

"The proprietors will not hold themselves responsible for articles lost or stolen unless handed to the manageress for safe custody. Valuables should be deposited for safe custody in a sealed package and a receipt obtained."

In an action by the plaintiff for negligence, the defendants also pleaded contributory negligence and claimed the protection of the Innkeepers Liability Act by which their liability was limited to £30. The plaintiff made out her case to the satisfaction of the court that the defendants, through their agents, were negligent. Clause 1 of the Act was never intended to exempt the proprietors from liability in respect of loss or theft caused by the neglect of the proprietors. They were bound by the common law duty to take reasonable care.[77] Furthermore, the notice in the bedroom had no bearing on the case since the loss was caused by neglect of the defendants' agents. Furthermore, the notice did not form part of her contract with the defendants. It was not handed to her at the time the contract was made, and neither was it a prominent notice brought to the plaintiff's attention at the time of the contract.

In addition to the foregoing, an excluding or limiting clause does not avail in favour of (a) a person who is not party to the contract; or (b) a person who is in breach of, or is unwilling to discharge, his contractual obligations. This means that the excluding or limiting term, which is an integral term of the contract, cannot be invoked so as to protect a stranger to the consideration by which the parties are bound in contract. This accords with the doctrine of *privity* upon the principle that a stranger to the consideration cannot enjoy the benefits of or rights derived from either the contract or from any particular term contained in it, whether or not it purports to confer such benefits upon him.

The excluding or limiting term cannot operate so as to excuse from liability a party who fails to perform or is guilty of misperformance of his part in the contract. This means that an exclusion clause cannot be invoked so as to relieve a party from liability for breach of contract, or to deprive the innocent party relief for loss or damage suffered as a direct, or indirect, consequence of such breach. As stated by Lord Blackburn in *Elbinger Act Ien-Gesellschaft v Claye*, "the right to sue and liability to be sued upon a contract are reciprocal." Moreover, "… a

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[75] *Olley v Marlborough* Court Ltd [1949] 1 KB p.532; [1949] 1 All ER p.127; *Burnett v Westminster Bank Ltd* [1966] 1 QB p.742; [1965] 3 All ER p.81.

[76] *Olley v Marlborough* Court Ltd [1949] 1 KB p.532.

[77] *Scarborough and Wife v Cosgrove* [1905] 2 KB p.805.

man cannot make a contract in such a way as to take the benefit unless also he takes the responsibility of it."[78]

2.8 Vitiating Factors

2.8.1 Introduction

A contract entered into by the parties and which satisfies formal validity may nonetheless be invalidated or vitiated in certain circumstances. Common law recognizes certain factors which, if present in a contract, reverse the legal effect of the transaction and render it unenforceable at law or in equity. Though seemingly proper in form and substance, the contract may be void at the onset or voidable at the instance of the aggrieved party, depending on the fundamental nature and effect of the particular factor. Their overall effect is to negate one or more of the essentials of a valid contract, such as mutual consent or intention to create legally binding relations.

On the other hand, a contract may contain what is commonly known as a *force majeure* clause: French meaning irresistible compulsion or coercion. The phrase is used particularly in commercial contracts to describe events possibly affecting the contract and which are completely outside the parties' control. Such events are normally listed in full to ensure their enforceability. They may include acts of God, fires, and failure of suppliers or sub-contractors to supply the supplier under the agreement, and strikes and other labour disputes that interfere with the suppliers' performance of an agreement. Such an express clause would normally excuse both delay and a total failure to perform the agreement.[79] Similarly, a *force majeure* clause contained in the contract may indicate that the parties to a contract contemplate the possibility of war and mutually agree that, in such event, the contract should be put to an end.[80]

2.8.2 Mistake

It is presumed that, at the time of making the contract, the parties are like-minded and that their bargain is motivated by commonality of purpose. Indeed, mutual consent (Commonly referred to as *conscensus ad idem*) is an essential element of a valid contract. This presumption may be negated by mistake on the part of either or both of the parties in respect of either the subject matter or some fundamental term that goes to the root of the contract. The effect of mistake at Common law is that the contract becomes null and void and no rights are derived from it. Mutual or unilateral mistake negates the existence of an agreement since the parties are at cross-purposes. Despite appearances, there is in fact no real correspondence of offer and acceptance and, therefore, the transaction must be void.

In order to render a contract void, (a) the mistake must exist at the time the contract is made; and (b) must be one of fact as distinguished from one of law. However, a mistake of law is of no consequence and, if advanced in defence, does not excuse the defendant from liability or other consequence of non-performance or miscarriage of contractual obligations.[81]

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[78] *Elbinger Act Ien-Gesellschaft v Claye Law Redp* 8 QB p.313 at pp.316-7.

[79] Oxford Dictionary of Law.

[80] *Emanuel Mantheakis v The Custodian of Enemy Property* (1943) 10 EACA p.17.

[81] *Sapra Studio v Kenya National Properties Ltd* [1985] KLR p.986.

Mistakes differ in nature and effect, and may be of any of the following types, namely, (a) common mistake; (b) unilateral mistake; and (c) mutual mistake. A mistake is said to be common where both parties operate under the same mistake that is fundamental and not merely collateral to the attainment of the main object of the contract. In this case, each party knows the intention of the other and accepts it, but each is mistaken about some underlying fundamental fact that goes to the root of the matter. The parties, for example, are unaware that the subject matter of their contract does not or no longer exists. For instance, where parties contract for sale of goods which, unknown to them at the time of making the contract, have perished, the sale is void and none of its terms shall be enforced by one against the other. Such a common mistake erodes all the contractual rights and obligations contemplated in the agreement. This means that a common mistake has no effect whatsoever at Common law, unless it is such as to eliminate the very subject matter of the agreement, or unless it empties the agreement of all content[82]leaving nothing to bind the parties.

In contrast, mistake is said to be mutual where parties misunderstand one another and are at cross-purposes. Purported acceptance of something different from what was actually offered is ineffectual and does not bind the parties in contract. The parties must have unity of purpose and be like-minded in respect of the subject matter, and in the terms of the contract. The absence of *consensus ad idem* destroys the very object of making an offer on the part of the offeror while the offeree believes that he has accepted what has not in fact been offered. The effect is to negative the existence of mutual consent without which there can be no agreement.

On the other hand, mistake is unilateral where only one party is mistaken while the other is clear minded as to the terms of the contract. The promisor is in a different position from the promisee. The disparity in purpose has the same consequences in that neither party can arbitrarily enforce his own will on the other. No legal rights or obligations are created where an offeree misunderstands the offeror in terms fundamental to the transaction. Where there is mutual or unilateral mistake, and where the issue of consent is directly raised, there is no genuine agreement because there is no corresponding offer and acceptance. The unilateral mistake must be so far reaching as to upset the basis of the bargain. Otherwise, a mistake is wholly immaterial at Common law unless it results in a complete difference in substance between what the mistaken party bargained for and what in fact he will obtain if the contract is fulfilled. To vitiate a contract in any case, the mistake must be of a fundamental nature and not merely collateral to the main purpose.

2.8.3 Misrepresentation

When parties advance their respective bargain, the corresponding offer and acceptance may be preceded by statements calculated to induce the desired action on each other. Such statements may be comprised of preliminary promises that do not form part of the intended contract. For instance, a motor dealer may remark: “I can assure you that this car would never let you down. It is good value for your money.” While offering to buy it, the seller may rejoin: “I trust your judgment”. The sale may thereafter be concluded on express terms as to price and specifications. Yet the preceding brief conversation may not be part of the bargain, even though calculated to elicit favourable response to the offer. The contractual terms may thereupon be reduced into writing without reference to the promissory terms by which acceptance was induced and without mention of the “assurance” or “trust” alluded to in the pre-contractual negotiations.

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[82] Cheshire GC, Fifoot CHS and Furmston MP *Law of Contract* (11th edn Butterworths London 1986) p.219.

As a general rule, promissory or pre-contractual terms, or representations, are of no effect unless they form an integral part of the contract. A representation may be described as a statement of fact made by one party to the contract, which, while not forming a term of the contract, is yet one of the reasons that induces the representee to enter into the contract. It consists of a positive assertion or express denial of a fact as opposed to mere silence. Silence in itself does not amount to misrepresentation notwithstanding the fact that it may lead the innocent party to wrong conclusions. It is immaterial that the representee would not have accepted the offer but for the offeror's silence as respects a particular matter.

A misrepresentation is an untrue statement of fact and not of intention, or of opinion, or of law, and relates to an existing fact or past event. Except in contracts of insurance, failure to disclose a material fact which might influence the mind of a prudent contractor, does not give the right to avoid the contract even though it is obvious that the contractor has a wrong impression that would be removed by disclosure. However, silence may constitute misrepresentation in the following three circumstances:

(a) where the silence distorts positive representation, and where it is maintained by the defendant with intent to mislead the plaintiff;

(b) where the contract requires *uberrimae fides* (utmost good faith) and imposes an implied duty on either or all of the parties of full and honest disclosure of all material facts; or

(c) where a fiduciary relationship (i.e., one founded on trust and confidence) exists between the contracting parties.

Misrepresentation may be categorized into three main classes, namely, Fraudulent, or negligent misstatement, or Innocent misrepresentation. Lord Herschel defined fraudulent misrepresentation to mean:

"a false statement made knowingly, or without belief in its truth or recklessly, careless whether it be true or false."[83]

A fraudulent misrepresentation is a false statement which, when made, the representor did not honestly believe to be true. It must have been calculated to advance a fraudulent purpose or other undue advantage to the detriment of the innocent party. An allegation of fraudulent misrepresentation is a most serious allegation involving for the party making it a very heavy onus of proof.[84]

Fraud must be proved by showing that the false representation had been made knowingly or without belief in its truth, or recklessly without caring whether it was true or false.[85] Mere carelessness or absence of reasonable ground for believing the statement to be true might be evidence of fraud, unless it was shown that it was made under an honest (though mistaken) impression that it was true. However, "fraud without damage or damage without fraud," does not give rise to a right of action at common law.[86]

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83 *Derry v Peek* [1889] 14 AC p.337.

84 *Juthalal Velji v Gulamhussein Remtulia Jivraj* (1949) 16 EACA p.75 at p.77.

85 *Nocton v Lord Ashburton* [1914] AC p.932 at p.947.

86 *Derry v Peek* [1889] 14 AC p.337 at p.343.

Civil liability in cases of negligent misstatement or false misrepresentation made to a representee rests upon (a) want of reasonable ground to suppose that the statement in issue is true; or (b) want of care to ascertain its truth, to the same extent as liability in fraud. In *Hedley Byrne and Co. Ltd v Heller and Partners Ltd*, it was held that, in some circumstances, an action would lie in tort for negligent misstatement. The court found that a negligent pre-contractual misrepresentation made by one party to the contract to the other may give rise to an action for damages in tort.[87] Innocent misrepresentations are those that are made without fault or intent to prejudice the representee. Remedies for misrepresentation include damages and rescission.

2.8.4 Duress and Undue Influence

A party may by unconscionable means coerce or unduly influence another to enter into a contract without that other's free will. Undue influence includes unfair or improper conduct, coercion, and over-reaching, cheating or personal advantage taken by the guilty party to procure the other's agreement. Use of one's superior position or status to gain advantage over the other and compel him to make a contract to which he could not have agreed but for the improper persuasion amounts to undue influence and will invalidate the contract. Any pressure which the law does not regard as legitimate is wrongful and amounts to duress, which rests upon the finding of fact that the plaintiff was by any means subjected to an improper motive for the action whether or not by threat to life and limb. On the part of the plaintiff, there must be found in truth factors which negative the voluntary character of the transfer of contractual benefit to the defendant.[88]

Since a contract depends upon free consent, an agreement obtained by actual threats or undue persuasion is insufficient to create contractual rights and obligations. A party cannot be held to a contract unless he is a free agent. At equity, duress and undue influence negate the freedom of contract and render the contract voidable at the instance of the innocent party for want of genuine or free consent.

Duress means actual violence or threats of violence to the person calculated to produce fear of loss of life or bodily harm. To constitute duress, the threat must be illegal in the sense that it must be a threat to commit a crime or a tort.[89] However, a threat to prosecute, as was the case in *Gandhi and another v Ruda*, is not of itself illegal where the transaction between the parties involves a civil liability as well as possibly a criminal act. Such a threat does not necessarily vitiate a subsequent agreement by the debtor to give security for a debt which he justly owes to his creditor. Accordingly, the court in this case held that there was no undue influence operating on the third appellant to compel him to execute the mortgage in the respondent's favour.

2.8.5 Illegality

One of the essential elements of a valid contract is that the object of the contract shall be lawful. A contract made for or pursuant to an unlawful object is void at the outset and cannot create any enforceable rights or benefits. As was held in *GG Somaiya and Co Ltd and another* v *Govindji*

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[87] *Hedley Byrne and Co. Ltd v Heller and Partners Ltd* [1964] AC p.465.

[88] *Madhupaper International Ltd and another v Kenya Commercial Bank Ltd and others* [2003] KLR p.31.

[89] *Gandhi and another v Ruda* [1986] KLR p.556.

Popatlal, a contract tainted by fraud (which must be strictly proved) is unenforceable.[90] The law prohibits any party from deriving any benefits from an illegal transaction. Instead, both the promisor and the promisee bear the consequences of breach or other miscarriage by either of them of the obligations created thereunder without any right to compensation for loss or damage arising from such breach. In effect, the loss remains where it falls.

Illegality manifests in various forms and may be with reference either (a) to the nature and object of the contract itself; or (b) to the nature of an act performed by one party pursuant to a valid transaction. In every case, vitiating factors that would warrant the court's intervention on freedom of contract under this head must constitute an illegality under common law or statute. For instance, wagering contracts and contracts in restraint of trade are rendered illegal by statute and are unenforceable. Accordingly, a gambling debt is irrecoverable, and any action to enforce payment is unsustainable.

A contract in restraint of trade may be defined as "any agreement or contract which contains a provision or covenant whereby a party thereto is restrained from exercising any lawful profession, trade, business or occupation."[91] A wagering contract is one involving two parties, each of whom stands to win or lose something of value according to the results of some future event, such as a horse race, or to which one of them is correct about some past or present fact; neither party can have any interest in the contract except his stake in the gamble.

A bet or wager is defined as a stake of any money or valuable thing by or on behalf of any person or an express or implied undertaking, promise or agreement to wager or stake by or on behalf of any person, any money or valuable thing on a horse race, or other race, fight, game, sport, lottery or exercise or any other event or contingency.[92] In general, gaming and wagering contracts are by statute null and void and no action can be brought to recover any money paid or won under them.

On the other hand, a contract, though valid, may yet be unenforceable by an action at law unless and until certain technical requirements for its validity are satisfied. Though lawfully made, a contract that offends statutory provisions for formal requirements cannot be enforced where such want of form is so fundamental as to invalidate the transaction. For example, an unwritten contract of guarantee, or a contract contained in a deed without seal, or an unwritten hire purchase agreement, creates no rights at law and cannot be enforced.

2.9 Assignment of Contractual Rights and Liabilities

A contract creates an intimate if not exclusive relationship between parties privy thereto with corresponding rights and obligations enforceable either way for their benefit. As a general rule of Common law, a contract between two parties cannot confer rights or liabilities on a stranger to the contract. The only means by which a third party can enjoy rights under a contract to which he is not party is by assignment.

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90 *GG Somaiya and Co. Ltd and another v Govindji Popatlal* [1957] EA p.30.

91 The Contracts in Restraint of Trade Act, 1932 s 2.

92 The Betting, Lotteries and Gaming Act Revised 2000 (1966) s 2.

Assignment is a process by which one party (called the assignor) assigns to another (called the assignee) rights or benefits derived from a contract and known as choses in action. These may be described as personal rights of property, which can only be claimed or enforced by action and not by taking physical possession. A chose in action is a term which comprises a number of proprietary rights, such as debts,[93] shares, negotiable instruments, rights under a trust, legacies, policies of insurance, bills of lading, patents, copyrights and rights of action arising out of tort or breach of contract, all of which are assignable under statute law or in equity.

An assignment of a legal chose is legal and valid if it satisfies the following formal requirements:

(a) the assignment is in writing and signed by the assignor although it need not be by deed or for value;

(b) it is absolute in that it transfers the whole of the interest to the assignee and not merely by way of charge only; and

(c) the assignor has given express notice in writing of the assignment to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action.

Even though an instrument in writing is desirable, no particular form of words is required in order to constitute a valid equitable assignment of a legal chose, whether voluntary or for value, (and whether absolute or by way of security), as long as the intention of the assignor to this end is clear from the language used,[94] unless such form is required by statute or is otherwise a matter of trade custom or usage. Moreover, equity looks to the intent rather than the form. The language and content of the contract, or communication of the intention to assign, is immaterial as long as the meaning is plain.[95] However, an equitable assignment of an equitable chose is required to be in writing and signed by the assignor.

As regards contractual obligations, the general rule is that

"[n]either at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor onto those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to somebody else; this can only be brought about by the consent of all the three, and involves the release of the original debtor."[96]

Novation, therefore, is the only method by which the original obligor can be effectively replaced by another. On the other hand, the benefit of a contract can be assigned, and wherever the consideration has been executed and nothing more remains but to enforce the obligation against the party who has received the consideration, the right to enforce it can be assigned, and can be put in suit by the assignee in his own name after notice.

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93 *National House Ltd v the Kenya Farmers Association* (*Co-operative*) *Ltd* [1962] EA p.463.

94 *Standard Bank Ltd v DL Patel Press (Kenya) Ltd* [1985] KLR p.334.

95 *Brandt's Sons and Co. v Dunlop Rubber Co.* [1905] AC p.454 at p.462.

96 *Tolhurst v Associated Portland Cement Manufacturers* (*1900*) *Ltd* [1902] 2 KB p.660 at p.668.

Assignment may also occur automatically in certain circumstances, and in the absence of an express agreement. Automatic assignment by operation of law of contractual rights and liabilities occurs upon the death or bankruptcy of one of the contracting parties. The general rule of Common law is that, on the death of a contracting party, all causes of action subsisting against or vested in him shall survive against or, as the case may be, for the benefit of his estate. Personal representatives of a deceased contractor may recover damages for its breach or may themselves perform what remains to be done and then recover the contract price. Conversely, they may be sued in their representative capacity for a breach of the contract, whether committed before or after the death of the deceased, although they are liable only to the extent of the assets in their hands. However, this rule does not apply where the contract is for personal services, such as a contract between master and servant. The case must be one in which the cause of action does not abate on the death of a party.

It must be appreciated that not all benefits derived from a contract are capable of enforcement against, or for the benefit of, the estate of a deceased contractor. To be enforceable, the contractual rights or obligations in issue must be capable of surviving his death and of being actionable by the administrators of his estate or executors of his will, as the case may be. For instance, a moneylender is entitled to enforce the loan contract against, and recover the outstanding debt from, the estate of a deceased debtor by action against the personal representatives of the deceased. Likewise, any right of action for breach of contract possessed by a bankrupt which relates to his property and which, if enforced, will swell his assets, passes to his trustee in bankruptcy. The trustee is generally empowered by statute in bankruptcy proceedings to collect in and take any action for the recovery of any contractual debts due and payable to the estate of the bankrupt.

2.10 Discharge of Contracts

2.10.1 Introduction

Parties to a contract contemplate its discharge or termination upon due completion or other eventuality, whether or not stipulated in the contract. Apart from complete performance, other factual situations may arise so as to bring a contractual relationship to an end and discharge the parties from their duty to perform subject, of course, to such relief as may be available to restore them to the position in which they would have been but for the unforeseen termination. A contractual relationship subsists unless or until determined by performance or by some other act or inaction on the part of either one or all the parties.

Certain events may also occur so as to frustrate and render performance impossible and discharge a party from duty to fulfil his part of the bargain. Depending on the facts and circumstances of the case, the supervening event may excuse the party charged from liability for non-performance. However, it cannot reasonably be intended that a contract should become void or voidable, or that the parties be discharged from performance on the ground of what may be perceived as impossibility merely because the promised act becomes more difficult or burdensome than was expected.[97] In the opinion of Bacon JA, the mere fact that a contractual obligation is unduly burdensome or difficult to discharge does not of itself release the offending party from liability under the contract.[98]

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[97] *MacLaine Watson and Co. Ltd v Kanji Meghji Shah* (1956) 23 EACA p.366 at p.367.

[98] ibid.

2.10.2 Discharge by Performance

If a party completely and perfectly performs his part in the contract, his duties are at an end. He thereby honours his obligations and is himself discharged from liability to perform or to do any act in furtherance of the contract. When the duties imposed on him by the contract are exhausted, there is nothing else left for him to do. His perfect performance must be reciprocated by corresponding action on the part of the other party, whose failure to discharge his contractual duties without lawful excuse amounts to breach. Where both parties discharge their respective legal obligations imposed by the contract, their complete performance wholly discharges them. Having accomplished what they set out to do, they are released from liability to account to one another in respect of any of the terms of the fulfilled agreement.

Performance must be complete and not merely partial. Partial performance is tantamount to breach of condition or warranty not fulfilled by the offending party. Unless excused by mutual agreement or justified by the right to rescission, or otherwise rendered impossible by supervening events or other unforeseen contingency or frustrating circumstance, a party guilty of partial performance is accountable to the other for loss or damage arising directly or indirectly from failure on his part to honour his obligations under the contract. The consequences of breach depend upon its gravity and overall effect on the transaction as a whole. Non-performance of any term that results in complete destruction of the main object of the contract amounts to repudiation, which justifies rescission and withholding of performance by the innocent party.

2.10.3 Discharge by Express agreement

Parties to a contract are the masters of the pact by which they are bound. Accordingly, they are endowed with power not only to create, but also to extinguish the rights and liabilities accruing thereunder. The general rule at common law is that what has been created by agreement may be extinguished by agreement.[99] In other words, since a contract is created by mutual consent, it may also be terminated by agreement, which amounts to a contract in its own right. This means that the parties are free to determine the terms on which their consensual release is to be formulated, provided that it satisfies the essential elements of a valid contract. Where a contract contains a termination clause, the termination must be in accordance with the terms of that clause.[100]

In view of the foregoing, any subsequent agreement intended to extinguish the respective rights and obligations under the original contract is enforceable in its own terms and must be either under seal or supported by consideration. It must contain an express intention to release the parties from their contractual obligation to honour their respective undertakings in the original contract. Such agreements are valid in their own right as pertains to their form and substance. They may be made in writing or orally, or partly orally and partly in writing. The terms on which the parties agree to terminate and be released from an earlier contract are their prerogative. For instance, the parties may agree that payment be made for part-performance, such as work already done or goods already supplied, or on *quantum-meruit,* to recover reasonable remuneration proportionate to the benefits conferred upon the other party.

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99 Cheshire GC, Fifoot CHS and Furmston MP *Law of Contract* (11th edn Butterworths London 1986) p.543.

100 *Kilimanjaro Construction v The East African Power and Lighting Co. Ltd* [1985] KLR p.201.

Discharge by performance may also be unilateral where one party to the contract has fully performed his part, but is nevertheless agreeable to releasing the other from his legal obligations. Unilateral discharge in return for consideration is known as accord and satisfaction. The accord is the agreement for the discharge of the original contract; the satisfaction is the consideration conferred upon the party who has performed his obligations.[101]

2.10.4 Discharge by Breach

Where a contract contains specific terms and conditions, both parties are required to be in strict conformity therewith. However, where the contract is unlawfully determined or otherwise breached, the plaintiff is, in principle, entitled to such damages as would as nearly as possible put him in the same position as if the contract had been completed.[102]

Breach of contract results from failure without any lawful or reasonable excuse on the part of the offending party to perform his promise in accordance with its terms. Failure of performance, whether total or partial, constitutes a fundamental breach if it goes to the root of the contract.[103] Refusal, failure or neglect to honour an obligation to fulfil a condition imposed on a party under an agreement has far-reaching consequences. Such breach discharges the innocent party from his corresponding responsibility to discharge his reciprocal obligations under the contract. This is in addition to liability on the part of the offending party to compensate him for such loss as may result from such breach.

In effect, if a promisor breaks a condition however slight, it gives the other party a right to be discharged from his obligations and to sue for damages, unless he (expressly or by his conduct) waives the condition, in which case he is bound to perform his future obligations even though he is entitled to sue for damages for the loss suffered in consequence of the breach. On the other hand, if the promisor breaks a warranty in any respect, however serious, the other party will not be discharged from his obligations. He is bound to perform them and sue for damages.[104] In other words, breach of a warranty is not as severe in consequence as that of a condition.

Where the party in default commits a fundamental breach or repudiates the contract either before performance or completion, the contract comes to an end, giving the innocent party the right to an action for damages and to treat the contract as repudiated. He is not bound to fulfil his contractual undertaking in the face of clear intimation on the part of the offending party that he does not wish to honour his part of the bargain. Exercising the right to withhold further performance upon being notified of such repudiation prudently mitigates such loss or injury as may naturally arise from such breach.

Repudiation is the expression of intention not to honour one's obligations in the contract when they become due. The intention not to perform one's part of the bargain may be expressed in any form or inferred from the conduct of the defaulting party. For example, an anticipatory or repudiatory breach occurs if a person contracts to sell specific goods to another but sells and delivers them to a third party before the date agreed for delivery to the original buyer. The

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101 *Kimeu v Kasese* (number 2) [1990] KLR p.35.

102 *Kilimanjaro Construction v The East African Power and Lighting Co. Ltd* [1985] KLR p.201.

103 *Ongecha v The City Council of Nairobi* [1982] KLR p.151.

104 *Wickman Machine Tool Sales Ltd v L Schuler AG* [1973] 2 Lloyds Reat p.53.

repudiation entitles the injured party to treat the contract as at an end and to sue for damages for the loss sustained. The innocent party may sue for special or general damages, or for specific performance in appropriate cases.

Specific performance is an equitable remedy which can only be granted where there is a valid contract. Moreover, the court has discretion whether or not to grant specific performance. Which will not be ordered if the agreement is uncertain in any material respect, or if such an order (if decreed) would involve hardship.[105] The innocent party may also rescind the contract. On the other hand (with the exception of certain contracts, such as insurance policies), breach of a warranty (which does not go to the root or upset the purpose of the contract) only results in loss or other injury for which the innocent party is entitled to pecuniary compensation in damages without the right of rescission. He is nevertheless obligated to perform his part and thereafter seek damages from the party faulted by such breach.

Breach occurs in two ways. It may be either actual or anticipatory. It is actual where due performance has been withheld without lawful cause, and where the time (if any) fixed for performance has lapsed. Where the time is of the essence of the contract, belated performance would not cure the breach, unless the innocent party acquiesces to or assents to mutual variation of the term relating to the time so fixed. On the other hand, extension of time for performance of a contract does not cease to make time of the essence if it is so agreed.[106] In other words, delayed performance is an actual failure by a party to a contract to perform his obligations under that contract, unless the delay complained of was attributable to, or the cause of delay was within, the plaintiff's control.[107] Under common law, time is always of the essence to the contract, unless expressly stated otherwise.[108]

Breach is said to be anticipatory where the party makes an advance indication of his intention not to perform. An indication that a contract will be breached in the future amounts to a rescission and is referred to as repudiation or anticipatory breach, which may be either expressed in words or implied from the conduct of the offending party. The act from which the implication is drawn must be shown to have led to a reasonable inference that the party in breach does not intend to fulfil his part of the bargain when performance on his part becomes due. For example, refusal to accept delivery in a contract for sale of goods amounts to anticipatory breach, provided that the aggrieved party is able and willing to perform his bargain and to treat the contract as subsisting.[109]

2.10.5 Lapse of time

Parties may enter into a contract to pursue a specified object with or without express stipulation as to the term for which the relationship should subsist or the period within which performance shall be discharged. A contract entered into for a specific term is discharged when the period agreed for its performance lapses. The obligation on the part of each party to perform the acts respectively undertaken pursuant to the contract is at an end. Where no such time is stipulated, then the

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105 *Ongecha v The City Council of Nairobi* [1982] KLR p.151.

106 *Panesar v Popat* [1968] EA p..

107 *Naumann, Gepp* (*East Africa*) *Ltd v Ranchhodbhai Baberbhai Patel and others* [1957] EA p.771.

108 *Osman v Mulangwa* [1995-98] 2 EA p.275.

109 *Alidina v Globe Mercantile Corporation Ltd [*1968] EA p.114.

contract is discharged after expiry of a reasonable time. What is reasonable time in any particular case depends on the subject matter of the contract in issue.

Depending on the nature of the contract and the intention of the parties, such period of time may lapse as would render further performance of no practical benefit and discharge the parties from their obligation to act in pursuance of their object. However, it must be established that no useful purpose would be achieved by extension of the contractual relationship beyond the period considered by the parties to be reasonable, taking account not only of the subject matter but also of the facts and circumstances of the transaction.

Discharge by lapse of reasonable time also occurs where there is such inordinate delay in performance on the part of the parties or any of them as would render further action in pursuance of the contract nugatory. The delay or inaction is tantamount to breach for which the innocent party is entitled to damages for loss or injury arising directly from such delay, unless he is disentitled to recover full compensation by reason of failure or neglect on his part to take such steps as would have been necessary to mitigate his loss.

2.10.6 Operation of law

Certain circumstances may arise in which rights derived from, and obligations imposed by, a contract are extinguished by law. In the circumstances, the parties are discharged from the duty to honour their part of the bargain and from their corresponding duty to ensure complete performance. However, the discharge does not operate in retrospect but only renders future performance unenforceable.

A contract may be discharged by operation of law in any of the following circumstances:

(a) by merger;

(b) on bankruptcy where the rights of the bankrupt pass to his trustee in bankruptcy;

(c) by death of a party in contracts for personal services; or

(d) by unilateral material alteration of a deed or other contractual instrument.

Where parties incorporate a simple contract in a deed (i.e., by merger), action lies on the deed only. The former agreement is subsumed in the latter and the terms of the deed supersede those of the original contract. Likewise, the contractual relationships between a bankrupt and third parties existing prior to his adjudication come to an end with immediate effect and the trustee steps into the position of the bankrupt with power to enforce the rights and benefits accruing to his estate under such agreements.

In a contract for personal services, the duty previously imposed on the deceased employee does not survive his death so as to obligate his personal representatives to act in his place. This is because the services contracted are personal in nature and the employer's right to enforce performance is automatically extinguished by death of the employee. However, his personal representatives are entitled to recover payment for valuable benefits obtained by the employer prior to the contractor's death notwithstanding the employer's inability to enforce further performance. If *B* employs *G* to tend his flower garden for a period of two weeks at an agreed wage, and *G* dies before the term of his contract comes to an end, B is bound to pay to

G'spersonal representatives such sums as may be due on account of work done. The contract for *G*'s personal services is terminated by operation of law and no one, including his personal representative, is obligated to complete performance.

Similarly, a contracts is at an end where one party makes material alteration of the deed or other document containing the contract. If, for instance, a creditor unilaterally alters the quantum of the guaranteed debt or extends the term of repayment of the debt, or releases a co-guarantor from liability under the guarantee, the guarantor or guarantors are forthwith released from liability and the contract of guarantee is thereby discharged. Unilateral material alteration of a deed without the consent of all the parties to the instrument deprives the offending party of all rights to enforce performance on the part of the others. The alteration violates the express intention of the parties and rebuts the presumption of mutual consent and is, therefore, unenforceable against them.

2.10.7 Frustration

Unforeseen contingencies or supervening circumstances may occur, which prevent or render impossible the attainment of the object or main purpose of the parties. In such circumstances, the parties may be excused from performing their part of the contract. Where, for example, delivery of goods sold became impracticable due to refusal of the railway corporation to transport them resulted in frustration of the contract owing to lack of alternative mode of carriage.[110] On the other hand, Duffus JA observed that failure on the part of a party to establish that it took all necessary steps to obtain the requisite import licence or to obtain permission for payment to the other of the purchase price defeated its defence of frustration.[111]

Similarly, a contract may be frustrated by (a) subsequent destruction of its subject matter; or (b) subsequent illegality through change in statute law, which renders performance illegal. The general rule as laid down in *Paradine v Jane* is that when the law casts a duty upon a man which, through no fault of his own, he is unable to perform, he is excused for non-performance; but if he binds himself by contract absolutely to do a thing, he cannot escape liability for damages without proof that as events turned out performance is impossible.[112] For instance, if a house is destroyed by fire or other calamity without fault on his part, the lessee is excused from complete performance of his obligations under the lease. In effect, where the law creates a duty or charge, and the party is disabled to perform it without any default on his part, and have no remedy over, there the law will excuse him. In contrast, mere hardship or inconvenience would not justify discharge from his contractual obligations.

In other cases, performance of the contract may be excused for the reason that the contract itself requires to be interpreted as being subject to the implied condition that the parties should be excused if, before breach, performance became impossible from the perishing of the subject matter of the contract without default on the part of the seller.[113] According to Lord Coleridge CJ, this was not an absolute contract of delivery under all circumstances, but a contract to deliver so

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110 *Victoria Industries Ltd v Ramanbhai and Brothers Ltd* [1961] EA p. *at p.11.*

111 *Karachi Gas Co Ltd v H Issaq* [1965] EA p.42 at p.53.

112 *Paradine v Jane* [1647] Aleyn p.26.

113 *Howel v Coupland* [1876] 1 QBD p.258 at p.261.

many potatoes of a particular kind grown on a specific place, if deliverable from that place. On the facts, the condition did arise and the performance was excused.

In addition to the foregoing, the plea of what is commonly known as "act of god" is available to relieve a defendant from liability for damage suffered following the performance of part of his obligation, but not merely to absolve a person from the performance of an obligation. According to Sir Charles Newbold P, the person setting up the plea must prove to the satisfaction of the court that the frustrating event in question was due exclusively to natural causes of so extraordinary a nature that it could not reasonably have been foreseen, and the results of whose occurrence could not have been avoided by any action which should reasonably have been taken by the person who seeks to avoid liability by reason of the occurrence.[114]

The effect of frustration is that the loss, which occurs without fault of the parties, remains where it fell. Consequently, only moneys due and payable at the time of frustration could be recovered. Accordingly, a party who has done something or incurred expenses in performance of the contract prior to the frustrating event may claim compensation for such expenses and any benefits thereby conferred upon the other party. The court will grant relief where the other party has obtained a valuable benefit, but will not award compensation for benefits that would have accrued if performance were complete even if earlier performance would have altogether avoided or mitigated the loss complained of, unless such delay was in itself tantamount to breach of the contract.

2.11 Remedies for Breach of Contract

In the law of contract, rights and remedies are closely related in that an innocent party is afforded redress where the other is guilty of breach or improper performance. For instance, if a person is induced to enter into a contract by the other party's misrepresentation, he can rescind the contract and sue for damages for any loss or damage directly or indirectly arising from such misrepresentation. Likewise, serious failure by one party to perform may entitle the other to withhold his own performance and terminate the contract. In effect, fundamental breach not only entitles the aggrieved party to compensation but also confers upon him the right to treat the contract as repudiated.

2.11.1 Damages

Breach of contract deprives the innocent party of anticipated advantage or benefits which would have been acquired had performance been completed as agreed. Where breach occurs in a contract for supply of services, the claimant will have lost the particular result he bargained for. The same consequences occur where performance is delayed beyond a reasonable time. Granted, there may or may not be any direct or indirect financial loss. Whatever the eventuality, and where damages are recoverable, the law seeks to restore the plaintiff to the position he would have been in had the breach not occurred. To this end, the aggrieved party may sue for financial compensation for breach of contract, and the redress may take the form of either special or general damages, or both. However, general damages are not usually awarded for a breach of contract because damages arising from such breach are usually quantifiable and are not at large.[115]

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[114] *Ryde v Bushell and another* [1967] EA p.817 at p.820.

[115] *Habib Zurich Finance (K) Ltd v Muthoga and another* [2002] 1 EA p.81.

Special damages are liquidated and represent the actual loss suffered in consequence of the breach complained of. On the other hand, general damages are assessed by the court as reasonable financial compensation for such breach and are intended to restore the aggrieved party to the position in which he would have been had the breach not occurred.

In assessing damages, the court considers what would be the reasonable cost of remedying the breach or defective performance. To this end, every reasonable presumption may be made as to the benefit which the other party might have obtained by the *bona fide* performance by that other of the agreement.[116] the quantum of damages to be awarded in any event must not be disproportionate to the end to be attained.[117] For example, an award of nominal damages may be appropriate for breach in certain cases where no financial loss is proved to have been suffered. However, in claims for breach of contract, the plaintiff cannot recover damages for his injured feelings,[118] unless the object of the particular contract is to afford pleasure.

There would usually be no difficult in assessing the quantum of damages for breach of contract in ordinary cases where the nature of loss complained of is financial. The amount recoverable in compensation is, therefore, ascertainable and, accordingly, the plaintiff is entitled to no more than is sufficient to meet his actual loss. In actions for damages, it is not enough for the plaintiffs to write down particulars of special damages. They must specifically prove the damages sought.[119] In other words, special damages must not only be specifically claimed but also strictly proved. The degree of certainty and the particularity of proof required depends on the circumstances and the nature of the acts themselves.[120]

The requirement for specific proof of special damages is premised on The rule of the common law that

"… where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract has been performed."[121]

The objective of this approach is that the damages to be awarded must be proportionate to the cost (if any) of restoring the plaintiff to the position in which he would have been had the defendant discharged his contractual obligations to his satisfaction. In other words, where the expenditure was out of all proportion to the benefit to be obtained, the appropriate measure of damages was not the cost of reinstatement but the diminution in the value of the work occasioned by the breach, even if that would result in a nominal award. In deciding between diminution in value and the cost of reinstatement, May J was of the view that the appropriate test would be the reasonableness of the plaintiff's desire to reinstate the property and, in any event, the damages to

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116 *Wilson v Northampton and Banbury Junction Railway Co* [1874] 9 Ch Apat p.279 at p.286.

117 McGregor H *McGregor on Damages* (15th edn Sweet and Maxwell London 1988) pp.675 -6.

118 *Addis v Gramophone Co Ltd* [1909] AC p.488.

119 *Kenya Shell Ltd v Kibiru and another* [1986] KLR p.410.

120 *Hahn v Singh* [1985] KLR p.716.

121 *Robinson v Harman* [1848] 1 Exch p.850 at p.855.

be awarded must be reasonable as between the parties.[122] In this regard, Lord Bridge of Harwich expressed the basic principle in the following words:

"… damages for breach of contract must reflect, as accurately as the circumstances allow, the loss which the claimant has sustained because he did not get what he bargained for. There is no question of punishing the contract breaker as would punitive damages or cost of reinstatement."[123]

The object of damages is always to compensate the plaintiff, not to punish the defendant. Though difficult to quantify in certain cases, it is normally assumed that each contracting party's interest in the bargain is purely commercial and, therefore, the loss resulting from the breach of contract in issue is measurable in purely economic terms. However, this does not mean that, in every case of breach of contract, the plaintiff can obtain the monetary equivalent of specific performance.[124]

In claims for compensation, it is not sufficient merely to prove that a breach occurred. The claimant must further establish that he has suffered some loss or damage which flows from the breach complained of. In other words, the loss must have been a natural consequence of that breach. The breach in issue and its natural consequences must have been foreseeable as opposed to an unforeseen contingency or supervening event that may result in impossibility and frustration of the contract beyond the defendant's control or ability to avert.

For the claim of damages to succeed, the quantum of damages must also be proved. The court must be persuaded that the amount sought in damages is restorative and reasonable in the circumstances, and that its award would not amount to an unjust enrichment of the claimant. In principle, damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party.[125]

There are circumstances, however, when the loss suffered by the plaintiff in consequence of the defendant's breach cannot entirely be borne by the defendant. The right of action for full compensation may be defeated or diminished by proof of inaction on the part of the innocent party who has failed or neglected to take reasonable steps to avoid or mitigate the loss complained of. For example, a consignor who fails to take any steps to either dispose of his merchandise before they deteriorate or decline in quality, or engage an alternative carrier, in anticipation of compensation from a carrier who fails to honour his contractual obligation to collect and deliver them at an appointed destination, may not be entitled to full compensation for such loss as is occasioned directly by his inaction. The law does not allow a party to recover damages for loss which would not have been suffered if he had taken reasonable steps to mitigate it.

In the absence of blame on the plaintiff, the general rule as stated in *Robinson v Harman* is that if a party has suffered loss or damage that is not too remote, he must, as far as money can do,

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122 CR *Taylor* (*Wholesale*) *Ltd v Hepworth Ltd* [1977] 1 WLR p.659 at p.667.

123 *Ruxley Electronics Construction Ltd v Forsyth* [1996] AC p.344 at p.353.

124 ibid at p.365.

125 ibid at p.357.

be restored to the position he would have been in had that damage not occurred.[126] This rule was expressed in the Latin maxim: *Restitutio In Integrum*.

In certain cases, parties to a contract may agree beforehand what sum shall be payable by way of damages in the event of breach. On the one hand, this may be a genuine pre-estimate of the loss that will be caused to one party if the contract is broken by the other, and is known as liquidated damages, which are a genuine forecast of the probable loss. On the other hand, damages may be in the nature of a threat held over the other party as security to the promisee that the contract will be performed.

When quantified in anticipation of breach, a sum of this nature is called a penalty and is not enforceable against the party at fault. The distinction between penalties and liquidated damages depends on the intention of the parties to be inferred from the wider context of the contract and from the facts of each case as established on evidence. However, courts will not enforce a penalty in any case regardless of the parties' intention that it be imposed on the offending party. The court in *Mussa Sassani v Hunt and another* restated the rule that liquidated damages, if sought by the claimant, must represent a genuine pre-estimate of his actual loss.[127] This was a suit in which such damages were improperly sought.

2.11.2 Specific performance

Even though pecuniary compensation is desirable in most instances, not all cases of breach can be appropriately compensated by an award of damages. Depending on the nature of the subject matter of the contract, pecuniary compensation may not adequately redress the innocent party for loss likely to be incurred in the event of breach. The jurisdiction of the court to award damages at common law rests upon the premise that such compensation shall be fair and reasonable depending on the circumstances of each case. However, certain cases may demand that a party be compelled to honour and discharge his contractual obligations and fulfil his promise. In such special cases, a decree of specific performance may be issued by the court to compel a contracting party to perform what he undertook to do.

Notably, the remedy of specific performance is discretionary and does not avail to the plaintiff as of right. It is an equitable remedy which is granted where an award of damages is imperfect or would defeat the just expectations of the aggrieved party. It would not, however, be decreed where there is adequate compensation by way of damages. As was held in *Manzoor v Baran*, specific performance will not be decreed where a common law remedy, such as damages, would be adequate to put the plaintiff in the position in which he would have been but for the breach.[128] Moreover, it does not avail to a party who is himself in breach of, or unwilling to perform, his obligations under the contract.

According to Lord Selborne in *Wilson v Northampton an Banbury Junction Railway Co.*, "[t]he court gives specific performance instead of damages only when it can by that means do more perfect

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126 *Robinson v Harman* [1848] 1 Exch p.850.

127 *Mussa Sassani v Hunt and another* [1964] EA p.201.

128 *Manzoor v Baran* [2003] 2 EA p.581.

and complete justice."[129] In other words, it is given only where the legal remedy is inadequate or defective.[130]

As a general rule, specific performance of agreements will be decreed in equity in cases where damages might be recovered at law but such damages would not answer the intention of the contracting parties, and a specific performance is essential to justice. Where, for example, the plaintiff buys and pays for a rare work of art which the seller fails to deliver, preferring to sell it to a third party at a higher price, it would be unjust for the court to order return of the actual price already paid notwithstanding the fact that the breach arising from the defendant's failure to deliver the article results in loss by the plaintiff of only the price money. The antique or sentimental value of the article goes beyond the material loss of the price money. In the circumstances, it would only be fair and just that the defendant be compelled to honour his duty and perform his part in the bargain.

On the other hand, where the damages recoverable at law are commensurate with the injury sustained by a breach of the contract, equity will not interfere. For instance, a court would not, in ordinary circumstances, order reinstatement of an employee in a claim for wrongful dismissal since statute law provides for adequate compensation.[131] An award of reinstatement and back pay would be inappropriate and impracticable to re-establish the employer-employee relationship.[132]

4.11.3 Injunction

A person may be in breach of contract where he does an act which he expressly promised not to do. On the other hand, if unrestrained, the doing of the act in issue may be tantamount to breach of the contractual rights or other interests of the innocent party. Where the act constituting the breach is imminent, the plaintiff may apply for an injunctive order of the court to restrain the defendant from carrying out the infringing act. The equitable right of injunction is also codified in the statutory provisions of Order 40, rule 2 of the Civil Procedure Rules, 2010, which provides that an aggrieved party may institute proceedings to restrain the defendant from committing a breach of contract or other injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right. It is immaterial for the purpose of the restraint whether pecuniary compensation is claimed in the suit or not.

An injunction is an equitable and discretionary remedy which takes the form of an order of the court restraining the doing, continuance or repetition of a wrongful act. A prohibitory injunction is granted to refrain the defendant from doing what he has expressly promised not to do. On the other hand, where the act complained of has already been done, the order of injunction sought must be mandatory in nature and capable of compelling him to undo it. A mandatory injunction is restorative in effect and directs the defendant to take positive steps to undo what he has already done in breach of the contract. It is equitable in the sense that it is valid in equity as disticnct from law. Equitable remedies are essentially discretionary and are granted by equity to redress wrong where damages would be inadequate. This is because the range of

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129 *Wilson v Northampton an Banbury Junction Railway Co* [1874] 9 Ch App p.279 at p.284.

130 *Flint v Brandon* [1803] 8 Ves p.159.

131 The Employment Act Revised 2012 (2007) s 49(1) (c).

132 *Kenya Airways Ltd v Aviation and Allied Workers Union Kenya and Three Others* [2014] EKLR p.50 available at www.kenyalaw.org (last accessed on 28th October 2015).

legal remedies previously recognised by courts of common law, which relied primarily on the remedy of damages, was originally limited in scope and flexibility, equity showed great flexibility in granting discretionary remedies, such as specific performance, rescission, cancellation, rectification, account, injunction, and the appointment of a receiver in cases where damages were inadequate.

Injunctive orders may be sought either (a) in the main suit where permanent orders are granted as relief for the breach complained of; or (b) in an interlocutory process by summons in chambers as a temporary measure pending final determination of the claim. Order 40 rule 1 of the Civil Procedure Rules empowers the court (i) to grant a temporary injunction to restrain such acts as constitute breach of contract; or (ii) to stay or prevent the wasting, damaging, alienation, sale, removal, or disposition of the property in dispute, until the disposal of the suit, or until further orders.

For the injunctive orders to be granted, it must be proved to the satisfaction of the court on a balance of probability that (a) in the case of a property claim, the suit property is in danger of being wasted or alienated by any party to the suit, or wrongfully sold; or (b) in any other case, the defendant threatens or intends to remove or dispose of his property to obstruct the plaintiff's bid to execute a decree passed against the defendant in the suit.

The orders of injunction will only be granted if it is established to the satisfaction of the court that it is the only means by which the parties can be fairly and justly restored to the position in which they were prior to the commission of the act complained of. The court will exercise its discretion to grant an injunction where it is demonstrated that the maintenance of the status quo, or the restoration of the *status quo ante* (i.e., The state of affairs prevailing before the act constituting the breach complained of), as the case may be, is the only means by which the contractual rights and interests of the applicant can be protected. The case must be one in which an award of damages without more would result in an injustice against the innocent party. The applicant must show, among other things, that denial of injunctive orders would result in irreparable loss which cannot be redressed by an award of damages.

2.11.4 Specific restitution

The remedy of specific restitution takes the form of an order for specific delivery of a chattel where damages for its retention are inadequate. It is granted for the recovery of valuable articles of a rare and special nature. It may be given to order the delivery of specific or ascertained goods in a contract of sale, or the return of property wrongfully delivered by a bailee under an assignment or otherwise to, and detained by, a third party in violation of the owner's right to title or other right at law or in equity. For the order of specific restitution to issue, the goods in question must be of a special nature so that to decree payment of their pecuniary value as compensation would be inequitable. In other cases, the remedy is also common in actions for recovery of goods or chattels wrongfully held or detained.

Courts were given discretionary power at common law to order the return of specific chattels particularly (a) where such chattels were rare and of a peculiar value; and (b) where the remedy at law (for damages) was considered as being inadequate to meet the justice of the case.[133] The remedy of restitution is also available in cases of unjust enrichment.

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[133] *Re Wait* [1927] 1 Ch p.606 at p.616.

The special power vested in the court to order the delivery up of a particular chattel is discretionary in that it ought not to be exercised in any of the following cases, namely,

(a) when the chattel is an ordinary article of commerce and whose acquisition or replacement would present no special hardship to the plaintiff;

(b) when the chattel is not alleged to be of any special value or interest, and is in fact of no special value or interest, to the plaintiff; or

(c) where damages would fully compensate the plaintiff.[134]

2.11.5 Limitation of Actions

The right of action for breach of contract subsists until the party at fault is discharged from liability by release or expiration of the cause of action. A right of action for breach of contract may be expressly released either by a release under seal or by accord and satisfaction, or it may be extinguished by the effluxion of time in accordance with the provisions of the Limitation of Actions ActRevised 2007 (1967). Under the 1967 Act, actions founded on contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

The expression "cause of action" means the factual situation stated or asserted by the plaintiff, which, if substantiated, entitles him to a remedy against the defendant. Acknowledgement or part-payment revives the cause of action. In other words, time which has started to run against a creditor may be stopped and made to start afresh by (a) a written acknowledgement of liability; or (b) part-payment made by the debtor in a claim for a debt or other liquidated sum. On the other hand, the statute of limitation does not apply to equitable claims, such as specific performance or for an injunction or other equitable relief. However, unreasonable delay (or laches) in making a claim or an assertion in equity will bar the claim.

2.12 Quasi-Contracts

Not all transactions intended to create legally binding relations are ultimately enforceable as contracts. In effect, the contractual rights and obligations contemplated by the parties may not be created in law as might have been intended. It becomes necessary in the circumstances to mitigate the risk of any loss that may ensue due to the inability of the parties to enforce their respective claims in the absence of a contract. In such eventuality, common law comes to their aid. Where parties engage in a transaction that falls short of a legally enforceable contract, common law sets in motion principles under which their legitimate interests are protected. In effect, the law views their engagement as though it was a contract and recognizes its existence for the purpose only of providing relief to the aggrieved party. This loose relationship is referred to as a quasi-contract.

The court in *Madhupaper International Ltd and another v Kenya Commercial Bank Ltd and others* affirmed the principle that the purpose of quasi-contracts is to provide remedies to innocent parties where, otherwise, unjust enrichment[135] or unfair losses would occur in the absence of a pure contractual relationship between the parties.[136] The basic elements presupposed by the doctrine of unjust enrichment are (a) that the defendant has been enriched by the receipt; (b) that he has been so enriched at the expense of the plaintiff; and (c) that it would be unjust to allow the defendant to retain the benefit in the circumstances of the case.

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134 *Whiteley v Hilt* [1918] p.819.

135 *Madhupaper International Ltd and another v Kenya Commercial Bank Ltd and others* [2003] KLR p.31.

136 Hodgin RW *Law of Contract in East Africa* (Kenya Literature Bureau Nairobi 1982) p.272.

As explained by Pollock CB in *Gore v Gibson*, the law does not require an actual agreement between the parties, but implies a contract from the circumstances and in a sense makes the contract for the parties.[137]

In such cases, the law creates or infers the existence of what is commonly known as a quasi-contract. A claim in quasi-contract may be made under any of the following heads, namely,

(a) quantum-meruit, where one party has derived benefits under an invalid contract;

(b) money paid by the plaintiff to the defendant's use, where the plaintiff claims that he has paid money to a third party on behalf of the defendant and now seeks in quasi-contract to recover that sum;

(c) money had and received by the defendant to the plaintiff's use, such as where the plaintiff alleges that he has paid money to the defendant under a mistake of fact, or where money has been paid and there follows a complete failure of consideration from the other party; or

(d) money paid in pursuance of an ineffective, void or illegal contract and cannot, therefore, be retained by the recipient.

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[137] *Gore v Gibson* [1845] 13 M and W p.623 at p.626.