

Moshi Co-operative University

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LAW OF CONTRACT I IN TANZANIA

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MOSHI CO-OPERATIVE UNIVERSITY

(MoCU)

FACULTY OF LAW

LAW OF CONTRACT I

A STUDENT COMPENDIUM

BY

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❖ **TOPIC ONE: GENERAL INTRODUCTION TO LAW OF CONTRACTS**



- **This study manual on Law of Contract I aims to provide the candidate with a broad understanding of the following concepts pertaining to the Law of Contract;**
 - The nature of a contract.
 - Formation of a contract.
 - Classification of Contracts.
 - Elements of a valid contract.
 - Terms of contract; Exemption clauses, conditions and warranties.
 - Privity of contract.
- **The below items will be dealt well in Law of Contract II and it's advised that a candidate to have both manuals for easy references as the concepts do interlink. [Emphasis is Mine].**
 - Vitiating factors; mistake, misrepresentation, duress and undue influence.
 - Termination and discharge of a contract.
 - Remedies for breach of contract.
 - Limitations of actions.



▪ **COMMON TERMINOLOGIES AS APPLIED & USED IN LAW OF CONTRACTS**

- **Offer:** an unequivocal and clear manifestation by one party of its intention to contract with another. (See S. 2 (1) of Law of Contract [Cap 345 R.E 2002] hereunder referred to as LCA).
- **Unequivocal:** clear, definite and without doubt.
- **Invitation to treat:** This is a mere invitation by a party to another or others to make offers or bargains. The invitee becomes the offeror and the invitor becomes the offeree. A positive response to an invitation to treat is an offer.
- **Acceptance:** This is the external manifestation of assent by the offeree.(See S. 2 (1) (b) of LCA)

- **Revocation:** This is the withdrawal of the offer by the offeror. (See S. 6 (1) of LCA)
- **Consideration:** It has been defined as “an act or promise offered by the one party and accepted by the other party as price for that others promise.” (See section 2 (1) (d) 10, 23, 25 of LCA)
- **Estoppel:** It a doctrine that is to the effect that where parties have a legal relationship and one of them makes a new promise or representation intended to affect their legal relations and to be relied upon by the other, once the other has relied upon it and changed his legal position, the other party cannot be heard to say that their legal relationship was different.
- **Conditions:** This is a term of major stipulation in a contract. If a condition is breached, it entitles the innocent party to treat the contract as repudiated and to sue in damages. (See also SS. 12-16 of SOGA Cap 214).
- **Warranties:** This is a minor term of a contract or a term of minor stipulation. If breached, it entitles the innocent party to sue in damages only as the contract remains enforceable and both parties are bound to honor their part of the bargain. (See S. 2 (1) of SOGA).
- **Merchantable quality:** Fit to be offered for sale. Reasonably fit for the buyer’s purposes.
- **Privity of contract:** This doctrine is to the effect that only a person who is party to a contract can sue or be sued on it.
- **Void:** Lacking legal force. (See S. 2 (1) (g) & (j) of LCA).
- **Voidable:** Capable of being rescinded or voided. (See S. 2 (1) (i) of LCA).



❖ THE LAW OF CONTRACT

- **A contract** may be defined as a legally binding agreement made by 2 or more parties. It has also been defined as a promise or set of promises a breach of which the law provides a remedy and the performance of which the law recognizes as an obligation.
- According to Anson, “A contract is an Agreement enforceable by law made between two or more persons by which rights are acquired by one or more to acts or forbearances on the part of the other or other’s”.
- According to Salmond, “Contract is an Agreement, creating and defining obligations between the parties”

- The most important characteristic of a contract is that it is enforceable. The genesis of a contract is an agreement between the parties hence a contract is an enforceable agreement. However, whereas all contracts are agreements, all agreements are not contracts.
- The provision of section 2 (1) (h) of the Law of contract Act¹, defines the term contract to mean all agreements that are capable of being enforced by the law.
- The word **contract** refers to an **agreement** which can be **enforced** by law between one person and another. The two words: “**agreement**” and “**enforced by law**” which are found in the definition are fundamental to the validity and thence presence of any contract.
- It follows therefore, if any purported contract can not be enforced by law it is not a legally valid contract. A contract needs to be **binding** to be legally useful and it can not be binding unless it is **enforceable**.
- It also follow that, **all contract are contracts are agreement but not all agreement are contract**, the rationale for this assertion is found under section 10 of LCA, which reads as follows:-
 - “All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.”
 - In light of the above section it can thus be construed that, for and agreement to become a contract must meet the essential requirements stipulated in the above provision of LCA, and other requirements such the intention to create legal relation must be present, short of that the agreement will not be capable to bind the parties thereto.
 - All contracts are agreement since because for a contract to be formed there must be an agreement (**Consensus ad ideam i.e Meeting of two minds**) as defined under section 2 (1) (e) of LCA.

▪ **SOURCES OF LAW OF CONTRACTS**

- **Customary laws:** will apply to customary contracts. Customary laws in Tanzania are applicable by virtue of section 11(1) of the Judicature and Application of Laws Act², which is to the effect that customary law shall be applicable to, and courts shall exercise jurisdiction in accordance therewith in, matters of a civil nature.
- **Legislation:** the principle legislation that provides for the general principles of contract law in Tanzania is the **Law of Contract Act, Cap 345 of 2002**.

¹[Cap 345 R.E 2002]

²Judicature and Application of Laws Act [Cap 358 RE 2002]

- **Case laws:** cases that have been decided by the Supreme Courts of Tanzania; the High Court and the Court of Appeal and which have established various principles on contract law are also sources of contract law.
- **Common law:** the substance of the Contract Act occasions a number of lacunas on some aspects of contract law i.e. it means it does not provide for any principles for some of the matters relating to contracts and when this happens the applicable law would be the common law of England on contracts.
- Prof. Nditti, an expert in contract law of East Africa has this to say about the application of English common laws to Tanzania. *“Where the contract Act is silent on any particular aspect of contract law, English common Law of contract as modified by equity and acts of parliament is applicable”*³¹
- He further states, and I agree with him, that English cases which, substantially, have been decided on common law may be used in interpreting the matters provided in the contract Act⁴.

- **CLASSIFICATION & TYPES OF CONTRACTS**

- 1) **CLASSIFICATION BASING ON THEIR VALIDITY**

- A) **Valid contract**

- A valid contract is a contract that the law will enforce and creates legal rights and obligations. A contract valid ab initio (from the beginning) contains all the three essential elements of formation: • agreement (offer and acceptance); • intention (to be bound by the agreement); • consideration (for example, the promise to pay for goods or services received).
- In addition, a valid contract may have to be in writing to be legally valid (although most contracts may be oral, or a combination of oral and written words). (See Section 10 of LCA).

- B) **Void contract**

- A void contract lacks legal validity and does not create legal rights or obligations. A contract that lacks one or more of the essential formation elements is void ab initio (from the beginning). In other words, the law says that it is not, or never was, a valid contract. ((See S. 2 (1) (g) & (j) of LCA).

- C) **Voidable contract**

- A voidable contract is a valid contract that contains some defect in substance or in its manner of formation that allows one party (or sometimes both parties) to rescind it.

³Nditti, NN (2004), *General Principles of Contract Law in East Africa*, DUP, DSM. Pg 12

⁴Ibid

- A voidable contract remains valid and can create legal rights and obligations until it is rescinded. The party with the right to rescind may lose that right by affirmative conduct, or undue delay, or where the rights of an innocent third party may be harmed. (See S. 2 (1) (i) of LCA)

D) Unenforceable contract

- An unenforceable contract is an otherwise valid contract that contains some substantive, technical or procedural defect. Most commonly, such a contract is illegal, either in its formation or its performance, as it offends either public policy (the common law) or some statute. As a general rule, the law will not allow the enforcement of such a contract.

E) Illegal Contracts

- An agreement which goes beyond the rule of basic public policy and is criminal in nature or immoral. It generally contain both unlawful object and consideration (See section 23 of LCA).

2) CLASSIFICATION BASING ON THEIR FORMATION

A) Express contract:

- A contract in which the terms are stated by parties in words, written or spoken. Section 9 of the LCA contains this provision which reads as under: “So far as the proposal or acceptance of any promise is made in words, the promise is said to be express”.
- Thus, a promise made in words is called an express promise. And the express promises result in express contracts.

B) Implied contract:

- A contract in which the terms are inferred from the circumstances of the case or conduct of the parties.
- Thus, an implied contract is that which is not made in words. Such contracts came into existence on account of act or conduct of the parties. In a continuing course of dealing, the acts or conduct of the parties may give rise to implied contracts.

C) Quasi contract or constructive contract:

- It is an obligation created by law regardless of agreement between the parties. As a matter of fact, quasi-contracts are not contracts as there is no intention of the parties to enter into a contract.
- In fact, it is an obligation which the law creates in the absence of any agreement. A quasi-contract is based upon the equitable principle that a person shall not be allowed to enrich himself at the expense of another. (See SS. 68-72 of LCA).

3) CLASSIFICATION BASING ON THEIR PERFORMANCE

A) Unilateral contract:

- A contract in which one party has performed his obligation while the other party has yet to perform his obligation.
- Thus, a unilateral contract is a one-sided contract in which only one party has to perform his obligation. In such contracts, promise on one side is exchanged for an act on the other side.

B) Bilateral contract:

- A contract in which both the parties have yet to perform their obligations. A bilateral contract is a two-sided contract in which both the parties have to perform their respective obligations, i.e. at the time of formation of a contract the obligations of both the parties are outstanding.
- In such contracts, promise on one side is exchanged for a promise on the other. The bilateral contracts are also known as contracts with executor consideration.

C) Executory contract:

- A contract in which the promises of both the parties have yet to be performed. Thus, executory contract is that where under the terms of a contract something remains to be done by the parties.
- In other words, where one or both the parties to the contract have still to perform their obligations in future, the contract is termed as executory contract.

D) Executed Contract:

- A contract in which both the parties performed their respective promises. When a contract has been completely performed, it is termed as executed contract, i.e. it is a contract where, under the terms of a contract, nothing remains to be done by either party. A contract may be executed at once i.e. at the time when it is made.
- For example, in case of cash sales, the contract is executed at once. It may become executed in some future date when the terms of the contract are carried out.

4) CLASSIFICATION ACCORDING TO ENGLISH LAW

A) Formal Contracts:

- English Contract Act recognizes formal contracts. Validity of these contracts depends upon their form and they are valid even without consideration. They are of two types:- (i) Contracts under Seal, and (ii) Contracts of Record. (i) 'Contracts under seal' are in writing and signed by the parties to them. The following contracts should be under seal, otherwise they will not be valid:- (a) Contracts without consideration, (b) Lease of land for a period of more than three years; (c) Contracts by corporations;

B) Simple Contracts:

- All contracts other than the formal ones are called simple contracts. They may either be in writing or oral. Consideration is also necessary for their validity.

- CUSTOMARY CONTRACTS AND THEIR RECOGNITION IN TANZANIA

- Customary law consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws. They are also termed consuetudinary law⁵.
- The provision of section 2 (1) (h) of the Law of contract Act⁶, defines the term contract to mean all agreements that are capable of being enforced by the law.
- Customary laws in Tanzania are applicable by virtue of section 11(1) of the Judicature and Application of Laws Act⁷, which is to the effect that customary law shall be applicable to, and courts shall exercise jurisdiction in accordance therewith in, matters of a civil nature.
- In the light of above definitions, customary contracts are those contracts which are regulated or governed by customary law⁸.
- The applicability of customary law is also affirmed in several court decisions which have recognized the validity and legitimacy of customary law. For example, in the case of **Maagwi Kimito V. Gibeno Werema**⁹, where the Court of Appeal of Tanzania held that, “Customary laws of this country now have the same status as any other law subjects only to the constitution and other statutory law that may provide to the contrary”.

- HISTORICAL BACKGROUND OF CUSTOMARY CONTRACTS IN AFRICA COMMUNITIES

- The development of customary contracts in Africa can be traced as far back as during the period of feudalism where surplus started to be produced a thing that encouraged exchange at larger extent. Such changes were in terms of barter or sale or another type of arrangement which were legally binding according to customs, usage or rules of a given community or tribe¹⁰.

⁵Black’s Law Dictionary, 8th Edition, p. 1165

⁶[Cap 345 R.E 2002]

⁷Judicature and Application of Laws Act [Cap 358 RE 2002]

⁸Nditi, N (2004). *General Principles of Contracts in East Africa*. Dar es Salaam: Dar es Salaam University Press. pp 4-10

⁹Civil Case Appeal No. 140 of 1979 (unreported)

¹⁰Nditi, N (2004). *General Principles of Contracts in East Africa*. Dar es Salaam: Dar es Salaam University Press. p 4

▪ CUSTOMARY CONTRACTS AND THEIR RECOGNITION IN TANZANIA

- The Tanganyika order in council of 1920 required the governor when making Ordinances, to respect existing native laws and customs provided they were not opposed to justice or morality¹¹.
- Also every court was called upon, in all cases to which natives were parties to be guided by native law so long as it was applicable and was not repugnant to justice and morality or inconsistent with an Order-in-Council or Ordinance or any Regulation or Rule made under any Order-in Council or Ordinance¹².
- Moreover, the courts were required to decide cases to which natives were parties, according to substantial justice without undue regard to technicalities of procedure and without undue delay¹³.
- Basing on the Order-in-Council, 1920, one may argue that customary contracts were recognized and could be enforced in the courts provided they did not go against the provisions of the existing law and were not repugnant to justice or morality¹⁴.
- In 1963 under section 14(1) of the Magistrates' Courts Act¹⁵, primary courts were given general civil jurisdiction over causes of action governed by customary or Islamic law, and certain other matters in respect of which jurisdiction was specifically conferred by statute.
- Therefore relevant customary law must be applied if it is applicable and is not repugnant to justice or morality or inconsistent with any written law as explained also in different decided cases.
- In **Mtatiro Mwita V. Mwita Marianya**¹⁶, in this case the plaintiff received one bullock from defendant in exchange for some finger millet. The bullock died two months later of unknown causes. Both parties belong to the Kuria tribe, and this type of contract is well known in tribal custom. The custom is that if an animal so exchange for millet dies within one year, the meat and skin may be returned to the other party who is then obliged to replace the animal. Plaintiff followed this procedure and then brought this suit for another bullock. The lower courts refused to follow the custom on the ground that the dispute involved contractual rights and therefore the primary court had no jurisdiction to hear it. On a second appeal the learned Chief Justice allowed the appeal and found no reason

¹¹Article 13(4) of the Tanganyika Order- in-council of 1920

¹²Article 24 (a) of the Tanganyika Order- in-council of 1920

¹³Ibid

¹⁴Nditi, N (2004). *General Principles of Contracts in East Africa*. Dar es Salaam: Dar es Salaam University Press. pp 4-10

¹⁵Magistrates' Court Act of 1963

¹⁶[1968] HCD NO. 82

why primary courts should not be able to hear cases involving agreements well known to tribal customs. Therefore on appeal it was held as follows;

- “...If persons of the same tribe enter into an agreement well known to tribal custom, under which the terms are prescribed, these persons must, in the absence of evidence to the contrary, be understood to be contracting in accordance with these terms. Also Relevant customary law must be applied if it is applicable and is not repugnant to justice or morality or inconsistent with any written law...”
- There is authority for the proposition that the principle of privity of contract shouldn't be applied in customary contract cases¹⁷.
- The above position is affirmed in the case of **Ephraim Obongo v. Naftael Okeyo**¹⁸, whereby the defendant, a lorry owner, used to collect cassava from plaintiff for selling. On one occasion, his lorry driver and turn boy went to plaintiff to collect some bags of cassava. Plaintiff refused to deliver the goods, demanding that they first produce some empty cassava bags which they had evidently taken another day, or some money.
- They returned to defendant's wife, who gave them 24 bags and T.shs. 190/-, and sent a not promising that everything would be taken care of when her husband returned from a journey. Plaintiff received no more money, and sued in Primary Court for the value of the cassava he had given them, and for some other empty bags not returned, less the money and bags received. The Primary Court held that since the transaction leading to the disputes was between plaintiff and the defendant's wife the proper party to the suit was the defendant's wife and not the defendant. On that ground he dismissed the suit. The case went on appeal to the District court and then to the High Court. Seaton J observed that the case involved an issue of privity of contract, a contract rather subtle and technical point which, perhaps Primary Court couldn't deal with. He said.
- “...In suits between Africans living within a local community and doing business amongst themselves on a basis of trust, I consider it would not be in the interests of justice to import technical notions of privity of contract and other such notions, unless clearly required by the law to do so...”
- In **Joseph Constantive v. Losilale Ndaskoi**¹⁹, in this case the plaintiff agreed to build a house for defendant and, in return, defendant was to give plaintiff a piece of land. Both are Waarusha. Plaintiff entered the land and carried out a number of improvements. He failed to build the house for the defendant. Defendant forcibly ejected plaintiff from the land. Plaintiff, in an action brought initially in the High Court, claimed compensation for

¹⁷Nditi, N (2004). *General Principles of Contracts in East Africa*. Dar es Salaam: Dar es Salaam University Press.

¹⁸[1968] HCD NO. 288

¹⁹[1968] HCD 381

unexhausted improvements, including permanent trees and some houses and produce, under Arusha law. In earlier proceedings, defendant had claimed title to the land on the basis of Arusha Law.

- It was held that (1) The dispute is governed by Arusha law, because (i) plaintiff based his claim upon it and not upon the Law of Contract Ordinance; (ii) both parties had accepted that the agreement was governed by customary law; and (iii) defendant's claim for title of the land had been governed by customary law, and it would now be illogical to decide the question of unexhausted improvements on a different basis. (2) Since the agreement was governed by customary law, the Law of Contract Ordinance was excluded by section 1 (3) of that Ordinance, as amended in the Magistrates Courts Act 1963, Sixth Schedule. (3) By section 57(1) of the Magistrates Courts Act, no proceedings relating to immovable property under customary law could be instituted in any court other than a Primary Court without the leave of the High Court.
- Generally, the customary law contracts are well applicable in Tanzania in a condition that such contracts are not inconsistent with the constitution and other written law and this has been well exemplified by different court decisions and provision of some statutes.

❖ TOPIC TWO: FORMATION OF A CONTRACT

- A contract comes into existence when an **offer** by one party is unequivocally **accepted** by another and both parties have the requisite **capacity**. Some **consideration** must pass and the parties must have **intended** their dealings to give rise to a **legally binding agreement**. The purpose of the agreement must be **legal** and any necessary **formalities** must have been complied with.
- In the formation of a contract the law provides for a minimum number of prerequisites or some times are referred to as essentials of a contract, before an agreement can be a contract. **Some of these are expressly stipulated in the Law of Contract Act, Cap 345 under section 10 and those which are not provided can be implied from the English common law of contract.**
- An analysis of this section brings up three of the essential of a contract as follows:
- **Free consent of the parties**, The principles of contract law require that parties enter into the contracts out of their own free will, without being forced or influenced by any person. According to s.14 of the LCA free consent is that which is not caused by such vitiating factors as coercion, undue influence, fraud, misrepresentation and mistake.
- **Competency (sometimes is referred to as capacity) to contract**: Here the parties must be legally capable of entering into the contract. A person for instance may not be competent to contract if he falls under one of the following groups: is of under the age of the majority age, is of unsound mind as provided under section 11 and 12 of LCA.
- **Lawful consideration and Lawful object (sometimes referred to as legality) (see also Section 25 and 23 of LCA).**
- The most familiar essential of a contract that has been implied to our law from the English common law of contract is **intention to create legal relation**.
- **NOTE**: We shall deal with each of the items mentioned above in the coming chapters.

❖ ESSENTIAL ELEMENTS OF A VALID CONTRACT

- These are the constituents or ingredients of a contract. They make an agreement legally enforceable. These elements are:
 - a. Offer
 - b. Acceptance
 - c. Capacity
 - d. Intention
 - e. Consideration
 - f. Legality

g. Free Consent

h. Formalities if any

1) OFFER

- An offer has been defined as: an unequivocal manifestation by one party of its intention to contract with another. The party manifesting the intention is the **offeror** and the party to whom it is manifested is the **offeree**.
- The meaning of the word proposal is provided by s. 2(1) (a) of the LCA. Any person will be said to have made an offer/proposal²⁰ if:
- He has signified to another person his willingness to do or to abstain from doing anything, with the view to obtaining the assent of that other person to such act or abstinence.
- An offer may be described as a final statement or proposal by one person (offeror) to another person (offeree). The statement or proposal is usually made on certain terms and often follows a process of negotiations. In other words, an offer only exists when there is nothing further to negotiate – either the offer is accepted or it is rejected.
- Whether a statement amounts to an offer depends upon whether the offeree would reasonably interpret it as an offer. This is an objective test and not a subjective test of what the actual offeree thought.
- The proposal usually contains of a number of terms, which would either take an oral or written form depending on the nature of a particular contract. Some contracts must be made in writing only e.g. Bills of exchange, insurance contracts, hire purchase contracts etc.
- **Instances of a proposal:** A calls B and tells him, “I would like to sell to you my plot located at “Majengo” or C writes a letter to D telling him that he wants to buy D’s cow at Tshs. 75000/=
- Instances number one and number two above are examples of how offers/proposals are made as done by A and C respectively.
 - **RULES / CHARACTERISTICS OF AN OFFER:**
- There are a number of rules that have been developed to assist in determining whether an offer has been made and this includes:-
 - **1) An offer must be clear and definite**
- i.e. it must be certain and free from vagueness and ambiguity. There are a number of cases decided in Tanzania to this effect: In **Alfi E. Africa Ltd v Thembi Industries and**

²⁰The two terms may be used interchangeably

Distributors Agency Ltd²¹, and Nitin Coffee Estates Ltd and 4 others v United Engineering Works Ltd And another²², In these cases there was a conclusion of the agreement, which did not disclose the price. Price in a contract of sale was held to be a fundamental term and non disclosure of which renders the agreement uncertain.

- In law uncertain agreements are not legally recognized agreements. **S. 29 of the LCA** provides that: “An agreement, the meaning of which is not certain, or capable of being made certain, is void”

- **2) Offer must be communicated**

- An offer must be communicated to the intended offeree or offerees. An offer remains ineffective until it is received by the offeree.
- An offer is ineffective until it is communicated by the offeror to the offeree. If the offeree is unaware of an offer, then it would be impossible to accept it. In **R v Clarke²³**, the court held that Clarke could not claim a reward for information he had given because, at the time he gave the information, he was unaware that a reward had been offered.

- **3) Offer may be unilateral**

- In **Carlill v Carbolic Smoke Ball Co²⁴**, the plaintiff (Carlill) saw a newspaper advertisement placed by the defendant (Carbolic) claiming that their ‘smoke ball’ would cure all sorts of illnesses including influenza. More importantly, the advertisement also stated that the defendants offered to pay £100 to any person who used one of their smoke balls and then succumbed to influenza within a specified time. The plaintiff purchased their smoke ball and subsequently came down with a nasty bout of the ‘flu. She sued the defendant for the £100. The defendant argued, inter alia, that an offer must be made bilaterally (that is, an offer can not be made to the entire world). The court disagreed and held that an offer can be made unilaterally (that is, an offer can be made to the entire world).

- **4) Offer must be distinguished from Mere puffs**

- Offers must be distinguished from non-promissory statements made during the course of negotiations. Objectively, these statements are exaggerated and a reasonable person would not expect them to be true. For example, no reasonable person would believe that a toothpaste can really make teeth ‘whiter than white’. (Maxim: Simplex commendation non obligate)

²¹[1984] TLR 256

²² [1988] TLR 203 (CA)

²³ (1927) (HC)

²⁴ (1893) (CA)

- **5) The offeror may prescribe the duration the offer is to remain open for acceptance.**

- However, the offeror is free to revoke or withdraw his offer at any time before such duration lapses e.g. in **Dickinson v. Dodds**²⁵, the defendant offered to sell a house to the plaintiff on Wednesday 10/06/1874 and the offer was to remain open up to Friday 12th at 9.00 am. However on the 11th of June, the defendant sold the house to a 3rd party.
- The plaintiff purported to accept the offer of Friday morning before 9.00 am. It was held that there was no agreement between the parties as the defendant had revoked his offer by selling the house to a 3rd party on June 11th. A similar holding was made in **Ruoutledge v. Grant**, where the defendant's offer was to remain open for 6 weeks but he revoked or withdrew it after 4 weeks. It was held that there was no agreement between the parties.

- **6) The terms of a proposal must be a final expression**

- The maker of the proposal must not change the terms and his willingness to be bound by the terms of the proposal he has made otherwise this would change the *subject and the essence of their agreement*.
- However, if a contract is in writing, its content can only be varied (changed) in writing and there must be a separate agreement whose function is to change that contract. This agreement must be supported by consideration. These words are the decision of Lugakingira J., in **Edwin Simon Mamuya v. Adam Jonas Mbala 1983 TLR 410 (HC)**.
- 7) An offer may be oral, written or implied from the conduct of the offeror. 8) An offer may be conditional or absolute.
- The offeror may prescribe conditions to be fulfilled by the offerer for an agreement to arise between them. In **Stella Masha v. Tanzania Oxygen Limited**²⁶, Whereby the court held that in order for an acceptance to constitute an agreement, it must in every respect meet and correspond with the terms and conditions of the offer.
- 9) The offeror may prescribe the method of communication of acceptance by the offeree. If he insists on a particular method, it becomes a condition. 10) An offer may be general or specific i.e it may be directed to a particular person, a class of persons or the public at large.

²⁵[1876] 2 Ch D 463

²⁶[2003] TLR 64

▪ **ACTS BEARING A RESEMBLANCE TO OFFERS**

- An offer should be a **firm promise and a final expression** to do or to refrain from doing something as explained earlier. Some acts when done appear like offers/proposals but in real sense they are not; these acts are such as the following:

▪ **(A) A mere supply of information**

- Usually a person may seek information from another concerning something he wishes to buy probably for the purpose of acquiring sufficient knowledge about it prior to such buying. This request for information does not amount to an offer. The following case illustrates this point.
- **A request for further information is not an offer.** In *Harvey v Facey*²⁷, the plaintiff (Harvey) sent a cable to the defendant (Facey), asking: 'Will you sell us Bumper Hall Pen? Telegraph lowest cash price.' Bumper Hall Pen was the name of a property belonging to the defendant. The defendant cabled back the reply: 'Lowest cash price for Bumper Hall Pen £900.' The plaintiff sent a further cable purporting to accept the defendant's offer. **The court held that there was no agreement.** The plaintiff had requested some information and the defendant had merely responded to his request. The plaintiff's further cable did not contain an acceptance, but was an offer to buy, which the defendant refused.

▪ **(B) Invitation to treat**

- An offer must be distinguished from an Invitation to treat. This is a mere invitation by a party to another or others to make offer or bargain. The invitee becomes the offeror and the invitor becomes the offeree. A positive response to an invitation to treat is an offer.
- An 'invitation to treat' is simply an invitation by one party to commence negotiations which may or may not lead to an offer. While an invitation to treat is not an offer, it can determine the form that a subsequent offer is to take (for example, sale by auction or tender).
- In other words, a person who responds to an invitation to treat is in fact making an offer, which may be accepted or rejected. The distinction between an offer and an invitation to treat depends, of course, upon the objective intention of the parties.

²⁷[1893] AC 552

- **Examples of invitation to treat**

- **1) Sale by self-service:**

- At common law, a sale by self service is an invitation to treat. Prospective buyers make offers by conduct by picking the goods from the shelves and the offer may be accepted or rejected at the cashier's desk. The offeror is free to revoke his offer to buy the goods at any time before reaching the cashiers desk.
 - In **Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd**²⁸, the court held that, in a self-serve shop, the offer takes place at the sales counter when the shop assistant accepts the customer's offer to buy the selected goods. Putting goods on display shelves with price tags attached was not an offer that could be immediately accepted by a customer putting the goods into his or her shopping basket. Therefore, the shop display was only an invitation to treat.

- **2) Advertisement of sale by auction:**

- At common law, an advertisement to sell goods or other property by public auction is an invitation to treat. The prospective buyer makes the offer by bidding at the auction and the auctioneer may accept or reject the offer.
 - It was so held in **Harris v. Nickerson**²⁹, where a commission agent had sued as auctioneer for failure to display furniture he had advertised for sale by auction. It was held that there was no contractual relationship between the parties as the advertisement was merely an invitation to treat and as such, the auctioneer was not liable. **(See section 59 of SOGA, Cap 214).**

- **3) Sale by display:**

- At common law, the display of goods with cash price tags is an invitation to treat. The prospective buyer makes the offer to buy the items at the stated or other price which the shop owner may accept or reject. In **Fisher-v-Bell**³⁰, the defendant was sued for 'offering for sale' a flick knife contrary to the provision of the Offensive Weapons Act. The defendant had displayed the knife in a shop with a cash price tag. Question was

²⁸[1953] (CA),

²⁹(1873) L.R. 8 Q.B. 286

³⁰[1960] 3 All E.R. 731 or reported also in [1961] 1 Q.B. 394

whether he had offered the knife for sale. It was held that he had not violated the Act as the display of the knife was an invitation to prospective buyers to make offers.

- Generally, When goods are displayed in a shop for sale together with its price ticket attached to it, this act does not amount to an offer. By so displaying, the law presumes that this person only meant to invite offers from the interested persons.
- This also entails that even if the seller mistakenly placed a lower price tag than a required price on which a particular item could fetch, he is not bound in any way to sell in that lower price.

▪ **4) Sale by tender**

- Advertisements that call for tenders are mere invitation to treaty but they are not offers. The person who tenders is the one who makes an offer. Acceptance of this offer is done by the person advertising tenders by considering and accepting one of them. A tender is an invitation for interested persons to send in offers. The recipient of the offers (or bids) can then enter into a contract by communicating acceptance with the chosen tenderer.
- However, it was held in **Harvela Investments Ltd v Royal Trust Company of Canada (CI) Ltd**³¹, that if the request is made to specific persons and it is stated that the contract will be awarded to the highest or the lowest bidder (as the case may be), then this statement will be binding as a unilateral offer.
- In **Gbl & Associates Ltd v Director Of Wildlife Ministry Of Lands, Natural Resources And Tourism And Two Others**³², In this case the Central Tender Board for the government of Tanzania advertised in the Daily News Paper of February 09 1988 inviting tenders for the sale of elephant ivory. Various persons sent in their offers and the offer made by the plaintiff Co. was accepted. The terms which the advertisement specified for the tenderers to include in their offers was that payment and collection of the ivory must be done within 30 days.
- Rubama J. held in this case that: (i) The advertisement by the Secretary of the Central Tender Board calling for the purchase of elephant ivory was not an offer but an invitation to treat. Each of the tenderers offered to buy at his quoted price and it was upon the

³¹ [1986] (HL)

³² (1989) TLR 195 (HC)

government of the United Republic of Tanzania to accept an offer or reject it;
(ii)...Central Tender Board was not obliged to accept the 1 bid or any of the tenders...

▪ **TYPES OF OFFERS**

▪ **1. Cross offers**

- This is a situation where a party dispatches an offer to another who has sent a similar offer and the two offers cross in the course of communication. No agreement arises from cross offers for lack of consensus between the parties. The parties are not at *ad idem*.

▪ **2. Counter offer**

- This is a change, variation or modification of the terms of the offer by the offeree. It is a conditional acceptance. A counter offer is an offer in its own right and if accepted an agreement arises between the parties.
- Its legal effect is to terminate the original offer as in **Hyde v. Wrench (1840)**, the defendant made an offer on June 6th to sell a farm to the plaintiff for £1,000. On 8th June, the plaintiff wrote to the defendant accepting to pay £950 for the farm. On 27th June, the defendant wrote rejecting the £950. On 29th June the plaintiff wrote to the defendant accepting to pay £1,000 for the farm.
- The defendant declined and the plaintiff sued for specific performance of the contract. It was held that the defendant was not liable as the plaintiff's counter offer of £950 terminated the original offer which was therefore not available for acceptance by the plaintiff on 29th June as the defendant had not revived it. A **counter offer must however be distinguished from a request for information or inquiry.**
- **Request for information:** An inquiry which does not change terms of the offer. The offeree may accept the offer before or after inquiry is responded to as was the case in **Stevenson-v-Mc Lean**³³, where the defendant had offered to sell 3,800 tones of iron to the plaintiff at £ 40 per tone and the offer was to remain open from Saturday to Monday. On Monday morning, the plaintiff telegraphed the defendant inquiring on the duration of delivery.
- The defendant treated the inquiry as a counter offer and sold the iron to a third party. The plaintiff subsequently accepted the offer but thereafter received the defendant's notice of

³³ [1880] 5 QBD 346

the sale to the 3rd party. The plaintiff sued in damages for breach of contract. It was held that the defendant was liable.

▪ **3. Standing offer.**

- A standing offer arises when a person's tender to supply goods and service to another is accepted. Such acceptance is not an acceptance in the legal sense. It merely converts the tender to a standing offer for the duration specified if any. The offer is promising to supply the goods or services on request and is bound to do so where a requisition is made
- Any requisition of goods or services by the offeree amounts to acceptance and failure to supply by the offeror amounts to a breach of contract.
- As was the case in **Great Northern Railway Co Ltd v. Witham**,³⁴ The plaintiff company invited tenders for the supply of stores for 12 months and Witham's tender was accepted. The company made a requisition but Witham did not supply the goods and was sued. It was held that he was liable in damages for breach of contract.
- In standing offer, the offeror is free to revoke the offer at any time before any requisition is made, unless the offeror has provided some consideration for the offeror to keep the standing offer open.
- This consideration is referred to as '**an option**'. This is an agreement between an offeror and the offeree by which an offeree agrees to keep his offer open for a specified duration. In this case, the offeror cannot revoke the offer.
- In a standing offer, if no order or requisition is made by the offeree within a reasonable time, the standing offer lapses.
- Other types of offer included general or specific offer, conditional or absolute offer, Unilateral or bilateral offer just to mention a few.

▪ **PROPOSALS HOW COMMUNICATED**

- To be effective an offer must be communicated by the person making it to the offeree. An offer can only be accepted after it has come to the knowledge of the person to whom it is made.
- Section 4 (1) of the LCA provides that: ***"communication of an offer is deemed to be complete when it comes to the knowledge of the person to whom it is made"***

³⁴ (1873) Court of Common Pleas L.R. 9 C.P. 16.

- It does not matter therefore, whether communication is made orally or in writing, it must come to the knowledge of the offeree.
- Any one who purports to accept the offer while he has been unaware of its existence, his acceptance is not legally accepted. This situation has happened in the following case:
- **In R v Clarke (1927)**, it was advertised by the government of Australia that *if any accomplice of a specified syndicate of murderers furnished evidence that would help to arrest the murderers, he would be offered a free Pardon by the government.*
- One Mr. Clarke gave the information while he was unaware that there was such a pardon by the government. He only realized later after he gave the information and claimed that he be given a pardon because he had accepted the offer.
- **The court held that:** Mr. Clarke could not benefit from the reward because he was not aware of the offer. It appears therefore that if Mr. Clarke had a knowledge of the offer before he tendered the information to the government, his acceptance would have been valid and he would have been entitled to benefit from the free government pardon.

▪ **TERMINATION OF OFFERS**

- An offer does not stay valid for ever; there is always a point in time when the offer comes to an end. Usually, before it is accepted, an offer is valid as long as nothing happens that brings it to an end. There are a number of events, in daily life and as far as principles of contract are concerned, whose effect is to end the offer. Generally Such events are as follows:
- Termination of an offer is referred to by s. 6 of the Law of Contract Act under one general word as **revocation** of a proposal. More or less of the events mentioned above are enumerated under this section as acts which when done would occasion revocation.
- **According to S.6 of the LCA reads as follows:** A proposal is revoked
 - (a) by the communication of notice of revocation by the proposer to the other party;
 - (b) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;
 - (c) by the failure of the acceptor to fulfill a condition precedent to acceptance; or

- (d) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.
- Out of all the events that I have mentioned above only two events are not mentioned in this section; ***rejection and counter offer***.

A) BY REVOCATION (S. 6 (a) of LCA).

- An offer must be revoked by the person who has made the offer or it may be revoked by the person who is authorized to act on his behalf.
- **Revocation of an offer must be communicated:** Revocation of a proposal is effected by doing any act that has an effect of communicating it to the offeree.
- By communicating it, it implies that revocation of a proposal must come to the knowledge of the offeree, otherwise it is ineffective.
- **s. 3 of the LCA, provides that:** The communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking, by which he intends to communicate such proposal, acceptance or revocation, and which has the effect of communicating it.
- From this thus, the communication of the **revocation of the proposal** is deemed to be done when there is **any act** or **omission** of the person who revokes. This act or omission should not only be intended to communicate such revocation but also must have the effect of **communicating it** (it must actually come to the knowledge of the offeree).
- To be effective such communication of revocation of an offer must be done at any time before the same has been accepted.
- This is the import of s. 5 (1) of the LCA, which reads as follows: ***“A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer”***
 - **General Rules as to revocation of offers:**
- An offer is revocable at any time before it becomes effectively accepted. It was so held in *Paybe v. Cave*. In *Dickinson v. Dodds*, the sale of the house by the defendant to a 3rd party revoked his offer to the plaintiff.

- Notice of revocation must be communicated to the offeree. However, such communications need not to be effected by the offeror. It suffices, if communicated by a 3rd party as was the case in *Dickinson v. Dodds*.
- An offer is revocable even in circumstances in which the offeror has promised to keep it open to a specified duration, unless an option exists, as was the case in *Dickinson v. Dodds*.
- Revocation becomes legally effective when notice is received by the offeree.
- An offer is irrevocable after acceptance. It was so held in *Byrne v. Van Tienhoven*.
- In unilateral contracts, an offer is irrevocable if the offeree has commenced and continues to perform the act which constitutes acceptance.
- A bid at an auction is revocable until the hammer falls as per section 59 of Cap 214.

B) REJECTION

- Another way in which an offer can be terminated is if the offer is rejected by the offeree by any of the following acts: if he turns down the offer and If he makes a counter offer. A person will be said to have made a counter offer if his acceptance contains new terms which are different from those which are contained in the original offer.
- An offer terminates if the offeree refuses to accept the same, the refusal may be express or implied from the conduct of the offeree e.g. silence by the offeree amounts to a rejection as was the case in *Felthouse v Bindley*.

C) LAPSE OF TIME (S. 6 (b) of LCA)

- Certain offers do stipulate the specific duration of time beyond which an offer ceases to be valid i.e. this offer will expire after that time and for offers of this kind any acceptance after which expiry will be ineffective.
- For offers which do not provide for a specific time frame, they will lapse after a certain period of time referred to as ***reasonable time***.
- **Section 6 (b) of the LCA provides that:** *A proposal is revoked by the lapse of time prescribed in such proposal for its acceptance, or, if no time is prescribed, by the lapse of a reasonable time, without communication of the acceptance;*
- In **Virji Khimji v Chatterbuck**, The defendant ordered timber from the plaintiff and indicated that it be supplied as soon as possible. The plaintiff did not respond but

delivered the timber. 4 ½ months later, the defendant refused to take delivery and was sued. It was held that he was not bound to take delivery as his offer had lapsed for non- acceptance within a reasonable time.

- The statute just mentions the phrase reasonable time without providing for its meaning. The reasonable time will be deduced from the circumstances of each particular case. It is the court that normally decides if there was **reasonable time** from the facts of a particular case that have been tendered before it.
- The case of **Ramsgate Victoria Hotel Co. v. Montefiore**³⁵, illustrates the instance where the court construed reasonable time. In June **Montefiore** offered to buy shares from Ramsgate Victoria Hotel. The offer did not set the time limit for its acceptance. **In** November Ramsgate accepted this offer being five months later. But by this time Mr. Montefiore did not need the shares any more. Ramsgate sued him, claiming that he breached the contract since they accepted his offer while Montefiore maintained that his offer had expired and could no longer be accepted, so his was not an acceptance in the eyes of the law.
- **Held:** Where an offer is stated to be open for a specific length of time, then the offer automatically terminates when that time limit expires. Where there is no express time limit, an offer is normally open only for a reasonable time. Thus the court was of the view that the company accepted the offer as of too late.

▪ **D) COUNTER OFFER:**

- This is a change or variation of the terms of the offer by the offeree. It is a form of rejection. The legal effect of a counter offer is to terminate the original offer as was the case in **Hyde v. Wrench**.
- Generally a counter offer has two effects that is It amounts to rejection of an offer and It cancels the original offer, in which case it is useless even if you accept it later on the original terms.
- **E) DEATH OR INSANITY OF THE OFFEROR/ PROPOSER (S. 6 (d) of LCA)**
- The death of the offeror or offeree before acceptance terminates an offer. However, the offer only lapses when notice of death of the one is communicated to the other.

³⁵[1866]

- The unsoundness of mind of either party terminates an offer. However, the offer only lapses when notice of the insanity of the one is communicated to the other.
- The death of the offeror, as long as it has come into the knowledge of the offeree, will have an effect of terminating the offer.
- **Section 6 (d) of the LCA provides that:** A proposal is revoked- by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.
- According to this section, in either case, whether it is death or insanity, knowledge of it is an important element.
- **What if the offeree does not know of the death of the offeror?** If the offeree does not know of the death of the offeror he is **entitled to accept the offer, nonetheless**, despite this death except when identity or personality of the deceased offeror is vital i.e. the offeree will not, under this situation, be entitled to accept the offer.
- An offer that has been given by a **professor of Law of Moshi Co-operative University**, who happens to die before it is accepted, can not be accepted by the offeree who does not know of this death, if his identity as the **professor of Law of Moshi Co-operative University**, is vital to the contract.
- This means that if the offer was for a performance of something **that could be done by any person other than the professor** in his professional capacity, then his personal representative can act on his behalf.
- **FAILURE OF A CONDITION SUBJECT TO WHICH THE OFFER WAS MADE:**
- These are conditional offers. If a condition or state of affairs upon which an offer is made fails, the offer lapses.
- The conditions may be of two kinds: express terms- made orally or in writing. Implied are neither made orally nor in writing. They are inferred from studying each particular situation
- **Section 6 (c) of the LCA.** A proposal is revoked by the failure of the acceptor to fulfill a condition precedent to acceptance

- In **Financings Ltd v. Stimson [1962]**, the defendant opted to take up a vehicle on hire purchase terms. He completed the hire purchase application form and paid a deposit. This form constituted his offer. He took delivery of the vehicle but returned it to the showroom after 2 days for some minor rectification. The vehicle was stolen from the showroom and when recovered it was badly damaged by reason of an accident. The defendant refused to take delivery or pay installments and was sued. He pleaded the state of the vehicle. It was held that he was not liable as his offer had lapsed. This offer was conditional upon the motor vehicle remaining in substantially the same condition as it was before and since its condition had changed, his offer had lapsed.

▪ **2: ACCEPTANCE**

- An acceptance is an unconditional assent to the terms of the proposal. The word unconditional means that the terms of the acceptance must not set new conditions apart from those stated in the offer. If the acceptance does so it is termed a **counter offer**.
- This is the external manifestation of assent by the offeree. It gives rise to an agreement between parties. In legal theory, an agreement comes into existence at the subjective moment when the minds of the parties meet. This moment is referred to as *Consensus ad idem* (meeting of minds).
- However, this subjectivity must be externally manifested by the offeree for the agreement to arise. Acceptance may be oral, written or implied from the conduct of the offeree.
- **Section. 2(1) (b) of the LCA states “When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted, and a proposal, when accepted, becomes a promise;”**
- An acceptance has to meet certain legal aspects before it becomes an effective acceptance. The general rule is that an acceptance is supposed to ***reflect the terms of the offer as it has been made***. In other words the acceptance must match or reflect those of the offer. This in contract law is called the **“mirror image rule**.
- **If the offer is for sale of a motor cycle at Tshs. 2000/=, the acceptance must not be for buying a car at Tshs 3000/=**

- According to s. 7 (a) (b) of the LCA in order that acceptance changes a proposal into a promise, it must have the following features: (a) it must be absolute and unqualified (b) if **the proposal does not prescribe the manner in which it is to be accepted**, the acceptance must be expressed in some usual and reasonable manner. (c) If the proposal prescribes the manner in which it is to be accepted, and the acceptance does not follow this manner, the proposer must insist that his proposal be accepted in the manner prescribed and only that. If he fails do so he is deemed to have accepted that acceptance.

RULES OF ACCEPTANCE

- **Acceptance may be oral, written or implied from the conduct of the offeree.** In *Carlill v. Carbolic Smoke Ball Co.*, acceptance by Mrs. Carlill took the form of her conduct by purchasing and consuming the smoke balls. In *Brogden v. Metropolitan Railway Co.*, where it was held that the 1st load of coal supplied by Brogden constituted acceptance of the defendants offer to supply the coal and hence there was an agreement between the parties.
- **The offeree must have been aware of and intended to accept the offer:** A person cannot accept an offer whose existence he is unaware of. In *Crown-v-Clarke*, the Australian government offered £1,000 to any person who volunteered information leading to the arrest and conviction of the killers of 2 police officers. Any accomplice who gave information would be pardoned. Clarke, who was aware of the murder gave the information and the killers were arrested and convicted. However, he made it clear that he had given the information to clear his name. It was held that he was not entitled to the reward as he had given the information for a different purpose and therefore had not accepted the offer.
- **Acceptance must be unconditional and unqualified:** The offeree must accept the offer in its terms, any variation or modification of the offer amounts to a conditional acceptance which is not an acceptance as was the case in *Hyde v. Wrench*, where the plaintiff modified the defendant's offer of £1,000 to £ 950.
- **An offer must be accepted within the stipulated time if any or within a reasonable time failing which it lapses.** As was the case in *Ramsgate Victoria Hotel v. Montefiore*, where the defendant's offer made in June was not accepted until

November by which time had elapsed. A similar holding was made in *E.A Industries Ltd v. Powyslands*.

- **Acceptance must be communicated to the offeror in the prescribed method if any or an equally expeditions method.** Where no method of communication is prescribed, the method to apply depends on the type of offer and the circumstances in which the offer is made.
- **As a general rule, silence by the offered does not amount to acceptance,** it was so held in *Felthouse v. Bindley*. The plaintiff intended to buy a house owned by a nephew named John who had no objection. The plaintiff intended to buy it or £30 15p. He wrote to Jon stating ‘if I hear no more about him, I consider the horse mine at that price.’
- John did not respond but 6 weeks later he gave the horse to the defendant for sale but instructed him not to sell the particular horse. It was sold by mistake. The plaintiff sued the auctioneer in damages for conversion. Question was whether there was a contract of sale between the plaintiff and John. It was held that there was no contract as John had not communicated his acceptance of the offer.
- **Where parties negotiate by word of mouth in each others presence, acceptance is deemed complete when the offeror hears the offeree’s words of acceptance.** It was so held in *Entores Ltd v. Miles Far East Corporation* , where Lord Denning observed that there was no contract between the parties until the offeror hears the words.
- Where parties negotiate by **telephone**, acceptance is deemed complete when the offeror hears the offeree’s words of acceptance. It was so held in *Entores Ltd v. Miles Far East Corporation*.
- Where parties negotiate by **telex** acceptance is deemed complete when the offeree’s words of acceptance are received by the offeror. It was so held in *Entores v. Miles Far East Corporation*.
- In **unilateral offers**, commencement and continuation of performance constricts acceptance. During performance, the offeror cannot revoke the offer but to do so if performance is discontinued as was the case in *Errington v. Errington and Woods*.

- A father bought a house where the son and daughter in-law lived by paying a deposit of £250 and raising the balance by a loan from a Building society. He promised to transfer the house to them if they paid all installments as and when they fall due. The £250 would be a gift to them.
- They commenced payment of the installments but stopped before the entire sum had been paid. The father was compelled to pay the remaining installments. He declined the transfer of the house to them. It was held that he was not bound to do so as they had discontinued payments' of the installments.
- In **standing offers**, a specific order or requisition by the offeree constitutes acceptance and the offerer is bound as was the case in *Great Northern Railway Co. v. Witham*.
- An offer to a **particular/specific person** can only be accepted by that person for an agreement to arise. It was so held in *Boulton v. James*.
- An offer to a **class of persons** can only be accepted by a member of that class for an agreement to arise. It was so held in *Wood v. Lecktrick*.
- An offer to the **general public** may be accepted by any person who fulfills its conditions. As was the case in *Carlill v. Carbolic Smoke Ball Co*.

▪ **COMMUNICATION OF ACCEPTANCE**

- To be effective, acceptance must be communicated to the offeree. If the offeror does not specify any special mode by which acceptance should be carried out, it may be done by any normal method such as: by oral means, written means, by phone, by fax or even by conduct⁴. Not only must it be communicated but also the communication must be complete.
- **Communication of acceptance of the proposal how made: Remember s. 3 of the LCA**, It is deemed to be made if the offeree does any **act or omission** by which he intends to communicate such acceptance and the act or omission must have the effect of communicating it. Only when this has been done can we say that communication of acceptance is effective. Without this no contract can be formed.

- The **general rule in contract law** is that an acceptance must be communicated. Silence does not amount to acceptance. ***Felthouse v Bindley***³⁶, Felthouse offered in writing to buy a horse from his nephew John in which he stated that: “*If I hear no more about him, I consider the horse is mine at £30 15s.*” There was no reply from his nephew. Later the uncle claimed that there was a binding contract between the nephew and him. **The court held** that there was no contract because acceptance did not amount to acceptance.

- **THE POSTAL RULE OF ACCEPTANCE**

- The post rule was developed in an English case of ***Adam v Lindsell* [1818] 1B & Ald 681 or 106 ER 250. 2/9/1817**, the defendant offered to sell to the plaintiff a quantity of wood on certain terms and required a response ‘in the course of post.’ The plaintiff received the letter on **5/9/1817** and posted an acceptance. On **8/9/1817** the defendant posted a letter revoking the offer. The plaintiff’s letter of acceptance was received on **9/9/1817**. It was held that there was a contract between the parties as the plaintiff had posted the letter of acceptance by the time the defendant purported to revoke the offer. Hence, the revocation was ineffective.
- **This means that once the letter of acceptance has been sent whether or not it reaches the offeror a binding contract is formed and both the proposer and the acceptor therefore are bound on that spot.**
- **Exceptions: there are a number of circumstances in which though post is used, post rule may not apply.**
- **i) It applies only when the parties contemplated it as a means of communication of acceptance.** For instance if all the negotiations have taken place by telephone post rule may not be said to have been contemplated by the parties. **ii) Post rule applies exclusively to acceptance of an offer.**
- In ***Holwell Securities Ltd v Hughes* [1974] 1 All ER 161**, in this case Hughes made an offer to sell in which he stated that an acceptance to this offer should be made “by notice in writing to him” [emphasis mine]. ***Holwell Securities***, who sought to find cover under post rule, had posted their acceptance by the prescribed mode but it did

³⁶[1862] 11 CB (NS) 869, or 142 ER 1037

not reach Hughes. The court held that there was no contract since *Hughes expressed a clear intention to be bound after he received the notice in writing.*

- **Discussed above is the position at common law. Let us delve into the legal stance on field in Tanzania.**

- **POST RULE IN TANZANIA**

- **Section 4 (2)** of the LCA slightly modifies the post rule. This section suggests that, unlike in common law, the proposer and the acceptor will be bound by the contract at different points of time once the letter of acceptance has been posted.
- **The section reads as follows:** The **communication of an acceptance is complete:-**
 - **(a) as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;**
 - **(b) as against the acceptor, when it comes to the knowledge of the proposer.**
- This section implies that once the acceptance has been posted and the letter of acceptance is out of the power of the person sending the acceptance, only the proposer will be bound but not the acceptor and the acceptor will be bound when it comes to the knowledge of the proposer.

3) INTENTION TO CREATE LEGAL RELATIONS

- In addition to offer and acceptance, an agreement must be characterized by intention. The parties must have intended to create legal relations. Intention is one of the basic elements of a contract as common law. An agreement is unenforceable unless the parties thereto intended such a consequence.
- An intention to be legally bound is the second essential element of contract formation. A contract does not come into existence unless the parties intend to enter into a legal relationship and be legally bound by it. Intention may be expressed by the parties or implied by their conduct.
- In relation to implied intention, the courts have developed the following rebuttable presumptions:
 - **(a) parties to contracts involving commercial and business matters do intend legal enforceability. (b) parties to contracts involving commercial and business matters do not intend legal enforceability.**

- **(A) Domestic, social and family agreements**

- **I) Husbands and wives**

- In **Balfour v Balfour (1919) (CA)**, the husband agreed to pay his wife monthly support until she rejoined him in Sri Lanka. The reunion did not eventuate and the husband failed to honor the agreement. The wife sued for breach of contract but was unsuccessful. The court held that that, in the absence of an express intention, the presumption was clearly against enforceability. Their agreement involved matters of a social or domestic nature and there were no facts to rebut the presumption that applies. Ascertainment of intention.

- **Other family members**

- **Ii) Agreements between Parent and Child**

- Such an agreement is ordinarily not intended to be a contract but a working relationship.
 - In **Jones v. Pandervatton, (1969) (CA)**, the plaintiff persuaded her daughter to leave a well paying job to study Law in Britain, she was promised a maintenance allowance as she studied. She reluctantly agreed.
 - In the meantime, the plaintiff bought a house where the defendant lived as part of the maintenance. Before the daughter completed her studies, the 2 quarreled and the mother sought to evict her from the house. She argued that there was a contract between them.
 - However it was held that the parties had not intended to create legal relations and the mother was entitled to evict her.
 - However the circumstances in which a domestic or social agreement is entered into may show that the parties intended to create legal relations. Such intentions may be collected from the words used by the parties, their conduct and the circumstances of the agreement; **(See the case of Merritt v Merritt 1971).**
 - Such an agreement may be forced if the parties have manifested an intention to contract. E.g. in **McGregor v McGregor**, a husband and wife sued each other for assault but later resolved to withdraw the cases but live apart. The husband promised to pay a weekly sum as maintenance while the wife promised to maintain the children.
 - The husband was in arrears for 6 weeks and the wife sued. It was held that her action was sustainable as the parties had manifested an intention to contract.

▪ **Rebuttal of presumption**

- The presumption may be rebutted by evidence of the real intention of the parties. The following factors are relevant: (a) what the parties said to each other either orally or in writing; (b) the context in which the statements were made; (c) the conduct of the parties; (d) how grave the consequences would be to the innocent party if the promises made by the other party were to be breached.

▪ **3. Other Social Agreements**

- Such agreements may be enforced if the parties if the parties have manifested an intention to contract. In **Simpkins v. Pays**, the defendant owned a house where she lived with a grand daughter; the plaintiff was a paying boarder (a lodger).
- The three took part in a Sunday newspaper competition. All entries were made in the defendant's name. However, there were no rules on payment of postage. One week's entry won £750.
- The plaintiff claimed 1/3 of the sum. The defendant argued that this was a pastime activity not intended to create legal relations.
- However the court held that the plaintiff was entitled to 1/3 of the sum as the parties had manifested an intention to contract. A similar holding was made in *Parker v. Clark*.
- See also the case of **Bi khadija kilumanga v. Bi. Peris miso [1982] TLR 266**
- Case law demonstrates that an agreement is legally unenforceable unless the parties to it intend such a consequence.

▪ **B) Business or commercial agreements;**

- In considering such agreements, courts proceed from the presumption that the parties intended to create legal relations.

▪ **1) Advertisements**

- These are intended to promote sales of the advertiser. They have a commercial objective. In *Carlill v. Carbolic Smoke Ball Co. Ltd*, the company had manifested an intention to create legal relations by stating that it had deposited £1,000 with Alliance Bank Regent Street. Hence Mrs Carlill was entitled to the £100 as she had contracted with the company.

▪ **2. Employment agreements.**

- These are commercial agreements intended to impose legal obligations on the parties thereto. In **Edwards v. Skyways Ltd**, the plaintiff was a former employee of the defendant company as a pilot and was declared redundant but promised on *ex-gratia* sum. He provided consideration for the promise.
- By reason of many other redundancies, the company was unable to make good the promise to Edwards who sued. It was held that he was entitled to the sum as this was a business agreement intended to create legal relations. The court was emphatic that this was not a domestic agreement.

▪ **Rebuttal of presumptions**

- However, the circumstances in which a commercial or business agreement is entered into may show that the parties did not intend to create legal relations and this would be the case where **honour clauses** or **honourable pledge clauses** are used.
- Parties to a commercial or business agreement may expressly declare that their agreement is not to be binding in law. In **Rose and Frank Co v JR Crompton and Bros Ltd (1925) (HL)**, the court saw no public policy why it should not give effect to an express intention not to form a legal relationship. Nevertheless, the words used in the contract must be clear and unambiguous.
- In **Edwards v Skyways Ltd (1964) (QB)**, the words ‘*ex gratia*’ were used to describe the promise of a redundancy payment. The court held that these words were insufficient to negative contractual intention. The court construed the words as admission of liability by the defendant to make a redundancy payment. By contrast, in **Jones v Vernon’s Pools Ltd (1938) (KB)**, the court held that a clause included in a soccer pools coupon was effective to prevent any action being taken against the defendant in a court of law.

▪ **4) CAPACITY TO CONTRACT**

- Incapacity of contracting parties may vitiate a contract. Capacity to contract refers to the legal ability of a party to enter into a contractual relationship. For an agreement to be enforceable as a contract the parties must have had the requisite capacity.
- As a general rule, every person has a capacity to enter into any contractual relationship as per section 11(1) of LCA. According to **section 11** a person who is legally allowed to

enter into a contract is he who belongs to the age of majority and who is not insane and who is not disqualified by any law from contracting.

- However, in practice, the law of contract restricts or limits the contractual capacity of certain classes of persons namely;
 1. Infants or minors.
 2. Drunken persons.
 3. Persons of unsound mind.
 4. Corporations.
 5. Undischarged bankrupts.

4.1 CONTRACTUAL CAPACITY OF INFANTS OR MINORS

(Section 4 of Cap 214 and Section 68 of Cap 345)

- Under Section 2 of the Age of Majority Act, an infant or minor is any person who has not attained the age of 18. Contracts entered into by an infant are binding, voidable or void depending on their nature and purpose.

4.1.1 BINDING CONTRACTS

- These are legally enforceable contracts; the infant can sue or be sued on them. Both parties are bound to honor their obligations. These contracts fall into 4 categories;

4.1.2 Contracts for the Supply of “Necessaries”

- Under section 4 (2) of the Sale of Goods Act necessities mean goods suitable to the condition in life of such an infant or minor and to his actual requirement at the time of sale and delivery. In **Nash v. Inman**³⁷, the defendant was an infant college student. Before proceeding to college, his father bought him all the necessary clothing material. However, while in college, he bought additional clothing material from the plaintiff but did not pay for them and was sued. His father gave evidence that he had bought him all the necessary clothing material. The court held that, though the clothes were suitable to the minor’s condition in life, these goods were not necessities because the minor was well provided with clothes by his rich father.

³⁷ (1908) 2 KB 1

4.1.3 Contracts for the Supply of “Other Necessaries”

- These are necessities other than those covered by Section 4 (2) of the Sale of Goods Act. E.g. Legal services transport to and from work, lodging facilities etc. An infant is bound by any contract for the supply of such necessities. Under the Sale of Goods Act, whenever an infant is supplied with necessities, he is liable to pay not the agreed price but what the court considers as reasonable.

4.1.4 . Educational Contracts

- An infant is bound by a contract whose purpose is to promote his education or instruction.

4.1.5. Contracts for Beneficial Service

- These are beneficial contracts of service. Case law demonstrates that an infant can sue or be sued and is bound by contracts whose object is to benefit him as a person. In **Doyle v. White City Stadium**,³⁸ the plaintiff was a qualified infant boxer. He applied to join the British Boxing Board and was granted a license. One of the rules of the body empowered it to withhold payment of any prize money won if a boxer was disqualified in a competition. The plaintiff was disqualified on one occasion and the Board withheld payment. The plaintiff sued. Question was whether the plaintiff was bound by the contract between him and the Board. It was held that he was as in substance it was intended to benefit him hence the money was irrecoverable.
- A similar holding was made in **Chaplin V. Leslie Fremin (Publishers) Ltd.**³⁹, Where the plaintiff, an infant had engaged the defendant to write a book for him. He subsequently discontinued the transaction. It was held that the contract was binding as it was intended to benefit him.

4.2.2 VOIDABLE CONTRACTS

- Certain contracts entered into by an infant are voidable i.e. the infant is entitled to repudiate the contract during infancy or within a reasonable time after attaining the age of majority.

³⁸ [1935] 1 KB 110

³⁹[1966] Ch. 71.

- By avoiding the contract, the infant escapes liability on it. The infant cannot be sued on the contract during infancy. These contracts confer upon the infant a long term benefit. Examples include: Partnership agreements, lease or tenancy agreement and contract for the purchase of shares.

4.2.3 VOID CONTRACTS

- These are contracts which the law treats as nonexistent. They confer no rights and impose no obligations on the parties. These contracts are; all accounts stated with infants: These are debts admitted by an infant. The infant cannot be sued on such admission.
- Contracts for the supply of goods other than necessities. Money lending contracts: An infant is not bound to repay any monies borrowed from a 3rd party as the contract is void. However if the infant repays, the amount is irrecoverable.

4.2 CONTRACTUAL CAPACITY OF DRUNKEN PERSONS

- A contract entered by a drunken person is voidable at his option by establishing that: 1. He was too drunk to understand his acts. 2. The other party was aware of his condition.
- By avoiding the contract, the person escapes liability on it. In **Gore v. Gibson**⁴⁰, the defendant was sued on a bill of exchange he had signed and endorsed. He pleaded that when he did so he was too drunk to understand what he was doing and that the plaintiff was aware of his condition. It was held that he was not liable as the contract was voidable at his option by reason of the drunkenness.
- If a contract entered into by a person when drunk is ratified by him when sober it is no longer voidable as was the case in **Mathews v Baxter**⁴¹, where the defendant had contracted to sell a house to the plaintiff. When sued he pleaded drunkenness. However it was held that he was liable as the plaintiff proved that he had subsequently ratified the transaction while sober. Under Section 4 (2) of the Sale of Goods Act, if a drunken person is supplied with necessities he is liable to pay a reasonable price.

4.3. CONTRACTUAL CAPACITY OF PERSONS OF UNSOUND MIND

(Section 12 (1) (2) (3) of LCA)

⁴⁰[1845] 13 M & W 621; 153 ER 260

⁴¹ [1873] LR 8 Exch 132

- A contract entered into by a person of unsound mind is voidable at his option by establishing that: 1. He was too insane to understand his acts. 2. The other party was aware of his mental condition.
- By avoiding the contract the party escapes liability on it. In **Imperial Loan Co. Ltd v Stone**⁴², the defendant was sued on a promissory note he had signed. He argued that at the time, he was insane and therefore incapable of comprehending the nature or effects of his acts and that he was not liable on the promissory note as the contract was voidable by reason of insanity. In the words of Lopes L.J. “In order to avoid a fair contract on the ground of insanity, the mental capacity of the one contracting must be known to the other contracting party. The defendant must plead and prove not merely his insanity but the plaintiff’s knowledge of that fact and unless he proves these 2 things he cannot succeed.”
- If a contract entered into by a person of unsound mind is ratified by him when he is of sound mind it ceases to be voidable. Under Section 4 (2) of the Sale of Goods Act, if a person of unsound mind is supplied with necessities, he is liable to pay a reasonable amount.

4.4 CONTRACTUAL CAPACITY OF UNDISCHARGED BANKRUPTS

(Section 3 of Bankruptcy Act)

- These are persons who have been declared bankrupt by a court of competent jurisdiction. Their capacity to contract is restricted by the provisions of the Bankruptcy Act⁴³.

4.5. CONTRACTUAL CAPACITY OF CORPORATIONS

- These are artificial persons created by law, either by the process of registration or by statute. The capacity of the corporations to contract is defined by law e.g. a statutory corporation has capacity to enter in transactions set out in the statute as well as those reasonably incidental thereto.
- Other transactions are **ultra vires** and therefore null and void. The contractual capacity of a registered company is defined by the object clause of the memorandum. At common law a registered company has capacity to enter into transactions set forth in the objects and those that are reasonably incidental to the attainment or pursuit of such objects.

⁴²[1892] 1 QB 599

⁴³Section 3

- It was so held in **Ashbury Railway Carriage and Iron Co. v. Riche** as well as in **Attorney General v. Great Eastern Railway Co**⁴⁴. Other transactions are *ultra vires* (beyond the powers of) the company and void. Transactions within the powers of a company are said to be *intra vires* a company. An *ultra vires* transaction cannot be ratified and any purported ratification has no legal effect. It was so held in *Ashbury's Case*.

▪ **5. CONSIDERATION**

- In addition to consensus, capacity and intention, an agreement must be characterized by consideration to be enforceable as a contract. At Common Law, a simple contract is unenforceable unless supported by some consideration. Consideration is the bargain element of a contract.
- Sir Frederick Pollock defined consideration as ‘an act of forbearance of one party or the promise thereof, is the price for which the promise of the other is brought and the promise thus given for value is enforceable’ (Pollock’s *The Principles of Contracts*). This definition was adopted in *Dunlop Pneumatic Tyre Co Ltd v Selfridge Co Ltd* (1915) (HL).
- In other words, consideration is simply something of value and may take the form of: (a) an act for a promise; (b) a promise for an act; (c) a promise for a promise; (d) a promise to forbear (that is, not to do something).
- In the words of Lush J. in **Currie v. Misa**, “a variable consideration may consist of some right, interest, profit or benefit accruing to the one party or some loss, forbearance, detriment or responsibility given, suffered or borne by the other.”
- In the words of Patterson J in *Thomas v. Thomas* “consideration means something which is of some value in the eye of the law moving from the plaintiff. It may be some benefit to the defendant or detriment to the plaintiff but at all events it must be moving from the plaintiff.”
- Consideration is whatever the promisee gives or provides to buy the promisor’s promises. By so doing the promisee becomes party to the contract. Consideration takes various forms. In *Carlill v. Carbolic Smoke Ball Co*, it took the form of detriment i.e. swallowing

⁴⁴[1875] LR 7 HL 653

of the smoke balls by Mrs. Carllil. In *Patel v. Hasmani*, it took the form of forbearance to sue.

▪ **TYPES OF CONSIDERATIONS**

- Consideration may be **executory** or **executed** but must not be **past**. However in certain circumstance past consideration may support a contractual claim.

▪ **1. Executory Consideration**

- Consideration is executory where the parties exchange mutual promises. Neither of the parties has performed its part of the contract. The whole transaction is in future. Executory consideration is good to support a contractual claim. E.g. purchase of goods on credit for future delivery. Consideration is executory when one party makes a promise in return for a counter-promise by the other party. In other words, it is a promise to do something in the future (for example, the promise by the Carbolic Smoke Ball Co to pay ‘£100 reward’).

▪ **2. Executed Consideration**

- Consideration is executed where a party does an act to purchase the others promise. The act may be partial or total performance of the party’s contractual obligation. It is good consideration to support a contractual claim.

▪ **3. Past Consideration**

- Consideration is past where a promise is made after services have been rendered. There is no mutuality between the parties. Past consideration is generally not good to support a contractual claim.
- Consideration can be present or future, but not past. In *Roscorla v Thomas* (1842) (QB), the plaintiff (Roscorla) purchased a horse from the defendant (Thomas). After the sale had been concluded, the defendant promised the plaintiff that the horse was in good health and not vicious. The horse was vicious and the plaintiff sued for breach. The court held the promise was not binding as it was made independently of the sale (that is, after the sale). The defendant’s subsequent promise was not supported by a return promise from the plaintiff, and therefore it could not be enforced.
- In certain circumstances, past consideration is sufficient to support a contractual claim. These are exceptions to the general rule: Acknowledgement of a statute barred debt,

Negotiable instrument, rendering service on request constitute to a significant exception to the general rule regarding past consideration.

▪ **RULES OF CONSIDERATION**

▪ **Mutual love and affection is not sufficient consideration:**

- It was so held in **Thomas v. Thomas**. Mr. Thomas had expressly stated that if he died before his wife, she was free to use his house as long as she remains unmarried. His brothers who later became executors of his estate knew of this wish. (See also S. 25 of LCA).

▪ **Consideration must be sufficient, but need not be adequate**

- Objectively, if consideration of some value exists, the court is not concerned with its adequacy. In **Thomas v Thomas (1842) (QB)**, the court held that a promise by a widow to pay an annual rent of £1 was sufficient consideration for a contract with the executors to transfer a life estate in the property to her. After his death, Mrs. Thomas remained in his house and unmarried. After the death of one of the executors, the other sought to evict Mrs. Thomas from the house. She sued the late husband's estate. It was held that the husband's promise was enforceable as she had provided consideration by way of the £1 she paid for every year she lived in the house. The love she had for the late husband was not sufficient consideration but the £1 she paid every year was.

▪ **Consideration must move from the promisee**

- Only the promisee can enforce the promise. Apart from the promisor, the only party who can enforce the contract is the other party who has provided the consideration for the promise. In **Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd (1915) (HL)**, the plaintiff (Dunlop) entered into a contract to sell tyres to a dealer (Dew and Co). The contract provided that the dealer would not sell tyres below the plaintiff's list price and would obtain a similar undertaking from any retailer they onsold to. The dealer subsequently sold tyres to the defendant (Selfridge) who gave the required undertaking. The defendant later sold tyres to a customer below the plaintiff's list price and the plaintiff sued for breach of the undertaking. The court found for the defendant. The plaintiff had not provided any consideration for the defendant's promise to the dealer. The plaintiff was not even a party to that subsequent contract.

- The rule that consideration must flow from the plaintiff is referred to as **The Doctrine of Privity of Contracts**.

- **Consideration must be definite and not illusory**

- The consideration must be so certain that a court is able to place a legal value on it, no matter how inadequate it may actually be. In **White v Bluett (1853) (Ex)**, the defendant (Bluett) promised ‘not to bore his father’ in return for non-payment of a debt. Following the father’s death, the plaintiff executor (White) sought repayment of the debt due by the defendant. The defendant relied on his agreement with his late father as a defence to the claim. The court found for the plaintiff and held that the son’s promise was too vague to have a legally recognised value.

- **Consideration must be present in every simple contract.**

- In **Rann v Hughes (1778) (KB)**, the defendant (Hughes) was administrator of an estate and made a promise to pay a debt owed by the deceased to the plaintiff (Rann). The court held that, as there was no consideration given by the plaintiff for the promise made by the defendant, the contract was void.

- **Consideration must be lawful**

- The consideration must not be illegal or unlawful and must not involve a breach of civil law or public policy. In **Parkinson v College of Ambulance Ltd and Harrison (1925) (KB)**, the plaintiff (Parkinson) gave the defendant charity (College) £3,000 in return for a promise that he would receive a knighthood. The knighthood did not eventuate and the plaintiff sued for the return of the money. The court refused to make the order. The consideration was a promise to do something to promote public corruption and this was illegal as it was against public policy.

- **Consideration must not be past**

- As a general rule, past consideration is not good to support a contractual claim as exemplified by the decisions in **Re McArdles case and Roscorla v. Thomas**. However, in certain circumstances, past consideration is sufficient to support a contractual claim, as indicated above.

- **DOCTRINE OF PROMISSORY OR EQUITABLE ESTOPPEL**

- This doctrine was developed by equity to mitigate the harshness of the common law rule of consideration. It is an equitable intervention which modifies the rule of consideration.

- The Doctrine was explained by Lord Denning in **Combe v. Combe**. It is to the effect that where parties have a legal relationship and one of them makes a new promise or representation intended to affect their legal relations and to be relied upon by the other, once the other has relied upon it and changed his legal position, the other party cannot be heard to say that their legal relationship was different. The party is estopped from denying its promise.
- For the doctrine of estoppel to apply the following conditions are necessary:
 - 1. A legal relationship between the parties.
 - 2. A new promise or representation in intended to be relied upon.
 - 3. Reliance upon the representation.
 - 4. Change in legal position as a result of the reliance.
 - 5. It would be unfair not to estop the maker of the representation.
- The Doctrine of Promissory Estoppel is often referred to as “**The Rule in the High Trees Case.**”

❖ **TOPIC THREE: THE DOCTRINE OF PRIVACY TO CONTRACT**

■

■ **INTRODUCTION**

- The assertion that only parties to contract can sue or being sued under it is commonly known as doctrine of privity of contract and largely is a common law principle or mechanism by which contractual rights and liabilities are limited to the contracting parties. The logic behind this is that only contracting parties have accepted the terms and responsibilities stipulated in the agreement. Basic rule is that if there is no privity to contract, there is no right to sue and cannot be sued⁴⁵.
- This doctrine is to the effect that only a person who is party to a contract can sue or be sued on it. It means that only a person who has provided consideration to a promise can sue or be sued on it and it also means that a stranger to consideration cannot sue or be sued even if the contract was intended to benefit him⁴⁶.
- Privity of contract is the relation which exists between the parties to a contract which enable one person to sue another on it. The privity of contract principle is to the effect that only parties to a contract acquires rights and incur liability under it. As such a stranger to a contract cannot sue or be sued on it⁴⁷.

■ **DEVELOPMENT OF DOCTRINE OF PRIVACY TO CONTRACT IN ENGLAND**

- The doctrine of privity to contract that is only parties to contract can sue or be sued under the contract and not the third party, in England developed through a number of courts decisions as it shown below:-
- In **Tweddle v Atkinson**⁴⁸, In this case two couples intended to get marriage; before the marriage the parents that are father of the husband and father of the wife agreed that the father of the wife should pay £290 to the husband and the real father will only pay £ 100. This promise was not fulfilled by the father of a wife since he paid only £ 90. Therefore

⁴⁵http://books.google.ae/books?id=l423LTgRnJoC&dq=basic+contract+law+for+paralegals&source=gbs_navlinks_s accessed on 23rd January 2017 at 16:30HRS

⁴⁶Beatson, J, Burrows, A and Cartwright, J. (2010). *Anson's Law of Contract (29th ed)*. Oxford University Press: New York pg 615

⁴⁷Nditi, N (2004). *General Principles of Contracts in East Africa*. Dar es Salaam: Dar es Salaam University Press

⁴⁸[1861] 123 E.R 762

the husband instituted a case against the father of the wife. The issue before the court was whether the husband of a wife who is not the party to the contract could sue on it.

- It was held that the husband has no right to sue because he is not a party to a contract. This is because there is existence of relationship between two fathers that is the father of the husband and the father of the wife. The husband is regarded as a beneficiary or a stranger. No act could be brought to the court by the party who is stranger to the contract. Also it is established principle that no stranger to the consideration can take advantage of the contract although made for his benefits. It is important to note that in this case the plaintiff was both stranger to contract and consideration.
- Similarly, the above position was affirmed in the case of **Dunlop Pneumatic Tyre Co., Ltd v Selfridge & Co., Ltd**⁴⁹, where the appellants in this case (Dunlop) who was manufacturers of motorcar tyres sold some of the Tyres to on Dew and Co, with an agreement that these tyres will not be sold below the list price. Dew & Co on their side sold some of the tyres to the respondents (Selfridge& Co.) with an agreement that the respondents shall observe conditions as to price and the respondents also promised that they would pay the appellants a sum of \$5 for every tyre sold below the list price. The respondents sold some of tyres below the list price and the appellants brought an action against them (respondents) to recover damages for the breach.
- The House of Lords held that: The plaintiff could not maintain an action against the respondents because there was no contract between the two parties. It was further observed that even if it is taken that Dew & co. were action as there was no consideration between the two and the respondents since the whole of purchase price was paid by Selfridge & Co. to Dew & Co. Their Lordship reasoned thus:
- “...In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue or be sued on it. Our law knows nothing of a ***Jus quaesitum tertio*** arising by way of contract. Such a right may be conferred by way of property as for example under a trust but cannot be conferred on a stranger to a contract as a right to enforce the contract in personam”.
- The above quotation is to the effect that in England only people who are part to the contract can sue under it and obtain some rights there to and not a third party who haven't

⁴⁹[1915] A.C 847

furnished consideration or being the party to contract, though sometimes by a way of trust or any other means a stranger to contract can sue under the contract and obtain some rights thereto. The term *Jus quaesitum tertio* therefore means the right of a third party to enforce a contract to which he is not a party. However such stranger to a contract cannot sue on it in his own name even though he is the beneficiary of the arrangement that is he cannot enforce the contract in personam.

- Yet again in the case of **Beswick v Beswick**⁵⁰, where the deceased agreed with the company that the company should employ him as a consultant and also the company should pay his wife E5 per week if he dies, so when he dies the wife claim for it in two grounds, firstly she is a beneficiary of E5 and secondly she was administrator of her husband estate. It was held that as administrator the widow could obtain an order of specific performance which would enforce the provision in the contract for benefit but that in her personal capacity for arrears she had no cause of action.

- **THE POSITION OF TANZANIA AS TO DOCTRINE OF PRIVACY OF CONTRACT**

- The aforesaid position in England is the same as that of Tanzania; however In the Law of Contract Act is silent on the principle of privity of contract. Though section 2(1) (d) of the Law of Contract Act⁵¹, permits a third person to furnish consideration for the promisee but doesn't allow him to sue on the contract on the ground that he furnished consideration⁵².
- The applicability of the doctrine of privity to contract that is only parties to contract can sue or be sued under it, is evidenced by looking on different court's decision regarding privity to contract as follows:-
- In the case of **Burns & Blane Limited v. United Construction Company Limited**⁵³, Plaintiff sued for goods sold and delivered and services rendered. Plaintiff had acted as a subcontractor to defendant, the main contractor, on a construction project. Defendant did

⁵⁰[1966] 3ALL E.R. 1 (C.A)

⁵¹[CAP 215 R.E. 2002]

⁵²Nditi, N (2004).*General Principles of Contracts in East Africa*. Dar es Salaam: Dar es Salaam University Press

⁵³[1967] H.C.D No 156

not deny that it was liable under the contract. However, defendant alleged that plaintiff's recovery should be reduced by the amount of expenses which defendant had incurred in correcting certain defects and also by the amount of a settlement which defendant had made with a third party, the company for which the building was being constructed, because of other defects in materials which plaintiff had supplied. It was held there was no privity of contract between plaintiff and the third party with which defendant made the settlement, nor did defendant expend funds to correct those defects in respect of which the settlement was made. Therefore, the amount of the settlement should not be deducted from plaintiffs.

- In **Juma Garage v Co-Operative and Rural Development Bank**⁵⁴, This case is about Privity of Contract, and issue was whether Respondent instructed to act for an insurance corporation, whether such instruction makes the respondent an agent of Agency-Agent acting for Principal and whether the agent may sue in his own name. The fact of this case is that, the respondent owned a motor vehicle with Registration Number SU 770 which was insured with the National Insurance Corporation (NIC). The vehicle was involved in an accident, which made NIC liable for its repair. NIC took the motor vehicle to the appellant for repairs and later on, when the appellant delayed to complete the work, NIC instructed the respondent to follow up the matter with the appellant. After completion the respondent sued the appellant for general and exemplary damages amounting to TZS 5 640 000 for loss of use of the motor vehicle, and a further sum of TZS.78200 being the cost of replacing some parts missing from the vehicle at the time the respondent took delivery of the motor vehicle. The High Court allowed the claim of exemplary damages, hence this appeal.
- The court held that, the fact that NIC instructed the respondent to follow up the matter with the appellant and that it, NIC, would be responsible for expenses did not mean termination of the contract between NIC and the appellant; the respondent was not party to the contract with the appellant but merely an agent of NIC.
- However, the doctrine of privity to contract in Tanzania is used with certain limitations, as the doctrine is normally not imposed in agreements or contracts that falls under customary laws and this is evidenced by the following courts decisions:-

⁵⁴[Civil Appeal No 58 of 1996]

- In **Ephraim Obongo v. Naftael Okeyo**⁵⁵, where by the defendant, a lorry owner, used to collect cassava from plaintiff for selling. On one occasion, his lorry driver and turn boy went to plaintiff to collect some bags of cassava. Plaintiff refused to deliver the goods, demanding that they first produce some empty cassava bags which they had evidently taken another day, or some money.
- They returned to defendant's wife, who gave them 24 bags and T.shs. 190/-, and sent a not promising that everything would be taken care of when her husband returned from a journey. Plaintiff received no more money, and sued in Primary Court for the value of the cassava he had given them, and for some other empty bags not returned, less the money and bags received. The Primary Court held that since the transaction leading to the disputes was between plaintiff and the defendant's wife the proper party to the suit was the defendant's wife and not the defendant. On that ground he dismissed the suit. The case went on appeal to the District court and then to the High Court. Seaton J observed that the case involved an issue of privity of contract, a contract rather subtle and technical point which, perhaps Primary Court couldn't deal with. He said.
- "...In suits between Africans living within a local community and doing business amongst themselves on a basis of trust, I consider it would not be in the interests of justice to import technical notions of privity of contract and other such notions, unless clearly required by the law to do so..."
- The same position was reflected in the case of **Burns & Blane Limited v. United Construction Company Limited**⁵⁶, Plaintiff sued for goods sold and delivered and services rendered. Plaintiff had acted as a subcontractor to defendant, the main contractor, on a construction project. Defendant did not deny that it was liable under the contract. However, defendant alleged that plaintiff's recovery should be reduced by the amount of expenses which defendant had incurred in correcting certain defects and also by the amount of a settlement which defendant had made with a third party, the company for which the building was being constructed, because of other defects in materials which plaintiff had supplied. It was held that there was no privity of contract between plaintiff and the third party with which defendant made the settlement, nor did defendant expend

⁵⁵[1968] HCD NO. 288

⁵⁶[1967] H.C.D. No. 156

funds to correct those defects in respect of which the settlement was made. Therefore, the amount of the settlement should not be deducted from plaintiff's Claim.

- From the above cases it is reasonable to propose that in Tanzania although a stranger to a consideration may sue and recover on the basis of section 2(1) d of the Law of Contract Act so long as he is a party to the contract. A stranger to a contract cannot sue on it in his own name even though he is the beneficiary of the arrangement or that he furnished consideration⁵⁷.

- EXCEPTIONS TO THE DOCTRINE OF PRIVITY OF CONTRACT

- Like the position of England which allows a third party who is not a party to contract to sue under it, the position is the same also in Tanzania as there certain branches of the law in Tanzania allow a third party beneficiary to sue on the contract in his own name. Those contracts which allow a third party to sue on his name include the following:

- Contract relating to trust

- Where a trust has been created and proved then the beneficiary (third party) may sue on the contract in his own name. It must be proved to the satisfaction of the court that trust was created. Once trust has been proved then the third party can sue the promissory to enforce the contract and becomes, as general rule entitled to the benefits under the contract.
- A third party can enforce a contract, if it can be established that the promise intended to create a trust. "A trust is an obligation, enforceable in equity, by which a person, the trustee, holds property on behalf of another, the beneficiary⁵⁸". The law of trusts gives third party beneficiary the right to action against promisors non-performance.
- In a practical context, the promise (trustee) on the insistence by the third party (beneficiary) takes action against the promisor in case of breach. There can be no trust in case there is no promise or property that the trustee holds for the beneficiary. Establishment of intention of trust is very important in the law of trust.
- In **Tanzania Union of Industrial and Commercial Workers [TUCO] at Mbeya Cement Company Ltd v Mbeya Cement Company Ltd and National Insurances**

⁵⁷Nditi, N (2004). *General Principles of Contracts in East Africa*. Dar es Salaam: Dar es Salaam University Press

⁵⁸Mckendrick, E (2009). *Contract Law (8th Ed)*. Basingstoke: Palgrave Macmillan.

Corporation⁵⁹, in this case the action based on trust deed and the issue was whether plaintiff can sue on trust deed to which he is not party and whether the trust rules applicable.

- The fact of the case is that, the plaintiff filed a suit against the defendants jointly, for among other relief, a specific performance of a trust deed. The basic of the suit was the trust deed rules and regulation for Mbeya Cement Company group staff endowment assurance scheme which was annexed to plaint. The counsels for defendants raised a preliminary objection for plaintiff had no locus stand to institute the suit either for lack of legal status or based on trust deed.
- It was held that although the plaintiff union is capable of suing and being sued, it can only do so if the alleged wrongful acts were committed against it. It's for each for each individual employee to sue the defendants for their rights under the trust deed and group endowment scheme.

- Negotiable instrument

- The Bill of Exchange Act⁶⁰ under section 38 (a) empowers a holder of a bill to sue on it in his own name. A holder is defined under section 2 of the Bill of Exchange Act that "holder" means the payee or endorsee of a bill or note that is in possession of it, or the bearer thereof. A holder may sue any person whose signature appears on the bill not necessarily the immediate party. Therefore by closely observing the above provision it's clear that such provision provides an exception to the general rule of privity of contract.

- Transfer of landed property

- A person who buys property with notice that the seller or owner of the land is bound by certain obligations created by a covenant affecting the land shall be bound by them even though he was not a party to the covenant⁶¹.

- Contract relating to the law of agency

- An agent can take a legal action and recover damages for the loss endured by his principal. The doctrine of agency gives such rights in a business setting. "Agency is the

⁵⁹[Civil Case No. 135 of 2000]

⁶⁰[CAP 215 R.E. 2002]

⁶¹Nditi, N (2004). *General Principles of Contracts in East Africa*. Dar es Salaam: Dar es Salaam University Press

fiduciary relationship ... the principal's control, and the agent manifests assent or otherwise consents so to act⁶².

- Under part X of the Law of Contract Act⁶³ deals with contract relating to an agency. There are provisions dealing with the effect of agency on contracts with third persons.
- Under section 178 of the Law of Contract Act⁶⁴ expressly provides that: Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.
- Agency can arise in a number of ways but one that gives problems with the concept of privity of contract is the case of the undisclosed principal. This arises where the agent doesn't disclose that he is acting on behalf of the principle when he enters into the contract with the third party, but simply contracts in his name. In this situation it has been held that when the agency is disclosed, the third party may elect to sue either the agent or principal and either agency or principal also may sue the third party.

- Contract based on insurance

- This type of contract normally found under the Road Traffic Act⁶⁵, where by the third party acquire right to sue. Therefore for those owners of motor vehicle must have compulsory third party insurance in the sense that a person who is not known and foreseeable to the contract may acquire rights and that is the third party⁶⁶. Therefore a third party may sue the parties to the contract of insurance that is either the owner of the motor vehicle or the company of insurance or both.

- CRITICISMS OF THE DOCTRINE OF PRIVY OF CONTRACT

- Despite the rule relates to the benefit of the contract and states that a contract can only be enforced by a person who is a party to the contract, or, alternatively, a person who is not a party to a contract cannot claim any benefit under it even if the contracting parties had

⁶²As defined in <http://www.duhaime.org/LegalDictionary/A/Agency.aspx>, accessed on 19th January 2017

⁶³[Cap 345 R.E. 2002]

⁶⁴[Cap 345 R.E. 2002]

⁶⁵[CAP 168 R.E. 2002]

⁶⁶Nditi, N (2004). *General Principles of Contracts in East Africa*. Dar es Salaam: Dar es Salaam University Press

themselves agreed that the third party should be able to enforce it⁶⁷. The doctrine of privity to contract is faced with some criticism among different authors and educators, such criticism leveled against the doctrine include the followings:-

- Firstly, the doctrine of privity of contract it infringes the right of beneficiaries. Some contract may be made purposely for the benefits of the third party. But the doctrine limits liabilities and rights to the parties only. Hence the third part's right is infringed. Since he/she was not a party to a contract but it was made for his or her interest. Secondly, Privity of contract defeats the intention of the parties to the contract.
- Generally, Third party rights would be effective only when the contract expressly states it or if the terms in contract expressly purported to confer a benefit on the third party and it can be interpreted that the third party can be permitted to have a remedy in pursuing such benefit against them. So, all these exceptions and statutes explained above are considered important and highly beneficial in circumventing the rule when third party rights need to be established.

❖ <u>TOPIC FOUR: TERMS / CONTENTS OF A CONTRACT</u>
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- Parties negotiating a contract make many statements some of which are intended to be terms while the others are mere representations. Whereas terms form the content of the contract, representations are mere inducements and if false they are referred to as misrepresentations and may affect the contract.
- Whether a statement was intended to be a term or representation is a question of fact and courts are guided by the following rules or presumptions in so ascertaining:
- **Time Gap:** If the duration between making the statement and the conclusion of the contract is long, it is presumed to be a representation and if short it is deemed to be a term.
- **Guarantee:** If a party to the negotiations appears to guarantee its statements, they are presumed to be terms.

⁶⁷http://books.google.ae/books?id=l423LTgRnJoC&dq=basic+contract+law+for+paralegals&source=gbs_navlinks

- **Special Knowledge:** If either of the parties has special knowledge in relation to the subject matter of the contract, its statements are presumed to be terms. In **Oscar Chess Ltd v. Williams**, Williams sold a 2nd hand car to the plaintiff. The registration book showed that it was a 1948 model while in fact it was a 1939 car. Williams had no means of ascertaining the truth. The plaintiff sued in damages for the untrue statement. However it was held that since the statement was innocently misrepresented, the plaintiff had no action in damages.
- However in **Dick Bentley Productions Ltd v. Harold Smith motors Ltd**, the plaintiff intended to buy a motor vehicle from the defendant and was informed that the vehicle in question had had a replacement engine and gearbox and had only done 20,000 miles. In fact nothing had been replaced and it had done over 100,000 miles.
- The plaintiff sued in damages for the untrue statement. It was held that the untrue statement was a term of the contract as the defendant was a motor dealer and was therefore liable in damages for the misrepresentation.
- **Terms of a contract may be: Express or Implied.**
 - **1. EXPRESS TERMS**
 - These are the oral and written terms agreed upon by the parties. Written terms prevail over oral terms. If contractual terms are written, oral evidence is generally not admissible to vary or explain the written terms.
 - However, such evidence is admissible to prove that:
 1. The contract was subject to a particular trade usage or custom.
 2. The parties had not incorporated all the terms into the document.
 3. The parties had agreed to suspend the agreement until some event occurred
 - If handwritten, printed and typed terms contradict, the handwritten terms prevail as they are a better manifestation of the parties' intentions. It was so held in *Glynn v. Margetson*.
 - **2. IMPLIED TERMS**
 - These are terms which though not agreed to by the parties, are an integral part of the contract. These terms may be implied by statutes or by a court of law.
 - **A. Terms implied By Statutes.**

- Certain statutes imply terms in contracts entered into pursuant to their provisions. These terms become part of the contract.

- **1. Terms implied in Sale of Goods contracts by the Sale of Goods Act Cap 214**

- The Sale of Goods Act implies both conditions and warranties in contracts of Sale of goods unless a different intention appears.

- **CONDITIONS**

- **Right to sell.**

Under Section 14 (a) of the Act there is an implied condition that the seller of goods shall have the right to sell when property in the goods is to pass.

- **Correspond to description.**

Under Section 15 of the Act, in a sale by description there is an implied condition that the goods shall correspond to the description.

- **Fitness for purpose.**

Under Section 16 (a) of the Act, where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to rely on the sellers skill and judgement, there is an implied condition that the goods shall be reasonably fit for that purpose.

- **Merchantable Quality.**

Under Section 16 (b) of the Act, where goods are bought by description from a person who deals in such goods in the ordinary course of business whether a seller or manufacturer, there is an implied condition that the goods will be of merchantable quality.

- **Sale by Sample.**

Under Section 17(1) of the Act, in a sale by sample, the following conditions are implied:

- 1) The bulk shall correspond with the sample in quality.
- 2) The buyer shall be afforded a reasonable opportunity to compare the bulk with the sample.

3) That the goods shall be free from any defects rendering them unmerchantable.

- **WARRANTIES**

- **Quiet Possession**

- Under Section 14 (b) of the Act there is an implied warranty that the buyer shall have and enjoy quiet possession of the goods.

- **2) Free from Charge or encumbrance**

- Under Section 14 (c) of the Act there is an implied warranty that the goods shall be free from any charge or encumbrance not made known to the buyer when the contract was made.

2. Terms Implied By Courts of Law

- Courts of law reluctantly imply terms in contracts as it is the duty of the parties to agree as to what the contractual terms shall be.
- However in certain circumstances, courts are called upon to imply terms in contracts and do so for 2 reasons: a) To give effect to the intentions of the parties. b) To facilitate commercial transactions or give business efficiency.
- Courts of law imply terms in contracts on the basis of: **The reasonable by stander test and Trade usages and customs.**

- **1. Reasonable By-Stander Test**

- Under this test a court will imply into a contract any term which a reasonable person overhearing the contract being made would have implied.
- In **Hassan Ali Issa v. Jeraj Produce Shop**, the plaintiff repaired the defendant's motor cycle. However, the defendant did not collect the repaired item until after 1 year. The plaintiff demanded repair and storage charges.
- The defendant refused to pay storage charges on the ground that it had not been agreed. The plaintiff threatened to sue the defendant. As a consequence, the defendant wrote a cheque for both amounts but it was dishonored. The plaintiff sued.
- It was held that the defendant was liable to pay storage charges. The court implied into the contract a term that if a repaired item is not collected within a reasonable time, The party undertaking storage is entitled to reasonable storage charges.

- In the **Moorcock Case**, the parties had agreed that the plaintiffs ship could unload at the defendant's jetty situated upstream the River Thames. During low tide as the ship sailed towards the jetty it grounded and was damaged. The jetty owner was held liable for damage. The court implied the term that the passage to the jetty was reasonably safe for the ship.

- **2. Trade Usages & Customs.**

- A court of law may imply a trade usage or custom into a contract if it is proved that the transaction was subject to it. The party relying on the trade custom must prove that: The custom do exist, it's certain and reasonable, it's known to the parties and the parties had not exempted the custom from their transaction.
- In **Fluery and King v. Mohamed Wali & Another**, the plaintiff bought 1000 handkerchiefs from the defendants and the same were delivered in batches of 30. The plaintiff took delivery but sued the defendant for a reduction in the purchase price. It was proved that in Zanzibar there was a trade usage that handkerchiefs bought in bulk were supplied in dozens.
- The court implied the custom into the contract and held that the plaintiff was entitled to the reduction in the price as he had to unpack and repack the pieces in dozens.
- Contractual terms may be **conditions, warranties or innominate terms**.
- **1. CONDITIONS**, This is a term of major stipulation in a contract. It runs to the root of the contract. It is part of the central theme of the contract. If a condition is breached, it entitles the innocent party to treat the contract as **repudiated** and to **sue in damages**. As was the case in **Poussard v. Spiers and Pond**. A singer was engaged to play the leading role in a French Opera from the beginning of the season but owing to illness she was unable to take up her role during the first 1 week forcing the organizers to engage a substitute and consequently rejected the singer's services who sued.
- It was held that the organizers were entitled to treat the contract as repudiated as the singer had broken a major term of the contract. A condition may be express or implied in a contract.
- **2. WARRANTIES**, This is a minor term of a contract or a term of minor stipulation. It is a peripheral or collateral term that does not run into the root of the contract. If breached,

it entitles the innocent party to sue in **damages only** as the contract remains enforceable and both parties are bound to honour their part of the bargain.

- In **Bettini v. Gye**, an actress was engaged to perform in concerts and theatres from the beginning of performances. However she additionally agreed to appear for 6 days in advance for rehearsal but appeared for only 3 days.
- The organizers purported to treat the contract as repudiated. It was held that the contract was subsisting as the agreement to appear for rehearsals was a collateral term.
- **3. INNOMINATE TERMS,** These are terms of a contract categorized as neither conditions nor warranties. The breach of such terms may be attended by trivial or grave consequences. The remedy available depends on the nature, effect and consequence of the breach. It was so held in **Hong Kong Fur Shipping Co. v Kawasaki Kisen Kaisha** where a ship was chartered for 24 months but was unavailable for use during the 1st 20 weeks. The charterer sued alleging that the unavailability of the vessel was breach of a condition. However it was held not to be.

- **EXEMPTION OR EXCLUSION CLAUSES (Limiting or Excluding clauses)**

- The theory of freedom of contract assumes that parties are free to contract with one another and can protect their own interests.
- It assumes parity in contractual bargains which is not necessarily the case. The stronger party may insert terms favourable to it. This is the genesis of exemption clauses.
- An exemption clause is a clause inserted in a contract by the stronger party exempting, itself from liability or limiting the extent of any liability arising under the contract.
- These clauses are common in standard form contracts e.g. conveyance of goods, hire purchase agreements contracts of insurance etc.
- These clauses are justified on the theory of freedom of contract. From an example clause to be given effect, the court must be satisfied that it was an integral part of the contract.
- It must have been incorporated into the contract. In **L'estrage V. Graucob (1934)** the plaintiff bought an automatic cigarette vending machine from the defendant. The terms of the agreement were written in a document entitled sale agreement.
- Some of the clauses were in a very small print and the plaintiff signed the document without reading. One clause exempted the defendant from liability if the machine turned out to be defective. It worked for only a few days. The plaintiff sued and the defendant

relied on the exemption clause in the agreement. It was held that the defendant was not liable as the document contained the terms of the contract and the plaintiff had signed the same and was therefore bound.

▪ **INCORPORATION OF EXEMPTION CLAUSES IN CONTRACTS**

- An exemption clause may be made part of a contract: -

- a. By signature
- b. By notice

○ **INCORPORATION BY SIGNATURE.**

- If a document signed by the parties to a contract contains an exemption clause, the court must be satisfied that: -
 - a. The document contained the terms of the contract between the parties
 - b. It was signed by the party affected voluntarily
- Signature *prima facie* means acceptance. A party cannot after signing a document argue that it did not read, understand or that the print was too small. It was so held in *L'Estrange V. Graucob*.
- However if there is evidence that the signature was procured by fraud or misrepresentation of the contents of the document the signature is voidable at the option of the innocent party.
- As was the case of *Curtis v. Chemical Cleaning & Dyeing Co.* the plaintiff took a wedding dress to the defendant shop for cleaning and was given a document to sign. She requested the shop assistant to explain to her the contents and was informed that the document exempted the company from liability for any damage caused to the decorations of the dress.
- She signed the document without reading. Her dress was damaged and stained. She sued the company which relied on the exemption clause which excluded it from liability for any damage.
- The plaintiff pleaded that the contents of the document had been misrepresented to her and hence the signature, it was held that the signature was voidable at her option and the company was liable.

○ **INCORPORATION BY NOTICE.**

- What the exemption clause is not contained in a document requiring any signature, the court must be satisfied that the party affected by the clause was aware of its existence when the contract was entered into.
- As was the case in *Parker v. South Eastern Railway Co.* The plaintiff had left in luggage at a railway station luggage office and was given a ticket containing the words “**see back**”. At the back was a clause exempting the company from liability for lost luggage. The plaintiff’s luggage was lost and he sued. The company relied on the exemption clause.
- It was held that the company was not liable as it had brought the exemption clause to the plaintiff’s notice who was therefore bound.
- However, a belated notice of an exemption clause has no effect on the contract as it is not part of it. In **Olley v. Malborough Court** the plaintiff had booked in a hotel and paid for a weeks board, she was given a key to her room where there was a notice exempting the hotel from liability for lost items. The notice was behind the door.
- Guests were requested to deposit valuable with the manageress of the hotel. During her absence a stranger opened the room and stole her expensive clothing. She sued. The hotel relied on the exemption clause in the room.
- It was held that the hotel was liable as the exemption clause was brought to the plaintiffs notice after the contract had been concluded.
- **It should be noted that at common law exemption clauses contained in tickets or receipts issued offer payment of a sum of money are not deemed to be part of the contract as the ticket or receipts is evidence of payment and not the basis of the contract.**
- In **Thomton v. Shohane Parking Co. Ltd.** The defendant operated an automated parking lot. Motorists had to insert coins to obtain a receipt so as to access the parking lot. Behind the receipt was a notice exempting the defendant from liability for injuries sustained within the parking lot. The plaintiff who had accessed the parking lot in the ordinary manner was injured and sued.
- The defendant relied on the exemption clause on the ticket. However it was held that the defendant was liable as the clause had not been incorporated into the contract.

▪ **RULES RELATING TO ENFORCEMENT OF EXCLUSION/EXEMPTION**
CLAUSES

- For a court of law to give effect or consider the effect of an exemption clause it must be satisfied that the exemption clause was an integral part of the contract. Since exemption clauses are generally unfair to the weaker party, Courts have evolved rules which to some extent ensure that the unfairness is mitigated.
- An exemption clause must have been incorporated into the contract either by notice or signature. The party affected must have been aware of the exemption clause when the contract was entered into.
- If contractual terms are contained in a document, it must be evidence that the document was the basis of the contract and was signed by the parties voluntarily as was the case of *L'Estrange v. Graucob*.
- For an exemption clause to be given effect it must be clear and definition free from vagueness or ambiguity. In the event of any ambiguity the clause is interpreted ***contra proferentes***. This is the ***Contra Proferentem Rule*** of interpretation under which clauses are interpreted restrictively against the party relying on them. As was the case in *Omar Sale v. Besse and Co. Ltd.* Where in a contract of sales of goods, the seller exempted itself from liability for breach of 'warranties'. It breached an implied condition in the Sale of Goods Act.

A question was whether the term warranties included conditions. It was held that since the term warranties were vague. It had to be interpreted restrictively against the seller and therefore did not include conditions. Hence the seller was liable.

- As a general rule, only person's privy to a contract can take advantage of an exemption clause in the contract. It was so held in *Scruttons Ltd. v. Midland Silicones Ltd.*

In *Halal Shipping Co. v. SBA and Another*, a contract of carriage of goods by sea exempted the carrier from liability for any damage to the good in the course of transit. The good were damaged in the course of unloading from the ship and the plaintiff sued. The carrier relied on the exemption clause and escaped liability. The unloading company

purported to rely on the same clause. It was held that it could not do so as it was not party to that contract and was therefore liable.

- A court of law would generally not give an exemption clause effect if doing so enable the party evade what amounts to be the fundamental obligation of the contract or a fundamental breach. This rule is based on the premise that every contract has a fundamental obligation to be discharged and a party must not use an exemption clause to evade such obligation.

*****END*****

“INJUSTICE ANYWHERE IS A THREAT TO JUSTICE EVERYWHERE.”

WABILLAH TAWFIQ

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