

KENYA SCHOOL OF LAW
ADVOCATES TRAINING PROGRAMME

THE SALE OF GOODS IN KENYA

By
Rautta-Athiambo

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INTRODUCTION

- In general the rights and obligations of parties to a sale of goods contract in Kenya are stipulated in various statutes and rules.
- The rights of the consumer of such goods (as well as services) are today largely consolidated in the Consumer Protection Act of 2012, briefly discussed herein below.
- Virtually all the statutes aim or are designed to ensure that consumers are provided with full information, including the price and quality, of any product or service they may wish to purchase, and to ensure that they are safe and meet international standards.

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1. THE CONTRACT

- ◊ The contract of sale of goods is one whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the **price**: see s. 3 (1), Sale of Goods Act, *infra*.
- ◊ To constitute a contract of sale of goods, the seller must either-
 - (a) **transfer** or
 - (b) **agree to transfer**
 property in the goods to the buyer.
- ◊ The contract is deemed **executed** in (a) , while it is **executory** in (b).

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The contract... *contd.*

- ◊ The **price** need not to be wholly in money: see *Alridge v. Johnson*, (1857) 7 E & B. 885, where a contract for the sale of 52 bullocks valued at Pounds 6 each against 100 quarters of barley valued at Pounds 2 per quarter with the difference to be paid in cash was treated as sale of goods.

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2. SOURCES OF LAW

- (a) The principal law that "regulate[s] the sale of goods" in Kenya is the Sale of Goods Act, Chapter 31.
- ◊ It became effective on 1st October, 1931.
- ◊ It was, in part, designed to protect the consumer against unfair trading practices.
- ◊ It is virtual copy work of the 1893 English statute by the same title, which was a codification of the law as it had evolved.
- ◊ Before then, the sale of goods law was based largely on cases decided by courts at common law.

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Sources of law... *contd.*

- ◊ For 80 years the English Act remained intact but has since been amended in 1973, 1977, re-enacted in 1979 and further amended in 1994 and 1995.
- ◊ The current English Act has also been supplemented by many regulations made by Statutory Instruments in respect of the European Community.
- ◊ Two essential observations:
 - (i) Our law on this subject remains unchanged.
 Hence application of post-1973 UK case law to Kenya must be critically examined.

Sources of law...contd.

(ii) The Act does not seek to make a contract for the parties but merely defines their obligations where the matter is not governed by agreement. E.g. by section 55, any right, duty or liability which would arise under a contract of sale by implication of law, may be negated or varied by express agreement.

Sources of law...contd.

They may even be negated or varied by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract. That is, the Act preserves the common law rule, that "there is no rule of law to prevent the parties from making such contracts as they please": per Blackburn J. in *Calcutta and Burma Steam Navigation Co. v. De Mattos* (1863) 32 L. J. QB 322, at p.328.

3. The Act also preserves rules of common law, including the law merchant, the rules relating to the law of agency and the general law of contract: see s. 59(2).

Sources of law...contd.

(b) Law of Contract Act, Chapter 23, Laws of Kenya. The Kenyan law simply imports "the English common law of contract to Kenya, with certain modifications".

(c) Judicial decisions
The decisions of courts while interpreting the statutes relating to sales form a large portion of the law today.

3. DEFINITIONS

"Goods" includes-

- All chattels personal other than things in action and money;
- All emblems;
- Industrial growing crops; and
- Things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale: see s. 2 (1).

NB: 1. "Goods" is never used in the singular; thus, one does not speak of selling a "good".

2. One may refer to an item of goods or an article.

Definitions ... contd.

- Virtually every kind of movable property except actionable claim and money is regarded as 'goods'.
- Growing crops, grass and things attached to or forming part of the land, are regarded as goods as soon as they are agreed to be separated from the land.

Definitions ... contd.

The goods may either be:

- existing goods owned or possessed by the seller;
- goods to be manufactured; or
- goods acquired by the seller after the making of the contract of sale: see s. 7 (1).

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Definitions ... contd.

Emblems

-These refer to growing crops annually produced by agricultural labour, e.g. wheat, corn, flax, potatoes, as opposed to a crop occurring naturally.

-They are deemed to be personal property which the executor or administrator of an estate of a deceased tenant may harvest regardless of who may have since occupied the land.

-Also refers to the tenant's right to take away such crops after the tenancy has ended.

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Definitions ... contd.

ii. Industrial growing crops

-This phrase is not defined in the Act but is presumed to refer to crops that take long to mature in comparison to emblems.

-They become goods only once they are severed from the land.

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Definitions ... contd.

Classes of goods.

Goods may be:-

- (a) Specific;
- Ascertained; or
- Unascertained.

Another classification of goods may be as "existing" or "future" goods.

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Definitions ... contd.

(a) Specific goods-

(i) Goods identified and agreed upon at the time a contract of sale is made: see s. 2(1).

(b) Ascertained goods-

Goods as are identified with the agreement after the contract is made.

(c) Unascertained goods-

Goods not identified and agreed on at the time that the contract of sale is made.

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Definitions ... contd.

(d) Existing goods-

Goods which form the subject of a contract of sale and which are owned or possessed by the seller: see ss. 7(1)

(e) Future goods-

Goods to be manufactured or acquired by the seller after the making of the contract of sale: see sections 2 (1) and 7(1).

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Definitions ... contd.

EXCLUSIONS

(a) "Other than things in action"

- ◊ Also referred to as *chooses in action*.
- ◊ The term is used to describe "all personal rights of property, which can only be claimed or enforced by action and not by taking physical possession": see *Torkington v. Magee* (1902) 2 K.B. 427, at p. 430.
- ◊ E.g. stocks and shares, trade marks and debts.

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Definitions ... contd.

(b) "Money"

A coin transferred as currency is excluded from the definition of goods; but if sold as a curio or souvenir, it is an article within the definition: Cf *Moss v. Hancock* [1899] 2 Q.B. 111.

(c) Things attached to the land

- This phrase includes leases and natural produce of the soil such as grass, fruit trees and others growing naturally (*fructus naturales* as opposed to *fructus industrielles*), before they are severed or agreed to be severed from the land.

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Definitions ... contd.

Formalities

- A contract of sale of goods, like any other contract, depends upon establishing an agreement between the parties and involves the elements of offer and acceptance.
- In general, the contract can be made in any form: see s. 5.
- It is not necessary that payment or delivery be made at the time of making the contract of sale.

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Definitions ... contd.

In summary:

- i. A contract of sale may be in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties: see s. 5. (But this does not affect the law relating to corporations).
- ii. A contract of sale may be **absolute** or **conditional**: see s. 3 (3).
- iii. The **essential parties** to a contract of sale are **buyer** and **seller**.

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4. TERMS & CAPACITY

Terms of the contract.

The express and implied terms of the contract of sale are its contents.

It is the terms of the contract which define the rights and obligations of the parties.

Capacity to buy and sell.

Regulated by the general law concerning capacity to contract and to transfer and acquire property, e.g. an infant has no capacity to enter into any contract; but where *necessaries* are sold and delivered to an infant or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price: see s. 4.

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5. SALE AND AGREEMENT TO SELL.

1. **Sale-** Occurs where under a contract of sale the property in the goods is transferred immediately from the seller to the buyer.
2. **Agreement to Sell-** Occurs where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled: see s. 3 (3).

An agreement to sell is said to become a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred: see s. 3(5).

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Sale and Agreement to Sell ... contd.

Differences between a sale and an agreement to sell.

- A **Sale** is an *executed contract*, operating as an actual transfer of ownership while an **Agreement to Sell** is an *executory contract* to transfer ownership at a later date.
- If the *buyer defaults* in a sale, the, seller can sue for the price but in an agreement to sell if *buyer defaults* seller can only sue for unliquidated damages for breach of contract.

Sale and Agreement to Sell ... contd.

- iii. If the seller defaults in a sale, the buyer can sue for damages, and claim delivery of the goods but in an agreement to sell if seller defaults buyer can only sue for damages.
- iv. Since ownership passes to the buyer in a sale, he bears the risk of loss or deterioration but in an agreement to sell, ownership does not pass to the buyer so the risk of loss or deterioration remains with seller.

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6. DISPOSITIONS OF GOODS AKIN TO SALE

Sale of Goods Act applies only to contracts of sale of goods and does not apply to other dispositions of goods. The following are other transactions whose commercial objects may be similar but are otherwise legally quite different:

1. **Bailment**

Goods are delivered by one person to another for a limited purpose and on the term that the very same goods will be returned to the bailor or delivered to a third person in accordance with the bailor's instructions at the termination of the agreement.

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Dispositions of Goods akin to Sale ... contd.

The bailor parts with possession of the goods, but he retains the ownership of them while under a contract of sale, the seller undertakes to part with possession and ownership.

2. **Hire purchase**

This is a bailment coupled with an option to purchase the goods.

3. **Pledge (or pawn)**

This is a bailment of goods by a borrower as a security for a loan.

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Dispositions of Goods akin to Sale ... contd.

4. **Mortgage of goods**

Mortgage of goods occurs where the parties go through a form of sale as a security for a loan.

The borrower transfers the property in the goods to the lender on condition that the property will be retransferred upon the repayment of the loan.

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Dispositions of Goods akin to Sale ... contd.

5. **Lien**

Like a pledge, a lien does not involve the transfer of property and each is easy to distinguish from a sale.

NB: By s. 59(4), the provisions of the Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge or other security.

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Dispositions of Goods akin to Sale ... contd.

6. **Contracts for work and material**

When the substance of the contract is an undertaking to use skill in producing a particular article, the contract may be one for work and materials, and not a contract for sale of goods.

7. **Exchange or Barter**

Exchange or barter involves a transfer of one chattel in exchange or in return for another.

8. **Gift**

A gift differs from a sale because there is no consideration for the transfer of the property in the goods.

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7. CONTENTS OF AGREEMENT

- CITATION, TYPE OF CONTRACT;
- IDENTITY OF THE PARTIES, DESCRIPTION: SELLER AND BUYER;

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Contents of agreement... *contd.*

- CITATION, TYPE OF CONTRACT;
- IDENTITY OF THE PARTIES, DESCRIPTION: SELLER AND BUYER;
- PURCHASE PRICE;

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Contents of agreement... *contd.*

- CITATION, TYPE OF CONTRACT;
- IDENTITY OF THE PARTIES, DESCRIPTION: SELLER AND BUYER;
- PURCHASE PRICE;
- SUBJECT MATTER OF THE CONTRACT OR DESCRIPTION AND IDENTIFICATION OF GOODS ;

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Contents of agreement... *contd.*

- CITATION, TYPE OF CONTRACT;
- IDENTITY OF THE PARTIES, DESCRIPTION: SELLER AND BUYER;
- PURCHASE PRICE;
- SUBJECT MATTER OF THE CONTRACT OR DESCRIPTION AND IDENTIFICATION OF GOODS ;
- WARRANTIES, REPRESENTATIONS AND UNDERTAKINGS ;

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Contents of agreement... *contd.*

- CITATION, TYPE OF CONTRACT;
- IDENTITY OF THE PARTIES, DESCRIPTION: SELLER AND BUYER;
- PURCHASE PRICE;
- SUBJECT MATTER OF THE CONTRACT OR DESCRIPTION AND IDENTIFICATION OF GOODS ;
- WARRANTIES, REPRESENTATIONS AND UNDERTAKINGS ;
- EVENTS OF FUNDAMENTAL BREACH;

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Contents of agreement... *contd.*

- EVENTS OF FUNDAMENTAL BREACH;
- RIGHTS OF PARTIESUPON FUNDAMENTAL BREACH;

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Contents of agreement... *contd.*

- EVENTS OF FUNDAMENTAL BREACH;
- RIGHTS OF PARTIESUPON FUNDAMENTAL BREACH;
- DELIVERY;

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Contents of agreement... *contd.*

- EVENTS OF FUNDAMENTAL BREACH;
- RIGHTS OF PARTIESUPON FUNDAMENTAL BREACH;
- DELIVERY;
- INDEMNIFICATION AND LIABILITY ;

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Contents of agreement... *contd.*

- EVENTS OF FUNDAMENTAL BREACH;
- RIGHTS OF PARTIESUPON FUNDAMENTAL BREACH;
- DELIVERY ;
- INDEMNIFICATION AND LIABILITY ;
- FORCE MAJEURE / ACTS OF GOD;

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Contents of agreement... *contd.*

- EVENTS OF FUNDAMENTAL BREACH;
- RIGHTS OF PARTIESUPON FUNDAMENTAL BREACH;
- DELIVERY ;
- INDEMNIFICATION AND LIABILITY ;
- FORCE MAJEURE / ACTS OF GOD;
- DISPUTE RESOLUTION, E.G., ARBITRATION ;

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Contents of agreement... *contd.*

- EVENTS OF FUNDAMENTAL BREACH;
- RIGHTS OF PARTIESUPON FUNDAMENTAL BREACH;
- DELIVERY ;
- INDEMNIFICATION AND LIABILITY ;
- FORCE MAJEURE / ACTS OF GOD;
- DISPUTE RESOLUTION, E.G.,ARBITRATION ;
- LAW GOVERNING;

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Contents of agreement... *contd.*

- EVENTS OF FUNDAMENTAL BREACH;
- RIGHTS OF PARTIESUPON FUNDAMENTAL BREACH;
- DELIVERY ;
- INDEMNIFICATION AND LIABILITY ;
- FORCE MAJEURE / ACTS OF GOD;
- DISPUTE RESOLUTION, E.G.,ARBITRATION ;
- LAW GOVERNING;
- EXECUTION.

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8. PERFORMANCE: SELLER'S DUTIES

- The seller has the following duties towards the buyer:
 - (a) To deliver the goods in accordance with the terms of the contract.
 - (b) To transfer the property in goods to the buyer.
 - (c) To deliver to the buyer goods which accord with the terms of the contract, express and implied.
 - (d) To deliver the quantity of goods he agreed to sell to the buyer.

Of the above, we focus a little on the issues of delivery and transfer of property or good title by the seller to the buyer.

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9. DELIVERY

- ◊ It is the duty of the seller to deliver the goods in accordance with the terms of the contract of sale: see s. 28.
- ◊ "Delivery" means voluntary transfer of possession from one person to another: see s. 1 (1).
- ◊ Place of delivery is the seller's place of business, if he has one, and if not, his residence: see s. 30(1).

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Delivery... contd.

- ◊ The time for delivery is the time, if any, fixed in the contract of sale.
- ◊ But where, under the contract of sale, the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time: see s. 29 (2).

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Delivery... contd.

Delivery, examination and acceptance-

- ◊ Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract: see s. 35 (1).

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10. THE DUTY TO PASS GOOD TITLE

Under a contract of sale, the seller **transfers**, or **agrees to transfer**, the property in (the ownership of) the goods to the buyers: see s. 3 (1).

"Transfer" here refers to the transfer of the right of ownership with respect to goods.

As seen above, the seller transfers or agrees to transfer the property in goods to the buyer: s. 3(1).

"Property" here means ownership.

A mere transfer of possession of the goods cannot be termed as sale.

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Passing of title... contd.

- The term 'property', as used in the Act, means "general property" in goods as distinguished from "special property".
- E.g., where the owner of certain goods pledges them to another, he retains general property in the goods, while that other person will have special property or interest in the goods; but only to the extent of the amount of advance he has made to the pledgee.
- Similarly, in the case of bailment of goods for the purpose of repair, the bailee has special interest in goods bailed to the extent of his labour charges.

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Passing of title... contd.

Ownership and Possession.

- If property passes before delivery, the buyer has ownership but not possession.
- Property in the goods sold may pass from the seller to the buyer concurrently with delivery or otherwise.
- If property does not pass before, or concurrently with, delivery, the buyer gets possession but not ownership.
- If property passes concurrently with delivery, the buyer obtains both *ownership and possession*.

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Passing of title... contd.

No property can pass in unascertained goods.

Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred: see s. 19 (1).

Where property has already passed under an unconditional contract of sale, a subsequent stipulation to the effect that property shall not pass except upon the fulfillment of a condition shall not be valid: see *Dennant v. Skinner* (1948) 2 KB 164.

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Passing of title... contd.

Property passes when the parties intend that it shall pass: see s. 19.

Transfer of property is critical in assessing where risk falls, i.e., who bears risk of loss or deterioration, between the seller and the borrower.

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Passing of title... contd.

- This, in turn, depends on whether it is a sale or an agreement to sell, and whether the goods are specific, ascertained or unascertained.
- The property in first two passes when the parties intend it to pass, whether stated in the contract or left to be ascertained by the court from circumstances.
- Property in unascertained goods passes only when they become ascertained.
- Tests of intention are laid down in sections 20, 21 and 22.

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Passing of title... contd.

The passing of risk.

Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer. However, when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not: see s. 22.

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11. PERFORMANCE: BUYER'S DUTIES

The buyer has two main duties only.

(a) Duty to accept the goods

- It is the duty of the buyer to-
 - (a) accept; and
 - (b) pay for

the goods in accordance with the terms of the contract of sale: see sections 28, 36 and 38.

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Buyer's duties... contd.

(b) The duty to pay the price

It is the duty of the buyer to pay for the goods according to the terms of the contract and at the time he agreed to pay in the contract of sale: see s. 28.

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12. NEMO DAT QUOD NON HABET

- With respect to the sale of goods, the general rule of law is that no one can give what he has not got.
- It is captured in the Latin maxim: *nemo dat quod non habet*.
- It means that a seller of goods cannot give a better title to the purchaser than he himself possesses; e.g. a purchaser who buys goods from a thief can get no valid title or claim to such goods.
- But there are a number of situations when, under the Act, a person can, notwithstanding the defective title, confer a good title on the buyer and thereby defeat the claims of a person with superior title, the true owner.

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Exceptions to "nemo dat" rule

These important statutory exceptions to this rule under the Sale of Goods Act are as follows:

- a) Sale by an agent: see s. 23;
- b) Sale by a mercantile agent without authority;
- c) Sale under a voidable title: see s. 24;
- d) Sale or disposition by a seller in possession to a third person: see 26 (1);

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Exceptions to "nemo dat" rule... contd.

- e) Sale or disposition by a buyer in possession to a third person: see 26 (2);
- f) Sale under a Court order or special power: see s. 27;
- g) Sale by unpaid seller who exercises his right of lien or retention or stoppage in transit: see s. 48 (2);
- h) Estoppel: s. 23 (1); and
- i) Sale in market overt: i.e. in open or public market.

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13. IMPLIED CONDITIONS AND WARRANTIES

- ◊ In a contract sale, unless the circumstances of the contract are such as to show a different intention, there are implied terms known as conditions and warranties.
- ◊ Conditions and warranties generally aim to protect the buyer.
- ◊ No definition of "condition"; but, in relation to a warranty, it seems that a condition is more cardinal and imperative.
- ◊ A warranty is defined as "an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated": see s. 2(1).

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Implied conditions and warranty ... contd.

The following are the conditions and warranties implied by law into every contract of sale of goods:

(a) The seller's right to sell

An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods at the time when the property is to pass: see s. 14 (1).

Thus where, unknown to either party to the sale, goods were sold were so labelled that if the buyer re-sold them (as was intended) he would infringe a trade mark, it was held that this condition was breached: see *Niblett v. Confectionaries Materials Co. Ltd* (1921) 3 K.B. 387, C.A.

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Implied conditions and warranty ... contd.

Similarly where a person sells a stolen motor vehicle to another person who is compelled to return the same to its true owner, that other person can recover the price from the seller, whether the seller knew the car was stolen or not: see *Rowland v. Divall* (1923) 2 K.B. 500.

The argument that the plaintiff was limited to a claim for damages for breach of warranty failed because there could not be acceptance where there was nothing to accept, as per Atkin L.J.

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Implied conditions and warranty ... contd.

(b) Correspondence with description

In a sale by description, the buyer relies on the description of the goods as given by the buyer in the contract or during negotiations.

Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description and also with the sample: see s. 15.

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Implied conditions and warranty ... contd.

If the buyer has not seen the goods, that will be deemed to be a sale by description.

Even where the buyer has seen the goods but he relies on the seller's description, it will be a sale by description if there is some inaccuracy in that description that is not apparent: see *Thornet & Fehr v. Beers & Son* (1919) 1 K.B. 486.

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Implied conditions and warranty ... contd.

•Covered under this provision also are any representations as to the nature, origin or identity of the goods as well as the packing.

In *Re Moore & Co. and Landauer & Co.* (1923) 2 K.B. 519, C.A., delivery of canned fruit was to be in boxes containing 30 tins but some boxes supplied contained only 24 tins. Even though the market of the consignment was not affected, the Court held that the packing formed part of the description and the sellers were therefore in breach of section 15. The buyers were entitled to reject the entire consignment.

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Implied conditions and warranty ... contd.

•It should be noted though that section 31(2) allows the buyer to accept goods delivered by the seller, which are in accordance with the contract that he contracted to sell, mixed with goods of a different description not included in the contract and reject the rest.

He may, of course, reject the whole.

•Specific goods sold as answering a particular description and not as specific goods are deemed to be sold by description; e.g. where a buyer asks for a pair of underpants in a shop: see *Grant v. Australian Knitting Mills* [1936] A.C.85.

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Implied conditions and warranty ... contd.

(c) Sale by sample

A contract for sale by sample is one where there is a term in the contract, express or implied, to that effect.

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Implied conditions and warranty ... contd.

(d) Merchantable quality

This means that the goods must be such as would be acceptable to a reasonable person, having regard to the prevailing conditions.

Goods which have defects that make them unsuited for ordinary use are not merchantable.

Similarly, if a reasonable person knowing of their condition would not buy them, then they are not merchantable.

Where it was possible for the buyer to discover the defects when he examined them, this condition does not apply.

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Implied conditions and warranty ... contd.

• Where goods are bought -

(i) by description,

(ii) from a dealer in goods of that description,

they must be of merchantable quality.

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Implied conditions and warranty ... contd.

(e) Fitness for particular purpose

If the buyer impliedly or expressly makes known the intended purpose and relies on the skill and judgment of the seller, the goods must be reasonably fit for the purpose.

Similarly, if the goods are of a description which it is in the seller's business to supply, they must meet this condition.

If the goods are bought under a trade mark or patent, this condition does not apply.

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Implied conditions and warranty ... contd.

(f) Quiet possession: An implied warranty that the buyer shall have and enjoy quiet possession of the goods: see s. 15 (2).

(g) Freedom from encumbrance. An implied warranty that the goods shall be free from any charge of encumbrance in favour of any third party: see s. 14 (3).

NB: Conditions and warranties are not distinguished with respect to their fundamental or inherent nature but by reference to the remedies available to the buyer.

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Implied conditions and warranty ... contd.

• SOME WARRANTIES, REPRESENTATIONS, UNDERTAKINGS, ETC

- The Seller acknowledges that the Buyer has no understanding, or has very limited understanding of the technical nature of the units comprising the Goods and accordingly is not in a position to assess whether the Goods are capable of causing loss or damage to end-consumers and/or users or they meet the standards required in the Buyer's country.

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Implied conditions and warranty ... contd.

- The Seller warrants, represents and undertakes to the Buyer that at the time of delivery each unit or product comprising the total goods shall be free from defects, fit for their intended use and life expectancy, be of merchantable quality, and shall comply with all applicable laws and safety and quality standards and shall conform in all respects to the quality, reliability and safety standards.

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Implied conditions and warranty ... contd.

- ❖ Seller warrants, represents and undertakes to Buyer that the Goods shall comply with the standards imposed from time to time by the relevant government departments or trade organizations in the Republic of Kenya and that the Seller holds all licences and all other authorisations necessary to manufacture, sell and export the goods necessary to meet the date of consignment.

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Implied conditions and warranty ... contd.

- The Seller warrants, represents and undertakes to the Buyer that neither the Goods nor the manufacturing process of the Goods infringe or will infringe the intellectual property or any other rights of any third party.
- The Seller warrants that at the time of entering this Agreement, the Seller neither knows nor has reason to know of the existence of any outstanding title or claim of title hostile to the rights of the Seller in the Goods.

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Implied conditions and warranty ... contd.

- ❖ The Seller acknowledges that the Buyer relies on each of the Seller's warranties, representations and undertakings hereof to enter into this Agreement; and in particular the Seller acknowledges that the Buyer would not have entered into this Agreement but for the Seller making each warranty, representation and undertaking hereof.

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CONSUMER PROTECTION

- Related to the conditions and warranties is legislation to protect the rights of the consumer, generally.
- On 14th March, 2013, the Consumer Protection Act, 2012, was brought into operation by the Minister for Trade.
- This Act ("the CPA") is to provide for the protection of the consumer, prevent unfair trade practices in consumer transactions and to provide for matters connected with and incidental thereto.
- It prohibits unfair trade practices and transactions that affect consumer rights like under-cutting and over-pricing of goods and services.

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Consumer protection... contd.

- Principally, it seeks to enforce respect for the consumer and to eliminate unfair business practices.
- Under the CPA, firms which supply sub-standard or injurious products will be liable to be punished through measures such as-
 - recalling such products from the market;
 - compelling the firms to repair defects;
 - replacing faulty products; or
 - making refunds to aggrieved customers.

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Consumer protection... contd.

- ❖ Firms are required to publicly disclose the nature and danger of any defects on their products.
- ❖ Failure to make full disclosure of information on goods and services will imprisonment for a term not exceeding five years, or a fine not exceeding Sh10 million, or both.
- ❖ False, misleading or deceptive representations will also attract heavy penalties.

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Consumer protection... contd.

- The CPA states that "the supplier" is deemed to warrant that the goods or services supplied under a consumer agreement are of a reasonably merchantable quality: see s. 5(1), the CPA.
- The "supplier" means a person who is in the business of selling, leasing or trading in goods or services or is otherwise in the business of supplying goods or services, and includes an agent of the supplier and a person who holds himself out to be a supplier or an agent of the supplier: see s. 2(1), the CPA.

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Consumer protection... contd.

- Invoking provisions of the Sale of Goods Act, the CPA states that "the implied conditions and warranties applying to the sale of goods under [the Act] shall apply with necessary modifications to goods that are leased, traded or otherwise supplied under a consumer agreement".
- Section 5(3) of the CPA declares to be void any provision, whether part of the consumer agreement or not, that purports to negate or vary any implied condition or warranty under the Sale of Goods Act.

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14. SELLER'S REMEDIES FOR BUYER'S BREACH

- An action for the price of the goods:**
 - E.g.
 - Where the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract: see s. 49(1); or
 - Where the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, although the property in the goods has not passed and the goods have not been appropriated to the contract: see s. 49 (2).

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Seller's remedies for buyer's breach... contd.

- An action for damages for non-acceptance:** see s. 50; The measure of damages for non-acceptance is:
 - Estimated natural loss.* The estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract: see s. 50(2).
 - Further loss.* Any further loss due to special circumstances outside the ordinary course of events, but of which the buyer had knowledge, actual or imputed: see *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd.* (1949) 2 K.B. 528; (1949) 1 All ER 997.

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Seller's remedies for buyer's breach... contd.

- Note that the right of the seller (and the buyer, too) to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

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Seller's remedies for buyer's breach... contd.

Unpaid seller

- A seller of goods is deemed to be an unpaid seller when-
 - the whole of the price has neither been paid nor tendered; or
 - a bill of exchange or other negotiable instrument has been received as a conditional payment and the instrument has been dishonoured.

Even where property in the goods may have passed to the buyer, a seller of goods who has not been paid (the unpaid seller) has by implication of the law (s. 40) certain rights, **subject to the provisions of the Act** (*emphasis added*).

Seller's remedies for buyer's breach... *contd.*

(a) **Lien** on the goods for the price while he has possession of the goods.

A **lien** on the goods for the price while he has possession of the goods.

Lien arises where (i) the goods have been sold without any stipulation as to credit; or (ii) the goods have been sold on credit but the term of credit has expired or, (iii) the buyer has become insolvent.

The right is lost when the seller delivers the goods to a carrier or other bailee for transmission to the buyer without reserving the right of disposal of the goods, or when the buyer or his agent lawfully obtains possession of the goods; or by waiver thereof.

Seller's remedies for buyer's breach... *contd.*

(b) A right of **stoppage** of the goods in transit after he has parted with possession where the buyer has become insolvent.

- This arises when the buyer becomes insolvent.
- Ends with transit.
- Transit is ended when buyer obtains delivery or buyer rejects the goods or carrier informs the buyer he is holding the goods for him.

Seller's remedies for buyer's breach... *contd.*

(c) A right of **resale**.

Arises-

- from express contractual reservation; or
- pursuant to s. 48(3); or
- from common law, where the buyer has expressly or impliedly repudiated the agreement.

Seller's remedies for buyer's breach... *contd.*

Seller's remedies for buyer's breach... *contd.*

- The above **rights are against the goods** as opposed to the seller's personal rights against the buyer.
- A "seller" here includes any person who is in the position of a seller; e.g. an agent of the seller to whom the bill of lading has been endorsed, or a consignor or an agent who has himself paid or is directly responsible for the price.
- NB: (i)These rights may be negated by express or contractual terms as agreed by the parties: see s. 55.

Seller's remedies for buyer's breach... *contd.*

- (ii) These rights are also subject to the provisions of the Act and may be defeated , e.g. by the right of an innocent third party to whom the buyer may have transferred the documents of title relating to the goods: see ss. 26(2) and 47: see *Cahn & Mayer v. Pockett's Bristol Channel Stem Packet Co. Ltd.* (1899)1 Q.B 643, CA.
- (iii) In case of insolvency of the buyer, the unpaid seller may stop the goods in transit, resume possession and retain them until payment is made: see s. 44.

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15. BUYER'S REMEDIES FOR SELLER'S BREACH

The remedies available to the buyer in case of breach of contract by the seller are as follows:

- (a) An action for damages for non-delivery; or
- (b) To reject the goods and treat the contract as repudiated; or
- (c) An action for damages for breach of warranty; or
- (d) To set up breach or warranty as a defence to an action for the price; or
- (e) An action for money paid on a consideration which has wholly failed; or
- (f) An action in tort; or
- (g) Specific performance;

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16. INTERNATIONAL SALES

International sales, also referred to as export sales, are contracts of sale that involve a foreign element – in the agreement itself, the payment or carriage of the goods by sea.

- ◊ These contracts involve transport of goods from one country to another.
- ◊ Parties thereto are exposed to more risks than are involved in purely domestic sales, e.g.
- physical risks associated with transportation and handling of the goods;
- financial risks, like exchange rates fluctuations;
- political risks – war, blockades;
- legal risks – if foreign jurisdiction is involved, say, in execution of judgment.

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International Sales... contd.

- ◊ There have been continuing efforts to harmonize the laws different countries which deal with international sales.
- ◊ See e.g. the Hague Convention on Uniform Law on the International Sales, 1964 and the UN Convention on Contracts for the International Sale of Goods, the Vienna Convention.
- ◊ Like in all other contracts, international trade agreements are designed to:

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International Sales... contd.

- (a) manage risk between the parties thereto;
- (b) negotiate terms to fit specific transaction;
- (c) allocate risk, esp. relating to payment, delivery and quality of the goods;
- (d) fix performance obligation and responsibilities;
- (e) fix price;
- (f) fix desired quality; and
- (g) make sure understanding is reflected in contract.

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International Sales... contd.

Stages in Documentary transaction

- ◊ The Seller;
 - ✓ gives goods to the carrier and gets bill of lading;
 - ✓ endorses bill of lading and gives it to bank with other required documents (insurance, certificate of origin or inspection, documentary draft);
 - ✓ gives goods to the carrier and gets bill of lading;
 - ✓ endorses the bill of lading and gives it to bank with other required documents (insurance, certificate of origin or inspection, documentary draft).
- Thereafter, the Seller's bank forwards documents to the collecting bank in buyer's country.
- The documents are released to buyer when he pays.

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Trade terms

- Many terms of international contracts are now standardised
- However, interpretation of the terms is not uniform throughout the trading world.
- Certain commercial expressions are commonly used to give a general indication as to the terms of various types of contract.
- They do not give precise details of the actual contractual terms.
- Standardized interpretations of trade terms help in avoiding misunderstanding among contracting parties.
- See e.g. "INCOTERMS" (acronym for the International Rules for the Interpretation of Trade Terms, done by the International Chamber of Commerce)
- The terms are used to denote what responsibilities are negotiated, assigned and allocated and when the risk passes from one party to another.
- For convenience the terms are usually clustered as "C", "D", "E", or "F" Terms.

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Trade terms... contd.

EXW – Ex works:

- Hardly differs from domestic sale.
- The seller's only responsibility is to make the goods available at the agreed time and place or the seller's premises.
- The price is payable on delivery.
- The buyer is to collect and bears full costs of moving the goods from there to destination.
- Risk shifts to buyer when goods are made available by the seller at named location.

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Trade terms... contd.

FCA – Free carrier:

- The seller delivers the goods, cleared for export, to the carrier selected by the buyer.
- The seller loads the goods if the carrier pickup point is at seller's premises.
- The buyer bears costs of moving the goods to destination.
- Risk shifts to buyer when goods delivered to carrier.

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Trade terms... contd.

FAS – Free alongside ship:

- The seller at his own expense delivers the goods alongside the ship named by the buyer.
- The buyer must nominate ship and give adequate notice to seller.
- Risk shifts to buyer when goods delivered alongside ship.
- The loading of goods onto ship is buyer's responsibility.
- There are no rules as to who obtains export licences, etc: see per Viscount Simonds in *Pound & Co. v. Hardy & Co. Inc.* (1956) A.C. 588 at p. 608.

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Trade terms... contd.

FOB – Free on board:

- Of great commercial importance, this imposes additional obligations on the seller.
- In strict FOB, the seller places or delivers the goods on board the ship at his own expense.
- He clears the goods for export.
- Buyer who must nominate ship and notify the seller then bears all transport and insurance costs.
- Risk shifts to buyer when goods have been lifted over the ship's rail or crossed ship's rail.
- NB: On insurance, and regarding certain sea routes, see s. 33(3).

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Trade terms... contd.

FOR – Free on rail:

- Seller must see the goods loaded onto railway authority's collecting vehicle;
- At his own expense he must give notice to the buyer that he has done so;
- Seller's duty to assist buyer obtain documents, Cf ex-works.
- Thereafter property passes to buyer;
- Risk passes to buyer;
- Buyer to make own arrangement for carriage and pay freight.

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Trade terms... contd.

FOT –Free on truck:

- Same as FOR;
- Plus, seller to load the goods onto the railway truck;
- Seller to load at own expense.

• NB: Seller must go beyond loading merely onto the railway collecting vehicle.

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Trade terms... contd.

CFR – Cost & freight:

- The seller clears the goods for export and pays the costs of moving the goods to destination.
- Risk shifts to buyer when goods cross ship's rail.

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Trade terms... contd.

CIF – Cost, insurance & freight:

- One of the better known of the terms.
- Essential feature: “a contract for the sale of goods to be performed by the delivery of documents”, see per Blanke and Warrington LJJ. in *Arnhold Karberg & Co. Blythe*, (1916) 1 K.B. 495, pp. 510, 514.
- Thus emphasis is on the shipping documents: insurance policy, bill of lading and invoice.
- A contract without “sale of documents” character, is not a c.i.f. contract, even if so branded.
- In *C. Groom, Ltd. v. Barber* (1915) 1 K.B. 316, it was held that on tender of the documents the buyer is bound to pay for the goods even where the same are known to have been lost!!

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Trade terms... contd.

CIF... contd.

- The seller clears the goods for export and pays the costs of moving the goods to the port of destination.
- He must ship goods within agreed or reasonable time.
- He makes contract for carriage of goods by sea according to the particular trade custom.
- He must take out policy of marine for the cargo with reputable insurers.
- He procures the commercial invoice in conformity with the contract.
- The buyer can claim on the insurance policy.
- He must tender the shipping documents to the buyer.
- Risk then shifts to buyer when goods cross ship's rail.

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Trade terms... contd.

CIF... contd.

- The buyer must -
 - accept the documents if in order;
 - pay the price;
 - take delivery of the goods at the agreed destination.
 - pay unloading costs, customs and other duties.

NB: Other variants of CIF include: CIF & C (commission); CIF & E (exchange); and CIF & C & I (interest).

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Trade terms... contd.

CPT – Carriage paid to:

- The seller pays for moving the goods to destination.
- Risk shifts to buyer when goods are transferred to the first carrier.
- Buyer must procure own insurance.

CIP – Carriage & insurance paid to:

- The seller pays for moving the goods to destination.
- Risk shifts to buyer when goods are transferred to the first carrier.
- Seller must purchase cargo insurance; buyer can claim on policy.

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Trade terms... contd.

DAF – Delivered at frontier:

- Seller transports goods to “frontier” point in destination country.
- Buyer pays freight from frontier point.
- Risk shifts when goods handed to buyer at frontier point.

DES – Delivered ex ship:

- Seller transports goods to destination port.
- Buyer pays costs of unloading ship.
- Risk shifts to buyer when goods ready for unloading by buyer.

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Trade terms... <i>contd.</i>		
DEQ - Delivered ex quay:		
<ul style="list-style-type: none"> • Seller delivers the goods - not cleared for import - to the buyer at the port of destination. • Seller bears costs and risks of moving the goods to port. • Buyer clears goods for import and pays customs clearance costs and duties. • Risk shifts to buyer when goods placed on dock. 		

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Trade terms... <i>contd.</i>		
DDP - Delivered duty paid:		
<ul style="list-style-type: none"> • Seller delivers goods - cleared for import - to buyer at destination. • Seller bears costs and risks of moving goods to destination, including customs duties and taxes. • Risk shifts to buyer when goods delivered at specified location. 		

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Trade terms... <i>contd.</i>		
DDU - Delivered duty unpaid:		
<ul style="list-style-type: none"> • Seller delivers goods - not cleared for import - to buyer at destination. • Seller bears costs and risks of moving goods to destination. • Risk shifts to buyer when goods delivered at specified location. 		

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17. SALE OF GOODS AT PUBLIC AUCTIONS		
Auction		
A public sale at which goods are sold to the highest bidder.		
Bidder		
A person who offers to buy at a price a thing put on sale at an auction.		
Auctioneer		
A licensed agent to sell property and conduct sales or auctions. Deemed to be an agent of both the seller and the buyer.		

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<i>Sale at auction ... contd.</i>		
1. The fall of the hammer		
A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner: see s. 58(1) (b).		
Any bidder may retract his bid before at any time before the sale is complete; that is, before the fall of the hammer: see s. 21 (8).		
2. Sale of lots.		
A lot is a set of things offered together for sale.		
Where goods are put up for sale by auction in lots, each lot is <i>prima facie</i> deemed to be the subject of a separate contract of sale: see s. 58(1).		

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<i>Sale at auction ... contd.</i>		
3. Reserving right to bid		
A right to bid may be <i>expressly reserved</i> by or on behalf of the seller: see s. 58 (4).		
It must be stated in the particulars or conditions of sale: see 21 (3) Auctioneers Act.		
Where such right is expressly reserved, the seller, or any one person on his behalf, may bid at the auction.		
Only one person may be authorized to bid on the seller's behalf.		

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*Sale at auction ... contd.***4. Reserve price**

- A sale by auction may be notified to be subject to a reserved or upset price: see s. 58(1)(c).
- A right to bid may also be reserved expressly by or on behalf of the seller: *ibid*.
- Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction: see s. 58(2).
- A sale by auction is notified to be subject to a reserve price: see s. 58(4).

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Sale at auction ... contd.

Whether a sale by auction is subject to a reserve price must be stated in the particulars or conditions of sale: see s. 21 (3), Auctioneers Act.

If it is stated that the sale is subject to a reserve price as regards any one or more lots, the seller or anyone acting on his behalf may give one bid for each such lot and no more.

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*Sale of Goods at auction ... contd.***5. Lien**

An auctioneer has a lien over the goods as against the seller in respect to his commission and expenses related to the sale.

He also has a personal right to sue the buyer for payment of the price.

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*Sale of Goods at auction ... contd.***6. Obligations and warranties**

- The auctioneer undertakes as between himself and the buyer the following obligations or warranties:
- (a) that he has authority to sell (warranty);
- (b) that he knows of no defects in his principal's title;
- (c) that he will give possession in return for the price; and
- (d) that possession once given will not be disturbed by his principal or himself.

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*Sale of Goods at auction ... contd.***7. Bid by Auctioneer**

An auctioneer is not permitted to make a bid either on behalf of himself or as agent for any other person unless, on making such bid, he announces that it is his bid: see s. 21 (7), Auctioneers Act.

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17. REFORMS

1. The word "sale" should include all near-sale transactions, including leases with an option to purchase and leases for substantial terms, and should cover materials transferred under a contract for work and materials.
2. "Sale" should also include transactions which embrace the supply of incidental services such as the installation of the goods.

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Reforms... contd.

3. The distinctions between *conditions* and *warranties* should be abolished and be replaced by the single concept of a warranty.

- This is because-
 - (a) the Act itself introduces a confusion in the import of the two terms such that one is not quite distinguishable from the other in practical terms; and
 - (b) the chief significance of the condition-warranty distinction in the Act has only been in relation to the right of a buyer to reject, and the right of both parties to discharge the contract for breach.

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Reforms... contd.

4. Representations made by a seller which have induced a contract but have not been incorporated into a subsequent contractual document should have the same legal status as the terms of the contract.

- Only then will the just expectations of the consumer are to be realized.

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Reforms... contd.

6.Under the present law, a situation the Act failed to correct, is the right of a seller to limit his potential liability to a buyer is, at least in theory, virtually unlimited.

- The devices used by the courts to contain this power tend to be somewhat arbitrary in their application.
- It would seem preferable that the matter, i.e. the extent to which the seller may opt out of statutory conditions and warranties, be covered or circumscribed by statute.

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Reforms... contd.

7. Although terms implied by the Act were meant to be protective, they are couched in rather vague and general terms.

- Thus concepts like "merchantability" and "fitness for purpose" involve matters of degree on which only a court can give a final determination in any given case.
- Reforms should, so far as practicable, introduce precise terms that would allow, to consumers, rights which will be enforceable by them without the need to have recourse to the courts.

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Reforms... contd.

8. Section 59(2) of the Act states, in part, that the "rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act...shall continue to apply to contracts for the sale of goods".

- There is no mention of the rules of equity.
- Make it clear that equitable principles, as well as those derived from common law, have a part to play in contracts for the sale of goods.

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YOU ARE GOOD TO GO!

AHSANTENI!

Nairobi,
September, 2013