



KENYA SCHOOL OF LAW  
COUNCIL OF LEGAL EDUCATION  
THE ADVOCATES TRAINING PROGRAMME  
COMMERCIAL TRANSACTIONS  
THE LAW OF CHATTELS TRANSFER

(Part II)  
by Rautta-Athianbo

The Law of Chattels Transfer  
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DOCUMENTS EXCLUDED

The Chattels Transfer Act specifically excludes the following from the definition of instruments:

- (a) securities over, or leases of, mortgaged, charged or leased fixtures;
- (b) assignment for the benefit of creditors of the person making them; or
- (c) assignments of or share in any ship or vessel; or
- (d) transfers of or share in any ship or vessel;

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Documents excluded... *contd.*

- (e) transfer of or agreement to transfer instruments by way of security;
- (f) transfers of chattels in the ordinary course of business of any trade or calling;
- (g) debentures and interest coupons issued by any government or local authority;
- (h) bills of sale of chattels in any foreign parts or at sea;

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Documents excluded... *contd.*

- (i) bills of lading, warehouse keepers' certificates, warrants or orders for the delivery of chattels, entries in auctioneers' books or *any other document used in the ordinary course of business as proof of the possession or control of chattels or authorizing the possessor of the document to transfer or receive the chattels thereby presented;*
- (j) debentures and interest coupons issued by any company or other corporate body and secured upon the capital stock or chattels of that company or corporate body;

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Documents excluded... *contd.*

- (k) mortgages or charges granted or created by a company formed under the Companies Act (Cap 486);
- (l) mortgages or charges granted or created by a co-operative society registered under the Co-operative Societies Act (Cap 490);
- (m) hire-purchase agreements: See section 2 of the Act.

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## CONTENTS OF INSTRUMENTS

### Covenants

#### Definition:

A covenant is a clause of agreement contained in a deed whereby a party stipulates for the truth of certain facts or binds himself to give something to another or to do or not to do any act

Certain covenants are to be implied in every instrument.

The covenants implied shall have effect as if they were respectively set out at length in the instrument.

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Covenants... *contd.*

But all those conditions set out in the schedules to the Act may be negotiated, modified or altered or added to by express words in the instrument: s. 46.

Whether expressed in the instrument or implied by the Act, covenants bind executors, administrators and assigns of the person or successors and assigns of the company upon whom they impose an obligation.

They also operate for the benefit of those "for whose benefit they enure" i.e. come into use; s. 45.

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Covenants... *contd.*

### Covenants of Title, s.41 & 2<sup>nd</sup> Schedule.

The following covenants of title are implied in every instrument, unless otherwise expressly provided:

1. That the grantor has good right and full power to assign to the grantee the chattels purporting to be assigned by the instrument.
2. That the chattels are free and clear from encumbrances except those mentioned in the instrument.
3. That the grantor will, at his own cost, do and execute all such acts, deeds, matters and things for the better assigning of the chattels assigned or intended to be assigned, as required by the grantee may from time to time: See Second Schedule to the Act.

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Covenants...contd

**Other Covenants**

There are further implied covenants on the part of the grantor as follows:

1. To pay to the grantee the principal money and interest secured under the instrument at the rate and time mentioned without any deduction.
2. To pay interest on any further advances that may be secured under the instrument at the rate and date mentioned.

Other Covenants ...contd.

- Not to do or allow any act or deed which prejudicially effects the chattels assigned, while any moneys remain owing on his security.
- 4. To pay all rents due on any lands or premises on which any of the chattels are situated, so long as any moneys remain due on this security.

Other Covenants ...contd.

5. To keep and maintain all and singular the chattels assigned by the instrument in the same good order and condition in which they are at the date of execution; and to repair any damage to the chattels and replace any chattels destroyed or which cease to exist with other chattels of the same nature.
6. To execute, if required by the grantee, any instrument that may be necessary to give to the grantee security over chattels.

**FORM AND CONTENTS OF AN INSTRUMENT**

The instrument should be in the prescribed form as provided or with variations, modifications or additions: see section 22 of the Act and Form 4 of 1st Schedule thereto.

It should be executed, attested and verified.

Essentially, the main segments of an instrument should comprise of the following clauses-

- the date;
- the parties';
- the consideration;

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**Form and Contents of an Instrument...contd**

- the covenants; and
- the testimonium.

It should also contain:

**1. The Date and Parties' Clause**

The first clause will usually state the nature of the document, the date and brief descriptions of the parties. For example in a Chattels Mortgage, it shall read 'This chattels mortgage is made the 30th day of July 2009 NIT NDEKLE of P.O. Box 44444 (hereinafter called "the Mortgagor") and B of P.O. Box 55555 (hereinafter called "the Lender") ...' and so on

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**Form and Contents of an Instrument...contd**

**2. Consideration Clause**

The consideration clause should state the amount of loan or advance given to the Mortgagor against the specified chattels.

It will mostly read, for example, something like:

'In consideration of Kenya shillings 50, 000/= the Mortgagor does hereby assign and transfer to the Mortgagee ...'.

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**Form and Contents of an Instrument...contd**

**3. Covenants Clause**

Covenants are the terms agreed by the parties and expressly stated in the instrument.

Although a large number of these terms are implied by statute and clearly stated in the 1st and 2nd Schedules of the Act, drafters of instruments tend to repeat most of these terms in the instruments.

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**Form and Contents of an Instrument...contd**

**4. The Testimonium**

The part of the document that links the preceding parts of the document with the seal and signature part is known as the testimonium.

It usually begins with words:

'IN WITNESS WHEREOF...' or other variations of the phrase.

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**Form and Contents of an Instrument...contd****5. Execution**

Most legal documents that convey title must be properly executed.

This means generally that they must be signed, witnessed or attested and, invariably, verified.

This is where the parties affix their seals and/or signatures as the case may be.

**Form and Contents of an Instrument...contd**

It is also a key part of the instrument.

It will contain words such as 'IN THE PRESENCE OF:.....'.

Normally attestation will be by the parties' advocate in whose presence the document was signed.

**REGISTRATION**

An instrument becomes effective from the time of its registration (s. 16) and all persons are deemed to have notice of the instrument and its contents on such registration (s. 4)

- An instrument is deemed to be made on the date of its execution.
- The mode of registration of instrument is regulated by the Act itself.

**Registration... contd**

- An instrument is registered by filing in the department of the Registrar-General, Attorney-General's Office, on the payment of a fee: see sections 5 and 8.
- All the schedules endorsed on, annexed to or referred to in it, together with an affidavit in the prescribed form (Form 1) must be filed together with the instrument: Section 5.
- Forms to the same effect as the prescribed forms may be adapted for registration and as well as for renewal, *infra*.

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#### Registration...contd

- It must contain or have endorsed on it a schedule of the chattels, known as **an inventory**: s. 17.
- True copies of the instrument and schedules are permitted for filing.
- An instrument must be stamped before it may be registered: see section 38, Stamp Duty Act, Chapter 480
- Twenty-one (21) clear days are allowed for registration.

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#### REGISTER BOOK

- The Registrar shall cause every instrument registered in his office under the Act to be numbered, and shall mark on each such instrument, or on the filed copy thereof, the date of registration and the number: s. 7, Act
- He must, at the time of registration, enter in a register to be kept for the purpose in his office the particulars of the instrument registered in the prescribed form: see Form 2 in the First Schedule

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#### Register Book...contd

- The Registrar shall also keep an index of the names of grantors and grantees of instruments and shall refer therein to the entries in the Register Book of the instruments given by each grantor.
- The index of the register book shall be arranged in divisions corresponding with the letters of the alphabet, so that all grantors and grantees whose surnames begin with the same letter (and no others) shall be comprised in one division, but the arrangement within each such division need not be strictly alphabetical.

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#### Register Book...contd

- Where an instrument states that the maker or giver resides outside the province in which the registry is situated, the registrar must forthwith and within 3 clear days, transmit an abstract of the contents of the instrument to the Provincial Commissioner in whose province the place stated is situated.
- A similar abstract must be transmitted to the Provincial Commissioner in whose place the chattels are stated to be situated: see section 7(5) of the Act.
- The Provincial Commissioner must then file, keep and index such abstract in the same manner required of the registrar.

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## Register Book...contd

- Any person may search, inspect and make extracts from and obtain copies of the abstract so registered in the same terms as to payment as he would of the instrument registered by the registrar.
- These provisions apply *mutatis mutandis* to the renewal of the registration of an instrument: see section 10(6) of the Act.

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## EXTENSION OF REGISTRATION

- Where registration is not effected within the period of twenty-one (21) days due to inadvertence or accidental omission, the Court, on application, may order that the omission be rectified by extending the time for registration: see section 9 of the Act.
- The application for such extension must, however, be accompanied by a copy of the relevant chattels instrument.
- In the case of *Re Benjamin Kaburi Kamurui*, High Court Civil Case No. 404 of 2006, Nairobi, the applicant brought an application pursuant to, among others, section 9 of the Act seeking extension of time.

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## Extension of Registration...contd

- The main ground was that the delay in registration was as a result of the inability of the lands office to stamp the instrument in good time. The applicant had delivered the instrument, made on 9th March 2006, to the lands office four (4) days later "for stamp duty and registration" but it was not until 25th May, that the instrument was received from that office.
- The Court, while acknowledging the provisions of section 9, declined to allow extension of the period because the applicant had failed to annex a copy of the chattels instrument, which was the subject of the extension.

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## ATTESTATION

- Every instrument must be attested by at least one witness: section 15 of the Act.
- The witness must add to his signature his residence and occupation.
- Lack of sealing does not however affect the validity of an instrument.
- An unattested instrument is valid between parties but incapable of registration and ineffective against other persons": see the Privy Council in *National and Grindlays Bank Ltd v- Dharamshi Vallabhji and Others* (1966) EA 186.

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### EFFECT OF REGISTRATION

So long as an instrument continues to be registered, the chattels comprised in it will not be deemed to be in the possession, order or disposition of the grantor for bankruptcy purposes, that is, the grantor will not be considered the reputed owner of the chattels.

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### EFFECT OF NON-REGISTRATION

- Unless an instrument is registered as required within twenty-one (21) days from the date of its execution it will "be deemed fraudulent and void" as against the following persons:
  - (a) The Official Receiver or trustee in bankruptcy of the estate of the grantor;
  - (b) The assignee or trustee acting under any assignment for the benefit of the creditors of the grantor;

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### Effect of non-registration...contd

- (c) Any person seizing the chattels or any part of the chattels comprised in the instrument, in execution of the process of any court authorizing the seizure of the grantor's chattels; and
- (d) Every person on whose behalf the court process was issued.

In all the cases above the chattels must at the material time be in the possession or apparent possession of the grantor of the instrument: (s. 13).

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### Effect Of Non-registration...contd

- In *Nyali Chemicals Limited v Thugi River Estate Limited & Another & Charterhouse Bank Limited*, Nairobi Commercial Division, Milimani, No. 134 of 1999, Trading Desk International objected to the attachment of all movable assets in a purported execution of a decree against the judgement debtor on the grounds that the said movables were charged to the objector by virtue of a duly registered chattels mortgage.
- Emukule J. held that the grantee of the chattels mortgage had no priority over the decree holder since the chattels mortgage in question was not stamped, neither was it registered.

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## Effect of non-registration...contd

Furthermore, except where he has **express notice**, an unregistered instrument comprising any chattels will not be valid or effective against the following:

- (a) a bona fide purchaser for valuable consideration;
- (b) a mortgagee for valuable consideration;
- (c) an auctioneer selling or dealing with the chattels;
- (d) dealer or agent in the ordinary course of his business: s. 14.

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## Effect Of Non-registration...contd

- A registered instrument enjoys a higher status than a contract between two parties involving chattels.
- That was the position taken by the High Court at Nakuru in the case of *Simon Wanjohi v Resma Commercial Agencies Limited and Joseph Ngeni*, Civil Appeal No. 91 of 2002. It was held by L. Kimaru, J., the said agreement, which was not registered, "was a contract between two parties.
- It did not in law amount to a chattels mortgage which would have given the [vendor] authority to repossess the said motor vehicle without recourse to the courts of law."

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## Effect of non-registration...contd

- The Court's position in the above case was that any property subject of a registered chattels mortgage may be repossessed without the intervention of the law.
- With the exception of chattels such as stock, wool, crops and certain fixtures, plant or trade machinery, the registration of an instrument will give good title only to the chattels comprised in the inventory annexed to it.
- Any other chattels belonging to the grantor will be void as against the persons stated above.
- Any "after-acquired" chattels, are not covered and will be void against the persons specified in section 14: sections 17 to 20.

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## RENEWAL

- The registration of an instrument lasts for duration of five (5) years only.
- However, the life of an instrument may be extended through renewal of such registration: section 10, CTA.
- Such renewal must be done during the subsistence of the instrument: section 10(1)
- This is done by filing in the office of the Registrar an affidavit in the form prescribed under the Act or a form to the same effect: see Form 3 in the First Schedule.

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#### Renewal...contd.

- On the payment of the fee, the Registrar shall number the affidavit and mark thereon the date of renewal of registration.
- Particulars of the instrument in the register book and date of renewal of registration are also entered in the column provided therefore in the register book: see section 10(4).

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#### Renewal...contd

- If renewal is not effected as required, the registration of the instrument ceases to be of any effect at the expiration of any period of five (5) years during which a renewal has not been made.
- A registered chattels mortgage has a life of five (5) years, at the expiration of which it loses its validity and becomes void and of no effect as against a decree-holder: per Anyara Emukule, J., in the *Nyali* case, *supra*.
- See also *John Patrick Macharia vs MDC Holdings Ltd & 2 Others* HCCC No. 1549 of 2001 and *Fidelity Commercial Bank Ltd. vs Agri-tools Ltd and Others* HCCC 1677 of 2000, both at Milimani Commercial Courts, Nairobi

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#### FEES

- The fee payable to the Registrar upon registration or renewal shall be such as may be prescribed by the Attorney General (the Minister): see s.14A, CTA, as inserted in 2007.
- By LN No. .... of . .... the fee for
  - registration is Kshs. ....; and
  - renewal is Kshs. ....

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#### TRANSFER OF INSTRUMENTS

- A person to whom an instrument has been granted may transfer the same in the form prescribed by the Act or some other form to the same effect.
- Registration of a transfer is effected in the same manner as instruments are registered.
- The grantee thereby transfers, for a consideration, all his rights, title, estate and interest in and to the chattels comprised in the instrument.

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Transfer of instruments...*contd.*

- The transfer should be attested.
- Where two or more transfers of any one instrument are executed, a registered transfer will have priority over an unregistered transfer.
- The priority of registered instruments is determined in order of the times they were registered.

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## SATISFACTION

- Once the debt secured by the chattels is extinguished, it should be formally discharged.
- A memorandum of satisfaction in the prescribed form (Form 5 in First Schedule) signed by the grantee or his attorney, discharging the chattels comprised in the instrument should be produced to the Registrar who must file the memorandum.

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Satisfaction...*contd.*

- Memorandum of satisfaction must be attested.
- But where the instrument is destroyed or cannot be found or produced, the Registrar may dispense with its production: s. 34.
- From the date of filing the memorandum of satisfaction the debt or charge created by the instrument is vacated to the extent specified in the memorandum.

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## PRESCRIBED FORMS

- The following forms are reproduced from the First Schedule to the CTA.
- Affidavits to the same effect as those provided in Forms 1 and 3 (appendices II & IV) are allowed under ss. 5 and 10;
- Form 4 (appendix I) or "to the same effect with such variations or modifications thereof and additions thereto as are expressed in the instrument" may be used: see s.22; and
- Form 5 (appendix III) "or to the same effect" may be used for a memorandum of satisfaction: s.34.

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# APPENDIX I: INSTRUMENT

A.B., of [state residence and occupation], being owner of the chattels mentioned in the schedule hereto [where a schedule is necessary], in consideration of the sum of Shs. .... lent and advanced to him by C.D., of [state residence and occupation] [on, if consideration not an advance of money, state any other consideration for which mortgage given], does hereby assign and transfer them to the said C.D. by way of mortgage to secure the payment of the said sum of Shs. .... on the ..... day of 20.... with interest thereon in the meantime, and so long as that sum or any part thereof remains unpaid, at the rate of  $A\%$ ..... per centum per annum by ..... payments on the ..... day of the months of ..... and ..... in each year.

[Implied covenants, powers and provisions may be varied or negatived.]

In witness whereof A.B. has hereunto subscribed his name, this ..... day of ..... 20....

[Schedule

A.B.

Signed by the above-named A.B. in the presence of

E.F.

[Residence and occupation]

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# APPENDIX II: AFFIDAVIT ON REGISTRATION OF INSTRUMENT

In the High Court of Kenya

In the matter of the Chattels Transfer Act

I, [full name of deponent], of [place of residence or business], Kenya, [occupation], make oath and say as follows:

1. The paper writing herein annexed and marked "A" is a true copy of an instrument under the above-mentioned Act, and of every schedule or inventory thereon endorsed or therein annexed or therein referred to, and of every attestation of the execution thereof, as made and given and executed by [full name of grantor].
2. The said instrument was made and given by the said [full name of grantor] on the ..... day of ..... 20.... at [state place where instrument executed].
3. I was present, and saw [full name of grantor] duly execute the said instrument on the ..... day of ..... 20.... at [state place where instrument executed].
4. The said [full name of grantor] resides at [place of residence], and is [occupation].  
[This may be varied in describe residence at date of instrument.]
5. The name subscribed to the said instrument as that of the witness attesting the due execution thereof by the said [name of grantor] is in the proper hand-writing of one, the deponent.
6. I am [occupation] and reside at [place of residence]..... E.F.

Sworn at ..... the ..... day of ..... 20....  
Before me ..... G.H.

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# APPENDIX III: MEMORANDUM OF SATISFACTION

I, C.D., hereby consent to a memorandum of satisfaction being written upon the instrument [or registered copy of the instrument] given for securing the sum of Shs. .... bearing the date the day of ..... 20.... and made between ..... and ..... and registered on the ..... day of ..... 20...., as No. .... Under the Chattels Transfer Act, the moneys for which the instrument was given as a security having been satisfied.

Dated this ..... day of ..... 20....

C.D.

(Grantee or Assignee.)

Witness

E.F.

[Residence and occupation]

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# APPENDIX IV: AFFIDAVIT ON RENEWAL OF REGISTRATION OF INSTRUMENT

In the High Court of Kenya

In the matter of the Chattels Transfer Act

I, [full name of deponent], of [place of residence or business], Kenya, [occupation], make oath and say as follows:

1. I am the grantee of the instrument registered under the above Act, as No. .... and made between [state names of parties to instrument, their residences and occupations, as appearing therein; also names of the parties to the instrument, their residences and occupations at the time of the making of the affidavit].
- [If the affidavit is made by an agent, clerk or servant of the grantee or grantor, state that fact, and also state briefly how deponent has become acquainted with the facts deposed to.]
2. The said instrument was registered on the ..... day of ..... 20....
3. The registration of the said instrument was last renewed on the ..... day of ..... 20....  
[This paragraph is inapplicable where registration of the instrument is being renewed for the first time.]
4. The said instrument is still subsisting, and in full force and effect.

Sworn at ..... this ..... day of ..... 20....

Before me ..... G.H.

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