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**■ KENYA SCHOOL OF LAW**  
**COUNCIL OF LEGAL EDUCATION**  
**THE ADVOCATES TRAINING PROGRAMME**  
**COMMERCIAL TRANSACTIONS**  
**NEGOTIABLE INSTRUMENTS**  
 by  
**Rautta-Athiambo**

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**CTS ...contd.**

- The system was developed by the Kenya Bankers Association and is expected to also reduce bank frauds, risks associated with manual mode of cheques such as theft and other malpractices as well as transaction costs.
- CTS also aims to improve efficiency in service delivery to bank customers, reduce reconciliation problems and eliminate logistical problems.

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**CHEQUE TRUNCATION SYSTEM (CTS)**

- **Cheque truncation** is a system of cheque clearing and settlement between banks based on electronic data or images or both without the physical exchange of the cheque itself.
- It is a process in which physical cheques presented to a bank are converted into electronic forms.
- The images taken thereof are then transmitted to the Clearing House for processing and eventual payment by the paying bank.

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**CTS ...contd.**

- Bank customers will henceforth be issued with new truncated versions of cheques.
- All banks are required to be on the system as soon as the project starts to operate.
- The current cheques will no longer be in use.
- All new cheques will have the Cheques Truncation System (CTS) logo watermark and will be issued in one standard size, whether personal or corporate.
- Old cheques will cease to be processed.

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**CTS ...contd.**

- To date, cheques within given townships or cities such as Nairobi currently take up to four (4) days to clear.
- Up country cheques take longer.
- In both cases, it is expected that when the system becomes fully operational the cheques clearance period will be reduced to one (1) day countrywide. ✓

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**CTS ...contd.**

- NB: The paying bank retains the right to demand for the production of the original cheque at any time before payment is effected, if it reasonably suspects forgery or material alteration to the cheque.
- The new automated system was due to become effective from **1st June 2011** but due to logistical reasons the effective date was moved to **15th August 2011**.
- New CTS-compliant cheques are now issued or being issued.
- See LN 123 of 2010.

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### Promissory note

- ❑ A 'promissory note' is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money, to, or to the order of, a specified person, or to bearer: see section 84(1), BEA.
- ❑ The person who makes the promissory note is called the *maker*; the person to whom the payment is to be made is called the *payee*.
- ❑ **NB:** A bank note or a currency note is not a promissory note.

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### Promissory note: essential elements...contd.

- Must be definite and unconditional; thus an instrument promising to pay when convenient or when Fulani delivers the goods is not a promissory note.
- Must be signed by the maker.
- Parties – maker and payee - must be certain.
- Must be a promise to pay money, the legal tender of the Republic of Kenya, only; thus an instrument promising to pay Kshs 10, 000/= and 50 kgs of sugar is not a promissory note.
- Must be duty-stamped: see ss. 5, 33 and Sch. (at item 5) Stamp Duty Act, Cap. 480.

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### Promissory note (basic form)

#### PROMISSORY NOTE

*Stamp Duty*

- Address
- Date
- KSHS.10,000/=
- Three (3) months after date, I promise to pay to Messrs. Mino Dugu Limited the sum of Kshs.10,000/=

Signed .....  
NIT NDEKLE

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### Promissory note: essential elements...contd.

- **NB:** The following formalities though common features are not strictly essential in law to the validity of a promissory note:
  1. The date, except where the amount stated is payable at a certain time after date;
  2. Place where the promissory note is made;
  3. Consideration reflected in words such as "for value received".

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### Promissory note: essential elements

- Must be in writing (print, typewriting, ink or pencil); mere verbal engagement or promise to pay is not enough.
- Must be a promise to pay; thus the following are not promissory notes:
  - > An IOU;
  - > an acknowledgment of indebtedness;
  - > a declaration that one is bound to pay;
  - > a receipt for payment.

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### TRANSFERABILITY AND NEGOTIABILITY

#### Transferability

- ❑ A transferor transfers whatever title in the instrument he has to the transferee.
- ❑ If transferor has defective title (such as a stolen cheque), he can only transfer the defective title. i.e. the transferee will obtain a defective title.
- ❑ Transferring a bad title will result into the receiver acquiring a bad title.

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### Transferability and Negotiability.... contd.

- ❑ Depending on the case, a transferee may acquire a good title, although the transferor transfers defective title.
- ❑ The receiver may acquire good title which was bad at time of transfer.
- ❑ Thus, all negotiable instruments are transferable.
- ❑ But not all transferable instruments are negotiable.

### HOLDERS

#### (a) Holder

A holder is any payee or endorsee or bearer in possession of a bill.

A holder must have possession of the bill but the possessor may not necessarily be the owner of the bill.

Impliedly, every holder is prima facie holder in due course.

### Transferability and Negotiability.... contd.

#### Negotiability

-A transferee acquires a better title to the instrument than that possessed by the transferor through negotiation.

-i.e., to obtain value, negotiate.

### Holders... contd.

A payee of a cheque cannot be a holder in due course, as it was **issued** and *not negotiated* to him.

The cheque was merely transferred to him.

He is just a holder of that cheque.

### Transferability and Negotiability.... contd.

**Test:** A person taking an instrument *bona fide*, and *for value*, known as a **holder in due course**, gets title even though the title of the transferor may be defective.

A rough and ready test of negotiability in case of bearer instruments is:

***Can a good title be acquired through a thief? If yes, the instrument is negotiable.***

In other words, the principle of '*nemo dat quod non habet*' does not apply to negotiable instruments.

### Holders... contd.

#### (b) Holder for value

**This is a person who has given value or valuable consideration for the bill.**

'Valuable' means:

- (a) any valuable consideration;
- (b) settlement of debt;
- (c) that the holder has a lien on the cheque.

Once a bill/cheque is given the value, all subsequent holders are holders of value.

### Holders... *contd.*

#### (c) Holder in due course

**This is someone who takes the bill complete and regular on the face of it (on both sides of the bill/cheque).**

This means that:

- (a) there has been no forgery of essential endorsement;
- (b) the cheque is complete, without any missing sections; and
- (c) the cheque must not be overdue and must be taken without notice of previous dishonour.

### Characteristics ... *contd.*

#### (b) Holder gets free from defects:

A person taking an instrument bona fide and for value, known as a holder in due course, gets the instrument free from all defects in the title of the transferor.

**NB/Contrast:** An assignee of an ordinary chose in action gets no better title than his assignor had.

#### (c) Holder can sue in own right:

The holder in due course can sue upon a negotiable instrument in his own name for the recovery of the amount.

### Holder in due course... *contd.*

Rights of holder in due course

- (i) He is an absolute legal owner of bill/cheque.
- (ii) His title cannot be disputed and is not affected by any defect in the previous title or by any counterclaims (e.g., claims of set-off).
- (iii) He can enforce against any prior parties, sue all prior parties, if necessary, in his own name if bill/cheque is not paid/honoured.
- (iv) He can pass a perfect title.

### Characteristics ....*contd.*

#### (d) No notice to debtor:

Further the holder need not give notice of transfer to the party liable on the instrument to pay, i.e. the debtor or other obligee.

**NB/Contrast:** Ordinary assignments must be notified.

## CHARACTERISTICS OF A NEGOTIABLE INSTRUMENT

### (a) Title passes by delivery:

The property in a negotiable instrument passes from one person to another by –

- (i) delivery, alone, if the instrument is payable to bearer, and
- (ii) endorsement plus delivery, if it is payable to order.

**NB:** A legal assignment of an ordinary chose in action must, on the other hand, be in writing.

## PRESUMPTIONS

### (a) *Consideration*

Every negotiable instrument is presumed to have been made, drawn, accepted, endorsed, negotiated or transferred, for consideration: section 30 (1) BEA.

### (b) *Date*

Every negotiable instrument bearing a date is presumed to have been made or drawn on such date.

### Presumptions... contd.

#### (c) *Time of acceptance*

When a bill of exchange has been accepted, it is presumed that it was accepted within a reasonable time of its date and before its maturity.

#### (d) *Time of transfer*

Every transfer of a negotiable instrument is presumed to have been made before its maturity.

### CLASSIFICATION OF NEG. INSTRUMENTS

#### (a) *Bearer and order instruments*

A negotiable instrument is **payable to bearer-**

- (i) when it is expressed to so payable
- (ii) when the only or last endorsement on the instrument is an endorsement in blank.

A negotiable instrument is **payable to order-**

- (i) when it is expressed to be so payable, or
- (ii) when it is expressed to be payable to a particular person, and does not contain words prohibiting or restricting its transfer.

### Presumptions... contd.

#### (e) *Order of endorsement*

The endorsement appearing upon a negotiable instrument are presumed to have been made in the order in which they appear thereon.

#### (f) *Stamp Duty*

When an instrument has been lost, it is presumed that it was duly stamped.

### Classification...contd.

#### (b) *Inland and Foreign Instruments*

A promissory note, bill of exchange, or cheque drawn or made in Kenya and made payable in Kenya, or drawn upon any person resident in Kenya, is deemed to be an inland instrument: section 4, BEA.

All instruments which are not inland instruments are deemed to be foreign instruments: *ibid.*

### Presumptions... contd.

#### (g) *Holder presumed to be a holder in due course.*

Every holder of a negotiable instrument is presumed to be a holder in due course.

#### (h) *Dishonour presumed on proof of protest*

In a suit upon an instrument which has been dishonoured, the Court, on proof of the protest, presumes the fact of dishonour, until such fact is disproved.

### Classification ...contd.

#### (c) *Demand and Time Instruments*

A promissory note or bill of exchange is payable on demand-

- (i) when it is expressed to be payable on "demand" or "at sight" or "on presentment" or
- (ii) when no time for payment is specified in it.

A cheque is always payable on demand.

### Classification... *contd.*

**NB:** A bill or note is a 'time instrument' if it is stated to be payable: -

- (i) at a fixed period after its date, or
- (ii) at a fixed period after sight, or
- (iii) on or at a fixed period after an event which is certain to happen.

### MATURITY AND DAYS OF GRACE

- ┐ When a promissory note or bill of exchange is payable after specified period, the date on which it falls due, known as date of maturity, has to be calculated.
- ┐ Every instrument payable otherwise than "on demand" is entitled to three days of grace: section 93 (1), BEA.

### Classification... *contd.*

(d) *Accommodation bill* is a bill drawn, accepted or endorsed without any consideration.

(e) *Inchoate instrument* is an instrument which is incomplete in some respect: section 20, BEA.

(f) *Bill in sets* is a bill of exchange drawn in parts, generally three: section 71, BEA.

### CAPACITY OF PARTIES

The capacity of a person to incur liability as a party to a promissory note, bill of exchange or cheque is *co-extensive* with his capacity to contract.

#### (a) **Minor**

A minor may draw, endorse, deliver and negotiate a negotiable instrument so as to bind all parties except himself.

That is, he may operate as a channel to convey title and liability but not to originate it.

### *Bill in sets ... contd.*

This is done:-

- (i) to avoid undue delay and unnecessary inconvenience due to possible loss or miscarriage of the bill during **transit**; and
- (ii) to ensure the safe transmission of at least one part of the bill to the drawee at the earliest time possible.

### Capacity of parties... *contd.*

#### (b) Person of <sup>un</sup>sound mind

- ┐ Bills and notes drawn or made by a person of unsound mind are void as against him if at the time of the execution of such instruments, he is not capable of forming a rational judgment.
- ┐ However the other parties continue to be liable.

### Capacity of Parties... *contd.*

#### (c) Corporation

A corporation, being an artificial person, can exercise only those powers which its Memorandum or Articles confer on it.

A trading company has implied power, to bind itself by negotiable instruments.

However, a non-trading company must obtain express power, to draw, make endorse, or accept negotiable instruments.

### Presentment ...*contd.*

- ❑ A bill payable on *demand* or *at sight*, or on a certain fixed date, need not be presented for acceptance unless it is specifically agreed that such a bill is to be presented for acceptance.
- ❑ But presentment for acceptance is obligatory in case of a bill payable some period after sight or after presentment or when there is an express stipulation in the bill that it shall be presented for acceptance

### Capacity of Parties... *contd.*

#### (d) Agent

An agent who signs a negotiable instrument for his principal may bind his principal provided (1) he signs the principal's name or states on the face of the instrument that he signs as agent, and (2) he acts within the scope of his authority.

#### (e) Partner

In a trading firm each partner has implied authority to bind his co-partners by drawing, endorsing, accepting or negotiating bills, notes and cheques.

### Presentment... *contd.*

Presentment for acceptance may be made: -

- (a) To the drawee of his duly authorized agent.
- (b) To his legal representative if the drawee has died.
- (c) To his assignee, if the drawee has been declared insolvent.
- (d) To all the drawees, if there are several drawees unless they are partners or agents of one another.
- (e) To drawee in case of need.

### PRESENTMENT

- ❑ 'Presentment' means showing a negotiable instrument to the drawee for **acceptance** or to the acceptor, for **payment**.
- ❑ It is only bills of exchange of a certain type that require to be presented for acceptance i.e. the signification by the drawee of his assent to the order of the drawer that he will pay the bill at the appropriate time.
- ❑ The liability of the drawee does not arise until he has accepted the bill.

### Presentment... *contd.*

Presentment for acceptance is excused where: -

- (a) the drawee is a fictitious or incompetent person,
- (b) he cannot, after reasonable search, be found,
- (c) he is dead or insolvent,
- (d) although the presentment has been irregular, acceptance has been refused on some other ground.

**Presentment ...contd.**

- ❑ Presentment is not necessary-
  - a) where it is intentionally prevented by the maker, drawee or acceptor, or
  - (b) where the business of the maker, drawee or acceptor is closed or he cannot after due search be found, or there is no person at the place of payment, or

**Presentment ...contd.**

- ❑ A promissory note payable after sight must be presented to the maker for sight to determine its maturity, during business hours, and on a business day.
- ❑ If the maker cannot be found, after a reasonable search, presentment is excused and the note may be treated as dishonoured.

**Presentment ...contd.**

- (c) where there is a promise to pay notwithstanding non-presentment, or
- (d) where presentment is expressly or impliedly waived, or
- (e) where the bill is dishonoured by non-acceptance, or
- (f) where the drawee is a fictitious person, or
- (g) where the presentment becomes impossible.

**Presentment ...contd.**

- ❑ Promissory notes, bills of exchange and cheques must be presented for payment to the maker, acceptor or drawee thereof respectively, by or on behalf of the holder.
- ❑ If default is made, the parties other than the parties primarily liable are discharged of their liability: see sections 45, 74 & 88 of BEA.

**Presentment ...contd.**

- ❑ A bill payable at sight is equivalent to one payable on demand.
- ❑ By section 10, BEA, a bill is payable on demand-
  - if it is expressed to be so payable, or
  - at sight or on presentation, or
  - if no time for payment is expressed.

**Presentment ...contd.**

- ❑ Presentment for payment must be made: -
  - (a) to the drawee, maker or acceptor, as the case may be;
  - (b) where the drawee, maker or acceptor has died, to his representative;
  - (c) where he has been declared insolvent, to his assignee.
- ❑ Delay in presentment for payment is excused if it is caused by circumstances beyond the control of the holder.



## ACCEPTANCE

- ❑ "Acceptance" of a bill is the signification by the drawee of his assent to the order of the drawer: s. 17, BEA.
- ❑ The drawee signs on the bill to indicate accepting the obligation to pay, unconditionally; or to indicate acceptance of goods in trust of bank, i.e., ownership of goods is with the bank.
- ❑ A bill payable on demand needs not be presented to drawee for acceptance; it may be paid immediately.

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## Modes of acceptance... *contd.*

### (ii) Qualified acceptance

- ❑ The acceptance is qualified when it is given subject to some condition or qualification.
- ❑ The holder may refuse to take the qualified acceptance, and treat the bill as dishonoured by non-acceptance.
- ❑ But if he takes it he does so at his ~~own~~ <sup>own</sup> risk and discharge all parties prior to himself unless he obtains their consent to such acceptance.

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## Acceptance... *contd.*

Acceptance is necessary -

- (a) when the bill is payable after sight (presentment is necessary to determine the date of payment); or
- (b) where the bill expressly state that it must be presented for payment; or
- (c) where the bill is payable elsewhere other than at the place of residence or business of drawee.

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## Acceptance and payment for honour

- ❑ Normally a stranger to a bill cannot accept it, but he may, with the consent of the holder, accept the bill in place of the drawee, for the honour of some party liable on the bill.
- ❑ Such an acceptor is known as *acceptor for honour*.
- ❑ Just as a bill may be accepted for the honour of a party to the bill, it may also be paid for the honour of a party liable to pay the bill.

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## Acceptance... *contd.*

### Modes of acceptance

- ❑ An acceptance may be general or qualified: -
- (i) **General acceptance**
- ❑ The acceptance is general when the drawee, while accepting the bill, does not attach any condition or qualification to it.

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## DISHONOUR

- ❑ A bill of exchange is deemed to have been dishonoured if the drawee refuses to accept it, or having accepted it fails to pay it: see section 42, 43 and 47 BEA.
- ❑ A bill may be dishonoured by: -
  - (a) non-acceptance; or
  - (b) non-payment.
- ❑ A promissory note or cheque can be dishonoured only by non-payment.

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### Dishonour... contd.

#### Notice of Dishonour

- ❑ When a negotiable instrument is dishonoured the holder must give a notice of dishonour to all the parties whom he wants to make liable on the instrument.
- ❑ If he fails to do so, except in cases when notice of dishonour may be excused, all the prior parties liable thereon are discharged of their liability.

### Dishonour... contd.

No notice of dishonour is necessary –

- (a) when it is dispensed with by the party entitled thereto;
- (b) to charge the drawer, when he has countermanded payment;
- (c) when the party charged could not suffer damage for want of notice;

### Dishonour... contd.

#### Notice by whom

- ❑ Notice of dishonour may be given **by the holder or by any of the parties to the instrument** to the prior parties.

#### Notice to whom

- ❑ Notice of dishonour may be given to **all the prior parties** whom the holder seeks to make liable.
- ❑ Such notice need not be given to the maker of a note, acceptor of a bill or drawee of a cheque.

### Dishonour... contd.

- (d) when the party entitled to notice cannot after due search be found;
- (e) to charge the drawer when the acceptor is also a drawer;
- (f) in the case a promissory note which is not negotiable; and
- (g) when the party entitled to notice promises to pay unconditionally.

### Dishonour... contd.

#### Form of notice

- ❑ The notice of dishonour may be oral in writing and may be sent by post.
- ❑ It may be in any form but it must inform the party to whom it is given that the instrument has been dishonoured.
- ❑ It must be given within a reasonable time at the place of business or residence of the party for whom it is intended.

### NOTING AND PROTESTING

#### Noting

- ❑ Where a bill of exchange is not paid on presentation the holder then applies to a Notary Public who will again present the bill.
- ❑ If it is still not paid he makes a memorandum and note of the non-payment.

#### Noting... *contd.*

- ❑ Thus noting the bill means the recording of the fact of dishonour by a Notary Public on a dishonoured bill, or upon a paper attached thereto, or partly upon each.
- ❑ The Notary Public is required to endorse his initials, the day, month and year as well as his charges for so minuting.
- ❑ This is the preparatory step towards a **protest**.

#### Discharge...*contd.*

- ❑ It may be provided (pursuant ss. 59 to 64) that a bill is discharged totally or only vis-à-vis certain parties only.
- ❑ It may also be provided that while the bill remains valid and enforceable, the liability of certain parties is terminated.
- ❑ If one or more of the parties (excepting the party who is ultimately liable to pay) is discharged from liability, the instrument continues to be negotiable and the other parties continue to be liable on it.

#### Noting and Protesting... *contd.*

##### **Protest-**

- ❑ A protest is a formal declaration or certificate by the holder of a bill of exchange or promissory note or by a Notary Public at his request, that the bill of exchange has been refused acceptance or payment.
- ❑ It is also a notice that the holder intends to claim recovery of all expenses incurred by him as a consequence of the dishonour.

#### Discharge ...*contd.*

- ❑ An instrument may be discharged-
  - (a) By payment in due course, to a bona fide holder, the payer having no notice of any defect in the holder's title: s. 59;
  - (b) By maker or acceptor becoming the holder of all rights on the bill at or after its maturity: s. 61;

#### DISCHARGE

- ❑ An instrument is said to be discharged when all rights of action under it are completely extinguished and when it ceases to be negotiable.
- ❑ When a person repays his loan he is discharged; that is, his obligation ceases to exist in respect of the loan and all rights of action on the bill are extinguished.
- ❑ Most obvious and common way to discharge a bill is to pay in due course.

#### Discharge ...*contd.*

- (c) By express waiver by the holder renouncing, in writing or by delivery to the acceptor of the bill, all rights against the acceptor after maturity of the bill: s. 62;
  - (d) By express or intentional cancellation by the holder or his agent, when apparent from the bill itself: s. 63;
  - (e) By material alteration of the bill or its acceptance, without the assent of the parties liable on it: s. 64.
- NB: It may also be discharged like a contract for the payment of money.

### When party may be discharged from liability

- A party to a negotiable instrument may be discharged-
  - (a) By cancellation;
  - (b) By release;
  - (c) By undue delay in presentment of a cheque;

### Material alteration... *contd.*

#### What constitutes Material Alteration

- Any alteration is material if it in any way alters the operation of the bill and the liabilities of the parties thereto, whether the change be prejudicial or beneficial.
- Examples given in s.64(2) are when a bill is altered as to or with respect to-
  - date,
  - sum payable, in word or figures,
  - the time of payment;

### Discharge ... *contd.*

- (d) By material alteration;
- (e) By operation of law which includes discharge by –
  - (i) an order of insolvency Court,
  - (ii) merger,
  - (iii) lapse of time; and
- (f) By payment of altered instrument.

### Material alteration... *contd.*

- the place of payment; and
- addition of place of payment, without acceptor's consent, where the bill has been accepted generally.
- Other material alterations include:
  - alteration of name of drawee: see *Lumsden & Co v. London Trustee Savings Bank* (1971) 1 Lloyd's Rep 114;
  - crossing;
  - change from "order" to "bearer" (but not *vice versa*); and
  - alteration to payee's name.

### Material alteration

- By section 64, BEA, where a bill is materially altered without the assent of all parties liable on it, the bill is void except as against-
  - (a) a party who has himself made, authorized or assented to the alteration, and
  - (b) subsequent endorser provided alteration is not apparent, or
  - (c) a holder in due course, where the alteration is not apparent.

### Material alteration... *contd.*

#### Apparent and non-apparent alteration

- It is stated, in s.64(1) proviso, that a holder in due course may, notwithstanding a material alteration, enforce payment of a bill according to its original tenor where the alteration is not apparent.
- No guidance given on what is "apparent" alteration but may be one which a reasonably careful scrutiny would reveal: see *Woolatt v. Stanley* (1923).
- A non-apparent alteration is a cleverly or skillfully made one.