

7
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KENYA SCHOOL OF LAW
COUNCIL OF LEGAL EDUCATION
THE ADVOCATES TRAINING PROGRAMME
COMMERCIAL TRANSACTIONS
NEGOTIABLE INSTRUMENTS IN KENYA
contd.

by
Rautta-Athiambo

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1

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.

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2

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: 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.

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3

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: Ordinary assignments must be notified.

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4

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.

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5

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.

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6

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*

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

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7

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) *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.

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8

CLASSIFICATION OF NEGOTIABLE INSTRUMENTS

(a) Bearer and order instruments

A negotiable instrument is payable to bearer

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

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9

Bearer bill....contd.

- (iii) when it is payable to a *fictitious* or *non-existent* person.

NB: A **non-existent** is one whose existence the drawer is unaware of or who does not exist at all; and a **fictitious** person is one whose existence the drawer is aware but who was not intended by the drawer to receive payment: see *Bank of England v. Vagliano Bros.* (1891) A.C. 107.

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10

Bearer bill....contd.

There are three ways to denote the payee of a bearer bill or cheque:

- Pay Nit Ndekle or Order; or
- Pay Nit Ndekle or Bearer; or
- Pay Bearer.

In the first, payment is to be made to Nit Ndekle or such other person as he orders to be paid.

The words "or order" are usually presumed even where they are not inserted so long as the bill is made payable to a named person.

In 2nd and 3rd, anyone who is in possession of, or bears, the bill will be entitled to payment.

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11

Order instrument

A negotiable instrument is payable to order-

- (i) when it is expressed to be so payable, or

(ii) when it is directed or expressed to be payable to a specified or particular person, and does not contain words prohibiting or restricting its transfer: e.g. "Pay Nit Ndekle" or "Pay Nit Ndekle or order".

- The bill remains payable only to Nit Ndekle until he transfers it to someone else by endorsement.
- If Nit Ndekle endorses it in blank then it becomes payable to bearer.

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12

Classification...*contd.**(b) Inland and Foreign Instruments*

An inland bill is one which is or, on the face of it, purports to be both drawn and payable within East Africa or drawn upon any person resident therein: section 4, BEA.

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

The distinction is of no importance except with regards to the steps a holder must take in case of dishonour: see s.51, BEA.

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13

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: See section 10, BEA.

NB: A cheque is always payable on demand.

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14

Classification... *contd.*

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.

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15

Classification ... *contd.*

(d) Accommodation bill is a bill drawn, accepted or endorsed for the purpose of lending a name to some other person without any consideration to the party: see s. 28, BEA.

(e) Inchoate instrument is an instrument which is incomplete in some material respect or form e.g. no amount or payee's name stated: section 20, BEA.

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16

Classification (Inchoate instrument)...*contd.*

- Where a person places a simple signature on a blank stamped paper and delivers it to another, intending it to be converted into a bill, it operates as authority to fill it up as a complete bill for any amount which the stamp will cover.
- Any person in possession of an inchoate bill or cheque has prima facie authority to complete it in any way he wishes.
- This must be within a reasonable time and strictly in accordance with the authority given.
- NB: A bill is not inchoate if it lacks in a non-essential particular only, e.g. the date, because a date is not essential to the validity of a bill

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17

Classification ... *contd.*

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

A bill may be drawn in a set-

- (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.

NB: In practice, only foreign bills are drawn in a set.

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18

MATURITY AND DAYS OF GRACE

When a promissory note or bill of exchange is payable after a 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 (3) days of grace: section 93 (1), BEA.

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19

TYPES OF CHEQUES

As seen above, a cheque is a bill of exchange drawn on a specified banker and payable on demand: section 73 (1) BEA.

A cheque starts its life when it is issued.

Delivery is either actual or constructive.

Constructive delivery is effected by mere intention, e.g. where drawer completes a cheque and notifies payee while holding it on payee's behalf, the cheque is deemed issued.

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20

Order and Bearer cheques

Order cheque

This is negotiated by endorsement.
Holder may endorse generally or specially.

Bearer cheque

This is negotiated by delivery alone.
It remains as bearer cheque for the rest of its life: see s. 8 (3) BEA.
It cannot convert into an order cheque.

Cash cheque

A cheque made payable to "cash" is equivalent to a bearer cheque.

A cheque made payable to "cash", like that made payable to "bearer" is therefore a bill of exchange: see *Khan Stores v. Delawer* (1959) E.A. 714.

Types of cheques... *contd.*

Crossing

When a cheque bears across its face two parallel transverse lines, the cheque is said to be *crossed*.

Crossing of a cheque is to prevent fraud and act as safeguard to drawer and subsequent holders.

Crossing a cheque.... *contd.*

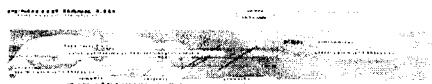
The payment of a crossed cheque can be obtained only through another banker.

The crossing may be-

- general,
- special, or
- restrictive.

A cheque may be crossed by the drawer or the holder, or the banker.

Cheque ...contd.



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25

Crossing ...contd.

General crossing

This is effected by two parallel lines "& Company" and/or "Not Negotiable".

The proceeds must be paid direct into payee's account.

Must not exchange for cash over the counter.

Where name of bank is inserted between the two parallel lines, e.g. "ABC Bank Ltd", cheque must only be paid by the drawee banker to the banker named in the crossing.

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26

Special crossing

Special crossing is the addition of the name of a bank, with or without the addition of two transverse lines on the cheque.

It is meant to ensure paying that the bank pays the proceeds of the cheque to the bank stated in the crossing.

Collecting banker stamps its "crossing stamp" for the same reason.

If lost or stolen, paying bank will only make payment to bank stated in crossing.

If two banks are stated, the cheque will be returned.

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27

Not negotiable crossing

This is a general or special crossing plus the words 'not negotiable'.

It removes negotiability and only allows transferability (to the payee who cannot be holder in due course).

No one else can obtain a better title.

Use of this crossing recommended, esp. when sending cheque by post.

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28

Not negotiable crossing... *contd.*

Any of the following words written or printed between two horizontal parallel lines:

'Not negotiable'

(or)

'(Siany Ltd)' + Not negotiable

(or)

(name) Bank Ltd

(or)

(name) Bank Ltd + Branch

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29

Not Negotiable... *contd.*

In *Wilson and Meeson vs Pickering*, (1946) KB 422, a clerk took a signed blank cheque from his employer (the cheque duly crossed "non-negotiable" and fraudulently made it payable to Pickering.

Court held employer could recover from Pickering. Since the clerk had received no title to the cheque, Pickering could get no better title because of the crossing.

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30

Account Payee

By s.81A(1), BEA, where a cheque is crossed and bears the words "account payee" or "a/c payee" with or without the word "only", it is not transferable and is valid only between the parties to it.

"Account Payee" crossing becomes a pay order, neither transferable nor negotiable.

The banker will be deemed negligent if he collects such cheque for the party other than the named payee (and loses its statutory protection).

Validity of 'account payee' cheque is restricted to the parties thereto.

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31

Account Payee... *contd.*

PESA BANK LTD, Ligisa Street, Chweya Town
26th August 2009

Pay NIT NDEKLE the sum of Kenya Shillings Ten Thousand.

Kshs. 10,000/-

(with words 'A/C payee' (or) 'PESA BANK LTD , A/C' written or printed from bottom to top between two vertical parallel lines, across the cheque)

.....
Signature of drawer

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32

Account Payee... *contd.*

Case

In House Property Company of London Ltd vs. London County and Westminster Bank Ltd... a cheque drawn in favour of two trustees was paid into account of the trustees' solicitor. Bank was liable for wrongful conversion in that they acted negligently for collecting "account payee" cheque for someone other than the named payee.

Effect of crossing

"Not Negotiable" and "Account Payee" crossing are the safest crossings.

They prevent negotiability and warns the collecting banker to pay only to the named payee.

As a practice all banks in Kenya now pre-print 'A/C Payee' only on cheque leaves.

Effect of crossing...*contd.*

Crossing is to give protection to either drawer or holder.

A general crossing takes longer time to debit drawer's account allowing more time to stop payment.

General crossing makes it easier to trace who the beneficiary is or may be.

'A/c payee' crossing reduces losses due to fraud.

FORGED OR UNAUTHORIZED SIGNATURE

Where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative.

No right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature: see section 24, BEA.

Forged or unauthorized...contd.

A party may who is otherwise precluded from setting up the forgery or want of authority may not however rely on this provision.

An unauthorized signature may be ratified.

A forgery may not be ratified.

A bank may, in certain cases, be entitled to debit its customer, the acceptor, with amounts on the ground that the named payee was a fictitious or non-existing person and the documents may be treated as payable to bearer: see *Bank of England v. Vagliano Brothers, supra*.

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37

Forged or unauthorized...contd.

Forgery is the act of falsely making or altering any document with the intention of defrauding or prejudicing another person.

It must be established that the intention of the forger was that the forged signature shall be accepted as genuine and that someone shall suffer thereby.

A forged signature of a drawer on a bill makes the bill invalid especially in view of section 3, BEA, which refers to a bill as an "unconditional order in writing signed by the person giving it".

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38

Forged or unauthorized...contd.

An unauthorized signature is either a signature made by a person without any permission from the person whom it is sought to hold liable or a signature made in pursuance of a purpose not approved by the person whom it is intended to hold liable.

E.g. where a person signs a bill for a purpose other than that permitted by, say, his company directors, such signature is unauthorized.

Such authority may expressly conferred or may arise from the operation of the general law of agency.

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39

Forged or unauthorized...contd.

Cf: Procuration Signature

By section 25, BEA, a signature by procuration operates as a notice that the agent has only a limited authority.

In that case the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority.

See *Hasham Jiwa v. Popatlal Premchand Vora t/a Supreme Traders* (1957) E.A. 122 as to a son's authority to sign "per pro" in the name of his father.

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40

Forged or unauthorized...contd.

An unauthorized signature does not bind the alleged signatory.

However, where unauthorized person purports to sign for a company, the ability of the company to rely on his lack of authority is limited.

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41

Forged or unauthorized...contd.

In order to amount to estoppel **negligence**, it must be an approximate cause and arise in some duty owed to the parties or the general public.

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42

Forged or unauthorized...contd.

Forged or unauthorized endorsement or signature are deemed 'irregular,' i. e. the cheque is 'not complete and regular on its face.'

An innocent 3rd party who gives value in good faith cannot be the holder in due course but may be holder for value: see *Arab Bank Ltd v Ross* (1952) 2 QB 216 CA

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43

PAYMENT IN DUE COURSE

'Payment in due course' means payment-

- in accordance with the apparent tenor of the instrument,
- in good faith and
- without negligence to any person in possession thereof
- under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned.

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44

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.

Capacity of parties... *contd.*

(b) Person of 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; but a non-trading company must obtain express power, to draw, make endorse, or accept negotiable instruments.

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.

MATERIAL ALTERATION

Any alteration to a bill is material if it in any way changes the operation and effect of the bill and the liabilities of the parties, whether the change is beneficial or prejudicial.

By section 64, BEA, where a bill is materially altered without consent of all parties liable to it, it is void except as against-

- (a) a party who has himself made, authorized or consented to alteration, or
- (b) a subsequent endorser.

Provided that the alteration is not apparent a holder in due course may enforce payment of it.

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49

Apparent and non-apparent alterations

Alteration may be apparent or non-apparent: see s. 64, BEA.

Apparent alteration suggests an obvious alteration.

A *non-apparent* alteration is a skilful or clever alteration.

Where the alteration is non-apparent, a holder in due course may claim against the drawer, the payee and the subsequent endorsers.

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50

Material alteration... *contd.*

NB: This provision applies equally to bills and notes; but any alteration of a bank note vitiates the note completely and makes it valueless to a subsequent holder

What Constitutes Material Alteration?

When a bill is altered as to or with respect to-

- (i) date,
- (ii) amount payable in word and figures;
- (iii) the time of payment;
- (iv) place of payment;

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51

Material alteration... *contd.*

- (v) the obliteration of a crossing;
- (vi) change from "order" to "bearer", or
- (vii) alteration to payee's name.

An "addition" is not the same thing as an "alteration": see *National Bank of Commerce v. Yusuf Hussein Allidina* (1968) High Court Digest 485 (T), *per* Georges, C.J.

Further, additions of places (s. 64(2)) applies to bills accepted generally.

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52

Material alteration... *contd.*

Effect of material alteration

An unauthorized alteration discharges all parties prior to alteration, unless they agree to it.

The onus of proof lies on the person suing on any bill of exchange which have patently been altered in a material respect to show that the defendant was privy to the alteration: see *Fakhri Stores Ltd. v London Confirmers Ltd.* (1965) E.A. 159.

Alteration on cheque

A banker will not pay a cheque bearing material alteration unless the alteration has been agreed to and signed by the drawer

Where alteration is not apparent, a holder in due course can enforce the cheque as if it was unaltered.

THE END

THANK YOU ALL

16th September, 2009