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**“ONLINE CONTRACTS IN KENYA: CHALLENGES THE INTERNET POSES AS TO
FORMATION AND FORMALITIES OF CONTRACT”**

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BY:

SANG BERNARD KIBET

REGISTRATION NUMBER:

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SUPERVISOR:

MR. MWESELI, TIM

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DECLARATION

I, **SANGBERNARD KIBET**, declare that this is my original work and has neither been submitted nor is it currently being submitted for a Degree in any other University.

Signed:
SANG BERNARD KIBET

Date: _____

This Research Project has been submitted with my approval as the University Supervisor.

Signed:
MR MWESELI, TIM

Date: _____

ACKNOWLEDGEMENT AND DEDICATION

I would like dedicate this Research to my parents, **MR** and **MRS ANDREW LANG'AT** for the unwavering financial support and encouragement, and to my family, **MRS DAISY SANG** and **Baby CHEPCHUMBA JADE**, for their encouragement and patience.

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3. Electronic Communications Act 2000-United Kingdom.
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5. Interpretation and General Provisions Act, Cap 2, Laws of Kenya.
6. Kenya Information and Communications Act, Cap 411A, Laws of Kenya.
7. Land Registration Act, No. 3 of 2012, Laws of Kenya.
8. Law of Contracts Act, Cap 23, Laws of Kenya.
9. Registration of Documents Act, Cap 285, Laws of Kenya.
10. Uniform Electronic Transactions Act-US.

INTERNATIONAL CONVENTIONS

1. UN Convention on the Use of Electronic Communications in International Contracts (2005).
2. UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (1996), with additional article 5 bis as adopted in 1998.

LIST OF ABBREVIATIONS

1. CCK- communications Commission of Kenya
2. KICA- Kenya Information and Communications Act
3. LLC- Limited Liability Company
4. UETA- Uniform Electronic Transactions Act, US
5. UK- United Kingdom
6. UN- United Nations
7. UNCITRAL- United Nations Commission on International Trade Law
8. SA- South Africa

CHAPTER ONE:

1.0.INTRODUCTION

Through globalization, there has been spread and connection of production, communication and technologies.¹ The spread and connection involve the interlacing of economic and cultural activities.² According to the World Bank, globalization is an inevitable phenomenon that has been bringing the world closer through the exchange of goods and products, information, knowledge and culture.³ Over the last few decades there has been an increased pace in global integration because of immense advancement in technology, communications, science, transport and industry.⁴ Therefore, globalization has ‘reduced’ the distance that exists among various countries and their people.

At the heart of globalization is internet. Internet refers to an international computer network through which computer users all over the world can communicate and exchange information.⁵ There has been increased use of internet in Kenya.⁶ According to the Communications Commission of Kenya (CCK), the annual growth in the estimated number of Internet users in Kenya was recorded at 11.9% from 12.5million recorded in

¹Mark K Smith, and Michele ErinaDoyle 'Globalization' the *encyclopedia of informal education 2002*), www.infed.org/biblio/globalization.htm accessed on 24 November 2012.

²ibid.

³ The World Bank Group ‘Globalization’ (World Bank, 2012) <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:23272496~pagePK:51123644~piPK:329829~theSitePK:29708,00.html> accessed on 24 November, 2012.

⁴ibid.

⁵AS Horby, *Oxford Advanced Learner’s Dictionary of Current English* (5th edn, Oxford University Press 1995) 624.

⁶ CCK, ‘Internet Access and Usage Increases in the Country’ http://www.cck.go.ke/news/2012/Internet_access.html accessed on 25 November, 2012.

2011.⁷Internet has made it possible for commercial transactions to be negotiated and concluded with much speed. The conclusion of commercial transactions concluded through electronic networks is termed as e-commerce.⁸

E-commerce has seen the formation of various contracts over the internet, hence the phrase 'online contracts'. According to Smith, the typical subject matter of contracts currently formed over the internet are: contracts for the sale of physical goods like books; contracts for the supply of digitised products, for example software, music and multimedia products; and contracts for the supply of services and facilities like financial services; giving of professional advice over the internet; and provision of voice telephony and potentially video-conferencing.⁹

1.1. Background to the Problem

Internet-based contracts have brought about legal issues as to validity of online contracts. The legal issues touch on essential elements of contracts like invitation to treat, offer and acceptance, as well as formalities like the requirements for certain contracts to be in writing and signed.

⁷ *ibid.*

⁸ David Jacobson, 'Online Contracts: How to Make Ecommerce Work' www.jacobsonconsulting.com.au accessed on 24 November, 2012.

⁹ GJH Smith, '*Internet Law and Regulation*' (4th edn, Sweet and Maxwell 2007) 775.

Traditionally, the display of goods in a shop window, would amount to an invitation to treat, as opposed to an offer.¹⁰ This is because the customer will pick the goods and head to the pay counter and make an offer to buy the same.¹¹ The shop will accept his or her offer whereupon the customer will pay for the goods. There can however be uncertainty over whether the display of goods over an internet website constitutes an invitation to treat or an offer. This is more so in a situation where the seller has limited stock of goods to dispatch or where the seller is prepared to sell to a limited class of persons.

Another issue is when an acceptance of offer is deemed to have been effectively communicated over the internet. Should there be an application of the rule regarding instantaneous communication, so that receipt or deemed receipt by the offeror is key?¹² On the other hand, should the postal rule be applied, so that the dispatch of the accepting e-mail or response form is effective?¹³

Regarding where there is a requirement for writing of some contracts, would contracts concluded on the internet qualify to be written contracts for this purpose?¹⁴ How about the requirement that for certain contracts to be legally enforceable, they must be signed?¹⁵ How would it be possible to validly input signatures for contracts concluded on the internet?

¹⁰Ibid 811.

¹¹ ibid.

¹²Ibid 814.

¹³ ibid.

¹⁴ Section 3(3)(a)(i) of the Law of Contracts Act (Cap 23, Laws of Kenya) requires that contracts for the disposition of interest in land must be in writing for them to be legally enforceable.

¹⁵ As per sections 44(2) and 45 of the Land Registration Act (No. 3 of 2013, Laws of Kenya), contracts for disposition of an interest in land must be signed by the parties and signature attested to.

It is on this background that this study seeks to explore if and how Kenyan law addresses the challenges brought about by online contracts. In particular, the challenges are in respect of invitation to treat, offer and acceptance, as well the requirement for writing and signature.

1.2.Statement of the Problem

Globalization has seen the increasing use of the internet as a convenient tool for concluding commercial transactions. However, the internet has brought about challenges with respect to essential elements and formalities of valid contracts. In this case, the essential elements isolated and discussed are invitation to treat, offer and acceptance, and the requirement for writing and signature being formalities for validity of certain contracts.

Precisely, the study investigates and addresses the problem and challenge on whether the display of goods online amounts to invitation to treat or offer. Secondly, it addresses the problem of when acceptance online is deemed to be legally communicated. Is it when the message is sent or received? Thirdly, is the problem posed by the requirement for writing and execution or signing of certain contracts. The question is how the requirement for writing or signature for certain contracts will be satisfied in respect of online contracts. As this study centres on contract formation, the elements of intention to create legal relations, consideration, certainty and capacity, are also briefly addressed.

1.3. Justification

Whereas, internet would be a fast and convenient platform of concluding contracts, the legal uncertainties arising from contracting online have no doubt been an impediment. These legal uncertainties have been obstacles to the growth of e-commerce, and by extension commercial transactions in general. This study attempts to address the challenges that the internet poses as to formation and formalities of online contracts. It is hoped that the findings of this research will eventually inform law reform regarding online contracting and eventually boost e-commerce and commerce in general.

1.4. Theoretical/Conceptual Framework

This study is generally based on the promissory theory of contract law, proclaimed by Charles Fried.¹⁶ This is also known as the promise principle.¹⁷ In this regard, Fried claims that the promise principle is the moral basis of contract law.¹⁸ Further, contracts are rooted in, and underwritten by, the morality of promising.¹⁹ Fried goes on to conclude that the life of a contract is indeed promise.²⁰ The essence of this is that contract is based on promise, and as such whoever makes a promise is under moral obligation to honour it. In summary, without promise, no contract will arise. This study is premised on the concept of contract, which is has its basis on the promise principle.

¹⁶ Brian H. Bix, 'Theories of Contract Law and Enforcing Promissory Morality: Comments on Charles Fried' <http://ssrn.com/abstract=1965557> accessed on 20 July 2014.

¹⁷ C. Fried, *Contract as a Promise, A Theory of Contractual Obligation* (Harvard University Press 1994) 1.

¹⁸ *ibid.*

¹⁹ Charles Fried, 'The Convergence of Contract and Promise' (2007) *Harvard Law Review* (2007) 1, 3.

²⁰ Fried (17) 37-38.

This study is further based on the theory of regulation, particularly by the proponents of what has been termed by Lawrence Lessig as the New Chicago School.²¹ According to this School, behaviour is regulated by four types of constraints-law is one of those constraints. Others are social norms, markets, and architecture. Social norm is a rule that is neither promulgated by an official source, such as a court or a legislature, nor enforced by the threat of legal sanctions, yet is regularly complied with.²² Markets control through the device of price.²³ Architecture is nature or the world-that one cannot see through walls is a constraint on his or her ability to snoop.²⁴

The constraints of social norms, markets and architecture are subject to the constraint of law.²⁵ That is, norms may affect behavior, but law can affect norms (for example advertisement campaigns); markets may affect behavior, but laws can modify markets, for example taxes; and that architecture may constrain, but law alters architecture (think of building codes).²⁶ Therefore, law not only regulates behaviour in a direct way but also indirectly, given that it is used to regulate the other constraints that directly regulate the law.²⁷

By analogy, in the same way that law can be used to generally regulate behaviour, is the same way it can be used to regulate the way persons contract. In particular, law can be used

²¹Lawrence Lessig , 'The New Chicago School' (June 1998) *The Journal of Legal Studies* 27- 2,661.

²²Richard A. Posner, 'Social Norms and the Law: An Economic Approach' (1997) 87 *Am. Econ. Rev.*, 365, cited in by Lessig (n21).

²³Lessig (n21).

²⁴ *ibid.*

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ *ibid.*

erode uncertainties that arise in respect to validity of online contracts. Law can be used to clarify what amounts to online offer/invitation to treat and acceptance. Further, law can be used to prescribe the equivalence of ‘written contracts’ and ‘signature’ for contracts entered online. This also amounts to regulation of the cyberspace.

Andrew Murray has gone on to term the theory of regulation of the cyberspace as ‘cyberpaternalism’.²⁸ The supporters of the theory of cyberpaternalism are Lawrence Lessig and Joel Reidenberg.²⁹ Cyberpaternalism highlights the fundamental importance of the regulation of the cyberspace by technology and constitutional values. It is also on the basis of cyberpaternalism that online contracting can be regulated so as to bring about certainty and by extension boost e-commerce.

1.5.Literature Review

Graham JH Smith has written on the Formation of Electronic Contracts.³⁰ He addresses the issue of offer/invitation to treat; acceptance and communication of acceptance; revocation and lapsing of offer; as well as the formalities of ‘writing’ and signatures for online contracts. The book is however written from the point of view of English law with comparisons of the US situation, and as such does not interrogate the Kenyan laws on online contracting. This study shall analyse this literature alongside the existing Kenya laws on online contracting.

²⁸C Reed, *‘Making Laws for the Cyberspace’* (OUP 2013) 1.

²⁹ *ibid.*

³⁰Smith (n9).

Treitel has written on the essential element of acceptance, in respect of online contracts.³¹ In particular he ponders whether the postal rule is applicable to communication of acceptance in respect of online contracts. He is of the view that where ‘instantaneous’ means of communication such as E-mail is used, the postal rule should not apply. This study shall, in addition to online communication of acceptance, address the issues of offer/invitation to treat, as well as the formalities of ‘writing’ and ‘signature’ that this literature has left out.

Andrew Grub has written on the legal effectiveness of electronic communications and their admissibility as evidence in court.³² He has particularly interrogated the formalities of ‘writing’ and ‘signature’ in respect of electronic contracts as compared with the traditional paper-based contracts. This study shall, in addition to ‘online writing and signature’ address the issues of offer/invitation to treat, and acceptance that this literature has not captured.

Taylor and Taylor have also done some work regarding communication of acceptance.³³ They wonder whether electronic means of communication, including e-mails, should be classified as instantaneous or non-instantaneous. That, whereas E-mail messages are instantaneous compared to the post, there is a good argument that they only arrive when you choose to access them from a central server, perhaps several days after they sent. Further to online communication of acceptance as captured by the authors, this study shall address the elements of online offer/invitation to treat, as well the formalities of ‘writing’ and ‘signature’ that the literature has left out.

³¹GH Treitel *An Outline of the Law of Contract* (5thedn, Butterworths 1995) 13.

³²A Grubb A, *The Law of Contract* (2ndedn, Lexis NexisButterworths 2003) 454.

³³R Taylor &D Taylor, *Contract Law Directions* (3rdedn, OUP 2011) 39.

Jill Poole has written on the issue of acceptance, as well as the requirement for ‘writing’ and ‘signature’ for online contracts.³⁴ Whereas he is of the view that electronic acceptance is instantaneous, actual communication is required. What amounts to actual communication? Is it when the communication is received by the machine or when read by the intended recipient? The author further goes on to address the issues of writing and signing online contracts. The literature has however not addressed the issues of online offer/invitation to treat, which this study shall input.

An article by Kethi D. Kilonzo³⁵, is relevant to the extent that it addresses the issue of Electronic Signatures in Kenya. However, the article does not analyse the amendments to the Kenya Information and Communication Act³⁶ that provide for Electronic Signatures. This is because the article was written in 2007 before the amendment of the Act in 2009.³⁷ The article also does not address the challenges regarding formation of online contracts, in particular regarding the essential elements of offer/invitation to treat, and acceptance, as well the formality of ‘writing’. This study shall therefore analyse the issue of electronic signatures as covered by this literature taking into account the amendments that were introduced to the Kenya Information and Communication Act in 2009. Also, this study shall address the issues of offer/invitation to treat, acceptance, as well as the requirement for ‘writing’ that were not captured in this literature.

³⁴J Poole, *Casebook on Contract Law* (10thedn, OUP 2010) 49.

³⁵Kethi D Kilonzo, ‘An Analysis of the Legal Challenges posed by Electronic Banking’ (2007) 1, Kenya Law Review, 323.

³⁶Chapter 411A of the laws of Kenya.

³⁷ The amendment was done through the Kenya Information and Communication Amendment No. 1 of 2009.

Weblaw's article³⁸ is relevant to the extent that it analyses the issue of invitation to treat, offer and acceptance in respect of online contracts. It considers whether the display of goods on a website amounts to invitation to treat or offer. The article also looks into what amounts to valid acceptance for e-mail as well as on-site acceptance. Other than the article not being specific on the Kenya situation, it does not address the issue of online writing or signatures. Thus, this study shall analyse this literature in light of the Kenyan laws on online contracting, aside from addressing the challenge of writing and signing online that were not covered by the article.

A paper by Topaz Systems Inc.³⁹ is relevant for comparative purpose because it explores the requirements of signature laws such as E-Sign Act⁴⁰ and UETA⁴¹ and specific signature technologies. It also sets out how these technologies satisfy the requirements for enforcement under existing contract law and how these technologies practically function in open and closed system environments. The paper does not however address the issues raised by online contracting as to invitation to treat, offer and acceptance, which this study shall seek to deal with.

Marco van der Merwe's paper⁴², gives an insight on the Legal and practical aspects of contracting online. It looks at the suitability of the general principles of offer and acceptance for contracting online. It also interrogates the challenges the internet has brought about

³⁸Weblaw, 'How to contract Online' <http://www.weblaw.co.uk/articles/how-to-contract-online/> accessed on 24 November, 2012.

³⁹Topaz Systems Inc., 'US Electronic Commerce Law Clarified' <http://www.topazsystems.com/Information/esignlaw.htm> accessed on 24 November, 2012.

⁴⁰E-Sign Act means the Electronic Signatures in Global and National Commerce Act-US.

⁴¹UETA means the Uniform Electronic Transactions Act-US.

⁴²Marco van der Merwe, 'Internet Contracts' <http://www.legalnet.co.za/cyberlaw/cybertext/chapter6.htm> accessed on 24 November 2012.

regarding the requirement for ‘writing’ and ‘signature’ for validity of certain contracts. The paper is however written from the South African point of view, and as such this study will analyse the literature in light of the Kenyan law on online contracting.

A paper by Farhan AL-Farhan is also a useful material.⁴³ It assesses the impact of UNCITRAL Model laws on various legal regimes in the world. The paper however restricts itself to the US, EU and Saudi Arabia, and as such this study will use the literature in comparison to how the UNCITRAL Models have affected (if at all) the Kenya laws on online contracting.

A paper on eContracting-Security and Legal Issues⁴⁴ is also useful. The paper looks at the legal issues raised by the internet for contracts concluded online. In particular, it explores the aspect of electronic signatures. This study shall however address the issues of offer/invitation to treat and acceptance, as well the formality of ‘writing’ that have not been captured in the literature.

The paper by Andrew D. Murray⁴⁵ is relevant for comparative purposes. This paper looks into the approaches taken by the US and EU regarding the UNCITRAL Model laws on Electronic Contracts. The paper was however written in 2004, and as such may not capture recent developments on e-commerce, which this study shall seek to update.

⁴³Farhan AL-Farhan, ‘The Impact of the UNCITRAL Model Law on International Legal Systems’ www.cailaw.org/academy/magazine/uncitral.pdf accessed on 24 November, 2012.

⁴⁴Keith Hampson, ‘eContracting: Security and Legal Issues’ www.construction-innovation.info accessed on 24 November, 2012.

⁴⁵Andrew D. Murray, ‘Regulating Electronic Contracts: Comparing the European and North American Approaches’ www.works.bepress.com/cgi/viewcontent.cgi?article...andrew_murray accessed on 24 November, 2012.

An article on Electronic Contracts in the United States and the European Union⁴⁶ is also relevant for comparative purposes. It sets out the varying approaches to e-contracts in US and EU. The article was however written in 2001, and as such may not contain recent developments on electronic contracting, which this study shall input.

An article by Amelia H. Boss⁴⁷ is also relevant to the extent that it analyses the issues arising on electronic contracting. In particular it tries to address the question relating to what substantive rules of assent apply to the typical modes of contract formation in an electronic environment (shrink wrap, click wrap, and browse wrap). The paper does not however address the aspect of invitation to treat and requirement for ‘writing’ and ‘signature’, which this study will cover.

This study, in light of the above literature, will discuss the formation and formalities of online contracts in Kenya. In particular, it will address the essentials elements of invitation to treat, offer, and acceptance, as well the formal requirements of ‘writing’ and ‘signature’, in respect of online contracts.

1.6. Objectives of the Research

1.6.1 General Objective

To examine the Kenyan law relating to formation and formalities of online contracts, and

⁴⁶Martha L. Arias, ‘Internet Law - The Law of Electronic Contracts in the United States’ http://www.ibls.com/internet_law_news_portal_view.aspx?id=1913&s=latestnews accessed on 24 November, 2012.

⁴⁷Amelia H. Boss, ‘Electronic Contracting: Legal Problem or Legal Solution?’ http://www.unescap.org/tid/publication/tipub2348_part2iv.pdf accessed on 24 November, 2012.

in particular the essential contract elements of invitation to treat, offer and acceptance, as well as, in applicable situations, the formalities of ‘writing’ and ‘signature’.

1.6.2. Specific Objectives

The specific objectives of the research are to:

- (i) assess the challenges that internet poses as to essential contract elements of invitation to treat, offer and acceptance, in respect of online contracts in Kenya.
- (ii) assess the challenges that internet poses as to the formalities of ‘writing’ and ‘signature’ in respect of certain online contracts in Kenya.
- (iii) analyse how Kenyan law provides for essential contract elements of invitation to treat, offer and acceptance, in respect of online contracts.
- (iv) analyse how Kenyan law provides for formalities of ‘writing’ and ‘signature’ in respect of certain online contracts.

1.7. Research Questions

This study shall seek to answer the following questions:

- (i) How and to what extent does Kenyan law recognize online contracts?
- (ii) Does Kenyan law adequately (if at all) address the challenges that internet poses as to essential contract elements of invitation to treat, offer and acceptance, in respect of online contracts?
- (iii) Does Kenyan law (if at all) address the challenges that the internet poses as to formalities of 'writing' and 'signature', in respect of certain online contracts?
- (iv) Is there need for a substantive legislation or regulations that adequately address the challenges that the internet poses as to the above essential elements and formalities of contract, in respect of online contracts?

1.8. Hypotheses

The hypotheses of this study are as follows:

- (i) Kenyan law does recognize online contracts but does not adequately address the challenges the internet poses as to essential contract elements of invitation to treat, offer and acceptance, and where applicable the formalities of 'writing' and 'signature' in respect of online contracts.
- (ii) There is need for a substantive legislation to address the challenges that the internet

poses as to the above essential elements and formalities of online contract in Kenya.

1.9. Methodology of Research

In this study, library and internet research will be the methods used in collecting data. Library research will entail collecting various literature from the libraries in the University of Nairobi, especially the School of Law; the Supreme Court as well as the High Court Libraries; and legal practitioners' libraries. This method is appropriate because of the useful legislation, case law, international legal instruments and scholarly writings available in the mentioned libraries. Internet research shall be useful in the sense that most of the literature on this subject is available in the internet. In this regard, I shall look at sites that host legislations, case law, international legal texts and other legal scholarly writings.

It will be noted that this study utilises secondary, but not primary modes of data collection. This is mainly informed by the writer's view that the study is focused on problems regarding an already established legal scenario. The problem in this case is the internet, whereas the established legal scenario is the traditional rules of contracting that were developed at the pre-internet age.

1.10 Chapter Breakdown

Chapter One: Introduction

This contains the contents of the research proposal. These are: the background of the

problem; the statement of the problem; theoretical/conceptual framework; literature review; objectives of the study; research questions; assumptions or hypotheses; methodology; and this chapter breakdown.

Chapter Two: Formation and Formalities of Contracts in Kenya: An Overview

This chapter covers in brief the formation as well as formalities of contracts in Kenya. This is the basis of exploring the challenges that the internet poses as to the formation and, where applicable, formalities of online contracts in Kenya.

Chapter Three: Formation and Formalities of Online Contracts in Kenya: Challenges and the Law.

This chapter assesses the challenges that the internet poses as to the formation and formalities of online contracts in Kenya. As to formation, this study focuses on the essential elements of invitation to treat, offer and acceptance, and in respect of formalities of contract, the requirement for writing and signature in certain transactions.

This study also seeks to establish how (if at all) Kenyan law addresses the challenges. The relevant legislations regarding electronic transactions in Kenya are the Kenya Information and Communications Act ('KICA')⁴⁸ as well the Evidence Act⁴⁹. The Preamble of KICA provides that one of the overall objectives of the Act is to facilitate the development of

⁴⁸ Cap 411 A, Laws of Kenya.

⁴⁹ Cap 80, Laws of Kenya.

electronic commerce, which in this case is carried out by online contracting.⁵⁰ Part VII of the Evidence Act is dedicated to the admissibility and proof of electronic records in judicial proceedings. According to the Act, electronic records are admissible in evidence, as long as certain conditions are fulfilled.⁵¹

Chapter Four: Comparative Analysis

This chapter compares how other jurisdictions have provided for challenges mentioned in chapter Three. It covers the respective provisions under the United Nations (“UN”), United Kingdom (“UK”), United States of America (“USA”) and South Africa (“SA”). The above jurisdictions have been chosen so as to try and spread the comparative global platform as wide as possible, noting not to be too broad given the time limitation.

Under the auspices of the UN is the United Nations Commission on International Trade Law (“UNCITRAL”).⁵² UNCITRAL specializes in commercial law reform worldwide, and comes up with model laws to be adopted by member states.⁵³ The UNCITRAL texts that are relevant to this study are:⁵⁴ the 2005 UN Convention on the Use of Electronic

⁵⁰ The Preamble reads:

An Act of Parliament to provide for the establishment of the Communications Commission of Kenya, to facilitate the development of the information and communications sector (including broadcasting, multimedia, telecommunications and postal services) and **electronic commerce** to provide for the transfer of the functions, powers, assets and liabilities of the Kenya Posts and Telecommunication Corporation to the Commission, the Telkom Kenya Limited and the Postal Corporation of Kenya, and for connected purposes (*emphasis mine*).

Section 2 of KICA defines ‘electronic’ to mean relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

⁵¹ Section 106 B of the Evidence Act.

⁵² UNCITRAL, ‘About UNCITRAL’, http://www.uncitral.org/uncitral/en/about_us.html accessed on 24 November, 2012.

⁵³ *ibid*.

⁵⁴ UNCITRAL, ‘Electronic Commerce’ http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce.html accessed on 25 November, 2012.

Communications in International Contracts; the 2001 UNCITRAL Model Law on Electronic Signatures with Guide to Enactment; and 1996 - UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, with additional article 5 bis as adopted in 1998.

The UK, USA, and SA have taken steps to address the problems in this study. Thus, the UK has in place the Electronic Communications Act 2000 and Electronic Signatures Regulation 2002. On the other hand, USA has enacted the Uniform Electronic Transactions Act⁵⁵. South Africa has legislated on Electronic Transactions through the Electronic Communications and Transactions Act, 2002.⁵⁶

Chapter Five: Conclusion and Recommendations

In conclusion, this study gives a summary of the previous chapters and makes recommendations on the way forward (if need be).

⁵⁵ *ibid.*

⁵⁶ Acts Online, 'Communications' <http://www.acts.co.za/home.htm> accessed on 25 November, 2012.

CHAPTER TWO:

2.0. FORMATION AND FORMALITIES OF CONTRACTS IN KENYA: AN OVERVIEW

The starting point regarding the law applicable to contracts in Kenya is the Law of Contracts Act.⁵⁷ According to the Act, English Common Law of Contract, as modified by doctrines of Equity and Acts of Parliament of the United Kingdom, is applicable in Kenya.⁵⁸ Therefore to know where to find the law on formation and formalities of contracts, applicable in Kenya, one has to look at the English Common Law, which is found in judicial decisions.⁵⁹ Having said that, this study proceeds to briefly analyse the formation and formalities of contracts in Kenya.

2.1. Formation of Contracts

In order to form a contract, parties must first reach an agreement.⁶⁰ The agreement is reached when one party (offeror) gives an offer that is accepted by the party receiving the offer (offeree). In addition to the agreement, there must be intention to create legal relations, and consideration. Further, there must be certainty of terms and contractual capacity.⁶¹ In short, for there to be a contract, the essential elements of offer, acceptance, intention to

⁵⁷Cap 23, Laws of Kenya.

⁵⁸ Ibid, Section 2.

⁵⁹ Common Law is the body of law deriving from judicial decisions, rather than statutes or constitutions {Garner B.A., *Black's Law Dictionary* (8th edn, Thomson West) 293}.

⁶⁰HG Beale, *Chitty on Contracts, General Principles* (13th edn, Vol. 1, Sweet & Maxwell) 143.

⁶¹C Elliot.&F Quinn, *Contract Law* (7th edn, Pearson & Longman 2009)9.

create legal intentions, consideration, as well as certainty of terms and contractual capacity, need to be there. These elements are explained below.

2.1.1. The Offer

Offer is defined as an expression of willingness to contract on specified terms.⁶² The offer must be made with the intention (actual or apparent) that it is to become binding as soon as it is accepted by the person to whom it is addressed. In order for an offer to be valid, it must be communicated to the other party so that he may accept or reject it; the communication may be in any manner, that is, in writing, word, or by conduct; may be communicated to a particular person, group of persons, or to the whole world; must be definite in substance; and must be distinguished from an 'invitation to treat'.⁶³

Offers can unilaterally be made to whole world, so that acceptance is when a member of the general public acts upon it. The leading case of *Carlil v Carbolic Smoke Ball Co*⁶⁴ set the precedent that indeed offers can be made to the whole world. In that case, the defendants, who were manufacturers of 'smokeballs' published an advertisement stating that if anyone used their smokeballs for a specified time and still caught flu, they would pay that person £ 100. Mr. Carlil bought and used a smokeball from the defendants, but nevertheless succumbed to flu, and therefore claimed the £ 100 from the defendants. The defendants argued that it was not possible to make an offer to the whole world, an argument that was rejected by the court. It is therefore possible to address offers to the

⁶² Ibid 144.

⁶³ M Suf *Essential Contract Law* (2nd edn, Cavendish Publishing Limited 1997) 3.

⁶⁴ [1893] 1QB.

general public, acceptance to which is when the offer is acted upon by a member of the general public.⁶⁵

Offer is distinguishable from invitation to treat. Invitation to treat is commonly a communication by which a party is invited to make an offer.⁶⁶ This is because an invitation to treat is not made with the intention that it is to become binding as the person to whom it is addressed simply communicates his assent to its terms. A common example is the display of goods at the window shop which amounts to invitation to treat in that the customer picks the goods and proceeds to the cash counter to make an offer which is accepted by the shop by receiving the payment in exchange for the goods.

2.1.2. The Acceptance

A contract is not complete until the offer is accepted by the offeree indicating his unequivocal assent to its terms and therefore his willingness to be bound by the terms of the offer.⁶⁷ Acceptance is an unconditional agreement to all the terms of the offer.⁶⁸ In other words, acceptance is a final and unqualified expression of assent to the terms of an offer.⁶⁹ It means that the offer must set out clear terms in order for the offeree to clearly accept them. Should there be variation of the terms of the offer, then the same will not amount to acceptance. Usually, the acceptance will often be oral or in writing, but in

⁶⁵F Quinn & C Elliott, *'Contract Law'* (8thedn, Pearson Education Limited 2011) 13.

⁶⁶Supra note 4, pg 148.

⁶⁷Grubb A, *'The Law of Contract'* (2ndedn, Lexis Nexis Butterworths, 2003) pg 415.

⁶⁸Beale (n 60)24.

⁶⁹ibid158.

some other cases it may be by conduct such as delivering goods in response to an offer to buy.⁷⁰

The general rule is that for acceptance to be valid, it must be communicated to the offeror, unless the need for communication is waived by the offeror.⁷¹ It is only logical that the offeror should only be bound by an acceptance that was communicated. In the leading case of *Entores Ltd v Miles Far East Corporation*⁷², the plaintiffs, a company based in London, made an offer by telex to the defendants, a company based in Amsterdam who acted as agents for an American corporation. The defendants sent their acceptance of the offer by telex. The plaintiffs applied for leave to serve notice of a writ on the American corporation in New York. Their entitlement to do so turned on the answer to the question: where was the contract made? Was it when the defendants sent their acceptance by telex (i.e., in Amsterdam) or was it made when the telex was received on the plaintiff's machine (i.e., in London)? It was only if the contract was made in England that the court had jurisdiction to grant leave to serve out of the jurisdiction. It was held that the contract was formed when the communication of the acceptance was received by the plaintiffs in London so that the English courts had jurisdiction to grant leave to serve out of the jurisdiction.

⁷⁰ibid 24.

⁷¹McKendrick, *'Contract Law, Text Cases and Materials'* (4thedn, OUP 2010) 99.

⁷²[1955] 2 QB 327, CA.

2.1.3. Intention to Create Legal Relations

An agreement may not be recognized by court as legally binding if there is no intention on the part of the parties to create a contract.⁷³ The law does not proclaim the existence of a contract merely because of the mutual promises.⁷⁴ This requirement elevates contractual promises over other promises that persons may usually engage in their everyday endeavours. Thus, contractual promises must be made with more seriousness noting that the same will give rise to binding contracts enforceable by courts. In order to deduce the intention, the circumstances of the case would be assessed.⁷⁵ Not unless there is an express denial of contractual intention by the parties, agreements of commercial or business nature, are deemed to contain the requisite intention to create legal relations.⁷⁶ This is not the case in domestic agreements.⁷⁷

Thus, agreements between husband and wife; as well as parent and child do not normally amount to binding contracts. If, for example, a husband makes arrangements to make monthly allowance to his wife for her personal enjoyment, it is not taken to contemplate legal relations.⁷⁸ In *Balfour v Balfour*⁷⁹ the defendant, who was a civil servant abroad, had promised his wife (who would not accompany him abroad because of her health) that he would pay her a monthly maintenance of £ 30. The wife sued for breach of this agreement after failure to honour the promise. The Court of Appeal held that even though

⁷³RW Hodgkin, 'Law of Contract in East Africa' (Kenya Literature Bureau 2007) 62.

⁷⁴MP Furmston, 'Cheshire, Fifoot and Furmston's Law of Contract' (15thedn, OUP 2007) 142.

⁷⁵Hodgin (n73)62.

⁷⁶Ibid.

⁷⁷ibid 63.

⁷⁸Furmston (n74) 144.

⁷⁹[1919] 2 KB 571.

consideration was present, no legal relations had been contemplated and hence the parties had not reached a binding contract.

2.1.4. Consideration

As a general rule, a promise is not binding as contract unless the same is either made in a deed or supported some consideration.⁸⁰ According to Grubb, consideration is provided by the promisee 'paying for' the promise, by doing, or promising to do, or forbearing, or promising to forbear from doing, something in return for it.⁸¹ It has also been defined to mean the signifying of some benefit or advantage going to one party or some loss or detriment suffered by the other party.⁸² For instance, in a motorvehicle sale contract, the consideration would be the vehicle on one hand and the money or price paid, on the other.

Case law has come up with rules that govern consideration-Firstly, consideration must move from the promisee.⁸³ In *Tweddle v Atkinson*⁸⁴, William, the son of John Tweddle and the daughter of William Guy intended to marry. John Tweddle agreed with William Guy in writing that both should pay money to the husband, William Tweddle, on the occasion of his (William Tweddle) marriage to Guy's daughter. William Guy died before paying money to William Tweddle. Guy's executors refused to pay the money to Tweddle, who in turn sued the executors of the estate. William Tweddle's case failed

⁸⁰Beale (n60) 253.

⁸¹Mckendrick (n61) 214.

⁸²Hodgin (n73) 40.

⁸³S Fafinski&E Finch, 'Contract Law' (2ndedn, Pearson and Company Limited 2010) 34.

⁸⁴(1861) 121 ER 762.

because, even though he was named in the agreement, he had not himself given consideration for the agreement. In my view, since the contract was between John Tweddle and William Guy, the suit ought to have been brought by John Tweddle, who was a party to the agreement. William Tweddle was just a subject in the agreement and not a party.

Secondly, consideration must not be past.⁸⁵ In *Re McArdle*⁸⁶, a son and his wife lived in his mother's house. On her death, the house was to pass to the son and three other children. The son's wife paid for both repairs and improvements to the property. The mother then made her four children sign an agreement to pay her daughter-in-law back from the proceeds of her estate. The mother died and the children refused to pay. The daughter-in-law's claim failed because she had already performed the act before the promise to pay had been made, and as such her consideration was past and the promise to pay unenforceable. Thus, if the promise to make reimbursements for the repairs was made before the repairs were done, then the same would have been binding.

Lastly, the consideration must be sufficient but need not be adequate.⁸⁷ The court will not concern itself with the adequacy of consideration as long as it has some value sufficient to render the promise enforceable.⁸⁸ This means that if the value of a piece of land is K.Shs 20 Million, but the parties agree on a figure of K.Shs 5 Million, the courts would not interfere with the same on account of inadequacy of consideration. In any case,

⁸⁵Fafinski & Finch (n83) 34.

⁸⁶[1951] Ch 669.

⁸⁷Fafinski & Finch (n83) 34.

⁸⁸ibid 38.

freedom of contract empowers the parties to voluntarily agree on the price. In *Thomas v Thomas*⁸⁹, a husband expressed a wish that his wife should be allowed to remain in the house they were living in, after his death. This was not written in his will. After his death, his executors allowed his wife to stay at a rent of £1 per year. They later tried to dispossess her. The court held that the payment of ‘peppercorn’ rent was sufficient consideration for the contract to be enforceable. However, the husband’s wish, alone, would not have been sufficient consideration for the contract to be enforceable.

2.1.5. Certainty

In order for a contract to be binding, an agreement must not be vague or obviously incomplete.⁹⁰ An example of a vague or uncertain contract is one that does not specify the price of goods or service. Thus, an agreement based on a promise to pay ‘a West End salary to be mutually arranged between us’ is vague and not enforceable. In *Loftus vs Roberts*⁹¹, Roberts engaged an actress to appear in a play at ‘a West End salary to be mutually arranged between us’. The court held that there was no binding contract between them because the provision concerning payment was too vague. Thus, if the Roberts and the actress had agreed on a definite salary, the agreement would have been binding.

Courts, however, would usually look for ways of making an apparently vague or incomplete agreement more certain by: use of provisions for clarifications; terms implied

⁸⁹(1842) 2 QB 851.

⁹⁰C Elliot & F Quinn, *Contract Law* (7th edn, Pearson Longman 2009) 20.

⁹¹(1902) 18 TLR 532, 53.

by statute; previous course of dealing; reasonableness; custom; and removal of minor uncertain terms.⁹²

Certain contracts may leave out details, but contain provisions stating how they are to be clarified.⁹³ Thus, a lease contract may not set out a definite amount of rent to be paid by the leasee in future, but may provide that the amount of rent will be determined by a valuer to be jointly appointed by the lessor and leasee.

Certain statutes imply terms on contracts so that even if the same are not expressly agreed upon by the parties, the provisions of statute will be binding.⁹⁴ An example is the Employment Act⁹⁵ which at Part V sets the minimum conditions that must be contained in either written or oral employment contracts.

Where the parties have had previous dealings, their past agreements may be used to clarify uncertain terms in a contract.⁹⁶ Their past dealings will give an indication of what they ought to have included in the contract to make it more certain.

Sometimes, courts will rely on the principle of reasonableness to clarify vague terms.⁹⁷ In *Sudbrook Trading Estate Ltd –vs- Eggleton*⁹⁸, leaseholders had the option to buy the premises at such price as may be agreed upon by two valuers, the parties able to nominate

⁹²Elliot& Quinn (n90) 57.

⁹³ibid 57.

⁹⁴Ibid.

⁹⁵Act No. 11 of 2007, Laws of Kenya.

⁹⁶Elliot& Quinn (n90) 57.

⁹⁷Ibid.

⁹⁸ [1983] 1 AC 444, 55, 57

one each. The landlord refused to appoint a valuer, and claimed that the agreement was not binding because there was no provision detailing how the price would be reached if the two valuers disagreed. The House of Lords disagreed, stating that the important point was that the price was to be set by professional valuers. Such individuals would be obliged to apply professional and, by implication, reasonable standards in setting the price, and therefore the option was actually a definite agreement to sell at a reasonable price. As such the condition that each party should appoint one of the valuers was merely ‘subsidiary and inessential’.

Apparent vagueness can also be cured by custom which develops over time in course of transactions.⁹⁹ The courts will in this case be giving legal effect to a practice that over time has come to be acceptable in a particular industry.

Courts may also clarify vague contracts by use the ‘officious bystander’ test.¹⁰⁰ In this case, the courts asks whether a person observing the making of a contract would have believed that a particular term was part of a contract.¹⁰¹ Thus, if that person would have believed so, then the term becomes part of the contract.

Finally, in exceptional circumstances, courts remove minor uncertain terms which may not only be vague, but meaningless.¹⁰² Upon removal of the minor terms, the rest of

⁹⁹Elliot & Quinn (n90) 57.

¹⁰⁰ibid.

¹⁰¹ibid.

¹⁰²ibid.

contract would be enforceable.¹⁰³ In this case, drafters of contracts would usually put in a provision that in the event that a particular clause of a contract is found to be uncertain, the same should be removed and the remaining clauses enforced.

2.1.6. Capacity

There are certain categories of persons whose power to make contracts is limited by law, namely minors, insane or drunk persons, and corporations.¹⁰⁴ Other than contracts for supply of necessities, contracts with minors are not binding.¹⁰⁵ Regarding insane or drunk persons, contracts with such persons will be valid unless, at the time of contracting, the person is incapable of understanding the nature of the transaction and the other party knows this.¹⁰⁶ Such contracts would be voidable at the instance of the party who was insane or drunk at the time of contracting.¹⁰⁷ The ability of corporations to contract depends on its stated activities.¹⁰⁸ A corporation must act within the limits of its Memorandum of Association.¹⁰⁹ If it acts beyond the limits, then its actions will be *ultra vires* and void.¹¹⁰ This informs the reason why when drawing constitutions of corporations, legal practitioners set out objects that are as wide as possible.

¹⁰³ *ibid.*

¹⁰⁴ *ibid* 69.

¹⁰⁵ *ibid* 79.

¹⁰⁶ *ibid* 86.

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid* 76..

¹⁰⁹ G Applebey, 'Contract Law' (Sweet & Maxwell 2001)184.

¹¹⁰ *ibid.*

2.2. Formalities of Contracts

The general rule is that no formality is required to contract.¹¹¹ Hence, contracts can be made informally, in that, no writing or other form is required.¹¹² However, there are statutory exceptions that require that certain contracts must be made or evidenced in writing and even signed, for the same to be valid.¹¹³ The reasons why formalities exist are as follows: they create evidence of the transaction; they may caution and deter parties from making hasty and premature contracts; they may create a standardized form of transactions given that the transactions are stored in written form; and that they may be used to protect the weaker parties in a transaction.¹¹⁴ Examples are contracts for disposition of interests in land and contracts of guarantee, which must be made in writing and signed by the parties.¹¹⁵

Further, the Land Registration Act¹¹⁶ prescribes that every instrument effecting any disposition of land shall be executed by each party consenting to it.¹¹⁷ The execution is by way of appending a person's signature or affixing the thumbprint or other mark as evidence of personal acceptance of that instrument.¹¹⁸ Disposition is defined to include an agreement to sell land, whereas instrument includes any writing that affects legal or equitable rights.¹¹⁹

This means that a land sale agreement is an instrument that is used for disposition of land.

¹¹¹McKendrick (n61) 27.

¹¹²Beale (n60) 379.

¹¹³McKendrick (n61) 27.

¹¹⁴Beale (n60) 379.

¹¹⁵ Law of Contracts Act (Cap 23, Laws of Kenya), Section 3.

¹¹⁶ Act No. 3 of 2012, Laws of Kenya.

¹¹⁷ibid, Section 44(1).

¹¹⁸ibid, Section 44(2).

¹¹⁹ ibid, Section 2.

The land sale agreement must therefore be signed by the parties consenting to the sale. It goes without saying that only written agreements can be signed.

‘Writing’ and expressions referring to writing is defined to include printing, photography, lithography, typewriting and any other modes of representing or reproducing words in visible form.¹²⁰ On the other hand, to “sign”, in relation to a contract, is defined to include the making one’s mark or writing one’s name or initial on the instrument as an indication that one intends to bind himself to the contents of the instrument.¹²¹ In relation to a body corporate ‘signing’ includes (a) signature by an attorney of the body corporate duly appointed by a power of attorney registered under the Registration of Documents Act¹²²; or (b) the affixing of the common seal of the body corporate in accordance with the constitution or the articles of association of the body corporate.¹²³

2.3. Conclusion

In summary, for a contract to be formed, the essential elements of offer, acceptance, intention to create legal intentions, consideration, as well as certainty and capacity, ought to be present. However, regarding online contracting, and as this study discusses in chapter three, it is the elements of offer, as distinguished from invitation to treat, and acceptance, that are affected by online contracting.

¹²⁰ Interpretation and General Provisions Act (Cap 2, Laws of Kenya), Section 3(1).

¹²¹ Supra note 37, Section 3(6).

¹²² Cap 285, Laws of Kenya.

¹²³ Cap 23 (n 115).

The common formalities of contract are that of 'writing' and 'signature'. Even though not all contracts should be written and signed, it is more difficult to prove oral agreements than written ones. Further, it is easier to ascertain terms agreed by the parties, if the agreement is reduced into writing. Written agreements would then have to be signed so as to indicate one's intention to be bound by the contract. As such, agreements of significant nature are often written and signed, even though the law does not make it mandatory. As this study discusses in chapter Three, the challenge arises as to how to satisfy these formalities while contracting online.

CHAPTER THREE:

3.0 FORMATION AND FORMALITIES OF ONLINE CONTRACTS IN KENYA: CHALLENGES AND THE LAW

3.1. The Challenges as to Formation and Formalities of Online Contracts:

3.1.1. Formation of Online Contracts

As observed by Marco van der Merwe, online offer and acceptance is not a simple matter by any means.¹²⁴ The reasons are because the rules pertaining to offer and acceptance for defined contracts are complicated; and that the rules applicable to existing contracts originated at a time when modern forms of contracting were a far-off glimmer on the horizon. Merwe is thus of the view that these rules have to be adapted to accommodate newer forms of communication which include internet communications.

It is important to ascertain when an offer, as distinguished from invitation to treat, has been made in respect of online contracts. This is because, as stated, an offer is made with the intention, actual or apparent, that it is to become binding as soon as it is accepted by the person to whom it is addressed.¹²⁵ On the other hand, invitation to treat is not made

¹²⁴Merwe (n42).

¹²⁵Beale (n60)148.

with the intention that it shall be binding if the addressee assents to its terms.¹²⁶ It is therefore necessary to distinguish online offers from invitations to treat.

Usually, the display of goods in a shop window, would amount to an invitation to treat, as opposed to an offer.¹²⁷ This is because the customer will pick the goods and head to the pay counter and make an offer to buy the same. The shop will accept his or her offer whereupon the customer will pay for the goods. There can, however, be uncertainty over whether the display of goods over an internet website constitutes an invitation to treat or an offer. This is more so in a situation where the seller has limited stock of goods to dispatch or where the seller is prepared to sell to a limited class of persons.

It is also necessary to differentiate between an offer and acceptance for online contracts. This is because an offer that has not been accepted cannot give rise to a binding contract.¹²⁸ So, what does the act of clicking on the 'OK' icon on a website amount to?¹²⁹ Does it constitute acceptance of an offer to provide a service or a customer's offer to contract? Should it be an offer, then no contract will have been formed. However, should the same amount to an acceptance, then assuming that there was consideration and intention to create legal relations, then a binding contract will be formed.

¹²⁶ *ibid* 144.

¹²⁷ Smith (n9) 811.

¹²⁸ A Grubb, *The Law of Contract* (2nd edn, Lexis NexisButterworths 2003) 415.

¹²⁹ Lovells, 'E-Finance: Law and Regulation: Contracting on-line' (Lexis Nexis).

While there have been no reported cases in Kenya, there have been incidences of display of wrong prices on the UK's Amazon.co.uk website. Amazon.co.uk was once shut down over lunchtime following a rush of orders for pocket computers selling at £ 7.32, instead of the usual price of £ 192.¹³⁰ In this case, customers received immediate and automatic confirmation of their 'purchases' by e-mail, and soon thereafter the site was pulled down and the product withdrawn. There has been no consensus as to whether or not binding contracts arose. My view is that once the confirmation e-mail was received, there was acceptance of the customer's offer, and as such Amazon.co.uk was bound to supply the products at the displayed price, no matter how unrealistically low the prices were.

Amazon's position was that its online Terms and Conditions state that there is no legal contract to sell to customers until Amazon sends them an e-mail confirmation that the item has been dispatched. No claim was however brought against Amazon and as such the court's view in such a situation is not ascertainable. Were a similar situation to arise in Kenya, and in particular where there are no Terms and Conditions similar to that of Amazon, what would be the legal position?

Knowing the time that the contract was concluded is of paramount importance because this is when the contractual obligations and rights are deemed to arise. Therefore, what time is an online contract concluded? Is it the time of receipt or of sending the

¹³⁰Haggart G, ' "Mistakes, I've made a few...":another e-tailer gaff,' LNB News of 21 March 2003 41 <http://www.ebldirect.com/eb/siteinfo/pricingFS.htm> (Lexis Nexis).

acceptance? When is an online order deemed to have been placed?¹³¹ Is it when it is received or when it is accepted? Is it when it enters a computer network or when it is drawn to the attention of a particular person designated as the recipient? What if the seller is on holiday and the email orders were not checked? How about if there is insufficient stock and the customer was not warned about delays?

There are views that because of the borderless nature of the internet, more often than not, online contracts are international transactions.¹³² I do not agree with this view given that there are numerous transactions that are concluded over the internet within the domestic borders. Nonetheless, the place of contract formation is of interest to international transactions. In the absence of express provisions by the parties or applicable international convention, how is the place of formation of the contract determined?

Further, regarding the place of contract formation, the international element is complicated in cases involving corporate transactions in particular where the computer of the offering company that first receives a reply may be located in one jurisdiction. The reply may then be transmitted automatically to a subsidiary or holding company located in a different jurisdiction. Therefore, the question that arises is, is the contract formed where the acceptance is sent, where it is received at the place of re-transmittance, where it is received at its last destination, or where it reaches the mind of the offeror?

¹³¹Jacobson (n8) 3.

¹³² *ibid.*

In electronic contracting, the so called ‘shrink wrap’, ‘click wrap’ and ‘browse wrap’ contracts have raised fundamental questions about assent or acceptance in contracts.¹³³ Firstly, in a ‘shrink wrap’ contract, for example, when purchasing off-the-shelf software, when the purchased product is received, it comes with additional terms and conditions in the packaging or in the accompanying documentation. Secondly, in a ‘click-wrap’, the purchaser is required to click “I agree” before the transaction will continue, the installation will proceed or the user will gain access to the web site. Thirdly, in the ‘browse wrap’ contract, the user will visit the pages of a web site where terms and conditions are posted that purport to bind anyone who uses the web site or its services. In particular, the question is about what types of conduct constitute assent or acceptance to terms and conditions. In particular reference to ‘shrink wrap’ contracts, how should one treat the terms that are not proposed or disclosed until after the user has already agreed to go forward with the transaction and has tendered the required consideration?

As stated, it is a general rule that for acceptance to be valid, it must be communicated to the offeror, unless the need for communication is waived by the offeror.¹³⁴ Thus, communication is key to acceptance of an offer. As such, when is acceptance deemed to have been effectively communicated over the internet? Should there be an application of the rule regarding instantaneous communication, so that receipt or deemed receipt by the offeror is key? On the other hand, should the postal rule be applied, so that the dispatch of the accepting e-mail or response form is effective?

¹³³ Boss (n47).

¹³⁴ McKendrick (n71) 99.

3.1.2. Formalities of Online Contracts

As stated, the general rule is that no formality is required to contract.¹³⁵ There are however statutory exceptions that require that certain contracts must be made or evidenced in writing and even signed, for the same to be valid.

‘Writing’ has been defined to include printing, photography, lithography, typewriting and any other modes of representing or reproducing words in visible form.¹³⁶ There is no doubt that in traditional paper-based contracting, ‘writing’ can easily be carried out on a piece of paper. The issue that arises is whether online contracts can amount to written contracts. Would it be written contracts because the definition of ‘writing’ includes any other modes of or representing words in a visible form?

In traditional contracting, a party will simply indicate his or her assent to the terms of the contract by affixing his or her signature to a piece of paper. As defined ‘signature’ entails the making of one’s mark or writing one’s name or initial on the instrument as an indication that one intends to bind himself or herself to the contents of the instrument.¹³⁷

In relation to a body corporate, ‘signing’ includes (a) signature by an attorney of the body corporate duly appointed by a power of attorney registered under the Registration of Documents Act¹³⁸; or (b) the affixing of the common seal of the body corporate in accordance with the constitution or the articles of association of the body corporate.

¹³⁵Fafinski & Finch (n83) 34.

¹³⁶ Interpretation and General Provisions Act (Cap 2, Laws of Kenya), Section 3(1).

¹³⁷ Cap 23 (n57), Section 3(6).

¹³⁸ Cap 285, Laws of Kenya.

How then would the requirement for signature be fulfilled in respect of online contracts? Would it be sufficient that someone made a mark or typed out his or her name or initials at the bottom of the e-mail or contract? But, this would not be as unique as a handwritten signature that seeks to distinguish the signature as that of the person signing. Besides, the making of a mark or typing out of one's name or initials in online contracts can easily be challenged as having been forged. This is because, unlike where a pen is used to create one's signature on a paper, there is nothing unique or authentic about just typing a mark or initials on online documents-it can easily done by an impostor. In my view therefore, the courts would not add a lot of weight to this kind of online signing as compared with the traditional paper-based signature that is usually unique.

3.2. The Law on Formation and Formalities of Online Contracts

The relevant legislations regarding electronic transactions in Kenya are the Kenya Information and Communications Act ('KICA')¹³⁹ as well the Evidence Act¹⁴⁰. The preamble to the KICA provides that one of the overall objectives of the Act is to facilitate the development of electronic commerce, which in this case is carried out by online contracting.¹⁴¹ Under KICA, the Communications Commission of Kenya ("CCK") is bestowed with responsibility of promoting electronic transactions.

¹³⁹ Cap 411 A (n48).

¹⁴⁰ Cap 80 (n49)..

¹⁴¹ The Preamble reads:

An Act of Parliament to provide for the establishment of the Communications Commission of Kenya, to facilitate the development of the information and communications sector (including broadcasting, multimedia, telecommunications and postal services) and **electronic commerce** to provide for the transfer of the functions, powers, assets and liabilities of the Kenya Posts and Telecommunication Corporation to the Commission, the Telkom Kenya Limited and the Postal Corporation of Kenya, and for connected purposes (emphasis mine).

KICA states that the functions of CCK in relation to electronic transactions are to, (a) ensure use of reliable electronic records with a view of facilitating electronic transactions; (b) eliminate barriers to electronic commerce, for example, those relating to uncertainties over writing and signature requirements, with a view of facilitating electronic commerce; (c) promote confidence in the public about the integrity and reliability of electronic records and transactions; (d) foster the development of electronic commerce through the use of electronic signatures; (e) promote efficient public sector services by use of reliable electronic records; and (f) develop frameworks for minimization of forged electronic records and fraud in electronic commerce and transactions.¹⁴²

Part VII of the Evidence Act addresses the issue of the admissibility and proof of electronic records in judicial proceedings. According to the Act, electronic records are admissible in evidence, as long certain conditions are fulfilled.¹⁴³ This in my view is meant to facilitate electronic commerce, including online contracting, by promoting public confidence about electronic transactions.

It is therefore apparent that KICA and Evidence Act have the objective of promoting electronic commerce. This study shall however examine if this objective has been adequately provided for in the Acts, in this case relating to formation and formalities of electronic contracting.

Section 2 of KICA defines ‘electronic’ to mean relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

¹⁴²Cap 411A (n48) section 83C.

¹⁴³Cap 80 (n49)section 106 B.

3.2.1. Formation of Online Contracts

Regarding formation and validity of contracts, KICA states that unless otherwise provided by the parties, offer and acceptance may be expressed by means of electronic messages.¹⁴⁴ Further that contract shall not be denied validity and enforceability solely on the ground that it was created by use of electronic message(s).

Yes, KICA does recognise electronic offers and acceptance. That is not a big deal though. The big deal is with the manner in which the internet can complicate the applicability of the traditional rules on contract formation. Firstly, KICA does not make an attempt to distinguish between an offer and invitation to treat, when it comes to display of goods on a website. It could be said that the same has been left to interpretation using the usual contractual rules. However, the traditional rules of interpretation of contracts cannot be suitable for online shopping, in my view. This is because in the physical world, a customer picks the goods displayed on the shop window and heads to the counter to make an offer to buy the goods. If the shopkeeper accepts his or her offer, he or she will accept the customer's payment in exchange for the goods.

On the other hand, in online shopping, there is no opportunity to appear before the shopkeeper. On clicking the 'OK' icon and paying for the goods by electronic means, the deal is as good as done. What happens if, because websites can be viewed by many people at the same time, there are numerous 'purchases' by customers, upon which there is no sufficient stock? These are matters that should be legislated on, in my view. Thus,

¹⁴⁴Cap 411A (n48) section 83 J.

given the peculiar nature of online shopping, there should be a substantive legislation to the effect that display of goods on a website amounts to an invitation to treat so that when the customer clicks the 'OK' icon, he or she will be making an offer. Should there be sufficient stock, the seller will accept the offer by dispatching or alerting the customer to collect the goods. In case of insufficient stock, the seller will not be liable for matters that are beyond his or her control, but should then refund the payments or restock his or her shop at the discretion of the customer who should otherwise be refunded for any payments made.

Secondly, KICA does not specify the place of contract formation. This is key, particularly regarding the jurisdiction that governs the contract, where no express specification is made. Is it at the place of sending or receipt of acceptance? Since electronic communications are instantaneous, and that receipt is key to communication of acceptance, it should be substantively provided that it is the place of receipt that is the place of contract formation. There is no need of leaving it to judicial interpretation when there is no harm in specifying.

KICA also attempts to address the issue of communication of offer or acceptance in electronic transactions. It states that, unless otherwise agreed, acknowledgement of receipt may be given by any communication, automated or otherwise, by the addressee; or by any conduct of the addressee sufficient to indicate to the originator that the electronic communication has been received.¹⁴⁵

¹⁴⁵ibid section 83M (1).

Further, where stipulated by the originator that electronic record shall only be binding on receipt of acknowledgement of such electronic record, then the electronic record shall be deemed to have never been sent by the originator, unless such acknowledgment has been received.¹⁴⁶ Where not stipulated, and no acknowledgment has been received, the originator may give notice to the addressee stating that no acknowledgment has been received and specifying a reasonable time for receipt of the acknowledgment, non-compliance of which entitles him or her to treat the electronic record as having not been sent.¹⁴⁷

It is difficult to relate the above provision to a communication of acceptance in a contract situation. The provision is couched in a manner that is not specific to contract formation, but general electronic communication. Nonetheless, what I understand is that that KICA does not prescribe the rule that is applicable to electronic communication. It neither states that the rule regarding instantaneous communication nor postal rule is applicable. It leaves it open to freedom of contract, so that a party may chose to stipulate that an electronic record is only binding on him or her upon receipt. The party may as well not stipulate as such, but then is at liberty to notify the other party that he must receive the electronic communication within a reasonable time if he or she is to be bound. There is need for certainty. In my view, because electronic communications are instantaneous, the rule regarding instantaneous communication should be applicable so that it is only upon receipt of the communication that the recipient is bound. It would even be appropriate, in

¹⁴⁶ibid Section 83 M (2).

¹⁴⁷ibid Section 83 M (3).

my view, if a provision in this regard is made with specific reference to electronic contracting and even endorsed in the Law of Contract Act.

The legal issues raised by the so called ‘shrink wrap’ contracts have not been addressed by KICA. As stated, in a ‘shrink wrap’ contract, for example, when purchasing off-the-shelf software, when the purchased product is received, it comes with additional terms and conditions in the packaging or in the accompanying documentation.¹⁴⁸ Should there be legal recognition of terms that are not proposed or disclosed until after the user has already agreed to go forward with the transaction and has tendered the required consideration? In my view, terms that one has not been given an opportunity to scrutinize before making a purchase should not be legally binding on the customer. Thus, an online purchaser should be able to read the terms of the transaction before proceeding to do the purchase. These terms should be clearly stipulated to avoid uncertainty.

3.2.2. Formalities of Online Contracts

While giving powers to the Cabinet Secretary to prescribe otherwise, KICA does not apply to any rule or law that requires writing or signatures in, (a) the making of a will; (b) negotiable instruments; and (c) title documents. So far, no regulations to the contrary have been made by the Cabinet Secretary, and as such electronic transacting is not legally recognized for the mentioned items. This in my view goes against the objective of the KICA, that is, promotion of electronic commerce by eliminating barriers resulting from

¹⁴⁸Boss (n47).

requirements for writing and signature.¹⁴⁹ In any case, about four years later after the enactment of the legislation, the Cabinet Secretary ought to have made appropriate regulations.¹⁵⁰

Nonetheless, KICA goes on to stipulate that where any law provides that information or any matter shall be in writing, then, such requirement shall be deemed to have been satisfied if such information or matter is, (a) made available in electronic form; and (b) accessible for use later.¹⁵¹ On the face of it, any legal requirement for writing shall be satisfied if a document is produced in an electronic form as in the case of online contracts. This may also boost my argument that creation of documents online amounts to representations of words in visible form and thus meet the definition of what ‘writing’ is. As stated, ‘writing’ has been defined to include printing, photography, lithography, typewriting and any other modes of representing or reproducing words in visible form.¹⁵²

However, as stated, KICA has ruled out the application of electronic writing or signature in respect of wills, negotiable instruments and documents of title, thus diminishing the importance of recognition that electronic representation of words amount to writing. Further, ‘writing’ usually goes along with the requirement for signing. So, even if electronic contracts are recognised as being written contracts, how will the accompanying requirement for ‘signature’ be satisfied?

¹⁴⁹ Cap 411A (n48) section 83 C (b).

¹⁵⁰ The amendment to KICA was made in 2009 vide Kenya Communications (Amendment) Act, No. 1 of 2009.

¹⁵¹ Cap 411 A (n48) section 83 G.

¹⁵² Cap 2 (n136)..

KICA allows the use of advanced electronic signature to be affixed in a manner prescribed by the Cabinet Secretary, upon which any legal requirement for authentication using a signature shall be deemed to have been satisfied.¹⁵³ According to KICA, an advanced electronic signature means an electronic signature which: (a) is linked to the signatory in a unique way; (b) can identify the signatory; (c) is created by means that the signatory can maintain under his sole control; and (d) is linked to the data to which it relates and in such a way that any change to the data is detectable.¹⁵⁴

Similarly, the exemption of wills, negotiable instruments and documents of title to the applicability of the Act, in my view, also negates the attempt by KICA to satisfy any legal requirement for ‘signature’ by use of advanced electronic signature in online contracts. Further, as stated, the advanced electronic signature should be affixed in the manner prescribed by the Cabinet Secretary.¹⁵⁵ The Minister therefore ought to make regulations prescribing the manner of affixing the advanced electronic signature. This has not happened so far, rendering this provision unimplementable. But I wonder why it was left to the Cabinet Secretary to prescribe on how a signature should be affixed! The manner of affixing the signature is rather obvious. The same is affixed after the writing in a manner that indicates one’s intention to be bound.

There also seems to be some unnecessary duplication that creates some variation in what amounts to an advanced electronic signature. Whereas section 2 of KICA defines what an advanced electronic signature is, section 83O prescribes the requirements that a reliable

¹⁵³Cap 411A (n48) sections83O(1) and 83P.

¹⁵⁴:ibid section 2.

¹⁵⁵:ibid, section 83P.

advanced electronic signature must meet. As stated, section 2 of KICA defines an advanced electronic signature to mean an electronic signature which, (a) is linked to the signatory in a unique way; (b) can identify the signatory; (c) is created by means that the signatory can maintain under his sole control; and (d) is linked to the data to which it relates and in such a way that any change to the data is detectable. On other hand, section 83O provides that a reliable advanced electronic signature must, (a) be generated through a signature-creation device; (b) be created by data that are solely linked to the signatory; (c) be created by data that is under the sole control of the signatory; (d) enable detection of subsequent alterations to the signature; and (e) enable detection of subsequent alteration of information that the signature relates to. Whereas, it may be assumed that an advanced electronic signature is generated by a signature-creation device, it would, in my view, be appropriate to state so in section 2 of the Act, just as stated in section 83O. Otherwise, I am of the view that, it would have been sufficient to make the definition of an advanced electronic signature in section 2 of the Act, only, without giving a further definition in section 83O.

In what appears to have been lack of clarity in the minds of the drafters, the legislation goes on to give discretion to the Cabinet Secretary, in consultation with CCK, to make regulations for electronic signatures.¹⁵⁶ Does it now mean that there is a distinction between the advanced electronic signature and the electronic signatures anticipated? Why are there separate provisions for the advanced electronic signatures, from those of electronic signatures, and yet the advanced electronic signature is a form or electronic

¹⁵⁶Ibid section 83R.

signature? In any case, these regulations have not been made by the Cabinet Secretary, rendering the use of electronic signatures non-operational.

The Evidence Act provides that, other than in a case of a secure signature, there must be proof that an electronic signature is that of the subscriber.¹⁵⁷ In order to prove this, the court may direct that the person or the certification service provider produces the electronic signature certificate; or that any other person applies the procedure stipulated in the electronic signature certificate to verify the electronic signature purported to have been affixed by that person.¹⁵⁸ Firstly, what is this secure signature that must not be proved in court? Secondly, are there certification service providers in Kenya?

The Evidence Act does not prescribe what amounts to a secure signature. On the other hand, the electronic signatures, including the advanced electronic signature, anticipated by KICA, are meant to be secure. What then is this unsecure electronic signature that needs proof? Is it an electronic signature that is not produced by a signature-generating device, like typing out ones names after the text? There is need for clarity on this.

Certification services providers in Kenya are supposed to be licensed by CCK.¹⁵⁹ KICA defines “certification service provider” to mean a person who has been granted a licence, by CCK, to issue a digital signature certificate.¹⁶⁰ Now, ‘digital signature’ has been introduced. Is it the same as an electronic signature, or a form of an electronic signature?

¹⁵⁷Cap 80 (n49) section 106C.

¹⁵⁸:*ibid* section 10 D.

¹⁵⁹Cap 411A (n48) section 83E.

¹⁶⁰:*ibid* section 2.

This in my view is a form of electronic signature since the word ‘electronic’ includes digital capabilities.¹⁶¹ Therefore, does it mean the certification service providers cannot issue certificates for other forms of electronic signatures? They should be able to. This needs to be clarified. It can be said that in so far as there are no licensed certification service providers in Kenya and hence the evidential value of electronic signatures is still in limbo.

3.3.Conclusion

In summary, whereas Kenyan law has given legal recognition to online written offers and acceptance, the same has not adequately addressed the complications that internet poses to the application of the traditional rules of contract formation. This is particularly in respect of the distinction between offer and invitation to treat for display of goods on websites; the applicable rule regarding communication of acceptance; the place of contract formation; and the issues raised by the so called ‘shrink wrap’ contracts.

Further, in as much as Kenyan law recognises online written contracts, the accompanying requirement for signature for certain contracts can still not be achieved legally. This is because of the lack of regulations as well as certification service providers to facilitate the implementation of the provisions on electronic signatures.

¹⁶¹ibid.

As noted, there have been no reported cases in Kenya regarding disputes arising from online contracts. Common law has neither had a chance to address issues in respect of online contracts. Common law would have had a chance had the dispute regarding display of wrong prices on Amazon.uk, gone to court. This could be because use of internet in commercial transactions, or otherwise, is relatively new, and is yet to earn full acceptance as a platform for contracting. Parties would thus prefer to contract using the traditional paper-based agreements. This is therefore a grey area that in the view of the writer will in the near future attract litigation.

The next chapter discusses and analyses on comparative basis English law and international law relating to electronic transactions that Kenya is a signatory to as well as the law in other jurisdictions.

CHAPTER FOUR:

4.0 COMPARATIVE ANALYSIS

This chapter is dedicated to comparing the Kenyan situation with those of the UN Commission on International Trade Law (“UNCITRAL”), The United Kingdom (“UK”), United States of America (“US”) and South Africa (“SA”).

As stated, UNCITRAL is a body of the UN specializing in commercial law reform worldwide, and comes up with model laws to be adopted by member states.¹⁶² The UNCITRAL texts that are relevant to formation of electronic contracts are: the 2005 UN Convention on the Use of Electronic Communications in International Contracts (“The Convention on e-Communications”); and 1996 - UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, with additional article 5 bis as adopted in 1998 (“the Model Law on e-Commerce”).¹⁶³ Though UNCITRAL laws are concerned with international trade, they are relevant in the sense that online transacting is the key form of carrying out international trade because of its speed and low cost.

The UK, US, and SA have taken steps to address the problems and challenges in this study. Thus, the UK Electronic Communications Act 2000 (“UK e-Communications Act”) and Electronic Signatures Regulations 2002 (“UK e-Signatures Regulations”), are relevant to this

¹⁶²UNCITRAL (n52). UNCITRAL is the UN system in the field of international trade law. It is a body with worldwide membership specializing in commercial law reform worldwide for over 40 years. Its business is the modernization and harmonization of rules on international business.

¹⁶³UNCITRAL(n53).

study. On the other hand, the US has enacted the Uniform Electronic Transactions Act (“UETA”). South Africa has legislated on electronic transactions through the Electronic Communications and Transactions Act, 2002 (“SA e-Communications Act”).

4.1. Formation of Online Contracts

4.1.1. Invitation to Treat, Offer and Acceptance

According to the Convention on e-Communications¹⁶⁴, “communication” means any statement, declaration, demand, notice or request, which includes an offer and the acceptance of an offer that the parties are required to make in connection with the formation or performance of a contract.¹⁶⁵ There is no equivalent definition in the Kenyan situation. KICA does not define what communication is. It is necessary for KICA to define that communication includes the making of offers and acceptance, in order to make it clear that electronic communications also covers the formation of online contracts.

Unlike UK e-Communications Act, UETA, SA e-Communications Act, and KICA (which are silent), the Convention on e-Communications has gone ahead to distinguish between invitation to treat, and offers or acceptance in respect of electronic transactions.

It states as follows:

¹⁶⁴ The Convention on e-Communications applies to the use of electronic communications in connection with the formation of contracts between parties whose places of business are in different States (see Article 1). However, given the borderless nature of online transacting, the convention serves as a good guide to formation of online contracts in Kenya.

¹⁶⁵ 2005 UN Convention on the Use of Electronic Communications in International Contracts, Article 4 (1).

A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.¹⁶⁶

Going by the convention, the display of goods on a website amounts to an invitation to treat, unless otherwise stated by the owner of the site. This creates certainty and there is no reason why Kenya should not borrow from it.

4.1.2. Time and Place of Contract Formation

Unlike the Kenyan situation, the Convention on e-Communications, the Model Law on e-Commerce, UETA, and the SA e-Communications Act, set rules on how to determine the time and place of dispatch and receipt of electronic communication, which includes communication of offers and acceptances. Accordingly, the time of dispatch of an electronic communication is deemed to be the time when the communication leaves an information system under the control of the originator¹⁶⁷ or of the party who sent it on

¹⁶⁶ Ibid, Article 11.

¹⁶⁷ Article 4(d) of the Convention on e-Communications as well as Article 2 (c) of the Model Law on e-Commerce define “originator” of an electronic communication to mean a party by whom, or on whose behalf, the electronic communication has been sent or generated prior to storage, if any, but it does not include a party acting as an intermediary with respect to that electronic communication.

behalf of the originator.¹⁶⁸ If the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time of dispatch is the time when the electronic communication is received.¹⁶⁹

The Convention on e-Communications provides that the time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee.¹⁷⁰ Further, that an electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.¹⁷¹ This has been reflected in the Model Law on e-Commerce and UETA.¹⁷²

The SA e-Communications Act provides that an agreement concluded between parties by means of data messages is concluded at the time when the acceptance of the offer was received by the offeror.¹⁷³ So is it when it reaches the address of the recipient or when the recipient actually opens and reads the message? What happens if the recipient actually reads the message and keeps quiet? The Convention on e-Communications and Model Law on e-Commerce, give clearer provisions in that they state that the time of receipt of the message is when the same is capable of being retrieved by the recipient.

¹⁶⁸ Article 10(1) of the Convention on e-Communications, Article 15(1) of the Model Law on e-Commerce, and Section 15 a(1) of UETA.

¹⁶⁹ 2005 UN Convention on e-Communications (n 165), Article 10 (1).

¹⁷⁰ Article 10(2). Further, Article 4(e) of the convention defines "addressee" of an electronic communication means a party who is intended by the originator to receive the electronic communication, but does not include a party acting as an intermediary with respect to that electronic communication.

¹⁷¹ 2005 UN Convention on e-Communications (n 165) Article 10 (2).

¹⁷² Article 15 (2) & (3) of the Model Law on e-Commerce and Section 15 b(1) of UETA.

¹⁷³ SA e-Communications Act, Section 22 (2).

Regarding acknowledgment of receipt, the Kenyan law (KICA), SA e-Communications Act have similarities with that of the Model Law on e-Commerce. This is because both provide that, unless otherwise agreed, acknowledgement of receipt may be given by any communication, automated or otherwise, by the addressee; or by any conduct of the addressee sufficient to indicate to the originator that the electronic communication has been received.¹⁷⁴ However, KICA and the Model Law on e-Commerce, go on to state that where stipulated by the originator that electronic record, or data message, shall only be binding on receipt of acknowledgement of such electronic record, then the electronic record shall be deemed to have never been sent by the originator, unless such acknowledgment has been received.¹⁷⁵ Where not stipulated, and no acknowledgment has been received, the originator may give notice to the addressee stating that no acknowledgement has been received and specifying a reasonable time for receipt of the acknowledgment, non-compliance of which entitles him or her to treat the electronic record as having not been sent.¹⁷⁶

However, unlike KICA, the Model Law of e-Commerce provides that where the acknowledgement of receipt by the addressee is received by the originator, there is a presumption that the related data message was received by the addressee.¹⁷⁷ However, the presumption does not imply that the data message corresponds to the message

¹⁷⁴ Section 83M (1) of KICA, Article 14(2) of the Model Law on e-Commerce, and Section 26 (2) of the SA e-Communications Act.

¹⁷⁵ Section 83M (2) of KICA and Article 14(3) of the Model Law on e-Commerce.

¹⁷⁶ Section 83M (3) of KICA and Article 14(4) of the Model Law on e-Commerce.

¹⁷⁷ Model Law on e-Commerce, Article 14(5).

received.¹⁷⁸ This because the communication sent by the originator may be corrupted on receipt by the addressee, and as such the addresses should not be bound by information that is not the same as that sent by the originator. This is an important provision that should not have been left out in KICA.

It seems the Convention on e-Communications, the Model Law on e-Commerce, UETA and the SA e-Communications Act, rule out the applicability of postal rule to electronic communication of offers and acceptances. This is because they lay emphasis on receipt of the communication, in an apparent recognition that electronic communications are instantaneous. Therefore, the rule regarding instantaneous communication is applicable and should be specified in KICA.

According to the Convention on e-Communications, the Model Law of e-Commerce, UETA and the SA e-Communications Act, the place of dispatch of the electronic communication is at originator's place of business, whereas the place of receipt is the addressee's place of business.¹⁷⁹ 'Place of business' is presumed to be the location indicated by that party, unless otherwise demonstrated; and where not indicated, and a party has more than one place of business, then the place of business is that which has the closest relationship to the relevant contract, having regard to the circumstances known to or contemplated by the parties at

¹⁷⁸ *ibid.*

¹⁷⁹ Article 10 (3) of the Convention on e-Communications, Article 15 (4) of the Model Law on e-Commerce, Section 15 d of UETA and Section 231(c) of the SA e-Communications Act. According to Article 6 (4) of the Convention on e-Communications, a location is not a place of business merely because that is: (a) where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or (b) where the information system may be accessed by other parties. Article 6(5) states that the sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in that country.

any time before or at the conclusion of the contract.¹⁸⁰ Further, if a natural person does not have a place of business, his or her place of business is his or her habitual residence.¹⁸¹

Unlike the Convention on e-Communications, Model Law on e-Commerce, UETA, and KICA, the SA e-Communications Act has gone ahead to specify the place of contract formation. The SA e-Communications Act provides that an agreement concluded between parties by means of data messages is concluded at the place where the acceptance of the offer was received by the offeror.¹⁸² KICA should make such a clarification.

4.1.3. The 'Shrink Wrap' Contracts

Just like in Kenya, these other jurisdictions have not addressed the legal issues raised by the so called 'shrink wrap' contracts. As stated, in a 'shrink wrap' contract, for example, while purchasing off-the-shelf software, when the purchased product is received, it comes with additional terms and conditions in the packaging or in the accompanying documentation.¹⁸³ Should there be legal recognition of terms that are not proposed or disclosed until after the user has already agreed to go forward with the transaction and has tendered the required consideration. In my view, terms that one has not been given an

¹⁸⁰2005 UN Convention on e-Communications (n 165) Article 10 (3).

¹⁸¹ *ibid.*

¹⁸²SA Communications Act (n 174)..

¹⁸³ Boss (n 47).

opportunity to scrutinize before making a purchase should not be legally binding on the customer.

4.2. Formalities of Online Contracts

4.2.1. Requirement for ‘Writing’

Regarding the requirement for ‘writing’ the Convention on e-Communications provides that the requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.¹⁸⁴ The Model Law on e-Commerce has reflected this position by stating that a requirement for ‘writing’ can be fulfilled by a data message¹⁸⁵ if the information contained therein is accessible so as to be usable for subsequent reference.¹⁸⁶

Whereas the UK e-Communications Act and Regulations are silent on this, the UETA and SA e-Communications Act also have provisions to the effect that the requirement for writing is met if information is produced in electronic form that is available for subsequent use or retention by the recipient.¹⁸⁷ All these are similar to the Kenyan situation, where KICA provides that where any law provides that information or any matter shall be in writing, then, such requirement shall be deemed to have been satisfied

¹⁸⁴2005 UN Convention on e-Communications (n 165) Article 9(2).

¹⁸⁵ Article 2(a) of the Convention on e-Communications defines ‘data message’ to mean information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

¹⁸⁶2005 UN Convention on e-Communications (n 165) Article 6 (1).

¹⁸⁷ Section 12 (1) of the SA e-Communications Act, and Section 7(c) & 8(a) of UETA.

if such information or matter is, (a) made available in electronic form; and (b) accessible for use later.¹⁸⁸ On the face of it, there is no doubt that the requirement for ‘writing’ has adequately been recognized by law. How about the accompanying requirement for ‘signature’?

4.2.2. Requirement for ‘Signature’

When it comes to the requirement for signature, the e-Communications Convention, the Model Law on e-Commerce, and the Model Law on e-Signature, stipulate that the requirement is met in relation to an electronic communication if: a method is used to identify the party and to indicate that party’s intention in respect of the information contained in the electronic communication; and the method used is either as reliable as appropriate for the purpose of the electronic communication, and proven in fact to have fulfilled the functions of identifying the party and indicating his or her intentions.¹⁸⁹

It is apparent that the convention and the model laws do not make it mandatory that there be a signature. Instead, if the purpose for which a signature is required, is fulfilled, then the requirement for signature should be deemed to have been met. The convention seems to make it flexible and easy for parties to fulfil the requirement for signature, unlike in the Kenyan situation which requires that there be an electronic signature.¹⁹⁰ Signature, in

¹⁸⁸ KICA, Section 83G.

¹⁸⁹ Article 9(3) of the Convention on e-Communications, Article 7 of the Model Law on e-Commerce, and Article 6(1) of the Model Law on e-Signature.

¹⁹⁰ Section 83O(1) and 83P of KICA allow the use of advanced electronic signature to be affixed in a manner prescribed by the Cabinet Secretary, upon which any legal requirement for authentication using a signature shall be deemed to have been satisfied.

my view, is the most appropriate way of authenticating and identifying a document to a person. Therefore, there ought to be use of electronic signature that satisfies the purpose for which a signature is a requirement, that is, identifying a party and his or her intentions to be bound by the information.

The Model Law on e-Signature, as well as KICA provide that an electronic signature is considered to be reliable for the purpose of identifying a party and his or her intention, if the signature creation data is solely linked to the signatory; the signature creation data were at the control of the signatory, and no one else; any alteration to the signature is detectable; and that any alteration made to information, which the signature relates to, after the time of signing, is detectable.¹⁹¹

The UK e-Communications Act provides that an electronic signature related to an electronic communication is admissible as evidence as to the authenticity of the communication.¹⁹² This just gives legal effect to electronic signatures. There is nothing that Kenya can borrow from this since electronic signatures are already recognised by KICA.

UETA provides that an electronic signature can fulfil the requirement for signature.¹⁹³ It defines ‘electronic signature’ to mean an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent

¹⁹¹ Article 6(3) of the Model Law on e-Signature and section 83O(3) of KICA.

¹⁹² UK e-Communications Act, Section 7.

¹⁹³ UETA, Section 7(d).

to sign the record.¹⁹⁴ This is a wide and flexible definition because it includes the use of sound and process as e-Signatures. According to UETA, the electronic signature is attributable to the person if it was the act of the person, which act may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.¹⁹⁵

The SA e-Communications Act provides that in situations where the law requires a signature, but does not specify the type of signature, such a requirement is satisfied with respect to data message only if an advanced electronic data message is used.¹⁹⁶ Otherwise, other types of electronic signatures may be used.¹⁹⁷ However, these electronic signatures must satisfy the purpose of indentifying the signatory and signifying his approval of the information.¹⁹⁸ Unlike for the Model Law on e-Signature, KICA, and UETA, the SA e-Communications Act does not, unfortunately, elaborate on what will enable an e-Signature satisfy the purpose of identifying the signatory and indicating his or her intention to be bound.

Whereas KICA has some similar provisions with the Model Law on e-Signature, UETA, UK e-Communications Act, and the SA e-communications Act, there are no

¹⁹⁴ibid, Section 2 (8).

¹⁹⁵ibid, Section 9.

¹⁹⁶SA e-Communications Act (n 174)section 13 (1).

¹⁹⁷ibid, Section 33 (2).

¹⁹⁸ibid, Section 33 (3).

regulations to facilitate the implementation of the law (KICA). The regulations should be made by the Cabinet Secretary.

One cannot talk of e-Signatures without mentioning certification service providers. According to the Model Law on e-Signature, a certification service provider is a person that issues certificates and may provide other services related to electronic signatures.¹⁹⁹ Therefore, a certification service provider would provide the software or platform for creation of electronic signatures and thereafter issue certificates for the same, if called upon to. An example of such service provider is the US based RightSignature LLC which provides a platform for creation of online-signatures and issues accompanying certificates.²⁰⁰

The Kenyan definition of what a certification service provider is, limits the function of such a service provider to only issuing certificates for digital signatures. KICA defines a certification service provider to mean a person who has been licensed to issue a digital signature certificate.²⁰¹ Firstly, this means that a service provider cannot be licensed to provide e-Signature creation services. Who then can provide such important services that need regulation? Secondly, why has KICA restricted the definition to ‘digital signatures’ only? Is a digital signature the same as an electronic signature, or a form of an electronic signature? This in my view is a form of electronic signature since the word ‘electronic’ includes digital capabilities.²⁰² Therefore, does it mean the certification service providers

¹⁹⁹Model Law on e-Signature, Article 2(e).

²⁰⁰RightSignature LLC ‘About Us’<https://rightsignature.com/about> accessed on 22 November 2013.

²⁰¹KICA (n188)section 2.

²⁰²ibid, Section 2.

cannot issue certificates for other forms of electronic signatures? They should be able to. There is need for amendment of this definition to allow certification service providers to issue electronic signature certificates and also perform other electronic signature services including those of e-Signatures creation.

The UK e-Signature Regulations set out the rules that electronic signature certificates must meet.²⁰³ The Regulations also list the requirements that certification service providers must meet before being licensed to perform electronic signatures services.²⁰⁴ The regulation of electronic signatures certifications in these ways is important to guarantee the integrity of e-Signatures. The Kenyan Cabinet Secretary, who is yet to make such rules, can borrow from the UK experience.

4.3 Conclusion

In summary, unlike the Convention of e-Communications, KICA has not distinguished between an invitation to treat and offer, in respect of online contracts. Regarding time and place of contract formation, unlike the Convention on e-Communications, Model Law on e-Commerce, UETA, and SA e-Communications Act, there are no provisions in KICA that determine the time and place of dispatch and receipt of the electronic communication. As to the so called ‘Shrink Wrap’ Contracts, KICA as well as the comparative texts, are silent on

²⁰³ UK e-Signature Regulations, Schedule 1.

²⁰⁴ *ibid*, Schedule 2.

the same. Whereas the formality of ‘writing’ has legal recognition, the accompanying requirement for signature is yet to be fully addressed by Kenyan law, as compared to the other jurisdictions analysed in this chapter. As shown, there is no comparative model that singularly addresses all the challenges raised in this study. It is for this reason that the study does not recommend any model that should be applicable within the Kenyan context. Instead, as demonstrated, Kenya should borrow from the relevant provisions of the various legal regimes that adequately address either of the issues raised. Be that as it may, it is out of this comparative analysis and the preceding discussion on the Kenyan position that chapter five will conclude this study and give recommendations on the way forward regarding online contracting in Kenya.

CHAPTER FIVE:

5.0 CONCLUSION AND RECOMMENDATIONS

This study has shown that Kenya has made some steps in legislating on electronic commerce, which includes online contracting. This legislation is contained in the Kenya Information and Communications Act (“KICA”)²⁰⁵ and the Evidence Act²⁰⁶. However, as shown in chapters three and four, the legislation has some shortcomings on formation and formalities of contracts, which may hinder the overall objective of promotion and facilitation of e-Commerce. These shortcomings as well the recommendations for reform on the same are summarised below:

5.1. Formation of Online Contracts

5.1.1. Invitation to Treat, Offer and Acceptance

Electronic communication is an aspect that distinguishes online contracting from the traditional paper-based ones. Offers and acceptances would therefore have to be communicated using electronic means. It is therefore necessary to define communication to include the making of offers and acceptances with a view of entering into contracts- KICA has not done so. This paper therefore proposes that KICA borrows from the 2005

²⁰⁵Cap 411A (48).

²⁰⁶Cap 80 (49).

UN Convention on Electronic Communications (“Convention on e-Communications”)²⁰⁷, which defines “communication” to mean any statement, declaration, demand, notice or request, which includes an offer and the acceptance of an offer that the parties are required to make in connection with the formation or performance of a contract.²⁰⁸ This will make it clear that electronic communications also apply to formation of online contracts.

KICA does not distinguish between invitations to treat and offers, in respect to online contracting. This is more so when it comes to the display of goods on a website. This study proposes that KICA be amended to distinguish between electronic invitation to treat and offer, as in the case of the Convention of e-Communications discussed in this study.²⁰⁹ By doing so, there shall be no doubt that the display of goods on a website amounts to an invitation to treat, unless otherwise stated by the owner of the site. This creates certainty.

5.1.2. Time and Place of Contract Formation

The time and place of contract formation is necessary to ascertain when and where contractual obligations arose. KICA does not set rules on how to determine the time and place of dispatch and receipt of electronic communication, which includes

²⁰⁷ The Convention on e-Communications applies to the use of electronic communications in connection with the formation of contracts between parties whose places of business are in different States (see Article 1). However, given the borderless nature of online transacting, the convention serves as a good guide to formation of online contracts in Kenya.

²⁰⁸ 2005 UN Convention on e-Communications (n 165), Article 4 (1).

²⁰⁹ *ibid*, Article 11.

communication of offers and acceptances. KICA can borrow from the Convention on e-Communications, 1996 - UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, with additional article 5 bis as adopted in 1998 (“Model Law on e-Commerce”), the US Uniform Electronic Transactions Act (“UETA”), and the Electronic Communications and Transactions Act, 2002 (“SA e-Communications Act”).

Accordingly, the time of dispatch of an electronic communication should be deemed to be the time when the communication leaves an information system under the control of the originator²¹⁰ or of the party who sent it on behalf of the originator.²¹¹ If the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time of dispatch is the time when the electronic communication is received.²¹²

The time of receipt of an electronic communication would be the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee.²¹³ Further, that an electronic communication should be presumed to be capable of being retrieved by the addressee when it reaches the addressee’s electronic address.²¹⁴

²¹⁰ Article 4(d) of the Convention on e-Communications as well as Article 2 (c) of the Model Law on e-Commerce define “originator” of an electronic communication to mean a party by whom, or on whose behalf, the electronic communication has been sent or generated prior to storage, if any, but it does not include a party acting as an intermediary with respect to that electronic communication.

²¹¹ Article 10(1) of the Convention on e-Communications , Article 15(1) of the Model Law on e-Commerce, and Section 15 a(1) of UETA.

²¹²2005 UN Convention of e-Communications (n 165), Article 10 (1).

²¹³ Article 10(2). Further, Article 4(e) of the convention defines “addressee” of an electronic communication means a party who is intended by the originator to receive the electronic communication, but does not include a party acting as an intermediary with respect to that electronic communication.

²¹⁴2005 UN Convention of e-Communications (n 165) Article 10 (2).

KICA should also state that where the acknowledgement of receipt by the addressee is received by the originator, there is a presumption that the related data message was received by the addressee.²¹⁵ However, the presumption should not imply that the data message corresponds to the message received.²¹⁶ This because the communication sent by the originator may be corrupted on receipt by the addressee, and as such the addressee should not be bound by information that is not same as that sent by the originator.

It is thus clear that the rule that should apply to electronic transactions is that regarding instantaneous communication, as opposed to the postal rule. This is because electronic communications are instantaneous, as compared to post. It follows that the time of online contract formation should be the time when the acceptance of the offer is received by the offeror.²¹⁷

The place of dispatch of the electronic communication would be at the originator's place of business, and the place of receipt being the addressee's place of business.²¹⁸ 'Place of business' will be presumed to be the location indicated by that party, unless otherwise demonstrated; and where not indicated, and a party has more than one place of business, then the place of business should be that which has the closest relationship to the relevant contract, having regard to the circumstances known to or contemplated by the parties at

²¹⁵ *ibid*, Article 14 (5).

²¹⁶ *ibid*.

²¹⁷ SA e-Communications Act (n 174), Section 22 (2).

²¹⁸ Article 10 (3) of the Convention on e-Communications, Article 15 (4) of the Model Law on e-Commerce, Section 15 d of UETA and Section 231(c) of the SA e-Communications Act. According to Article 6 (4) of the Convention on e-Communications, a location is not a place of business merely because that is: (a) where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or (b) where the information system may be accessed by other parties. Article 6(5) states that the sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in that country.

any time before or at the conclusion of the contract.²¹⁹ Further, if a natural person does not have a place of business, his or her place of business should be his or her habitual residence.²²⁰

The rule regarding instantaneous communication also determines the place of contract formation. Thus, online contracts should be deemed to be concluded at the place where the acceptance of the offer was received by the offeror.²²¹

5.1.1.3. The ‘Shrink Wrap’ Contracts

As stated, in a ‘shrink wrap’ contract, for example, when purchasing off-the-shelf software, when the purchased product is received, it comes with additional terms and conditions in the packaging or in the accompanying documentation.²²² The issue that arises is there should there be legal recognition of terms that are not proposed or disclosed until after the user has already agreed to go forward with the transaction and has tendered the required consideration. This study proposes that the law makes it clear that terms that one has not been given an opportunity to scrutinize before making a purchase should not be legally binding on him or her.

²¹⁹2005 UN Convention of e-Communications (n 165), Article 10 (3).

²²⁰ *ibid.*

²²¹SA e-Communications Act (n 174) Section 22 (2).

²²² Boss (n 47).

5.2. Formalities of Online Contracts

5.2.1. Requirement for ‘Writing’

Kenyan law makes it clear that a legal requirement for ‘writing’ can be satisfied by electronic contracting. KICA provides that where any law provides that information or any matter shall be in writing, then, such requirement shall be deemed to have been satisfied if such information or matter is, (a) made available in electronic form; and (b) accessible for use later.²²³ On the face of it, there is no doubt that the requirement for ‘writing’ has adequately been recognized by law. Issues arise as to the accompanying requirement for ‘signature’.

5.2.2. Requirement for ‘Signature’

When it comes to the requirement for signature, KICA provides that the same can be satisfied by use of an advanced electronic signature which is as reliable as was appropriate for the purpose for which the electronic message was generated or communicated.²²⁴ An electronic signature is considered to be reliable for the purpose for which the electronic message was created, if: the signature is generated through a signature-creation device; the signature creation data are solely linked to the signatory; the signature creation data were under the control of the signatory and no one else; any

²²³Cap 411A (n48) Section 83G.

²²⁴ibid, Section 83O(1).

subsequent alteration to the electronic signature is detectable; and any subsequent alteration made to the information, to which the signature relates, is detectable.²²⁵

KICA can also be as wide and flexible as possible, like UETA which defines e-Signatures to include sound and process. UETA defines ‘electronic signature’ to mean an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.²²⁶

Whereas KICA has provisions with respect to e-Signatures, there are no regulations to facilitate the implementation of the same. The regulations should be urgently made by the Cabinet Secretary.

The meaning and function of certification service providers are not adequately provided for in KICA. KICA’s definition of a certification service provider limits the function of such a service provider to only issuing certificates for digital signatures. It defines a certification service provider to mean a person that has been licensed to issue a digital signature certificate.²²⁷ Firstly, this means that a service provider cannot be licensed to provide e-Signature creation services. Who then can provide such important services that need regulation? Secondly, why has KICA restricted the definition to ‘digital signatures’ only? Is a digital signature the same as an electronic signature, or a form of an electronic signature? This in my view is a form of electronic signature since the word ‘electronic’

²²⁵ibid, Section 83O (3).

²²⁶UETA, Section 2 (8).

²²⁷Cap 411 A (n 48) Section 2.

includes digital capabilities.²²⁸ Therefore, does it mean the certification service providers cannot issue certificates for other forms of electronic signatures? They should be able to. There is need for amendment of KICA to allow certification service providers to issue electronic signature certificates and also perform other electronic signature services including those of e-Signatures creation.

The UK e-Signature Regulations set out the rules that electronic signature certificates must meet.²²⁹ The Regulations also list the requirements that certification service providers must meet before being licensed to perform electronic signatures services.²³⁰ The regulation of electronic signatures certifications in these ways is important to guarantee the integrity of e-Signatures. The Kenyan Cabinet Secretary, while making the regulation on e-Signatures, can get important tips from the UK experience.

It is therefore clear that online contracting has three aspects. The first aspect is that on contract law, which is to be found in the traditional rules governing contracts. The second one is the evidential value of online contracts, which is addressed by the Evidence Act. The third aspect is the electronic environment, which is regulated by KICA. Thus, subject to the recommendations in this chapter, KICA is the key legislation that deals with the electronic aspect of online contracting. Hence, there is no need for any other substantive legislation, other than KICA, with the Evidence Act coming in with respect to the admissibility of electronic records.

²²⁸ *ibid.*

²²⁹ UK e-Signature Regulations, Schedule 1.

²³⁰ *ibid.*, Schedule 2.

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