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CUSTOMARY CONTRACTS: HOW DO THEY
COMPARE WITH THE MODERN CONTRACTS?
TO WHAT EXTENT ARE THE KENYAN
COURTS ALLOWED TO APPLY CUSTOMARY
RULES RELATING TO CONTRACTS?

By

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TO MY DEAR HUSBAND AND MY
BELOVED PARENTS WHO SHARED
AND CARE, AND TO MR. NDERITU
FOR HIS MOST APPRECIATED HELP

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1982

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INTRODUCTION:

The word contract has received countless definitions over the centuries. Klidely accepted however is pallock's definition "A Promise or a set of promises which the law will enforce". But this short definition does not tell us much above the contract. It is my aim therefore to define the contract in details in the first chapter of this article. This will involve looking at the historical development of the contract and finally trying to justify Pallock's definition of the contract.

It will be in the second part of the article that I will look at the customary contracts themselves. Though written African Customary law is a complete system of rules of conduct and behaviour governing and regulating every aspect of life imaginable. It governs and regulates contractual obligations between individuals, between an African Community and another and prescribes the rights and obligations of the individual inter se as well as the rights and duties which the individual owes to the community. It is these rules of contract that I am going to look at here and try and compare them with the modern rules of contract. Since it will not be possible to discuss the whole law of contract within the scope of this small article I intend to take only a few aspects of the law of contract. First and foremost I will look at the enforceability of contracts. The major issue here will be to look at what criteria determines those contracts that are legally enforceable and those that are not both in the traditional contracts and the modern law of contract. Consideration in the modern law of contract has for a long time been accepted as the major criteria. Among the Africans there is no generalised rule relating to the enforceability of contracts, although looking at the cases that came before the courts closely it is evident that consideration plays a great part in the formation of most of these customary contracts.

The second aspect I will look at in this second chapter, is capacity to enter into a contract. In the modern law of contract every person has a right to enter into a legally binding contract as long as he is sane and is not an infant.

Among the Africans, unmarried children and women could not enter into legally binding contracts.

Finally I will look at the breach of a contract and the remedies available for such breach both in the modern law of contract and the customary contracts. I also intend to discuss the purposes served by such remedies. In the modern law of contract for example the idea is to compensate the grieved party, while in some of the African Contracts apart from compensating the aggrieved party punitive remedies are available the purpose of which is to punish the party who has breached the contract.

In the last chapter of the article I will look at the extent to which customary contracts are applicable by the Kenyan courts today.

Sc.2 of the Magistrates Courts Act 1967 in listing all the customary rules that are applicable by the Kenyan courts does not make any reference to the customary law rules relating to contract. In other words it abolishes the application of customary law rules relating to contract by the District Magistrates Courts. The Judicature Act Sc 3(2) provides that the High Court and all the Subordinate Courts shall be guided by Customary law in all civil cases. This Act also does not make any reference to customary contracts and although Conran in his article integration of the Kenyan Courts suggest that it could not have been the intention of the legislature to abolish the application of customary contracts, evidence supported by authorities show that the express words of Sc.2 of the Magistrates Courts Act are clear and could not be accorded another meaning different from the one they express. The Judicature Act cannot be said also to give Jurisdiction to the Magistrates Courts to apply customary contract, the same Jurisdiction which by the express words of Sc.2 of the M.C.A. has been removed from the courts. Moreover, the law of Contract Act 1968 makes it very clear that the law of contract to be applied by the Kenyan Courts in the English Law of contract and not customary law of contract. It would not be wrong therefore to come to the

conclusion that the application of the customary contracts is prohibited to the Magistrates Courts, and although one can still argue that the High Court can still apply such contracts this is only going to be to a very limited extent. It would be cumbersome if even petty cases like the ones relating to small compensations were all going to be brought before the High Court Judges instead of taking them to the District Magistrates who are more conversant with such issues.

CHAPTER ONE

HISTORICAL DEVELOPMENT OF THE CONTRACT

A contract is a set of promises which the law will enforce. In order to be able to understand the notion of contract, it is my aim in this chapter to try and look at the historical development of contract. I will begin by looking at how the promise itself came into being.

Some societies have been known to exist without promises. They have secured corporation through sharing based on obligations that are rooted in the status instead of exchange of promises based on bargains rooted in competition. Man has therefore succeeded in creating societies that do not rely on bargains as do ours: Sometimes because he achieves corporation largely without exchange based on bargains or because he feels scant need to achieve corporation yet all of these are the ancient societies. What of more advanced societies?

In 1861 Sir Henry Maine came out with his formulation that "the movement of a progressive society has been from status to contract"¹ that Maine's generalization is not universal and not necessarily law, he himself recognized in his treatment of feudal land Tenure. The rights and duties of the Sovereign and those of the subjects have always been based on contract and generally ceased to be so as they became customary and were later replaced by legislation of the modern national state.

Some modern legal theorists have also shown that the government has in all countries been steadily increasing the scope of its functions so that man now do things by virtue of their status as citizens and tax-payers which they did before by voluntary agreements. Moreover in relations in which men are more or less free to enter into contracts such

as those between insurer and insured, landlord and tenant, employer and employee, the terms of the agreements are more and more being fixed by law. The specific rights and duties are not fixed by agreements though the assumption of the relation is more or less voluntary.

Nevertheless there is enough truth in Maine's observation to warrant a more discriminatory attitude to it than that of complete rejection. Looking at the matter more closely there can be little doubt that legally binding agreements or promises played a smaller part in the earlier history to all known people. The development of contract is largely an incident of commercial and industries enterprises that involve a greater anticipation of the future than is necessary in a simpler and less developed society.

What then was the origin of the promise of bargain?

Bargain begins with the transaction of barter in which the parties bargain for immediate exchange of goods on both sides. Barter does not involve promises because neither party's performance is deferred so that there is no commitment to perform in the future. Although there are some societies like the Barotse in Rhodesia and Sebei in Uganda where exchange was converted into a kinship relationship and as such bargain and exchange did not exist, Nonetheless the concept of bargain and exchange as manifested in the barter are widely spread and even the highly individualistic Amasalik are reported to swap everything from bone darts to wives in much the same way as small boys do with picture cards and knives.

When a society comes to regard a particular form of wealth as a medium of exchange that is to say as "currency" or "money" it may engage in what we call cash or present sale. But although money has been substituted for goods on the one side of the transaction its essence remains the same - there is exchange and bargain but nothing resembles

the promise. Even where the seller is held responsible for the quality of goods after their delivery to the buyer promise is not necessarily involved. The germ of promisory liability is to be found instead in the rise of credit.

Credit comes when a need emerges for exchange in situations where only one party performs immediately while the other's performance is to take place in one future. Among people who are accustomed to reliance on strong ties of kinship and affinity, credit may be slow in developing. This is because most of these people do not believe in lending to a kinsman or relative. Instead one was supposed to give to a kinsman rather than lending to him.

One of the most ancient instances of credit arose out of blood feud. The German and the Anglo-Saxon peoples provided a prototype. Where a murderer in order to buy off the vengeance of his victim's kinmen was required to pay a larger wargild than he could immediately raise, he was allowed to pay in instalments by giving security which was forfeited if he did not pay. Thus security at first took the form of hostages and any later could goods of substance be substituted. Gradually the furnishing of hostages was replaced by the furnishing of surities who assumed personal liability to the creditor and the pledge of goods of substantive value gave way to the pledge of something of triffling value. Soon it was no longer necessary for the debtor to furnish surities and the traditional formalities began to be supplanted by others including the spoken pledge of faith and the profering of the right. Soon the credit came to be used together with exchange in a commercial setting by way of loans.

Because of those same ties of kinship and affinity that generally impeded the rise of credit, the loan if it does arrive after, appears first as a secured loan with a pattern of security very similar to that of the wargild. Because of the tradition of sharing one does not led to a close kinsman,

a duty was an achievement of the Roman Law. It came however through the development of a series of exceptions rather than through an establishment of a general system of enforceability of promises. The Maxim evolved in Roman Law that a naked pact ("Nudum pactum") did not beget an action. Although the agreement may have a moral efficacy it was not legally enforceable unless it fell within a limited number of categories that the law came to treat as exceptions to this general rule.

One of the categories established in the very early times was the stipulation. A party could bind himself by a promise known as stipulation if he observed the prescribed form of question and answer. The terms of the promise were framed not by the promiser but by the promisee who was then required to put them to the promiser in his presence as a solemn question. Although the historical origins of a stipulation are uncertain the most probable view is that it arose in the procedures obligations undertaken in legal proceedings which as we have seen are among the earliest form of promise to have arisen in many ancient societies. Although the participation of both parties was needed any only party was bound and for this reason the stipulation was not by nature well suited to bargains that resulted in exchange of promises where a pair of reciprocal stipulations would have been required.

Nor could such a transaction be brought within the category of "real contracts" another of the earliest types of enforceable agreements to be recognised in Roman law. Real contracts are those in which the handing over of the subject matter made the promise binding. But since the validity of one contract depended upon delivery by one of the parties it was not adaptable to transactions where there was a simple exchange of promises with no performance on either side.

one gives to them; and because of lack of trust one does not lend to others, one pawns to them. Furthermore the commercial incentive is always lacking since some primitive people look down on the taking of interest. Nevertheless when special need for credit occurs the loan arises to meet them. Max Gluckman tells us how in Africa a family may require a loan in order to meet the bride-price for one of its members, and in order to meet such emergencies land is pledged or an individual is pawned into "debt slavery" being permitted to work off the debt.⁴

From the delivery of goods on credit it is but a short time to the furnishing of services on credit. Exchange involving service came when specialisation of functions in the society generates a demand for services. And since services usually take time for their performances while payment can be made on instance on exchange of services for payment cannot ordinarily be made simultaneously. One must look to the future and rely on the other's credit.

But the idea of loan still left men short of the conception of promise, for the duty to which a loan gives rise to is not generally regarded by ancient societies as arising out of the debtor's words. To the ancient men the debt is recoverable not because the debtor has promised to pay but because he has received goods which although they are in his custody are still regarded as belonging to the creditor. Under the view the breach by the creditor is not a failure to perform a promise but a wrong with respect to property.

Since there is no market on which prices fluctuate, there is little economic need for parties to arrange for such an exchange to take place in the future at a price fixed at present. Because of the absence of such a market it is not surprising, that such transactions in which there has been no performance on either side are not recognised by the ancient societies. Credit developed but the rise of promise is yet to come.

The notion that a promise itself gives rise to

The view that promises are not generally enforceable which started from the premise of Roman Law that a mere agreement did not beget an action was held by common law. Born views continued to hold upto the end of the 12th century when the common law view prevailed. It achieved its success less on its intrinsic merits than as a by-product of the victories of common law courts in the Jurisdictional struggle with their competitors. Canon Law, the law merchant and Equity. Canon law and the law merchant were denied Jurisdiction. Equity hesitated to intervene unless the common law was wanting. The credit for the development of the general basis of enforceability of promises therefore fully developed and thus Pallock's definition "A contract is a set of promises which the law will enforce."

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CHAPTER TWO

It will be of great importance here that before I begin to compare customary contracts with the modern contracts to look briefly at some of the customary contracts that did exist and still do exist among the Africans.

Though unwritten, African customary law is a complete system of rules of conduct and behaviour governing and regulating every aspect of life imaginable. It governs and regulates contractual obligations between individuals, between an African community and another land prescribes the rights and obligations of the individual inter se as well as rights and duties which the individual owes to the community and vice-versa.

Y.P. Ghai in his article, Customary contracts and Transactions in Kenya¹ observes that "a study of the records of African courts reveals two types of contractual obligations that came before them. One set of transactions are of traditional type and solutions of disputes arising out of them are based on well established principles of law and precedents. Other transactions are created by modern developments and present the courts with novel problems. The courts seem to maintain that they can deal with those often in terms of traditional customary rules and they also act on occasion in terms of what we call natural justice."

Traditional contracts largely concern land and stock reflecting the rural non-monetary economy of tribal societies. Among the Luo a common kind of contract is what is known as the "Singo" pledge². In this contract A gives B a heifer in exchange for a bull. B keeps the heifer until it gives birth to a female calf. When a female calf is born B returns the heifer and gives one more bull but retains one calf. If the heifer dies before producing a female calf, then A must provide another cow. Luos regard one cow as equal in value to two bulls. This type of contract benefits both parties.

All outright exchange is also possible among the Luos. This is known as the "Wilo" and one cow is exchanged for two bulls.

The Meru have a somewhat similar institution called "Ngwato". In this one a party gives to another a cow and the latter pays for the heifer of that cow with goats by instalments, when the heifer is in fact born the cow is returned to the original owner. If one cow dies before producing a heifer the owner must produce another cow or return the goats³. If the cow produces a bull the person who has the cow keeps the bull till such time as the heifer is born. When that happens he returns the bull and the cow and retains the heifer. The buyer of the cow must complete payment before the calf is born and if it is born before, he has paid it and it belongs to the owner of the cow.⁴

Herding contracts are also quite frequent. If a person owns some cattle he may not be able to look after them himself either because he has something else to do or because he has no land on which to graze the cattle. It is usual in those circumstances for him to ask someone to look after the cattle for him in return for payment. Among the Kikuyu if a person keeps one cow in another's carrol and the cow produces ten calves, one of the bulls out of the ten calves belong to the herder. Among the Embu also payment must be made and in a case where the herder brought an action to recover payment the court said; "Among the Kimbere if someone is giving his cow another to look after for him always something must be given to the other by the person for whom the cows are being looked after."⁵

There are also well defined land transactions and the rules about the sale of land and about tenancies are clear. Among the Kikuyu it was only after a purchaser had paid or agreed to pay the number of sheep and goats required as the price of the land that the two parties concluded on agreement.⁶

Before buying and selling of land took place there was a preliminary ceremonial discussion between the buyer and the seller. According to custom of the people no one could go directly to another and tell him that he wanted to buy his land. Land was regarded as the mother of the people and as such the buying and selling of it was treated matrimonially when a man wanted to buy another's land, he could brew a small quantity of beer and take it to the land owner in the same way as if he was proposing marriage to his daughter. After sipping the beer ceremoniously the two men would then join in a conversation talking in parables. Through such conversation the land owner would know what his guest wanted. In the same language they would agree on the price and fix a date on which to mark the boundaries.

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" Tenancies are basically gratuitous loans of land. Among the Embu the user can be evicted at any time but if there is any permanent crop in the land, he must be given compensation. Among the Kikuyu similar practice do obtain (a tenancy is called "uhoi wa githaka") someone who is given building, cultivation or grazing rights on another's land without payment whatever is called a "Muhoi." If a "muhoi" does anything which displeases the giver "Muheani" he may be required to leave the land immediately. There is a Judgement of the court of preview which claims that among the Luo a tenant cannot be evicted except for a good cause such as misbehaviour⁷.--In this case it was held that the tenant had forfeited his rights by planting trees and thus claiming that the land was his. The land can be given on conditions and land given for cultivation cannot be built on. "

Other contracts amongst other African tribes included contracts of personal services and loan contracts.

as security to a creditor. The property so left with the pledge creditor is by way of security only and may not be sold, lost, destroyed or otherwise disposed of by the lender. Unless what is borrowed is in use by the borrower or understood to be so, the lender may not make any use of the pledged property while the arrangement endures. On failure to return the article lent on the due date, the lender acquires from that instance full right of ownership over the thing pledged and he is free to dispose it off as he pleases. Any damage done to the article while in the custody of the lender must be made good by him no matter how caused.

The other type of contracts we are going to consider here are loan contracts. A person whose stock is temporarily short but who has to meet pressing needs such as tax, marriage payments or the expenses of the annual festival, can get a loan from his fellow kinsman. Among the Tswana a man who is unable to pay his dowry is usually given a loan by his close relatives.¹⁰ The idea is to try and help the unfortunate borrower to tide over a lean year due to bad harvest, so that he can thereby fulfill the social and legal obligations. As soon as his crops are good he is bound to return at least the same measure and kind of crop or grain as was originally lent, to him. Unless a definite date has been fixed for repayment the borrower is usually allowed a full season for the particular crop to be harvested and it is not uncommon for the lender to waive repayment on account of bad harvest and to demand it only when the borrowers fortunes have sufficiently improved. A good deal depends on the relationship between the parties to the contract.

The modern type of customary contracts include ad hoc individual contracts which have always played a part in tribal societies and the newer kind of contracts a response to the commercial monetary changes resulting from colonialism. Many of the traditional contracts have been carried over into the new age serving the needs of a somewhat different kind.

All outstanding example of these is bailment and agency. It was common and still is common practice to put ones cattle in another person's control if night fell when one was still some distance from his home. Sometimes the cattle was left there for some days or it can happen that someone is given money by another to buy cattle to take back to his carrol till collected by the new owner. The cattle cannot be used without permission otherwise there a valid claim for damages¹¹. In one case timber was left with the defendent for safe custody and it was agreed that if he got someone who wanted to buy it, he should bring that man to the plaintiff and they could agree on the price. The defendant without consulting the plaintiff sold the timber for 400. The plaintiff alleged that the value of the timber was 4905 and because the defendant had broken the terms of the bailment he was ordered to make up for the balance.¹²

COMPARISON BETWEEN CUSTOMARY CONTRACTS AND THE MODERN CONTRACTS

As I stated in the introduction, since it will not be possible for me to look at the whole of the law of contract (inorder to compare it with customary law of contracts) I am hereby going to confine myself to three major aspects of the law of contract. Mainly - enforceability of agreements and transactions. The issue here will be what criteria both in the traditional and the modern law of contract determines those contracts which are enforceable and those which are not? Is there any difference between the two systems of law. The second aspect I am going to look at is capacity to enter into a contract. Finally I will look at Breach of contract and the consequences of such breach. What remedies are available and what purpose do they serve?

In looking at enforceability of agreements or promises I will start off from a famous statement by Morris Cohen.

"It is indeed very doubtful whether there are many who would prefer to live in an entirely rigid world in which one is obliged to keep all one's promises instead of the present more viable system in which a vaguely faith proportion is sufficient. Many of us indeed would shudder at the idea of being bound by every promise no matter how foolish without any chance of letting increased wisdom undo past foolishness. Certainly some freedom to change ones mind is necessary for free intercourse" ¹³

As Cohen has observed in his comment not all promises or agreemtns are enforeable in all, otherwise the world would be chaotic.

For a long time the English law of contract has treated consideration as the major criteria for distinguishing between those contracts that are enforceable and those which are not. The law may refuse to enforce an agreement because the promise is not supported by consideration. Consideration has been defined to mean either benefits conferred to the promiser or the detriment which has been suffered byt he promisee. Consideration could also be the price that the promise pays for the promise.

Consideration is traditionarry classified into three categories. There is the executory consideration which means that at the time the contract comes into effect neither parties has carried out his obligation. At the inception of the contract there is only one exchange of promises. Secondly there is the excured consideration which normally arises in the cases of unilateral contracts. The contract does not become effective until the acceptance has been complete and the promisee has done all that was required of him. These two types of considerations should be distinguished from a third category which is refered to a past consideration. Past consideration arises where a

consideration is given for something that has been done in the past. This type of consideration is not usually enforceable except in cases of bills of exchange or where services have been performed at the request of the promiser and where both of the parties acted on the footing that these services would be paid for subsequently.

Such was illustrated in one case of Lampleigh -V- Braithwaite¹ where the defendant requested the plaintiff to endeavour to obtain for him a free pardon from the king, and the plaintiff incurred certain expenses as a result of his efforts to do this, and the defendant subsequently promised to pay him £100 for his trouble. The plaintiff sued him for this sum. The court held that the plaintiff was entitled to recover.

It has also been a rule that consideration need not be adequate to the promise but it must be of some value in the eye of law. The courts will not make bargains for the parties to a suit and if a man gets what he contracted for, it will not enquire whether it was all equivalent to the promise. In the case of Haig -V- Brooks¹⁵ the consideration of a promise to pay certain bills was one surrender of a document supposed to be a guarantee which turned out to be of doubtful validity. The worthlessness of the document surrendered was held to be no defence to an action on the promise. The plaintiff were induced by the defendant's promise to part with something which they might have kept and the defendant obtained what he desired by means of that promise.

Though consideration need not be adequate it must be real. It must be something which is of some value in the eye of the law.

Consideration must come from the promisee. The person who seeks to enforce must have provided the consideration. This rule is closely related to the doctrine of privity of contract. It is not however necessary that it should have intended to benefit the other party. So it need not move to the promisor.

In some cases to the courts have decided that there is no sufficient consideration where a person promises to perform what he is legally bound to do. This arises in a case where a person has a public duty imposed by law and he promises to perform it in return for a counter-promise. This was well illustrated in the case of Glassbrook Brothers -V- Glamorgan¹⁶. In this case there was a strike at a coal mine, owned by Glassbrook Brothers. The owners of the coal mine requested Glamorgan County Council to stage a police contingent at the mines. The police commander thought that a mobile force would be sufficient to protect the miners. The Galaabrook brothers promised to pay a fee in return for a force being stationed at the mines. The court in this case stated that if a person does what he is supposed to do under public obligation, then there is no sufficient consideration. He will be able to enforce a promise where he does more than he is supposed to do under public obligation.

The English Common Law recognizes a further creteria on which promises can be enforced. This is the element of intention to enter into a legally binding contract. There are situations more even though the parties have agreed and the agreement was supported by consideration the courts will not enforce a contract because the parties did not intend to enter into a legally binding obligations.

However some writers especially in America have denied the existence of intention as a seperate part of a contract. Once there is a bargain the agreement is a legally enforceable contract irrespective of the parties subjective intention.

Courts have nonetheless indicated that in cases of domestic and social relations there has been **presumption** that the parties do not intend to enter into a legally binding agreement. The policy behind this is that law should be excluded from domestic and social transactions.

It is also their desire to avoid many unnecessary suits. But even here the courts have indicated their intention to utilise an objective test in determining there was an intention to be contractually bound. This was illustrated in the case of Merrit -V- Merrit¹⁷ where the husband after separating with his wife promised to transfer the matrimonial home to his wife after she had paid off the mortgage. In this case it was held that the written agreement was intended to create legal relations between the parties.

What criteria is used to distinguish between legally enforceable promises and those which are not in customary law relating to contracts?

There is no generalized concept of executory contracts under customary law which is to say that the mere exchange of promises by itself has no legal validity. This point was illustrated strikingly in a Meru African court.¹⁸ The case concerned the sale of a piece of land. B had agreed to buy the land from A at 2,330 S. All the negotiations were carried out as was shown by evidence given by the witnesses. The final agreement was reduced into writing which was given in court. After the agreement had been reached A changed his mind and claimed his land back. The court upheld his claim although B occupied the land, he had so far paid nothing for the land and mere agreement was held not binding. This is different from the modern law of contract where it is possible to exchange a promise for a promise and thereby having what is referred to as executory consideration. The necessity of consideration on the one hand is very crucial. It is crucial not only to make agreements binding but also because it creates liability even though there is no agreement somewhat on quasi, contractual principles. The same court which refused to enforce the land agreement held that there was liability in the following situation.¹⁹ X had paid a fine for his brother Y

in the resident magistrates court as well as given to the African court for compensation ordered to be paid by his brother, although the brother was in jail at this time and had not requested X to make these payments. Nor was there an understanding that Y was to pay back those sums when X sued Y to recover the money Y could not plead in his defence the lack of agreement or understanding to pay back the money. X made a payment for Y and therefore was entitled to the recovery of it. This is very similar to one of the exceptions of c.L. rules that a consideration which is past is enforceable in law. Such a consideration will be enforceable services have been performed at one request of promisor and where both parties acted on the footing that these services would be paid for subsequently. Lampleigh -v- Braithwaite

Under the Kikuyu customary law in cases of sale of land transactions it is not until a man has agreed to pay or has paid for the land that an agreement of sale is concluded. The buyer by paying for the land on agreeing to pay furnishes a consideration which creates a liability on the part of the seller and thus making his promise enforceable in law. This therefore emphasises the importance of consideration in customary contracts.

CAPACITY TO ENTER INTO A CONTRACT

A sane, sober person of contractual age is capable of making a valid contract.²⁰

Infants therefore, have no capacity to enter into contracts. Kenya has recently introduced a short Act that clarifies contractual age. Originally the Age of majority Act 1933 laid down a contractual age of 21 years for Europeans and 18 for non - Europeans other than Africans. This statute remained in force until 1974 when a new age of majority Act was passed.

By the new Act 1974 18 years was fixed as the Age of majority. However, there are three basic situations that describe the possible contractual position of an infant in Kenya:- By the infant relief Act 1874 which applies in Kenya contracts for goods other than necessaries, loans of money and accounts stated are described as absolutely void.

The second category of contracts are those described as voidable at the option of the infant. This means that if both parties are happy with the contract then they must perform their respective duties under it. But if the infant changes his mind then he is entitled to avoid it, he must do this while he is still an infant or within a reasonable time of becoming an adult. If he fails to exercise this right then the contract will become fully binding on him. Contracts that fall under this heading are those where the infant gets something of a permanent benefit.

The last category of contracts are those where the infant is bound by the agreement. The justification of this class is that the contract is for the infant's benefit, whether he likes it or realises does not matter, the court will enforce it. This arises in cases of goods that are regarded as necessaries to the infant; or contract that which can be regarded as beneficial to the infants in terms of education and training.

Insane and drunkard persons also have no capacity to enter into contracts. There is no question of law punishing a person who makes a contract while mentally ill or under the influence of drink. Infact the complete opposite is the case. The court's intention was to protect both classes of people against their own defeciencies and to protect them from others who might attempt to take advantage of them.

The requirement is that the incapability must be such that the affected person did not fully appreciate what he

was doing and the other contracting party must be aware of such incapacity. In the case of drunkenness it should be fairly apparent but mental disability may be more difficult to detect.

A contract made in those circumstances is voidable at the option of the incapacitated party.

Corporations have power to enter into any type of contract but such contracts will be treated as void where such contracts are ultra-vires the objects of the corporation as stated in the memorandum and articles of association. This was illustrated in the case of Re Jon Beauforte London Ltd where a firm was empowered to manufacture various types of clothing and they in fact started to manufacture veneered panelling. It was held that they had acted ultra vires and the company could not be sued on contracts made with suppliers customary.

CUSTOMARY CONTRACTS:

Generally women and unmarried children cannot make a valid contract without the consent of their male guardian who then also represents them at court in cases of disputes.

On the other hand men occasionally need the consent of the near relatives before entering into agreements. Among the Kikuyus for example land belonged to one's family or clan and no man had the right to enter into a sale agreement without the consent of his close relatives or his clan. Even where he sold the land, he was not supposed to sell it to someone of a different tribe.

Among the Tswana for a betrothal to be valid it requires the approval not only of parents of both sides but also of their siblings and other close relatives. A man could not give away or lend arable land without his neighbours consent while they could refuse if the prospective beneficiary has a bad reputation say for being quarrellsome.

Among the Tswana also a sick person cannot enter into a valid contract. In one case it was held that a man had acted wrongly in buying an ox from another who was sick.

In this case the seller of the ox had disposed of an animal he was herding and was sued by its owner. It was heard that such a contract or sale was not valid.

Capacity under customary law is not very different from the one in the modern law of contract. The only difference between the two is that in the modern law of contract women and unmarried children can enter into contracts as long as they do not fall under the category of infants.

The idea that runs through the two systems is that people who are regarded as weak in a society have no capacity to enter into contracts. They are therefore protected against being taken advantage of by the stronger ones both mentally and physically. Among the Kikuyus for example women are regarded as weaker both mentally and physically.

REMEDIES FOR BREACH

What remedies are available for breach under the modern law of contract?

The original common law remedy available to the innocent party was to ask for an award of damages. Money to compensate for the financial loss suffered. This did not always prove to be satisfactory and later equivariance remedies were made available, namely specific performance and injunction.

The purpose of an award of damages is to put the plaintiff in a position he would have been if the breach had never occurred. The award of damages may be either nominal or substantial. In the former only a small sum is awarded reflecting the plaintiff's success but showing that he has suffered no real financial loss. Such an award might be between one and forty shillings substantial damages reflect the financial loss suffered or at least the amount the court if willing recognise as flowing directly from the loss.

Certain losses may be too "remote" and for these the plaintiff is not entitled to compensation. This rule was first formulated in the case of Hadley-V- Baxendale ²² where Alderson B. in the court of Exchequer said "Where two parties have made a contract while one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally or such as may reasonably be supposed to have been in the contemplation of both parties at the time, they made the contract, as the probable result of the breach of it".

Sometimes in order to avoid costly court action and the supplementary to common law remedy of damages. It follows that it will not normally be granted where damages provide adequate relief. A good example is in the case of the sale of land where the law requires that either party to contract for the sake of land is entitled to sue for specific performance of the agreement.

Specific performance may be ordered in respect of an anticipatory breach of contract in circumstances where the plaintiff having elected to affirm the agreement would have no immediate right of action for damages.

The order of specific performance is a discretionally remedy and it does not follow that specific performance will necessarily be granted because damages are not an adequate compensation. The court has a choice in the matter and will consider the general fairness of the transaction and refuse the remedy in circumstances which would not justify a refusal of common law remedy time taken up by such actions parties to a contract may stipulate in their agreement the extent of damages to be paid should one side breach the agreement. Such clauses will be enforced by the courts if it can be shown that the sum to be paid is genuine pre-estimate of the probable loss that could occur. In such a situation the damages are known as liquidated damages.

Where damages will not provide adequate remedy, equitable remedies will normally be sought to supplement the common law remedy of damages. Thus under certain circumstances a promise to do a thing may be enforced by all order of specific performance and an express or implied promise to forebear may be enforced by all injunction.

An order of specific performance is one by which the court directs the defendant to perform the contract which he has made and in accordance with its terms. The remedy is of damages.

The court will not compel performance of contracts for personal service nor of those which will require the use of personal skill. The court for example refused to grant specific performance in one case of Lumley -V- Wagner²³ where a singer had been hired to sing. Also where the court would be required constantly to supervise the execution of the contract specific performance will not be granted.

Injunction may be used as a means of enforcing an express negative stipulation in a contract or a simple covenant or promise to forebear.

Although the grant of an injunction is normally discretionary it does not seem that the court has any discretion to refuse the grant of an injunction to restrain the breach of a negative contract. A negative contract is one whereby a promisor covenants not to do something for example not to carry on a certain trade or one which is negative in substance although not in form for example to buy beer exclusively from a certain brewer the injunction being granted to restrain the covenantor from buying beer elsewhere.

What objectives underlie the modern law of remedies for breach of contract?

Lewellyne in his article "What Price Contract"²⁴ concluded that the real major effect of law will be found not so much in the cases in which law officials actually intervene, nor in those which such intervention is consciously contemplated as a possibility, but rather in contributing to, strengthening attitudes towards performance as to what is to be expected and what "is done".

Nevertheless the law of remedies like that of most of the rest of the world, is not directed at. Compulsion of promises, to prevent breach but at relief to promisees to redress breach. Breach of contract is nowhere a crime and it is not with rare exceptions a basis for the award of positive damages."

The idea behind the remedies for breach is not therefore to punish the breach of contract but rather a redress to the innocent party. If a contract is broken the measure of damages is generally the same whatever the cause of the breach.

CUSTOMARY CONTRACTS

Most customary transactions are completed at once or almost at once. There is no exchange of promise for goods purchased may be paid for and taken away immediately or people helping at work may be rewarded at once. Problems arise where agreements are not carried out like in those cases where A may be still under an obligation of some kind to B.

If payment for a debt is refused or withheld, the debtor is ordered to pay. This is similar to the order of specific performance in the modern law of contracts. Among some tribes, a man whose debtor would not pay had another remedy other than going to court, he could seize cattle or other property from the latter and hold it as security. This is true of the Kikuyus who refer to it as "Gutaha" and the Tswana who call it "Thukutha".

A defendant may similiary be ordered to do work he has promised or to finish a task he has abandoned or done badly. Specific examples include digging a well, transporting goods, ploughing and doctoring. Among the Tswana an order could be issued ordering a marriage to take place. But if the defendant can show that performance was impossible he may be excused.

Where payment has already been made as in cases of dowry, the "court" will usually order its refund and thus cancels the contract. This is true of most of the tribes in Africa. The return of dowry is tatamount to the reslinding of a marriage contract. A contract of marriage will still be regarded as binding until dowry has been refunded by the man and his family.

Among the Tswana a person who has suffered loss through a breach of contract may be awarded special damages²⁵. This applies also in cases where a girl is jilted by her fiance especially after she has born him a child; in one such case the court awarded her eight heads of cattle as damages because he had spoilt her chances of getting married to someone else.

Among the Embu hwere someone asks another to look after his cattle for him because he (owner) does not have enough grazing land, payment must be made. In a case where a man brought an action to recover such money, the court ordered the owner of the cattle to pay the herder.²⁶

Sometimes in customary law relating to contracts if a case of breach of contract is due primarily to the defendant's obstinacy on other misconduct the court in addition to any other award may inflict special punishment upon him He maybe fined. This is different from the modern law of contract where no punitive damages are **not recoverable**.

Nevertheless, when one looks at most of these cases one will find that the idea of the judgements given is to stress obligation. An agreement has been made and should therefore be kept. The traditional societies are said to have a higher sense of obligation than the modern societies. The customary law relating to breach of contracts is therefore not very different from the modern contract law relating to breach.

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CHAPTER THREE

APPLICATION OF CUSTOMARY CONTRACTS BY

KENYAN COURTS TODAY

The major issue here is how far can our Kenyan courts apply customary law rules relating to contracts today. It suffices here to begin by looking at the historical background of the customary law application generally. This will compel us to go right back to the colonial period since our legal system as we have it today is to a large extent a result of the changes and developments that took place in law during the colonial rule.

This history can be traced right back to 1895 when the British came to Kenya and established a protectorate. Although it was not until 1920 that the British made Kenya a colony, the colonial government had always exercised their control over much of what is today the Kenyan Republic.

Initially when the British came to Kenya their aim was to fashion the Kenyan legal system on a British model. They wanted to import and enforce into Kenya most of the common law rules and in that way try and civilize the "natives". But this was soon proved unworkable for most practical purposes.

It is to be noted that the British believed in using indirect rule in most of the territories they colonized in the African continent. It was well recognized as a fundamental axion of the British rule overseas that except in settled colonies, (where the settlers carried English law with them) pre-existing systems of law continued in operation. In East Africa as in other British dependencies on the continent provisions were made at an early date for the recognition of African Customary laws in various ways

and within certain limits and those provisions continued in force with little change throughout the colonial period. Thus the native courts were to administer such laws; the magistrates and the superior courts were to be guided by such laws involving natives: and legislators in enacting new laws were enforced to respect customary laws. The limitations commonly imposed were that customary laws were not to be applied if they were inconsistent with any written laws or repugnant to Justice and Morality.

Recognition of customary laws had its basis in practical necessity, political theory and Juridical philosophy. The hesitant grudging nature of the establishment of British protection in Uganda and the East African protectorate with very limited resources of staff and the uncertain policy of objectives made this aspect of indirect rule inevitable. Thus in 1896 Hardinge Commissioner of the East African protectorate had to accept that the Jurisdiction of his officers up-country should be restricted to within five miles of their stations and even so he instructed them; "You should not go out of your way to oppose native law and usage"¹ But apart from the necessity of the situation it was positively desirable to preserve traditional laws which whatever might be an objective, assessment of them was just because they were familiar and indigenous.

A less altruistic political explanation of the prominence which colonial governments gave to customary laws is that such laws proved increasingly more convenient as administrative authority developed; in particular the imprecision and adaptability of rules of customary law made them useful elements for preserving administrative control and buttressing recognized African authorities. In his official Report on Native Tribunals in Kenya in 1945² Phillip noted that although criminal penalties then current had no precise paralell in indogenous law, Native Tribunal imposed them for "Offences against native

law and custom with a tendency to regard this category of offences as a sort of "Contingencies Vote" on which a tribunal can always fall back to Justify a conviction in circumstances which were not foreseen or provided for by any other law.

Juridical foundation for the enforcement of customary laws lay of course in the support which they enjoyed from the people "It is the assent of the native community that gives a custom its validity and therefore barbarous or mild it must be shown to be recognized by the native community whose conduct it is supposed to regulate"³

It was for the above reasons that the British allowed the application of customary law in what were known as the native courts in Kenya. The East African Order in Council 1897 established native courts and gave them jurisdiction to apply customary law rules in both civil and criminal matters where the parties to a dispute were natives except in cases where a native was a party to a suit against a non-African in which case English law was supposed to apply.

The chief native commissioner was given powers under the above ordinance to establish and abolish such courts and he could over-rule a customary rule which in his opinion was contrary to natural justice and morality. This natural justice and morality was to be measured against the British standards of justice and morality.

The 1897 Native Courts Regulations which were made under the East African Order in Council made it very clear that the native courts to be established were to be of two kinds. One for the muslims and the other one for the real natives who in this case were Africans.

The colonial administration of justice just like any other administration was therefore characterised by a dual system. There was one system of justice for the African and another one for the non-Africans. The African System

at all the material times was characterised by the application of customary law rules in the native courts. Customary law rules of contract were therefore applied by the native courts during the colonial rule. The position remained like this upto independence and even after independence the dual System still persisted.

It was not until 1967 during the integration of the courts in Kenya that significant changes took place as far as the application of customary law was concerned.

In 1967 there was passed the Magistrates Courts Act 1967 which had the effect of re-organising the system of administration of justice and establishing new courts. The Act also ascertained the law as far as the application of customary law rules was concerned. In section two of the Act provides:

"In this Act except where the context other wise provides a claim under customary law means a claim concerning any of the following matter under African customary law:-

1. Land held under customary Tenure
2. Marriage, Divorce, Maintenance and dowry
3. Seduction or pregnancy of an unmarried Woman or girl.
4. Enticement of or adultery with a married women.
5. Matters affecting status and in particular the status of women, widow and children including guardianship, custody, adoption and legitimacy.
6. Succession both testate and intestate and administration of Estates except as regards property disposed of by will be under any written law".

In the same year 1967 there was passed the Judicature Act chapter 8 of the laws of Kenya. Sc 3(2) of this Act provides:

"The High Court and all the subordinate Courts shall be guided by African Customary Law in all civil cases!".

In 1968 there was passed in Kenya the Law of Contract Act. This one provides that the law of contract to be applied by the Kenyan courts is the English law of contract.

It is worthy noting at this particular point that in the above three Acts no particular reference has been made to the application of customary law rules relating to contract. The Magistrates Courts Act omits the application of all customary law rules except a few of them. The Judicature Act does not make any reference to customary rules of contract. The law of Contract Act makes it very clear that the law of contract to be applied in Kenya is the English law of contract. Are our Kenyan Courts then allowed to apply any customary law rules relating to contract. If they are allowed to do so, to what extent can they apply them?

E. N. Cotran in his article Integration of Customary Law in Kenya⁴ advances the view that the omission of customary contracts is only an apparent omission and he goes ahead to suggest that it could not have been the intention of the legislature so to abolish the application of customary contracts and rules which hitherto had been dealt with without any restrictions by the African Courts. He also suggests that the provision of Sec 3(2) of the Judicature Act 1967 in any event gives Jurisdiction to the Kenyan Courts to administer the whole of customary law. Thus according to Cotran the Kenyan Courts are allowed to enforce and apply customary law rules relating to contracts. But then there is enough evidence supported by authorities to show that such a conclusion would not be totally correct.

In an article Can District Magistrates Administer the whole of Customary Law⁵ P. Nowrojee contends that both rules of construction and Judicial authority are heavily

against a conclusion that the legislature could not have intended the abolition of the enforceability of those customary contracts and torts it does not provide for.

"In a court of law and equity what the legislature intended to be done can only be legitimately ascertained from what it has chosen to enact either in express words or by reasonable and necessary implication⁶. The express words of the Magistrates Courts Act wherein one looks to ascertain that intent are clear" in this Act except where the context otherwise requires, claim under customary law means a claim concerning any of the following matters under customary law." As Lord Esher M. R. pointed out in Reports Exparte Taylor⁷ the use of the word "means" confines the expression concerned to the definition therein contained.

The words of Sc 2 of the Magistrates Courts Act are therefore quite clear and being so do not admit any other meaning by implication. That is parliament has enacted a legislation which has restricted the District Magistrates' Courts from applying all except certain specified customary law rules.

On this view if the literal and proper construction of Sc 2 of the Magistrates Courts Act results (which it does) in the exclusion of customary contracts from the application of customary law, then that is what the law and what the courts will enforce. Until a much wider application comes to be adopted, the courts in Kenya will not be the instruments of repairing such omissions whether they are intended by the legislature or not.

The above argument will also be supported by an interpretation of Sc. 3(2) of the Judilature itself. The provision provides for the application of customary law and limits that application inter - alia by the old colonial restrictions "So far as it is applicable and so far as it is not repugnant to Justice and morality. One cannot help making the conclusion that Parliament intended to provide some new or other yardstick of Justice and Morality against which customary

laws are to be measured.

Cotran has also argued that the Judilature Act Sc 3(2) includes in the application of customary law rules all customary law including customary contracts. This also can be rejected with authority. Sc 3(2) of the Judilature Act provides: "The High Court and all the subordinate Courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to or affected by it so far as it is applicable and it is not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantive Justice without undue regard to technicalities of procedure and without undue delay".

It is difficult in the face of the express and excluding provision of the Magistrates Courts Act to draw from the above section the implication sought. If it were only a matter of conflict between two contemporaneous provisions it would be the better founded submission that the specific provisions of the enabling Magistrates courts Act would prevail over the general provisions of the procedural Judilature Act for in respect of the subordinate courts the Judilature Act is concerned with the mode of exercise of h their Jurisdiction rather than with providing Jurisdiction itself.

But there are other difficulties to acceptance of Cotran's way out. First the High Court of Kenya has gone as far as to hold against his basic argument that Sc 3(2) of the Judilature Act is inclusive of all customary contracts and Torts. In the case of Joseph Mwangi Wainaina -V- Gathoni Wainaina the court held that:

"The Judilature Act and the Magistrates Courts Act were enacted on the same day and came into operation on the same day and in my opinion in relation to the exercise under the formar Act of the Jurisdiction confered upon Magistrates by the latter, there is no warrant, ther is

no warrant for according to a meaning to the "African customary law as used in the Judilature different from that expressed by definition of the Magistrate's courts Act".

We can also say with confidence that even where a customary claim comes squarely under all the qualifications of the Judicature that is, it is a civil suit, one or more of the parties are subject ot African customary law or affected by it, and it applies to the circumstances of the case, it is not repugnant to Justice and morality; and it is not inconsistent with any written law, the court still need not administer and adjudicare according to the relevant customary law. This was illustrated in the case of Jessee Nyokabu -V- Public Trustee⁹ where an attempt on the part of the defendant to force the plaintiff to take into account damages that might be recoverable under customary law much less to adopt only customary law remedy was rejected by the court. The court accordingly proceeded to adjudicate the claim as laid and awarded damages under the Fatal Accidents Act.

Finally the law of contract Act which is the major legislation as far as the law of contract is concerned by providing that the law of contract to be applied in Kenya is the English law of contract clearly prohibits application of the customary law rules relating to contract. The words of the law of contract Act are clear and cannot be said to be having two meanings.

Neverthelss although the Jurisdiction to apply customary law contracts has been removed from the District Magistrate's by virtue of Sc 2 of the Magistrates courts Act, one can still argue that such Jurisdiction is still held by the High Court in accordance with Sc 3(2) of the Judilature Act which provides that, the High Court and all the subordinate Courts will be guided by customary law in all civil cases. But even here a customary law rule can still be impeacked on the ground that it is repugnant to justice and morality.

Moreover it will be cumbersome if even the petty civil cases relating to contract were all to be taken to the High Court Judges instead of leaving them to be dealt with by the Magistrates who are more conversant with customary law rules.

We have observed from the above that our Kenyan Courts are no longer able to apply customary rules relating to contract by virtue of the Magistrates Court Act Sc 2 and the law of contract Act. This can be explained from the fact that the main thrust of development in the colonial era was to displace African courts and laws with courts and laws owing their inspirations to the English legal system and common law but with variations to take account of local circumstances and necessities of colonial rule. But even though one can still say that after independence there has been little attempt by the government of Kenya to create a more African legal system for Kenya and even to blend together African rules together with the English ones as was half heartedly attempted by the colonialists. The government seems to have thought that such attempts were still - born and a modified, unified legal system can only be build on the imported legal base. For this reason there has not been any legislation passed to ascertain customary law rules and especially the ones relating to contract.

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CONCLUSIONS:

The Africans have well defined rules relating to contract. These rules were enforced and applied by what were regarded as native courts during the Colonial rule the basis of their recognition being, practical necessity, political theory and Juridical philosophy.

Since independence there has been no attempts by our Kenyan Government to create a more - African legal System for Kenya. As such no particular legislation has been passed to ascertain customary law rules and in particular the ones relating to contract. Instead Parliament has enacted legislations which have had the effect of dissapply customary rules relating to contract by the Kenyan Courts today.