

A PROPOSAL TO DE-COLONISE SALE OF GOODS LAW IN KENYA: WHY THE KENYAN SALE OF GOODS ACT IS A HOPELESS LEGISLATION

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ABSTRACT

When members of the Legislative Council of the Kenya Colony met in July 1930 to pass the Sale of Goods Ordinance, the Kenyan Colony was not represented by any African. White missionaries were the African representatives because it was felt that they knew a lot about Africans that they would best protect African interests in the Act. The Sale of Goods Act, Chapter 31 Laws of Kenya (The Act) was adopted from the English Sale of Goods Act, 1893. There are good reasons to believe that the Act was passed to protect colonial interests in sale of goods Law in the country. This Act has substantively remained unamended since 1893. With the dynamic nature of the commercial environment, it is expected that the Law governing such an environment also keeps the momentum. This has not been the case in Kenya. The current study seeks to critically examine the extent to which the doctrine of freedom of contract is entrenched in the Act. The study examines the topic under four themes: elements of the doctrine of freedom of contract in the Act, formation of the contract of sale of goods, implied conditions and warranties, and exclusion clauses. The study then makes recommendations on how these provisions should be amended or repealed to reflect the modern commercial environment in Kenya.

Keywords: Law Merchant; Codification; Sale of Goods; Freedom of Contract; Implied Terms; Exclusion Clauses

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1.0 INTRODUCTION

A discussion on Sale of Goods Law in Kenya is only complete when traced from where it all started: England. This paper will show that Kenya's Sale of Goods Act, Chapter 31 Laws of Kenya, was transplanted from England and has defied change, yet the version from where it was transplanted has undergone several amendments to keep up with the changing commercial environment. The paper will also demonstrate that the Act has completely watered down the doctrine of freedom of contract that it purports to safeguard, and the remnants of this doctrine are only available in Common Law. The paper will also apply Marxist reasoning to demonstrate how, through the Act, the state has interfered with the commercial environment that should ideally be a free environment.

Professor Clive Schmitthoff's work on the history of Sale of Goods Law in England is instructive.¹ Schmitthoff opines that "The central concept of the Act of 1893 is that of the property in the goods sold, and many problems require an examination of the question whether the property, or, as it is called title, has passed from the seller to the buyer. In the modern view, the test of property has, in this connection, a somewhat abstract and unrealistic flavour."² The enactment of this law confirmed Jeremy Bentham's assertion that "property and state-made law "are born and must die together. Before the [state's] law there was no property: take away the law, all property ceases."³ This paper will demonstrate how this concept of transfer of property dominated discussions towards the enactment of this English Sale of Goods Act which was thereafter adopted by all common law jurisdictions and how this concept no longer has the same flavour in these jurisdictions, Kenya being a case study. Central to this discussion will be the concept of freedom of contract, and how the inequality of parties to the contract of sale has watered down the central theme of this doctrine.

2.0 HISTORICAL DEVELOPMENT OF SALE OF GOODS LAW

Rules governing sale of goods developed independently without the coercion of the state. Even before the enactment of the English Sale of Goods Act, 1893, merchants were already in the market and had their dispute resolution mechanisms. After the fall of the Roman Empire, commercial activities became rare. These activities started emerging in the 12th and 13th centuries because

1. Schmitthoff, C., *The Sale of Goods*, 2nd ed. London: Stevens & Sons, 1966. pages 5-17.

2. *Ibid*, at page 4.

3. Jeremy Bentham, *Works*, Volume 1, edited by John Browning (Edinburgh: W.Tait, 1859), at page 309.

of the growth of agricultural and industrial production. A professional class of merchants started emerging around this time. Their trading activities were however limited to local environments at the beginning, because of language barrier and different cultural backgrounds. Geographical barriers were also the order of the day because traditional modes of transport could not take them to far lands. These traders were therefore forced to develop some rules of interaction. It is during this time that the Law Merchant (*lex mercatoria*) developed.⁴ It has been argued that the periods of Renaissance and the Industrial Revolution could not have succeeded without this system of law.⁵ The law was voluntarily developed, adjudicated and enforced by the merchants, devoid of state coercion.

The advantage of having merchants themselves develop the Law Merchant is that the law of sale of goods developed in line with the needs of the market. It was not a coerced law.⁶ It will be demonstrated that the Kenyan Sale of Goods Act was adopted in the 1930s and has not been changed ever since. Rules of Law Merchant were only meant to facilitate interaction between players in the market. They were not complex. They were also not enforced in a coercive manner. They were enforced through threats of being ostracised by the other merchants.⁷ The threat of being ostracised from the merchant community and goods being boycotted by buyers proved more effective than state coercion.⁸ The Law Merchant judges were selected from among merchants. They understood the business of sale of goods and were experts in it. Juxtapose this with Common Law judges who could be educated in the Law, but with little practical experience on the same.⁹ In addition, whereas Common Law judges would follow strict codified rules, Merchant judges would prefer simplicity and continuity of business.

Around the 12th century, governments across Europe started codifying the rules of the Law Merchant. England codified the Carta Mercatoria in the 14th century. This was a charter granted to foreign merchants by King Edward I in 1303. It translated to “The Charter of Merchants”. It guaranteed them freedom of trade, exemption from additional taxes and duties, and protection under the

4 Berman, Harold J *Law and Revolution: The Formation of Western Legal Tradition*. Cambridge, Mass.: Harvard University Press, 1983, at 333.

5 Trakman, Leon E *The Law Merchant: The Evolution of Commercial Law*. Littleton, Colo.: Fred B. Rothman and Co., 1983, at 13.

6 Fuller, Lon L *The Morality of Law*. New Haven: Yale University Press, 196, at page 12.

7 Trakman, note 5 at page 10.

8 Wooldridge, William C., *Uncle Sam, the Monopoly Man*. New Rochelle, NY: Arlington House, 1970, at page 96.

9 Mitchell, W. *Essay on the Early History of the Law Merchant*. New York: Burt Franklin, 1904. At page 13.

Law.¹⁰ Since merchants were reluctant to subject their disputes to state codified Law and instead continued filing their disputes before Merchant courts, governments started enacting laws to attract these merchants to Common Law courts. In England, for example, the government enacted the Statute of the Staples of 1353 to grant merchants “protection in the fourteen major trading centres for “staple” products—mainly wool, leather and lead.”¹¹ German, Flemish and Italian merchants and bankers occupied these centres and therefore the government sought to guarantee them freedom through the statute. Merchants could therefore appeal to the royal courts and the King’s Council if they were dissatisfied with decisions of Merchant courts. This is how the government started weakening Law Merchant courts. Through this statute, the government also started controlling foreign trade flows, so that goods from outside England had to pass through identified towns and special courts were established to adjudicate upon disputes arising from such trade. The state had effectively taken over the Law Merchant.

Landes and Posner have opined that it was in the interest of a Common Law judge to protect the financial interest of the state in the commercial environment, because the judge was employed by and remunerated by the state. A Law Merchant judge would only protect the interest of merchants. Hence, the state gradually succeeded in moving sale of goods disputes to Common Law courts by the 16th century.¹² Some legal historians have credited John Holt (Chief Justice of England from 1689 to 1710) and Lord Mansfield (Chief Justice of England from 1756 to 1788) as the founders of Commercial Law in England, but the truth is that they only helped in codifying the Law Merchant that existed long before their time.¹³

The Bill relating to the enactment of the English Sale of Goods Act of 1893 was drafted by Sir MacKenzie Chalmers. Chalmers’ intention as to codify the law relating to sale of goods. The long title of the Act captures this very well when it provides that it is an “Act for codifying the Law relating to the Sale of Goods.”¹⁴ This caption recognises that the law of sale of goods still existed before the Act, though it was uncodified.¹⁵ Chalmers also sought to document,

10 *Ibid*, at page 11.

11 Mitchell, note 9, at page 72.

12 Landes, William M. and Richard A. Posner, “Adjudication as a Private Good.” *Journal of Legal Studies*, March 1979, 235-84. At page 258.

13 Trakman, note 5, at page 27.

14 Long title of the Sale of Goods Act, 1893, United Kingdom, Chapter 71 Laws of the United Kingdom.

15 See Ferguson, “Legal Ideology and Commercial Interests: The Social Origins of the Commercial

in written form, the principles of law developed by Common Law courts in England at the time.¹⁶ There is reason to believe that the Sale of Goods Act of 1893 was enacted to provide a mechanism for acquiring raw materials from England's former colonies. Bridge captures this very well when he states that the kind of case law that Sir Chalmers' Act sought to codify did not:

Deal with massive shipments or supertankers or with the sale of complex manufactured machinery. It is heavily concentrated in the area of relatively small-scale transactions involving raw materials soon to be used in the manufacturing process. There is little evidence of dealings in futures. The cases are therefore replete with references to bags of waste silk, quantities of worsted coatings, pockets of hops, Manila hemp, scarlet cuttings, oil extracted from grain, long-staple Salem cotton and the like. Less often, they deal with relatively unsophisticated manufactured objects such as hosting ropes, carriage poles, and copper sheathing for a ship.¹⁷

It is interesting to find that most colonies especially those in Africa, have not yet repealed their Sale of Goods Acts that was firmly anchored on this English Act. Kenya ranks first among those colonies. The English Act was adopted almost verbatim by the Legislative Council of the Kenya Colony in 1930. It was first enacted as the Sale of Goods Ordinance which commenced on 1 October 1931. This Act was imposed on a society that conducted its business largely on barter terms, although some communities in the Coastal region used cowrie shells as a medium of exchange. Among the Akikuyu, land and stock were exchanged for goats and cattle. Commodities such as sugarcane, potatoes, millet, bananas, yams, etc would also be exchanged in the barter market. According to Jomo Kenyatta, barter trade subsisted even after the advent of Europeans and such goods as articles of clothing from animal skins, Lancaster cotton, agricultural implements, sheep and goats were the most precious goods that a man could have.¹⁸ Kenyatta states as follows:

In the Gikuyu country before the introduction of the European monetary system, sheep and goats were regarded as the standard currency. The price of almost everything was determined in terms of sheep and goats¹⁹

Law Codes" 4(1) *British Journal of Law and Society* 18.

16 The Law Commission and the Scottish Law Commission. 1987. Sale and Supply of Goods (Law Com. No. 160, Scot. Law Com. No. 104), paragraph 1.5.

17 Bridge, MG 'The evolution of modern sales law', (1991) LMCLG 53.

18 Jomo Kenyatta, *Facing Mount Kenya: Tribal Life of the Agikuyu*. Heineman Educational Books, 1971.

19 *Ibid*, at page 66.

Animals had a sacrosanct aspect. The Agikuyu used to sacrifice animals to their God. In addition, no one could be allowed to marry without paying animals as dowry. Hence, these animals had such a high value attached on them. The doctrine of freedom of contract was highly revered, not because there was any coercive power of the state, but because of good morals. Exploitation was highly disdained. Kenyatta states as follows:

For instance, if one man has beans and he wants yams, he goes to the man who has yams and is in need of beans and tells him: "I have my beans and I want your yams". Then they argue (haggling) as to how many yams to a basket of beans. If they agree they exchange there and then each goes his way. If not, looking for someone else who will agree with him for the exchange depends entirely on individual buyer and seller.²⁰

Other communities like the Kamba, Luo, Embu, Meru etc had similar barter transactions.²¹ Indeed, the Kikuyu largely traded with the Kamba.

Clearly, the English Act did not invent the wheel insofar as the doctrine of freedom of contract is concerned. The doctrine was even more adhered to because of the high moral standards set up by the communities. It will be demonstrated later that this doctrine, as it appears in the Kenyan Sale of Goods Act, is an oxymoron. It is submitted that this Act was passed in Kenya in 1930, at a time when the colonial policy was to "create a Whiteman's foreign country in Kenya." African fertile land in the highlands had already been occupied by White settlers and the administration, led by a Governor, was all White.²² Clearly therefore, the intention was to pass a law that ensured that the Whiteman's interests in Kenya were well protected. Why, then, would Kenya still retain such a Sale of Goods Act in 2023?

There are adequate facts to support the assertions in the paragraph above. First, the Legislative Council that passed this Act was all-White. Africans were not represented! Africans were only represented in 1944. The White missionaries that represented Africans in the Council that time had been handpicked by the colonial government in the pretext that, unlike the colonial government representatives, the missionaries understood African problems better. It should

²⁰ Kenyatta, note 18, at page 61.

²¹ See YP Ghai "Customary contracts and transactions in Kenya" a seminar paper presented in Haile Selassie 1 University under the auspices of the International African Institute in April 1964. The article is contained in "Ideas and Procedures in African customary law" Edited by M. Gluckman, at P. 333.

²² A more concise account of how colonial masters did their best to make Kenya a Whiteman's territory away from England is provided by M. P.K. Sorrenson, "Land Reform in the Kikuyu country: A study in Government Policy" Oxford University Press, NAIROBI, 1967.

be recalled that these missionaries also believed that Africans were not capable of solving their own problems, and African traditions had to be replaced by European practices in all spheres of life. So, how could such missionaries be seen to have adequately represented Africans in the Council that passed the Sale of Goods Ordinance?

Most authorities during this time demonstrate that the freedom of contract was never respected. Agreements entered between Africans and Europeans were a result of coercion. The decision of *Ole Njogo and others v A.G. Kenya Protectorate*²³ comes to mind. In this decision, Masai elders were forced by the colonial government to sign a treaty whose effect was to move from their Ngong area to the Laikipia Plateau to allow European settlement. One of the clauses in the agreement was that the agreement was valid for as long as Masai as a race existed. Later, the Masai were moved back to Ngong because they had now grazed down the long grass in Laikipia which had impeded European settlement. The Masai claimed that this was a breach of agreement. It was, however, held that the Masai were not competent to enter such an agreement because they were not sovereign. In addition, the court held that the relocation was an Act of State that could not be challenged in court.

Another reason to believe that the Act was never intended to protect African traders is that when the Attorney-General moved the Bill in July 1930, there was no debate as the bill was not opposed. The Attorney-General stated as follows:

Commercial conditions have changed very considerably since the middle of the last century. Particularly have they changed sir, in so far as the commercial transactions of those who live in the more distant parts of the Empire are concerned, and yet sir, our local legislation on the sale of Goods bears the date, 1872 (referring to the Indian contract Act, 1872) and bears the obvious imprint of the early fifties, when it was first prepared. Since that date there has been a volume of extremely critical case law ----- (which) was embodied in what is generally accepted as one of the most carefully and admirably drafted statutes which adorn the statute Book of England, the Sale of Goods Act, 1893. So admirable is that Act that in spite of changing conditions, it has never been necessary to amend one word of it. And, sir, here we are working under an antiquated system, which may be said to represent

23 [1914] 15 EALR 70 (Also known as the Masai Case). See also Montagu, S. (1955) "The Trial of Jomo Kenyatta" Secker and Warburg, London; and Japhet, Kirilo and Earle Seaton. The Meru Land Case. Nairobi: East African Publishing House, 1967.

commercial practice or the state of the law which existed at the later date, that is, 1872.²⁴

The speech by the Attorney-General is the only indication of the purpose of the Act, since there was no debate about the Bill in the legislative Council. The Attorney-General's speech clearly demonstrates that the Sale of Goods Act of 1930 was meant to protect the British in Kenya in their business of sale of goods. Before this law was enacted, the Indian Contract Act of 1872 was applied in sale of goods in Kenya. This law had become antiquated because it had not incorporated the provisions of the English Sale of Goods Act, 1893. The British in Kenya therefore felt less protected when they compared themselves with their counterparts in England. The Attorney-General stated as follows:

The Indian Contract Act, to which I refer sir, has been amended in India and brought into line with English legislation. That amendment ---- is not applicable to this territory. Zanzibar, which also uses the Indian Act has amended it to bring it into line to a large extent with the English sale of Goods Act. We have done nothing of the sort, Sir up to now, and I do not think we can do so now too rapidly²⁵

With this background, this paper will now interrogate the Kenyan Sale of Goods Act within four themes: the doctrine of freedom of contract, formation of the contract of sale, implied terms of the contract (conditions and warranties), and exclusion clauses.

3.0 ELEMENTS OF THE DOCTRINE OF FREEDOM OF CONTRACT IN THE SALE OF GOODS ACT

When the bourgeoisie seized political power in Britain, they demanded a free labour market in which labour workers were now "freed" from their property, economic forces, and service. Free labour workers could easily be subjected to bondage as hunger and search for necessities would inevitably drive them to work in factories. Marx captures this situation well as follows:

The workers were to be free from the old relation of clientship, villenage or service, but also free from all goods and chattels, from every real and objective form of existence, free from all property. Such a mass would be reduced either to the sale of labour power or to beggary, vagabondage or robbery as his only source of income. History records the fact that it first tried beggary, vagabondage and crime, but was

24 Legislative Council Debates 1930, Volume 11 at P.P. 458. The Attorney-General at that time was Hon A. DA MACGREGOR K.C.

25 *Ibid.*

herded off this road on the narrow path which led to the labour market by means gallows, pillory, and whip.²⁶

Eventually, the law declared everyone equal, and this gave rise to the doctrine of freedom of contract. Yet, the society was characterised by private ownership of property and means of production, the effect was the strengthening of the dominant property owners. This is because there were those with property, and then there were those without any property.²⁷ The doctrine meant that those with property were free to give it out or to decline to give it out to those without.

This doctrine is beautiful in theory, but very ugly in practice. It does not take into consideration the economic disparity of the parties to a contract of sale.²⁸ The Kenyan society is a class society.²⁹ How would the doctrine apply to a buyer from the rural parts of the country who enters a contract with General Motors Ltd. for the purchase of a pickup to facilitate his agricultural activities in the countryside. Are these two parties equal, so that they are “free” to contract in their own terms? In any case, General Motor’s will have a standard form contract drafted by its lawyers, and this farmer will be required to sign it “as is”. Where is the freedom there? Developed by capitalists, this doctrine was sanitised by the judiciary in the 19th century and two cases deserve mention. In *Printing and Numerical Registering Co v Sampson*,³⁰ Sir George Jesse opined as follows:

It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that man of full age and competent understanding shall have the utmost liberty of contracting, and that their contract when entered into freely, and voluntarily shall be held sacred and shall be enforced by the courts of Justice. Therefore, you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract

26 Marx, *Pre-capitalist Economic Formations*, London (1964), page 98.

27 Handel, *Marxist Economic Theory*, London (1968).

28 Dicey, *Law and Opinion in England in the 19th Century*, London (1914), page 57.

29 Retired Chief Justice Dr Willy Mutunga did an excellent paper on class analysis in Kenya, which is available in Willy Mutunga, “Commercial Law and Development in Kenya”, *A Journal of African Studies*, 12(1), 1982.

30 (1875) 19 Eq 462.

In the second case of *Manchester Sheffield & Lincolnshire Railway Co v Brown*,³¹ a case where a company entered a contract to buy fish from a fish merchant but later sought to rescind the contract because of pressure from the market and declined to assume liability for the loss caused on the merchant, Lord Bwamwel stated as follows:

I am prepared to hold that unless some evidence is given to show that a contract is unjust and unreasonable, it ought to be taken that contract is a just and reasonable one, the burden of proof being upon the man who says that it is unjust and unreasonable. First of all, its justice and reasonableness are prima facie proved against him by his being a party to it, and if he means to say that what he agreed to is unjust and unreasonable, he must show that it is so

The Kenyan Act does not define what freedom of contract is, but the definition of a contract of sale of goods in section 3(1) is the clearest indication that the buyer and the seller have freedom to contract. The section states as follows:

- 3.(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price

Doctrines of Law of Contract continue to apply to the contract of sale of goods, because section 4 states that capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property. Kenyan courts have competently weighed in on this doctrine. In *African Safari Club Limited v Kenya Kazi Limited*,³² Amin, J, while recognising that this doctrine has lost its appeal in recent times because of the realisation that parties to a contract are not at the same level economically, stated as follows:

Freedom of contract. In the nineteenth century freedom of contract was regarded by many philosophers, economists and judges as an end in itself. The parties were supposed to be the best judges of their own interest, and if they freely and voluntarily entered into a contract, the only function of the law was to enforce it. It was immaterial that one party was economically in a stronger bargaining position than the other. If he introduces qualifications and exceptions to his liability, e.g. in what are known today as exemption clauses, and the other party accepted them, then full effect would be given to what the parties agreed. These ideas have to a large extent lost their appeal today. "Freedom of contract," it has been said, "is a reasonable social ideal only to the extent that equality of bargaining power between

31 (1883) 8 AC 703.

32 [1990] eKLR.

contracting parties can be assumed, and no injury is done to the economic interests of the community at large.

In *George M Musindi and others v Small Enterprises Finance Co. Ltd.*³³ Nyamu, J weighed in as follows regarding this doctrine:

In certain situations the free reign of the principle of freedom of contract as defined in the last century would not serve the interest of doing justice and small wonder in many jurisdictions legislators have made inroads into the principle so well described by two of its patron saints

...

Sadly, the world has not yet manufactured the enlightened people answering the description captured by the two gentlemen above nor has the gap of bargaining power between contracting parties necessarily been bridged in the two centuries, hence the need for further thought and intervention both statutory and by the courts under the common law.

...

I have, as observed above noted that the superman intended to have been “invented” in the 20th and 21st centuries, with gifted mature reason and governed by enlightened self-interest to manage transactions on the basis of unfettered freedom of contract was not and has yet been invented and cannot be invented because men and women are created. It follows therefore that the principle of freedom of contract without an underlying commercial morality is like a train whose brakes are slowly failing with each mile covered, it has inbuilt in it seeds of self-destruction. This explains the great interventions in many jurisdictions by the Legislature to rein in the freedom – e.g. Business Premises Rent law, Rent Restriction Laws, laws on housing and mortgages and policies underpinning Housing laws, etc.

These two courts are recognising the fact that the doctrine of freedom of contract ignores the fact that, in most instances, parties to a contract of sale do not have equal bargaining power and are differently economically empowered. Oftentimes, the more powerful party to the contract includes exemption clauses in the contract so that they will not be liable in the event the less powerful party suffers injury. Such clauses will be discussed later in this paper. Evidently, therefore, this doctrine needs to be revisited, if at all it applies in the Kenyan Sale of Goods Law.

33 [2007] eKLR, civil case 1861 of 1995.

4.0 FORMATION OF THE CONTRACT OF SALE OF GOODS

This section will examine selected sections of Part II of the Sale of Goods Act titled Formation of the Contract with a view to raising concerns on the meaning and purpose of such sections in the modern commercial environment in Kenya. The section does not purport to provide an exhaustive account of Part II. Goods are the subject matter of the contract of sale. Unlike other contracts, the contract of sale must be about goods. Section 2 of the Act defines “goods” as follows:

“goods” includes all chattels personal other than things in action and money, and all emblements, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale

Per the *Halsbury Laws of England*, the phrase “chattels personal” comprises two sub-categories: ‘things in possession’ and ‘things in action’. ‘Things in possession’ include: “all things which are at once tangible, movable and visible, and of which possession can be taken, for example, animals, household articles, money, jewel, corn, garments, and everything else that can properly be put in motion and transferred from place to place.”³⁴ ‘Things in action’ comprise “‘shares and other securities, debts, bills of exchange and other negotiable instruments, bills of lading, insurance policies, patents, copyrights and trademarks and other incorporeal property.”³⁵ Money is excluded from the definition of goods. However, when money is not used as legal tender but for other purposes, it can fit the definition of goods.³⁶

The language used in this definition is obscure and archaic. Non-lawyers will find it difficult to comprehend.³⁷ What was so hard in making it clear that “goods” must be tangible and should not include money, intangible things, land, water, etc? Why would, in 2023, Kenya still retain such an obscure definition of goods and how would it help sellers and buyers of goods who are ideally the target of the Law?

The other question that arises is whether computer software fits this definition of goods. It should be remembered that computer software is simply a set of instructions or commands telling the computer hardware what to do.

34 *Halsbury, Laws of England* (4th ed), Volume 35, paragraph 1205.

35 Guest A.G. et al. 2006. *Benjamin’s Sale of Goods* (7th ed.) (London: Sweet & Maxwell), paragraph 1- 080.

36 *Ibid.*, paragraph 1-084. Bridge, *The Sale of Goods*, *op. cit.*, paragraph 2.20. It is not uncommon for people in Kenya to buy old coins as “goods”.

37 See for example sentiments by Bradgate, R. & Twigg-Flesner, C. 2003. *Blackstone’s Guide to Consumer Sales and Associated Guarantees* (Oxford: Oxford University Press), paragraphs 2.2.1.3. & 2.3.1.5.

Software is not tangible and is therefore excluded from the definition of goods. However, Sir Iain Glidewell of the UK Court of Appeal opined, in obiter, in *St Alban's City and District Council v International Computers Ltd*,³⁸ that where the software is fed into a disk or any other hardware and sold in it, it would be construed to be “goods” in line with the definition. This is because the hardware is tangible. Where the software is just being sold online and not in any hardware, then it is subject to general Law of Contract and Intellectual Property Law, not the Sale of Goods Act. Green and Saidov have settled this matter as follows:

The important point is that whether or not the existence of IP rights has an effect on the characterisation of the software transaction as sales is a matter of a particular case. A non-exhaustive list of relevant considerations includes such factors as whether the duration of using software is indefinite, whether payment is to be made once or periodically, and whether the licence can be revoked³⁹

This was the issue in the UK High Court case of *London Borough of Southwark v IBM UK Ltd*,⁴⁰ where the Borough alleged that the software supplied by IBM was not fit for purpose. The Court dismissed the case by stating that this was not a contract of sale in line with the Sale of Goods Act 1979, because there was no transfer of property. The parties had agreed that the title to the software remained with the third party who had supplied it.

Kenyans are very entrepreneurial. There are many of them that are in the business of selling movies, games, computer software etc, all in soft-copy version and without feeding them in any hardware device like a CD-ROM. How does the Sale of Goods Act help these people and their buyers with such a definition of goods in section 2?

It might be argued that the sale of software, which is intangible, can be categorised as supply of services, or provision of labour, and therefore subject to other laws like the Employment Act. But courts have not been helpful in this regard! For example, in *Lee v Griffin*,⁴¹ the supply of dentures by a dentist was held to be sale of goods, despite the dentist employing his skill and labour to the patient. How do you reconcile this with *Robinson v Graves*,⁴² where an artist sold a portrait of the customer to the customer himself and the court held this to be

38 [1996] All ER 481.

39 Green and Saidov, ‘Software as Goods’, (2007) JBL 161 at page 177.

40 [2011] EWHC 549 (TCC) (17 March 2011).

41 (1861) 1 B&S 272.

42 [1935] 1 KB 579.

supply of services and labour, yet the artist also employed his skill and knowledge just like the dentist in *Lee v Griffin*? Benjamin does not understand.⁴³ The author of this paper also shares in his confusion. The confusion is compounded by the thought that books, which are the subject of the application of intense skill, knowledge and labour, qualify as goods and can be subjected to the Sale of Goods Act, yet computer software and other intangible things cannot.⁴⁴

How about other intangible things like electricity, water and gas? The definition in the Sale of Goods Act excludes them. Case law is also not helpful. Early English cases tell a contradictory story. In *Britvic Soft Drinks v Messer UK Ltd*,⁴⁵ the sale of carbon dioxide for use in carbonated drinks was held to satisfy the meaning of goods. In *East Midlands Electricity Board v Grantham*,⁴⁶ electricity was held not to be goods,⁴⁷ and in *Bentley Bros v Metcalf*,⁴⁸ the supply of power in whatever form was held to be sale of goods.

It is not justifiable why the definition of “goods” in the Act is that discriminatory. Most of the sellers and buyers in the Kenyan commercial environment are non-lawyers and will not understand why the definition is this discriminatory. Their intention is to buy and sell goods and such goods can be tangible or intangible. They can be manufactured goods or goods that require the application of skill, art and knowledge. They can also be software. And what is the phrase “industrial growing crops” supposed to mean? This phrase should be deleted and replace it with a phrase that recognises that any crops and farm yields fit the definition of goods, provided they will be severed from the land before sale. In addition, the word “emblems” needs to be replaced by a word that makes it clear that crops do not just include those grown for profit, as the word suggests. All crops, provided they will be harvested before sale, should be included in the definition.

Section 7 of the Act provides for three categories of goods: existing goods, contingent goods and future goods as follows:

43 Benjamin’s Sale of Goods, note 35, paragraph 1-047 fn. 1.

44 See Horovitz, “Computer Software as a Good Under the Uniform Commercial Code: Taking a Byte out of the Intangibility Myth”, (1985) B.U.L. Rev 129. See also Green and Saidov, ‘Software as Goods’, (2007) J.B.L. 161.

45 [2002] EWCA Civ 548.

46 [1980] CLY 271.

47 Yet in *County of Durham Electrical Power Distribution Co v IRC* [1909] 2 KB 604 this question was left open.

48 [1906] 2 KB 548 at 552-53.

- 7.(1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale.
- (2) There may be a contract for the sale of goods the acquisition of which by the seller depends upon a contingency which may or may not happen.
- (3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods

Section 2 defines future goods as goods to be manufactured or acquired by the seller after the making of the contract of sale. The section does not define existing goods. A contract of sale can only be entered for the sale of existing goods. Where the goods are future goods, that is to say, goods that will be made available in the future, the contract can only be an agreement to sale, and it will be concluded when the goods are made available.⁴⁹ Section 19(1) talks about “specific” or “ascertained” goods. Property in the goods can only pass where the goods are ascertained or specific. Property cannot pass in unascertained goods. Section 2 does not define ascertained goods. It only defines specific goods as goods identified and agreed upon at the time a contract of sale is made. For example, if it is a car, it needs to be a particular car with a designated registration number, chassis number, colour, model, etc. This classification of goods is not justified. It is not clear what purpose it seeks to serve. In a jurisdiction where the doctrine of freedom of contract works, one would expect a willing buyer and willing seller, both of whom are competent to contract, should be let alone to decide which goods should form the subject matter of their contract. Bridge agrees with this proposition:

A modern Sale of Goods Act does not need to have a conceptual distinction between specific and unascertained goods (though it does need to have a notion of goods that have not yet been ascertained). Even less does it need to have a distinction between future and existing goods, which, with little forcing, could be accommodated within the distinction between specific and unascertained goods if this latter distinction were thought to be worth preserving⁵⁰

This is one of the moribund provisions of the Act that are ripe for repeal.

Section 5 does not raise any significant issues, because it states that a contract of sale may be made in writing (either with or without seal) or by word of

49 Section 3(4) of the Act.

50 Bridge, Michael G. (2006) “Do we need a new Sale of Goods Act?” In: Lowry, John and Mistelis, Loukas, (eds.) *Commercial Law: Perspectives and Practice*. LexisNexis Butterworths, London, UK. ISBN 9781405710077.

mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties. This is in line with the freedom of the parties to contract. Section 6 is the most archaic provision of the Act. Before any further interrogation is made, the section is reproduced herein:

- 6.(1) A contract for the sale of any goods of the value of two hundred shillings or upwards shall not be enforceable by action unless the buyer accepts part of the goods so sold, and actually receives them, or gives something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf

Why would the Act set a threshold of KShs 200 for a contract to be in writing for it to be enforceable in the country in 2023? This would have made much sense when the English Act, from which the Kenyan Act was enacted, was passed in 1893. But now it does not. The English provision was repealed in 1954 through the Law Reform (Enforcement of Contracts) Act 1954. In the US, the Uniform Commercial Code sets this threshold at \$ 5000 (approximately KShs 500,000/-),⁵¹ yet the Kenyan provision has remained static. It is not even justifiable why the Act should have such a provision, in a country which implements the doctrine of freedom of contract. The parties should be left to determine their own terms. If they think the subject matter of the contract of sale is highly valuable and the contract should be reduced into writing, they should be seen to be competent enough to do that.

Section 8 also deserves interrogation. It states that where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void. This section is a codification of the common law doctrines of mistake and frustration. It could be common mistake because both the buyer and the seller are genuinely not aware that the goods have perished, and therefore none of them is liable. It could also be frustration of a contract because the goods have perished because of something beyond the control of the two parties. The Act does not define what “perish” means. Whereas it could mean a complete destruction of the goods, case law suggests otherwise. For example, in *Asfar & Co. Ltd v Blundell*,⁵² dates which had been submerged in water for two days and fermented were held to have perished within the meaning of the English version of this section. They had lost their commercial sense, even if they still

51 Máire Ní Shúilleabháin, “Formalities of Contracting: A Cost-Benefit Analysis of Requirements that Contracts be Evidenced in Writing” (2005) 27 DULJ 113, page 119.

52 [1896] 1 QB 123.

existed after their retrieval from submersion. In *Barrow, Lane & Ballard Ltd v Phillip Phillips & Co. Ltd*,⁵³ stolen goods were held to have perished within the meaning of the English version of this section. Like Benjamin has opined, it is not clear why, for example, a stolen car should be taken as “perished goods” within the meaning of this section, yet it can still be recovered in its wholesome state.⁵⁴

There is, however, great danger in equating “perishing” with “merchantable quality” as the two are governed by different rules. Whereas a contract where the goods have perished is void, a contract where goods are not of merchantable quality leads to the buyer rejecting the goods, sue for refund of the price, or an action for damages for the loss suffered. This is a section that needs to be repealed, or an amendment done to section 2 to define what “perish” means for purposes of the Act. Is it wholesome destruction of the subject matter, or does it include theft, partial destruction, partial decay, or loss of possession?

Another element of the contract of sale is the price. Section 3(1) which defines the contract of sale states that the contract is entered for a money consideration called the price. The only consideration acceptable in a contract of sale is money. Section 10 states how the price is to be fixed:

- 10.(1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner thereby agreed, or may be determined by the course of dealing between the parties.
- (2) Where the price is not determined in accordance with the foregoing provisions, the buyer must pay a reasonable price; and what is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Section 11 states as follows:

- 11.(1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and the third party cannot or does not make a valuation, the agreement is avoided: Provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.
- (2) Where the third party is prevented from making the valuation by the fault of the seller or buyer, the party not at fault may maintain an action for damages against the party at fault.

53 [1929] 1 KB 574.

54 Benjamin's Sale of Goods, note 35.

Section 10 restates the freedom of the parties to the contract to fix the price. However, this is not without problems. Why would the parties fix the price later, or fix it in line with ‘the course of dealing?’ The House of Lords saw this problem in *May & Butcher Ltd v The King*,⁵⁵ where it held that an agreement for a sale of goods, where the price and other details were to be agreed later, was void for uncertainty. However, the same year, the court in *Foley v Classique Coaches Ltd*⁵⁶ stated that an agreement to supply petrol ‘at a price to be agreed by the parties’ was enforceable because the parties had demonstrated their intention to be bound by the terms of the contract. Even though the case of *May & Butcher* was about an executory contract in which most of the obligations were to be performed in the future, a careful investigator would not ignore this disjointed application of the law by courts. It is not the fault of the courts; it is the fault of the draftsman. Why would the law encourage parties to decide the price of the goods later? It does not happen in practice in the Kenyan commercial environment, and parties will almost always agree on the price and indicate it in the agreement before appending their signature on it. This is therefore a moribund provision.

Section 11 relates to a situation where the price is to be fixed by a valuer. In *Campbell v Edwards*,⁵⁷ Lord Denning opined that “if two persons agree that the price of the property should be fixed by a valuer on whom they agree, and he gives that valuation honestly, they are bound by it. If there were fraud or collusion, of course, it would be very different.” Why would the contract be void where the valuer has not done the valuation? It would even make more commercial sense if the section stated that the buyer should pay a reasonable price, instead of stating that the contract will be void.

In conclusion, it is noted that Part II which is titled “Formation of the Contract” does not really have a lot to do with formation of the contract of sale. One would expect provisions relating to the making of the offer, acceptance, consideration (although section 10 attempts to state how the price is to be fixed), capacity to contract (although section 4 states that capacity is to be governed by the general Law of Contract), intention to be bound, and rules on interpretation of the contract. A future legislation should have these provisions.

55 [1934] 2 KB 17.

56 [1934] 2 KB 1.

57 [1976] 1 WLR 403.

5.0 TERMS OF THE CONTRACT OF SALE: CONDITIONS AND WARRANTIES

In addition to the express terms of the contract drafted by the seller and the buyer, the Sale of Goods Act implies conditions and warranties into the contract. The Act does not define what a condition is. Scholarly materials will therefore be used to provide a definition. Atiyah has provided the following definition:

... in its usual meaning a condition is a term which, without being the fundamental obligation imposed by the contract, is still of such vital importance that it goes to the root of the transaction. The importance of a condition in contracts for the sale of goods is that its breach, if committed by the seller, may give the buyer the right to reject the goods completely and to decline to pay the price, or, if he has already paid it, to recover it.⁵⁸

The Act defines a warranty as “an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.” Under section 13, the buyer is allowed to decide whether to repudiate a contract if the seller breaches a condition in the contract, or to consider a breach of condition as a breach of warranty and therefore only sue for damages instead of repudiating the contract. Whereas this is a stipulation that appears to uphold the doctrine of freedom of contract, it is not without problems. At what point is the buyer allowed to equate a condition to a warranty, yet the two have different meanings? The Act does not even define what a condition is. Under section 13(2), whether a term is a condition or warranty depends on the construction of the contract on a case-by-case basis. One would wonder why the Act has to make this provision, and what purpose such a provision would serve. It is enough to just let the parties determine their own terms, whether a term is a condition, warranty or innominate term.

Under section 14(1), the Act provides an implied condition that on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass. This is a condition as to title. The seller must therefore have a title to the goods that he is selling to the buyer. The case of *Lakhamshi Brothers Ltd v R. Raja & Sons*⁵⁹ best explains this scenario. In this case, the appellant company bought 44 cases of boot polish from the respondents and sold 12 of them. The remaining 32 cases were seized by the

58 Atiyah, *The Sale of Goods* (12th edition), Pearson Education Canada, 2010.

59 [1966] EA 313.

Police under section 20 of the Police Act after the cases were suspected to have been stolen. A magistrate ordered the Police to return to the owner. The appellants therefore sought a refund of the price, but the respondents declined. The appellants appealed, citing breach of section 14(1) and 14(2) on the breach of warranty of quite possession. Spry J found that the appellants could not prove theft, yet it was clear that the respondents could not show how they acquired the title to the goods. This was an unfortunate decision and a lost opportunity in giving section 14 the correct interpretation.

In *Rowland v Divall*,⁶⁰ the plaintiff, a motor-car dealer, bought a car from the seller for £334 and resold it to a customer for £400. The car was seized by the police because it was stolen, and the plaintiff returned the £400 to his customer. The Court of Appeal held that the dealer was entitled to recover the £334 from the seller because the condition implied by section 12(1) of the 1893 Act was breached. Section 12(1) was copied to the Kenyan Act at section 14(a) and Kenyan version is a ‘carbon-copy’ of the English version. Indeed, Tunoi J recognised this position in *Heribert Maier v Eva-Marie Kersten*,⁶¹ when he stated as follows:

Section 12(1) of the English Sale of Goods Act 1893 corresponds with section 14(a) of our Sale of Goods Act. Clearly, the appellant’s ownership over the motor vehicle was not beyond reproach and the appellant did not attempt to perfect it when the police seized it. In the circumstances, the appellant had no right title to the motor vehicle and could pass none to the buyer, the respondent herein, at the time of the contract

In line with the need for protection of personal property as provided by article 40 of the Constitution of Kenya, section 14 does not need any repeal or amendment.

Section 15 states as follows:

15. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

⁶⁰ [1923] 2 KB 500.

⁶¹ [2004] eKLR, civil appeal 251 of 2003.

This section is one of the most troublesome in the Act. Most of the trouble arises with regard to what constitutes a sale by description. The Act does not define what sale by description means. The case of *Varley v Whipp*,⁶² decided only 7 years after the enactment of this section in England, took the earliest opportunity to illuminate on this section. The court stated as follows:

“The term “sale by description” must apply to all cases where the purchaser has not seen the goods, but is relying on the description alone. It applies in cases like the present where the buyer has never seen the article sold, but has bought by description. The most usual application of that section no doubt is to the case of unascertained goods, but I think it must also be applied to cases such as this where there is no identification otherwise than by description

The goods in this question were specific goods, going by the description: a ‘second-hand self-binder reaping machine’, but because the buyer had not seen it, the court held that there could be a sale by description, which condition the seller must abide by. In a later case of *Grant v Australian Knitting Mills Ltd*,⁶³ the court held that there could also be sale by description even where the buyer had seen the goods. Lord Wright stated as follows:

It may also be pointed out that there is a sale by description even though the buyer is buying something displayed before him on the counter: a thing is sold by description, though it is specific, so long as it sold not merely as the specific thing, but as a thing corresponding to a description, e.g. woollen undergarments, a hot-water bottle, a second-hand reaping machine to select a few obvious illustrations

Subsequent cases have affirmed this position, and even expounded that there is a sale by description where the buyer had examined the goods before entering the contract of sale.⁶⁴ It has also been held that there is a sale by description where the buyer personally selects the goods that the seller shows to him.⁶⁵ It has however been held that the description must be influential to the particular sale, so that it has an impact on the buyer’s decision to buy.⁶⁶ A future amendment should define what sale by description means for purposes of the Act.

Section 16(a) states that there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except where the buyer, expressly or by implication, makes known to

62 [1900] 1 QB 513.

63 [1936] AC 85 at 100.

64 See, for example, *Beale v Taylor* [1967] 1 WLR 1193.

65 *Beecham (H) & Co. Pty Ltd v Francis Howard & Co Pty Ltd* [1921] VLR 28.

66 *Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* [1990] 1 All ER 737.

the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, then there is an implied condition that the goods shall be reasonably fit for such purpose. Section 16(b) on the other hand states that where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacture or not), there is an implied condition that the goods shall be of merchantable quality. However, if the buyer has examined the goods, there shall be no implied condition as regards defects which that examination ought to have revealed.

The act places a huge burden on the buyer in these two provisions. For the seller to guarantee that goods are fit for purpose, the buyer must have disclosed the purpose for which they are buying the goods. In addition, the seller will not be held liable for goods not being of merchantable quality if the buyer had an opportunity to examine them. The Act expects the buyer to have skill and expertise to know when the goods are merchantable and when they are not. Yet, the Act does not define what merchantable quality means. This provision has been the subject of immense judicial scrutiny. In *Bristol Tramways Carriage Co. Ltd v Fiat Motors Ltd*,⁶⁷ Farwell, LJ opined that "merchantable quality" must denote goods of an acceptable quality. According to the judge, merchantable quality meant:

That the article is of such quality and in such condition that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article whether he buys it for his own use or to sell again

This decision was later criticised by Salmond, J in the New Zealand case of *Taylor v Combined Buyers Ltd*,⁶⁸ where the judge stated as follows:

... the term merchantable does not mean of good, fair or average quality. Goods may be of inferior or even of bad quality but yet fulfil the legal requirement of merchantability. For goods may be in the market in any grade, good, bad or indifferent, and yet all equally merchantable. On a sale of goods there is no implied condition that they are of any particular grade or standard. If the buyer wishes to guard himself in this respect he must expressly bargain for the particular grade or standard that he requires. If he does not do so, caveat emptor, and he must accept the goods, however inferior in quality, so long as they conform to the description under which they are sold and are of merchantable quality

⁶⁷ [1910] 2 KB 831.

⁶⁸ [1924] NZLR 627.

One may ask why the Act still retains the phrase “merchantable quality”, a phrase that it does not even define. The phrase merchantable quality focuses too much on fitness for purpose and ignores the fact that other aspects of quality such as appearance, absence of defects, suitability, comfort etc should also be considered. In the words of Mustill, J in *Rogers v Parish Motors (Scarborough) Ltd*,⁶⁹ a new car should be capable of being driven ‘with the appropriate degree of comfort, ease of handling, and reliability ... and of pride in the vehicle’s outward and interior appearance’ and not just effectively and comfortably.

This section requires an overhaul so that the intended definition of merchantable quality should be that the goods must be of an acceptable quality which incorporates fitness of goods for all their common purposes; appearance and finish; freedom from minor defects; safety; and durability. A buyer who buys beer from a pub expects that the beer will not harm his health so that he starts suffering gastroenteritis. A buyer who buys bread from a bakery expects that the bread will not cause her food poisoning. Likewise, someone who buys petroleum jelly expects that the jelly will not cause them a skin infection. All these are aspects of merchantable quality, which the Act is silent about. The UK Act has already been amended by the Sale and Supply of Goods Act 1994, and the phrase merchantable quality has been replaced with “satisfactory quality.”⁷⁰ The amendment has also provided a definition of satisfactory quality, as follows:

Goods are of satisfactory quality ‘if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances

The definition also lists some of the qualities that would be considered to determine satisfactory quality: durability, safety, freedom from minor defects, finish, and appearance.⁷¹ This is an approach the drafters of the Kenyan Act can take. The phrase, as currently stated, is archaic and makes little commercial sense. In addition, the first part of section 16 should be deleted. That part demonstrates everything that is wrong with this Act. For the avoidance of doubt, it is reproduced hereunder:

16. Subject to the provisions of this Act and of any Act in that behalf, *there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale,...* [Emphasis Mined]

69 [1987] 2 All ER 232.

70 See Irvine, W.C.H., ‘Satisfactory Quality: What Does It Mean?’, (2004) J.B.L. 684 at 688.

71 See also Bridge, M. ‘The Sale and Supply of Goods Act 1994’ [1995] J.B.L. 401.

Why would an Act of Parliament whose purpose is to regulate the commercial environment have such a negative and unorthodox provision? Some countries have already repealed this provision which was adopted from the UK 1893 Act. UK has already repealed it through the Sale of Goods Act of 1979, while Hong Kong has also repealed their Hong Kong Sale of Goods Ordinance Chapter 26. There is no justification for retaining the provision in the Kenyan Act.

Section 17 is about goods that are sold based on a sample. It provides as follows:

- 17.(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.
- (2) In the case of a contract for sale by sample there is—
 - (a) an implied condition that the bulk shall correspond with the sample in quality;
 - (b) an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;
 - (c) an implied condition that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of sample.

While section 17(1) purports to define ‘sale by sample’, it is a failed attempt to do so. It does not clarify what this type of sale is about. Basically what the section is saying is that where the contract of sale has a term stating that goods will be sold by sample, then there will be sale by sample, and the goods shall correspond with that sample. This is not a valid definition. One would expect that the sample displayed will be part of the goods to be sold to the buyer. Hence, the displayed goods represent the bulk of the goods that are in the store or on the shelves. The leading authority on this topic is *James Drummond & Sons v EH Van Ingen & Co*,⁷² where Lord Macnaghten stated as follows:

The office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject matter of the contract which, owing to the imperfection of language, it may be difficult or impossible to express in words

72 (1887) 12 App Cas 284 at 297. See also *Steels & Busks Ltd v Bleecker Bik & Co. Ltd* [1956] 1 Lloyd's Rep. 228., where a seller was held not to be in violation of section 15(1) (similar to Kenya's section 17(1)) of the English Act where a preservative was not present in the sample, but present in the bulk of the goods supplied to the buyer. The absence of the preservative could only have been verified by an expert, and the seller was not such an expert.

The buyer must be given a reasonable opportunity to examine the goods which are sold by description and by sample. In *Godley v Perry*,⁷³ a retailer who tested an elastic catapult and found it to be unmerchantable when it got broken was held to have examined the goods within the meaning of this section. It is not clear what kind of an examination the section refers to in section 17(2). Is it scientific examination of the goods by an expert or just the buyer looking at the goods and assuring themselves that the goods are merchantable?

It is not uncommon for sellers in Kenya to display samples of the goods they are selling, especially where they do not have enough space to display all the goods, but they have space elsewhere where the bulk of the goods is stored. Once the buyer has accepted this sample, he/she is hardly given another opportunity to examine the bulk of the goods. The bulk of the goods is delivered to the buyer once the contract is concluded and has been signed by the buyer. The question that arises is whether, even after the buyer has been given an opportunity to examine the bulk of the goods, and they have not identified any defect, the seller is discharged from any liability that might arise where the defect could not be identified easily through a casual examination of the goods. This is a provision that would directly violate section 16(b) on merchantable quality. The section also appears to suggest that the buyer will be an expert so that they should be able to identify any defect while examining the goods. This is not the case, especially in consumer goods.

6.0 EXCLUSION CLAUSES AND THEIR HARM ON THE BUYER

The implied conditions and warranties in sections 13 to 17 of the Act are of no benefit to the buyer if the seller is allowed to exclude themselves from liability through exclusion clauses. It has been argued in this paper that the doctrine of freedom of contract allows the seller and the buyer to enter contract based on their own terms. Usually, it is the seller who drafts the contract and hands it over to the buyer to sign. The seller will draft the terms in a manner that exempts him from liability should he breach any of the terms of the contract.

Section 55 of the Act is the clearest restatement of the doctrine of freedom of contract in Kenya. The section states as follows:

55. Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negated or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract

73 [1960] 1 WLR 9.

The effect of this section is that the implied conditions and warranties in sections 13–17 of the Act are not to infringe on the freedom of the parties to draft their own terms in the contract. This is the gap that the stronger party to the contract is likely to ride on to exempt themselves from liability. This is what happens in practice where the buyer does not carefully read the terms of the contract and instead hastens to sign it. This causes great injustice to the buyer. An example of such injustice can be seen in the signature case of *L'Estrange v F Graucob Ltd*,⁷⁴ in this case, a buyer (L'Estrange) signed a contract for the purchase of an automatic slot machine from the sellers (Graucob Ltd). The buyer signed the contract without reading it. The machine later turned out to be unfit for the purpose he had purchased it. He then sued the sellers for damages arising from breach of the implied condition of fitness for purpose. The sellers then relied on an exclusion clause in the contract which stated as follows:

This agreement contains all the terms and conditions under which I agree to purchase the machine specified above, and any express or implied condition, statement, or warranty, statutory or otherwise not stated herein is hereby excluded

The buyer pleaded that he had not read the contract and therefore had no way of reading the exclusion clause. The trial court relied on Lord Herschell LC's decision in *Richardson, Spence & Co v Rowntree*,⁷⁵ where Lord Herschell had asked three questions: (1) Did the plaintiff know that there was writing or printing on the document? (2) Did she know that the writing or printing contained conditions relating to the terms of the contract? (3) Did the defendants do what was reasonably sufficient to give the plaintiff notice of the conditions? The judge held that question (3) was not satisfied and therefore Graucob was not entitled to rely on the exclusion clause. On appeal by Graucob, the Court of Appeal (Scrutton, J) found the exclusion clause formed part of the contract. It was immaterial that L'Estrange had not read the clause. The fact that she signed it meant that she was bound by it. She was deemed to have read and agreed to the terms of the contract.

Maugham, LJ concurred by stating the following:

There can be no dispute as to the soundness in law of the statement of *Mellish LJ* in *Parker v South Eastern Ry Co* which has been read by my learned brother,

74 [1934] 2 KB 394. Lord Denning represented the seller company in this case when he was a young barrister. However, he later stated that this decision was wrong! See his remarks in Parliament in 1977 here: Hansard HL Debs (23 May 1977) vol 383, col 1119. Later in his judgment in the case of in his judgment on *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1982] EWCA Civ 5 and [1983] 2 AC 803, Denning described the case as emblematic of a “bleak winter for our law of contract”.

75 [1894] AC 217

to the effect that where a party has signed a written agreement it is immaterial to the question of his liability under it that he has not read it and does not know its contents. That is true in any case in which the agreement is held to be an agreement in writing.

[...]

In this case it is, in my view, an irrelevant circumstance that the plaintiff did not read, or hear of, the parts of the sales document which are in small print, and that document should have effect according to its terms. I may add, however, that I could wish that the contract had been in a simpler and more usual form. It is unfortunate that the important clause excluding conditions and warranties is in such small print.

Closer home, courts have held a different opinion. For example, Sir Kenneth O'Connor, J in *Omar Saleh v Besse & Co.*⁷⁶ opined that "I am not prepared to hold that a clause which excludes liability for warranties necessarily excludes liability for implied conditions", and in *Chatricha v Pumchand & Sons*,⁷⁷ the contract contained an exclusion clause excluding the seller of metal sheets from liability should some of the sheets be missing. Some of the sheets were found to be missing, and the Court of Appeal declined to allow the sellers protection through the exclusion clause, because they could not show that the circumstances were such that they could be protected.

Courts have developed the doctrine of fundamental breach as a reaction to exclusion clauses. The doctrine asserts that "where a seller relies on an exclusion clause which exempts him from liability under the contract, and which exclusion clause, if enforced would empty the contract of all its contents, the court will refuse to enforce such an exclusion clause on the basis that it protects the seller from liabilities arising from a fundamental breach of the contract."⁷⁸ Yet, this doctrine was rejected by the House of Lords in *Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale*,⁷⁹ as a substantive

76 [1960] EA 907.

77 [1959] EA 746.

78 Several cases restated this position: *Karsales (Harrow) Ltd v Wallis* [1956] 1 WLR 936; *Yeoman Credit Ltd v Apps* [1962] 2 QB 508; *Charterhouse Credit Co. Ltd v Tolly* [1963] 2 QB 683. In *Karsales (Harrow) Ltd v Wallis* for example, Denning LJ stated that 'exempting clauses of this kind, no matter how widely they are expressed only avail the party when he is carrying out the contract in its essential respects... They do not avail him when he is guilty of a breach that goes to the root of the contract. The thing to do is to look at the contract apart from the exempting clause and see what are the terms, express or implied, which impose an obligation on the party. If he has been guilty of a breach of those obligations in a respect which goes to the very root of the contract, he cannot rely on the exempting clauses.' *Ibid.*, at 938.

79 [1967] 1 AC 361 at 406. The doctrine stayed alive for some time, and was conclusively disapproved

rule of law. Lord Reid instead stated that exclusion clauses should be subjected to legislative control. It is imperative to reproduce what Lord Reid stated:

Exemption clauses differ greatly in many respects. Probably the most objectionable are found in the complex standard conditions which are now so common. In the ordinary way the customer has no time to read them, and if he did read them he probably would not understand them. And if he did understand and object to any of them, he would generally be told he could take it or leave it. And if he then went to another supplier the result would be the same. Freedom to contract must surely imply some choice or room for bargaining.

At the other extreme, is the case where parties are bargaining on terms of equality and a stringent exemption clause is accepted for a quid quo pro or other good reason. But this rule [fundamental breach] appears to treat all cases alike. There is no indication in the recent cases that the courts are to consider whether the exemption is fair in all the circumstances or is harsh and unconscionable or whether it was freely agreed by the customer... This is a complex problem which intimately affects millions of people and it appears to me that its solution should be left to Parliament.

Kenya has not subjected exclusion clauses to legislative control yet, because section 55 of the Act remains unamended. Buyers are therefore left at the mercy of courts who may choose to construe section 55 considering the English Court of Appeals decision in *L'Estrange v Graucob*. If such exclusion clauses are not expressly prohibited in consumer contracts, then buyers of consumer goods are likely to suffer, because sellers would readily have such exclusion clauses in goods that could harm the consumer. This section is ripe for a complete repeal. It is the clearest illustration of how harmful the doctrine of freedom of contract can be to the weaker party when the stronger party decides to exempt themselves to liability even when the goods they are selling under the contract are faulty.

7.0 CONCLUSION

The Sale of Goods Act, Chapter 31 Laws of Kenya, is now an outdated piece of legislation. This paper has traced the historical background of this Act from where it was adopted in the UK Sale of Goods Act, 1893 and arrived at the inevitable conclusion that the Act had nothing to do with Kenyan traders. It

by the by the House of Lords in *Photo Production Ltd v Securicor Transport Ltd* [1980] 2 WLR 283 and *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803.

was passed by the Legislative Council in 1930, a time when Kenya had not yet attained independence and there was no Kenyan representing the interests of Kenyans. The paper has also examined this Act under the doctrine of freedom of contract, formation of the contract of sale of goods, implied conditions and warranties and exclusion clauses. The doctrine of freedom of contract is based on the misconception that the parties to the contract of sale are of equal bargaining and economic power. This is not the case. In most cases, the paper has demonstrated that the seller has a stronger bargaining power and is in a stronger economic position. The buyer is therefore indirectly coerced into accepting terms that are to his detriment and favour the seller. Where exclusion clauses exist to the effect that the seller can run away from liability arising from the implementation of the contract of sale, even the implied conditions and warranties whose effect is to protect the buyer have no effect. The paper therefore recommends that the entire Sale of Goods Act is long past its repeal date and the earlier Parliament repeals it, the better it will be for traders in the Kenyan market.