

# BUSINESS LAW

## CHAPTER ONE

### NATURE, PURPOSE AND KINDS OF LAW

**After studying this chapter, you should be able to:**

- Define law and its various terminologies
- Distinguish between law and morality based on various aspects
- Explain the role of law in the society
- Explain the relationship between law and ethics
- Distinguish between different classification of the law such as civil law and Criminal law based on various aspects

#### INTRODUCTION & DEFINITION OF LAW

Many of us spend the greater part of our lives without occasion to consider just what it is that is contained in the law and, what exactly do we expect from the legal system of the country. In fact, we may argue that the need to understand the need for law springs from the necessity to clarify, first and foremost, just what is law? This basically is a question about law, not a question of law.

Occasionally it also comes to our attention, when our property or person is offended, that some behaviour should be regulated or at least that some protection is necessary and that this may be provided by the law.

“Life is like a play,” says *Shakespeare*. But the more complex the play, the more likely are disputes to arise. So no really good play can progress without rules. Life is more complicated than any sport you can ever imagine of – There are more players, bigger field, almost unlimited activities played round the clock. So, it’s an inevitable fact that in life, we need rules, laws and regulations for every situation.

In our contemporary world, it’s impossible to even imagine life without law. Some eminent jurists like Rousseau, Montesquieu, and Locke have, after detailed study and analysis concluded such a state of existence to have been short, brutish and nasty. Thus there arose need for law to govern human existence.

According to various schools of thought, law is important for the following purposes and functions inter-alia; law has been held to be instrumental in the maintenance of law and order in the country, it performs police functions. Plato opines that ‘mankind must either give themselves a law and regulate their lives by it or live no better than the wildest of the wild beasts.’

Hobbes says that ‘law was brought into the world for nothing but to limit natural liberty of particular men in such a manner as they might not hurt but assist one another and join together against a common enemy.’

## CHAPTER TWO

### SOURCES OF KENYA LAWS

**After studying this chapter, you should be able to:**

- Understand the different Sources of Laws of Kenya such as Constitution and Legislation
- Understand and appreciate the importance of different sources law and pass arguments in favor of each
- Distinguish between written and unwritten sources of law
- Define Constitution and appreciate its supremacy in the land

#### INTRODUCTION

The phrase ‘source of Law’ is used by different conceptions by philosophers and legal scholars. Some of the meanings attributed to the expression ‘Source of Law’ include:

-The social forces which direct law i.e. the **sociological factors** which lead to formation of particular rules or regulations of law within a given jurisdiction e.g. Culture, Morality, Religion, Science and technology, Economic or political environment e.t.c.

-The Law making **entity or Institutions** within a given society e.g. the parliament.

-**Territorial or Geographical origin** of the law of a given society like Kenya e.g. much of Kenyan law originates from British law. Enforcement of Kenyan law is also undoubtedly territorial i.e to Kenyans and to offences against Kenyans.

The formal sources or law in Kenya are set out in **Section 3 of the Judicature Act Cap. 8 Laws of Kenya**, which says ‘ The jurisdiction of the High Court the Court of Appeal and all Subordinate Courts shall be exercised in conformity with:

a). The **Constitution**.

b). Subject thereto; all other **written laws**, including the Acts of parliament of the United Kingdom cited in part I of the schedule to this Act, and modified in accordance with Part II of that schedule.

Summarizing the above quoted *Section 3*, of the Judicature Act leaves us with the following list of the sources of Kenyan law:

1. The Constitution.
2. Acts of Kenyan parliament.
3. Specific Acts of the parliament of the United Kingdom cited in Part I of the schedule to the Judicature Act.
4. Subsidiary /Delegated /subordinate legislation.
5. English statutes of General application, in force in England on the 12<sup>Th</sup> August 1897.

*Examples:*

- i. An unmarried man and a lady agree to be married in the near future. Although nothing has been done yet, there is a contract to marry between them. For the moment, they exchange their promise.
- ii. Mss. A goes to Mr. B's shop on the tenth day of the month and asks Mr. B- a tailor to make a suit for her as she promises to pay at the end of the month. He takes her measurements and promises to have the suit ready on the last day of the month. Here Mss A's promise is the consideration for Mr. B and vice versa, the price for each other's promise

### **b) Executed Consideration.**

Executed consideration is constituted by something done by the plaintiff because of a promise made by the defendant.

Examples:

- (i) If in example a. (ii) above Mss. A had paid for the suit in advance, the payment would be the executed consideration for Mr. B's promise.
- (ii) Mutiso puts an advertisement in the local newspaper that he has lost his goat of a certain description, and promises to pay Kshs. 200/= to anybody who returns it. Munene reads the advertisement, goes to look for the goat, finds it in the bushes nearby and returns it to Mutiso. Here what Munene has done is what constitutes the executed consideration required to make Mutiso's promise (executory consideration) binding on him.

### **Legal rules regarding consideration.**

- a. Consideration must be at the desire of the promisor i.e. it is at the request of the promisor otherwise its common sense that nobody would be held liable for what he did not tell you to do.
- b. Consideration may be past, present or future so long as it is co-extensive and basis upon which the other party's promise is obtained. I.e. it should consist in a single transaction with the promise to the other. In *Roscarla Vs. Thomas*, Roscarla bought a horse and paid for the price. After which, Thomas made statements to her to the effect that the horse was sound in wind and limb, perfect in vision and free from vice. Whereas the horse was vicious. This stipulation was unenforceable as it was after sale, i.e. after consideration made.
- c. Consideration must not be ambiguous impossible uncertain, fraudulent, immoral, illegal, or opposed to public policy i.e. it must be lawful.
- d. Consideration need not be adequate. It need not be full return for the promise provided it is something rather than nothing in the eye of the law. So long as consideration is real and sufficient to the bargain, it need not be adequate. The court will not allow anyone to plead that he made a bad bargain.
- e. Consideration must move from promisee. This means that only the person who has personally given consideration for a promise can sue for breach of performance. A person who has not given consideration for a promise is a stranger to consideration. It is a canon principle of law that one cannot claim something for nothing.

Therefore only a party to contract can sue. This introduces the principle of privity of contract.

### **PRIVITY OF CONTRACT.**

x. Where he received or pays money by mistake or fraud

Where an agent receives money to a third party by mistake or fraud, he is personally liable to the third party likewise, he has the right to sue the third party for the recovery of the money where he has paid it by mistake or under fraud of the third party,

### **DELEGATION OF AUTHORITY**

The general rule is that an agent is not entitled to delegate his authority to another person without the principal's consent. This is based on the maxim "*delegates non protest delegare*", which means that the person to whom authority has been given cannot delegate that authority to another.

To this general rule, there are exceptions as follows:

#### ***Sub-Agent***

- a) An agent may appoint a sub-agent and delegate the work to him if there is a custom or trade to that effect or if the nature of work is such that a sub-agent is necessary. A sub-agent is a person employed by and acting under the control of the original agent.
- b) Where the principal is aware of the intention of the agent to appoint a sub-agent but does not object to it.
- c) Where unforeseen emergencies arise rendering appointment of a sub-agent necessary.
- d) Where the act to be done is purely ministerial and not involving confidence, skill or use of discretion.
- e) Where the principal permits appointment of a sub-agent.

#### **Co-agent substitute agent**

A co-agent or substituted agent is a person who is named by the agent on an implied or express authority from the principal to act for the principal. He is not a sub-agent but an agent of the principal, for such part of the business of the agency as is entrusted to him. He is the agent of the principal through he is named (at the request of the principal) by the agent.

#### **Sub-agent and substituted agent distinguished**

- A sub-agent does his work under the control of the agent whereas a substituted agent works under the control and instructions of the principal.
- There is no privity of contract between the sub-agent and the principal while there is privity of contract between the principal and a substituted agent.
- The agent is responsible to the principal for the acts of the sub-agent whereas he is not responsible for any act or negligence of the substituted agent.

### **TERMINATION OF AGENCY**

Agency may be terminated by:

- a) - Act of the parties and;
- b) - Operation of law

#### **TERMINATION BY ACT OF THE PARTIES**

##### **1. Agreement**