

Development of a legal framework for e-commerce in Kenya

Ideas for Today and Tomorrow

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Vision Statement

To identify the laws of Kenya that act as barriers to E-commerce. Analyse select legal issues affecting e-commerce and recommend changes or introduction of new (sui-generis) laws to enhance the growth of e-commerce in Kenya

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Objectives

► Identify the legal issues that create barriers to the development of e-commerce

- a) Limitation of existing laws
- b) Origins of Kenya's Laws
- c) Evidence Act
- d) Electronic Transactions Bill, 2007
- e) Laws that relate to e-commerce

► Business Process Outsourcing

- a) Data Protection
- b) Formation and validity of contracts
- c) Jurisdiction

► Recommendations

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E-commerce and the Internet

► E-commerce is the use of electronic networks to exchange or transfer business information thorough the internet. *Electronic Transactions Bill of 2007*

► The internet is a worldwide computer network with three important facilities, amongst others that are provided via the internet, these are: e-mail, the worldwide web and Usenet. *Godfrey v Demon Internet Ltd [1999] 4 All ER 342*

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Limitation of existing laws

(Today's Situation)

The laws of Kenya at present do not recognise electronic transactions as the following requirements have to be presented in material form:

- Requirement to give information in writing
- Requirement to provide a signature
- Requirement to produce a document
- Requirement to record information
- Requirement to retain a document

ALL THE ABOVE REQUIREMENTS MUST BE IN MATERIAL FORM

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Origin of Kenya's legal system

(How Did We Get Here?)

- Kenyan law is based on the English Common Law system. *Judicature Act Cap 8*
- Computer print-outs have always been regarded as hearsay evidence.
- *Hearsay rule*: an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of a fact asserted: *Cross and Taper on Evidence* (8th edn, 1995) p 46
- The evidential status of a computer print-out is no different from that of a photocopy of a forged cheque *R v Governor of Brixton Prison, ex p Levin [1997] (hl) All ER at 289*

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Origin of Kenya's legal system

Select case law

- ▶ The courts have ruled that the law is bound to take cognizance of the fact that mechanical means have replaced human effort. *Owners of Motor Ship Sapporo Maru Vs Owners of Steam Tanker Statute of Liberty* [1968] 2 All ER at 195
- ▶ It seems to this court that the result in the form of the computer print-out was the product of a mechanical device which falls under the category of real evidence. *Castle vs Cross QBD* [1985] 1 All ER 87
- ▶ Computer generated artistic works are artistic works and can be protected as such. *Alternative Media Ltd vs Safaricom KLR* [2005] 255

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Origin of Kenya's legal system

Select case law

- ▶ In all the previous so-called ticket cases, the ticket has been proffered by hand, and there has always been at least the notional opportunity for the customer to say if he does not like the conditions.... But in the case of a ticket which is proffered by an automatic machine there is something irrevocable about the process. There can be no locus poenitentiae. *Thornton vs. Shoe Lane Parking (C.A.)* [1971] 2 QB 163

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The Evidence Act Cap 80 Section 65

(Summary of the current situation)

- ▶ Primary evidence means that the document itself must be produced for inspection s.65 (1)
- ▶ A statement contained in a document and included in printed material produced by a computer (computer print-out) shall if the following conditions are satisfied, be deemed to also be a document.....and shall be admissible in any proceedings without further proof or production of the original or of the facts stated therein of which evidence would be admissible. s 65 (5) (c)

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The Evidence Act Cap 80

(Summary of the current situation)

- ▶ Combination of computers
- ▶ All computers used for that purpose during that period shall be treated for the purpose of this section as constituting a single computer and any reference in this section to a computer shall be construed accordingly. s 65 (7) (a)-(d)

Godfrey vs Demon Internet Ltd [1999] 4 All ER 342

The internet is a worldwide computer network with three important facilities, amongst others that are provided via the internet,

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Electronic Transactions Bill, 2007

- ▶ Information shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of an electronic version. *Electronic Transactions Bill, 2007* [Part III section B]
- ▶ Where the law requires information to be in writing, the requirement of the law is fulfilled if the information is contained in electronic version that is accessible and intelligible so as to be useable for subsequent reference. *Electronic Transactions Bill, 2007* [part III section B]

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Laws that relate to e-commerce

Statute Law

1. *Industrial Properties Act*
2. *Trade marks Act*
3. *Copyright Act*
4. **Electronic Transactions Bill 2007**
5. **Data Protection Laws**
6. **Privacy Laws**

Common Law

1. Contracts
2. Passing-off
3. Confidential information
4. Know How
5. Traditional Knowledge

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Business Process Outsourcing

(select topic on e-commerce- data protection/privacy)

- ▶ Business Process Outsourcing involves the contracting of specific business tasks to a third party service provider
- ▶ E-commerce is the use of electronic networks to exchange or transfer business information thorough the internet. *Electronic Transactions Bill of 2007*
- ▶ Business tasks or Business information may include the transfer of personal data
- ▶ *Data Privacy*: the legal right to, or public expectation of privacy in the collection of storing of data

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Business Process Outsourcing

(select topic on e-commerce Data Protection/Privacy)

- ▶ Privacy concerns in data collected in digital form include the following:
 - a) Health information
 - b) Criminal Justice
 - c) Financial information
 - d) Genetic information
 - e) Location information
 - f) Ethnic or gender information
- ▶ *Data Protection Act 1998 (U.K)*
Personal data shall not be transferred to a country outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data

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Data Protection in Kenya

- ▶ *Copyright Act No. II of 2001*

Literary work means irrespective of the literarily quality, any of the works similar thereto (and include amongst others):

- 1) Charts and tables
- 2) Computer programs
- 3) Tables and compilation of data including tables and compilations of data stored and embodied in a computer or a medium used in conjunction with a computer

- ▶ *Electronic Transactions Bill 2007*

A record keeper who has possession or control of an electronic record that contains personal information shall ensure....The record is protected against unauthorised access, use, modification, disclosure or loss....

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Data Protection (Privacy)

- ▶ Article 12 *Universal Declaration of Human Rights*:

“ No one shall be subjected to arbitrary interference with his [her] privacy, at home or [their] correspondence, nor to the attacks on [their] honour and reputation.
Everyone has the right of protection from the law against such attacks”

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The law of Contracts

(Select topic on e-commerce formation of contracts)

- ▶ A contract is a legally binding exchange of promises that form an agreement which the law will enforce
- ▶ Contract formation includes:
 - 1) Offer and acceptance
 - 2) Consideration
 - 3) Intention to be legally bound
 - 4) Formalities may be reduced in writing
- ▶ *Postal Rule*
 - a) An offer made by letter is not effective until received by the offeree
 - b) Acceptance is effective as soon as it is posted*Adams vs Lindsell (1818) 106 ER 250*

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Contracts in a virtual environment

(Select topic on e-commerce formation of contracts)

- ▶ Instantaneous communications (telex)
The contract is formed when the acceptance is received.
Entores Ltd vs. Miles far East Corp [1955] 2 QB 327
- ▶ Where parties enter into an agreement by electronic means, such agreement is concluded at the time when and the place where acceptance of the offer becomes effective
 - a) An offer at the time it is received by the offeree
 - b) An acceptance becomes effective at the time and place the electronic version sent by the offeree confirming acceptance of the offer is received by the offeror*Electronic Transactions Bill, 2007*

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Jurisdiction & the formation of contracts

(Select topic on e-commerce-Jurisdiction)

The question whether a contract was made within the jurisdiction will often admit a simple answer: if both parties are in England at the time of making it, or if it is contained in a single document signed by both parties in England there is no difficulty

The general rule is that a contract is formed when acceptance of an offer is communicated by the offeree to the offeror. And it is necessary to determine where the contract is formed.... It appears logical that this should be at the place where the acceptance is communicated to the offeror. (Holland)

Brinkibon Ltd Vs. Stahag Stahl G.m.b.H (H.L.(E)) [1983] 2 A.C 35

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Jurisdiction & the formation of contracts

(Select topic on e-commerce-Jurisdiction)

- Where an agreement stated that any dispute arising out of or in the connection with the agreement "*shall be governed by and construed in accordance with the law of the state of Kansas*" The court of Appeal held that the courts will not disregard private international law on the status of law and exclusive jurisdiction clauses in international commercial agreements..... *Raytheon Aircraft Credit Corporation vs Air Al-Faraj Ltd [2005] 2 KLR 47*

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Jurisdiction & the formation of contracts

(Select topic on e-commerce-Jurisdiction)

(*Obiter, Per Githinji JA*)

There are no rules of the Court prescribing the procedure for challenging the Jurisdiction of the High Court by a foreign defendant who has been sued in Kenya for breach of contractual forum, selection and the exclusive jurisdiction clause. The procedures to be followed in this important area of litigation should no longer be left uncertain and the Rules committee should urgently promulgate appropriate comprehensive rules of procedure to facilitate the administration of justice.

Raytheon Aircraft Credit Corporation and another vs Air Al-Faraj Limited [2005] 2 KLR 47

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Recommendations

- Electronic Transactions Bill
- Data protection and privacy laws
- Review all the Acts that relate to e-commerce e.g. Trademarks and Domain Names (UNDRP)
- Procedural Laws relating to settlement of disputes:
 - a) ADR/Mediation
 - b) Jurisdiction
- Public and Private sector needs to liaise with Law Society on legal education
- Development of e-commerce curriculum in Colleges
- Finance

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