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Analysing the forms of contract and the role that written and unwritten contracts play in the resolution of commercial disputes in Kenya.

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ANALYSING THE FORMS OF CONTRACT AND THE ROLE THAT WRITTEN AND UNWRITTEN CONTRACTS PLAY IN THE RESOLUTION OF COMMERCIAL DISPUTES IN KENYA

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DECLARATION

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and has not previously, in its entirety or in part, been submitted at any University for a degree to the best of my knowledge.

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Signature: __  __ Date: 31st May 2024

Approval by the Supervisor

I, the undersigned, hereby declare that I supervised the work contained in this thesis. It is the candidate's own original work, and it has not previously, in its entirety or in part, been submitted at any University for a degree to the best of my knowledge. This Thesis proposal is submitted with my approval as a University Supervisor.

Signature__  _____Date 31st May, 2024

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ABSTRACT

As the world develops, so do business dealings and interactions. These interactions can give rise to disputes, and the resolution of these commercial disputes is becoming more important to many businesses. In essence, a commercial dispute can be viewed as a dispute between two or more business people or entities. Commercial disputes generally arise when a term to a contractual undertaking is breached or there is a disagreement between parties regarding how contractual terms are interpreted. Once a commercial dispute emerges, parties can use a number of ways to resolve such disputes including negotiation, mediation, arbitration, or Court-based litigation. Regardless of the dispute resolution method chosen, contractual claims are easier to enforce when a written contract exists, yet, many businesses enter into contracts by word of mouth. This study aimed to analyse the legal contractual environment of conducting business in Kenya and determine the role of both written and unwritten or oral contracts in commercial dispute resolution. The study adopted a descriptive research design which targeted individuals and entities involved in commercial litigations for dispute resolution. Ten litigations were selected and analysed using the doctrinal legal research method. This study found that parties who conducted commercial transactions on the basis of oral or unwritten contracts had great difficulty in proving the terms of their agreement or even proving that a contract between them and their counterpart existed in the first place. In contrast, the study found that where a written agreement was provided, the Court tended to stick to the express terms of the agreement and did not allow parties to vary the agreed terms, even when one party argued that the terms of the agreement had been orally renegotiated. The particulars of the manner in which Courts look at contracts in Kenya have been explored throughout this study. Based on the findings, this research recommends observing the requirements of a valid contract and making sure the terms of the agreement are written and related records preserved including communication between parties being documented in writing.

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LIST OF ABBREVIATIONS

ADR:	Alternative Dispute Resolution
CPR:	Civil Procedure Rules
IP:	Intellectual Property
CAM:	Court Annexed Mediation
ADR:	Alternative dispute resolution

CHAPTER ONE
INTRODUCTION

1.1 Background to the Study

Commercial disputes are a common occurrence in the commercial and corporate world resulting from a myriad of issues ranging from breach of contract, partnership disagreements to intellectual property (IP) infringement (Erie, 2019). Globalization has seen rapid growth and expansion of transnational and multinational business enterprises in recent decades. The implication of the growth of the business sector, according to Sagartz (2017), means the inevitable increase in the number of commercial disputes. If left unresolved, as Sagartz (2017) further points out, commercial disputes, especially on regional or global scales, can devolve into major trade conflicts with unfavourable political and economic consequences.

From an international perspective, commercial disputes have been on the rise. The statistical data on the current status of international commercial disputes (as provided by FINRA (n.d.)) shows that there have been at least 40,000 major intra-industry cases filed and closed since 2018. Among the common types of intra-industry commercial arbitration cases are breach of contract, promissory notes, libel or defamation, compensation, wrongful termination, breach of fiduciary duty, misrepresentation, and negligence (FINRA, n.d.). In their article, Shimmin and Hennessey (2023) suggest that the continued impact of the 2020 pandemic, war in Ukraine, global energy crisis, commodities shortages, and rising inflation have created a perfect storm of financial pressures on companies and led to an uptick in contractual disputes, insolvencies, and civil fraud claims. Shimmin and Hennessey (2023) explain further that disputes of this nature are core areas of expertise for commercial litigators across Europe, particularly in England. However, besides these issues, the trend of commercial disputes arising from the scrutiny of regulators and consumers in relation to ESG and competition spurred by increased political pressures is common Shimmin and Hennessey (2023).

Commercial disputes are also common in Africa (Onyema, 2021). According to Onyema (2021), the spread of African regional economic communities such as ECOWAS (“the Economic Community of West African States”), EAC (“the East African Community”), COMESA (“the Common Market for Eastern and Southern Africa”), SADC (“the Southern African Development

Community"), and several others, coupled with government programs aimed at promoting trade has seen a dramatic growth in the trade of goods and services between African States. Onyema (2021) observed that the creation of AfCFTA ("the African Continental Free Trade Area") in 2012 was driven by the need to facilitate economic growth by liberating trade, eliminating tariff and non-tariff barriers, and ensuring the free movement of goods, services and people.

As trading activities grow, so does the risk of disputes among trading parties at individual, organizational, and national levels. Onyema (2021) writes that the creators of AfCFTA were wise enough to recognize the inevitability of commercial disputes, so they included a dispute settlement protocol within the policy. In another study, Snider (2016) noted that the commercial dispute resolution landscape in the continent is undergoing a transformation amid the evolving economic partnerships and policies. However, the scholar contends that each African country is unique, and the type of commercial disputes will depend on economies, sources of commercial activities, and natural resources. For example, most of South Africa's disputes are associated with mining and oil, tourism, and telecommunications, Angola is diamonds and oil, and Nigeria is oil and telecommunications Snider (2016) .

In Kenya, litigation remains the most popular method of dispute resolution (Desai & Muthoka, 2022). However, as the country catches up to Africa's evolving commercial dispute resolution landscape, alternative methods such as mediation, arbitration, and negotiation are gradually gaining recognition. This can be attributed to the Constitution 2010 and the Civil Procedure Act encouraging the use of these methods in place of litigation (Desai & Muthoka, 2022). For instance, on the basis of Article 159 of the Constitution of Kenya, the Judiciary rolled out court-annexed mediation (CAM) in 2016 (Desai & Muthoka, 2022). So, once a case is filed in court, it is screened to determine whether it is appropriate for mediation before court proceedings. Desai and Muthoka (2022) further point out that CAM applies to all civil cases and can be proposed by the parties or the Court in any matter filed before the commercial and family divisions of the Court.

Literature on the law of contract demonstrates its significance in managing commercial disputes. For instance Hietanen-Kunwald and Haapio (2021) observed that proactive contractive design contributes significantly to preventing and de-escalating business-to-business disputes. The researchers further observed that proactive contract designs are more cost-effective

at addressing disputes than arbitration and litigation. Retnowati (2023) noted that the law of agreement (contract) is vital at the beginning of the business relationship to ensure business activities run well. Several other studies shared similar sentiments, including (Grow, 1993, (MacMahon, 2018, Remington & Cui, 2015, Coates, IV, 2012, Farnsworth, 1968). According to Bigsten et al. (2000) African manufacturing firms operate in an atmosphere marred by the risk of contractual non-performance or breach of contract. Therefore, cases of breach of contract are primarily handled through negotiation between the parties, and if this fails, outside lawyers and courts are sought.

1.1.1 Law of Contract

Mugambi (2011) argues that contracts play a critical role in building relationships and completing business and commercial transactions. He further asserts that contracts not only set out the duties of the parties but also stipulate the rights of the parties involved and provide for remedies in the event that those duties are not performed.

In Kenya, one of the laws that regulates contracts is the Law of Contracts Act, Cap 23. However, this Law is not detailed, and the legal content of the said Act extends to only two pages, encompassing a total of only four sections.

Further, the Law of Contracts Act does not touch on issues relating to the legality of Contracts, the manner in which contracts are to be interpreted or enforced, or how the Courts or other judicial bodies are to go about resolving contractual disputes or enforcing contractual rights. The Act essentially states that we are to refer to English Law with respect to matters of Contract Law (Law of Contract Act cap 23, 1961) and that Contracts dealing with Land and contracts of guarantee can only be enforceable if done in writing. The Act is otherwise entirely silent about the form of Contract one should adopt in their transactions and this leaves room for parties to decide whether their contracts will be in writing or not (Law of Contract Act cap 23, 1961).

The Contract Act's silence on the form of Contract means that businesses can formalise or enter into written contracts to widely varying degrees and can even choose to operate on trust if they so wish. The general approach taken by the Law is therefore that the parties to a contract are free to provide for the duties and consequences of both performance and breach of the Contract. It is only when they fail to regulate the consequences in their own way that it will be presumed that

they intended the consequences envisaged by the common law to operate. (Kessler, 1943). This concept is what is generally referred to as Freedom of Contract (Kessler, 1943).

Freedom of contract is, however, a double-edged sword. Parties are not only free to contract in as much detail as they want, but they are also free to do the complete opposite. Parties are generally not legally required to carry out their businesses under legally enforceable contracts, and most commercial contracts (exempting contracts for security, mortgages, and other specialized contracts) are not legally required to be put in writing or even to be drafted at all (Law of Contract Act cap 23, 1961). The natural consequence of this latitude in contract formation is that parties are generally free to negotiate and enter into transactions, no matter the size, scale, or complexity, purely on an informal basis, and they would not be directly penalised by law for their lack of formality. In short, the law views oral contracts to be just as valid and binding as written contracts.

While businesses may not be directly penalised for this lack of formality in contracts, the form and standard of contracts a business enters into with its commercial counterparts can have serious implications on its ability to resolve any ensuing commercial disputes. In order to determine what the advantages and disadvantages these varying forms have on dispute resolution, we turn to the courts which are bestowed with the ability to resolve such commercial disputes on behalf of the parties.

1.1.2 Commercial Dispute Resolution

Erie (2019) defines a commercial dispute as the disagreement between two or more parties in relation to commerce. Common examples include lease disputes, fiduciary disputes, IP disputes, property disputes, shareholder-director disputes, business acquisition disputes, and real estate disputes. Commercial disputes essentially cover any type of commercial dealings at an individual or organizational level and can vary in complexity. Erie (2019) further points out that commercial disputes can arise from the mismanagement of, misunderstanding of, or failure to perform contractual duties outlined in the contract. Commercial disputes are thus rooted in contract law and arise when a party fails to perform their obligations under the contract, thereby adversely affecting the interests and rights of the other party.

Commercial dispute resolution, according to Bookman and Erie (2021), refers to a structured procedure adopted to allow the concerned parties to settle their differences with a fair solution. The resolution of commercial disputes can be carried out in courts through litigation or outside the court through alternative dispute resolution (ADR) processes (Bookman & Erie, 2021). In his publication, Allison (1990) advocates for ADR methods, arguing court proceedings often take time, cost more in legal services, and are not guaranteed to be a success. Besides, as Allison (1990) further notes, 90% of all lawsuits are settled out of court. The five common ADR methods for commercial dispute resolution include mediation, negotiation, facilitation, arbitration, and expert determination.

In negotiation, the parties involved establish communication in person, in writing, or through their legal or nominated representatives to discuss issues and reach an agreement. In the mediation process, a neutral third party, or mediator, is brought in to facilitate the discussion between the parties until they come to a fair settlement (Allison, 1990). Facilitation is similar to mediation but is mostly used for groups in conflict. In the arbitration process, the parties present their case to an independent third party, the arbitrator, who determines the dispute on behalf of the parties (Allison, 1990). Here, the parties are bound to the decision of the arbitrator. Arbitration is the most sought-after ADR method for commercial dispute resolution. Lastly, expert determination applies to disputes associated with technical, complicated, and sector-specific issues that require the unbiased input of a specialist.

1.2 Statement of the Problem

In light of the optional nature of the concept of "freedom of contract," the importance of and need for formal and detailed written contracts can be greatly underestimated or underappreciated by a business. Unfortunately, the importance of written contracts only becomes truly evident in the midst of a resulting commercial dispute (Bookman & Erie, 2021). Parties decide their own rules of engagement and provide for the terms and conditions under which they wish to be bound. The Courts and Tribunals are resultantly relegated to the role of interpretation of agreements and enforcement of the parties' express and existing wishes and expectations (Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board, 1973).

The general rule applied by Courts in Kenya is that they will not re-write contracts for parties, and if the parties go ahead to get into bad bargains, fail to provide for material matters, or

otherwise contract in some unreasonable way, the Court will not impose whatever provisions they think should have been included in the Contract. This was expressly set out by the Court of Appeal in (National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another , 2001). The parties are, therefore, bound by the terms they provided in the contract unless vitiating factors are proved.

According to the Court of Appeal in (Margaret Njeri Muiruri v Bank of Baroda (Kenya) Ltd, 2014), the best the Courts can do is to reject the enforcement of unconscionable contracts whose terms are so oppressive, commercially unreasonable, or grossly unfair that the counterpart to the contract could not have freely entered into the contract.

Except for the above exceptions, parties are stuck with whatever contract they choose, and they will stand or fall by whatever means they select to bind them.

In addition to the freedom of deciding their terms of engagement, the parties are also free to choose what form of contract they wish to rely on and can freely choose whether to contract orally or in writing. The parties will however be required to adduce evidence relating to the contract and the terms reached in order to succeed in resolving any disputes emerging from the transaction (Mugambi, 2011). One way of providing such evidence of the contract is for a party to produce a written contract. However, if the contract was entered into informally, then it becomes difficult and sometimes impossible to adduce evidence of the existence of that contract (Mugambi, 2011) and this could lead to an unfavourable legal outcome.

Notwithstanding the nature and importance of written contracts, businesses may at times enter into commercial transactions without any written agreements. They may also contract informally or under simple contracts drafted between the parties without the taking of legal counsel. This assertion has been based primarily on my own experience as an Advocate, where I have dealt with numerous clients in commercial disputes who only involved legal counsel in the transaction after the dispute broke out but not during the drafting of the Contract or the creation of the commercial relationship. Consequently, such businesses may fail to take the importance of Contracts seriously unless they are faced with impending losses as a result of a breach.

In light of the above, there is a shortage of studies on the role that the form of contract plays in settling commercial disputes. While studies such as (MacMahon, 2018; Remington & Cui, 2015;

Coates IV, 2012; Bigsten et al., 2000; Farnsworth, 1968; Hietanen-Kunwald & Haapio, 2021; Retnowati, 2023; Grow, 1993) offer valuable inputs into the phenomenon, some of these studies are either outdated, fail to contextualize the law of contract to commercial disputes, or were conducted outside Kenya. Besides, available literature in Kenya fails to break down commercial dispute resolution in Kenya between written and unwritten Contracts and the role of each in commercial dispute resolution. The present study seeks to address the problems above by analysing the impact that the form of Contract has on commercial dispute resolution in Kenya. The study focused on written and unwritten contracts.

1.3 Research Objectives

1.3.1 General Objective

The main objective of the study was to analyse the form of contracts and determine the role that such form plays in commercial dispute resolution in Kenya.

1.3.2 Specific Objectives

i. To examine the role of written contracts in resolving commercial disputes in Kenya.
ii. To examine the role of unwritten contracts, if any, in resolving commercial disputes in Kenya.

1.4 Research Questions

To achieve the objectives, the research is guided by the following questions:

i. What is the role of written contracts in resolving commercial disputes in Kenya?
ii. What is the role of unwritten contracts in resolving commercial disputes in Kenya?

1.5 Scope of Study

The study analysed the outcome of specified commercial disputes which took place in Kenya and investigated the role that the form of contract had on the resolution of the said disputes. The independent variables were represented by the resolution of commercial disputes via written and unwritten contracts, while the dependent variable was the success/failure of the commercial dispute resolution. The units of analysis constituted litigants that have successfully and unsuccessfully resolved commercial disputes on the basis of written and unwritten Contracts in the superior courts of Kenya. The research studied ten litigants in Kenya, five of which were

successful and five of which were unsuccessful in resolving commercial disputes in their favour in the High Court of Kenya and the Court of Appeal in the last 10 years.

1.6 Significance of the Study

Despite the important role Contracts play in our commercial lives, understanding the manner in which contract law operates in Kenya is difficult since the act ironically gives no guidance on matters of Contract Law. This in turn may result in people entering into business transactions on the basis of oral or unwritten contracts only to later realise that the subject contracts are much more difficult to enforce than was originally thought. The proposed study aims to shed light on what impact the form of contract can have on dispute resolution and in so doing, help people have a deeper understanding on the consequences of doing business via written or unwritten contracts. The outcome of the study will particularly benefit the general public in understanding the significance the form of contract can have in resolving commercial disputes. Practitioners and policymakers will also find insights from the study in addressing commercial disputes and be informed of the significance of binding written agreements.

CHAPTER TWO
LITERATURE REVIEW

2.1 Introduction

This chapter provides the empirical review of the literature for the study by providing an in-depth review of previous empirical studies and other scholarly materials on the topic. Also covered in this section is a summary of the literature gap, conceptual framework, and operationalization of variables.

2.2 Theoretical Review

2.2.1 Promissory Estoppel

In general, theories of Contract approach contracts with a view to answering two basic questions. The first question, known as the "analytical" or "what" question, seeks to give an answer as to what the essential characteristics of a contractual obligation are, while the second or "normative" question seeks to answer what the justifications, if any, are for the imposition contractual obligations (Smith, 2004). According to Smith (2004), most contract theories can be placed into one or more of three broad categories depending on how they answer the analytical question, with one of them being promissory theories.

Contractual obligations are viewed as voluntary promissory obligations or some form of agreement-based uptake of obligation through the lens of promissory theories. Here, the promissory theory or promissory estoppel is a doctrine in contract law that prevents a person from going against a promise even if a legal contract does not exist (Smith, 2004). According to the legal principle, even promises made without consideration can be enforced in law, if the promisee relied on the promise to their subsequent detriment (Smith, 2004).

For many people, the natural view of contracts is essentially as promises or as "self-imposed obligations" emanating from a counterparties' communication that they intend to undertake certain obligations under the contract. Following such an undertaking, the obligation created is simply regarded as "a duty to do what was undertaken." (Smith, 2004).

Fried (2015), who is one of the most ardent supporters of promise theory, views promise as the moral foundation upon which contract law is built, and the principle thus serves as the foundation upon which persons may impose on themselves obligations that were non-existent before. Notwithstanding Fried's (2015), ardent support of promise theory, he is also quick to point out that not all promises or contracts are legally enforceable. Even among those that are enforceable, there are different categories amongst them.

Some are only enforceable if done in writing; others must be done between particular or specific parties, while others operate entirely on the reliance principle and will only be enforceable to the extent where a counterparty has relied on such a promise and even then, only to the extent of his detriment (Fried, 2015). It is not always clear where a particular contract falls unless you understand how contracts generally work. Even with Fried's observation, the concept of freedom of contract still operates at the contractual core, and what Fried is pointing out are, in fact, exceptions to the general rule.

In the event of a dispute, the doctrine of promissory estoppel helps the promisee recover (Fried, 2015). However, Calleros (2012) states that the following conditions must be met. A significant promise was made by the promisor, resulting in the promise acting on it; the promisee suffered significant damage from relying on the promise; the fulfilment of the promise is the only way the promise can be compensated According to Epstein et al. (2010) and Cartwright (2006), in the absence of a traditional contract, a promissory estoppel claim is legally enforceable in settling disputes.

Therefore, since the focus of this study was to determine the role that the form of contracts plays in commercial dispute resolution, it was presumed that the principles of promissory estoppel would be pertinent. On the contrary, what the research findings showed was that the Courts tended to rely on multiple theories of contract depending on the situation and facts of the case. At times the Courts made absolutely no reference to the theoretical approaches to contract and instead applied common sense reasoning to determine disputes before them.

In the circumstances, attempts to use a single theory to underpin the entire research had the result of watering down the results or otherwise unnecessarily excluding relevant results. Given the Court’s inconsistency in the reliance of the various contractual theories, the research and findings

were ultimately conducted and presented with only minor reference to Promissory Theory as a theoretical approach to contract.

2.3 Empirical Review of Literature

2.3.1 The Essential Concepts of Contract Law

2.3.1.1 The Concept of Freedom of Contract

According to Kessler and Fine (1964), "Classical contract theory, both in civil law and common law countries, has found its most striking expression in the idea of freedom of contract". They argue that Contract liability essentially presupposes that in entering into an agreement, the promise of the subject matter of the Agreement is voluntarily given. There is therefore, "no duty to contract except on terms agreed upon" (Kessler & Fine, 1964).

Kessler and Fine (1964) further argue that "Freedom of contract has its corollary in the "policy of certainty" and the principle of judicial non-intervention. The terms of an agreement to be enforced should be clear and unambiguous enough that the parties and the Court can both clearly know when either performance or breach has occurred and resultantly know what the expected benefit or remedy should be.

With this great latitude given to parties to decide their own terms, the responsibility for drafting clear terms and enforceable contracts lies with the parties. This power is unique and exclusive to the parties, and operates even against the Courts, which are not generally empowered to alter agreements on behalf of the parties (Kessler & Fine, 1964).This concept of freedom of contract is the general foundation for allowing parties to have such wide latitude in formulating the terms under which they wish to be bound and also to choose the form of contract they wish to adopt. Freedom of Contract is thus the reason that the Law does not generally ascribe particular forms of contract to be adopted in most commercial dealings.

Looked at on its own, Freedom of Contract can lead one to surmise that each form of contract is as good as the next since none are prohibited by the Law. Strictly speaking, oral contracts are just as valid as those in writing. One must therefore look behind the academic theories on contract and analyse the results in dispute resolution in order to determine if there are risks

associated with the different forms of contract that are not based on the validity of the contract itself.

2.3.1.2 Contract Validity

Regardless of the form of contract a party chooses to adopt, the pre-requisites for forming a valid contract apply across the board and are therefore worth mentioning. According to Mann and Roberts (2012), there are four pre-requisites to contractual validity: first, ***mutual Assent-*** which refers to the parties' clear manifestation by words or conduct that they have agreed to enter into a binding agreement over the subject matter. Second, ***consideration***- which is the legal terminology given to describe the benefit that flows between and amongst the parties under the contract. i.e., the value exchanged in the contract, gratuitous promises are generally not enforced (Chitty, 2012). Third, ***legality of object-*** This is a public policy ground where the Courts must refuse to enforce a contract whose purpose is in some manner illegal or fraudulent. Fourth, ***capacity-*** certain people, such as the underage, the intoxicated, and the mentally unsound, have no capacity to enter into binding contracts, Mann and Roberts (2012),.

The above-listed components form the basic pillars of Contract Validity, and the failure to meet any of the above requirements automatically makes a Contract unenforceable *(there are some exceptions in the case of capacity where people of unsound mind and intoxicated persons may respectively contract during lucid periods and ratify contracts when they sober up).* This is really the starting point for any contract, as, without validity, your contract is useless, no matter how detailed. These are similarly the same principles of validity that are applied in Kenyan Contracts.

2.3.1.3 The Varying Classifications and forms of Contracts

According to Mann and Roberts (2012), the primary classifications of contracts are as follows: express, implied, unilateral, bilateral, valid, void, voidable, unenforceable, executed and executory, formal, and informal contracts which are discussed in detail below.

Express Contracts- Referring to contracts that are entered into entirely in writing, entirely orally, or partly orally and partly written. In any case, the intention of the parties is expressly communicated between the parties, whether orally or in writing (Mann & Roberts, 2012).

Implied contracts- Referring to contracts that are inferred from the parties' conduct as opposed to their spoken or written words. Implied Contracts can typically be illustrated by food or drink service in restaurants where the very act of ordering such food or drinks implies that you agree to pay the bill even though there is no explicit agreement that you will do so, (Mann & Roberts, 2012).

Bi-lateral contracts – Most contracts typically operate by an exchange of promises. For instance, in a typical sale of land, one party promises to transfer a certain amount to the land owner, while the land owner promises to transfer the land upon receipt of the money. The promises are intertwined, and where promises flow from each party, a bilateral contract is formed, (Mann & Roberts, 2012).

Unilateral contracts- In contrast to bilateral contracts, unilateral contracts are formed where only one party makes the promise. For instance, if you ask someone to deliver a package on your behalf and that you will pay them x amount when they do, the contract will only be formed once the package is delivered. This would constitute a unilateral contract because only one party made the promise, (Mann & Roberts, 2012).

Valid Contracts- Referring to contracts that meet the necessary requirements to create a binding, enforceable contract.

Void Contracts. Referring to contracts that do not meet all of the necessary requirements and are thus unenforceable in law. An example of a void contract would be a contract whose objective is entirely illegal, for instance, a contract between parties to cooperate in the evasion of Tax.

Voidable- Voidable contracts can be defined as contracts which, though valid, entitle one or both parties to avoid the legal duties the contract creates. For instance, if a party to a contract misrepresents a material to their counterpart and this misrepresentation induces the said counterpart to enter into the contract, upon finding out about the misrepresentation, the party could opt out of the contract without any adverse consequences to them. (Mann & Roberts, Smith & Roberson's Business Law 15th Edition, 2012)

Unenforceable contracts: Unenforceable contracts are contracts that, though valid, cannot be enforced in law. For instance, the Law of Contract Act Section 3 (3) stipulates that no suit can be instituted on the basis of a disposition of an interest in land unless the contract is in writing. As such, though an oral contract for a disposition of land may be technically valid and have all of the ingredients necessary to form a binding contract, it will not be enforceable in a Court of Law.

Executed and Executory Contracts – Executed contracts merely refer to contracts whose duties have been performed in full, while executory contracts are contracts whose duties are yet to be fully performed (Mann & Roberts, 2012).

Formal and informal Contracts- Formal contracts are contracts that require meeting pre-requisite formalities (such as format mode of signing) before they can gain legal effect. For instance, in Kenya, contracts for the sale of land are required to be witnessed or attested by specified officers of the court, and the failure to meet such formality can invalidate the contract. All other contracts are informal contracts since their legal validity does not depend upon formalities (Mann & Roberts, 2012).

The above classifications (which are also generally the same as those by (Chitty, 2012) help categorise the numerous ways parties can contract with each other by setting out the forms of contracts that are generally capable of existing. These elements were relevant in this study as the gave an overview of the various ways the Law views Contracts which views ought to be generally understood by businesses and people engaging in contractual relationships.

2.3.1.4 Breach of Contract

The 9th Edition of the Black's Law Dictionary defines a breach of Contract as a party failing to perform their promise in the contract and thereby violating an imposed contractual obligation. The definition goes on to state that this violation can occur, by a party repudiating the contract and trying to essentially cancel or reject the same, or by otherwise interfering with the other party's performance or ability to perform the contact.

Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss with sufficient certainty, he at least has a claim for nominal damages" (Garner, 2009)

As is evident from the above definition, breach of contract deals with the central issue of performance of Contracts. According to Rowan (2012), "the essence of a contract is performance," and the whole point of entering into a contract in the first place is to ensure that each party gets what they want from the other. Not only does the literature on this point essentially unanimously agree, but it is also a matter of common sense that a party's interest in a commercial contract lies almost entirely in its performance.

On the other hand, the remedies for breach of Contract are generally confined to specified liquidated damages or monetary compensation, specific performance requiring a party to perform a specific obligation, injunctive relief to prevent or prohibit a party from doing a particular thing or punitive damages to punish a party for particular conduct/misconduct. These remedies, in turn, function to protect the interest either party has in the performance of the Contract (Rowan, 2012).

2.3.2 The Role of the Law of Contract in Commercial Dispute Resolution

Hietanen-Kunwald and Haapio (2021) sought to determine the role of proactive contract design in effective dispute prevention and resolution. To achieve this objective, the study adopted a systematic review of the literature for research design. Data was collected from various peer-reviewed sources which were drawn from reputable online databases. The findings suggest that the terms parties spend the most time and effort negotiating before execution of the contract often do not deal with the eventual cause of the ensuing disputes. Therefore, instead of reducing the risk of conflicts that often escalate into legal disputes, these contracts focus on minimizing the financial consequences for the parties involved.

Hietanen-Kunwald and Haapio (2021) further observed that proactive contract design that shifts the focus to the real problems and their causes goes a long way in preventing and resolving disputes effectively. According to the researchers, this is achieved in various ways: a well-designed contract defines the consensual mechanisms of the parties, helps diagnose conflict and its root causes, becomes instrumental in negotiation and mediation, and provides sufficient evidence in the event a conflict turns into a legal dispute. The study, however, was not based in Kenya. Findings cannot be inferred from commercial disputes in Kenya, a limitation the

proposed study seeks to address. In any event, the study did not focus on the impact that the form of contract had on a party's ability to resolve the dispute.

Yusuf and Tedjosaputro (2017) investigated alternatives that could be explored to achieve legal certainty in disputes arising from specified international contracts. The researchers adopted a case study analysis to achieve the objective above. The research focused on a commercial dispute between an Indonesian company and a South Korean company in 2014. The study observed that Judges did not yet appear to have enough legal understanding to provide reliable certainty in the resolution of international contractual disputes. The researchers argued that legal certainty is crucial in international contracts in ensuring the settlement of disputes is effective and efficient. They further proposed writing down and agreeing on clauses for dispute resolution methods within the contract and the use of the dispute settlement hybrid model. The study focused on international contracts, a broad scope that does not take unique elements of the law of contract that applies to Kenya and the study also did not focus on the impact that the form of contract had on a party's ability to resolve the dispute. The present study focused on contract law in Kenya and what impact the form of contract relied on by the parties had on commercial dispute resolution in Kenya.

In another study, Bigsten et al. (2000) sought to examine contractual practices of African manufacturing firms and the relationship between contractual flexibility and dispute resolution among these firms. The study used survey data gathered from six African countries: Zimbabwe, Cameroon, Burundi, Kenya, Zambia, and Cote d'Ivoire. Bigsten et al. (2000) discovered that contractual flexibility was entrenched and characterized by relational contracting across the value chain between manufacturers, their suppliers, and clients. It did however appear that long-term relations assisted in negotiations when dealing with contractual non-performance. However, when negotiations fail, large firms resort to confrontational methods using lawyers and courts. A notable limitation of the study is that it is outdated and thus does not capture recent developments in contract law, which the current study focused on.

In another study by Coates IV (2012), the role of contracts in managing disputes in mergers and acquisitions (M&A) was examined. The study hand-coded a sample of 120 M&As announced in Delaware, the United States, between 2007 and 2008, a period that led to the Global Financial

Crisis of 2008/2009. Three key observations were made: Delaware courts' strengths are unique corporate law in the context of M&A, the quality of lawyering varies across M&A contracts, and the use of arbitration is limited to private targets, absent in largest deals, and common in cross-border deals. Despite these valuable insights, the study was based in the United States and focused on M&As, meaning the findings cannot be inferred to commercial disputes in Kenya. The present study focused on commercial disputes in Kenya and the role of contract law in resolving these disputes.

Remington and Cui (2015) sought to examine the impact the 2008 labour contract law had on labour disputes in China. The study adopted a descriptive research design and used a systematic review of the literature to collect and analyse data. Findings suggest that the 2008 labour contract law formed part of an effort to improve employment conditions in China. According to the study, the 2008 labour contract law achieved this by strengthening the legal rights of individual workers vis-à-vis employers. The study was based in China and focused solely on labour disputes. The present study addressed this limitation by focusing on commercial disputes in Kenya.

In his study, MacMahon (2018) sought to examine an underexplored phenomenon, the reason for contract law: conflict minimization. According to the researcher, contract law plays a vital role in diminishing the wastage of time, effort, and resources on disputes and reducing the incidence of harm resulting from these disputes. From the findings, MacMahon (2018) contends that contract law is worth having in business relations because it minimizes the negative consequences of conflict. The study is valuable in gaining a deeper understanding of the phenomenon. However, it does not quantify the relationship between the form of contract and success or failure in dispute resolution, an area that the proposed investigation aims to do.

Retnowati (2023) conducted a study on the legal role of agreement law (contract law) in the settlement of business disputes between parties in the contract agreement. To achieve the objective above, the study employed a library search research method where peer-reviewed sources were selected from reputable online databases. The study found that it is important to develop an elaborate law of agreement at the beginning of business activities to guard the interests of both parties and ensure a smooth business relationship. In this case, the role of the law of agreement is to outline the desires and agreements of both parties. The study is limited in

that it was contextualized to Islamic Civil law and transactions, implying the findings cannot be inferred from the role of contract law in Kenya because of the different nuances of the two sets of laws and their role in settling commercial disputes. As such, the present study focused on contract law in Kenya and the role the form of contract plays in commercial dispute resolution in Kenya.

2.3.2.2 Role of Unwritten Contracts on Commercial Dispute Resolution

Pasaribu (2021) sought legal consequences for parties that breached verbal agreements. To achieve this objective, the study adopted a juridical approach where justice theory made for the study's theoretical framework. Primary, secondary, and tertiary data was obtained from legal materials. The study found that most Plaintiffs were not able to enforce verbal Contracts as the defendants simply denied the existence of such contracts. The judges therefore rejected the plaintiffs' lawsuits. The study was however based in the United States, implying its findings cannot be inferred to commercial dispute resolution in Kenya.

Zeitoun and Pamini (2021) sought to examine the role of union voice, Human Resource Management practices, and implicit contracts on workplace performance in times of crisis. The research study hypothesized that in times of recession and financial constraint, due to pressure, employers would be tempted to breach implicit but unwritten bargains with employees. The study used two waves of the British Workplace Employment Relations Survey (2004 and 2011) in the context of the 2008/2009 recession. The findings of the study confirmed its earlier stated hypothesis – recessions pressure employers to breach implicit contracts with employees since the terms were unwritten and difficult to enforce. However, with robust union voice and HRM practices, it becomes easier to observe these contracts. The limitation of the study is that because of including other variables such as HRM and Union Voice, the role of implicit contract is not well highlighted.

In another study, Parzefall and Coyle-Shapiro (2011) examined employees' evaluation and reaction to a perceived breach of psychological contract. The study adopted a qualitative research design and collected data via interviews, and the data collected was analysed via thematic analysis. Findings suggest employees reacted differently to perceived contract breaches. They made sense by attempting to clarify the breach, attributing responsibility, and seeking contextual

explanations. However, the common reactions were emotional, charges in reciprocity, and reframing the triggering event. Despite these insights, the study failed to highlight the impact of unwritten contracts on commercial dispute resolution.

2.4 Summary of Literature and Knowledge Gaps

Table 2.4.1 : Summary of Literature and Knowledge Gaps

Author	Topic	Findings	Research Gap	How the study addressed the gap
(Hietanen-Kunwald & Haapio, 2021)	Effective dispute prevention and resolution through proactive contract design	Proactive contractive design contributes significantly to preventing and de-escalating business-to-business disputes.	The study was conducted outside Kenya and followed a qualitative design. Findings cannot be inferred to Kenya.	The study is based in Kenya and used qualitative data.
(Yusuf & Tedjosaputro, 2017)	Dispute Resolution for International Contract to Achieve Legal Certainty	Judges' understanding of the international contract dispute is still not good enough to ensure the maintenance of justice and has not been able to provide legal certainty	The study focused on international contracts, a broad scope that does not take unique elements of the law of contract that applies to Kenya	The present study focused on contract law in Kenya and its role in commercial dispute resolution.
(Bigsten et al., 2000)	Contract flexibility and dispute resolution in African manufacturing	Contractual flexibility was pervasive, and relational contracting was the norm between manufacturers, suppliers, and clients. Also, long-term relations helped firms deal with contract non-performance through negotiation	The study is outdated and thus does not capture recent developments in contract law	The current study focused on the current status of the law of contract.
(Coates IV, 2012)	Managing disputes through	Delaware courts' strengths are unique corporate law, quality	The study was based in the United States and	The present study was based in Kenya and

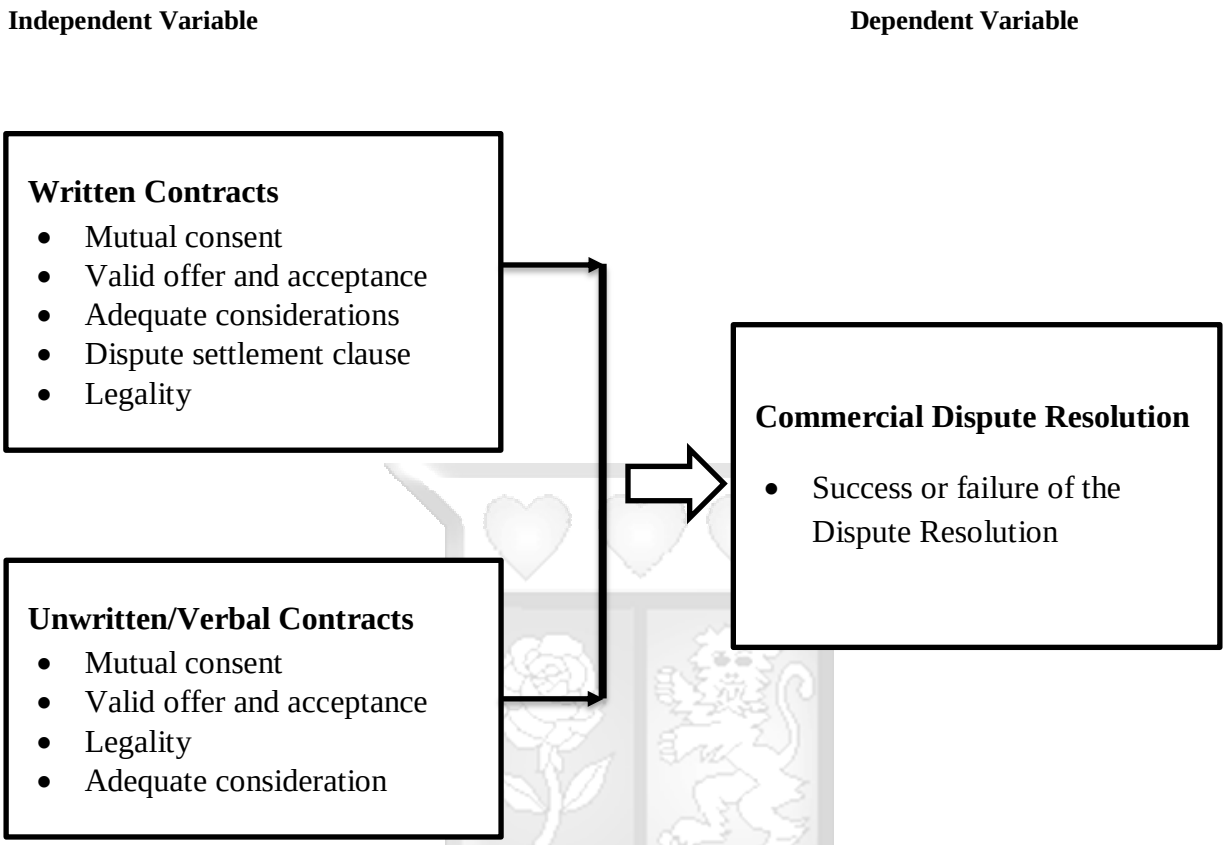
	contract: evidence from M&A	of lawyering varies across M&A contracts, arbitration is limited to private targets, absent in largest deals, and common in cross-border deals.	focused on M&A contracts.	focused on commercial disputes in general.
(Remington & Cui, 2015)	The impact of the 2008 labour contract law on labour disputes in China	The 2008 labour contract law strengthened the legal rights of individual workers vis-à-vis employers, thereby resolving disputes.	The study was based in China and focused solely on labour disputes.	The present study was based in Kenya and focused on commercial disputes.
(MacMahon, 2018)	Conflict and contract law	Contract law is worth having in business relations because it minimizes the negative consequences of conflict.	The study fails to quantify the relationship between contract law and dispute resolution.	The present study quantified the role contract law has on commercial dispute resolution.
(Retnowati, 2023)	The optimization legal role of contracts in the settlement of business disputes between the parties of contract agreement	The role of the law of agreement is to outline the desires and agreements of both parties.	The study is limited in that it was contextualized to Islamic Civil law and transactions, implying the findings cannot be inferred to the role of contract law in Kenya.	The present study focused on contract law in Kenya.
(Pasaribu, 2021)	Legal Consequences for Parties That Conduct Defaults in Verbal Contracts	Verbal contracts are legally valid and do not violate Law Number 1320 of the Code of Civil Law. However, despite proof of the validity	The study was based in the United States, implying its findings cannot be inferred to commercial	The present study was based in Kenya.

		of verbal contracts in the court of law, the judges rejected the plaintiffs' suit due to the absence of written contracts.	dispute resolution in Kenya.	
(Zeitoun & Pamini, 2021)	A promise made is a promise kept: Union voice, HRM practices, implicit contracts, and workplace performance in times of crisis.	Recessions pressure employers to breach implicit contracts with employees. This is because implicit contracts are unwritten and thus difficult to enforce.	The limitation of the study is that because of including other variables such as HRM and Union Voice, the role of implicit contract is not well highlighted.	The present study focused on written and unwritten contracts on commercial dispute resolution.
(Parzefall & Coyle-Shapiro, 2011)	Making sense of psychological contract breach	Employees made sense of the breach by attempting to clarify the breach, attributing responsibility, and seeking contextual explanations. The reactions were emotional, charges in reciprocity, and reframing the triggering event.	The study failed to highlight the impact of unwritten contracts on commercial dispute resolution.	The present study focused on unwritten contracts and their role in commercial dispute resolution.

2.4.2 Conceptual Framework

The Conceptual framework visually represents the anticipated relationship between variables in the study. The conceptual framework for the study is shown in Figure 2.1. Dispute Resolution was the independent variable and was represented by written and unwritten contracts, whereas Success or failure of the dispute resolution will be the dependent variable.

Figure 2.4.2.: Conceptual Framework



2.5 Operationalization of Variables

The conceptual framework illustrates the relationship between variables as described above. The operationalization of variables describes how the variables will be defined and measured. It helps turn abstract concepts of the variables into measurable or quantifiable indicators. The variables, indicators, and scale of measurements are illustrated in Table 2.2

Table 2.5.1: Operationalization of Variables

Variables	**Indicators**
Written contracts	• Mutual consent • Valid offer and acceptance • Adequate consideration • Dispute settlement clause

	• Legality
Unwritten contracts	• Mutual consent • Valid offer and acceptance • Legality • Adequate consideration
Commercial dispute resolution	• Success or failure on the basis of written/ unwritten agreements

CHAPTER THREE
RESEARCH METHODOLOGY

3.1 Introduction

The purpose of this chapter is to expound on the methods that were used to achieve the objectives of the study. The Chapter covers the research philosophy, the population and sampling, research design, among others.

3.2 Research Philosophy

This research employed a positivist research philosophy which generally operates from the viewpoint that the social world can be understood in an objective way and the researcher is but an objective analyst who essentially dissociates the research from their own personal values and or beliefs (Žukauskas et al., 2018).

The stable nature of reality, as seen from a positivist point of viewpoint, allowed for an unbiased appreciation and assessment of the role that Contracts play in businesses and further allowed for qualitative methods to be used to analyse and determine the role that the form of contracts have in commercial dispute resolution in Kenya. A positivist view further allowed for a qualitative assessment of whether or not there was a direct and ascertainable relationship between written Contracts and the chances of successful dispute resolution and if so, how strong or weak such a relationship was.

3.3 Research Design

Research design refers to the blueprint relied on to examine the particular research's questions of interest and refers to the methods by which research can be undertaken to find answers to the research questions (Marczyk et al., 2005).

This research employed a descriptive research design since descriptive research inherently requires the researcher to observe, describe, and explain a phenomenon along with its characteristics without influencing or interfering with it in any way (Marczyk et al., 2005). The objective of descriptive research, therefore, concerns itself more with "what rather than how or why something has happened" (Nassaji, 2015).

Descriptive research design was also preferred as it enabled the research to adopt and use qualitative methods of data collection, and this qualitative data was in turn used to establish the relationship(s) (if any) between the variables. The reason for descriptive research is that all of the data to be used in this study is qualitative rather than quantitative. As will be explained in the below paragraphs, looking at judgements delivered from commercial disputes is a relatively good way of assessing how certain forms of contract affect a party's ability to resolve a commercial dispute. Though such judgements can lend themselves to quantitative analysis, you are likely to lose the rationale behind the judgements unless the same are subjected to qualitative analysis. In the circumstances, descriptive research is preferable for this kind of qualitative research since descriptive research inherently requires the researcher to observe, describe, and explain the phenomenon on the study.

3.4 Population and Sampling

3.4.1 Population

A population in research refers to a group of individuals, items, entities, or objects with similar characteristics. The population in this research was selected as litigants in Kenya who have successfully and unsuccessfully resolved commercial disputes in Kenya's Court.

Using Litigants as the population of the study eliminated the possibility of biased opinions amongst the population since the disputes were resolved by an impartial third party (a Judge) as opposed to the litigants themselves. In contrast, asking various business people or parties involved in commercial disputes to directly give their own views of what impact the form of contract had on dispute resolution in Kenya would likely result in the subjects giving their personal opinions on the matter. There was no guarantee that such views, no matter how strongly held would accurately predict actual outcomes in commercial dispute resolution, particularly if the parties to the dispute were unable to agree.

On the other hand, the Courts of Kenya are legally empowered to resolve commercial disputes by delivering binding judgements on the basis of the disputes brought before them. The courts of Kenya also function on a system of judicial precedent so the findings in one case can be generally applied to other similar situations. As such, looking at judgements delivered on the

basis of commercial disputes is a relatively good way to determine how certain forms of contract affect a party's ability to resolve a commercial dispute.

3.4.2 Sampling

3.4.2.1 Sampling Frame

The sampling frame is the specific population of interest from which a sample is selected for a research study. In this case, the sampling frame was individuals and entities in Kenya who have undergone commercial dispute resolution (litigants) in the Commercial Division of the High Court and the Court of Appeal in the last ten years.

3.4.2.2 Sampling Technique

The study utilised a cluster sampling technique. It is a probability sampling method in which a population is divided into clusters and randomly selected (Acharya et al., 2013). A cluster is a mini-representation of the population. As such, the population was divided into two clusters: litigants in Kenya that have been successful in resolving commercial disputes in their favour in the Kenyan High Courts and Litigants in Kenya that have been unsuccessful in resolving commercial disputes in their favour in the Kenyan High Courts. Five litigants were selected from each cluster, as shown in Table 3.4.2.3

As explained in section 3.4.1 above, the Courts of Kenya function on a system of judicial precedents meaning that decisions tend to be consistent where similar issues are addressed before the Court. In the circumstances, it was concluded that 10 cases would show a statistical significance since the principles applied in the said cases were likely to be applied in subsequent and similar cases.

Table 3.4.2.3: Units of Analysis

	Litigants	**Sample**
1.	Litigants in Kenya that have been successful in resolving commercial disputes in their favour in the Kenyan High Court in the last 10 years.	5
2.	Litigants in Kenya that have been unsuccessful in resolving	5

	commercial disputes in their favour in the Kenyan High Courts in the last 10 years.	
3.	**Total**	**10**

3.5 Data Collection and Analysis Methods

This was doctrinal legal research (DLR), and the focus was therefore on an in-depth study of the cases and legal texts that best elucidate the applicable principles (Vranken, 2010). The study analysed the laws and cases governing the form of contracts in Kenya. The process involved, reading, analysing, and synthesising the cases selected using various techniques such as textual analysis, comparative analysis, and historical analysis.

With respect to the question of collection of Data related to the success and/or failure litigants in Kenya have had in resolving commercial disputes in the last 10 years, I relied on case reporting by the Superior Courts of Kenya (i.e., the Commercial Division of the High Court and the Court of Appeal).

Since the decisions handed down by our Courts are part of public record, electronic copies of the said Courts' decisions are accessible through the site "Kenyalaw.org." Out of select decisions handed down in the last 10 years, I selected 5 successful and 5 unsuccessful commercial cases and carried out an assessment of the factors the victors had in common as well as an assessment of what the losers had in common. I thereafter analysed whether from the judgments one could infer a significant relationship between the existence of written contracts and the outcome of commercial disputes so as to determine whether the form of contracts had a material effect on the chances of success in commercial dispute resolution during the time in question.

3.6 Research Quality

3.6.1 Reliability

The Reliability of the data collected was guaranteed by ensuring that the case law was obtained from reported cases and certified sources. Primarily, the study relied on the "Kenyalaw.org" website, which website is tasked with reporting on the various cases going on in the superior

Courts. Sources did not include any newspaper articles or any unverified sources of case reporting.

3.6.2 Validity

To ensure that research validity was maintained and also to guard against personal bias, the data collection methods were triangulated where possible. With respect to the collection of data on the concluded commercial cases, it was difficult to entirely eliminate personal bias since the cases the study was based on also had to be read through and sieved depending on their relevance to the study. As such, some level of personal bias was necessary for the purposes of selection. This was however not a significant drawback since the principles applied in the cases were more important than the cases themselves. In short, the cases were interchangeable whereas the principles were consistent. To ensure the validity and credibility of the case material found, the cases used in the study needed to follow the general legal rules in the realm of contract law so as to ensure that the said rules could be independently verified from other learned authors and texts.

The above approach also ensured that there was credibility since it will be possible for peers to independently verify whether the general rules derived from the various selected cases are proper positions of law and business practice, and this ought to favour the element of credibility.

3.6.3 Objectivity

The findings of the research were based solely on results derived from data and information collected during the study.

3.7 Ethical Considerations

Ethical considerations were considered and given the confidential nature of contracts, no information pertaining to existing contracts or contractual disputes which were not in the public domain were disclosed.

3.8 Limitations of the study

No major limitations were encountered in completing this research. The only issue was the amount of time it took to complete the study since navigating through the database to identify

relevant cases and statutes and analysing them was a time-consuming process. This is however a general problem that is encountered when analysing legal text and this is particularly true when dealing with contract Law since there is no Act of parliament to give guidance on the general positions.

CHAPTER FOUR
DATA PRESENTATION AND ANALYSIS

4.0 Introduction

The aim of the study was to analyse the forms of contract and the role that written and unwritten contracts play in the resolution of commercial disputes in Kenya. Given that commercial dispute resolution on the basis of contract Law is tied to contract Law, This chapter presents and analyses the findings of the study and also gives a brief overview of some of the essential concepts of Contract Law.

4.1 The Essential Concepts of the Law of Contract

4.1.1 The Varying Classifications and forms of Contracts

According to Mann and Roberts (2012), the primary classifications of contracts are as follows: express, implied, unilateral, bilateral, valid, void, voidable, unenforceable, executed and executory, formal, and informal contracts which were discussed in detail in paragraph **2.3.1.3** above.

The key finding on the above classifications of contract is there are various forms of contract that parties can use or employ to help them contract with each other. In turn and to ensure that parties have as much latitude in contract formation all of the various forms of contracting are generally as valid as each other. In short the form of contract does affect the validity or legality of contract unless some special accommodation or requirement is imposed.

In order to find out what effect the various forms of contract have on dispute resolution in Kenya, one has to look at the results of the dispute resolution itself.

4.1.2 Elements of a valid Contract

Though the form of contract does not generally affect the validity of a contract, the Primary ingredients for forming a valid contract are nevertheless worth mentioning.

This study revealed that an agreement only becomes valid and enforceable as a contract when certain conditions are met. As such, a contract, regardless of its nature, form, and content, must meet the basic legal requirements to constitute a valid contract. These elements include:

4.1.2.1 Offer and Acceptance

A contract is valid when there is an offer and a corresponding acceptance (Laibuta, 2006). A contract is initiated when a party extends an offer to another party. Generally speaking, an offer refers to a proposal with its set of terms, if the proposal is accepted by the other party, it results in a binding agreement (Crawford, 1994). It is worth noting that an offer can take many forms, including written, verbal, or simply implied. The key thing however is that the offer should be made with the intention of contracting on specified terms and conditions and with the intention that it should become binding on the person the offer is made to once accepted. (Salih, 2020)

A legal agreement between an offeror and an offeree thus comes to existence only when the offeree accepts the offeror's proposal (Laibuta, 2017). Of necessity in the acceptance of the offer is consensus between the offeror and the offeree as demonstrated in the English case of *The Crown v. Clarke* [1927], ***"the offeree must be informed about the offer and demonstrate intention to accept it"***. In addition and as per the English case of *Household Fire and Carriage Accident Insurance Company v Grant* [1879], ***"the assent of the offeree must be made known to the offeror."***

The positions of law are also reiterated in our own laws. According to Justice **Radido Stephen** in *Thomas Ogunde Mboya v Grand Royal Swiss Hotel* [2022]Eklr, three essentials are necessary for a contractual offer to be validly binding. There must first be an intention to create a legal relationship, and there must also be an offer and an acceptance and agreement between the parties on the essentials of the contract (including consensus on the rights and duties of the parties, remuneration, duration and start date). In view of the above, the traditional position of common law in England has not been materially altered in our own laws.

4.1.2.2 Contractual Capacity

The Law of Contract demands that the parties involved in a contract must be competent enough to create legally binding contractual relationships (Laibuta, 2006). Contractual capacity generally relates to the parties' age, mental condition, and legal status (Mann & Roberts, Smith and

Roberson's Business Law 15th Edition, 2012). Therefore, as a general rule of thumb, the following are limited in entering into contracts: minors, persons of unsound mind, corporations and declared bankrupt. With respect to corporations issues of capacity can also come up with respect to authorization or permission to enter into a contract.

4.1.2.3 Consideration

According to Justice Ongeri, not only must a party to a contract ensure that there is a valid offer and acceptance, but there must also be valid consideration in order for a binding agreement to be formed (Rusu Investments Ltd v Kaisugu Limited eKLR, 2021). Consideration on the other hand can be defined as the price one party pays in return for the other party to deliver their obligation. General speaking, the rule is that the consideration need not be monetary so long as it confers some agreed and recognisable benefit between the parties (Laibuta, 2017).

4.1.2.4 Intention to Create Legal Relations

The parties become bound if their transaction is intended to create a legally binding relation. Therefore, the mutual intention between the parties must be expressed (in verbal or written agreement), implied by their conduct or course of dealing with similar transactions, or implied by usage or custom. In contrast and as was observed by Lady Justice Kasango, where there is no consensus ad idem, the contract cannot be considered valid even if the other ingredients of the contract are present (Vincent M. Kimwele v Diamond Shield International Limited eKLR, 2018).

4.1.2.5 Legality of the Contract

The validity of a contract extends beyond the legal requirements outlined above. For it to be legally binding, the object of the contract must be lawful (Mann & Roberts, Smith and Roberson's Business Law 15th Edition, 2012). If the object of the Contract violates the law, causes harm to the public, limits the administration of justice, restraints trade (outside acceptable standards), etc. it becomes invalid. This is well demonstrated by justice Ngaah who observed that there are some contracts which the law cannot and should not enforce as their terms go against the good of the general public. As such the Law needs to strike a balance between the public good and the concept of freedom of contract which in its most raw expression does not feter a party's ability to craft the contract to their own design (Jairus, 2016).

The legality of a contract is therefore crucial for the contract to become enforceable and usable in a commercial dispute setting. As so far demonstrated, a valid contract must meet the above legal requirements – offer and acceptance, contractual capacity, consideration, and intention for legal relations. A lack of any of the above elements will in turn void a contract which becomes unenforceable in law.

4.1.3 Contents of a Contract

It is worth noting that the Law of Contract Act 1961 does not prescribe the formalities of creating a binding contract. However, there is a general understanding that the discussions and assurances leading up to the creation of the contract serve as the exclusive memorial of the agreement between the parties, as established in *Muthuuri v National Industrial Credit Bank Ltd* [2003]. No extrinsic evidence that contradicts, adds, subtracts, or varies from the terms of the agreement shall be admissible. The contents of a contract, in the context of dispute resolution, include terms expressed by the parties regarding the agreement (can be written, verbal, or both), terms implied from the commercial, custom, or local usage, terms implied by the conduct of the parties involved and terms presumed or implied by the courts of law to be essential to the contract (Mann & Roberts, Smith and Roberson's Business Law 15th Edition, 2012).

In regard to terms expressed in writing, the study observed that the Courts generally presume that by writing down a deed, the parties do not intend to be bound by terms other than those contained in the written instrument (Universal Education Trust Fund Vs Monica Chopeta [2021] eKLR, 2010).

The parole evidence rule shall be key in the discussion going forward as shall the dispute resolution clause.

4.1.3.1 Dispute Resolution Clause

Disputes can be resolved in a variety of ways, including arbitration, negotiation, mediation, and litigation. These mechanisms are well-outlined in the Alternative Dispute Resolution Bill (2021) which seeks to create a legal framework governing the settlement of certain civil disputes. My personal experience in this area has been that many parties who are used to formalising their agreements and contractual relations prefer to include dispute resolution clauses in their

contracts. The reason for this is that the absence of this clause exposes both parties to complex, time-consuming, and costly litigation.

The Supreme Court has also observed that Article 159 (1) of the constitution encourages the use of Alternative Dispute Resolution and as such it is possible to have the jurisdiction of the Court excluded by either statute or contractually by the agreement of the parties (Ngos Co-ordination Board and 4 others Vs Katiba Institute, 2019).

Agreements with respect to Alternative Dispute Resolution are however subject to legislative rules and to the normal rules on formation of contracts. For instance, where parties agree to proceed with Court Annexed Mediation as a dispute resolution mechanism, the disputants only have 60 days to conclude the mediation and while this time can be increased, having a timeline tends to impose a sense of urgency on the mediator and the parties who work with a clock.

The study however found that though ADR processes are encouraged and commonly used to resolve disputes in Kenya, there is no mandatory requirement for commercial disputants to submit their cases to ADR proceedings. The court may however refer commercial disputes to ADR processes, either on application of the parties or on its own motion. The common ADR methods in Kenya include negotiation, arbitration, conciliation, and mediation.

4.1.3.2 Arbitration

The fundamentals of arbitration are provided for in the Arbitration Act of 1995 and also mentioned in Section 59 of the Civil Procedure Act and Order 46 of the Civil Procedure Rules. Arbitration is somewhat similar to litigation but the process is subject to statutory controls and commercial disputes are determined by a private tribunal of the parties' choosing. As an alternative to litigation, the advantages of arbitration are tremendous. It is more flexible, cost-effective, fast, confidential, and produces binding outcomes. Also, arbitration is highly sought-after because it allows disputants to agree on an arbitrator.

4.1.3.3 Negotiation

Negotiation is another common dispute resolution mechanism which offers the parties in dispute absolute control over the process. The procedures for negotiation are not provided for in law. Therefore, it is open for the parties to identify and discuss issues in order to arrive at a mutually

acceptable solution. The goal of negotiation is to create a "win-win" outcome to the dispute at hand.

4.1.3.4 Mediation

Article 159 of the Constitution of Kenya recognizes mediation as a method for dispute resolution. It states that while exercising judicial authority, tribunals and courts shall be guided by certain principles, including, among others, mediation as a dispute resolution mechanism so long as it does not contravene the Bill of Rights. Mediation is one of the ADR methods that are greatly elevated by the constitution. It is informal, voluntary, confidential, consensual, and non-binding whereby a third-party can step in to reach a negotiated solution.

4.1.3.5 Conciliation

Conciliation is a process by which parties settle their disputes without resorting to Court or other traditionally litigious processes such as Arbitration. In conciliation, a third party or some other independent person or persons are appointed through the consent of the parties with the aim of bringing about a settlement of the parties' dispute (Shinde, 2012).

Like in mediation, a conciliator does not have the authority to impose his will or view on the matter and the parties must willingly consent to the solution in the conciliation for the same to be binding. Conciliation is in many respects akin to mediation and the practical differences between the two are so negligible that the 2002 UNCITRAL Model Law on International Commercial Reconciliation had to be amended and renamed in 2018 to the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements since the definitions Mediation as the definition of conciliation in the 2002 law was indistinguishable from the definition of mediation (Ugli, 2023).

Notwithstanding the amended definitions in the 2018 UNCITRAL Model laws, conciliation remains indistinguishable from mediation with respect to the manner of ADR it is. It is still a party driven process where the parties to the dispute engage a third party to discuss the dispute and attempt to reach an amicable resolution to their dispute without litigating. This is similarly the position in Kenya where conciliation can resolve the dispute if the parties unanimously agree to bound by the resolution proffered by the process.

4.1.4 Sources of Commercial Contract Disputes

Having explored commercial dispute resolution mechanisms, the study also sought to determine the common causes of commercial disputes from Kenya's perspective. Since a contract outlines the specific rules and obligations the parties must honour, it plays a crucial role in dispute resolution. This is because most of the time, commercial disputes emerge from issues relating to the contract. The study observed that the causes of contractual disputes vary, and may range from factors including but not limited to:

Breach of contract- This occurs when a party to a contract fails to honour some or all of their obligations under the contract. Breaches of contract can happen in a number of ways and for a number of reasons which will be explored in the cases analysed in this study.

Poorly defined roles which lead to misinterpretation of the contract or ambiguity in determining the precise obligations of either of the parties- According to Justice Tuiyot, where there is ambiguity in the terms of a contract, the principle of contra proferentem requires that the ambiguous term be construed against the party that was responsible for drafting the document (Uzuri Foods Limited v Occidental Insurance Company Limited eKLR, 2020). From the said case, it also emerged that the caveat to the contra proferentem rule is that the ambiguity in question must exist from an honest interpretation of the agreement and not merely because a certain clause can have more than one interpretation. If applying the alternative interpretation will lead to absurd results or where it is obvious that the parties could not reasonably have intended the alternative interpretation to apply, the contra proferentem rule will not apply.

One party being excluded from the creation of the contract- This generally applies in instances where one party is solely responsible for the drafting of a contract and drafts the same in a way that is unjust to their counterpart. Where the terms are unconscionable or heavily prejudicial to the party that was not involved in the drafting, the party will normally seek protection from the court by arguing that they signed the contract under some form duress. On this issue, justice Majanja noted that although courts cannot rewrite contracts for the parties, they could nevertheless "interfere with or refuse to enforce contracts which were unconscionable, unfair or oppressive such that they robbed the counterpart of any meaningful choice in the formation of the contract, leading to the execution of a contract that could be termed as "unconscionable" due to the extreme unfairness,

harshness, or commercial unreasonableness of the terms" (Momentum Credit Limited v Kabuiya (Civil Appeal E035 of 2022) [2022] KEHC 13705 (KLR), 2022).

4.2 Findings on the form of Contract and Commercial Dispute Resolution

This section presents findings on the analysis of ten commercial cases that have been resolved based on the form of the contract the parties has entered into.

4.2.1 Cases examining the role of written contracts in resolving commercial disputes.

4.2.1.1 Alba Petroleum Ltd v Total Marketing Kenya Ltd [2019] eKLR, Civ App 43 of 2015

Brief Facts

Alba Petroleum was in the business of supplying diesel for ships in Mombasa. The company bought 10,000 Metric Tonnes of diesel from Total Kenya (then Caltex Oil Ltd). Later, the defendant entered into a contract to sell one-quarter of this entitlement to Kenya Shell Ltd.

Alba instructed Caltex in December 1991 to release 2500 MT of its stored diesel to Shell. Caltex executed the order but incorrectly recorded the transfer in its books of account.

The error was not discovered until December 1997 following an internal audit whereafter Caltex demanded payment from Alba for the 2500 MT. Alba denied liability and refused to make the payment.

In April 1999, Caltex filed a lawsuit seeking payment of Kshs. 14,778,257 for the breach of contract. Alba continued to deny liability citing that the claim filed was time-barred since it was filed more than seven years after the error in the supply contract.

Legal Issue

There were three issues to be determined by the court:

Was Total's claim time barred, and if so, what were the legal consequences?

Was there breach of contract?

What remedies were available to Total Marketing Company (Caltex Oil)?

Rule

Section 4 of the Limitation of actions act is to be read together with section 26 of the same Act which requires that for the purposes of limitation, in cases of fraud or mistake time starts to run at the time when the fraud or mistake is discovered.

Analysis

Though it was conceded that Total had brought its claim more than 6 years after the sale and transfer of the 2,500 metric tonnes (the claim should have been brought by 1997 since the sale of the fuel was in 1991), it was also clear that the error was not discovered until much later (December 1997). In light of the provisions of section 26 of the limitation of actions act which provided that in cases of mistake of fraud, time would start running from the discovery of the mistake, the case was not time barred even though it was filed in 1998 since time only started to run in December 1997.

Alba Petroleum having not paid for the 2,500 metric Tonnes of fuel, they breached the supply contract and were therefore ordered to pay Kshs. 14,778,257/= for the said supply.

Conclusion on what impact the form of contract had on the resolution of the dispute

This case illustrates not only the importance of having a written contract but also the importance of having detailed and written records of the transaction which forms the basis of the contract. Normally Contractual disputes cannot be instituted after 6 years from the date of the alleged breach occurred. However, there is an exception to this rule in that where the breach is not discovered because of mistake or fraud, time only starts running from the time the breach is discovered. The issue of time can be of substantial importance and tends to be more ascertainable when dealing with dated documents as opposed to oral agreements where the memory of the parties involved is liable to fade or modify with time such that precise details are lost.

4.2.1.2 National Oil Corporation of Kenya Ltd Vs. Prisko Petroleum Network Ltd [2014] eKLR

Facts

National Oil Corporation and Prisko Petroleum entered into a contract for the sale of automotive gas oil whereby the respondent was the supplier of the product. Later, the applicant discovered that the respondent was sourcing the product for an overseas supplier, a Russian Company. So, the applicant went ahead to contract the same company for the product.

A dispute arose between them where the applicant referred it to arbitration under the first contract with the respondent. Following an ex-parte arbitral hearing in the absence of the respondent, the arbitrator issued an award in favour of the applicant who then sought to enforce the award in the court.

However, the respondent opposed the award citing that the respondent failed to disclose material facts to the arbitrator. Further, the respondent argued that the contract between the applicant and the foreign supplier superseded their own agreement. Therefore, the governing arbitration agreement was the one within the second agreement with the Russian company. This second arbitration agreement provided for the governing laws as English laws and the laws of Geneva.

The respondent further argued that the arbitration proceedings should be rendered void on two grounds. First, the proceedings were not held within the framework above and secondly, the respondent was denied the right of fair hearing since the proceedings were conducted ex-parte.

Legal Issues

What are the grounds under which arbitral awards can be challenged or set aside?

What if any, remedies were applicable to the Applicant in the matter?

Rule

As Arbitration is a consensual process, the Court can only intervene in Arbitral proceedings in limited situations. With respect to setting aside awards, the same can only be done under the limited provisions provided by Section 35 of the Arbitration Act.

Analysis

While it was acknowledged that Respondent in the matter did not take part in the Arbitration and that the award was given against them ex-parte, their argument that the Applicant failed to disclose material facts to the Arbitrator did not fall within the grounds provided under section 35 of the Arbitration Act which would enable the Court to set aside the Arbitral award. It emerged from this case, that a party cannot challenge an Arbitrator's award on the basis of findings of fact made by the Arbitrator. In essence, section 35 does not allow a party to appeal the decision of the Arbitrator, only to set the same aside on some specified limited grounds. The court therefore held that the arbitral proceedings were valid since they were concluded under the laws of Kenya as provided for in the contract. It was also determined that the arbitrator acted within his

jurisdiction when the award was issued. As such, the court adopted the award as a judgment of the court.

Conclusion on what impact the form of contract had on the resolution of the dispute

This case illustrates not only the importance of having a written contract but also the importance of having an elected dispute resolution mechanism in the contract. One of the issues that regularly makes people shy away from Courts and litigious dispute resolution is the lengthy time that it may take to go through the various court sessions and appeals. In the present circumstances, it is evident that a well drafted Arbitration clause can circumvent the delays that would hinder timely commercial dispute resolution by allowing parties to litigate on a private timeline.

An Arbitration clause also has the clear added advantage of forestalling future litigation by functioning as a final determination of a dispute with no recourse to lengthy appeals. The party in this matter essentially attempted to appeal the arbitral award under the guise of a challenge to the recognition of the award.

In contrast, it would be difficult to impose an oral agreement to arbitrate as it would be impossible to state with clarity how far the Arbitrator's jurisdiction extended or did not extend. This is not the case when the Arbitration contract can be provided and examined making it easy for a court to peruse the arbitration agreement and decide on the limits and specifics of both the Arbitration and the Arbitrator.

4.1.2.3 Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premlal Mahajan] v Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan] [2017] Eklr

Facts

This case was a complex family dispute between the Plaintiff, **Mamta Peeush Mahajan** (in her capacity as the Administratrix of the Estate of **the late Peeush Premlal Mahajan [the Plaintiff's late husband]**) and the Defendant **Yashwant Kumari Mahajan** (sued in both her personal capacity and as the Administratrix of the Estate of the late Krishna Lal Mahajan [the Defendant's late husband hereinafter referred to as Krishna]).

This dispute revolves around shares held by the Defendant and her deceased husband in a group of four family Companies incorporated by members of the Mahajan family between 1966 to1993.

The subject sale and purchase was negotiated by the Plaintiff's husband sometime in 2001, whereafter a formal contract was drawn up and signed between the parties for a total purchase price of Kshs 210,000,000/=. The purchase price was to be paid over a 6 year period with the first payment of Kshs. 8,000,000/= being made in 2012 while the balance of Kshs 202,000,000/= was to be paid in the remaining time. Upon payment of the said Kshs 8,000,000/=, the Defendant was to avail the executed share transfer forms and the original share certificates.

Despite payment of the said Kshs 8,000,000/= and a further Kshs 10,000,000/= in 2013, the Defendant refused to effect the transfers of the various shares, which refusal persisted until the death of the Plaintiff's husband in 2015. The Plaintiff thereafter inherited the dispute and filed suit seeking orders to compel the Defendant to perform her end of the agreement and transfer the shares.

In response, the Defendant argued that there was no valid contract for the sale of the shares and that what was signed was instead a non-binding draft and that in any case, her signature and that of the Plaintiff's husband were never witnessed when the agreement was signed.

The Defendant however did not deny signing the agreement or receiving the Kshs. 18,000,000/= but argued that the money was for other matters not related to the sale and purchase of shares.

Legal Issues

Was there a valid and enforceable agreement between the Plaintiff's husband and the Defendant for the sale and purchase of the shares owned by the Defendant and her deceased husband in the four family owned companies?

Was there any part performance of the agreement?

Was the Plaintiff entitled to an order for specific performance and, if so, on what terms?

Rule

Parties are free to contract in the manner of their choosing and what the court requires is evidence of the contract and the terms of the contract rather than requiring contracts to be in specific forms.

Where an agreement is found to exist between the parties, the Court can compel the parties or either of them to honour their obligations under the agreement.

Analysis

There was no dispute that the contract was signed by the Plaintiff's husband and the Defendant in the year 2012. It was also clear that the contract was only dated 28th September 2015 because stamp duty had to be paid and the contract was therefore dated when it was taken for stamp duty assessment.

Though it was a fact that the signatures for the Plaintiff's husband and the Defendant were not witnessed or attested, there was no requirement in law that such agreement be in any prescribed form. This was also clear from the Memorandum and Articles of each of the four companies which also did not have any mandatory requirements providing that the documents for sales and transfers of shares must be in a certain format. The parties were free to contract in the manner of their choosing and all the judge required was evidence of what was agreed. Such evidence having been given in the form of a signed agreement, the Judge could not ignore it. The judge also dismissed any arguments of fraud or other vitiating factors as the same were not pleaded with any specificity and could not be raised during final arguments or final submissions.

The Defendant having admitted to receiving Kshs. 18,000,000/=, it was noted that in subsequent written correspondence, and even in draft re-negotiations that the Parties always acknowledged that the Kshs 18,000,000/= had been paid on behalf of the Plaintiff's husband and the Defendant therefore could not reverse herself on this issue in light of the evidence adduced. The agreement therefore could not be vitiated by any factor, including the allegations of fraud or duress.

The Plaintiff's suit for specific performance was therefore allowed and the Defendant ordered to avail the original Share Certificates and signed transfer instruments with the Plaintiff being ordered to pay the balance of Kshs 192,000,000/= in exchange for the Share Transfers.

Conclusion on what impact the form of contract had on the resolution of the dispute

This dispute was substantial and was further complicated by the fact that one of the key parties (**Peeush Mahajan, The Plaintiff's husband)** was already deceased at the time the suit was filed. With the Plaintiff's husband dead, the Plaintiff would have had a difficult time proving the details of the agreement reached between her husband and the Defendant.

The position of Law is that hearsay evidence will not generally be admissible as parties are required to testify on and adduce evidence that is from their own first-hand experience of the facts attested to.

From the facts of the case, it appears that the agreement the subject matter of the case was negotiated and reached between the Plaintiff's husband and the Defendant, there is no evidence that the Plaintiff was involved in the negotiations.

It might be that the only way that evidence of the agreement between Peeush and the Defendant could be provided was by providing the written agreement. In view of the Defendant's conduct during the trial, it is likely that she would have denied ever having reached any agreement with the Plaintiff's husband if the only evidence of their agreement was oral.

Of note and relevance to this case is also the interplay between the concept of Freedom of Contract and the requirement for parties to prove the terms of the Contract to the Court.

While the Defendant raised technical issues on the contract including the argument that the Contract was a draft, that the same was not attested and that the contract was not witnessed, the judge observed that there was no requirement in law that the contract be in any prescribed form. The judge found that in the absence of statute or contractual provisions requiring the contract to be in particular form, all he required was evidence of what was agreed and such evidence having been given in the form of a signed agreement, the Defendant could not override the clear agreement of the parties by relying on extraneous issues.

Once it was proved that an agreement existed between the Plaintiff's husband and the Defendant, the Plaintiff was entitled to enforce the same. The Defendant also could not be allowed to argue that the agreement was a draft due to her conduct in accepting and keeping Kshs 18,000,000 from the Plaintiff's husband and even spending the same.

In all, this case highlights the need for contractual agreements to be conducted in writing since parties are liable to change their minds once agreements have been made. This case also highlights the manner in which a written agreement can benefit the resolution of a commercial dispute by vesting the Administrator of a deceased counterpart with the right to sue on the contract in the event they die before the agreement is fully performed.

4.1.2.4 County Government of Migori v Hope Self Help Group [2020] eKLR

Facts

The appeal was filed by the County Government of Migori regarding a disputed variation to a contract entered into between the County and Hope Self Help Group.

The Self Help Group having been aggrieved by the variation of their contract, they sued the County for breach of contract and won in the primary suit. The County thereafter appealed to the High Court seeking to overturn the decision.

With respect to the contract the subject matter of the dispute, the same provided that Hope Self Help Group would collect and clear garbage from the County of Migori at an agreed monthly remuneration of **Kshs. 204,188/=**.

The County claimed that via a letter dated **23rd January 2014**, they communicated to Hope Self Help Group that they had reviewed the monthly remuneration from **Kshs. 204,188/=** to **Kshs. 148,500/-**.

The County's argument was that since Hope Self Help Group continued to work while accepting the reduced sum of **Kshs. 148,500/-,** the continued performance of their contractual duties amounted to an implied acceptance of the varied terms. The County's argument was essentially that Hope Self Help Group had by their conduct accepted the variation in terms.

On their part, the Respondents (Hope Self Group) argued that the terms of the contract between the parties were clear and were never formally varied. The self-help group maintained that it had been contracted by the County at a monthly remuneration of Kshs 204,188/= but they were only paid for three months after which their monthly remuneration was unilaterally reviewed downwards.

The Group were adamant that they never agreed to the variation despite continuing to work and pleaded that they ought to be entitled to whatever arrears had accumulated from being paid less than the Contract provided for.

Legal Issues

Can a party who continues to perform their contractual duties after the unilateral variation of the contractual terms by their counterpart be deemed to accept the variation by virtue of such continued performance?

Was there consensus ad idem in the variation of the contract?

What remedies was the appellant entitled to?

Rule

The general rule with respect to variation of contracts is that the variation is subject to the same rules that exist upon the creation of the contract.

Consensus ad idem must be present to show that the variation was agreed to by both parties.

Analysis

In assessing the Case, the Court found that it was not in dispute that the County had written the letter varying the terms of the Contract after the subject contract had already been negotiated and signed by the two parties.

The judge also noted that it was not disputed that the alteration of the contractual terms was done unilaterally by the county who solely initiated and implemented alteration.

In its view the Court was unable to find any evidence that could reasonably point to variation having been agreed upon or intended by both parties. In essence there was no consensus ad idem on the matter of the variation.

In the end, the court found that the County's appeal lacked merit in its entirety and was dismissed with costs. The county were not entitled to any remedies.

Conclusion on what impact the form of contract had on the resolution of the dispute

The rationale of the decision is that once a Contract is formalised and executed between parties, any variation to the agreed terms must be clear and must be freely agreed to by both parties (consensus ad idem). Where consent to the variation is vague or is clearly unilaterally imposed, the same cannot be allowed to stand as to allow parties to unilaterally alter negotiated and agreed contractual terms would run contrary to established rules of contract formation by impairing the principles of valid offer and acceptance and the necessity of consensus ad idem.

The above being said, the importance of having the contract in writing is highlighted when one considers that Hope Self Help group had proceeded to repeatedly perform their contractual duties and had even gone on to accept lower pay for the performance of such services. Such a fact may have led one to assume that there had been a renegotiation of the terms of the contract or that such terms were what was agreed on in the first place.

In the absence of a written contract, it may be that the resolution of this particular dispute would have gone against Hope Self Help group as the exact terms of the contract may have been difficult to prove in light of Hope Self Group's conduct in continuously accepting lower remuneration.

4.1.2.5 Euromec International Limited v Shandong Taikai Power Engineering Company Limited (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling)

Facts

The Defendant in this case (Shandong Taikai Power Engineering Company Limited) got involved with a number of parties in relation to high voltage projects of the Kenya Electricity Transmission Company Limited ("KETRACO").

The aim of the parties was to secure funding from the Export Import Bank of China (EXIM Bank) and to ensure that the Defendant was successfully awarded the project. The Defendant also engaged the Plaintiff as an intermediary between it and Kenya's Energy Ministry, resulting in Agreements between the parties where the Energy Ministry would secure funding from the EXIM Bank of China and the Engineering Company would undertake the project on behalf of KETRACO.

The Plaintiff argued that it fully performed its obligations but that once all material issues were resolved and it became apparent that the project would go through, the Defendant begun to exclude the Plaintiff and ultimately refused to pay the contractual remuneration of Kshs 185,552,028/2.

In turn, the Defendant not only argued that the Contracts were unsanctioned and therefore void, but that the parties were required to submit their disputes to arbitration in Hong Kong as per the terms of the Agreement. In response, the Plaintiff disputed the demand to arbitrate in Hong Kong, citing the costs involved and other issues related to the Covid 19 situation in Hong Kong.

Ultimately, the defendant offered the Plaintiff an amount of Kshs. 47,000,000/= which sum was to be paid in full and final settlement of the Plaintiff's claim on condition that the plaintiff agreed to forego all the other claims against the Defendant.

The Plaintiff grudgingly accepted the offer and entered into a contract with the Defendant agreeing to relinquish any further claims and to withdraw various complaints filed against the defendant.

The Plaintiff complied with the requirement to withdraw the complaints but filed suit arguing that payment of Kshs.47,000,000/= was unconscionable as it forced the plaintiff to surrender more than 96% of its due under its Contracts.

The Plaintiff argued that the Defendant's conduct had been oppressive, unethical and unreasonable. Consequently, the settlement agreement ought to be voidable due to economic duress. The Plaintiff therefore prayed for damages equivalent to the amount forfeited.
In response, the defendant sought for a stay of the suit and referral of the dispute to arbitration in Hong Kong in accordance with agreement's terms.

Legal Issues

Is a party's argument that they will incur hardship or costs in undertaking international arbitration sufficient grounds for the Court to void an arbitration clause?
Where a party argues unconscionableness, economic duress or unfair and unethical practices in contractual dealings, can the Court determine such issues while there exists a valid arbitration clause?
In light of the provisions of Section 6 of the Arbitration Act, is a Court at liberty to proceed with hearing a dispute where an arbitration clause exists and a party to the dispute has already sought to refer a dispute to Arbitration?

Rule

Section 6(1) of the Arbitration Act prohibits a court from continuing with the hearing of a matter where an Arbitration clause exists and a party has sought to refer the dispute to arbitration at the time they enter appearance.

In addition to section 6(1) of the Arbitration Act, Section 10 of the Arbitration Act also provides that the Court is to play a limited role and avoid interference in Arbitral proceedings except as strictly permitted by the Arbitration Act.

The parties to a Contract should therefore have autonomy in selecting their dispute resolution mechanism and the Court ought to respect the decision of the parties.

Analysis

The Judge noted that Kenya is among 85 states that have adopted the model legislation based on the UNCITRAL Model Law on International Commercial Arbitration. This fact taken together with Article 159 of Kenya's Constitution means that Courts are encouraged to promote alternative forms of dispute resolution, including arbitration.

In the circumstances and notwithstanding what the Judges' views on the matter were, he had no choice but to stay the proceedings and refer the dispute to Arbitration.

On the issue of the unconscionability of the Settlement Agreement, the Court observed that for a Contractual term to be considered truly unconscionable, the inequity of the bargain needed to be so apparent as to "shock the judgment of a person of common sense". In addition, the degree to which the terms were to be oppressive needed to be so apparent that no reasonable person would propose them, nor would they accept them if they were a fair person.

The Judge therefore found that notwithstanding the agreement to receive a reduced contractual sum, there was no evidence by the Plaintiff proving the kind of imbalance of bargaining power necessary to successfully argue unconscionability in an agreement.

Though the Judge proceeded to make a finding that the Settlement Agreement was not unconscionable, there is a question as to whether the judge had the jurisdiction to make that determination in light of the fact that he referred the substantive dispute to Arbitration.

The Plaintiff's argument of the hardship they would experience, whether cost-wise or otherwise by conducting the Arbitration in Hong Kong was also not sufficient grounds for setting aside the arbitration clause.

The Court is bound by the express wishes of the parties and cannot re-write the contract for the parties so as to provide alternative venues of Arbitration solely on the application of one party.

Conclusion on what impact the form of contract had on the resolution of the dispute

The key highlight in this case is in showing the interplay between the contracts and elected methods of dispute resolution.

Where parties agree to pursue certain dispute resolution mechanisms, it becomes possible to entirely exclude the jurisdiction of the Court. For instance, we have seen that under section 6 of the Arbitration Act, where a party applies to stay court proceedings and refer a matter to Arbitration, the Court has no choice but to down its tools and refer the matter to Arbitration for determination by the Arbitrator.

This case has also made it apparent that it is not only the Court's jurisdiction that can be ousted but even the arbitral venue and applicable law can be decided in an arbitration clause. This applies even when the jurisdiction and venue selected is in a completely separate jurisdiction from where the parties live and perform the contract.

It appears from this case that the Arbitration clause can even be invoked where a particular contractual dispute appears to have been resolved as a settlement was clearly signed between the parties by the time the matter was being referred to Arbitration.

Though the court took note of the signed settlement, the Court prioritized the Arbitration clause and stayed proceedings in the Court to enable parties to refer the dispute to arbitration where the matter could be substantively concluded.

Even though a settlement appeared to have been reached between the parties, the arbitration clause generally constitutes its own contract between the parties and survives even when the original contract is terminated or appears to have been settled.

4.2.2 Cases examining the role of unwritten contracts in resolving commercial disputes.

4.2.2.1 Bid Insurance Brokers Limited v British United Provident Fund [2016] eKLR

Facts

In this matter, the Plaintiff claimed that it entered into a verbal agreement with the Defendant where it was agreed that the Plaintiff would act as the Defendant's insurance broker in exchange for 10% commission of the value of the business placed.

The verbal agreement appeared to have been entered in general terms and was unclear on the intended duration leading the Plaintiff to argue that the term was to be considered "long term".

The Plaintiff argued that it was an express or implied term of the agreement that the contractual relationship between the parties would only be determined for good reason, and by giving reasonable notice.

As there did not appear to be any consensus between the parties with respect to what "reasonable notice" in the circumstances would be, it was left to the court to determine the issue.

With respect to the claim, the Plaintiff's claim was for wrongful termination of the agreement leading to alleged losses which the Plaintiff quantified as summing up to Pound Sterling 209,121.76. The Plaintiff determined this amount by equating the sum to an estimated five years of commissions.

In response, the Defendant conceded that there was a verbal agreement between itself and the Defendant but denied that there were any explicitly or implicitly agreed terms for the termination of the agreement.

The Defendant stated that it gave the Plaintiff thirty (30) days' notice of termination, and argued that given the lack of any express agreement between the parties on how long the contract was to run or how it was to be terminated, the Plaintiff could not be faulted for given 30 days' notice to terminate.

Legal Issues

Is an oral contract binding on the parties to the agreement?

In the absence of express agreement on specific issues in an oral contract, can the Court determine the issue for the parties?

Where a party is unable to provide evidence of agreement on a specific issue in an oral agreements, can they rely on the said term by implication?

Rule

Oral contracts are a valid and recognised way of forming legally binding contracts between parties.

Oral contracts need to follow the same rules for contract formation and consensus ad idem must be demonstrated on the contract for the terms of the oral contract to be binding.

Where you are unable to prove the terms of the oral contract, the court will decline to enforce the oral agreement.

Analysis

When implying terms into a contract, the conduct of the parties becomes relevant since conduct can be used to establish patterns of behaviour or give insight as to the understanding of the parties with respect to their relationship. This is especially so where the terms of the relationship are not expressly written down. In the circumstances, it was noted that since the Plaintiff had previously terminated the verbal agreement without giving any giving notice or providing reason, it was unreasonable for them to change the termination terms and attempt to imply terms requiring the agreement to be terminated only upon giving notice or by providing reasons.

In the circumstances, the only reasonable conclusion was that there was no express or implied term that the verbal agreement would be terminated for good reason and on notice.

Further and in the absence of an express term on the issue of termination, the Court could determine what was reasonable notice in the circumstances.

In the Court's view, what was or was not reasonable was a question of fact, and given the loose relationship between the Plaintiff and the Defendant a 30 day notice was considered to be reasonable.

The judge also found that it was not even necessary to give reasons for the termination as there was nothing in the parties' conduct that would lead one to reasonably presume that the agreement could only be terminated by the giving of sufficient reason.

Conclusion on what impact the form of contract had on the resolution of the dispute

Although oral agreements are valid ways of forming contracts, the drawback of oral contracts is that since the terms of the same are not fleshed out, the parties may understand their relationship differently and may presume that certain sets of conditions exist or should apply. As such, where a dispute breaks out, the party asserting the existence of a certain understanding is often at a disadvantage since they are unable to prove that particular understanding.

The exact terms between the parties to an oral contract are also liable to be disputed leaving the Courts to intuit what is or is not be reasonable in the circumstances. This has the drawback of being open to subjective bias since it comes down to what each judge might consider reasonable or unreasonable in the circumstances. A court may therefore not see eye to eye with a particular claimant on implied terms. This is particularly so when a party attempts to imply detailed terms which are prejudicial to their counterpart.

4.2.2.2 June Dezina Vel v Nation Media Group Limited [2022] Eklr

Facts

This matter revolves around an employment situation regarding the Claimant and the Defendant. Sometime in or around July 2015, the Claimant approached QFM, for an employment opportunity.

Having had a pre-existing relationship with the General Manager ("GM") of QFM, the Claimant pitched herself as a prospective radio presenter and engaged in discussions with the said GM on the kinds of shows that she could potentially host.

Following these talks, the Claimant and some representatives from QFM jointly came up with a show that was dubbed "*Mazagazaga Ya Taraab"* which the Claimant was to host on the understanding that she would promote the sale of a double cabin Ford vehicle.

Once this understanding was reached, the claimant alleges to have sought direction on her employment status and demanded an employment contract before hosting the show.

The Claimant argued that the GM thereafter convinced her to sign a temporary contract on the understanding that a comprehensive employment contract would be signed later.

According to the claimant, the formal employment contract was never prepared but she was nevertheless convinced to present the show, which she did.

The Claimant stated that she was never given an employment contract but was instead offered a contract to act as an independent contractor providing promotional and related services to QFM. This in turn meant that she would not be entitled to a salary but would instead be paid on a commission basis.

The Claimant disputed the offer and insisted that the same was against the verbal terms that had been agreed with the GM. The parties having been unable to resolve the dispute, the Claimant was ultimately instructed to halt the show until directed otherwise.

The direction to re-commence the show never came and the claimant argued that this amounted to unfair termination. Her claim against the Respondent (who was the owner of QFM) was therefore for terminal dues related to her alleged employment.

With respect to the written agreement that was signed between the parties, the Claimant argued that the same was temporary and was only supposed to act on an intermediate basis pending the finalisation of the Claimant's employment contract.

In response, the Respondent wholly denied the existence of an oral employment contract with the Claimant and also denied the existence of an oral agreement to provide the claimant with an employment contract. The Respondent insisted that the only agreement it had with the Claimant was one where the Claimant was to act as an independent contractor as per the contract for services entered into between the parties.

In the circumstances, the main issue in the case was whether or not the Claimant was an employee.

Legal Issues

Was the Claimant an employee or an independent contractor?

Can a written contract be varied on the basis of oral agreement?

Between an oral agreement and a written agreement, which one should be given more weight?

What remedies, if any was the Claimant entitled to?

Rule

The parole evidence Rule prevents written agreements from being varied on the basis of oral discussions.

An independent contractor is not generally entitled to employment benefits.

Analysis

The Claimant did not deny executing the only written agreement that had been signed between the parties. Under clause No 8 of the said written agreement, it was explicitly provided that the Claimant was not an employee but was an independent contractor who was not entitled to employment benefits.

Given the express provisions of the written and signed contract, the Court could not come to a determination that was different from the explicit written intentions of the parties. To do so would be tantamount to rewriting the parties' agreement which was decidedly contrary to the Court's established position on the enforcement of contracts.

In the circumstances, the court would not even decide any issues related to employment since none of the remedies were available to independent Contractors.

Evidence of oral agreements could not be adduced to contradict express written terms in a contract.

Conclusion on what impact the form of contract had on the resolution of the dispute

This matter involved a case of parallel negotiations and parallel agreements, one set which was allegedly oral and one set which was in writing.

The court found that a party could not be allowed to introduce oral negotiations and agreements to vary a written contract. This was especially so when one of the parties only acknowledged the existence of the written contract.

The Court's finding that the oral agreement could not supersede the written contract highlights the risk of relying on oral agreements, especially where there exists conflicting written agreements.

The Parole evidence rule explicitly prohibits a party from using oral discussions to contradict or vary written agreements. As we have seen in this case, this term works against people conducting business by mixing oral and written agreements. In the event a dispute breaks out, the Court will disregard the oral agreements in favour of the written ones.

4.2.2.3 Masiga & 15 others v Menengai Farmers Limited (Civil Appeal E069 of 2021) [2022] KEELRC 4140 (KLR) (4 April 2022) (Judgment)

Facts

This appeal was filed by the appellants who were employees of the respondent and had initially been employed as general labourers on oral contracts.

Subsequently, the Respondent employer decided to convert the Appellants' oral contracts into written contracts where the term of the employees was fixed at 3 months. Pursuant to the said contracts, the Appellants continued to work until December 31, 2019 but claimed that come 2020, they were all let go without notice. The appellants therefore filed suit claiming terminal dues and arguing that they were unfairly terminated.

On the other hand, the Respondents argued that while the Appellants had initially been employed on the basis of oral employment contracts, these oral contracts were converted into written contracts which provided for three month term contracts.

The Respondent therefore argued that the contracts having all come to an end by effluxion of time, they were under no duty to renew the contracts and could not be penalized for "unfair termination" on the basis that they refused or declined to renew the contracts of the Appellants.

Legal Issues

Can an employer be held liable for failing or refusing to renew an employee's contract?

Can an employee who was enjoying certain benefits on the basis of an oral employment contract hold their employee liable for failing to provide such benefits when the contract is reduced to writing and excludes previously enjoyed benefits?

Can the terms of a pre-existing oral agreement be used to supplement a written agreement?

Rule

The concept of freedom contract allows parties to contract or not contract as they see fit.

Courts can only enforce agreements as written by the parties and cannot re-write agreements for the parties.

Oral agreements cannot be used to vary written agreements.

Analysis

It was evident from the documents produced in Court that the Appellants' contracts of employment were reduced into writing and provided for employment terms of only (3) three months.

The Respondent was therefore only obligated to pay for leave days accrued and other dues accrued on the basis of the short term signed contracts.

Once these contracts lapsed, it was up to the Respondent to decide whether or not it would renew the contracts, the Court could not compel the Respondent to renew the contracts or convert the same into permanent contracts if it did not wish to.

Though under the pre-existing oral agreement, the contracts would have continued to operate indefinitely on a month to month basis, the written term contracts superseded the oral agreement and that was what applied when an employment dispute broke out.

In the circumstances, the trial court was correct in not allowing the appellant's claim and the appeal failed.

Conclusion on what impact the form of contract had on the resolution of the dispute

While the previous case of June Dezina Vel v Nation Media Group Limited [2022] Eklr showed that the Court was very reluctant to allow a party to vary a written contract on the basis of oral agreements, the reverse is not true.

In this case, oral contracts which favoured the appellants were substantially varied in a way that was ultimately prejudicial to them and the Court had no issue relying on the variations done in writing.

Though the appellants tried to rely on the oral contracts, the subsequent written contracts even though prejudicial to their claim could not be ignored and ultimately the judge decided the parties' employment relationship on the basis of the written contracts.

The Parole evidence rule was once again applied to prevent the Appellants from relying on their previous oral contracts to supplement or vary the subsequent written contract.

This highlights the advantage that written contracts have over oral contracts, whether the written contract precedes the oral contract or the oral contract precedes the written one.

4.2.2.4 J K Kinoti v G J Kibanga [2013]eKLR

Facts

This matter has a long history and traces its roots back to the year 1988 the Appellant and the Respondent used to work together and it is alleged that sometime in 1988, the parties agreed to form a company which would be a supplying certain products.

Though the ultimate intention was to incorporate a limited liability company, it is alleged that the parties agreed to first start with a partnership.

Since the appellant is said to have had his base in Meru while the Respondent worked in Nairobi, it is alleged that the Respondent was assigned the duty of seeing to the registration of the partnership. Pursuant to such agreement, the certificate of registration was procured in September, 1988 but the appellant claimed to not have seen the certificate.

The appellant alleges that it was not until November of the same year that he discovered that the Respondent was the only registered proprietor of the business. According to the Appellant, the Respondent claimed to have omitted the Appellants name due to the fact that the appellant was still employed by one of the businesses that the prospective business was to trade with. This would have led to issues of conflict of interest which would jeopardize their ability to successfully apply for tenders or in a worst case scenario, result in disciplinary issues with respect to the Appellant's employment.

The Appellant alleged that in the circumstances, the parties agreed that the once the appellant resigned, his name would be included in the list of proprietors for the business.

Though the appellant subsequently resigned and joined the Respondent in the business, his name was never added onto the list of proprietors notwithstanding the fact that he had continued to contribute to the business in a financial sense.

Subsequently, it emerged that the Respondent edged the Appellant out of the business and the Respondent ultimately suspended the Appellant resulting in the present suit.

In the primary suit, the Appellant sought for dissolution of the partnership and an equal division of the assets of the business.

On the other hand, the Respondent argued that the Appellant could not claim to have provided capital for the business since the goods of trade were always supplied on credit

The Respondent denied the existence of any partnership agreement between him and the appellant and instead argued that the certificate of registration was conclusive evidence that he

was the sole owner and proprietor of the business. In the circumstances, there was no basis for dissolving the partnership since one did not exist.

Legal Issues

Can an alleged unwritten agreement be used to supersede an instrument of registration with respect to a partnership?

Can an oral agreement be proved to exist without any written record of what was or was not agreed?

Can the Parole Evidence Rule also apply beyond contracts to affect the ability of a party to contradict documents showing registrations of ownership?

Rule

The General Rule is that the burden of proving a particular situation or set of facts lies on he who alleges the existence of such facts.

While unwritten or oral agreements may be valid, the existence of the oral agreement must be proved by way of evidence.

Analysis

The Appellate judge having gone through the evidence adduced agreed with the decision of the trial Court and found that there was insufficient evidence to prove the existence of partnership between the parties.

Notwithstanding the alleged oral agreement, the Judge also noted that the Appellant failed to adduce any evidence that showed he used to share in profits since the financial evidence adduced showed that he was earning a commission on sales.

Though it was conceded that the bank account in National Bank was only opened with the Appellant's leave, this in itself was insufficient to establish a partnership agreement.

On a balance of probability, the registration certificate coupled with the evidence before the Court lead the judge to conclude that the respondent was the sole proprietor of the said business.

In the absence of a written partnership agreement, the Appellant had a duty to provide evidence that would indirectly point to the existence of a partnership agreement and having not been able to provide sufficient records, his claim could not be allowed.

The judge concluded by noting that at best, there may have existed an intention to create a partnership but intention was not enough for the Court to declare the existence of a partnership between the parties.

Conclusion on what impact the form of contract had on the resolution of the dispute

This case represents the classical problem with oral contracts which centres on evidence of the agreement.

In this case, the appellant's argument is plausible and there could well have been an agreement between him and the respondent on setting up the partnership. Notwithstanding this fact and since the agreement was oral, there was no way to prove what was and was not agreed between the two parties. It is notable that the judge even acknowledged the fact that there was evidence that the parties intended to form a partnership.

In light of the foregoing, doing business on the basis of oral contracts seems to favour unscrupulous individuals in that it gives them the option of denying the existence of agreements and thereby sets an uphill task to a claimant to prove what was or was not agreed between the parties.

On the other hand the party denying the existence of the oral agreement does not have to prove that the agreement did not exist. Once they deny the existence of an agreement, the burden automatically shifts onto the Claimant who is required to produce sufficient proof of the agreement, an arduous task when dealing with undocumented facts.

4.2.2.5 Whitris Company Limited v Papilo Limited [2014] eKLR

Facts

The Plaintiff in this matter is a bar and restaurant which had been operating from the Defendant's property between the years 2013 and 2014.

The Plaintiff's case was that pursuant to an oral agreement entered into between it and Defendant's Directors, the Plaintiff was to lease the suit premises to the Defendant for a 5 year term.Though the agreement was never reduced into writing, the Plaintiff nevertheless took possession of the suit premises.

With respect to the premises, the same had previously been leased to Dominos Investments Kenya Limited who subsequently sublet the same to the Plaintiff for 8,000 Euros.

The claimant alleged that by agreement of the parties, they did not pay a cash rent to the Landlord but instead, the Defendant's guests were allowed to eat from the Claimant's premises and the cumulative bills used to offset the rent owed by the Claimant.

The Claimant alleges that sometime on or around 22nd November 2013, the Defendant closed the premises and insisted on the rent being paid. Despite the said demand, the Defendant is alleged to have refused to take any cheques from the Plaintiff in the sum of Kshs. 314,460/=.

With respect to the lease agreement, the Plaintiff alleged that the Landlord never approached him on the issue of a written lease but instead sought to evict the Plaintiff. The Plaintiff argued that the eviction notice of 2 days was not only grossly short but was against the provisions of cap 301, the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

In response, the Landlord completely denied the existence of any oral agreement with the Plaintiff and instead pointed out that the only lease it had over the suit premises was the one with Dominos.

On the other hand Dominos were under a strict obligation under the terms of the lease not to sublet the premises without the written consent of the Landlord. The Landlord having never given consent to Dominos to sublet the premises, the Landlord argued that the Plaintiff's occupation of the suit property could only have been illegal.

The Landlord argued that in the absence of a lease agreement between itself and the Defendant, the Plaintiff lacked the legal standing to file suit over a tenancy.

Issues

Could the terms of an alleged oral tenancy agreement be used to supersede the terms of a written lease?

Did possession of a premises vest a party with the requisite legal standing to successfully prosecute a claim related to tenancy of the premises?

Rule

Oral evidence cannot be used to void clauses in written agreements.

Where multiple agreements are said to exist, the parole evidence rule can be applied to prevent a claimant from contradicting written contracts even when they are not party to the contract in question.

Analysis

Although the Plaintiff's assertion was that the Landlord was well aware of its sub tenancy from Dominos, the absence of a lease or other written agreement between the parties worked against the Plaintiff.

The situation was further complicated by the fact that the parent lease between the Landlord and Dominos explicitly required the Landlord to give his consent in writing before Dominos could be allowed to part with possession or sublet the premises to anyone. It was common ground that written consent was never given though there was argument of oral consent having been given.

There was additionally no evidence that the requirement to give written consent had been waived since there was no evidence that the Landlord ever received rent from the plaintiff, in fact the evidence on record is that the Landlord refused to accept the Claimant's cheques.

The argument that the Landlord had instead been setting off rent against its customers meals could not be verified and was therefore not accepted by the Court.

In the circumstances and given the facts placed before the Court, the Court was of the view that the Claimant was illegally in possession of the premises and could therefore not be given any favourable orders.

The Court further observed that even if the subletting agreement between Dominos and the Plaintiff was valid, the fact that it was contrary to the master agreement between Dominos and the Landlord meant that the Claimant's own agreement was illegal and the Court could not in good conscience enforce an illegal contract. The Court was emphatic that no court should enforce an illegal contract or allow itself to be an instrument of enforcing obligations arising from illegal transactions.

The Plaintiff could therefore not prove the existence of a tenancy relationship with the landlord and their claim had to fail.

Conclusion on what impact the form of contract had on the resolution of the dispute

This case also reiterates the classical problem with oral contracts which is that it is extremely difficult to prove the terms or even existence of oral agreements when one party refuses to even acknowledge the existence of the agreement.

In this case, it seems unlikely that the landlord was completely unaware of the fact that dominos had sub-let the premises to another bar and restaurant which was operating from the landlords premises.

Notwithstanding any suspicion, suspicion or intention is not enough to impose the existence of a legal relationship. Without the Landlord's cooperation, the Plaintiff had no way of providing evidence to the Court that their occupation of the suit premises was legal.

The Landlord having pointed out that any consent to sublet was required to be in writing and that there was no written lease between the Landlord and the Plaintiff, the Claimant's entire claimed failed on the basis of lack of evidence of the agreement.

4.3 Conclusion and findings on the effect of the form of contract on dispute resolution in Kenya

From the listed cases, we can clearly see that oral agreements seems to repeatedly suffer from the same problem of being very difficult to prove once a party to the dispute has denied the existence of the Contract.

In fact, of all the cases listed above, it is only in the British United Provident Fund [2016] eKLR case where a party openly admitted to the existence of an oral contract. Notwithstanding such admission, there were additional problems in prosecuting the claim when it came to the exact terms of the contract.

It was also apparent from the research that there was an ingrained preference by the Courts to give credence to written agreements over oral agreements since the parole evidence rule precluded parties from being able to contradict the provisions of written agreements on the basis of alleged oral agreements.

On the other hand, parties who were able to provide written agreements to the Court had a much easier time in enforcing the agreements since issues of the Agreement's existence and the terms were easily dealt with simply by reading the document. In this instance, even when parties attempted to deny the validity of the agreement such as in the Mahajan family case or where parties attempted to set aside agreements such as in the Euromec case, the Court expressed reluctance to void the written agreements.

In all, the findings of the study strongly suggest that it is easier to resolve disputes on the basis of written agreements as opposed to oral agreements.

CHAPTER FIVE

SUMMARY, DISCUSSION, CONCLUSION, AND RECOMMENDATIONS

5.1 Introduction

This chapter provides a summary, discussion of the findings, conclusion of the study and recommendations based on the findings. The discussion is organized in relation to the specific objectives of the study. Also provided in the chapter are limitations encountered, and suggestions for further research.

5.2 Summary of findings

The research study sought to interrogate the role written and unwritten contracts play in resolving commercial disputes in Kenya. The study employed a positivist research philosophy and adopted a descriptive research design. To achieve its aim, the study targeted commercial enterprises that had been involved in commercial dispute resolution in the superior courts of Kenya from which ten cases were selected for analysis, and findings were presented via text.

From the analysis of the ten cases, the study found that written contracts played a key role in resolution of commercial disputes. This was illustrated by the tendency of the Courts to stick with what the Contracts provided notwithstanding the arguments made by the parties. The trends and issues that were common across these cases is that written contracts were instrumental in providing clarity, defining rights duties and obligations, and offering protection when resolving disputes.

In relation to unwritten contracts, the findings revealed that unwritten contracts have inherent risks which hinder resolution of commercial disputes. The biggest risk associated with unwritten contracts was the higher burden of proof that parties face in proving not only the terms of their contract, but also proving the existence of the Contract in the first place. What emerged from the analysis of cases was that verbal contracts often led to disputes where parties took opposing views on the existence of the contract as well as on the duties and obligations between them. This in turn made it problematic to resolve the disputes since there was an apparent lack of evidence of the parties' agreement, rights or obligations.

5.3 Discussion

This study noted that neither the Contract Act nor Common Law prescribed the formalities of creating a binding contract nor is there general provision on the form of contract one is required to adopt. When it came to the actual contents of Contracts and the formalities of creating valid contracts, the law prescribed for only a limited number of Agreements and for the rest of the Agreements, the concept of freedom of contract came into play.

Freedom of contract generally refers to the legal right of contracting individuals to freely decide the manner in which they will form their contract and the right to decide what the specific rights and obligations of each contracting party will be (Kessler & Fine, 1964). Essentially, it is the parties' right to design and modify the operation of contract law, generally without legal restrictions. Scholars such as Hirsch (2010) and Weber (2013) view the concept of the freedom of contract as the cornerstone of free-market libertarianism and the underpinning of laissez-faire economics. These scholars further point out that it is only through the doctrine of the freedom of contract that persons can have the liberty to choose whether to contract, whom to contract with and the terms of agreement.

Whereas this is a similar position taken by the Kenyan courts, this study revealed that where parties had oral discussions and written contracts, the Court did not allow parties to supersede or amend the written contracts on the basis of prior or subsequent oral discussions or agreements. This principle which is known as the "parole evidence rule" turned out to be an unforeseen detriment to parties who were conducting both oral and written negotiations, since the Court repeatedly prohibited parties from contradicting written agreements on the basis of alleged prior oral discussions or agreements. The findings showed that courts have taken a general understanding that the discussions and assurances leading up to the creation of the contract served only as the exclusive memorial of the agreement between the parties.

With respect to clauses for dispute resolution in contracts, findings illustrate that the same could be expressed (written, verbal, or both), implied, or presumed. For formal contracts, clauses for dispute resolution can be incorporated to allow for solutions outside the restrictive procedures of the judicial processes in times of conflicts and misunderstandings. Lee (2019) explains that a

robust dispute resolution clause provides timely and cost-effective approaches for resolving disputes and can go a long way in preserving the relationship between parties in a contract.

In light of the dispute resolution clause, Schmitz (2006) contends that ADR processes are sought after to resolve conflicts without trial or to resolve conflicts with some sense of confidentiality. Alternative Dispute Resolution is provided for in Article 159 of the Constitution of Kenya where Courts and litigants are encouraged to pursue ADR. The ADR processes include negotiation, mediation, conciliation and arbitration. The fundamentals of arbitration are articulated in the following laws: the Arbitration Act of 1995, the Civil Procedure Act, and Order 46 of the Civil Procedure Rules.

5.3.2 Written Contracts and Commercial Dispute Resolution

It was observed that written contracts were effective in resolving the following commercial disputes: *Alba Petroleum v Total Kenya, National Oil Corporation vs. Prisko Petroleum Network, Mamta Peeush Mahajan v Yashwant Kumari Mahajan, County Government of Migori v Hope Self Help Group*, and *Euromec International v Shandong Taikai Power Engineering Company*. These cases demonstrated the importance of written contracts in dispute resolution. Written agreements played the following roles: providing evidence of what was or was not agreed, offering clarity and clearly defining the parties' rights and obligations, and offering protection when resolving disputes.

For instance, in the *Alba Petroleum v Total Kenya* case, having a written agreement between the two parties served as evidence to substantiate the terms of engagement between them. Since the exact terms were in writing, the written contract provided the proof needed to award judgement in Total's favour. Given the timelines of the transactions without the written contract, the dispute would have been difficult to settle as it may have been unclear what the actual terms of the agreement were. It is notable that in the above case, the transaction the subject matter of the contract was performed more than 7 years before the issue was discovered and suit instituted. Given the timeframe, it is likely that the people involved might have forgotten the specifics of the transaction or might have otherwise moved on to other jobs. The written contract was important in that it allowed both parties to say with certainty what the terms were, despite the litigation having been started 7 years after the transaction was finalised.

The *National Oil Corporation vs. Prisko Petroleum Network* dispute relates to a dispute resolution clause in a contractual agreement. When the dispute between the two parties arose, the applicant referred it to arbitration which was then settled through an ex-parte arbitral hearing. The respondent objected citing that the proceeding was void partly because the party was denied the right of fair hearing. However, the court held that the arbitral hearing was valid because it was provided for in the contract. Once again, by including a dispute resolution clause in the contract, it provided the applicant with a specific right to proceed with the legal action which could not be subjected to a lengthy appeal. In addition, the arbitration clause provided for fast and timely commercial dispute resolution that would otherwise not have been possible without a written arbitral agreement. This was also the key highlight in the *Euromec International v Shandong Taikai Power Engineering Company* which allowed a party to stay proceedings in a substantial litigation and instead refer the dispute to arbitration in Hong Kong despite the protests of the Plaintiff.

The role of a written contract serving as evidence was also demonstrated in the *Mamta Peeush Mahajan v Yashwant Kumari Mahajan* case. In this dispute, the court was presented with the predicaments of deciding whether or not to enforce a contract where one of the contracting parties was deceased and therefore not available to give evidence of the terms of the agreement. Ultimately and on the basis of the signed contract, the Plaintiff was allowed to enforce the contract since the Agreement spoke for itself even when one of the contracting parties was deceased. The presence of a written and signed agreement between the deceased and the Defendant therefore played a huge role in settling the dispute. The position of Kenya's law of contract is that written evidence trumps hearsay evidence in contractual disputes.

The *County Government of Migori v Hope Self Help Group* case presented another scenario in contract law that still highlights the importance of written agreements. The variation of agreed terms of a contract was a major issue in this case. Having the agreement in writing played an instrumental role in the resolution going in Hope Self Help Group's favour because the self-help Group had continued to perform their contractual duties despite a unilateral downward review in their contractual remuneration. In the absence of a written agreement, this particular dispute is likely to have gone against Hope Self Help Group as their conduct of repeatedly accepting a

certain sum in exchange for certain services may have reasonably led one to believe that those were the actual terms of the agreement.

The above findings correspond with the principles of promissory estoppel. In contract law, the theory of promissory estoppel views contractual obligations as some form of agreement-based uptake of obligation which prevents parties in a contract from going against the terms of the contract because. Though the term promissory estoppel was not used by any of the Judges while rendering their decisions, contracts in writing were nevertheless enforced even when the Defendants tried to shirk their contractual obligations.

In addition, the findings of the study also corroborate with previous literature, including Hietanen-Kunwald and Haapio (2021), Yusuf and Tedjosaputro (2017), Bigsten et al. (2000), Remington and Cui (2015), MacMahon (2018), Retnowati et al. (2023), and Coates IV (2012). According to these researchers, written contracts are beneficial and their roles in commercial dispute resolution are tremendous. For instance, written contracts lessen the risk of disputes, help diagnose contractual issues and pinpoint root causes of disputes, provide sufficient evidence in the event of legal disputes, ensure legal certainty, help deal with non-performance through negotiations, minimize the negative consequences of conflicts, and guards the rights and interests of parties in a contract.

5.3.3 Unwritten Contracts and Commercial Dispute Resolution

On this issue, the general observation was that verbal or oral contracts were ineffective in dispute resolution as demonstrated in the following cases: *Bid Insurance Brokers v British United Provident Fund*, *June Dezina Vel v Nation Media Group*, *Masiga & 15 others v Menengai Farmers*, *J K Kinoti v G J Kibanga*, and *Whitris Company Limited v Papilo*. In other words, the cases revealed the dangers of relying on unwritten agreements, including the burden of proof, parties forging or denying terms of agreement, memory and interpretation errors, risk of misunderstandings, absence of formality, and difficulty of enforceability.

For instance, the *Bid Insurance Brokers v British United Provident Fund* case highlights a major issue associated with disputes from oral contracts such as parties having misunderstandings on the specific terms of the contract, including issues such as the manner in which the contract can be terminated. Bid Insurance Brokers were aggrieved in the manner in which their oral contract

was terminated and filed suit seeking damages for short notice and loss of business. The judge rejected the argument and imposed his own rationale on what he thought was reasonable termination of the agreement in the circumstances. This kind of misunderstanding tends to be a common feature in oral agreements where there is a conflict of interest in a particular course of action. These kinds of disputes also highlight a risk in oral contracts in that if a certain issue is not discussed and agreed on, it falls upon the judge trying the case to apply his own discretion, which exercise of discretion may or may not go your way. The key highlight of the case besides misinterpretation is the lack of formality of the initial engagement and the absence of evidence of the trail of communication between the parties. The case was unsuccessful from the plaintiff's point of view due to the issues above. The lack of evidence is also demonstrated in the *Whitris Company Limited v Papilo* case.

The main talking point of the *June Dezina Vel v Nation Media Group* case is the power of a written contract to supersede oral agreements. This was a classic case of parallel negotiations partly in writing and partly oral. When the two conflict, courts disregard the oral agreements in favour of the written ones as per the "parole evidence rule". This is because without appropriate documentation, proving the existence and validity of terms of agreement between parties can be a challenge. In addition, the possibility of a party altering the terms of the agreement in an unwritten contract is high. Therefore, the resolution going against June Dezina was inevitable in this scenario. A similar case and rationale for the ruling was observed in the *Masiga & 15 others v Menengai Farmers* case.

The *J K Kinoti v G J Kibanga*, and *Whitris* case is interesting and it is another representation of the problem of evidence of agreement. The judge determined that there was lack of evidence of partnership despite a long working relationship between the parties. Agreements such as business partnerships are expected to be in writing and without written documentation highlighting the formalities of the terms and other elements of a valid contract, it becomes difficult to prove and enforce a contract created purely on oral agreements. This is especially so when one party vehemently denies the existence of the verbal contract. Though the denial is simple, it creates substantial difficulty in examining alleged agreements without a record of text, email, or other written evidence. The plaintiff is therefore unable to discharge his burden of proof and the case collapses before it has begun.

The findings above are consistent with previous literature, including Pasaribu (2021), Zeitoun and Pamini (2021), and Parzefall and Coyle-Shapiro (2011). These studies found that verbal, oral, or implicit contracts are often challenging to enforce and for this reason, are often rejected in lawsuits for lack of concrete evidence. This study has demonstrated the implications of relying on unwritten contracts. As Pasaribu (2021) points out, many people overlook the importance of written contracts and perceive them as applicable only for commercial purposes. However, even though oral agreements can be legally binding, they are associated with numerous complications when disputes arise. This is because human memory is fallible and people may have different recollections and disagreements about what was actually agreed upon. Oral agreements also implicitly encourage deliberate alteration of facts by dishonest people, leading to miscommunications, errors, forgery of details, and complexity of terms.

5.4 Conclusion

The study aimed to analyse the role that the form of contract has on commercial dispute resolution in Kenya. The study has demonstrated how written and unwritten contracts influence commercial dispute resolution. As the findings suggest, the law of contract is broad and encompasses a diverse range of aspects including types of contracts, the validity of a contract, elements of a contract, contents of a contract and the concept of the freedom of contract. As outlined in Kenya's law of contract, certain conditions must be met for a contract to be considered valid and enforceable. This validity is however a wholly different issue from enforceability of the Contract and the roles of written and unwritten contracts in commercial disputes vary. Based on these findings, this research concludes that while both written and unwritten contracts are valid and can be enforceable, written contracts substantially increase the probability of successfully resolving commercial disputes while oral or unwritten contracts have inherent risks which substantially decrease the probability of successfully resolving commercial disputes.

5.5 Recommendations

Contractual disputes are common in Kenya. This is because the sources of disputes vary and are plenty. Some take root from the specific terms of agreements while others arise from simple issues as misinterpretation of obligations. Whatever the case, the contents and terms of the

agreement play a crucial role in how these disputes are settled. Therefore, having a valid contract is not in itself enough and it is wise to ensure these terms are documented.

As this research illustrates, written contracts can go a long way in ensuring successful commercial dispute resolution. In certain cases, having agreements in writing, including a well-drafted dispute resolution clause can prevent the long and costly process of litigation. Other benefits of written contracts as the study demonstrates include fast and timely resolutions, reduced cases of conflicts, diagnosis of contractual issues, pinpointing root causes of dispute, providing sufficient evidence in the event of legal disputes, ensuring legal certainty, reducing the adverse outcomes of conflicts, and protecting the rights and interests of parties in a contract. Therefore, this study recommends observing the requirements of a valid contract and making sure the terms of the agreement are written and related records preserved, including documenting communication between parties. It appears that the primary burden faced by trying to enforce unwritten contracts is the evidentiary burden of proving what was or was not agreed. In the circumstances, keeping a written record of communication where the oral contract is discussed may help those trying to enforce written contracts as the communication itself may provide the necessary evidence.

5.6 Areas for Further Research

The overriding goal of this research was to analyse the role that written and unwritten contracts play in commercial dispute resolution in Kenya. The research relied on secondary data obtained from reported cases to achieve this objective. As such, while the roles of written and unwritten contracts in commercial dispute resolution have sufficiently been demonstrated, there is still a need to understand the degree to which these classes of contracts influence dispute resolution. Future researchers should consider incorporating quantitative data to measure the statistical significance of written and unwritten contracts on dispute resolution. Additionally, since this research was restricted to case law, it proposes including the opinions of relevant parties in commercial disputes, including parties in contracts, judges, legal representatives, who can weigh in on contracting culture in the Country.

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APPENDICES

Appendix I: List of Statutes

1. Law of Contract Act (Cap 23)
2. The Arbitration Act (Cap 49)
3. The Employment Act 2007
4. The Evidence Act (Cap)
5. Sale of Goods Act (Cap 31)

Strathmore UNIVERSITY

29th January 2024

Mr Mmbogori Andrew,
Andrew.Mmbogori@strathmore.edu

Dear Mr Mmbogori,

RE: Analysing the Law of Contracts and its Role in Commercial Dispute Resolution in Kenya

This is to inform you that SU-ISERC has reviewed and **approved** your above **SU-masters** research proposal. Your application reference number is **SU-ISERC1963/24.** The approval period is from **29th January 2024 to 28th January 2025.**
This approval is subject to compliance with the following requirements:

i. Only approved documents including (informed consents, study instruments, MTA) will be used.
ii. All changes including (amendments, deviations, and violations) are submitted for review and approval by SU-ISERC.
iii. Death and life-threatening problems and serious adverse events or unexpected adverse events whether related or unrelated to the study must be reported to SU-ISERC within 72 hours of notification.
iv. Any changes anticipated or otherwise that may increase the risks or affected safety or welfare of study participants and others or affect the integrity of the research must be reported to SU-ISERC within 72 hours.
v. Clearance for the export of biological specimens must be obtained from relevant institutions.
vi. Submission of a request for renewal of approval at least 60 days prior to the expiry of the approval period. Attach a comprehensive progress report to support the renewal.
vii. Submission of an executive summary report within 90 days of completion of the study to SU-ISERC.

Before commencing your study, you will be expected to obtain a research license from National Commission for Science, Technology, and Innovation (NACOSTI) https://research-portal.nacosti.go.ke/ and obtain other clearances needed.

Yours sincerely,

Mr Ambrose Rachier,
Chairperson; SU-ISERC

STRATHMORE UNIVERSITY INSTITUTIONAL SCIENTIFIC AND ETHICAL REVIEW COMMITTEE
(SU-ISERC)
30-Jan-2024
Email:ethicsreview@strathmore.edu
P.O BOX 59857-00200
NAIROBI-KENYA

REPUBLIC OF KENYA

NATIONAL COMMISSION FOR SCIENCE,TECHNOLOGY & INNOVATION

Ref No: **995351**

Date of Issue: **06/March/2024**

RESEARCH LICENSE

This is to Certify that Mr.. Andrew Gathu Mmbogori of Strathmore University, has been licensed to conduct research as per the provision of the Science, Technology and Innovation Act, 2013 (Rev.2014) in Nairobi on the topic: Analysing the Law of Contracts and its role in commercial dispute resolution in Kenya for the period ending : 06/March/2025.

License No: **NACOSTI/P/24/33556**

995351

Applicant Identification Number

Director General
NATIONAL COMMISSION FOR SCIENCE,TECHNOLOGY & INNOVATION

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See overleaf for conditions

THE SCIENCE, TECHNOLOGY AND INNOVATION ACT, 2013 (Rev. 2014)
Legal Notice No. 108: The Science, Technology and Innovation (Research Licensing) Regulations, 2014

The National Commission for Science, Technology and Innovation, hereafter referred to as the Commission, was the established under the Science, Technology and Innovation Act 2013 (Revised 2014) herein after referred to as the Act. The objective of the Commission shall be to regulate and assure quality in the science, technology and innovation sector and advise the Government in matters related thereto.

CONDITIONS OF THE RESEARCH LICENSE

1. The License is granted subject to provisions of the Constitution of Kenya, the Science, Technology and Innovation Act, and other relevant laws, policies and regulations. Accordingly, the licensee shall adhere to such procedures, standards, code of ethics and guidelines as may be prescribed by regulations made under the Act, or prescribed by provisions of International treaties of which Kenya is a signatory to
2. The research and its related activities as well as outcomes shall be beneficial to the country and shall not in any way;
    i. Endanger national security
    ii. Adversely affect the lives of Kenyans
    iii. Be in contravention of Kenya's international obligations including Biological Weapons Convention (BWC), Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO), Chemical, Biological, Radiological and Nuclear (CBRN).
    iv. Result in exploitation of intellectual property rights of communities in Kenya
    v. Adversely affect the environment
    vi. Adversely affect the rights of communities
    vii. Endanger public safety and national cohesion
    viii. Plagiarize someone else's work
3. The License is valid for the proposed research, location and specified period.
4. The license any rights thereunder are non-transferable
5. The Commission reserves the right to cancel the research at any time during the research period if in the opinion of the Commission the research is not implemented in conformity with the provisions of the Act or any other written law.
6. The Licensee shall inform the relevant County Director of Education, County Commissioner and County Governor before commencement of the research.
7. Excavation, filming, movement, and collection of specimens are subject to further necessary clearance from relevant Government Agencies.
8. The License does not give authority to transfer research materials.
9. The Commission may monitor and evaluate the licensed research project for the purpose of assessing and evaluating compliance with the conditions of the License.
10. The Licensee shall submit one hard copy, and upload a soft copy of their final report (thesis) onto a platform designated by the Commission within one year of completion of the research.
11. The Commission reserves the right to modify the conditions of the License including cancellation without prior notice.
12. Research, findings and information regarding research systems shall be stored or disseminated, utilized or applied in such a manner as may be prescribed by the Commission from time to time.
13. The Licensee shall disclose to the Commission, the relevant Institutional Scientific and Ethical Review Committee, and the relevant national agencies any inventions and discoveries that are of National strategic importance.
14. The Commission shall have powers to acquire from any person the right in, or to, any scientific innovation, invention or patent of strategic importance to the country.
15. Relevant Institutional Scientific and Ethical Review Committee shall monitor and evaluate the research periodically, and make a report of its findings to the Commission for necessary action.

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