

BBM 121: BUSINESS LAW I

1.0 INTRODUCTION TO BUSINESS LAW

Nature of Law

Law can be explained under the following three categories:

- (i) Physical Law – These are facts which have been proved to be correct and do not change over a period of time, for example, Law of Motion, Law of Gravity, and so on.
- (ii) Law of Social Sciences – These laws establish the relationship between the cause and effect of certain facts, but are true under certain given conditions, for example, Laws of Economics, Laws of Sociology, Moral Laws, and so on.
- (iii) Laws of State - These are law which are made or enforced by a state. It is the duty of the citizens to obey these laws. They consist of those rules of conduct and standards prescribed by the people in authority for governing and regulating peaceful relations between members of a particular community or state.

Meaning and Definitions of Law

The word law usually implies a rule which is enforceable by a court of law. There are several definitions of law but there is no consensus as to the exact meaning. Although there is no consensus, the objective is the same; to maintain peace and order.

Some of the definitions are as follows:

1. A law is a general rule of external human action enforced by a sovereign political body (Holland)
2. Law consists of a body of rules which are seen to operate as binding rules in that community by means of which sufficient compliance with the rules may be secured to enable the set of rules to be seen binding (Panton).

morality are defined by the law itself and can therefore be ascertained in a given circumstance without being confused with rules of morality.

PURPOSES OF LAW

The law serves many purposes and functions in society. The law is a guideline for minimally acceptable behavior in society and regulates the mutual relations and conduct of its members. It must be enforced to ensure that the members of the society live and work together in a peaceful and orderly manner. Therefore, the purposes of law are follows:

- (i) To establish standards and regulate the conduct of behavior of persons in the society
- (ii) To maintain peace, order and security in the country
- (iii) To protect fundamental rights, freedoms and rights of individuals
- (iv) To resolve disputes among individuals by establishing the procedures and regulations in which such disputes can be resolved
- (v) To provide justice to the members of the society
- (vi) To maintain political and economic stability in a country.

CLASSIFICATION OF LAW

Law is classified into the following:

- (i) Public Law and Private Law
- (ii) Criminal Law and Civil Law
- (iii) Procedural Law and Substantive Law
- (iv) International Law

These are explained as follows:

(i) Public Law and Private Law

Public Law is that part of in which the state has an interest. It governs the relations between the state and its citizens. It consists of Constitutional Law, Administrative Law and Criminal Law. Constitutional Law consists of those rules which regulate the different organs of the state, namely, Legislature, Judiciary and Executive. Administrative Law is the law which regulates the actual functioning of the executive instruments of the Government. Criminal Law consists of wrongs committed against the state.

Private Law, also known as civil law, is that part of law which is primarily concerned with the rights and duties of persons towards persons. In other words, it is that law which governs the relations of the citizen among themselves.

(ii) Civil Law and Criminal Law

Civil Law (or Private Law) is that law which governs the relations of individuals among themselves. Therefore, in general, individual interactions are guided by civil law such that any person aggrieved by an act of another person may seek the assistance of the civil law of the land. In other words, civil law is concerned with violation of private rights belonging to an individual in his capacity as an individual such as a tort (e.g. defaming a person, denying a registered voter his right to vote, etc), a breach of contract, a breach of trust. In this case, civil wrongs are instituted by the plaintiff and not the state prosecutor. The remedies in civil wrongs include; damages, specific performance, injunction, etc. Civil law includes the law of contract, the law of agency, law of succession, the law of torts, the law of property, etc.

Criminal Law is that law which governs the relations between the individual and the state. It falls within the purview of public law. This is because it is the duty of the state to protect its citizens and it is the state which must therefore seek redress for any public wrong (crime) committed against any citizen. A crime is a public wrong the commission of which may result in the prosecution and punishment (by a term of imprisonment or imposition of a fine) of the wrong doer. Crimes include theft, robbery, murder, rape, etc.

7. Freedom of movement
8. Freedom from discrimination or discriminatory laws

2. LEGISLATION (STATUTES LAW /ACTS OF PARLIAMENT)

This is law made by parliament directly in exercise of the legislative power conferred upon it by the Constitution. Statute Law or Legislation is a principal source of law applicable throughout Kenya and it must be consistent with the Constitution. The product of parliament's legislative process is an Act of Parliament e.g. The Hire Purchase Act.

Sec 3(1) (b) of the Judicature Act recognizes Legislation or Statutes Law as a source of law of Kenya by the words "All other written laws". These words encompass:

- i. Certain Acts of the UK Parliament applicable in Kenya
- ii. Certain Acts of the Indian Parliament applicable in Kenya
- iii. Acts of the Legislative Council
- iv. Acts of the Parliament of Kenya

The Law Making Process

Under Section 93 of the Constitution, the legislative power of the republic is vested in the parliament of Kenya which consists of the National Assembly and Senate.

Under Section 97 of the Constitution, the National Assembly consists of:

- (i) Two hundred and ninety members, each elected by the registered voters of single
- (ii) member constituencies;
- (iii) Forty seven women, each elected by the registered voters of the counties, each county constituting a single member constituency;
- (iv) Twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers; and
- (v) The Speaker, who is an ex officio member.

3. Inadequate publicity: Compared to statute law, delegated legislation attracts minimal publicity if any. This law is to a large extent unknown.
4. Sub-delegation and abuse of power: Delegates upon whom law making has been delegated by parliament often sub-delegate to other persons who make the law. Sub-delegation compounds the problem of control and many lead to abuse of power.
5. Detailed and technical: It is contended that in certain circumstances, delegated legislation made by experts is too technical and detailed for the ordinary person.

Control of Delegated Legislation

Both parliament and courts of law have attempted to control delegated legislation, however neither can effectively do so. These controls are as follows:

(a) Parliamentary or Legislative Control

Parliament has put in place various mechanisms in its attempt to control or contain delegated legislation:-

- i. Parliament delegates law making power to specific persons and bodies e.g. government ministries, local authorities, professional bodies, chief justice
- ii. The Enabling or Parent Act prescribes the scope and procedure of Law-making. The delegates can only make law as defined by the scope and must comply with the procedures prescribed.
- iii. The Enabling or Parent Act may require the draft rules to be circulated to interested parties for comments e.g. By-law.
- iv. The Enabling or Parent Act may provide that the delegated legislation made be laid before the concerned minister for approval e.g. By-laws made by local authorities. This is political control and is largely ineffective.

have no logical sequence as they often overlap. There can be two maxims that actually say the same thing or one maxim of equity which is the exact opposite of another maxim.

The Maxims of Equity include:

1. He who seeks equity must do equity
2. He who comes to equity must come with clean hands
3. Equity is equality (Equality is equity)
4. Equity looks to the intent or substance rather than the form
5. Equity looks upon as done that which ought to be done
6. Equity imputes an intent to fulfill an obligation
7. Equity acts *in personam*
8. Equity will not assist a volunteer (Equity favours a purchaser for value without notice)
9. Equity will not suffer a wrong to be without a remedy (Where there is a wrong there is a remedy for it) *ibi jus ibi remedium*
10. Equity does not act *in rem*
11. Delay defeats equity
12. Equity aids the vigilant and not the indolent

These maxims are explained as follows:

1. He who seeks Equity must do Equity: - This maxim means that a person who is seeking the aid of a court of equity must be prepared to follow the court's directions, to abide by whatever conditions that the court gives for the relief. And this is most commonly applied in injunctions. The court will normally impose certain conditions for granting the injunction.

2. He who comes to Equity must come with clean hands: - This scenario was summed up in the case of *Jones v. Lenthall* (1669) as "He who has committed inequity shall not

7. AFRICAN CUSTOMARY LAW

African Customary Law is based on the customs usages and practices of the various ethnic groups in Kenya. A custom embodies a principle of utility or justice. Customs are by their nature local. Not every rule of local customs is relied upon by a court of law in the settlement of a dispute.

For a custom to be relied upon as law, it must the following characteristics: -

- i. Reasonableness: A good local custom must be reasonable, that is, it must be consistent with the principle of justice. Whether or not a custom is reasonable is a question of facts to be determined by the courts.
- ii. Conformity with statute law: A local custom must be consistent with parliament-made law. This is because parliament is the principle law-making body and has constitutional power to disqualify the application of any rule of custom.
- iii. Observation as of right: A good local custom is that which a society has observed openly and as of right. . . not by force or by stealth nor at will.
- iv. Immemorial antiquity: A custom must have been observed since time immemorial. .

Kenyan law recognizes African customary law as a source of law. Section 3(2) of the Judicature Act, is the basic statutory provision regarding the application of African Customary Law in civil cases in which one or more of the parties is subject to it or affected by it, so far it is applicable and is not repugnant to justice and morality or inconsistent with any written law. These are explained as follows:

(a) Customary Law as a Guide: - African Customary law can only be relied upon as a guide. Courts are not bound to rely on any rule of custom. It is the duty of the court to decide whether or not to rely on a particular rule of custom.

The independence of the Judiciary is required to protect the fundamental rights and freedoms of the individuals.

The judiciary is responsible for the effective administration of justice in the country. It is the duty of the judiciary to protect the individuals against the excesses of government and the arbitrary action of government officials. The Judiciary tries criminal cases where the state prosecutes persons for some alleged crimes. The sentence or acquittal is entirely within the discretion of the court. The Judiciary also acts as the guardian of the Constitution. The Judiciary ensures that the executive actions of officials are in accordance with the provisions of the Constitution and that the Acts passed by Parliament do not conflict with the Constitution. The law courts must be open to all persons, rich or poor, citizens or non-citizens. The Judiciary is said to be independent when it makes decisions without pressure from the executive and legislature and in a non-biased way.

The Judiciary in Kenya is independent of both the Executive and the Legislature. The independency of the Judiciary has been assured by the provisions in the constitution. The judges and magistrates sometimes make decisions which might embarrass the Government. In Kenya, no person can by force or threats pervert the course of justice to his own ends.

The Chief Justice and Judges are appointed by the President on the advice of the Judicial Service Commission and once appointed; it is not easy to remove a judge. A judge can be removed from office only for inability to perform the functions of his office or for misbehavior; otherwise, a judge retires at the age of seventy four. The security of job of

live apart. He failed to pay, and his wife sued on the contract. It was held that the husband was not liable because there was no necessary implication from the circumstances of the parties that they intended to make a legally binding contract. It was more like a domestic arrangement between husband and wife rather than a contract.

In some cases the courts can, on examining the facts of the agreement, decide to conclude that there was intention to create a legal relation

Case law: Parker Vs Clark 1960

The defendant, an aged couple, arranged by correspondence with her niece and husband to share a house and promised to make a will of it. The couple subsequently quarreled and the plaintiffs were ordered to leave the house. It was held that the contract was more than a family agreement; there was an intention to create legal relations, and damages were awarded to the plaintiffs.

Commercial Agreements

In commercial or business agreements it is generally presumed that there is an intention to create legal relations, unless the parties insert a clause that their agreement shall not be binding in law but shall be binding on honour.

FORMATION OF A CONTRACT

A contract is formed by an offer by one person and the acceptance of this offer by another person. The intention of both parties must be to create a legal relationship and they must have the legal capacity to make such a contract. There must be some consideration against the contract between the two parties. The formation of a contract involves the following factors:

- (a) Offer
- (b) Acceptance
- (c) Consideration
- (d) Contractual Capacity
- (e) Intention to create a legal relationship

(a) THE OFFER

An offer is defined as an expression of willingness to enter into a contract with a determinate person on definite terms, as soon as these terms are accepted. The person making the offer is called the *offeror* while the person to whom the offer is made is called the *offeree*. An offer may be express (where the offeror specifically makes his intention known to the offeree, whether in writing or by word of mouth), or it may be implied from the conduct of the parties, particularly the offeror.

The offer has the following rules;

1. An offer may be made to a specific person, or to any member of a group of persons, or to the world at large but it cannot form the basis of a contract until it has been accepted by an ascertained person or group of persons.
2. An offer may be made by word of mouth, in writing or by conduct. (e.g. a passenger entering a passenger service vehicle paying through a certain route assumes the owner has made an offer by conduct and he is bound to pay the advertised fares)
3. An offer must contemplate giving rise to a legal consequence if accepted.
4. The terms of the offer must be certain and free from vagueness (ambiguity) in expression.
5. Every offer must be communicated; for a contract to arise, two parties must of the same mind, and so it cannot be accepted by a person who does not know that it has been made.
6. The offeror cannot bind the other party without his consent.
7. The offeror may attach any conditions to his offer, but must communicate them to the offeree, before they bind him by his acceptance of the offer.

An offer is different from:

- a. Invitation to treat
- b. A mere declaration of an intention
- c. A mere supply of information

4. Acceptance must be communicated to the offeror in the manner prescribed by him, otherwise the acceptance is ineffective.
5. Acceptance must be made within the time specified, or within a reasonable time.
6. Acceptance must be made before the offer lapses.
7. Acceptance once made cannot be revoked as in an offer.

Exceptions to the communication of acceptance

1. Acceptance by post is made when it is posted and constitutes a valid acceptance even if the acceptance has not been received by the offeror.
2. When offer is made to world at large and requires performance of a certain act, acceptance is made by performing the act and no need for communication to the offeror.

Acceptance subject to contract

The words 'subject to contract' usually mean that the parties do not intend to be bound until a formal contract has been agreed upon and signed.

(c) CONSIDERATION

The offer and acceptance are not enough to bring about a valid and binding contract. They must be supported by consideration, otherwise the contract is void. Specialty contracts are an exception.

In the past, consideration was defined as a valuable consideration in the sense of the law that may consist either in some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. Nowadays, consideration is more commonly viewed as the price paid by one party for the promise made by the other party; and in the world of litigation, it is the price paid by the plaintiff for the defendant's promise.

Consideration must be something of value e.g. money, a reciprocal promise, the performance of an act or supply of goods or services. Valuable consideration may take the form of money or money's worth. It can also be an act or forbearance of one party or

(b) Voidable Contracts- These are contracts of a continuing nature under which an infant derives some benefit or acquires some rights e.g. a lease of premises, a partnership agreement, or holding of shares of a limited company. These contracts are binding to the infant unless he avoids them during his infancy or after a reasonable time after attaining the age of majority.

(c) Void Contracts – Under section 1 of the Infants Relief Act 1874, the following contracts entered into with minors are declared to be absolutely void:-

- (i) Any contract for the repayment of money lent or to be lent (but can be binding if the money is used to buy necessities and it can be proved so).
- (ii) Any contract for the goods supplied or to be supplied other than necessities.
- (iii) All accounts stated with infants e.g. statements of acknowledgement of debts.

It should be noted that no one should upon attaining the age of majority be allowed to ratify contracts entered during infancy.

Unenforceable Contract:

Although contracts other than those for necessities, infants benefit and voidable contracts are unenforceable contracts against the infant during his infancy or after.

The Infants Relief Act stipulates that the infant cannot ratify a void contract made during infancy even though there is a fresh consideration given to him by the promisee.

The infant can however be liable if he makes a fresh promise after attaining age of majority.

2. Insane or Drunken Persons

A contract made with an insane person is binding on him only if it was made by him during the time he was sane. Contracts entered by an insane person other than for the supply of necessities are voidable, but he is bound by a contract of necessities and he must pay a reasonable price for them. For an insane person to escape liability, he must prove that:

back of a bus ticket, words such as 'Goods carried at owners risk' constitute an exemption clause.

The clause will only be enforced in law if the document containing it was an integral part of the contract and reasonable care was taken to bring it to the attention of the other party.

An exemption clause printed on the reverse side of a receipt, is not valid unless special care was taken to bring it to the notice of the other party. Where a person puts his signature on a contractual document, he is bound by any exemption clauses contained in it, unless he was induced by fraud or misrepresentation to sign it.

ILLEGAL CONTRACTS

The law relating to illegal contracts is found in the maxim "*ex turpi causa non oritur action*" meaning that no cause of action arises from an illegal transaction. All illegal contracts are void but not all void contracts are illegal.

An agreement may be unlawful because it is:

- a. Contrary to positive law.
- b. Contrary to the rules of morality as recognized by law
- c. Contrary to welfare of the state i.e. interfering with administration or leading to corruption.

Public policy

An act which violates the recognised limits of morality in which the everyday business of the state is conducted is considered to be against the public policy. A contract to commit a crime or tort or fraud is illegal **ab initio** (right from the beginning).

Contracts opposed to public policy

1. Contracts containing sexually immoral elements e.g. a person who lets his house for prostitution cannot recover the rent.
2. Contracts interfering with the sanctity of marriage e.g. an agreement between husband and wife for future separation

This is whereby one person is restricted from exercising a lawful profession, trade or business of any kind in the manner he wishes. This undermines the freedom of choice and/or freedom to compete.

Any contract in restraint of trade is void by reasonable restraint will be enforceable. But whether a contract is reasonable or not, it is the courts to decide. This is provided for in the *Contracts in Restraint of Trade Act (Cap 24)*

Effects of Illegality

All illegal contracts are void and parties can neither sue for their breach nor can they recover money paid or goods delivered.

Exceptions

- i. Where both the parties to a contract are not *in pari delicto* (not equally guilty), the innocent party may be able to recover any sum paid e.g. where a party is induced fraudulently into entering an insurance contract, he may recover the premiums.
- ii. Where the illegal part of the contract is yet to be carried out and one of the parties honestly repents entering into it, the courts will assist him recover the money or goods delivered.
- iii. Goods or money paid in pursuance of an illegal contract may also be recovered where a statute has been intended to protect a class of people and the person seeking to recover it is a member of that class.

VITIATING FACTORS OF A CONTRACT

A contract supported by consideration in which there is an intention to enter into legal relation, may still be of no legal effect where it is affected by a vitiating factor. A vitiating factor is one which tends to affect the validity of the contract. This is setting aside of a contract. A contract entered into by mistake of fact is void while those by duress, misrepresentation and undue influence are voidable. The vitiating factors consist of the following:

Money paid or goods transferred under mistake of fact are recoverable from the person who received them.

2. Misrepresentation

Preliminary negotiations before formal contracts are made include statements of two kinds;

- a. Those which become part of the contract (the terms of the contract), and
- b. Those which do not become part of the contract but play an important role in inducing the parties to enter into a contract. Such terms are called mere representation. There is misrepresentation if the representation is untrue.

A representation means a statement of fact made by one party to the other either before or at the time of contract, relating to some matter essential to the formation of a contract, with an intention to induce the other party to enter into a contract. A representation when made either innocently or intentionally is termed as a misrepresentation. A misrepresentation therefore is a representation or a statement of fact which is false.

Misrepresentation does not render a contract void but the party misled will be able to avoid the contract by proving that the misrepresentation was of fundamental fact, and not of law. The false representation is not restricted to words, and may be made by the conduct of the parties e.g. where a person wears the gowns of clergymen and obtains goods from another by inducing him to believe that he is a clergyman.

Elements of Misrepresentation

The law gives some form of remedy to a party aggrieved by misrepresentation made by the other party to the contract. But for misrepresentation to be operative, it must have the following characteristics:

- (i) It must be a representation of fact, not of law or opinion.
- (ii) The fact misrepresented must be a material fact. Therefore, misrepresentation must have;
 - a. Been acted upon by the plaintiff.
 - b. Induced the contract in that it must have influenced the plaintiff's judgment.

(d) INJUNCTION

This is an order by the court restraining the doing, continuance or repetition of a wrongful act. Where a party is in a breach of a negative term of contract, i.e. where he is doing something which he promised not to do, the court may by issuing an injunction, restrain him from doing what he promised not to do. It may be obtained to enforce a negative term where an order for specific performance is not possible e.g. an injunction to a singer from singing for a rival company after contracting to sing for a particular company. It is a preventive relief.

(e) RESCISSION

Where there is a breach of contract by one party, the other party may rescind the contract and need not perform his part of the obligation under the contract. He may decide not to take any legal action against the guilty party. Thus, applying to the court for rescission of the contract is necessary for claiming damages for the breach or for availing any other remedy. Suit for rescission is accompanied by suit for damages.

3.0 THE LAW OF TORT

The Nature of the Tort

Tort in Latin means crooked or twisted. In French tort is a word meaning wrong. Thus, in law, tort denotes certain civil wrongs.

Tort is defined as “An act which causes harm to a determinate person, whether intentionally or not, not being a breach of duty arising out of a personal relation or contract, and which is either contrary to law or an omission of a specific legal duty or a violation of absolute right”.

Each tort results from a breach of a certain duty which is primarily fixed by law and not by the parties as is the case in a contract. It includes duty not to defame, injure or damage the property of any person. The duty in tort is imposed on persons generally and is not limited to contracting parties. The duty in tort is also owed to every person.

Under this principle, it is necessary to establish some fault on the part of the wrongdoer before he can be made liable in tort.

Elements of fault

- a. Intentional – knowingly
- b. Recklessness – without caring about its consequences
- c. Negligence – without taking precaution to avoid the consequence, which he should have foreseen.

Distinction between Tort, Crime & Breach of contract

1) Tort & Crime

Tort	Crime
- Civil wrong to individual	- Breach of public right & duties affect whole community
- Aim is Compensation	- Aim is punishment
- Action brought by injured	- Proceedings conducted by state counsel accused punished if found guilty

2) Tort & Breach of contract

Contract	Tort
1. Duties fixed by parties	Fixed by Law
2. Duties owed to parties	Duty owed to all people
3. There is Privity of contract	No privity of contract
4. Award of either liquidated or un-liquidated damages	Duty owed to community at large. Award of only un-liquidated damages

GENERAL DEFENCES IN TORT

There are certain restricted defences to particular torts and known as specific defences.

The general defences are;

1. Volenti non fit injuria – plaintiff voluntarily took up the risk
2. Act of God
3. Inevitable accident
4. Necessity

- (v) The arbitrator or umpire has the same power as the High Court to order specific performance of a contract other than a contract relating to immovable property, (Section 16);
- (vi) The arbitrator or umpire has the power to correct an error arising from an accidental slip or omission, or clerical mistake in an award, (Section 18);
- (vii) An arbitrator or umpire may make an award at any time (Section 14(1)).

Note:

- The term ‘umpire’ means a third person who is to decide a controversy or question submitted to arbitrators in case of their disagreement. Thus, the Umpire’s authority commences when arbitrators are unable to agree (i.e. when there is a tie between an even number of arbitrators). An umpire is vested with the same powers as the arbitrators and has to perform the same duties.

REMOVAL OF ARBITRATOR OR UMPIRE

Section 14(3) of the Act provides that on the application of any party to a reference, the High Court may remove an arbitrator or Umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award, and an arbitrator or umpire so removed is not entitled to receive any remuneration in respect of his service. Section 24 of the Act states that the court may remove an arbitrator or umpire also on the ground of (e.g., accepted bribe) or proceedings (e.g., heard only one party or refused to record oral evidence tendered).

Section 26 of the Act deals with the power of the Court in case of removal of an arbitrator or umpire. The Section lays down that where the Court removes an umpire or one or more of the arbitrators for misconduct or any other reason, it may appoint persons to fill the vacancies.

AWARD

A judgment or final decision of an arbitrator or arbitrators or an umpire on all matters referred to arbitration is called the ‘award’. It should be in writing and signed by the arbitrators or umpire. No particular form or word is requisite for the validity of an award.

Preview from Notesale.co.uk
Page 119 of 119