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COMMERCIAL TRANSACTIONS

THE LAW OF CHATTELS TRANSFER

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INTRODUCTION

- Every lender desires to obtain as good a security as he possibly can for his loan.
- **Personal remedy** against the borrower is often considered inadequate, for a person advancing money upon mortgage requires something better than this. ✓
- The lender is entitled to some *jus in rem*, literally, the right against the world at large, or some right in certain specific things.
- This is in addition to the mere *jus in personam* or right against a specific person, that the mortgagor's vows, promises or covenants will give him.

Introduction...*contd.*

- This led to a call for legislation to make provision for chattel securities and the transfers thereof.
- Such legislation would be one to protect lenders against losing their money to unscrupulous borrowers.
- Legislation would facilitate loans on the security of chattels by giving a lender, who registers his instrument, a high degree of protection.

Introduction...*contd.*

- The Chattels Transfer Ordinance, now the Chattels Transfer Act, Chapter 28, Laws of Kenya was enacted in 1930
- It came into operation in Kenya on 13th June 1930.
- The CTA is the Kenyan equivalent of the English Bills of Sale Acts but is largely modelled upon the New Zealand Chattels Transfer Act of 1924.
- The principal reason for the Act was to facilitate loans to traders and farmers, in particular, on the security of their own farm and trade chattels.

Introduction...contd.

- It was hoped that the statute would "enable credit to flow more rapidly and in greater quantities" than it did at the time "from the ordinary banking and commercial channels": See Kenya Legislative Council Debates (1930) Vol. I.
- The focus then was the farming settler community in Kenya.

Introduction...contd.

- According to Worley, V.P in *Dyal Singh -v- Kenyan Insurance Ltd* (1955) 22 EACA 22, referring to Kenya & New Zealand as "young communities, mainly agricultural and rapidly developing" stated that it was "common to find classes of settlers, farmers, traders and others who are short of working capital and from time to time need to obtain loans to tide them over till the next harvest is in and the cash crops sold, but they have little security to offer except their stock, their machinery or their growing crops." [Italics supplied].

Introduction...contd.

- Worley further explained :

*"Lenders however are reluctant to advance money at reasonable rates on chattels and I think that it is clear that one of the main purposes of the Ordinance was to facilitate loans on the security of chattels by giving a lender, who registers his instrument, a very high degree of protection", ibid*

Introduction...contd.

- In an article in the East African Standard, Saturday 7th June 1930, (6 days before the Bill became operational) it was stated, in part, that it was "evident that there was a widespread desire on the part of the farming community for legislation to allow farmers to raise money from their crops and stocks by creating a charge thereon".

### DEFINITION OF CHATELS

There are three different meanings to the word "chattel":

(a) A movable physical object, e.g. a horse, a book or a shilling as contrasted with a piece of land.

(b) Movable property, whether corporeal or incorporeal; that is to say, chattels in the sense above plus all proprietary rights except those which are classed as immovable.

In (b), debts, shares, contracts and other choses in action are chattels, no less than furniture or stock-in-trade, as are patents, copyrights and other rights *in rem* (which are not rights over land).

### Definition of chattels...contd.

(c) Personal property, whether movable or immovable, as opposed to real property.

In this sense, (c), leaseholds are classified as chattels, because of the special rule by which they are excluded from the domain of real property.

### Definition of chattels...contd.

In Kenya, the meaning of the word "chattel" is limited to the first two, (a) and (b), senses. For example, a lease of land in Kenya is immovable property.

The concept of *chattels real* is unknown here.

The Act defines "chattels" as **any movable property that can be completely transferred by delivery.**

### Definition of chattels....contd.

- Chattels present peculiar problems of their own.
- Motor vehicles are the most usual form of chattels to be offered as security for loans.
- However, a vehicle may quickly and easily be stolen never to be traced again: See e.g. *Express Finance Limited v Joseph Muiyo Nzioka*, HCCC 2680 of 1996, where the court could only make an order for recovery of the loan as the motor vehicle had already disappeared.

### TYPES OF CHATTELS

By statute, the following are included in the definition of chattels:

- (a) machinery;
- (b) stock and the natural increase of stock (sheep, cattle, horses, pigs, poultry and any other living animals);
- (c) all crops (including grass for hay or grain) grown above or below the ground; and
- (d) wool.

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### CHATTELS EXCLUDED

- Specifically, the following are excluded from the definition of chattels:

- (a) title deeds, choses in action or negotiable instruments; or
- (b) shares and interests in the capital or property of any company or other corporate body; or
- (c) shares and interests in the stock, funds or securities of any government or local authority; or
- (d) debentures and interest coupons issued by any government or local authority or company or other corporate body.

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### HOUSES AS CHATTELS?

- Under both Kenyan and the English legal systems, a building or a house is deemed to be part of the land and can never be a chattel.
- However, in Kenya, there are a number of old court decisions which hold that in certain circumstances a house could be a chattel.
- E.g. in *Suliman Virji & Sons-v- Kassam Amersi*, (1922) 9 E.A.L.R 33, the court held that where the defendant had the right to remove the building from the land, such a building was chattel.

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### Houses as chattels (*Suliman Virji* case) ..contd.

- The court had to consider the legal position of a building which was situated on land held by the defendant under a tenancy agreement, her landlord holding the land under a Crown lease.
- The house consisted of a building of corrugated iron walls and roof erected on a stone plinth. "The corrugated iron sheets are nailed together, the walls resting on the plinth; there are wooden posts used as support for the roof which are cemented into the plinth", per Sheridan J.

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#### Houses as chattels...*contd.*

- The house had been included in a bill of sale which was consequently *held* to be valid and the grantee had the right to seize and sell the house.
- The *Sulimani Virji* case was decided before the passing of the CTA, but the court, in a 1935 case came to the same conclusion when it had to consider a *wake* of a house without the land on which it stood.

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#### Houses as chattels...*contd.*

In that case, *Jamal Sunderji Mithav Halima Binti Taufic*, 16 KLR 89, Horne J., said:

*"Ordinarily it is difficult to regard a house as a chattel but a building worth only Shs. 200/=, like temporary buildings or wood and iron buildings bolted down to concrete blocks or resting on them, may quite easily be transferable completely by delivery and thus fall within the definition of "chattel" in the Chattels Transfer Ordinance".*

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#### Houses as chattels... *contd.*

Note, however, that for an article to be a chattel within the meaning of the CTA it must fulfill two conditions:

1. It must be capable of being manually transferred from one place to another; and
1. Its identity must remain unaffected by such transfer.

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#### Houses as chattels... *contd.*

- The first requirement excludes any possibility of symbolic or "constructive" delivery being permissible and thus makes it impossible for any large or bulky object to be a chattel within the definition
- The second requirement was considered by Bourke J. in the case of *Saleh -v- Elhofri & Another*, 24 KLR 17, when he referred to the fact that demolition of the house would mean that "the whole character of the thing would be gone".

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Houses as chattels... *contd.*

He said,

*"...Consider a trailer on its wheels, this is a chattel within the scope of the CIA but if its wheels were to be removed it would be almost impossible for it to be transferred manually by delivery. It would be necessary to dismantle it and later reassemble the pieces after they have been separately delivered. In such circumstances the trailer is arguably not capable of being "completely transferred by delivery" and accordingly outside the provisions of the CIA. This appears to be an absurdity which arises from the faulty definition of the word "chattels"..."*

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Houses as chattels.. *contd.*

Therefore if the two requirements suggested above are correct, then it would follow that the decisions of the Court in *Jamal Sunderji Mitha -v- Halima Binti Taufic* (1935) and *Saleh -v- Elhofri & Another* (1950) were wrong.

The court seems to have followed as precedent the holding in *Suliman Virji & Sons -v- Kassam Amersi* (1922) which was decided on the provisions of the English Bills of Sale Act

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## DEFINITION OF INSTRUMENT

The word "instrument" is defined in the Act, to mean "any instrument" given to secure the payment of money or the performance of some obligation.

It is used in its ordinary conventional sense, that is, as a deed or other formal written legal document.

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## TYPES OF INSTRUMENTS

An instrument under the Act includes-

- any bill of sale (an assignment of chattels personal under seal);
- mortgage;
- lien; or
- any other document that **transfers or purports to transfer** the property in or right to the possession of chattels.

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Types of instruments...*contd.*

- Such transfer may be permanent or temporary.
- It may be absolute or conditional.
- It may also be by way of sale, security, pledge, gift, settlement or lease.
- NB: In Kenya, the usual kinds of instruments are the chattels mortgage, letters of hypothecation, pledges, liens, powers of attorney and bills of sale.

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Types of instruments...*contd.***(a) Mortgage**

- A *chattel mortgage* is an instrument by which the owner conveys conditional title to personal property to secure the payment of a debt or the performance of a contract or other obligation.
- It is a pledge that the debt will be paid.
- Any personal property that may be sold may be mortgaged, such as automobiles, livestock, machinery, farm implements, life-insurance policies, corporation stock, and crops.

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Types of instruments (mortgage)...*contd.*

- The *mortgagor* is the person who conveys the property.
- The *mortgagee* is the person to whom the transfer is made.
- The chattels mortgage is effected by the creation or transfer of a legal or equitable interest in property.

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Types of instruments...*contd.***(b) Hypothecation**

- Under hypothecation, goods are availed as security for a debt without transferring either the property or the possession to the lender.
- Debtor retains ownership but creditor gets right *in rem* which entitles him to deal with the goods in the manner stated in the letter of hypothecation if the debt is not repaid.

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Types of instruments...*contd.*

**(c) Pledge**

- A pledge involves the transfer of possession, but not the ownership of a chattel as security for the payment of a debt or the performance of an obligation.
- The chattel or goods or documents of title for the chattel or goods are delivered by the pledgor to the pledgee to be held as security upon understanding that the goods will be restored to the pledgor upon payment of debt/discharge of obligation.
- If the pledgor fails to pay or perform as agreed, then the chattel or the goods may be sold.

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Types of instruments...*contd.*

**(d) Lien**

- The right to hold the property of another person as security for the performance of an obligation is known as a lien.
- With respect to personalty, a lien is the right of a creditor or bailee to retain the possession of a chattel previously delivered to him or otherwise entrusted to him until his claim upon it is satisfied.
- At common law a lien lasts only so long as the creditor or bailee retains possession of the chattel or goods.
- However, there may exist an equitable lien on chattels which are not in his possession at the time the obligation arises, that is, independently of possession.

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Types of instruments...*contd.*

**(e) Power of Attorney**

Ordinarily, a power of attorney is an instrument that grants someone authority to act as agent.

It may also be used as chattels transfer instrument in certain format.

*See below.*

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Types of instruments...*contd.*

**(f) Bill of Sale**

- Under the Act, an instrument is defined as including a bill of sale.
- In the United Kingdom, a bill of sale was a **document intended to give effect to the grant of chattels where the possession remained unchanged.**
- Under the Bill of Sale Act (UK) such instruments are of two kinds:

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Types of instruments (bills of sale)...*contd.*

- a) absolute bills of sale where chattels are sold absolutely; and
- b) bills of sale by way of security for securing loans.

In spite of the express reference to this kind of document in our statutes, it is not known or used in Kenya.

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## OTHER DOCUMENTS DEEMED TO BE INSTRUMENTS

- The following, which though not capable of being drawn to accord with the statutory form of instrument (Form No. 4, First Schedule, section 22), are also deemed to be instruments within the meaning of the Act:

- (i) **Inventories of chattels** to which a receipt is attached;
- (ii) **Receipts** for purchase-money of chattels;

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Documents deemed to be instruments ... *contd.*(iii) **Other assurances of chattels**

This phrase seems to be in reference to the first two documents, (a) and (b) and should be construed *ejusdem generis* with them.

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Documents deemed to be instruments ... *contd.*(iv) **Declarations of trust without transfer**

In relation to goods, this is a statement by one party that he holds the goods in trust for another.

The beneficial ownership of the goods passes to the designated beneficiary, while the legal title remains in the trustee.

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Documents deemed to be instruments ... *contd.*

**(v) Power of attorney**

(authority or licence **to take possession of chattels as security for any debt**)

- As seen above, a power of attorney is a formal instrument by which one person gives authority to another to represent him or to act in his stead, usually in his absence, for certain purposes.
- The giver, the donor or principal or constituent, confers on another, the donee, power to act on behalf of the donor in the performance of a specified act or classes of acts generally.

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Documents deemed to be instruments (p/a)... *contd.*

- Under this heading such a power of attorney will only constitute an instrument **if it confers the power to take possession of chattels as security for a debt.**
- The power may be conferred directly or indirectly.
- It may also be given to authorize or license another person to take possession of chattels as security for any debt.

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Documents deemed to be instruments ... *contd.*

**(vi) Agreement conferring right to chattels**

Any agreement by which a right in equity to any chattels or to any charge or security thereon or there-over is conferred.

Such an agreement will be void if not registered or if it does not comply with the statutory form: See section 2 of the Act.

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**DOCUMENTS EXCLUDED**

The CTA specifically excludes the following from the definition of instruments:

- (a) securities over, or leases of, mortgaged, charged or leased fixtures;
- (b) assignment for the benefit of creditors of the person making them; or
- (c) assignments of or share in any ship or vessel; or
- (d) transfers of or share in any ship or vessel;

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Documents excluded... *contd.*

- (e) transfer of or agreement to transfer instruments by way of security;
- (f) transfers of chattels in the ordinary course of business of any trade or calling;
- (g) debentures and interest coupons issued by any government or local authority;
- (h) bills of sale of chattels in any foreign parts or at sea;

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Documents excluded... *contd.*

- (i) bills of lading, warehouse keepers' certificates, warrants or orders for the delivery of chattels, entries in auctioneers' books or *any other document used in the ordinary course of business as proof of the possession or control of chattels or authorizing the possessor of the document to transfer or receive the chattels thereby presented;*
- (j) debentures and interest coupons issued by any company or other corporate body and secured upon the capital stock or chattels of that company or corporate body;

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Documents excluded... *contd.*

- (k) mortgages or charges granted or created by a company formed under the Companies Act (Cap 486);
- (l) mortgages or charges granted or created by a co-operative society registered under the Co-operative Societies Act (Cap 490);
- (m) hire-purchase agreements: See section 2 of the Act.

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**COVENANTS**

A **covenant** is a clause of agreement contained in a deed whereby a party stipulates for the truth of certain facts or binds himself to give something to another or to do or not to do any act.

Covenants are the terms agreed by the parties and expressly stated in the instrument.

Certain covenants are to be implied in every instrument, in which case they shall have effect as if they were respectively set out at length in the instrument.

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*Covenants...contd.*

But all those conditions set out in the schedules to the Act may be negotiated, modified or altered or added to by express words in the instrument: s. 46.

Whether expressed in the instrument or implied by the Act, covenants bind executors, administrators and assigns of the person or successors and assigns of the company upon whom they impose an obligation.

They also operate for the benefit of those "for whose benefit they enure" i.e. come into use; s. 45.

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*Covenants...contd.*

**Covenants of Title, s.41 & 2<sup>nd</sup> Schedule.**

The following covenants of title are implied in every instrument, unless otherwise expressly provided:

1. That the grantor has good right and full power to assign to the grantee the chattels purporting to be assigned by the instrument.
2. That the chattels are free and clear from encumbrances except those mentioned in the instrument.
3. That the grantor will, at his own cost, do and execute all such acts, deeds, matters and things for the better assigning of the chattels assigned or intended to be assigned, as required by the grantee may from time to time: See Second Schedule to the Act.

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*Covenants...contd.*

**Other Covenants**

There are further implied covenants on the part of the grantor as follows:

1. To pay to the grantee the principal money and interest secured under the instrument at the rate and time mentioned without any deduction.
2. To pay interest on any further advances that may be secured under the instrument at the rate and date mentioned.

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*Other Covenants ...contd.*

3. Not to do or allow any act or deed which prejudicially affects the chattels assigned, while any moneys remain owing on his security.
4. To pay all rents due on any lands or premises on which any of the chattels are situated, so long as any moneys remain due on this security.

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**Other Covenants ...contd.**

5. To keep and maintain all and singular the chattels assigned by the instrument in the same good order and condition in which they are at the date of execution; and to repair any damage to the chattels and replace any chattels destroyed or which cease to exist with other chattels of the same nature.

6. To execute, if required by the grantee, any instrument that may be necessary to give to the grantee security over chattels.

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**FORM AND CONTENTS OF AN INSTRUMENT**

The instrument to be in the prescribed form, provided, or with variations, modifications or additions: see s.22 and Form No. 4, 1st Sch.

It should be executed, attested and verified.

Main segments of an instrument should comprise of the following clauses-

- the date;
- the parties;
- the consideration;
- the covenants; and
- the testimonium.

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**Form and Contents of an Instrument...contd.**

It should also contain:

**1. The Date and Parties' Clause**

The first clause usually states the nature of the document, the date and brief descriptions of the parties.

E.g., in a Chattels Mortgage, it shall read:

**'This chattels mortgage is made the 30th day of July 2011 NIT NDEKLE of P.O. Box 444, Olare (hereinafter called "the Mortgagor") and CHOTO BUYA of P.O. Box 555, Asego (hereinafter called "the Lender") ...'**

and so on

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**Form and Contents of an Instrument...contd.****2. Consideration Clause**

The consideration clause should state the amount of loan or advance given to the Mortgagor against the specified chattels.

E.g.:

**'In consideration of K Shs 500, 000/= the Mortgagor does hereby assign and transfer to the Mortgagee....'**

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**Form and Contents of an Instrument...contd.**

**3. Covenants Clause**

The terms agreed by the parties should be expressly stated in the instrument.

A large number of covenants are implied by statute and clearly stated in the 1st and 2nd Schedules of the Act, drafters of instruments tend to repeat most of these terms in the instruments – possibly for emphasis.

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**Form and Contents of an Instrument...contd.**

**4. The Testimonium**

The part of the document that links the preceding parts of the document with the seal and signature part is known as the testimonium.

It usually begins with words:

**'IN WITNESS WHEREOF...'**

or other variations of the phrase.

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**Form and Contents of an Instrument...contd.**

**5. Execution**

Most legal documents that convey title must be properly executed.

This means generally that they must be signed, witnessed or attested and, invariably, verified.

This is where the parties affix their seals and/or signatures as the case may be.

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**Form and Contents of an Instrument...contd.**

It is also a key part of the instrument.

It will contain words such as:

**'IN THE PRESENCE OF:.....'**

Normally attestation will be by the parties' advocates in whose presence the document was signed.

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### REGISTRATION

- Registration means the filing of an instrument with schedule or inventories, or a true copy thereof, with the affidavit: s. 2.
- An instrument is deemed to be made on the date of its execution.
- It becomes effective from the time of its registration ( s. 16).

### Registration...*contd.*

- An instrument is registered by filing in the department of the Registrar-General, Attorney-General's Office, on the payment of a fee: see sections 5 and 8.
- All the schedules endorsed on, annexed to or referred to in it, together with an affidavit in the prescribed form (Form 1) must be filed together with the instrument: Section 5.
- Forms to the same effect as the prescribed forms may be adapted for registration and as well as for renewal, *infra*.

### Registration...*contd.*

- It must contain or have endorsed on it a schedule of the chattels, known as **an inventory**: s. 17.
- True copies of the instrument and schedules are permitted for filing.
- An instrument must be stamped before it may be registered: see s. 38, Stamp Duty Act, Chapter 480.

### REGISTER BOOK

- The Registrar shall-
  - ✓ keep a register for the purpose of entering particulars of instruments;
  - ✓ cause every instrument registered in his office to be numbered;
  - ✓ mark on each such instrument, or on the filed copy thereof, the date of registration and the number: s. 7;

Register Book...*contd.*

- ✓ at the time of registration, enter in the register the particulars of the instrument registered in the prescribed form: see Form 2 in the 1<sup>st</sup> Sch.;
- ✓ keep an index of the names of grantors and grantees of instruments; and
- ✓ refer therein to the entries in the Register Book of the instruments given by each grantor.

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Register Book...*contd.*

- The index of the Register Book shall be arranged in divisions corresponding with the letters of the alphabet.
- All grantors and grantees whose surnames begin with the same letter (and no others) shall be comprised in one division.
- The arrangement within each such division need not be strictly alphabetical.

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Register Book...*contd.***Transmission of Abstract to PC**

- Where the maker or giver of an instrument resides outside Nairobi, the registrar must forthwith and within 3 clear days, transmit an abstract of the contents of the instrument to the Provincial Commissioner in whose province the maker or giver resides: see section 7(5) of the Act.
- The Provincial Commissioner must then file, keep and index such abstract in the same manner required of the registrar.

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Register Book...*contd.***Searches etc**

- Any person may search, inspect and make extracts from and obtain copies of the abstract so registered in the same terms as to payment as he would of the instrument registered by the registrar.
- These provisions apply *mutatis mutandis* to the renewal of the registration of an instrument: see section 10(6) of the Act.

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### EXTENSION OF REGISTRATION

- Twenty-one (21) clear days are allowed for registration.
- However, the Court may, on application, extend the time for registration where registration is not effected within 21 days, due to inadvertence or accidental omission, the Court, and may order that the omission be rectified: see section 9 of the Act.
- The application for such extension must, however, be accompanied by a copy of the relevant chattels instrument.

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### Extension of Registration...contd.

- In the case of *Re Benjamin Kaburi Kamuruci*, High Court Civil Case No. 404 of 2006, Nairobi, the applicant brought an application pursuant to, among others, section 9 of the Act seeking extension of time.
  - The main ground was that the delay in registration was as a result of the inability of the lands office to stamp the instrument in good time.
  - The applicant had delivered the instrument, made on 9th March 2006, to the lands office 4 days later "for stamp duty and registration" but it was not until 25th May, that the instrument was received from that office.
  - The Court, despite power to extend time, declined to allow extension because the applicant had failed to annex a copy of the chattels instrument, which was the subject of the extension.

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### ATTESTATION

- Every instrument must be attested by at least one witness: section 15 of the Act.
- The witness must add to his signature his residence and occupation.
- Lack of sealing does not however affect the validity of an instrument.
- An unattested instrument is valid between parties but incapable of registration and ineffective against other persons": see the Privy Council in *National and Grindlays Bank Ltd -v- Dharamshi Vallabji and Others* (1966) EA 186.

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### EFFECT OF REGISTRATION

- **All persons are deemed to have notice** of it and its contents on such registration (s. 4).
- So long as an instrument continues to be registered, the chattels comprised in it **will not be deemed to be in the possession, order or disposition of the grantor** for bankruptcy purposes.
- I.e., the grantor will not be considered **the reputed owner** of the chattels.

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### EFFECT OF NON-REGISTRATION

Unless an instrument is registered as required within twenty-one (21) days from the date of its execution it will "be deemed fraudulent and void" as against the following persons:

- (a) The Official Receiver or trustee in bankruptcy of the estate of the grantor;
- (b) The assignee or trustee acting under any assignment for the benefit of the creditors of the grantor;



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### Effect of non-registration...contd.

(c) Any person seizing the chattels or any part of the chattels comprised in the instrument, in execution of the process of any court authorizing the seizure of the grantor's chattels; and

(d) Every person on whose behalf the court process was issued.

In all the cases above the chattels must at the material time be in the possession or apparent possession of the grantor of the instrument: (s. 13).



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### Effect of Non-registration...contd.

- In *Nyali Chemicals Limited v Thugi River Estate Limited & Another & Charterhouse Bank Limited*, Nairobi Commercial Division, Milimani, No. 134 of 1999, Trading Desk International objected to the attachment of all movable assets in a purported execution of a decree against the judgement debtor on the grounds that the said movables were charged to the objector by virtue of a duly registered chattels mortgage.

➤ Emukule J. held that the grantee of the chattels mortgage had no priority over the decree holder since the chattels mortgage in question was not stamped, neither was it registered.



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### Effect of non-registration...contd.

Furthermore, except where he has **express notice**, an unregistered instrument comprising any chattels will not be valid or effective against the following:

- (a) a bona fide purchaser for valuable consideration;
- (b) a mortgagee for valuable consideration;
- (c) an auctioneer selling or dealing with the chattels;
- (d) dealer or agent in the ordinary course of his business: s. 14.



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Effect of Non-registration...*contd.*

- A registered instrument enjoys a higher status than a contract between two parties involving chattels.
- That was the position taken by the High Court at Nakuru in the case of *Simon Wanjohi v Resma Commercial Agencies Limited and Joseph Ngena*, Civil Appeal No. 91 of 2002. It was held by L. Kimaru, J., the said agreement, which was not registered, "was a contract between two parties."
  - It did not in law amount to a chattels mortgage which would have given the [vendor] authority to repossess the said motor vehicle without recourse to the courts of law".

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Effect of non-registration...*contd.*

- The Court's position: that any property subject of a registered chattels mortgage may be repossessed without the intervention of the law.
- With the exception of chattels such as stock, wool, crops and certain fixtures, plant or trade machinery, the registration of an instrument will give good title only to the chattels comprised in the inventory annexed to it.
- Any other chattels belonging to the grantor will be void as against the persons stated above.
- Any "after-acquired" chattels, are not covered and will be void against the persons specified in section 14: ss. 17 to 20.

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## RENEWAL

- The registration of an instrument lasts for duration of five (5) years only.
- However, the life of an instrument may be extended through renewal of such registration: section 10, CTA.
- Such renewal must be done during the subsistence of the instrument: section 10(1)
- This is done by filing in the office of the Registrar an affidavit in the form prescribed under the Act or a form to the same effect: see Form 3 in the First Schedule.

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Renewal...*contd.*

- On the payment of the fee, the Registrar shall number the affidavit and mark thereon the date of renewal of registration.
- Particulars of the instrument in the register book and date of renewal of registration are also entered in the column provided therefore in the register book: see section 10(4).

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#### Renewal...contd

- If renewal is not effected as required, the registration of the instrument ceases to be of any effect at the expiration of any period of five (5) years during which a renewal has not been made.
- A registered chattels mortgage has a life of five (5) years, at the expiration of which it loses its validity and becomes void and of no effect as against a decree-holder: per Anyara Emukule, J., in the *Nyali* case, *supra*.
- See also *John Patrick Macharia vs MDC Holdings Ltd & 2 Others* HCCC No. 1549 of 2001 and *Fidelity Commercial Bank Ltd. vs Agritools Ltd and Others* HCCC1677 of 2000, both at Milimani Commercial Courts, Nairobi

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#### FEES

- The fee payable to the Registrar upon registration or renewal shall be such as may be prescribed by the Attorney General (the Minister): see s.14A, CTA, as inserted in 2007.
- It seems that AG has yet to prescribe fees but registrar still charges Kshs. 50/= and Kshs. 10/= for registration and for renewal, respectively.

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#### TRANSFER OF INSTRUMENTS

- A person to whom an instrument has been granted may transfer the same in the form prescribed by the Act or some other form to the same effect.
- Registration of a transfer is effected in the same manner as instruments are registered.
- The grantee thereby transfers, for a consideration, all his rights, title, estate and interest in and to the chattels comprised in the instrument.

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#### Transfer of instruments...contd.

- The transfer should be attested.
- Where two or more transfers of any one instrument are executed, a registered transfer will have priority over an unregistered transfer.
- The priority of registered instruments is determined in order of the times they were registered.  
See Fifth Schedule, CTA and Appendix 5, below.

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### SATISFACTION

- Once the debt secured by the chattels is extinguished, it should be formally discharged.
- A memorandum of satisfaction in the prescribed form (Form 5 in First Schedule) signed by the grantee or his attorney, discharging the chattels comprised in the instrument should be produced to the Registrar who must file the memorandum.

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### Satisfaction...contd.

- Memorandum of satisfaction must be attested.
- But where the instrument is destroyed or cannot be found or produced, the Registrar may dispense with its production: s. 34.
- From the date of filing the memorandum of satisfaction the debt or charge created by the instrument is vacated to the extent specified in the memorandum.

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### CRITIQUE OF THE ACT

- No alphabetical indexing of records by reference to the surname of the grantor (section 7(3) of the Act) making searches a complex process.
- Consider expanding classification of chattels.
- Manual registration of instruments imposes delay in the provision of finance to a borrower.
- Lack of candour in Registries where instruments get 'lost' upon presentation of renewal or satisfaction for registration.

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### RECOMMENDATIONS

- The old, manual and uncoordinated system of registering chattels securities should be upgraded by the introduction of technology to suit the 21<sup>st</sup> century.
- This can only be remedied by legislation.
- The statute is ancient and requires a general review to harmonize it with modern commercial practices.

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**PRESCRIBED FORMS**

- Forms reproduced from 1st Sch. to CTA.
- Affidavits to the same effect as those provided in Forms 1 and 3 (appendices II & IV, below) are allowed under ss. 5 and 10;
- Form 4 (appendix I, below) or "to the same effect with such variations or modifications thereof and additions thereto as are expressed in the instrument" may be used: see s.22; and
- Form 5 (appendix III, below) "or to the same effect" may be used for a memorandum of satisfaction: s.34.

**APPENDIX I: INSTRUMENT**

A.B., of [state residence and occupation], being owner of the chattels mentioned in the schedule hereto [where a schedule is necessary], in consideration of the sum of Shs. .... lent and advanced to him by C.D., of [state residence and occupation] [or, if consideration not an advance of money, state any other consideration for which mortgage given], does hereby assign and transfer them to the said C.D. by way of mortgage to secure the payment of the said sum of Shs. .... on the ..... day of 2011 with interest thereon in the meantime, and so long as that sum or any part thereof remains unpaid, at the rate of £ ..... per centum per annum by ..... payments on the ..... day of the months of ..... and ..... in each year.

[Implied covenants, powers and provisions may be varied or negated]

In witness whereof A.B. has hereto subscribed his name, this ..... day of ..... 2011.

[Signature]

A.B.

Signed by the abovesigned A.B. in the presence of

E.F.

[Residence and occupation]

**APPENDIX II: AFFIDAVIT ON REGISTRATION OF INSTRUMENT**

In the matter of the Chattels Transfer Act.

1. [full name of deponent], of [place of residence or business], Kenya, [occupation], make oath and say as follows:  
1. The paper writing hereto annexed and marked "A" is a true copy of an instrument under the above mentioned Act, and of every schedule or inventory thereon endorsed or thereto annexed or therein referred to, and of every attestation of the execution thereof, as made and given and executed by [full name of grantor].

2. The said instrument was made and given by the said [full name of grantor] on the ..... day of ..... 2011.

3. I was present, and saw [full name of grantor] duly execute the said instrument on the ..... day of ..... 2011 at [state place where instrument executed].

4. The said [full name of grantor] resides at [place of residence], and is [occupation].

[This may be varied to describe residence at date of instrument]

5. The name subscribed to the said instrument as that of the witness attesting the due execution thereof by the said [name of grantor] is in the proper handwriting of me, the deponent.

6. I am [occupation] and reside at [place of residence] ..... E.F.

Sworn at ..... the ..... day of ..... 2011,  
Before me ..... G.H.

**APPENDIX III: MEMORANDUM OF SATISFACTION**

I, C.D., hereby consent to a memorandum of satisfaction being written upon the instrument [or registered copy of the instrument] given for securing the sum of Shs. .... bearing the date the day of ..... 2011 and made between ..... and ..... and registered on the ..... day of ..... 2011, as No. .... Under the Chattels Transfer Act, the moneys for which the instrument was given as a security having been satisfied.

Dated this ..... day of ..... 2011.

..... C.D.

[Grantor or Assignor]

Witness ..... E.F.

[Residence and occupation]

#### APPENDIX IV: AFFIDAVIT ON RENEWAL OF REGISTRATION OF INSTRUMENT

In the matter of the Chattels Transfer Act

I, [full name of deponent] of [place of residence or business], Kenya, [occupation], make oath and say as follows: -  
 1. I am the grantee of the instrument registered under the above Act, as No. .... and made between [state names of parties to instrument, their residences and occupations, as appearing therein; also names of the parties to the instrument, their residences and occupations at the time of the making of the affidavit].

[If the affidavit is made by an agent, clerk or servant of the grantee or grantor, state that fact, and also state briefly how deponent has become acquainted with the facts deposed to.]

2. The said instrument was registered on the ..... day of ..... 2011.

3. The registration of the said instrument was last renewed on the ..... day of ..... 2011.

[This paragraph is inapplicable where registration of the instrument is being renewed for the first time.]

4. The said instrument is still subsisting, and in full force and effect.

..... C.D.

Sworn at ..... this ..... day of ..... 2011..

Before me:

..... G.H.  
 Commissioner for Oaths.

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#### APPENDIX 5: TRANSFER OF INSTRUMENT

(s. 47)

I, C.D., of [state residence and occupation of transferor], the grantee of the instrument registered in the office of the Registrar General ..... as No. .... under the Chattels Transfer Act, do in consideration of [state consideration], hereby transfer to X.Y., of [state residence and occupation of transferee] all my rights, title, estate and interest in and to the chattels comprised in the said instrument.

As witness my hand this ..... day of ..... 2011..

..... C.D.

Signed by the said C.D. in the presence of

..... E.F.

[Residence and occupation.]

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THE END.

Rautta-Athiambo

4<sup>th</sup> October, 2011

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