

1 Monday, October 07, 2013

KENYA SCHOOL OF LAW
 THE ADVOCATES TRAINING PROGRAMME
 COMMERCIAL TRANSACTIONS

 THE LAW OF CHATTELS TRANSFER
by Rautta-Athiamba

 The Law of Chattels Transfer Instruments
 (Abridged) by Rautta-Athiamba

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DEFINITION OF CHATTELS

- The word "chattel" (usually in plural) is defined, in one dictionary, as "the name given to things which in law are deemed personal property": See *Mozley and Whiteley's Law Dictionary*.
- Another expands this as "Movable or transferable property; personal property; esp., a physical object capable of manual delivery and not the subject matter of real property": *Black's Law Dictionary*, 8 edn., at p. 251

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Definition of "chattels".....*contd.*

- In the principal legislation, the Chattels Transfer Act, "chattels" means "**any movable property that can be completely transferred by delivery**": s.2.
- Thus, two conditions must be fulfilled:
 1. It must be capable of being manually transferred from one place to another; **and**
 2. Its identify must remain unaffected by such transfer.

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Definition of "chattels".....*contd.*

Two meanings of "chattel" in Kenya:

- (a) A movable physical object, e.g. a horse, a book or a shilling as contrasted with a piece of land.
- (b) Chattels personal, that is to say, chattels in the sense above plus all proprietary rights except those which are classed as immovable.

- *Cf.* Concept of chattels real in U.K. e.g. leasehold and other interests in land less than freehold is not known here.

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Definition of "chattels".....*contd.*

Included in (b), above, are:

- (i) debts, shares, contracts and other choses in action; or
- (ii) furniture or stock-in-trade; or
- (iii) patents, copyrights and other rights *in rem* (which are not rights over land).

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Definition of "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- Eljofri & Another*, 24 K.L.R 17, when he referred to the fact that demolition of the house would mean that "the whole character of the thing would be gone".
- Bourke, J. said:

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Definition of "chattels" ...contd.

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"...Consider a trailer on its wheels, this is a chattel within the scope of the CTA 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 CTA. This appears to be an absurdity which arises from the faulty definition of the word "chattels"..."

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Definition of "chattels" ...contd.

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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: s. 2, CTA.

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TRANSFER OF CHATTELS

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"Chattels transfer"

- Chattels transfer means no more than the transfer of articles or chattels, so as to pass their possession or control to another person.

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Chattels transfer ...contd.

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Methods of transfer

(a) By contract of-

- (i) sale, where the seller agrees to transfer the property in the goods to the buyer, for a consideration known as price; or

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Chattels transfer ...contd.

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- (ii) exchange or barter, where parties agree to transfer goods with consideration for the goods being another type of goods.

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Chattels transfer ...contd.

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- (b) By bankruptcy

Where the property of a person declared bankrupt is vested in his trustee in bankruptcy.

Chattels will accordingly transfer to the trustee in bankruptcy.

This includes goods, which may not belong to the bankrupt but are in his possessions, order or disposition, as reputed owner.

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Chattels transfer ...contd.

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- (c) By distress, Execution etc.
 - Chattels belonging to, e.g., a tenant may also be transferred by way of distress for rent arrears, rates, taxes or through the order of a court of competent jurisdiction.
 - In case of such a court order the chattels are then taken in execution of such order

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Chattels transfer ...contd.

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- (d) By death
 - On death, the property of the deceased will devolve upon his personal representatives, beneficiaries.

AND lastly,

- (e) By Deed

Alienation by deed, with or without valuable consideration.

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Chattels transfer ...contd.

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- Our principal concern is with this form of transfer - by deed or instrument, as security or collateral for loans.
- Chattels as security or collateral for loans pose unique problems, especially to (potential) lenders.

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Chattels as security for loans

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- Unlike land or buildings on land, chattels are prone to both damage and theft and, in the latter case, may travel so "far off in a short space, and be out of the reach of the most industrious owner".
- It was considerations of this kind that induced the Government to turn to and pass legislation governing chattels transfer as security for loans.

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THE PURPOSE OF CHATTEL TRANSFER ACT

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- The Chattels Transfer Ordinance, now the Chattels Transfer Act, Chapter 28, Laws of Kenya (CTA) 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 was closely modelled upon the New Zealand Chattels Transfer Act of 1924.
- The principal reason for CTA: **to facilitate loans to traders and farmers, in particular, on the security of their own farm and trade chattels.**

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The Purpose of CTA...

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- Worley, V.P of the Court of Appeal for Eastern Africa said of the CTA in *Dyal Singh v. Kenyan Insurance Ltd* (1955) 22 EACA 22:
- "I have taken into account the purpose of the Chattels Transfer Ordinance as revealed in its provisions... and it is interesting and not without significance to observe some similarities in the conditions obtaining in the two countries. Both are young communities, mainly agricultural and rapidly developing.

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The Purpose of CTA... contd.

- "In such communities it is 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.

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The Purpose of CTA... contd.

- "Lenders however are reluctant to advance money at reasonable rates on chattels and I think that it is clear that one of the main purpose 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", p. 14.

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The Purpose of CTA... 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.

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TYPES OF CHATTELS

- Chattels today form a significant portion of collateral requirements for borrowers in the Kenyan microfinance industry.
- They are collateral requirements for Kenyan borrowers in order to secure microcredit loans.
- In the year 2012 alone, 84,342 chattels transfer instruments were registered.

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Types of chattels ... contd.

- The most usual forms of chattels to be offered as security for loans range from and include all kinds of-
- motor vehicles, tractors, farm and other machinery;
- sewing machines,
- furniture or household items;
- livestock.

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DEFINITION OF INSTRUMENT

CTA defines "instrument" as "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 25 Monday, October 07, 2013

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. 26 Monday, October 07, 2013

Such transfer may be-

- permanent or temporary;
- absolute or conditional; or
- by way of sale, security, pledge, gift, settlement or lease.

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Types of instruments...contd. 27 Monday, October 07, 2013

(a) Chattels Mortgage

- A *chattels 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.
- The creation of chattels mortgages is largely restricted to securities owned by individuals.

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Types of instruments...contd. 28 Monday, October 07, 2013

- In this regard, companies are considered to be adequately served by securities arising from debentures and other forms of Charges provided for in the Companies Act.
- 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...contd. 29 Monday, October 07, 2013

- 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. 30 Monday, October 07, 2013

(b) Hypothecation

- To 'hypothecate' is to pledge, say, property as security or collateral for a debt, without delivery of title or possession.
- A letter of hypothecation also known as general hypothecation is a debtor's pledge to allow all the property named in the security instrument to serve as collateral and to be used to satisfy the outstanding debt: *Black's Law Dictionary*.

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Types of instruments...contd.

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- Thus, 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.

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(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.

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(d) Lien

- The right to hold the property of another person as security for the performance of an obligation.
- 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.

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(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.

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Types of instruments...contd.

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(f) Bill of Sale

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

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OTHER DOCUMENTS DEEMED TO BE INSTRUMENTS

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- 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:
 - Inventories of chattels to which a receipt is attached;
 - Receipts for purchase-money of chattels;

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Other docs deemed to be instruments ... contd.

(iii) Other assurances of chattels

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

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(Abridged by Raula-Atrium)

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Other docs 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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Other docs deemed to be instruments ... 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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Other docs deemed to be instruments ... contd.

(v) 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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Docs 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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Does excluded ... *cont'd.* 43 Monday, October 07, 2013

(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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Does excluded ... *cont'd.* 44 Monday, October 07, 2013

(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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ESSENTIAL CONTENTS OF INSTRUMENT

The form and contents of a chattels transfer instrument are as follows:

(i) Instrument and date clause

- -Type or description of instrument created, e.g. "chattels mortgage";
- -An instrument shall be deemed to be made on the day on which it is executed, and shall take effect from the time of its registration date, e.g.
- "This chattels mortgage dated this 27th May, 2013".

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Essential contents of instrument ... *cont'd.*

(ii) The parties' clause

- -Name, residence and occupation of the transferor/mortgagor.
- -Name and particulars of the transferee/mortgagee, e.g. a finance corporation.

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Essential contents of instrument ... *cont'd.*

(iii) Description or Inventory of Chattels

- -The chattels being attached: a description should be given for each item in an inventory appended as a schedule.
- -The instrument should give a good title only to the chattels described in the schedule.

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Essential contents of instrument ... *cont'd.*

(iv) The consideration clause

- The amount of money being advanced by the finance corporation to the mortgagor (the borrower).

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Essential contents of instrument ... *contd.*

(v) The Covenants clause

-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.

In an instrument, they are the terms agreed by the parties and expressly stated in the instrument.

They are set out in 2nd, 3rd or 4th Schedules to the Act and are to be implied in every instrument (s. 42) unless negatived or modified or altered: s. 46.

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Essential contents of instrument ... *contd.*

Covenants...contd.

- They may also be invoked from statutory provisions.
- They include the period within which the monies loaned should be paid and the interest rates that will be used when the monies become due.
- They bind executors, administrators and assigns of the person or successors and assigns of the company upon whom they impose an obligation.

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Essential contents of instrument ... *contd.*

Covenants...contd.

Covenants of Title, s.41 & 2nd Schedule.

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 from time to time: See Second Schedule to the Act.

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Essential contents of instrument ... *contd.*

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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Essential contents of instrument ... *contd.*

Covenants...contd.

3. Not to do or allow any act or deed which prejudicially effects 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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Essential contents of instrument ... *contd.*

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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Essential contents of instrument

(vi) The Testimonium

- - This is the part that links the preceding parts of the instrument with the signature/seal part; thus “*IN WITNESS WHEREOF.....*”
- - It should be properly attested and witnessed by one person who should give particulars of his residence and occupation.

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Essential contents of instrument

(vii) Execution

- - Signatures
- - Official stamp
- - Common seal, if corporation
- - Preceded by words such as “*IN THE PRESENCE OF....*”
- An instrument is deemed to be made on the date of its execution.

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ATTESTATION

- Every instrument must be attested by at least one witness, who must add to his signature his residence and occupation: s. 15.

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Attestation ... contd.

- Every instrument must be attested by at least one witness, who must add to his signature his residence and occupation: s. 15.
- It is not necessary to seal the instrument.

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Attestation ... contd.

- Every instrument must be attested by at least one witness, who must add to his signature his residence and occupation: s. 15.
- It is not necessary to seal the instrument.
- “The natural implication from this provision and its context and the scheme of the Act is that an unattested instrument is valid between parties but incapable of registration and ineffective against other persons”: see *National and Grindlays Bank Ltd v. Dharamshi Vallabhji and Others* (1966) EA 186, the Privy Council.

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REGISTRATION OF INSTRUMENTS

- Registration is “the filing of an instrument with schedule or inventories, or a true copy thereof”, with prescribed affidavit: s. 2.

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Registration of instrument ... *cont'd.*

- Registration is “the filing of an instrument with schedule or inventories, or a true copy thereof”, with prescribed affidavit: s. 2.
- In Registrar General's office, on payment of a prescribed fee: ss. 5 and 14A.

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Registration of instrument ... *cont'd.*

- Registration is “the filing of an instrument with schedule or inventories, or a true copy thereof”, with prescribed affidavit: s. 2.
- In Registrar General's office, on payment of a prescribed fee: ss. 5 and 14A.
- An instrument may be registered within 21 days from the date of its execution: s. 6(1).

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Registration of instrument ... *cont'd.*

Registration procedure:

- Do due diligence – e.g. carry out an official search relating thereto must be conducted to ascertain existence, confirm ownership and other pertinent matters that may affect the security; e.g. in registry of motor vehicles in case of cars offered as chattels.
- Draw up and have instrument executed.

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Registration of instrument ... *cont'd.*

- Lodge instrument with the Registrar of Companies, to be assessed to determine stamp duty payable, (currently at 0.1 per cent of the sum secured or consideration): see s. 38, Stamp Duty Act, Chapter 480.
- Registrar will duty-stamp and register the instrument lodged, on payment of a fee.

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Registration of instrument ... *cont'd.*

NB: An unstamped instrument is “to that extent void and of no effect as against a decree-holder”: per *Emukule, J. in Nyali Chemicals Ltd. v. Thugi River estate Ltd. & Others*, HCC Suit No. 134 of 1999.

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Registration of instrument ... *cont'd.*

(a) Effect of regn.

- Instrument becomes effective from the time of its registration (s. 16).
- Regn. operates as notice to ALL of instrument and its contents: s. 4.

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Registration of instrument ... *contd.*

(b) Effect of non-regn.

- Unless registered, instrument shall be deemed fraudulent and void as against:
 - (a) official receiver or trustee in bankruptcy of grantor; or

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Effect of non-regn. ... *contd.*

(b) Effect of non-regn.

- Unless registered, instrument shall be deemed fraudulent and void as against:
 - (a) official receiver or trustee in bankruptcy of grantor; or
 - (b) assignee or trustee acting for the benefit of creditors; or

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Effect of non-regn. ... *contd.*

(b) Effect of non-regn.

- Unless registered, instrument shall be deemed fraudulent and void as against:
 - (a) official receiver or trustee in bankruptcy of grantor; or
 - (b) assignee or trustee acting for the benefit of creditors; or
 - (c) any person seizing the chattels comprised in the instrument in execution of the process of any court authorizing the seizure of the chattels: s. 13.

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Effect of non-regn. ... *contd.*

(b) Effect of non-regn.

- Unless registered, instrument shall be deemed fraudulent and void as against:
 - (a) official receiver or trustee in bankruptcy of grantor; or
 - (b) assignee or trustee acting for the benefit of creditors; or
 - (c) any person seizing the chattels comprised in the instrument: s. 13.

Any chattels comprised in a registered instrument shall not be deemed to be in the reputed ownership* of the grantor.

[*possession, order or disposition]

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Registration of instrument ... *contd.*

- There is indication that in the last few years more chattels transfer instruments are being used and registered, e.g.:
 - (a) April to 31st Dec., 2010.....22,924;
 - (b) 1st Jan. to 31st Dec., 2011.....47,788; and,
 - (c) 1st Jan. to 31st Dec., 2012.....84,342.

The increase of registrations in 2012 over 2011 represents about 76.5 per cent!

Source: Discussions with Senior Deputy Registrar-General—28 May 2013

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Registration of instrument ... *contd.*

- Preliminary figures obtained from the RG's office show amounts borrowed on security of chattels for the first three months of this year (2013) as follows:
 - (a) JanuaryKshs. 274, 397, 000/=;
 - (b) February.....Kshs. 250, 994, 400/=; and
 - (c) MarchKshs. 374, 714, 000/=.

NB: Registry records very poor; so the above figures should be treated as merely indicative of the critical role chattels play as collaterals in the country today.

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EXTENSION OF TIME

- The High 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 time... *cont'd.*

- In *Re Benjamin Kaburi Kamuruci*, HCCC No. 404 of 2006, Nairobi, an application was brought pursuant to, among others, s. 9 of the Act seeking extension of time.
 - 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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Extension of time... *cont'd.*

- 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.

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TRANSFER OF INSTRUMENTS

- A grantee may, for a consideration, transfer all his rights, title, estate and interest in and to the chattels comprised in the instrument.

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Transfer of instruments

- A grantee may, for a consideration, transfer all his rights, title, estate and interest in and to the chattels comprised in the instrument.
- Every transferee, his executors, administrators and assigns shall acquire same rights, powers, remedies and obligations as transferor.

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Transfer of instruments

- A grantee may, for a consideration, transfer all his rights, title, estate and interest in and to the chattels comprised in the instrument.
- Every transferee, his executors, administrators and assigns shall acquire same rights, powers, remedies and obligations as transferor.
- Registration of a transfer is effected in the same manner as an instrument.

The Law of Chattels Transfer Instruments
(Abridged) by Raula-Athumbe

Transfer of instruments ...*contd.*

- A grantee may, for a consideration, transfer all his rights, title, estate and interest in and to the chattels comprised in the instrument.
- Every transferee, his executors, administrators and assigns shall acquire same rights, powers, remedies and obligations as transferor.
- Registration of a transfer is effected in the same manner as an instrument.
- The transfer should be attested: ss. 46 & 47 + Fifth Schedule.

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Transfer ...*contd.*

- 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.

The Law of Chattels Transfer Instruments
(Abridged) by Raula-Athumbe

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), CTA.

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.

The Law of Chattels Transfer Instruments
(Abridged) by Raula-Athumbe

Renewal ...*contd.*

- On the payment of 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 therefor in the register book: see section 10(4).
- Particulars of 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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(Abridged) by Raula-Athumbe

Renewal ...*contd.*

- In absence of renewal, the registration of the instrument ceases to be of any effect at the expiration of any period of five (5) years.
- Thus, 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 *Njali* 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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PRESCRIBED FORMS

- The following forms are reproduced from 1st Schedule to the CTA:
 - (i) The instrument: Form 4 (appendix I, below): see s.22, CTA
 - (ii) Affidavits: Forms 1 and 3 (appendices II & IV, below) are allowed under ss. 5 and 10, CTA;
 - (ii) Transfer of instrument: Fifth schedule, s. 47 ; and
 - (iii) Memorandum of satisfaction: Form 5 (appendix III, below): s.34, CTA.

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APPENDIX I: INSTRUMENT 85 Monday, October 07, 2013

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 Kshs..... on the day of 2013 with interest thereon in the meantime, and so long as that sum or any part thereof remains unpaid, at the rate of Kshs. per centum per annum

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Instrument ... contd. 86 Monday, October 07, 2013

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 hereunto subscribed his name, this ... day of ..., 2013.
[Schedule]

..... A.B.
Signed by the above-named A.B. in the presence of
..... E.F.
[Residence and occupation]

The Law of Chattels Transfer Instruments
(Abridged) by Raula Athumbe

APPENDIX II: AFFIDAVIT FOR REGISTRATION OF INSTRUMENT 87 Monday, October 07, 2013

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. 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].

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Affidavit ... contd. 88 Monday, October 07, 2013

2. The said instrument was made and given by the said [full name of grantor] on the day of 2013.

3. I was present, and saw [full name of grantor] duly execute the said instrument on the day of 2013 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.]

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(Abridged) by Raula Athumbe

Affidavit ... contd. 89 Monday, October 07, 2013

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, this deponent.

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

Sworn at the day of 2013,
Before me G.H.

The Law of Chattels Transfer Instruments
(Abridged) by Raula Athumbe

APPENDIX III: MEMORANDUM OF SATISFACTION 90 Monday, October 07, 2013

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 2008 and made between and and registered on the day of 2008, 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 2013.

..... C.D.
(Grantee or Assignee.)

Witness E.F.
[Residence and occupation]

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(Abridged) by Raula Athumbe

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APPENDIX IV: AFFIDAVIT ON RENEWAL

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].

[NB: 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.]

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Affidavit on renewal ...

2 The said instrument was registered on the day of 2003.

3. The registration of the said instrument was last renewed on the day of 2008. [This paragraph is inapplicable where registration of the instrument is being renewed for the first time.]

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(Abridged by Raula-Athumbe)

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Affidavit on renewal ...

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

.....
Deponent

Sworn at this day of 2013.
Before me:

.....
Commissioner for Oaths.

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(Abridged by Raula-Athumbe)

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APPENDIX V: TRANSFER OF INSTRUMENT

s. 17

○ 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, 2013.

○ C.D.

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

○ E.F.

○ Residence and occupation.

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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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(Abridged by Raula-Athumbe)

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CHALLENGES

There are many challenges leading to many institutions being frustrated with CTA system.

E.g:

1. The process of chattels registration and creation of , e.g., a chattels mortgage is generally difficult and time-consuming hence few financial institutions (less than 30%) are willing to accept chattels as a form of collateral or security for loans.

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(Abridged by Raula-Athumbe)

Challenges ... *contd.*

2. The process of registration and transfer is manual; consequently-

- (a) actual registration by Registrar is usually delayed;

The Law of Chattels Transfer instruments
(Abridged) by Rauts-Athambis

Challenges ... *contd.*

2. The process of registration and transfer is manual; consequently-

- (a) actual registration by Registrar is delayed;
- (b) conducting searches is tedious and unhelpful; and

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(Abridged) by Rauts-Athambis

Challenges ... *contd.*

2. The process of registration and transfer is manual; consequently-

- (a) actual registration by Registrar is delayed;
- (b) conducting searches is tedious and unhelpful; and
- (c) it is almost impossible to determine whether a borrower is using the same chattel to secure loans in more than one institution.

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Challenges ... *contd.*

3. Manual registration of instruments imposes delay in the provision of finance to borrowers.

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Challenges ... *contd.*

3. Manual registration of instruments imposes delay in the provision of finance to borrowers.

4. There is no alphabetical indexing of records by reference to the surname of the grantors (section 7(3) of the Act) making searches a complex process.

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(Abridged) by Rauts-Athambis

Challenges ... *contd.*

3. Manual registration of instruments imposes delay in the provision of finance to borrowers.

4. There is no alphabetical indexing of records by reference to the surname of the grantors (section 7(3) of the Act) making searches a complex process.

5. Corruption in Registries, where instruments get 'lost' upon presentation of renewal or satisfaction for registration.

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Challenges ... *contd.*

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- This often leads many institutions to ignore legal requirements set in place for the use of chattels in lending.

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Challenges ... *contd.*

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- This often leads many institutions to ignore legal requirements set in place for the use of chattels in lending.

6. Chattels being a form of collateral that is movable, there is the risk that during the period of a loan the chattels may be damaged or stolen and never recovered in case of default.

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(Abridged) by Raula-Athambie

Challenges ... *contd.*

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E.g. cars which are often prone to theft and may never to be traced again.

In *Express Finance Limited v. Joseph Muisyo Nzioka*, HCCC 2680 of 1996, the court could only make an order for recovery of the loan as the motor vehicle had already disappeared.

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(Abridged) by Raula-Athambie

Challenges ... *contd.*

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E.g. cars which are often prone to theft and may never to be traced again.

In *Express Finance Limited v. Joseph Muisyo Nzioka*, HCCC 2680 of 1996, the court could only make an order for recovery of the loan as the motor vehicle had already disappeared.

7. Lack of clarity in the method or process of enforcement of repossession of chattels as collateral, in case of default by grantor, is a serious discouragement to lenders.

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Challenges ... *contd.*

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- Moreover, due to lack of adequate awareness on the part of borrowers it is difficult to repossess items pledged as collateral.
- Borrowers often seek police intervention when a lender hires an auctioneer to repossess chattels in times of default.

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RECOMMENDATIONS

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1. The old, manual and uncoordinated system of registering chattels securities should be upgraded by the introduction of technology to suit the 21st century.

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Recommendations ... *contd.*

1. The old, manual and uncoordinated system of registering chattels securities should be upgraded by the introduction of technology to suit the 21st century.
2. This can only be remedied by legislation.

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(Abridged) by Rautta-Athiambo

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Recommendations ... *contd.*

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

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Recommendations ... *contd.*

4. The Registrar General should undertake sensitization of borrowers in the use and ramifications of chattels as collateral.

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Recommendations ... *contd.*

4. The Registrar General should undertake sensitization of borrowers in the use and ramifications of chattels as collateral.
5. Finally, the classes of chattels to which the Act applies are too limited and should be expanded.

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THE END.

Rautta-Athiambo
25 June, 2013.

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(Abridged) by Rautta-Athiambo