

THE LAW OF HIRE PURCHASE IN KENYA

BY
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Athiambo, 2013

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INTRODUCTION

- › Collins English Dictionary defines hire purchase as a system in which a buyer takes possession of merchandise on payment of a deposit and completes the purchase by paying a series of installments while the seller retains ownership until the final installment is paid.
- › The instrument that facilitates hire purchase is known as the hire purchase agreement.

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Introduction.. *contd.*

- › The Hire Purchase Act of 1968 (the Act or HPA), defines hire purchase as *an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee; see s. .*
- › Section 3 of the Act, applies to transactions involving up to Kshs. 4,000,000/=.
- › The Act seeks to protect the interests of the hirer against exploitation by unscrupulous hire purchase companies.

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Introduction ...*cont.*

- › Exclusions:
 - Any scheme controlled, managed or guaranteed by the government for the purposes of providing loans to any person for the purchase of motor vehicles.
 - A body corporate as a hirer.
- See s. 3(2).

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REQUIREMENTS AND CONTENTS OF AGREEMENT

A. Agreement to be in writing , sec. 6

- › A hire purchase agreement must be **written**, signed by the hirer and by all the parties to the agreement.
- › It will otherwise be unenforceable by the owner.

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Requirements & Contents of agreement... *contd.*

B. Registration.

- › Every hire purchase agreement must be delivered to the Registrar of Hire-Purchase Agreements within **thirty days** of its execution.
- › This period may be extended by the Registrar if the delay was due to an accident, an inadvertence or some sufficient cause.
- › To be registered, the agreement must be in English language: see s. 5.

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Requirements & Contents of agreement... *contd.*

CERTIFICATE OF REGISTRATION OF AGREEMENT

- › I hereby certify that Hire-Purchase Agreement No. was registered this day of, 20 at o'clock.
- › Signed:
- › Registrar of Hire-Purchase Agreements
- › Fee paid: Sh....

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Requirements & Contents of agreement... *contd.*REGISTER OF HIRE PURCHASE AGREEMENTS -FORM
H.3
(Section 5)

- › Serial No. of Agreement
- › HIRER: Address
- › Name
- › OWNER: Address
- › Name
- › Date of Agreement
- › Date of Registration of Agreement
- › Amount of Agreement
- › Nature of Goods
- › Final Inst. Due
- › Completion or Termination

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Requirements & Contents of agreement... *contd.*

❑ Consequences of non registration:

- No one can enforce the agreement against the hirer or take action against any guarantor of the agreement.
- Owner cannot recover the goods from the hirer.
- The holder of any security given by the hirer or guarantor to the agreement cannot enforce against any of them.

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Requirements & Contents of agreement... *contd.*

C. Statement of Cash Price

- › The owner must state in writing in the prescribed form to the prospective hirer, a price at which the goods may be purchased by him for cash.
- › The agreement must show:
 - The amount of each installment,
 - The period of repayment,
 - Description of goods,
 - Notice of the hirer's rights displayed in a prominent form.
- Non-compliance makes the agreement unenforceable as against the hirer and guarantor.

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Requirements & Contents of agreement... *contd.*

Form H.P. 4

THE HIRE-PURCHASE ACT
(Section 6 (1))

Statement of Cash Price of Goods

- › I/We the undersigned hereby declare that cash price inclusive of accessories, etc., but net of any discounts of the undermentioned goods is Sh.
- › The goods
- › Signature of owner:
- › Address
- › Dated.....
- › Noted by
- › Prospective Hirer

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Requirements & Contents of agreement... *contd.*

D. Statutory Notice

- The agreement must have a **statutory notice setting out the rights of the hirer.**
- The notice must be at least as **prominent** as the rest of the contents of the agreement.
- It should contain **appropriate warnings** or notices to the hirer in prominent bold letters regarding his basic rights and obligations.
- For example, **the hirer's right to terminate the agreement** should be boldly drawn: see part of form HP 5, below.

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Requirements & Contents of agreement... *contd.*

THE HIRE-PURCHASE ACT

(Section 6 (2) (c))

Notice to be Included in Every Hire-Purchase Agreement

Right of hirer to terminate agreement

- › 1. The hirer may put an end to this agreement by returning the goods to the owner and giving him written notice of termination of the agreement.
- › 2. He must then pay any instalments which are in arrear at the time he gives notice. If when he has paid the instalments, the total amount which he has paid under the agreement is less than Sh. *..... he must also pay enough to make up that sum. (*Here insert one-half of the hire-purchase price.)

› Contd next page...

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Requirements & Contents of agreement... *contd.***Right to terminate...contd.**

- › 3. If the goods have been damaged owing to the hirer having failed to take reasonable care of them, the owner may sue him for the amount of the damage unless that amount can be agreed between the hirer and the owner.
- › 4. The hirer must return the goods at his own expense to the premises from which they were originally supplied to him or to such other place as the owner may direct. The owner must reimburse the hirer for any additional expense incurred in returning the goods to premises other than those from which they were originally
- › 5. The hirer should see whether this agreement contains provisions allowing him to put an end to the agreement on terms more favourable to him than those just mentioned. If it does, he may put an end to the agreement on those terms.

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Requirements & Contents of agreement... *contd.*

(Section 12)

Notice by Hirer to Terminate Agreement

- › From: [Here insert name and address of hirer]
- › To : [Here insert name and address of owner]
- › No. and Date of Hire-Purchase Agreement
- › Particulars of goods
- › I hereby give you notice to terminate forthwith the agreement made between us dated as above and comprising the above-mentioned goods. I confirm that I have returned the goods to you, and that the agreement is at an end.

› Contd next page

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Requirements & Contents of agreement... *contd.***Notice to terminate....contd.**

- › I understand that in consequence of giving this notice I am no longer entitled to the goods and my liabilities under the hire-purchase agreement and the Hire-purchase Act, are as follows:
- › (1) I must pay any instalments in arrear at the date of this notice.
- › (2) If, when I have paid the above mentioned instalments the total amount which I have paid under the agreement is less than one-half of the hire-purchase price specified in the agreement, then I must also pay enough to make up that sum.
- › (3) If the goods have been damaged because I have failed to take reasonable care of them, you are entitled to sue me for the amount of the damage unless that amount can be agreed between us.

› Contd next page...

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Requirements & Contents of agreement... *contd.*

- › I also understand that if at your request I have returned the goods to premises other than those from which they were originally supplied by you to me, I am entitled to be reimbursed for any additional expense so incurred.
- › Please sign and return the duplicate copy of this notice.
- › Dated.....
- › (Signature of Hirer)
- › Endorsement on Duplicate
- › Received a notice of which the above is a copy.
- › Dated(Signature of Owner)

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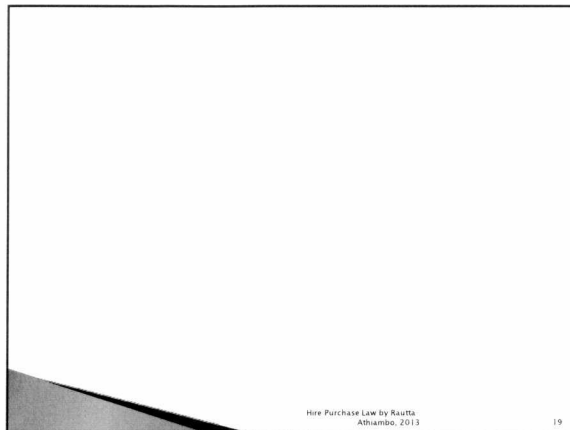
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Requirements & Contents of agreement... *contd.*

- › Other notices relate to the following:
 - Right of hirer to complete agreement and
 - Restriction of owners' right to recover goods .

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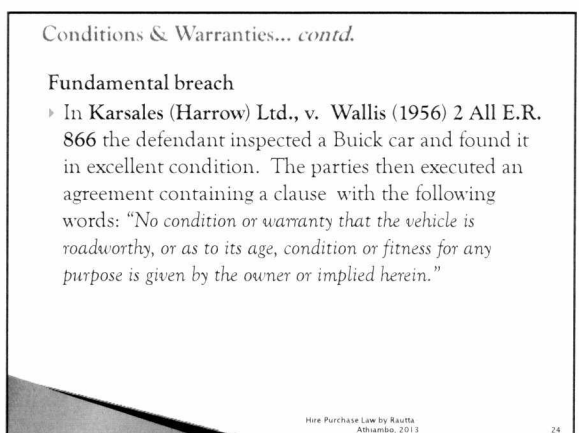
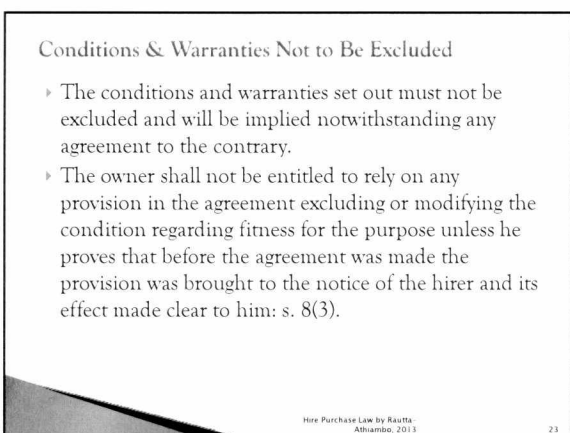
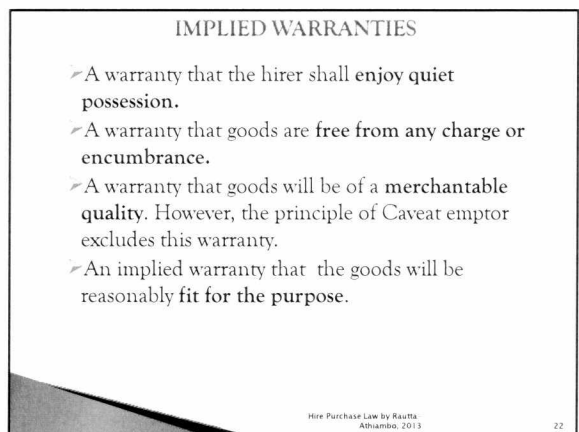
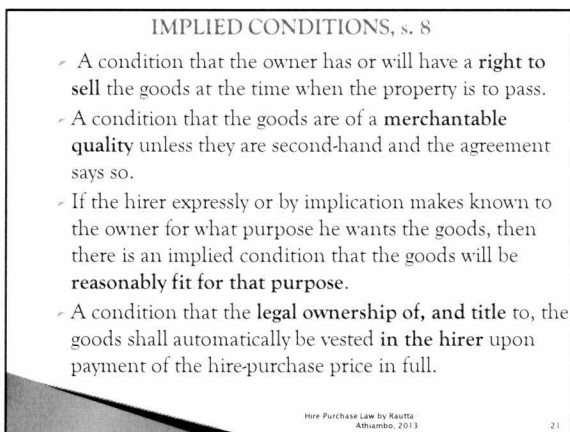
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Requirements & Contents of agreement... *contd.*

E. Delivery of copy of agreement to hirer

- › The owner must deliver or send by registered post to the hirer, a copy of the agreement, within **21 days** of the date of the agreement.
- › In case of failure to adhere to this requirement, the owner will not be entitled to enforce the hire purchase agreement or any contract of guarantee relating to it.



Conditions & Warranties... *contd.*

- When the car was delivered outside the hirer's home it was in a deplorable state. It would not go. It needed 150 pounds to restore it to its original condition. The defendant refused to accept it. The Plaintiffs (who were assignees of the finance co. under a recourse agreement (sued for instalments. The Court of Appeal held that the defendant had validly rejected the car because the owners were guilty of a fundamental breach of contract which prevented them from relying on the exemption clause.]]It was pointed out (Parker L.J.) that not every defect in a car rendering it temporarily unusable on a road amounted to a fundamental breach. However, the owners in this case, were in breach of their primary obligation which was to supply a car. In the words of Birkett LJ "a car which will not go is not a car at all"

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Conditions & Warranties... *contd.*

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Conditions & Warranties... *contd.*

- But in *Swisse Atlantique Societe' D'Armement Maritime S.A. vs. N.V. Rotterdamsche Kolen Centrale* (1967) 1AC 361; (1966 2 All ER. 61 the House of Lords, after examining a number of earlier cases, held, among other things, that there was no rule of law that an exemption clause could not cover a fundamental breach and that the scope of an exemption clause was a question of construction of the clause and of the contract as a whole.
- This is a clear demonstration that the provisions of the Act which appear to ban exclusion clauses, cannot provide the type of protection which was probably intended.

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Conditions & Warranties... *contd.*

- In practice through it is unlikely that the courts will allow a seller to undertake to deliver "coffee" and at the same time say that he is not liable if he delivers something else. It is most likely that the courts would strike out such exemption as being repugnant to the main purpose of the contract. The courts could also declare the whole contract void for want of consideration. The seller cannot be allowed to "give and then take away"; but he may be permitted to qualify what he is giving.

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THE TRIANGULAR TRANSACTION

☐ Parties:

- Finance company-puts money for hire purchase.
- Seller/dealer -sells goods to the finance company.
- Hirer - gets the goods from the finance company.
- Guarantor.

☐ Contracts established:

- Contract of sale of goods between the seller and the finance company.
- Contract of hire-purchase exists between the finance company and the hirer.

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The triangular transaction...*contd.*

Dealer's liability to the hirer:

- Usually, the first sale is by the dealer to the finance company, even when custody seems to be with the dealer.
- No contract of sale exists between the dealer and the hirer: see *Drury vs. Victor Buckland Ltd* (1941) 1 All E. R. 269, CA.
- If, however, the dealer gives express warranty to the hirer, the courts will infer a collateral contract between the dealer and the hirer: see *Andrew vs. Hopkins* (1957) 1QB 229, where the dealer warranted that a saloon car was "a good little bus, I'd stake my life on it".

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The triangular transaction...*contd.*

- › In this case the dealer is deemed to be an agent of the finance company.
- › As was stated by Lord Denning in *Financing Ltd v. Stimson* (1962) 3 ALL ER 386 at p. 388 “if we take, as we should, a realistic view of the position, the dealer is in many respects and for many purposes the agent of the finance company”.

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The triangular transaction...*contd.*

Finance company's liability:

- Pearson LJ. in *Mercantile Credit Co Ltd vs. Hamblin* (1965) 2 QB 205, stated that there is no rule of law that in a hire purchase transaction the dealer never is or always is acting as agent of the finance company.
- Dealer is a party on his own but may act as an intermediary or agent at certain but limited instances.

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GUARANTOR

- › Owners in hire purchase arrangements will often wish to ensure due performance of a hirer is guaranteed by another person.
- › This may be via a separate owner-guarantor agreement or by the making of the guarantor to be part of the hire purchase agreement itself.
- › The guarantor must sign a written note or memorandum by himself or by agent.
- › His liability is secondary only; i.e. his liability depends on the validity of the main agreement and on whether the hirer defaults or not.

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Guarantor... *contd.*

- › If the existing contract is varied without his consent, he will be discharged.
- › Ct: Contract of indemnity in which the giver of indemnity assumes primary liability.
- › The name given by the party to the contract collateral to another agreement may not always matter.
- › If the liability under the collateral contract is substantially different from the liability under the main contract this would suggest that the collateral contract is not a guarantee.

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Guarantor... *contd.*

- › In *Yeoman Credit Ltd. v. Latter* [1961] 1 W. L. R. 828; [1961] 2 All E. R. 294, where a father gave a special guarantee form “Hire-Purchase Indemnity and Undertaking” for his son in a hire purchase of a car he was held to have signed a contract of indemnity.
- › A guarantor may insist on due performance of the hirer's obligations.
- › He may claim an indemnity against the hirer if he is compelled to pay.
- › If he pays outstanding balance, he takes over by subrogation as against the owner.
- › He may also take over any securities such as cheques or promissory notes which the owner took.

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Guarantor... *contd.*

- › Usually the agreements do provide for his consent to such variations; for example it is usually provided that extension of time does not affect the guarantor's liability.
- › If the hirer or a co-guarantor is released the guarantor will be discharged, unless otherwise provided.

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VOID PROVISIONS

By section 7 of the Act, any provision in the agreement shall be **void** if it:

- Allows the owner or his agent to enter premises to take possession of the goods;
- Attempts to prevent the hirer from terminating the agreement as provided for in s. 12; or
- Adds extra liabilities should he so terminate; or
- Attempts to relieve the owner from liability for the default of his agents.

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Void provisions...contd.

Agent imposed on hirer

- A person acting on behalf of the owner cannot be treated as or deemed to be the agent for the hirer under a hire-purchase agreement as is often the case with insurance agreements.
 - Any provision purporting to impose such a person on the hirer as his agent will be void.
- A provision which **relieves the owner from liability for acts or defaults of any person acting on his behalf** in connection with the formation or conclusion of the agreement is equally void.

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Limitations against Owner

- Section 29 prevents the owner, in the event of the hirer's breach, from enforcing any kind of accelerated payment, unless more than **one-tenth of the hire-purchase price** is due in one installment or more than **one-twentieth** in two installments.
- Similarly prohibited is a provision calling for **damages, forfeiture, penalty or accelerated payments**, unless the hirer is given notice in writing and allowed 14 days within which to carry out the obligation.
- This section gives the hirer some time to put his house in order and avoid the results of what might merely be inadvertence in regard to some small detail on his part.

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LOCATION OF HIRER & GOODS

❖ Location of Hirer

- If the owner requires him to do so in the agreement, the hirer must inform the owner of any **changes in his location, including** his postal, residential and business addresses as per the agreement.
- Failure of hirer to comply means he may be **fined up to Shs. 2,000/=**.

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Location of hirer and goods... contd.

- **Location of goods**
- The owner of goods may also stipulate that the hirer shall not remove or permit the removal of the goods from Kenya without his written consent of the owner: s.10.
- Before he removes or allows the goods or part thereof to be removed from any premises for keeping at other premises, the hirer must notify the owner or his agent in writing

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Location of goods... contd.

- The hirer will be liable to a fine of up to **KShs. 10,000/=** and for **one year's imprisonment** if he contravenes this and, further, if the reason for removal was to deprive the owner of his ownership.
- NB: The court may, on the application of the hirer and after hearing any representations made by or on behalf of the owner, make an order approving the removal of the goods to some other place within Kenya.
- That place shall thereafter, for the purposes of the agreement, be substituted for the first-mentioned place: s. 11.

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RECOVERY OF POSSESSION

❖ Recovery of Possession by Suit

- Once **two-thirds** of the hire-purchase price has been paid or tendered, then any right to repossess the goods can only be exercised **through court action**
- If the owner institutes a suit to enforce a right to recover possession of the goods from the hirer and he proves that before the institution and after the right to recover accrued he had made a request in writing to surrender the goods, then the hirer's possession shall be deemed to be **adverse possession**: Section 14.

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Recovery of Possession by Suit... *contd.*

- S. 16(3)(b) allows the owner to **remove the goods if two or more installments are owing**. This is **not repossession** but merely an **action protecting the owner's interests**.
- S. 16(4) provides that at a hearing, a court can make the following orders:
 - Deliver of all the goods to the owner.
 - Delivery of a part of the goods to the owner
 - Condition that the hirer pays the unpaid balance in order to repossess the goods.

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Recovery of Possession by Suit... *contd.*

- Under s. 25, if the owner legally retakes the goods otherwise than by suit, there is a duty placed on him or her to **resell at the best possible price**.
- The hirer shall not be liable to the owner for **conversion** if he refuses to give up possession to the owner by reason only of such refusal: s. 26.

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LICENSING OF THE HIRE PURCHASE

- Any person who carries on a hire-purchase business may only do so under and in accordance with the terms of a current licence authorizing him to do so.
- The Minister shall appoint a public officer to be the licensing officer for the purposes of this Act.
- Such officer is currently known as Registrar of Hire-Purchase Agreements in the Office of the Attorney General.

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Licensing... *contd.*

- The Registrar may grant a licence without conditions or subject to such conditions as he may think fit, or refuse to grant a licence: s. 20(1).
- Every person carrying on hire purchase business must have an annual license failing which he is liable to a fine not exceeding ksh.20,000 or imprisonment not exceeding 1 year.
- The license must be displayed in a conspicuous place in the business premise.

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SERVICE OF NOTICES

- Section 32 states that notices to be served on either the owner or hirer should:
 - Be delivered to him personally
 - Delivered to a person over 16 years resident or employed at his place of residence or business.
 - Posting it to their last known residence or place of business.
- Section 32A allows the Minister in consultation with the Central Bank to determine matters to be taken into account in the computation of the **hire purchase price, installments, interest rates, penalties and forfeitures** that may be imposed on the hirer.

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Information

- A hirer can seek any information for example on the **outstanding balance, in writing and paying ksh.10.**
- The owner is to give the information within 14 days. If the owner defaults to supply the information within 30 days, he will be committing an offence and would be liable to a **fine not exceeding Ksh. 500/=**
- Under S.34, a person who gives any **false information in a proposal form or document** will be guilty of an offence and liable to a **fine not exceeding ksh.5,000 or 6 months imprisonment, or both.**

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TERMINATION

1. Exercise of hirer's option to determine by returning goods and **giving notice.**
 - If he takes this option, the hirer must **deliver the goods, meet depreciation costs and pay not less than ½ of the purchase price.**
2. Breach or repudiation by hirer;
3. Death of hirer;
4. Bankruptcy of hirer;
5. Distress or execution.

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COMPLETION

- The hirer may give notice in writing to the owner of his intention to complete the purchase of the goods and pay **to the owner on a specific day the net balance.**
- The hirer may exercise this option at any time during the continuance of the agreement or **within 28 days after the owner has repossessed the goods for whatever reason.**

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CONCLUSION

- › The two-thirds payment rule contained in section 15 reflects recognition of the dangers posed by aggressive door-to-door salesmen.
- › Firms should fully inform the hirers about the kind of transaction they are about to get into perhaps through proper adverts.
- › Finally it is quite obvious that with respect to its financial scope the Act now requires an urgent review. Kshs. 300,000/= is nowhere near what a small or medium trader requires today to start a useful or sustainable business.

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THAT SHOULD DO FOR NOW

THE END

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- › September, 2013

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