

## LEGAL ISSUES ARISING FROM FRAUD AND THEFT

### **1. Contracts**

Businesspeople regularly enter into oral and written contracts of many kinds. The key issue that they should bear in mind is the advisability of having written contracts that set out all the terms and conditions the parties have agreed upon. Comprehensive written contracts minimize the risk of disputes and, where disputes occur, enable the true intention of the parties to be known. To guard against fraud, it is important to establish the good faith and true identity of the other party.

Having written contracts is furthermore a requirement under the Sale of Goods Act (Cap 31) in contracts for the sale of goods worth more than Ksh 200/=, under the Law of Contract Act (Cap 23) and various property laws for contracts for sale of immovable property (land and buildings).

Another important area in contracts is asset acquisition. In the course of business, various movable and immovable assets will be acquired. This is an area in which a lot of people are defrauded, for instance by entering into transactions with people they believe to be genuine owners of property only to find later that they were fraudsters. Such fraudsters use fake title deeds and other ownership documents. Another instance is agreeing to buy an unregistered vehicle which then turns out to be unregistrable since taxes payable on importation were not fully paid. In most cases it is vital that the acquirer conduct thorough due diligence investigations before committing to purchase and making any payments. The most important aspects of these investigations will cover the title of the seller and the physical condition of the asset(s) being acquired. As previously noted, it is important and often mandatory to have a written contract that is comprehensive and correctly executed. For purchase of immovable property (buildings and/or land) written contracts are required by law. Such transactions will require the advice of a trusted and competent advocate for the overall goal of protecting the buyer's interests. Searches can be conducted for immovable property and also for chattels (movable property) that have registries e.g. motor vehicles.

In contracts, it is important to include certain key clauses. These are clauses on correct and accurate description of the parties, termination, and dispute resolution. Contracts should be correctly executed.

In entering into contracts, it is important to know the distinction between an incorporated company and a business name (sole proprietorship or partnership). A company has legal personality and is the entity conducting business and acquiring assets in its own name. On the other hand, business names are not distinct legal entities. They are representations of the person(s) who are registered as proprietors and who use the name to trade. Hence any dealings with sole proprietorships or partnerships are really dealings with the individuals and should be arranged as such. Contracts should be with the individuals indicating that they "trade as" a certain business name. Such contracts should therefore be signed by the individuals. On the other hand, contracts with companies should be

executed using a company seal, and the seal should be witnessed by two directors or a director and the company secretary.

## **2. Bad Debts**

Many businesses experience in varying degrees of severity the problem of debtors who do not settle their debts either at all or in time.

To enable recovery of receivables, either in legal proceedings or otherwise, businesses should keep appropriate and complete records of credit sales. The records that should be kept include: signed Local Purchase Orders that are verified as authentic, Pro Forma Invoices and Invoices that are signed and stamped by an authorized employee of the customer or the individual customer, and Delivery or Goods Received Notes that are signed and stamped by an authorized employee of the customer or the individual customer. Invoices and Delivery Notes should have a statement that indicates the credit period. They can also indicate that interest is payable on overdue accounts and set the rate at commercial levels (although where no interest rate is stipulated, a court judgment can award interest at court rates).

Other precautions against bad or overdue debts are: getting copies of appropriate identification documents from credit customers whether individuals or organizations, verifying customers' physical addresses, verifying that individuals who claim to represent organizations actually do so before selling to them. In establishing the customer's identity, it is important to know the distinction between an incorporated company and a business name (sole proprietorship or partnership) as highlighted in the previous section.

Sellers may also take the precaution of conducting a search on companies and businesses to accurately establish matters such as shareholders, proprietors, capital, e.t.c.

Where all these practices are strictly followed and precautions taken bad debts will not be a major problem and where accounts are overdue, it is relatively easy to bring successful legal proceedings against the debtor. In case of legal proceedings for recovery of an easily ascertained amount backed by proper documentation, the proceedings can be expedited by making a summary judgment application. Note that the greater portion of the legal and other costs of the legal proceedings to recover debts are recoverable from the debtor. Also, it is possible to make a complaint against any debtor who issues dishonored checks since this is a crime under the Penal Code. Obtaining credit by false pretences is also a crime under the Penal Code. Criminal proceedings can be brought by the police.

## **3. Fraudulent Claims by Employees for Illnesses or Injuries**

Employers are at risk of false, fraudulent or exaggerated claims against them by employees or imposters for accidents that never occurred or where injuries suffered are falsified or exaggerated. This risk can be minimized by taking certain measures. First employers should keep appropriate and thorough records of workplace incidents. These records include Employment Registers, Accident Registers and Casual Workers

Attendance and Payment Records. Daily employee attendance records can have a statement to the effect that no accident has occurred on the day of signature. These records can help disprove fraudulent claims. The second way to minimize the risk of false or exaggerated claims is to take injured employees to company assigned doctors to prepare. This will increase the probability of an accurate record of injuries sustained. This is easy for employers who take medical insurance for employees.

#### **4. Insurance Claims Following Theft/Burglary/Fire**

Businesses typically take insurance cover for theft of cash and inventory at the business premises. Such risks are covered by a fire/burglary policy. In the event of a fire, robbery or burglary, one's chances of compensation by the insurance company are improved by compliance with certain key terms of the insurance policy. It is important to read and understand the policy in order to be able to comply with its terms. There are some key provisions that should be noted in the policies. These are highlighted below:

##### **a) Claims Procedure**

Upon the occurrence of any event leading to loss covered by the policy, it is vital that the insured notify the insurer as soon as possible within the stipulated period. Otherwise, the insurer may reject the claim. Also important in the event of theft is a prompt report to the police, obtaining an abstract, and a list of the stolen or destroyed items.

Where practicable, the scene should be left intact so that when the police and the investigator sent by the insurer come to the premises, there is evidence of the occurrence.

##### **b) Average Clause**

Where the average value of the assets held by the insured exceeds the sum insured, the insured is taken to be his own insurer for the excess. In such circumstances, any loss suffered from an insured peril is prorated/apportioned/averaged between the insurer and the insured. For instance if the sum insured is Ksh 7,000,000/= while the average value of the assets is Ksh 10,000,000/=, and a loss of Ksh 1,000,000/= is sustained from an insured risk, payment is calculated as follows:

$$\frac{7,000,000 \times 1,000,000}{10,000,000} = \text{Ksh } 700,000/=$$

It is important therefore to adjust the sum insured and premiums paid based on actual value of assets held in the business.

##### **c) Complete and Accurate Records**

It is important to keep all records that will support a claim. These include purchase documents, inventory records, cash books, e.t.c.

## **5. Legal Recourse**

Where fraud is perpetrated and loss suffered due to the negligence of a service provider such a bank, it can be possible to bring legal proceedings against such a service provider for compensation.

The actions that lead to loss by fraud or theft may also be criminal offences and the victim can make a complaint with the police against the person or persons committing them. In relation to business, actions that are criminal offences include issuing a check in payment for goods or services in the knowledge that there aren't sufficient funds to cover the check or that the account is closed, forgery, obtaining credit by false pretences e.t.c.