



Where outbreak of COVID-19 frustrates the performance of a contract

By Geoffrey E. Odongo



A contract may be frustrated if an unforeseen event occurs after parties enter into the contract. A possible consequence of the outbreak of COVID-19 is that a party to a contract entered into prior to the outbreak may argue that the contract has been frustrated and that the party is discharged from further performance of obligations under the contract.

In order for a party to argue that a contract has been frustrated the contract should not contain a clause intended to deal with the unforeseen event or a force majeure clause event. In addition, the following circumstances must exist:

1. The contract must have become impossible to perform
2. The obligations under the contract must have been radically transformed from what was initially anticipated
3. The unforeseen event must not be caused by the conduct of either party to the contract

However, it is worth noting that frustration cannot be relied upon in the following instances:

- I. where a contract has a clause providing for the consequences of the supervening event or hardship event. An instance of this is where a contract has a hardship clause that provides for what will happen if the hardship event occurs;
- II. where an alternative method of performance is possible;
- III. where performance remains possible but has become more expensive; or
- IV. where a party has been let down by one of its suppliers.

Frustration if successfully pleaded by a party to the contract will immediately bring a contract to an end with both parties released from any further performance under the contract. Nonetheless, any money already paid by one party to another pursuant to the frustrated contract can be recovered where there has been a total failure of consideration.