E-commerce and Consumer Rights: Applicability of Consumer Protection Laws in Online Transactions in East Africa. *

Abstract

The huge platform that e-commerce has provided East African traders for business is noteworthy. Not only has the traders benefitted from transgressing territorial boundaries for the sale of their products, the consumer of goods and services have been provided with multiples choices of products and quality goods at competitive prices. Internet has thus revolutionized the way Kenyans and the rest of the world buy and sell their products.

In East Africa e-commerce is still in the formative stages and consumers are opening up to the idea of online shopping and relatively few fully fledged online companies are already in operation in these countries. The frequent setback with trade conducted with the use of internet is data protection. Protection of data that is made available online by the consumer is misused and this is one of the major concerns that have emerged in the recent times.

Consumers have various rights that are granted to them by the provisions of our Consumer protection laws. However these laws are ambiguous as to whether such provisions would be applicable to online transactions. Generally the terms of data protection are dependent on the contract that the parties have entered into. The disclosure and non-disclosure of the same would thus depend on that contractual relationship. Another one of the major concerns of a person dealing online is the jurisdiction of the cases in case of disputes. This paper seeks to establish the challenges and benefits of online trading within the East Africa Community e-commerce sector with Kenya as a case study. Further it also seeks to establish the performance of existing online business as well as establish the relationship between e-commerce models and their performance. The paper recommends that in order to improve customer trust in online businesses, the business owners need to invest in the requisite technology and system to secure their customers and their businesses as well as create consumer awareness to negate the poor perception of the sector by the consumers.

On the other hand, the government needs to invest in the enactment of laws and regulatory infrastructure that supports online purchasing. Most importantly the consumers have to be more willing to purchase products and services online. Finally, the governments in East Africa have to look into the policies and invest in system that will improve the current internet penetration rates across the East Africa members’ states if the e-commerce is going to thrive.

Keywords—e-commerce; Consumer right; Online transaction.

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I. INTRODUCTION

E-commerce though not specifically defined in our consumer protection and welfare laws,² is in general what others will call e-business, internet or online shopping. Recently Kenya has witnessed increase in the number of online shopping portals like Olx Kenya, Cheki, Rupu, Pigiame, and Jumia among other, where the physical presence of the customer in the supplier’s store has been dispensed with. The traditional physical presence of a customer to order for the goods or services has been substituted with an online offer and acceptance. Are these transactions within the purview of our laws though not expressly stated? If not are they applicable by implication to guarantee consumer rights generally? What protection does the customer information available online has? Finally in case of a dispute where both the buyer and seller are in different countries which law applies, is it the customer’s residence law or the seller residence law. These challenges on online trading will be the focus of this research paper and a recommendation on enactment of laws that supports e-commerce will be proposed not forgetting investment in modern technology viable to online business.

II. CONSUMER PROTECTION ACT³

Consumers have various rights that are granted to them by the provisions of our Consumer protection laws.⁴ The Kenyan Consumer Protection Act⁵ is the fundamental and principal Act that lay down and guarantees rights to consumers. In John kinyua Munyaka & 11 others vs. The county government of kiambu and 3 others,⁶ for example the court noted that the health and safety of consumers was paramount. Further regardless of whether the retailers were pursuing to enforce their own rights or whether they were petitioning on behalf of their clientele the regulation of drinking hours cannot, by any stretch of imagination, be construed to interfere with consumer rights.

Although the Act does not mention online transaction, the interpretation section defines ‘internet agreement’ as consumer agreement formed by text-based internet communications. Further sections 31, 32 and 33 on disclosure of information on internet agreement, availing of a copy of the agreement to a consumer and circumstances for cancellation of an internet agreement prescribes the basic requirement for an online transaction in Kenya. However the Consumer Protection Act provides a narrower picture. The challenges facing e-commerce such as misuse of data made available by online transaction and the problem of jurisdiction in case of disputes are not covered by this Act bringing more ambiguity and confusion in addressing the same challenges. In most online shopping portals the terms are already fixed with only two options that is ‘I Agree’ or ‘I Disagree’ icon. This leaves the customer with no other option, except to accept the terms of the contract if the customer wants to move forward with the transaction. The negotiation is lacking, section 31 of the Consumer Protection Act provides that before a customer enters into an internet agreement, the supplier shall disclose the prescribed information to the consumer with an opportunity to accept or decline or correct errors before entering into the agreement. The section brings about negotiation and standard contract with the two icons “I Agree” or “I Disagree” would be cancelled since the supplier did not

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³ Act No. 46 of 2012.
⁵ Supra.
⁶ Petition No 3 of 2014.
provide the customer with an opportunity to accept or decline the agreement or to correct the errors immediately before entering into it.\(^7\)

III. **KENYA INFORMATION AND COMMUNICATION ACT 2009** \(^8\)

Apart from the principal law for consumer protection, many other laws cover online transaction. The Kenya Information and Communication Act 2009 is another functional and comprehensive legislation which provides a legal framework for e-commerce.\(^9\) It essentially covers commercial transaction, in specific between the government, its agencies and ordinary citizens. The transactions are focused towards e-governance and are aimed at implementing measures for authentication of the electronic records by use of digital signatures for issuing or granting of any licence, permit, sanctions or approval.\(^10\) The Kenya Information and Communication Act is an attempt by the government to digitalize its services by making every piece of information available online and further ensuring that such transactions are secured.\(^11\) It further creates offences that protect e-commerce transactions.\(^12\) The most significant characteristics of this Act, is that it provides legal recognition to electronic records.\(^13\) The Act reinforces the Evidence Act on admissibility of electronic records.\(^14\) This legal recognition forms the foundation of all e-commerce undertaken by customers and effective enforcement of all the rights of the customer, if ignored and infringed. The recognition does not cover all the aspects of e-commerce with respect to consumer welfare. It covers primary commercial transactions between the public and government in effective service delivery. It also provides an avenue for the Minister responsible for Information to prescribe regulations providing for the manner and format in which such electronic records shall be filled, created or used.\(^15\) An ordinary Kenyan does not necessarily enter into electronic contracts but he impliedly uses electronic commerce for online shopping, online banking and money transfer activities. No specific provision for the same has been laid down under the Act even though the preamble to the Act provides that the Act facilitate the development of electronic commerce.\(^16\)

IV. **LAW OF CONTRACT**

Although the Law of Contract Act,\(^17\) is silent on electronic contracts in Kenya, the Consumer Protection Act and Kenya Information and Communication Act provides legal recognition to the concept of electronic contracts. The Kenya Information and Communication (Amendment) Act 2009 introduced section 83J which affords validity to contracts formed through electronic means. Section 83J states that:

_In the context of contract formation, unless otherwise agreed by the parties, an offer and acceptance of an offer may be expressed by means of electronic messages, thus where an electronic message is used in the formation of a contract, the contract shall not be denied validity or enforceability solely on the ground that an electronic message was used for the purpose._

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\(^7\) Section 33(1)(b) of Consumer Protection 2012.

\(^8\) Chapter 411A Laws of Kenya.

\(^9\) See preamble to the Kenya Information and Communication Act 2009.

\(^10\) Section 83S of the Kenya Information Communication Act. 2009

\(^11\) Section 83N. _Ibid._

\(^12\) Sections 83U, 83V, 83W, 83X, 83Y, 83Z, 84A, 84B and 84C. _Ibid_.

\(^13\) Section 83 G. _Ibid_.

\(^14\) Section 106A-106i of the Evidence Act Cap 80 Laws of Kenya.

\(^15\) Section 83S _ibid_.

\(^16\) _Supra_ Note 7.

\(^17\) Cap 23 Laws of Kenya.
The amendment has thus brought out validity even to e-contracts but fails to lay down the method for the implementation of the fundamental principles for formation of a valid contract like acceptance, revocation etc. The validity and enforceability granted to e contracts, is a step towards ensuring that the rights of consumers who carry e-commerce are protected. Though e-commerce concept is valid, in practice it is difficult to ensure that the essentials of a valid contract are complied with. For example it is difficult to distinguish between a person competent to contract or otherwise when transacting online. This often results in minors, lunatics and other incompetent people entering into contracts. As was held in *Halima Abdinoor Hasssan & Others v. Corporate Insurance Company Limited [2015] e KLR*, the parties to a contract of insurance or any other contract must have legal capacity to enter into a binding contract. A contract with a minor or lunatic is void. Such contracts would still be void online.

Another challenge on e contracts is its admissibility in a court of law. Section 106 B of the Evidence Act provides for admissibility of electronic records. It states that any information contained in an electronic record which is printed on paper, stored recorded or copied in optical or electro-magnetic media produced by a computer shall be deemed to be also a document and shall be admissible in any proceedings, without further proof or production of the original as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible. Hence, an e contract can thus be admissible as evidence and such a positive step ensures that the contracts if entered by a consumer online for provision of a particular service or good if breached can be redressed. In the case of *Republic v. Barasa Wayu Matuguda [2011] e KLR*, the court held that: “...any information stored in a computer which is then printed or copied shall be treated just like documentary evidence and will be admissible as evidence without the production of the original.”

However section 106B also provides that such electronic evidence will only be admissible if the conditions laid out in that provision are satisfied. In *Richard Nyagaka Tongol vs. Independent Electoral & Boundaries Commission & 2 Others [2003] e KLR*. Referring to the case of *Paul Gitenyi Mochorwa vs. Timothy Moset E. Bosire*, the judge held: “Section 106 A-106 H of the Evidence Act are statutory safeguards for the integrity of documentary evidence in relation to the production of electronic records.” Section 106 has been amended to include admissibility of computer outputs in the media, paper, optical or magnetic form. Sections 106F, 106 G, 106H and 106 I of the Evidence Act raises a presumption as regards electronic agreements, electronic records, digital signatures certificates and electronic messages. Thus the amendment and new introductions brought about in the ancillary Act of parliament with respect to electronic records guarantee that consumer rights are being protected by legally recognizing the contents and further making them admissible as evidence in a court of law. The irony however is that even with the application of such laws; consumer rights in e-commerce are still infringed.

Protection of data that is made available online by the consumers is misused and this is one of the major concerns that have emerged in the recent times. Generally the terms of data protection are dependent on the contract that the parties have entered into. The disclosure and non-disclosure of the same would be dependent on the contractual relationship between the parties. If any person who knowingly does an act which causes an unauthorized modification of data held in any computer system shall on conviction be liable to a fine not

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18 Cap 80 Laws of Kenya.
19 Kisii Election Petition No. 8 of 2003.
exceeding five hundred thousand shillings or imprisonment for a term not exceeding three years or to both.\textsuperscript{20} Nonetheless, there is no express legislation that contains provisions for data protection for online transactions. The Kenya Information and Communication Act only cover some aspect. For example under section 83Z any person who knowingly discloses any password, access code or any other means of gaining access to any program or data held in any computer for any wrongful gain, unlawful purpose or knowingly that the disclosure is likely to cause prejudice to any person shall commit an offence and on conviction be liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.\textsuperscript{21} These are the only provisions that act as a legal framework for data protection in the country. Apart from the legal safeguards in place, it is essential for the entity collecting information to have a privacy policy that offers data protection. Unauthorized access to personal information available online and any misuse of such personal information should be punished.

Another one of the major concerns of a person dealing online is the jurisdiction of the cases in case of disputes. Though it is a well-known fact that consumers can approach a resident magistrate court depending on their pecuniary limits, the question as to which of these courts has jurisdiction is among the areas of ambiguity.

In general civil suits are instituted following the provision of section 15 of the Civil Procedure Act,\textsuperscript{22} which states that every suits shall be instituted in a court within the local limits of whose jurisdiction the defendant at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain or the cause of action wholly or in part arises.\textsuperscript{23} Whether this law would be applicable to online transaction is where the confusion lies.

Further the internet can be accessed from anywhere in the country and the difficulty arises where the online good or service provider is based in another country with regard to jurisdiction. In such cases which law will apply, is it the supplier residence law or consumer residence law. This is an area that has not been fully addressed. Section 3 of the Consumer Protection Act provides that when interpreting or applying the Act a person, court or the Advisory Committee may consider appropriate foreign and international law. What is ‘appropriate law’ in the eyes of the court? What are the tests for such? This is even more ambiguous. Further the Penal Code,\textsuperscript{24} under section 6 states that when act or omission which if wholly done within the jurisdiction of the court would be an offence against an Act of Parliament is done partly within and partly beyond the

\begin{itemize}
\item \textsuperscript{20} Section 83X \textit{ibid.}
\item \textsuperscript{21} Section 83Z (a),(b) and (c) \textit{ibid.}
\item \textsuperscript{22} Cap 21 Laws of Kenya.
\item \textsuperscript{23} Kimani Waweru \& 28 others v Law Society of Kenya \& 12 others [2014] eKLR. Where the court held that in determining the place for trial with respect to the any proceedings where there is an application for transfer, the court must therefore take the convenience of the parties and their witnesses as a primary consideration. Indeed, one of the principles for the determination of the place of suing in an application for the transfer of cases pending before the subordinate courts is the place where the defendant resides or carries on business.
\item \textsuperscript{24} Cap 63 Laws of Kenya.
\end{itemize}
jurisdiction of the shall be tried and punished under the Act. Can this provision be used to remedy the ambiguity in our Consumer Law?

The advancement of technology and availability of internet in Kenya offers a platform for a majority of bank services online. Apart from the electronic and card payment, mobile banking in Kenya is one of other constructive facilities provided by banks for fund transfer. Safeguard needs to be taken in this area as well. In *Benard Murage v Fineserve Africa Limited & 3 others*, the risk of misuse of customer information in the use of the Thin Sim Technology was emphasized and the customers’ privacy needs to be safeguarded.

Although the laws described above provide protection mechanism for online transactions, consumer rights can still be violated in cases where the online shopping portal itself is a fraud.

Section 84B of Kenya Information and Communication Act provides that any person who by fraud causes loss of property to another person by an input alteration, deletion or suppression of data or any other interference with the functioning of a computer system with the intent to procure for himself or another person an advantage commits an offence and upon conviction is liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.

Safety measures undertaken by the customer for protecting their rights would include for example paying cash on delivery. Their bank information in this regard is protected from misuse when made available online.

V. CONCLUSION

Though there exist various Act of Parliament guaranteeing consumer rights, the Acts are insufficient and or lacking in protecting e-commerce. The government needs to invest in the enactment of laws and regulatory infrastructure that supports online purchasing. Most importantly the consumers have to be more willing to purchase products and services online. Finally, the governments in East Africa have to look into the policies and invest in system that will improve the current internet penetration rates across the East Africa members’ states if the e-commerce is going to thrive.

References.

Consumer Protection Act No. 46 of 2012.


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25 *Supra* note 1.
26 High Court, Nairobi, Petition 503 of 2014[2015] e KLR
27 *Ibid*. 98

The Evidence Act Cap 80 Laws of Kenya.

The Kenya Information and Communication Act 2009.