

LEGAL CHALLENGES TO THE FORMATION AND FORMALITIES OF ONLINE CONTRACTS IN KENYA

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Abstract

This study looks into the formation as well as formalities of contracts over the internet in Kenya. In particular, it explores the challenges that the internet poses as to the formation and, where applicable, formalities of online contracts in Kenya.

As to formation, this study focuses on the essential elements of invitation to treat, offer and acceptance in contracting online. Regarding formalities of contract, it assesses the requirement for writing and signature in certain transactions that may be concluded online.

The study also seeks to establish how Kenyan law addresses the legal challenges arising from contracting online. In doing so, a comparison is done with other jurisdictions, in particular, the United Nations (UN), United Kingdom (UK), United States of America (USA) and South Africa (SA).

In conclusion, this study gives a summary of the findings and makes recommendations on the way forward.

Keywords: Online Contracts, Internet Contracts, Electronic Contracts, Electronic Signatures.

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1.0 Introduction

The starting point regarding the law applicable to contracts in Kenya is the Law of Contracts Act.¹ According to the Act, English Common Law of Contract, as modified by doctrines of Equity and Acts of Parliament of the United Kingdom, is applicable in Kenya.² Therefore, to know where to find the law on formation and formalities of contracts, applicable in Kenya, one has to look at the English Common Law, which is found in judicial decisions.³

In order to form a contract, parties must first reach an agreement.⁴ The agreement is reached when one party (offeror) gives an offer that is accepted by the party receiving the offer (offeree). In addition to the agreement, there must be intention to create legal relations, and consideration. In short, for there to be a contract, the essential elements of offer, acceptance, capacity, intention to create legal intentions, and consideration, need to be there. However, regarding online contracting, and as this study discusses in the next heading, it is the elements of offer, as distinguished from invitation to treat, and acceptance, that are affected by online contracting, and which shall be interrogated in this paper.

On formalities, the general rule is that no formality is required to contract.⁵ Hence, contracts can be made informally, in that, no writing or other form is required.⁶ However, there are statutory exceptions that require that certain contracts must be made or evidenced in writing and even signed, for the same to be valid.⁷ Examples are contracts for disposition of interests in land and contracts of guarantee, which must be made in writing and signed by the parties.⁸

¹ Cap 23, Laws of Kenya.

² Ibid, section 2.

³ Common Law is the body of law deriving from judicial decisions, rather than statutes or constitutions (BA Garner, *Black's Law Dictionary*' (8th edition Thomson West) 293.

⁴ HG Beale *'Chitty on Contracts, General Principles'* (13th edition, Volume 1, Sweet & Maxwell) 143.

⁵ McKendrick, *'Contract Law, Text Cases and Materials'* (4th edition, OUP 2010) 99.

⁶ Beale (n 4) 379.

⁷ McKendrick (n 5) 27.

⁸ Cap 23 (n 1), section 3(3).

Further, the Land Registration Act⁹ prescribes that every instrument effecting any disposition of land shall be executed by each party consenting to it.¹⁰ The execution is by way of appending a person's signature or affixing the thumbprint or other mark as evidence of personal acceptance of that instrument.¹¹ Disposition is defined to include an agreement to sell land, whereas instrument includes any writing that affects legal or equitable rights.¹² This means that a land sale agreement is an instrument that is used for disposition of land. The land sale agreement must, therefore, be signed by the parties consenting to the sale. It goes without saying that only written agreements can be signed.

“Writing” and expressions referring to writing are defined to include printing, photography, lithography, typewriting and any other modes of representing or reproducing words in visible form.¹³ On the other hand, to “sign”, in relation to a contract, is defined to include the making of one's mark or writing one's name or initials on the instrument as an indication that one intends to bind himself to the contents of the instrument.¹⁴ As this paper discusses in heading 2, the challenge arises as to how to satisfy this formalities while contracting online.

2.0 Challenges to the Formation and Formalities of Online Contracts in Kenya

2.1.0 Formation of Online Contracts

As observed by Marco van der Merwe, online offer and acceptance is not a simple matter by any means.¹⁵ The reasons are because the rules pertaining to offer and acceptance for defined contracts are complicated and the current rules originated at a time when modern forms of contracting were a far-off glimmer on the horizon. Merwe is of the view that these rules have to be

⁹ No 3 of 2012.

¹⁰ Ibid, section 44(1).

¹¹ Ibid, section 44(2).

¹² Ibid, section 2.

¹³ Interpretation and General Provisions Act (Cap 2, Laws of Kenya), Section 3(1).

¹⁴ Section 3(6) (n 1).

¹⁵ Marco van der Merwe, *Internet Contracts* 'abvalable at <http://www.legalnet.co.za/cyber-law/cybertext/chapter6.htm>, accessed on 05 January 2016.

adapted to accommodate newer forms of communication which include internet communications.

It is important to ascertain when an offer, as distinguished from an invitation to treat, has been made in respect of online contracts. This is because, as stated, an offer is made with the intention, actual or apparent, that it is to become binding as soon as it is accepted by the person to whom it is addressed.¹⁶ On the other hand, an invitation to treat is not made with the intention that it shall be binding if the addressee assents to its terms.¹⁷ It is, therefore, necessary to distinguish online offers from invitations to treat.

Usually, the display of goods in a shop window, would amount to an invitation to treat, as opposed to an offer.¹⁸ This is because the customer would have to pick the goods and head to the pay counter and make an offer to buy the same. The shop will accept his or her offer whereupon the customer will pay for the goods. There can, however, be uncertainty over whether the display of goods over an internet website constitutes an invitation to treat or an offer. This is more so in a situation where the seller has limited stock of goods to dispatch or where the seller is prepared to sell to a limited class of persons.

It is also necessary to differentiate between an offer and acceptance for online contracts. This is because an offer that has not been accepted cannot give rise to a binding contract.¹⁹ So, what does the act of clicking on the 'OK' icon on a website amount to?²⁰ Does it constitute acceptance of an offer to provide a service or a customer's offer to contract? Should it be taken as an offer, then no contract will have been formed. However, should the same be taken as an acceptance, then assuming that there was consideration and intention to create legal relations, then a binding contract will be formed.

While there have been no reported cases in Kenya, there have been incidences of display of wrong prices on the UK's Amazon.co.uk website. Amazon.co.uk was once shut down over lunchtime following a rush of orders for pocket computers selling at £ 7.32, instead of the usual price of £ 192.²¹

¹⁶ Beale (n 4)148.

¹⁷ Ibid, 144.

¹⁸ GHJ Smith, '*Internet Law and Regulation*' (4th edition, Sweet and Maxwell, 2007) 811.

¹⁹ A Grubb, '*The Law of Contract*' (2nd edition Lexis Nexis Butterworths, 2003) 415.

²⁰ Lovells, 'E-Finance: Law and Regulation: Contracting on-line' (Lexis Nexis).

²¹ Haggart G, '“Mistakes, I've made a few...”: Another e-tailer gaff', LNB News of 21 March 2003 41 (Lexis Nexis).

In this case, customers received immediate and automatic confirmation of their “purchases” by e-mail, and soon thereafter, the site was pulled down and the product withdrawn. There has been no consensus as to whether or not binding contracts arose in that context. This article takes the view that once the confirmation e-mail was received, there was acceptance of the customer’s offer, and as such Amazon.co.uk was bound to supply the products at the displayed price, no matter how unrealistically low the prices were.

Amazon’s position was that its online Terms and Conditions state that there is no legal contract to sell to customers until Amazon sends them an e-mail confirmation that the item has been dispatched. No claim was, however, brought against Amazon and, as such, the court’s view in such a situation is still not ascertainable. Were a similar situation to arise in Kenya, and in particular where there are no Terms and Conditions similar to that of Amazon, what would be the legal position?

Knowing the time that the contract was concluded is of paramount importance because this is when contractual obligations and rights are deemed to arise. Therefore, what time is an online contract concluded? Is it the time of receipt or of sending the acceptance? When is an online order deemed to have been placed?²² Is it when it is received or when it is accepted? Is it when it enters a computer network or when it is drawn to the attention of a particular person designated as the recipient? What if the seller is on holiday and the email orders were not checked? How about if there is insufficient stock and the customer was not warned about delays?

There are views that because of the borderless nature of the internet, more often than not, online contracts are international transactions.²³ This view is not accurate given that there are numerous transactions that are concluded over the internet within the domestic borders. Nonetheless, the place of contract formation is of interest to international transactions. In the absence of express provisions by the parties or applicable international convention, how is the place of formation of the contract determined?

²² Jacobson Consulting Pty Ltd, ‘Online Contracts: How to Make Ecommerce Work’, available at www.jacobsonconsulting.com.au, accessed on 05 January, 2017.

²³ *Ibid.*

Further, regarding the place of contract formation, the international element is complicated in cases involving corporate transactions where the computer of the offering company that first receives a reply may be located in one jurisdiction. The reply may then be transmitted automatically to a subsidiary or holding company located in a different jurisdiction. Therefore, the question that arises is, is the contract formed where the acceptance is sent, where it is received at the place of re-transmittance, where it is received at its last destination, or where it reaches the mind of the offeror?

In electronic contracting, the so called ‘shrink wrap’, ‘click wrap’ and ‘browse wrap’ contracts have raised fundamental questions about assent or acceptance.²⁴ Firstly, in a ‘shrink wrap’ contract, for example, when purchasing off-the-shelf software, when the purchased product is received, it comes with additional terms and conditions in the packaging or in the accompanying documentation. Secondly, in a ‘click-wrap’, the purchaser is required to click “I agree” before the transaction will continue, the installation will proceed or the user will gain access to the web site. Thirdly, in the ‘browse wrap’ contract, the user will visit the pages of a website where terms and conditions are posted that purport to bind anyone who uses the website or its services. But what types of conduct constitute assent or acceptance to terms and conditions. In particular reference to ‘shrink wrap’ contracts, how should one treat the terms that are not proposed or disclosed until after the user has already agreed to go forward with the transaction and has tendered the required consideration?

As stated, it is a general rule that for acceptance to be valid, it must be communicated to the offeror, unless the need for communication is waived by the offeror.²⁵ Thus, communication is key to acceptance of an offer. As such, when is acceptance deemed to have been effectively communicated over the internet? Should there be an application of the rule regarding instantaneous communication, so that receipt or deemed receipt by the offeror is key? On the other hand, should the “postal rule” be applied, so that the dispatch of the accepting e-mail or response form is effective?

²⁴ Amelia H. Boss, ‘Electronic Contracting: Legal Problem or Legal Solution?’ available at http://www.unescap.org/tid/publication/tipub2348_part2iv.pdf, accessed on 05 January, 2017.

²⁵ McKendrick (n 5) 99.

2.2.0 Formalities of Online Contracts

The general rule is that no formality is required to contract.²⁶ There are, however, statutory exceptions that require that certain contracts must be made or evidenced in writing and even signed, for the same to be valid.

‘Writing’ has been defined to include printing, photography, lithography, typewriting and any other modes of representing or reproducing words in visible form.²⁷ There is no doubt that in traditional paper-based contracting, ‘writing’ can easily be carried out on a piece of paper. The issue that arises is whether online contracts can amount to written contracts. Would it be written contracts because the definition of ‘writing’ includes any other modes of or representing words in a visible form?

In traditional contracting, a party will simply indicate his or her assent to the terms of the contract by affixing his or her signature to a piece of paper. As defined ‘signature’ entails the making of one’s mark or writing one’s name or initial on the instrument as an indication that one intends to bind himself or herself to the contents of the instrument.²⁸

How then would the requirement for signature be fulfilled in respect of online contracts? Would it be sufficient that someone made a mark or typed out his or her name or initials at the bottom of the e-mail or contract? But, this would not be as unique as a handwritten signature that seeks to distinguish the signature as that of the person signing. Besides, the making of a mark or typing out of one’s name or initials in online contracts can easily be challenged as having been forged. This is so because, unlike where a pen is used to create one’s signature on a paper, there is nothing unique or authentic about just typing a mark or initials on online documents- it can be easily done by an impostor. Therefore, the courts would not place a lot of weight on this kind of online signing as compared with the traditional paper-based signature that is usually unique.

34. ²⁶ S Fafinski & E Finch, ‘*Contract Law*’ (2nd edition Pearson and Company Limited, 2010)

²⁷ Cap 2 (n13), section 3(1).

²⁸ Cap 23 (n1), section 3(6).

3.0 The Law on Formation and Formalities of Online Contracts in Kenya

The relevant legislations regarding electronic transactions in Kenya are the Kenya Information and Communications Act (KICA)²⁹ as well the Evidence Act.³⁰ The preamble to the KICA provides that one of the overall objectives of the Act is to facilitate the development of electronic commerce, which in this case is carried out by online contracting.³¹ Under KICA, the Communications Authority of Kenya (CAK) is bestowed with responsibility of promoting electronic transactions.

KICA states that the functions of CAK in relation to electronic transactions are to: (a) ensure use of reliable electronic records with a view of facilitating electronic transactions; (b) eliminate barriers to electronic commerce, for example, those relating to uncertainties over writing and signature requirements, with a view of facilitating electronic commerce; (c) promote confidence in the public about the integrity and reliability of electronic records and transactions; (d) foster the development of electronic commerce through the use of electronic signatures; (e) promote efficient public sector services by use of reliable electronic records; and (f) develop frameworks for minimisation of forged electronic records and fraud in electronic commerce and transactions.³²

Part VII of the Evidence Act addresses the issue of admissibility and proof of electronic records in judicial proceedings. According to the Act, electronic records are admissible in evidence, as long certain conditions are fulfilled.³³

²⁹ Cap 411 A, Laws of Kenya.

³⁰ Cap 80, Laws of Kenya.

³¹ The Preamble reads:

An Act of Parliament to provide for the establishment of the Communications Commission of Kenya, to facilitate the development of the information and communications sector (including broadcasting, multimedia, telecommunications and postal services) and electronic **commerce** to provide for the transfer of the functions, powers, assets and liabilities of the Kenya Posts and Telecommunication Corporation to the Commission, the Telkom Kenya Limited and the Postal Corporation of Kenya, and for connected purposes (emphasis mine).

Section 2 of KICA defines 'electronic' to mean relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

³² Cap 411A (n 29), section 83C.

³³ Cap 80 (n 30), section 106 B.

It is, therefore, apparent that KICA and Evidence Act have the objective of promoting electronic commerce. This study shall, however, examine if this objective has been adequately provided for in the Acts.

3.1.0 Formation of Online Contracts

Regarding formation and validity of contracts, KICA states that unless otherwise provided by the parties, offer and acceptance may be expressed by means of electronic messages.³⁴ Further, that contract shall not be denied validity and enforceability solely on the ground that it was created by use of electronic message(s).

Yes, KICA does recognise electronic offers and acceptance. That is not a big deal though. The big deal is with the manner in which the internet can complicate the applicability of the traditional rules on contract formation.

Firstly, KICA does not make an attempt to distinguish between an offer and invitation to treat, when it comes to display of goods on a website. It could be said that the same has been left to interpretation using the usual contractual rules. However, the traditional rules of interpretation of contracts cannot be suitable for online shopping. This is because, in the physical world, a customer picks the goods displayed on the shop window and heads to the counter to make an offer to buy the goods. If the shopkeeper accepts his or her offer, he or she will accept the customer's payment in exchange for the goods.

On the other hand, in online shopping, there is no opportunity to appear before the shopkeeper. On clicking the 'OK' icon and paying for the goods by electronic means, the deal is as good as done. What happens if, because websites can be viewed by many people at the same time, there are numerous 'purchases' by customers, upon which there is no sufficient stock? These are matters that should be legislated on. Thus, given the peculiar nature of online shopping, there should be a substantive legislation to the effect that display of goods on a website amounts to an invitation to treat so that when the customer clicks the 'OK' icon, he or she will be making an offer. Should there be sufficient stock, the seller will accept the offer by dispatching or alerting the customer to collect the goods. In cases of insufficient stock, the seller will not be liable for matters that are beyond his or her control, but should then refund

³⁴ Cap 411A (n 29), section 83 J.

the payments or restock his or her shop at the discretion of the customer who should otherwise be refunded for any payments made.

Secondly, KICA does not specify the place of contract formation. This is key, particularly regarding the jurisdiction that governs the contract, where no express specification is made. Is it at the place of sending or receipt of acceptance? Since electronic communications are instantaneous, and that receipt is key to communication of acceptance, it should be substantively provided that it is the place of receipt that is the place of contract formation. There is no need of leaving it to judicial interpretation when there is no harm in specifying.

KICA also attempts to address the issue of communication of offer or acceptance in electronic transactions. It states that, unless otherwise agreed, acknowledgement of receipt may be given by any communication, automated or otherwise, by the addressee; or by any conduct of the addressee sufficient to indicate to the originator that the electronic communication has been received.³⁵

Further, where stipulated by the originator that electronic record shall only be binding on receipt of acknowledgement of such electronic record, then the electronic record shall be deemed to have never been sent by the originator, unless such acknowledgment has been received.³⁶ Where not stipulated, and no acknowledgment has been received, the originator may give notice to the addressee stating that no acknowledgment has been received and specifying a reasonable time for receipt of the acknowledgment, non-compliance of which entitles him or her to treat the electronic record as having not been sent.³⁷

It is difficult to relate the above provision to a communication of acceptance in a contract situation. The provision is couched in a manner that is not specific to contract formation, but general electronic communication. Nonetheless, it appears, KICA does not prescribe the rule that is applicable to electronic communication in contract formation. It neither states that the rule regarding instantaneous communication nor postal rule is applicable. It leaves it open to freedom of contract, so that a party may choose to stipulate that an electronic record is only binding on him or her upon receipt. The party may as well not stipulate as such, but then is at liberty to notify the other party that he

³⁵ Ibid, section 83M (1).

³⁶ Ibid, section 83 M (2).

³⁷ Ibid, section 83 M (3).

must receive the electronic communication within a reasonable time if he or she is to be bound. There is need for certainty. Because electronic communications are instantaneous, the rule regarding instantaneous communication should be applicable so that it is only upon receipt of the communication that the recipient is bound. It would even be appropriate if a provision in this regard is made with specific reference to electronic contracting and even endorsed in the Law of Contract Act.

The legal issues raised by the so called 'shrink wrap' contracts have not been addressed by KICA. As stated, in a 'shrink wrap' contract, for example, when purchasing off-the-shelf software, when the purchased product is received, it comes with additional terms and conditions in the packaging or in the accompanying documentation.³⁸ Should there be legal recognition of terms that are not proposed or disclosed until after the user has already agreed to go forward with the transaction and has tendered the required consideration? Terms that one has not been given an opportunity to scrutinise before making a purchase should not be legally binding on the customer. Thus, an online purchaser should be able to read the terms of the transaction before proceeding to do the purchase. These terms should be clearly stipulated to avoid uncertainty.

3.2.0 Formalities in Online Contracts

While giving powers to the Cabinet Secretary to prescribe otherwise, KICA does not apply to any rule or law that requires writing or signatures in: (a) the making of a will; (b) negotiable instruments; and (c) title documents. So far, no regulations to the contrary have been made by the Cabinet Secretary, and as such electronic transacting is not legally recognised for the mentioned items. This appears to go against the objective of the KICA, that is, promotion of electronic commerce by eliminating barriers resulting from requirements for writing and signature.³⁹ In any case, about seven years after the enactment of the legislation, the Cabinet Secretary ought to have made appropriate regulations.⁴⁰

³⁸ Boss (n 24).

³⁹ Cap 411A (n 29), section 83 C (b).

⁴⁰ The amendment to KICA was made in 2009 vide Kenya Communications (Amendment) Act, No 1 of 2009.

Nonetheless, KICA goes on to stipulate that where any law provides that information or any matter shall be in writing, then, such requirement shall be deemed to have been satisfied if such information or matter is: (a) made available in electronic form; and (b) accessible for use later.⁴¹ On the face of it, any legal requirement for writing shall be satisfied if a document is produced in an electronic form as in the case of online contracts. This may also boost the argument that creation of documents online amounts to representations of words in visible form and, thus, meets the definition of what ‘writing’ is.⁴²

However, as stated, KICA has ruled out the application of electronic writing or signature in respect of wills, negotiable instruments and documents of title, thus, diminishing the importance of recognition that electronic representation of words amount to writing. Further, ‘writing’ usually goes along with the requirement for signing. So, even if electronic contracts are recognised as being written contracts, how will the accompanying requirement for ‘signature’ be satisfied?

KICA allows the use of advanced electronic signature to be affixed in a manner prescribed by the Cabinet Secretary, upon which any legal requirement for authentication using a signature shall be deemed to have been satisfied.⁴³ According to KICA, an advanced electronic signature means an electronic signature which: (a) is linked to the signatory in a unique way; (b) can identify the signatory; (c) is created by means that the signatory can maintain under his sole control; and (d) is linked to the data to which it relates and in such a way that any change to the data is detectable.⁴⁴

Similarly, the exemption of wills, negotiable instruments and documents of title to the applicability of the Act, negates the attempt by KICA to satisfy any legal requirement for ‘signature’ by use of advanced electronic signature in online contracts. Further, as stated, the advanced electronic signature should be affixed in the manner prescribed by the Cabinet Secretary.⁴⁵ The Minister ought to make regulations prescribing the manner of affixing the advanced electronic signature. This has not happened so far, rendering this provision unimplementable. But why was this left to the Cabinet Secretary? The manner

⁴¹ Cap 411A (n 29), section 83 G.

⁴² Cap 2 (n 13).

⁴³ Cap 411A (n29), Section 83O(1) and 83P.

⁴⁴ Ibid, section 2.

⁴⁵ Ibid, section 83P.

of affixing the signature is rather obvious. The same is affixed after the writing in a manner that indicates one's intention to be bound.

There also seems to be some unnecessary duplication that creates some variation in what amounts to an advanced electronic signature. Whereas section 2 of KICA defines what an advanced electronic signature is, section 83(0) prescribes the requirements that a reliable advanced electronic signature must meet. As stated, section 2 of KICA defines an advanced electronic signature to mean an electronic signature which, (a) is linked to the signatory in a unique way; (b) can identify the signatory; (c) is created by means that the signatory can maintain under his sole control; and (d) is linked to the data to which it relates and in such a way that any change to the data is detectable.

On other hand, section 83(0) provides that a reliable advanced electronic signature must, (a) be generated through a signature-creation device; (b) be created by data that is solely linked to the signatory; (c) be created by data that is under the sole control of the signatory; (d) enable detection of subsequent alterations to the signature; and (e) enable detection of subsequent alteration of information that the signature relates to. Whereas, it may be assumed that an advanced electronic signature is generated by a signature-creation device, it would be appropriate to state so in section 2 of the Act, just as stated in section 83(0). Otherwise, it would have been sufficient to make the definition of an advanced electronic signature in section 2 of the Act, only, without giving a further definition in section 83(0).

In what appears to have been lack of clarity in the minds of the drafters, the legislation goes on to give discretion to the Cabinet Secretary, in consultation with CAK, to make regulations for electronic signatures.⁴⁶ Does it now mean that there is a distinction between the advanced electronic signature and the electronic signatures anticipated? Why are there separate provisions for the advanced electronic signatures, from those of electronic signatures, and yet the advanced electronic signature is a form of electronic signature? In any case, these regulations have not been made by the Cabinet Secretary, rendering the use of electronic signatures non-operational.

⁴⁶ Ibid, section 83R.

The Evidence Act provides that, other than in a case of a secure signature, there must be proof that an electronic signature is that of the subscriber.⁴⁷ In order to prove this, the court may direct that the person or the certification service provider produces the electronic signature certificate or that any other person applies the procedure stipulated in the electronic signature certificate to verify the electronic signature purported to have been affixed by that person.⁴⁸ Firstly, what is this secure signature that must not be proved in court? Secondly, are there certification service providers in Kenya?

The Evidence Act does not prescribe what amounts to a secure signature. Further, the electronic signatures, including the advanced electronic signatures, anticipated by KICA, are meant to be secure. What then is this unsecure electronic signature that needs proof? Is it an electronic signature that is not produced by a signature-generating device, like typing out ones names after the text? There is need for clarity on this.

Certification services providers in Kenya are supposed to be licensed by CAK.⁴⁹ KICA defines “certification service provider” to mean a person who has been granted a licence, by CAK, to issue a digital signature certificate.⁵⁰ Now, ‘digital signature’ has been introduced. Is it the same as an electronic signature, or a form of an electronic signature? This is a form of electronic signature since the word ‘electronic’ includes digital capabilities.⁵¹ Therefore, does it mean the certification service providers cannot issue certificates for other forms of electronic signatures? They should be able to. This needs to be clarified. It can be said that in so far as there are no licensed certification service providers in Kenya, the evidential value of electronic signatures is still in limbo.

In summary, whereas Kenyan law has given legal recognition to online written offers and acceptance, the same has not adequately addressed the complications that internet poses to the application of the traditional rules of contract formation. This is particularly so in respect of the distinction between offer and invitation to treat for display of goods on websites; the applicable rule regarding communication of acceptance; the place of contract formation; and the issues raised by the so called ‘shrink wrap’ contracts.

⁴⁷ Cap 80 (n 30), section 106C.

⁴⁸ *Ibid*, section 10 D.

⁴⁹ Cap 411A (n 29), section 83E.

⁵⁰ *Ibid*, section 2.

⁵¹ *Ibid*.

Further, in as much as Kenyan law recognises online written contracts, the accompanying requirement for signature can still not be achieved legally. This is because of the lack of regulations as well as certification service providers to facilitate the implementation of the provisions on electronic signatures.

4.0 Comparative Analysis

This section is dedicated to comparing the Kenyan situation with those of the UN Commission on International Trade Law (UNCITRAL), the United Kingdom (UK), the United States of America (US) and South Africa (SA).

UNCITRAL is a body of the UN specialising in commercial law reform worldwide, and comes up with model laws to be adopted by member states.⁵² The UNCITRAL texts that are relevant to formation of electronic contracts are: the 2005 UN Convention on the Use of Electronic Communications in International Contracts (the Convention on e-Communications); and the 1996 UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, with additional article 5 bis as adopted in 1998 (the Model Law on e-Commerce).⁵³ Though UNCITRAL laws are concerned with international trade, they are relevant in the sense that online transacting is the key form of carrying out international trade because of its speed and low cost.

The UK, US, and SA have taken steps to address the problems and challenges raised in this study. Thus, the UK Electronic Communications Act 2000 (UK e-Communications Act) and Electronic Signatures Regulations 2002 (UK e-Signatures Regulations), are relevant to this study. The US has enacted the Uniform Electronic Transactions Act (UETA). South Africa has legislated on electronic transactions through the Electronic Communications and Transactions Act, 2002 (SA e-Communications Act).

⁵² UNCITRAL, 'About UNCITRAL', available at http://www.uncitral.org/uncitral/en/about_us.html, accessed on 05 January, 2017. UNCITRAL is the UN system in the field of international trade law. It is a body with worldwide membership specializing in commercial law reform worldwide for over 40 years. Its business is the modernisation and harmonisation of rules on international business.

⁵³ UNCITRAL, '*Electronic Commerce*' available at http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce.html, accessed on 05 January, 2017.

4.1.0 *Formation of Online Contracts*

4.1.1.0 Invitation to Treat, Offer and Acceptance

According to the Convention on e-Communications,⁵⁴ “communication” means any statement, declaration, demand, notice or request, which includes an offer and the acceptance of an offer that the parties are required to make in connection with the formation or performance of a contract.⁵⁵ There is no equivalent definition in the Kenyan situation. KICA does not define what communication is. It is necessary for KICA to define that communication includes the making of offers and acceptance in order to make it clear that electronic communications also covers the formation of online contracts.

Unlike the UK e-Communications Act, UETA, SA e-Communications Act, and KICA, the Convention on e-Communications has gone ahead to distinguish between invitation to treat, and offers or acceptance in respect of electronic transactions. It states as follows:

A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.⁵⁶

Going by the Convention, the display of goods on a website amounts to an invitation to treat, unless otherwise stated by the owner of the site. This creates certainty and there is no reason why Kenya should not borrow from it.

4.1.2.0 Time and Place of Contract Formation

Unlike the Kenyan situation, the Convention on e-Communications, the Model Law on e-Commerce, UETA, and the SA e-Communications Act, set rules on how to determine the time and place of dispatch and receipt of

⁵⁴ The Convention on e-Communications applies to the use of electronic communications in connection with the formation of contracts between parties whose places of business are in different States (see Article 1). However, given the borderless nature of online transacting, the convention serves as a good guide to formation of online contracts in Kenya.

⁵⁵ 2005 Convention on the Use of Electronic Communications in International Contracts, Article 4 (1).

⁵⁶ *Ibid*, article 11.

electronic communication, which includes communication of offers and acceptances. Accordingly, the time of dispatch of an electronic communication is deemed to be the time when the communication leaves an information system under the control of the originator⁵⁷ or of the party who sent it on behalf of the originator.⁵⁸ If the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time of dispatch is the time when the electronic communication is received.⁵⁹

The Convention on e-Communications provides that the time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee.⁶⁰ Further, that an electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.⁶¹ This has been reflected in the Model Law on e-Commerce and UETA.⁶²

The SA e-Communications Act provides that an agreement concluded between parties by means of data messages is concluded at the time when the acceptance of the offer was received by the offeror.⁶³ So is it when it reaches the address of the recipient or when the recipient actually opens and reads the message? What happens if the recipient actually reads the message and keeps quiet? The Convention on e-Communications and Model Law on e-Commerce, give clearer provisions in that they state that the time of receipt of the message is when the same is capable of being retrieved by the recipient.

Regarding acknowledgment of receipt, the KICA and SA e-Communications Act have similarities with that of the Model Law on e-Commerce.

⁵⁷ Article 4(d) of the Convention on e-Communications as well as Article 2 (c) of the Model Law on e-Commerce define "originator" of an electronic communication to mean a party by whom, or on whose behalf, the electronic communication has been sent or generated prior to storage, if any, but it does not include a party acting as an intermediary with respect to that electronic communication.

⁵⁸ Article 10(1) of the Convention on e-Communications, Article 15(1) of the Model Law on e-Commerce, and Section 15 a(1) of UETA.

⁵⁹ 2005 UN Convention on e-Communications (n 55), Article 10 (1).

⁶⁰ Article 10(2). Further, Article 4(e) of the convention defines "addressee" of an electronic communication means a party who is intended by the originator to receive the electronic communication, but does not include a party acting as an intermediary with respect to that electronic communication.

⁶¹ 2005 UN Convention on e-Communications (n 55), Article 10 (2).

⁶² Article 15 (2) & (3) of the Model Law on e-Commerce and Section 15 b (1) of UETA.

⁶³ SA e-Communications Act, section 22 (2).

This is because they provide that, unless otherwise agreed, acknowledgement of receipt may be given by any communication, automated or otherwise, by the addressee; or by any conduct of the addressee sufficient to indicate to the originator that the electronic communication has been received.⁶⁴ However, KICA and the Model Law on e-Commerce, go on to state that where stipulated by the originator that electronic record, or data message, shall only be binding on receipt of acknowledgement of such electronic record, then the electronic record shall be deemed to have never been sent by the originator, unless such acknowledgment has been received.⁶⁵ Where not stipulated, and no acknowledgment has been received, the originator may give notice to the addressee stating that no acknowledgement has been received and specifying a reasonable time for receipt of the acknowledgment, non-compliance of which entitles him or her to treat the electronic record as having not been sent.⁶⁶

However, unlike KICA, the Model Law of e-Commerce provides that where the acknowledgement of receipt by the addressee is received by the originator, there is a presumption that the related data message was received by the addressee.⁶⁷ However, this presumption does not imply that the data message corresponds to the message received.⁶⁸ This is because the communication sent by the originator may be corrupted on receipt by the addressee, and as such the addressee should not be bound by information that is not the same as that sent by the originator. This is an important provision that should not have been left out in KICA.

It seems the Convention on e-Communications, the Model Law on e-Commerce, UETA and the SA e-Communications Act, rule out the applicability of postal rule to electronic communication of offers and acceptances. This is because they lay emphasis on receipt of the communication, in an apparent recognition that electronic communications are instantaneous. Therefore, the rule regarding instantaneous communication is applicable and should be specified in KICA.

⁶⁴ Section 83M (1) of KICA, article 14(2) of the Model Law on e-Commerce, and section 26 (2) of the SA e-Communications Act.

⁶⁵ Section 83M (2) of KICA and article 14(3) of the Model Law on e-Commerce.

⁶⁶ Section 83M (3) of KICA and article 14(4) of the Model Law on e-Commerce.

⁶⁷ Model Law on e-Commerce, article 14(5).

⁶⁸ *Ibid.*

According to the Convention on e-Communications, the Model Law of e-Commerce, UETA and the SA e-Communications Act, the place of dispatch of the electronic communication is at the originator's place of business, whereas the place of receipt is the addressee's place of business.⁶⁹ 'Place of business' is presumed to be the location indicated by that party, unless otherwise demonstrated; and where not indicated, and a party has more than one place of business, then the place of business is that which has the closest relationship to the relevant contract, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.⁷⁰ Further, if a natural person does not have a place of business, his or her place of business is his or her habitual residence.⁷¹

Unlike the Convention on e-Communications, Model Law on e-Commerce, UETA, and KICA, the SA e-Communications Act has gone ahead to specify the place of contract formation. The SA e-Communications Act provides that an agreement concluded between parties by means of data messages is concluded at the place where the acceptance of the offer was received by the offeror.⁷² KICA should make such a clarification.

4.1.3.0 The 'Shrink Wrap' Contracts

Just like in Kenya, these other jurisdictions have not addressed the legal issues raised by the so called 'shrink wrap' contracts. As stated, in a 'shrink wrap' contract, when the purchased product is received, it comes with additional terms and conditions in the packaging or in the accompanying documentation.⁷³ Should there be legal recognition of terms that are not proposed or disclosed until after the user has already agreed to go forward with the transaction and has tendered the required consideration. Terms that

⁶⁹ Article 10 (3) of the Convention on e-Communications, Article 15 (4) of the Model Law on e-Commerce, Section 15 d of UETA and Section 231(c) of the SA e-Communications Act. According to Article 6 (4) of the Convention on e-Communications, a location is not a place of business merely because that is: (a) where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or (b) where the information system may be accessed by other parties. Article 6(5) states that the sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in that country.

⁷⁰ 2005 UN Convention on e-Communications (n 55), article 10 (3).

⁷¹ Ibid.

⁷² SA e-Communications Act (n 63).

⁷³ Boss (n 24).

one has not been given an opportunity to scrutinise before making a purchase should not be legally binding on the customer.

4.2.0 Formalities of Online Contracts

4.2.1.0 Requirement for 'Writing'

Regarding the requirement for 'writing', the Convention on e-Communications provides that the requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.⁷⁴ The Model Law on e-Commerce has reflected this position by stating that a requirement for 'writing' can be fulfilled by a data message⁷⁵ if the information contained therein is accessible so as to be usable for subsequent reference.⁷⁶

Whereas the UK e-Communications Act and Regulations are silent on this, the UETA and SA e-Communications Act also have provisions to the effect that the requirement for writing is met if information is produced in electronic form that is available for subsequent use or retention by the recipient.⁷⁷ All these are similar to the Kenyan situation, where KICA provides that where any law provides that information or any matter shall be in writing, then, such requirement shall be deemed to have been satisfied if such information or matter is, (a) made available in electronic form; and (b) accessible for use later.⁷⁸ On the face of it, there is no doubt that the requirement for 'writing' has adequately been recognised by law. How about the accompanying requirement for 'signature'?

4.2.2.0 Requirement for 'Signature'

When it comes to the requirement for signature, the e-Communications Convention, the Model Law on e-Commerce, and the Model Law on e-Signature stipulate that the requirement is met in relation to an electronic communication if: a method is used to identify the party and to indicate that

⁷⁴ SA e-Communications Act (n 63), article 9(2).

⁷⁵ Article 2(a) of the Convention on e-Communications defines 'data message' to mean information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

⁷⁶ SA e-Communications Act (n 63), article 6 (1).

⁷⁷ Section 12 (1) of the SA e-Communications Act, and Section 7(c) & 8(a) of UETA.

⁷⁸ KICA, section 83G.

party's intention in respect of the information contained in the electronic communication; and the method used is either as reliable as appropriate for the purpose of the electronic communication, and proven in fact to have fulfilled the functions of identifying the party and indicating his or her intentions.⁷⁹

It is apparent that the Convention and the model laws do not make it mandatory that there be a signature. Instead, if the purpose for which a signature is required, is fulfilled in other ways, then the requirement for signature should be deemed to have been met. The convention seems to make it flexible and easy for parties to fulfil the requirement for signature, unlike in the Kenyan situation which requires that there be an electronic signature.⁸⁰ Signature is the most appropriate way of authenticating and identifying a document to a person. Therefore, there ought to be use of electronic signature that satisfies the purpose for which a signature is a requirement, that is, identifying a party and his or her intentions to be bound by the information.

The Model Law on e-Signature, as well as KICA provide that an electronic signature is considered to be reliable for the purpose of identifying a party and his or her intention, if the signature creation data is solely linked to the signatory; the signature creation data were at the control of the signatory, and no one else; any alteration to the signature is detectable; and that any alteration made to information, which the signature relates to, after the time of signing, is detectable.⁸¹

The UK e-Communications Act provides that an electronic signature related to an electronic communication is admissible as evidence as to the authenticity of the communication.⁸² This just gives legal effect to electronic signatures. There is nothing that Kenya can borrow from this since electronic signatures are already recognised by KICA.

UETA provides that an electronic signature can fulfil the requirement for signature.⁸³ It defines 'electronic signature' to mean an electronic sound,

⁷⁹ Article 9(3) of the Convention on e-Communications, Article 7 of the Model Law on e-Commerce, and article 6(1) of the Model Law on e-Signature.

⁸⁰ Section 83O(1) and 83P of KICA allow the use of advanced electronic signature to be affixed in a manner prescribed by the Cabinet Secretary, upon which any legal requirement for authentication using a signature shall be deemed to have been satisfied.

⁸¹ Article 6(3) of the Model Law on e-Signature and section 83O(3) of KICA.

⁸² UK e-Communications Act, section 7.

⁸³ UETA, section 7(d).

symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.⁸⁴ This is a wide and flexible definition because it includes the use of sound and process as e-signatures. According to UETA, the electronic signature is attributable to the person if it was the act of the person, which act may be shown in any manner, including showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.⁸⁵

The SA e-Communications Act provides that in situations where the law requires a signature, but does not specify the type of signature, such a requirement is satisfied with respect to data message only if an advanced electronic data message is used.⁸⁶ Otherwise, other types of electronic signatures may be used.⁸⁷ However, these electronic signatures must satisfy the purpose of identifying the signatory and signifying his approval of the information.⁸⁸ Unlike for the Model Law on e-Signature, KICA, and UETA, the SA e-Communications Act does not, unfortunately, elaborate on what will enable an e-signature satisfy the purpose of identifying the signatory and indicating his or her intention to be bound.

Whereas KICA has some similar provisions with the Model Law on e-signature, UETA, UK e-Communications Act, and the SA e-communications Act, there are no regulations to facilitate the implementation of the law (KICA). The regulations should be made by the Cabinet Secretary.

One cannot talk of e-signatures without mentioning certification service providers. According to the Model Law on e-signature, a certification service provider is a person that issues certificates and may provide other services related to electronic signatures.⁸⁹ Therefore, a certification service provider would provide the software or platform for creation of electronic signatures and thereafter issue certificates for the same, if called upon to. An example of such service provider is the US based Right Signature LLC which provides a platform for creation of online-signatures and issues accompanying

⁸⁴ Ibid, section 2 (8).

⁸⁵ Ibid, section 9.

⁸⁶ SA e-Communications Act (n 63), Section 13 (1).

⁸⁷ Ibid, section 33 (2).

⁸⁸ Ibid, section 33 (3).

⁸⁹ Model Law on e-Signature, article 2(e).

certificates.⁹⁰

The Kenyan definition of what a certification service provider is, limits the function of such a service provider to only issuing certificates for digital signatures. KICA defines a certification service provider to mean a person who has been licensed to issue a digital signature certificate.⁹¹ Firstly, this means that a service provider cannot be licensed to provide e-signature creation services. Who then can provide such important services that need regulation? Secondly, why has KICA restricted the definition to ‘digital signatures’ only? Is a digital signature the same as an electronic signature, or a form of an electronic signature? Digital signatures must be taken as a form of electronic signature since the word ‘electronic’ includes digital capabilities.⁹² Therefore, does it mean the certification service providers cannot issue certificates for other forms of electronic signatures? They should be able to. There is need for an amendment of this definition to allow certification service providers to issue electronic signature certificates and also perform other electronic signature services including those of e-signatures creation.

The UK e-signature Regulations set out the rules that electronic signature certificates must meet.⁹³ The Regulations also list the requirements that certification service providers must meet before being licensed to perform electronic signatures services.⁹⁴ The regulation of electronic signatures certifications in these ways is important to guarantee the integrity of e-signatures. The Kenyan Cabinet Secretary, who is yet to make such rules, can borrow from the UK experience.

5.0 Conclusion and Recommendations

This paper has shown that Kenya has made some steps in legislating on electronic commerce, which is facilitated by online contracting. This legislation is contained in the Kenya Information and Communications

⁹⁰ RightSignature LLC ‘About Us’ available at <https://rightsignature.com/about>, accessed on 05 January, 2017.

⁹¹ KICA (n 78), section 2.

⁹² *Ibid*, section 2.

⁹³ UK e-Signature Regulations, Schedule 1.

⁹⁴ *Ibid*, Schedule 2.

Act (KICA)⁹⁵ and the Evidence Act.⁹⁶ However, the legislation has some shortcomings on formation and formalities of contracts, which may hinder the overall objective of promotion and facilitation of e-Commerce. This section provides recommendations for reform.

5.1.0 Formation of Online Contracts

5.1.1.0 Invitation to Treat, Offer and Acceptance

Electronic communication is an aspect that distinguishes online contracting from the traditional paper-based ones. Offers and acceptances would, therefore, have to be communicated using electronic means. It is, therefore, necessary to define communication to include the making of offers and acceptances with a view of entering into contracts. This paper, proposes that KICA borrows from the Convention on e-Communications,⁹⁷ which defines “communication” to mean any statement, declaration, demand, notice or request, which includes an offer and the acceptance of an offer that the parties are required to make in connection with the formation or performance of a contract.⁹⁸ This will make it clear that electronic communications also apply to formation of online contracts.

KICA does not distinguish between invitations to treat and offers, in respect to online contracting. This is more so when it comes to the display of goods on a website. This study proposes that KICA be amended to distinguish between electronic invitation to treat and offer, as is the case in the Convention on e-Communications discussed in this article.⁹⁹ By doing so, there shall be no doubt that the display of goods on a website amounts to an invitation to treat, unless otherwise stated by the owner of the site.

⁹⁵ Cap 411A (n 29).

⁹⁶ Cap 80 (n 30).

⁹⁷ The Convention on e-Communications applies to the use of electronic communications in connection with the formation of contracts between parties whose places of business are in different States (see Article 1). However, given the borderless nature of online transacting, the convention serves as a good guide to formation of online contracts in Kenya.

⁹⁸ 2005 UN Convention on e-Communications (n 55), article 4 (1).

⁹⁹ *Ibid*, article 11.

5.1.2.0 Time and Place of Contract Formation

The time and place of contract formation is necessary to ascertain when and where contractual obligations arise. KICA does not set rules on how to determine the time and place of dispatch and receipt of electronic communication, which include communication of offers and acceptances. KICA can borrow from the Convention on e-Communications, 1996 - UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, with additional article 5 bis as adopted in 1998, the UETA, and SA e-Communications Act.

Accordingly, the time of dispatch of an electronic communication should be deemed to be the time when the communication leaves an information system under the control of the originator¹⁰⁰ or of the party who sent it on behalf of the originator.¹⁰¹ If the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time of dispatch is the time when the electronic communication is received.¹⁰²

The time of receipt of an electronic communication would be the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee.¹⁰³ Further, that an electronic communication should be presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.¹⁰⁴

KICA should also state that where the acknowledgement of receipt by the addressee is received by the originator, there is a presumption that the related data message was received by the addressee.¹⁰⁵ However, the presumption

¹⁰⁰ Article 4(d) of the Convention on e-Communications as well as article 2 (c) of the Model Law on e-Commerce define "originator" of an electronic communication to mean a party by whom, or on whose behalf, the electronic communication has been sent or generated prior to storage, if any, but it does not include a party acting as an intermediary with respect to that electronic communication.

¹⁰¹ Article 10(1) of the Convention on e-Communications, article 15(1) of the Model Law on e-Commerce, and section 15 a(1) of UETA.

¹⁰² 2005 UN Convention on e-Communications (n 55), article 10 (1).

¹⁰³ Article 10(2). Further, article 4(e) of the convention defines "addressee" of an electronic communication means a party who is intended by the originator to receive the electronic communication, but does not include a party acting as an intermediary with respect to that electronic communication.

¹⁰⁴ 2005 UN Convention on e-Communications (n 55), article 10 (2).

¹⁰⁵ Ibid, article 14 (5).

should not imply that the data message corresponds to the message received.¹⁰⁶ This is because the communication sent by the originator may be corrupted on receipt by the addressee, and, as such, the addresses should not be bound by information that is not same as that sent by the originator.

It is clear that the rule that should apply to electronic transactions is that regarding instantaneous communication, as opposed to the postal rule. This is because electronic communications are instantaneous. It follows that the time of online contract formation should be the time when the acceptance of the offer is received by the offeror.¹⁰⁷

The place of dispatch of the electronic communication would be at the originator's place of business, and the place of receipt would be the addressee's place of business.¹⁰⁸ 'Place of business' will be presumed to be the location indicated by that party, unless otherwise demonstrated; and where not indicated, and a party has more than one place of business, then the place of business should be that which has the closest relationship to the relevant contract, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.¹⁰⁹ Further, if a natural person does not have a place of business, his or her place of business should be his or her habitual residence.¹¹⁰

The rule regarding instantaneous communication also determines the place of contract formation. Thus, online contracts should be deemed to be concluded at the place where the acceptance of the offer was received by the offeror.¹¹¹

¹⁰⁶ Ibid.

¹⁰⁷ SA e-Communications Act (n 63), section 22 (2).

¹⁰⁸ Article 10 (3) of the Convention on e-Communications, article 15 (4) of the Model Law on e-Commerce, Section 15 d of UETA and Section 231(c) of the SA e-Communications Act. According to article 6 (4) of the Convention on e-Communications, a location is not a place of business merely because that is: (a) where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or (b) where the information system may be accessed by other parties. Article 6(5) states that the sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in that country.

¹⁰⁹ 2005 UN Convention on e-Communications (n 55), article 10 (3).

¹¹⁰ Ibid.

¹¹¹ SA e-Communications Act (n 63), section 22 (2).

5.1.3.0 The 'Shrink Wrap' Contracts

As stated, in a 'shrink wrap' contract,¹¹² the issue that arises is whether there should be legal recognition of terms that are not proposed or disclosed until after the user has already agreed to go forward with the transaction and has tendered the required consideration. This paper proposes that the law should make it clear that terms that one has not been given an opportunity to scrutinise before making a purchase should not be legally binding on him or her.

5.2.0 *Formalities of Online Contracts*

5.2.1.0 Requirement for 'Writing'

Kenyan law makes it clear that a legal requirement for 'writing' can be satisfied by electronic contracting. KICA provides that where any law provides that information or any matter shall be in writing, then, such requirement shall be deemed to have been satisfied if such information or matter is, (a) made available in electronic form; and (b) accessible for use later.¹¹³ On the face of it, there is no doubt that the requirement for 'writing' has adequately been recognised by law. However, issues arise as to the accompanying requirement for 'signature'.

5.2.2.0 Requirement for 'Signature'

When it comes to the requirement for signature, KICA provides that the same can be satisfied by use of an advanced electronic signature which is as reliable as was appropriate for the purpose for which the electronic message was generated or communicated.¹¹⁴ An electronic signature is considered to be reliable for the purpose for which the electronic message was created, if: the signature is generated through a signature-creation device; the signature creation data are solely linked to the signatory; the signature creation data were under the control of the signatory and no one else; any subsequent alteration to the electronic signature is detectable; and any subsequent alteration made to the information, to which the signature relates, is detectable.¹¹⁵

¹¹² Boss (n24).

¹¹³ Cap 411A (n29).

¹¹⁴ Ibid, section 83O(1).

¹¹⁵ Ibid, section 83O(3).

KICA can also be as wide and flexible as possible, like UETA which defines e-signatures to include sound and process. UETA defines ‘electronic signature’ to mean an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.¹¹⁶

Whereas KICA has provisions with respect to e-signatures, there are no regulations to facilitate the implementation of the same. The regulations should be urgently made by the Cabinet Secretary.

The meaning and function of certification service providers are not adequately provided for in KICA. KICA’s definition of a certification service provider limits the function of such a service provider to only issuing certificates for digital signatures. It defines a certification service provider to mean a person who has been licensed to issue a digital signature certificate.¹¹⁷ There is need for amendment of KICA to allow certification service providers to issue electronic signature certificates and also perform other electronic signature services including those of e-signatures creation.

The UK e-signature Regulations set out the rules that electronic signature certificates must meet.¹¹⁸ The Regulations also list the requirements that certification service providers must meet before being licensed to perform electronic signatures services.¹¹⁹ The regulation of electronic signatures certifications in these ways is important to guarantee the integrity of e-signatures. The Kenyan Cabinet Secretary, while making the regulation on e-signatures, can get important tips from the UK experience.

¹¹⁶ UETA, section 2(8).

¹¹⁷ Cap 411A (n29), section 2.

¹¹⁸ UK e-Signature Regulations, Schedule 1.

¹¹⁹ Ibid, Schedule 2.