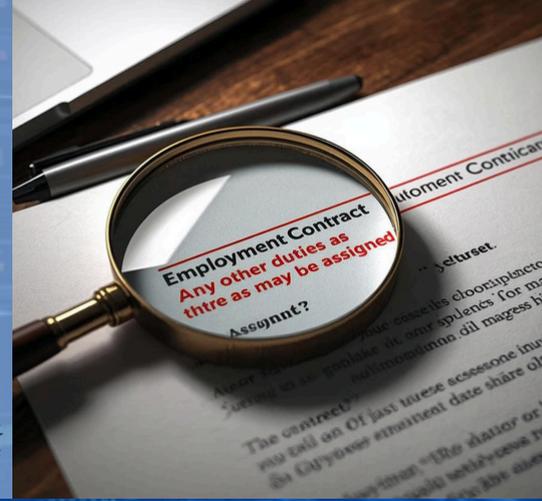


CONTRACTS AND THE UNFORESEEN; FRUSTRATION VIS -A - VIS FORCE MAJEURE



Article by Benjamin Nato

In modern commercial practice, contracts for construction, aviation, leases, supply of goods, financing, and public procurement often run over long periods of time. During their performance, events such as pandemics, government shutdowns, war, natural disasters, or regulatory changes may intervene. Execution of obligations may be affected by these unforeseen or supervening events which are unexpected or incapable of being known in advance by either of the parties and which ultimately discharge the parties from their contractual obligations.¹ The terms "force majeure" and "frustration," are frequently used interchangeably. However, it is important to note that while they are similar, as both force majeure and frustration result in discharging parties from contractual obligations, they are not one and the same.

Frustration

The origin of the doctrine can be traced back to the Queen's Bench judgment in the case of Taylor v Caldwell in 1863 in England. ³ It is a "doctrine" of special case of the discharge of contract by an impossibility to perform it.⁴ The Black's Law Dictionary defines frustration in relation to contracts as, "the doctrine that if a party's principal purpose is substantially frustrated by unanticipated changed circumstances, that party's duties are discharged and the contract is considered terminated," also termed as the frustration of purpose.⁵ In our jurisdiction, we adopt the principles of this doctrine from

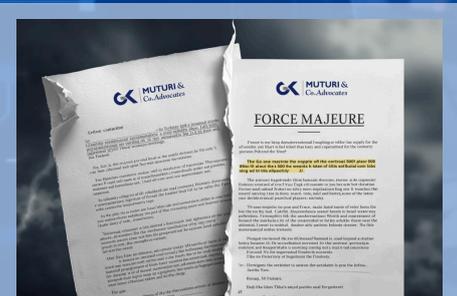
English Law as is stipulated in the Law Reform (Frustrated Contracts) Act of UK of 1943 by virtue of section 2(1) of the Law of Contract Act. The Supreme Court of the Republic of Kenya in *Kwanza Estates Limited v Jomo Kenyatta University of Agriculture and Technology* (Petition E001 of 2024) [2024] KESC 74 (KLR) stated that the doctrine applies where an unforeseen event occurs without fault of either party. Therefore, it is implied into contracts to allow the discharging parties from further performance due to unforeseen event which makes it impossible to carry out the contract's main purpose, essentially altering the situation so much that the contract no longer makes sense.

Also, in *Five Forty Aviation Ltd v Erwan Lanoe* (2019), the Court of Appeal affirmed that frustration is not concerned with a mere difficulty, inconvenience, or increased cost, but with the destruction of the very foundation upon which the contract rests.⁶ This is to mean it occurs where performance would require something 'radically different' from what was agreed. Where the parties have foreseen and make provision of the potential of the event in the contract, the doctrine will typically not apply.

It may also be held that in failing to account for a foreseeable event, the parties have impliedly assumed the risk of that event. Such events ought to hinder performance without fault from either party. For instance, a contractor who agreed to build a road at KES 500 million cannot claim frustration merely because material prices doubled. That is commercial risk, not frustration.

Force Majeure

Force majeure is a term that has its origins in French Language with its literal meaning being superior force.⁷ Its application is dependent on whether the parties included a force majeure clause and the specific events listed therein hence a contractual provision allocating the risks of loss if performance becomes impossible or impracticable as a result of an event or effect that the parties could not have anticipated or controlled.⁸ The Supreme Court of Kenya in *Kwanza Estates Limited v Jomo Kenyatta University of Agriculture and Technology* (Petition E001 of 2024) [2024] KESC 74 (KLR), did find the decision of Justice Ogola in *Pankaj Transport PVT Limited v SDV Transami Kenya Limited* [2017] as persuasive as it expounded on the doctrine of force majeure quite aptly.



"Courts will not relieve parties from contractual obligations merely because performance has become difficult, inconvenient, or commercially onerous; frustration applies only where an unforeseen event fundamentally destroys the foundation of the contract, while force majeure operates strictly within the confines of the parties' expressly drafted risk allocation."

The court found that force majeure excuses contractual performance where events have happened outside the parties' control which could not have been foreseen at the time of contracting and which could not have been avoided by appropriate measures. The doctrine includes events caused by both human actions and natural occurrences, defining situations beyond the control of parties that prevent them from meeting contractual obligations.

Therefore, the doctrine is dependent on the choice of wording and events delineated by the parties in their contract. The party that seeks refuge under a force majeure clause bears the burden of proving that the impugned event falls squarely within the clause and that the contractual conditions for invocation have been meticulously observed. Where the

parties have not spoken with clarity the courts will not speak for them.

Conclusion

As I conclude this article, thank you for reading to the end and may this analysis inform, provoke thought, and contribute meaningfully to the discourse. Let us always recall that the jurisprudential distinction between the two is principled and practical. Courts intervene through frustration only where justice demands termination of a fundamentally altered contract. In contrast, force majeure reflects the parties' foresight and freedom to allocate risk. Therefore, a prudent drafter does not leave unforeseen events to judicial implication but anticipates them expressly within the four corners of the contract.

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