



LEGAL TAKE

— DISPUTE RESOLUTION · INSIGHT

When Conduct Overrides the Contract: Estoppel by Convention in Kenya

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YOUR CONTACT

Fidel Mwaki

MANAGING PARTNER

ADVOCATES · COMMISSIONERS FOR OATHS · NOTARY PUBLIC

Contracts are not always performed exactly as written. Where both parties deal with each other on a shared understanding, Kenyan courts may hold them to it, even if the written terms say something different. This is estoppel by convention.

KEY POINTS

- A party may be prevented from going back on a shared assumption that both sides relied on.
- The doctrine rests on the Evidence Act and on equity, which Kenyan courts apply.
- It must be clearly pleaded and proved; a one-sided belief is not enough.

1. What it is

Section 120 of the Evidence Act provides that where one party, by words, conduct or silence, leads another to believe a state of affairs exists and to act on it, the first party cannot later deny it in proceedings between them. The Judicature Act allows Kenyan courts to apply equitable principles where written law does not cover the point. Together, these support estoppel by convention.

2. What must be proved

REQUIREMENT	WHAT IT MEANS
Common assumption	Both parties proceeded on the same understanding of a fact, legal position or arrangement.
Communication or acceptance	The assumption was shared, expressly or through conduct. A unilateral belief is not enough.
Reliance	The claimant acted, or kept dealing, on the strength of that assumption.
Change of position	The claimant suffered prejudice, took on an obligation or conferred a benefit as a result.
Unfairness	It would be unjust to let the other party go back on the assumption.

REQUIREMENT	WHAT IT MEANS
Pleading and evidence	Each element must be specifically pleaded and supported by evidence.

3. How Kenyan courts apply it

Where it has succeeded. Courts have held a county government to a shared understanding that road works would be done and paid for, stopped a bank from charging further interest after borrowers paid the amount it had communicated, and prevented a borrower from reopening a settlement after the security was released.

Variation by conduct. The Court of Appeal has recognised that a contract may be varied by the parties' later conduct, and that a party who accepts the variation may not revert to the original terms.

Where it has failed. Claims fail where the evidence does not show a clear mutual intention to vary the written terms, or where the party knew the terms, kept trading on them and did not properly plead its claim.

4. Practical lessons

Write it down. If you agree to do things differently from the contract, record the change in writing, even by email.

Watch your conduct. Accepting payments, extensions or a new way of working without objection can bind you.

Reserve your rights. If you are tolerating a departure for now, say so in writing so it is not treated as acceptance.

Plead it properly. In a dispute, set out the assumption, the conduct, the reliance and the prejudice specifically.

5. Drafting to manage the risk

Variation clauses. Require changes to be agreed in writing and signed. They help, but a court may still find that conduct has varied the contract.

Non-waiver clauses. Provide that tolerating a breach or delay does not waive your rights. Back them up by reserving your rights in correspondence.

Entire agreement clauses. Limit reliance on earlier discussions, though they do not answer what happens after signing.

Correspondence discipline. Make sure the people managing the relationship know that what they say and accept can bind the business.

WHERE THIS ARISES

- Payment schedules and interest after a negotiated settlement.
- Extended timelines on construction and supply contracts.
- Leases where rent or use has changed in practice.
- Long-running commercial relationships that have drifted from their paperwork.

TALK TO US

Every situation is different. This is where we get specific to yours.

Fidel Mwaki

MANAGING PARTNER

consult@fmcadvocates.com

+254 725 762 784

Kalson Towers, 1st Floor, Right Wing

The Crescent, off Parklands Road

Westlands, Nairobi, Kenya

fmcadvocates.com



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