

COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

ATP 100: CIVIL LITIGATION

MONDAY 16TH JULY, 2012

DURATION: 3 HOURS

Instructions to Candidates

- (a) Answer question **ONE** and any other three (3) questions
- (b) All questions carry 15 marks each
- (c) Marks may be lost for illegibility

PLEASE TURN OVER

1. In January, 2012 Ahmed Raymond Kundu employed Mwangi Khakhefwi as his agent to sell ten residential maisonnettes at Athi River Town. On February 1, 2012, Mwangi sent an e-mail message enquiring if Ahmed allow him to sell the said properties on that date at the price rate of Shs.50million per maisonnette. Ahmed immediately replied by e-mail communication the same day instructing Mwangi to wait and not to sell unless and until the price reached Shs.80million per maisonnette. Mwangi ignored the instructions, and, in breach of his duty sold the maisonnettes on February 1, 2012 at the price of Shs.50million each. As a matter of fact, on March 1, 2012, the maisonnettes could have been sold at Shs.90million each. Ahmed considers himself having suffered damage considering the price difference between what the maisonnettes were actually sold for and what they would have fetched only one month after they had been sold, if only Mwangi had abided by the instructions given to him.

You are a junior advocate in the firm of Originals & Co. Advocates who practice as such at Unswampy Towers, 10th Floor, Broad Avenue, Nairobi. The senior partner in the firm, having meticulously written down these facts as distilled from Ahmed, passes to you these factual details. He asks you to make a draft plaint for him to scrutinize. Draft the plaint.

(15 marks)

2. In a bad road accident which happened at a junction of a minor road along which the defendant was driving in company of his girlfriend (to whom all his attention was concentrated at the time of the occurrence of the accident) and a major road along which the plaintiff was driving with due care, the plaintiff lost cash Shs.100,000. He sustained bodily injuries including a fracture of his right thigh bone, right arm bone, and injuries to his right wrist and left leg. He was aged 52 years. Afterwards he spent Shs.30,000 to repair his motor vehicle. He sued, through your firm of advocates, to recover general damages for his injuries and the financial loss he sustained. He based his claim on the defendant's negligence. The defendant having been duly served with the plaint and a summons to enter appearance within 15 days entered none. You have applied for a judgement in default of appearance.

- i) What default judgement have you applied for and which the court may grant? **(3 marks)**
- ii) What is its significance? **(3 marks)**
- iii) Explain the procedure and what (if at all) the plaintiff will be called upon to do after this judgement is granted. **(9 marks)**

3. On March 10, 2012, Ramnik Otongolo was employed by your firm of advocates as a process server. On April 5, 2012, you gave him a plaint already filed in the High Court at Meru. You also gave him a summons to enter appearance. You instructed him to go and serve the plaint and the said summons upon Dambastas Kamau Ole Soup, the defendant in the suit. Ole Soup resides at Funny Crescent, House Six. He runs a Cow Hide and Skin Retail Shop in Kajiado and travels a lot to Beijing, China, where he is setting up a new branch of his business. Four weeks later Otongolo reports back to you that every time he has tried to serve the documents you gave him, he has not been getting Ole Soup.

- (a) Prepare the document(s) that you expect from Otongolo. **(8 marks)**
- (b) Outline the way forward. **(7 marks)**

4. Joho Duale Heh entered into a valid contract with Raskol Luk, by which Joho was to supply to Raskol eight bags of dried smoked pigeons, a delicacy at Raskol's restaurant. The agreed price was Shs.5,000 per bag, payable thirty days after delivery. Joho considers that he performed his part of the contract but Raskol is in breach. Joho files a suit to recover the agreed price. Paragraph 6 of the plaint reads:

"6. On or before May 2, 2012, the plaintiff delivered eight bags of dried smoked pigeons, a delicacy at Raskol Luk's restaurant."

You have asked your newly recruited assistant to draft an appropriate defence which she has done. In her draft answer to paragraph 6 of the plaint she has suggested to you the following two formulations for you to choose from:

- a) "Paragraph 6 of the plaint is denied."
- b) "The defendant denies that on or before May 2, 2012, the plaintiff delivered eight bags of dried smoked pigeons, a delicacy at his restaurant."

You have looked at these alternative phraseologies of the proposed answer.

- i) Giving reasons for your position state whether any of these proposed paragraphs can be appropriate answers to paragraph 6 of the plaint. **(8 marks)**
- ii) Whether you approve or reject both of your assistant's formulation, set out in your own words an answer to paragraph 6 of the plaint, which your new employee can refer to in future as precedent in drafting pleadings in cases similar to this one. **(7 marks)**

5. Shree Pal has employed you as one of his junior advocates in his famous law firm. He has put you in the Civil Litigation Department. The department is handling a suit brought by the firm on behalf of a client, in which a sum of Kshs.80 million is claimed as unpaid purchase price for specified quantities of construction material supplied by your firm's client under a contract. The defendant has filed a memorandum of appearance and has served it upon your firm. He has not filed a defence, but the time for doing so has not as yet expired. From previous correspondence in the possession of your firm, the overall standpoint of the defendant regarding the claim in the suit is that he "denies owing the plaintiff the sum of Kshs.80 million or any sum at all." That is definitely what he will say when he files his defence. Shree Pal is himself very interested in this case because the plaintiff is a very important client to the firm, and would like the suit expedited. He asks you to write an opinion on what procedure to adopt to bring about a fast conclusion of the case. Write a concise opinion on the option(s) open to the firm. **(15 marks)**

6. Shoreline Estate consists of 200 families. Of these families, fifty have five children of adult age each. Another set of fifty families has four adult children to each family. The remaining families were each blessed with ten children, who are also adults. These families engage in fishing for a living. Industrial Developer has started the construction of hide and skin processing plant within the state plant. If and when the plaint is completed, the Shoreline residents will have their means of livelihood adversely affected. All of them come to you as an advocate and instruct you to file a civil suit against Industrial Developer to seek appropriate remedies.

- a) How will you sue for all of these people?
- b) If only two of the Shoreline residents instructed you to sue Industrial Developer, how would you sue?

In each case, state concisely the principles to guide you in the choice of the method to be employed in suing Industrial Developer.

(15 marks)
