

THE KENYA SCHOOL OF LAW



EXAMINATION FOR ADMISSION TO
THE ROLL OF ADVOCATES

CIVIL LITIGATION- ATP 100

17TH NOVEMBER, 2014

DURATION: 3 HOURS

Instructions to Candidates

- (a) Answer Question **ONE** and **THREE OTHER** Questions.
- (b) All questions carry fifteen (15) marks each.
- (c) Marks may be lost for illegibility.

PLEASE TURN OVER

1. Rosemary Oldish Netondo travelled to Eldoret by air using Rapid Airways Ltd. She paid for, and received her air travel ticket at the airline's offices on Conspicuous Emporium, Sixth Floor along Restoration Avenue, Nairobi. The airline was also to carry Netondo's brief-case containing her wearing apparel, rare reading materials, and share-holder certificates. The airline received and took charge of the said brief-case and placed it in their luggage chamber of the aircraft in which Netondo was about to travel, for the purpose of its being carried to Eldoret on the travel day, June 8, 2014. Netondo travelled by the said aircraft to Eldoret, but her brief-case did not arrive, apparently Rapid Airways Ltd had not carried it to Eldoret, nor delivered it to her on her arrival there, or at all. It seems that the airline has either lost or retained the said brief-case, thereby depriving the lady of her brief-case and all its contents. She has gone through and suffered tremendous inconvenience, and has incurred expense in endeavoring to recover possession of her brief-case, without success. On returning to Nairobi, Netondo has come to your firm of Advocates which practises at Hefty People's Plaza, Second Floor, Famous Street, Nairobi, and instructed you to file a civil suit for the lost luggage.

(a) Draft a plaint with appropriate claims.

(13 Marks)

(b) Other than necessary fees, explain to Netondo what you will require at the time of filing the plaint in Court Registry to commence the suit.

(2 Marks)

2. Double Nine Kamau sued Moka Moka Omwene, and in his plaint there were the following allegations, among others:

"3. On May 22, 2014, the parties entered a written agreement signed by them, whereby the plaintiff sold to the defendant gemstones for Kshs.200,000,000.

4. Upon delivery, the defendant was to pay for the goods within 60 days.

5. The plaintiff delivered the goods promptly in accordance with the agreement.

6. Four months after the said delivery of the gemstones to the defendant, the said defendant has not made any payment of the purchase price, despite demand made for payment and notice of intention to sue in default given the defendant has refused, failed or neglected to pay for the gemstones"

The plaint sought for judgment for the purchase price and costs. Upon being served with the plaint, Moka Moka Omwene brings it to a well-known civil litigation law firm where you are a pupil and instructs the firm to enter appearance and file a defence properly responding to the plaintiff's allegation. In the client-advocate interview, Moka Moka Omwene tells you that whilst there was the signed written agreement between him and Double Nine Kamau, payment was to be made only after Moka Moka Omwene had received from abroad the proceeds of the gemstones, either on

of this piracy. Rashid is very aggrieved by Patel's action. So he comes to your pupil-master's office and relates how things have gone on. Patel is a financial mogul in the Republic. He has access to lucrative black markets within and beyond our borders. He is a globe-trotting-high flier. He is ruthless in business. Currently Patel is still having some 500,000 "CDs" in his store and may sell them. Juma is fearful of the imminent sale or other disposal of these "CDs" any moment. Your pupil master has, on these instructions, filed a suit against Patel for various reliefs. He now instructs you to draft an application for appropriate temporary protective reliefs against Patel. Draft the application and any other instrument that may assist the court in deciding whether to grant the application.

5. Mathews Barongo had sued the government through the Attorney General for damages and injuries sustained in an accident involving his personal vehicle and a truck belonging to the Ministry of Industrialization. A judgment was issued by the court for an amount of Kshs.1,700,000 for damages and the costs of the suit in favour of Mr. Barongo.
- (a) Explain to Mr. Barongo the procedure you would follow to enforce payment as determined by court.

(7 Marks)
 - (b) The judgment-debtor has since reneged, ignored or refused to make payment over to Mr. Barongo as per the judgment of the court.
 - (i) Explain to Mr. Barongo his recourse in view of the refusal to pay.

(2 Marks)
 - (ii) Explain the process he would follow to enforce the remedy in (i) above.

(6 Marks)
6. Mabona Muthusi had sued Cloud Co. Ltd for Kshs.2,500,000 that the company was indebted to him as a debenture holder. Judgment has now been passed in favour of Muthusi. While extracting the decree, Muthusi through a preliminary decree to order for taking accounts for the company, realized that Cloud Co. Ltd did not have any liquid assets, but had sufficient book debts totaling Kshs.15,000,000 to be able to satisfy his decree. In particular, Kilo Enterprises had a 90-day credit account outstanding as at the time of the judgment. Kilo Enterprise owed Cloud Ltd Kshs.2,600,000. Muthusi has now come to the offices of Smith Tabata Advocates where you are a pupil. He is seeking advice as to how he will ensure his judgment as against Cloud Co. Ltd is satisfied and the decretal amount paid over by the debtors of Cloud Co. Ltd. Your pupil-master has asked you to brief him on the procedure as well as advise him on the preliminary requirements to be met to effect a successful procedure for execution of the decree of Mabona Mathusi.

Proceed to advise your pupil master.

(15 Marks)

sale or from advance bonus from an overseas importer. He instructs you that he has never yet received any such proceeds or bonus. He explains that this has not happened because, contrary to the said agreement, Double Nine Kamau made a short delivery, and what was delivered was of very poor quality and he is incurring a loss trying to sell the goods delivered. He wishes to be compensated by Double Nine Kamau. He further adds that due to representations made by Double Nine, Moka Moka Omwene had signed the agreement in the belief that, and on the faith of, that representation that no money would become payable by him to Double Nine Kamau if the goods were not sold abroad, and that instead, Kamau would pay him a liquidated amount of Kshs.300,000,000, as per the verbal agreement. Omwene asks you to consider a rectification of the written agreement

On these instruction, draft appropriate responses pleading to the plaint, including Omwene's concerns set out above. Assume that appearance has already been entered, and that the pleading you draft is to be filed later. Your draft need not include the court and the parties. Simply have the right title of the pleading and the relevant paragraphs of the pleading dealing with the above instructions received from Moka Moka Omwene.

(15 Marks)

3. Gillian Mapasi has frantically approached the firm Khumalo & Dingu Advocates where you are a pupil. The cause of her distress is in a judgment that has been declared against her husband Fred Mapasi for the debt owed by him to Fedlink Bank of an amount of Kshs.6,000,000. The advocates representing the bank have extracted a decree for attachment and sale of the Mapasi residence in Juja just off the Thika Super Highway. Gillian feels that it would be very unfair to her if the house was sold as she put up half the cost of the construction of the house, which amounted to Kshs. 7,000,000. Moreover, that is the house they reside in with their two children, as a family. She is seeking advice from the firm on how she may be able to get a remedy against this judgment and impending execution.

Your pupil-master instructs you to undertake a research and urgently advise him on the way forward. Proceed to advise your pupil-master on the following:

- a) The rationale of any step(s) you may advise your pupil-master to consider taking.

(5 Marks)

- b) The procedure involved.

(5 Marks)

- c) What must Gillian establish in order to be successful.

(5 Marks)

4. Juma Rashid composed the fast-selling Taarab song titled "Halima Mchuzi Wangu". Patel Alfred is alleged to have pirated the song and produced cheap music compact discs which he is selling like hot cakes, and has already made millions of shillings out