

COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES

ATP 100: CIVIL LITIGATION

MONDAY 27TH JULY, 2015

DURATION: 3 HOURS

Instructions to Candidates

- (a) Candidates should answer **FOUR** questions
- (b) **Question ONE is compulsory**
- (c) All questions carry 15 marks each
- (d) Marks shall be lost for illegibility

PLEASE TURN OVER

1. On an official search carried out at the companies' registry on the 10th day of January, 2014, the promotor of a proposed limited liability company found the name Randabasia Food available for registration to form a limited liability company. They were happy, and, on the same day, the promotor registered such a company under the Companies Act (Cap 486, Laws of Kenya), with the share capital of Shs.100,000,000, divided into 100,000 shares of the value of shs.1,000 each. The registered office of the company was stated to be on the Twelfth floor of Tall Towers Building in Pleasant Avenue in Malindi. On the 20th day of January 20th 2014, a business lady known as Weyuya Keng'ene purchased and fully paid for, 100 ordinary shares, being those ranging from numbers 100 upto 200, in the capital register of the company.

Following the recommendation of the directors of the company, the said company at a general meeting on April 4th 2015, declared a dividend of 10 per cent on the shares payable out of the profit for the year ending January 10th, 2015 according to what each shareholder paid on the shares. As it has turned out, however, the company has still not paid Weyuya Yeng'ene her declared dividend in respect of her shares. A friend of hers advises Weyuya Yeng'ene to see you at your successful firm of lawyers practicing on Sea Front Elegant Villas along Ocean Belt Road, Malindi, under the firm name of Nani Atatushinda & Co. Advocates. After she saw you, and she engaged you to claim from the company the amount shs.250 million as her dividends, the company ignored the letter you sent out to it making an appropriate claim, with notice that failure to pay the dividends to Weyuya Yeng'ene in 10 days of the letter, litigation would commence against the company to recover her dividends.

Draft an appropriate plaint raising the claim sought by this lady.

2. The plaintiff in a civil suit in the High Court of Kenya claimed from the defendant specific performance of an alleged agreement for sale of an undivided half share of certain land, with alternative prayers for damages for breach of contract and for rescission of the agreement and return of moneys allegedly paid thereunder. Paragraph 5 and 8 of the plaint read as follows:

"5. In the year 2014 the plaintiff with the acquiescence or agreement of the defendant spent a sum of Shs.3,000,000 on improvement to the said property.

8. The plaintiff has at all material times been and is now ready and willing to perform his obligations under the said agreement."

When the case came for hearing a year later, the advocate for the plaintiff applied to amend, inter alia, paragraph 5 of the plaint to read:

"5. In the year 2014 the plaintiff with the acquiescence or agreement of the defendant spent a sum of Shs.3,000,000 on improvements to the said property. The said amount was spent by the plaintiff lawfully and on behalf of the defendant, not intending to do so gratuitously and in anticipation of the plaintiff becoming a co-owner of one half undivided share of the said property and of which improvements the defendant has enjoyed and, in the event of the plaintiff not becoming a co-owner, will enjoy the benefit."

and also sought to add the following new prayer:

"(iii) In the event of this Honourable Court not decreeing specific performance of the said contract, the sum of Shs.3,000,000 as mentioned in paragraph 5 (together with interest thereon at such rate and from such time as this Honourable Court deems just) under the Law of Contract Act, be refunded."

The advocate for the defendant opposed the application for amendment on a number of grounds.

Identify and explain each of the grounds which the advocate could raise to justify the opposition to the proposed amendments, and how the High Court would decide the application.

3. ✕ A purchaser sued the vendor of a piece of land for the specific performance of an agreement of sale of the vendor's land. The plaintiff applied for summary judgement. The defendant's second advocate asked for time in which to file his defence to be extended and for leave to amend it. The court refused the first and granted the latter, and an amended defence was filed, which the defendant filed a reply to. When the trial began only one issue was raised. The plaintiff and one witness testified and the plaintiff closed his case. The trial was adjourned to three months to come, and on the date so fixed, the defendant's advocate withdrew, so the defendant refused to give evidence because he had only learnt at midday that his advocate would no longer represent him, and he had no time to engage another. The hearing was adjourned to two days, the 9th and 14th of the same month of the trial for him to brief another advocate. On 14th the defendant said he would conduct his own defence and the advocate he had approached needed more time. The judge would not let the defendant have another adjournment and instead delivered judgement at once, and gave the plaintiff all the orders for which he asked for in his plaint save for damages for loss of rent.

The defendant is aggrieved by this turn of events, and seeks your considered opinion to guide him in a decision whether or not to appeal against the trial judge's refusal to grant a further adjournment to the defendant.

Setting out and explaining the nature of the power of the court to deal with applications for adjournment, and circumstances in which an appellate court may interfere with a refusal to grant an adjournment, and matters which the appellate court will consider on such appeal (which please set out), advise the aggrieved defendant in this case, whether he should have been granted the adjournment that was refused.

4. Mayanja was Kasule lost his suit before the High Court. He was very angry with the performance of his advocate before the High Court. After a long quarrelsome exchange between him and his advocate, he engaged a new advocate to appeal against the decision of the High Court. He was already two months late to appeal to the Court of Appeal of Kenya. His new advocate applied to the Court of Appeal for extension of time within which to file and serve a notice of appeal and to file and serve a record of appeal. The applicant told the Judge of Appeal that there was delay because in the first 40 days there was disagreement with his first advocate, and that the newly appointed advocate needed another 20 days to obtain, peruse and comprehend the court file, and to produce copies since the earlier advocate had refused to part with the case file.

As a research assistant to the Court of Appeal Judge hearing the application which is vehemently opposed, advise the judge in writing what factors he should consider in deciding this application, and, on these particular facts, whether the application should or should not be granted. Supply the judge with reasons for deciding the application one way or the other.

5. ✓ Tergat Mohamed Mvumo has come to your famous firm of advocates and alleged that the County of Machakos is taking steps which are prejudicial to her rights without her being heard in the matter. She instructs you to apply for an order of prohibition. You have applied for, and obtained leave to apply for that order against the County of Machakos. Having obtained leave to apply, you are pondering on how to make the application. You ultimately reach to what you consider to be the correct procedure in bringing before the court an application for an order of this kind.

- a) State how an application for an order of this category is issued.
- b) Draft the correct entitlement of the appropriate application after obtaining leave to apply. Do not draft further matters.

6. Rispa Fair Living Ho obtained a loan from Rasbari Finance Inc. She charged her residential property as security for the repayment of the loan. She defaulted to repay. Rasbari Finance Inc. moved to exercise its statutory power of sale. Rispa Fair Living Ho filed a suit to stop the lender from doing so. The suit was dismissed by the High Court of Kenya.

Intending to appeal against the dismissal of her suit, but fearful that Rasbari Finance Inc. might now proceed to sell her property she instructs you, as her advocate, to seek a stay of execution. You have instructions to seek the stay of execution in all available avenues to protect her interests as she undertakes the appeal process.

Set out and explain the applicable principles and factors which you will have to persuade each court, to which you will be making the application, to grant a stay of execution order.
