

COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

ATP 108: COMMERCIAL TRANSACTIONS

THURSDAY 26TH JULY, 2012

DURATION: 3 HOURS

Instructions to Candidates

- (a) Answer one question from each of the three sections and a fourth question from any section
- (b) All questions carry 15 marks each.
- (c) Marks may be lost for illegibility

SECTION A

1. The bedrock of Commercial Transactions is contracts, agreements and agency.
 - a) Set out the forms of contracts as enumerated in Section 34 of the Companies Act (Chaptr 486, Laws of Kenya), noting to pay attention to the details as to who may enter into contracts on behalf of a company and the reasons for their validity. **(6 marks)**
 - b) In what circumstances can a company have power to have an official seal? **(3 marks)**
 - c) Briefly outline the nature of the Hire Purchase contract and distinguish it from a contract for Sale of Goods. **(6 marks)**
2. Mr. Bahati Mbaya has been in the business of supplying wholesale goods to retailers all over Kenya for over ten years since 2000. He supplies assorted goods, but mostly specializes in aluminium foil, wiring, metals and related products, used in industrial processes. At first, business was really good and he was able to make good profits. However, since 2006, the Kenyan economy has seen hard times, and he is just grateful that his business has not gone under. The biggest problem he is facing is that most of his clients depend on a system of credit which allows them to take the goods on the understanding that they are to pay within a certain period, usually within 30 days of delivery of the goods. Without allowing his clients to take on credit, the volume of business will be greatly reduced and he just cannot afford to have lower returns anymore. At the same time the credit arrangement carries with it the risk of non-payment and other risks associated with difficult market conditions, such as bankruptcy of his customers. He is sure that the only way he can stay in business is to continue allowing his customers to take goods on credit for re-sale. He does not have money to insure goods already sold to retailers. He understands that there may be ways to still try to protect his interest in goods in possession of the retail customers.

Mr. Bahati Mbaya has come to your office aware of your reputation as a good commercial lawyer. He wants you to advise him on how to retain some form of ownership over his goods, without impeding his or his customers business. He is very skeptical that it is possible to do anything legally. You, Mr. Wakili Akili, are quite confident that this is possible.

- a) Identify the applicable legal framework and specific sections of the law that would enable him protect his investment, including the content and effect of the relevant sections. **(4 marks)**
- b) With the aid of at least two decided cases, illustrate to him how courts have dealt with such matters, including the principles that have been developed from such case law. **(8 marks)**
- c) Suggest the type of clause(s) you would recommend he inserts into the existing contracts with the retail customers to further the protection of his interest in his goods. **(3 marks)**

SECTION B

3.

- a) Explain what is meant by accommodation bill. (8 marks)
- b) Likus drew a bill and Karim accepted it for the accommodation of the former. However, on the due date Karim dishonoured the bill. Nyambura, the holder of the bill at the time (due time), nevertheless proceeded to collect the amount from Likus.

Likus has approached you and seeks to sue for the recovery of the amount.

Advise Likus.

(7 marks)

4. Kalamindi issued the following cheques to Asenath:

- i) An uncrossed cheque payable to Nikano whose endorsement had been forged by Kalamindi;
- ii) A "not negotiable" cheque payable to Kalamindi and endorsed by him but which he (Kalamindi) had received through fraud; and
- iii) An "account payee" cheque payable to Kalamindi duly endorsed by him.

Advise Asenath, who had no history of the cheques and gave value for them, as to whether she has a good title to any of them.

(15 marks)

SECTION C

5. Laleni Kenya Company Limited was founded in 1909. It has been "THE" in manufacturing business and also engages in wholesale business of clothing products.

As a result of poor management and reduced tax incentives for the clothing industry, coupled with the recent decision by the Minister for Finance to reduce tax on second hand clothing, Laleni Company Limited directors have decided to wind up their company. The Laleni Kenya Ltd Managing Director now seeks your advice on the provisions of the Companies Act (Chapter 486, Laws of Kenya) relating to winding up.

- a) Explain at least **FIVE** circumstances in which a company may be wound up by the court. (5 marks)
- b) Set out at least **THREE** provisions and circumstances under Section 221 of the Companies Act on the prerequisites of a petition for winding up and the effects thereof. (6 marks)
- c) Discuss the role of the official receiver in winding up of companies and make comparisons with the official receiver in a bankruptcy process. (4 marks)

6. Mr. Jasper Drake is a well-known American millionaire who made his wealth in the fast food business by selling tasty crunchy chicken through his outlets all over USA known as "Crunchy Chicken". He inherited the business from his father, and the reason for the success of his business has been the secret recipe for the crunchy chicken. This recipe is a well-guarded family secret, and over the years the family has ensured that only members of the immediate family have access to the recipe. In fact all the branches in America are headed by family members who are the only ones who have access to the recipe. Unfortunately Mr. Drake and his immediate relatives are all well over 70 years old and are considering retiring from the business soon, at least in the active sense. He has many grandchildren who may eventually take over but for the time being they are all still quite young.

Mr. Drake visited Kenya in June 2012 and was very impressed by Nairobi and Mombasa, and the level of business growth and population. He is of the opinion that Kenya may present a good market opportunity to expand his business for the sake of building income for his grandchildren. He has decided to visit your law firm, which specializes in commercial law, with a view to exploring business format options available to him. If you are able to convince him that his legal and commercial interests will be fully protected, you will be able to make a substantial income from the business he provides to you.

He has provided you with the following information:

1. He is not interested in engaging directly in the expanded business but wants to retain a great measure of control over how the business is to be conducted.
2. He will play a role in determining who will be the manager of the business outlets.
3. He does not want to invest any money in the business but is looking for someone who can invest assets and resources into the business in both Nairobi and Mombasa.
4. He will be able to share in the profits by way of an agreed sum.
5. He will allow the use of his business format, brand name and image, and these should be retained exactly as they are.
6. He will reveal and allow the business to use his recipe and other business information and knowledge but these secrets should be strictly protected.

Advise Mr. Drake on the most appropriate business format, explaining clearly what such a commercial concept would entail, its suitability and the entire scope of legal and other considerations that would have to be reflected in such an arrangement.

(15 marks)