

# COUNCIL OF LEGAL EDUCATION



## EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES

### ATP 100: CIVIL LITIGATION

MONDAY 16TH NOVEMBER, 2015

DURATION: 3 HOURS

#### Instructions to Candidates

- (a) Candidates MUST 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. Rankerous Lolwe employed Hawezi Kamwe as an agent to collect rent from his tenants in respect of 15 palatial residential houses in Muthaiga, Nairobi. Each tenant occupied a house on a monthly rent of Kshs.500,000/-. According to the tenancy agreement a deposit of Kshs.3 million was to be paid before occupation. All the 15 houses were fully occupied.

For some reason not disclosed, Hawezi Kamwe has not collected any rent from the tenants for 10 months. She had also not collected any down payments.

Feeling that his agent had not exercised due care and diligence, resulting in loss to him, Lolwe instructs you to file a suit against Kamwe for negligence, and claim from her sums due for rent and deposits, because any claim against the tenants had become time barred.

Your firm practices on New Sensation Plaza, 30th floor, Nairobi along Kenyatta Avenue. Hawezi Kamwe runs a debt collection business at Babekopi Emporium, Ground Floor, on Dreary Street, Machakos.

Draft an appropriate plaint for the claim.

2. Set out and describe in each item, the contents of an advocate's civil case file on any given case, from the moment a client retains an advocate for a civil claim which ended up in court, up to the time the case is called out for hearing on the merits, but before the hearing commences.
3. Tom Rashid sued Douglas Murunjiri in the High Court of Kenya, Kisii, in Civil Case No.300 of 2014, seeking to recover a sum of Kshs.10 million alleged to have been advanced to him at his request. He prayed for costs and interest. The defendant denied being indebted to the plaintiff. The case was heard and determined by Hon. Mr. Justice Speed who, in his judgement delivered on 6th October, 2015, after hearing evidence on both sides that same day, dismissed the suit.

Draft the appropriate decree.

4. Lucy Nabangala, a leading importer of high class leather goods for sale received a written order from Sylvia Omodi Dala, dated 3rd April, 2015. Lucy replied in writing giving the price quotation and enquiring whether Sylvia was willing to buy the goods at the quoted price. Her advice on the price was dated 4th April, 2015. Sylvia wrote back immediately on the same date, accepting to buy the goods at the price quoted by Lucy. Lucy supplied and delivered the required goods as evidenced by a delivery note of 5th April, 2015, and an invoice of the same date. She paid by cheque of that date for petrol to fuel the delivery vehicle. To her utter surprise Lucy received a letter dated 20th April, 2015 from Sylvia saying, among other things, that she had not received the goods, and that Lucy was in breach of the contract and should rectify the position.

By her letter of 22nd April, 2015, Lucy replied saying that delivery of the goods had been made as agreed, and that she was waiting for payment for the goods. Upon receiving this reply, Sylvia issued a demand letter requiring Lucy to supply the goods within 4 days from the date of receiving that letter dated 25th April, 2015. Not believing what she was reading Lucy wrote a letter to her closest of friends to express her shock at the turn of events. That letter, dated 26th April, 2015, was replied to by her friend's letter of the same date condemning Sylvia's conduct.

On 27th April, 2015, Lucy wrote to her advocates Messrs. Purity-of-Heart Advocates, seeking their advice on the position in law, and how she should respond to Sylvia's demand. Purity-of-Heart Advocates rendered the legal advice in a letter of 30th April, 2015. On the basis of the advice, Lucy gave the Advocates further instructions by letter of 2<sup>nd</sup> May, 2015, including instructions to write a separate letter to Sylvia denying any breach of contract.

When she received that reply dated 3<sup>rd</sup> May, 2015, Sylvia, through her own lawyers, Messrs. Wonekha & Co. Advocates, filed High Court Civil Suit No.515 of 2015, dated 5th May, 2015. Upon being served with summons to enter appearance, Lucy's Advocates filed a defence and counter-claim simultaneously with entering appearance on 10th May, 2015. At the pre-trial case conference, Wonekha obtained for Sylvia, orders of the Court at Nairobi, directing Lucy to make discovery of documents within seven days of the order, which period coincided with Purity-of-Heart's absence from the country. Purity-of-Heart telephones you and sends you your fee, and requests you to prepare for her client the necessary discovery. Lucy brings to you the full record of what went on up to this time.

Prepare the necessary discovery to be furnished and for filing in the court as ordered.

5. In a civil case filed and registered on the 8th January this year at Machakos Resident Magistrate's Court by Chibri Nyasani against Karanja Ole Razanga, the record of the hearing in the court case file, in its essential portions, omitting details not necessary for the present purpose, included the following evidence:

"Chibri Nyasani (PW1): I have sued Karanja Ole Razanga. He is my fellow Kenyan and my landlord at a building in Westlands, Nairobi which I use as a hotel with accommodation facilities, under a lease agreement entered into on 15th April, 2014 to last until 15th April, 2019. The lease agreement contained among other covenants, one which stated as follows:

'The landlord agrees to execute all outside and inside repairs of the said building which may be found necessary for a hotel in the course of reasonable wear.'

Two months later, by letter of 30th June, 2014 I informed Razanga that the glass roof and water pipes were leaking badly. So was the roof in the kitchen. Razanga sent his representatives and certain works were done in the glass roof, the gutterings and the kitchen roof. But because the glass roof was not made properly watertight the dining room flooded during the rains. Guests had to be moved out of the bedrooms owing to the leaking roof. The floor of the kitchen also required repair. Two guest rooms leaked, and the walls were cracked in several places. I gave verbal notice of the need of these further repairs. I suffered loss to the extent of Kshs.200,000 through loss of customers owing to the bad state of repair the hotel was in and owing to vacating the premises. I have brought this suit to claim this amount."

In answer to questions put to him in the course of cross-examination, he answered:

"I do not know the extent of the damage to the glass roof. My workers might have left the water-taps running all night, causing flooding. The experts who inspected the roof are not

here to give evidence as to its condition. No attendant at the hotel has come to testify as to the state of customers or the state of the hotel in the rains and loss of customers."

There was no re-examination of Nyasani, and his Advocate announced the close of his client's case.

When Karanja Ole Razanga took the witness-stand to testify, he admitted the landlord-tenancy relationship under the said lease agreement. But he said:

"I did all the repairs which Chibri notified me. The alleged loss of customers is denied; but if there was any such loss, it had nothing to do with the state of the building and might have been due to other causes not related to the state of the building. I ask the court to dismiss this suit with costs. I so pray. That is all. I have no witnesses to call."

On the basis of the record of the evidence given on both sides, the a judgement on the above claim, the advocates on both sides having exhaustively argued their respective cases by merely repeating and emphasizing what their clients had said in their evidence, and Razanga not having been cross-examined.

6. Developers Enabling Bank as chargee had, in exercise of its statutory power of sale, sold by public auction, charged property. The purchaser was Lady Khasoa. The conditions of sale included one requiring the highest bidder to pay immediately a deposit of twenty five per cent (25%) of the sale price, and the balance to be paid within 30 days from the date of the sale. Khasoa made a down payment of the 25% of the purchase price and was issued with a certificate of sale. She was left with a balance of Kshs.2,400,000 to be paid within 30 days from the date of the auction sale. Six days later, Khasoa wrote to Developers Enabling Bank asking it to supply her with title documents, discharge of charge, a duly executed transfer and rates and rents clearance certificates in respect of the parcel of land and improvements erected on it. She also stated in the letter that she required 60 days to enable her organize the necessary finance. Developers Enabling Bank responded by saying among other things, that it could not release the documents and was expecting to receive the balance of the purchase price within the stipulated 30 days. Subsequent discussions led to some mutual extension of the period for the payment of the balance. But it did not work. Developers Enabling Bank refunded to Khasoa the 25% deposit sums paid at the auction sale. While acknowledging the refund, Khasoa brought suit against the Bank for breach of contract. Developers Enabling Bank entered appearance and filed a defence to the suit, the basis of which was that the plaintiff Khasoa's counter-offer varying the conditions of the auction which was unacceptable to the defendant Bank. By a notice of motion filed in the Court, Khasoa applied for summary judgement against Developers Enabling Bank in the sum of Kshs.15,000,000 prayed for in the plaint as special damages for loss of bargain. She took the position that she was not in breach of the 30 days period within which it was required to pay the balance of the auction purchase price when the bank refunded to her the deposit of the purchase price, and the 30 days period had not expired. This being her take, Khasoa was of the view that the Bank was in breach of the contract of sale. The bank took the position that instead of paying the balance of the purchase price within the stipulated 30 days in the conditions of sale, Khasoa counter-offered and sought a 60 days period within which to pay the balance of the purchase price, and the counter-offer was unacceptable, and the Bank was not therefore in breach of the contract as alleged. On this ground, the Bank opposed the application for summary judgement and asked for leave to defend.

You are attached to Lady Justice Showy as her research assistant. She instructs you to carry out research for her and write out an opinion, applying relevant principles whether summary judgement is available on the above facts.

Set out your reasoned opinion, showing the applicable principles and applying them and advise the learned judge accordingly to assist her in writing her ruling on the application which she has heard before her.

7. In a case before the High Court of Kenya at Nairobi, the issues for the court's determination were (a) whether the parties were partners or co-owners; and (b) the taking of accounts.

The defendant applies for leave to deliver and for the plaintiff to answer the following interrogatories:

- (i) Were the plaintiff and the defendant ever co-partners as buyers and sellers of, and dealers in handed property?  
Were the plaintiff and the defendant ever jointly interested in any other property or properties? If yes, give a list of the property or properties, identifying them.  
Were any of the properties including the suit property acquired for the purpose of disposing of them and dividing the profit (if any) or losses, or were such properties acquired as and by way of permanent investment to belong to the plaintiff and the defendant to hold the same as owners and to enjoy the yield thereof?
- (iv) State in what proportion the purchase money of such properties was raised in each instance.
- (v) State in what proportion the equipment and running costs, including the management and all outgoings including ground rent and other taxes were raised.
- (vi) State how and in what proportions the proceeds from the farming yield were disposed of between the plaintiff and the defendant.
- (vii) Were the expenses of management and running the firm and the cost of development, improvement and obtaining the supplies always, or in some years, stating which, overtopping the income from the farm yield? If yes, state how and in what proportions the deficiency was borne or made good.
- (viii) Did the plaintiff and the defendant ever set up a separate shop or other establishment to trade in the farm produce from the suit property, or to obtain supplies from such trading establishment for the use of the said suit farm?
- (ix) State any special fact or facts you rely upon, including any special feature or features, or the manner of keeping accounts, by which you contend the relationship between the plaintiff and the defendant was not that of co-ownership of the suit farm and the produce thereof, but was that of partners.
- (x) Did you, (and if the answer is yes) on what basis allege that you agreed with the defendant to become partners in the purchase and holding of the farm, or in sharing the profits in the yield therefrom? State when and where and between whom such agreement was made, and whether verbally or in writing. If verbally state the substance of it, if in writing identify the document. When so agreeing did you appreciate the difference between the relationship of "partners" and "co-owners"?
- (xi) State who you allege was the fulltime or other farm manager. State by whom, when and where he was employed, what his salary was and other remuneration and what his hours

of work were. State whether such contract of employment was made verbally or in writing. If verbally state the substance of it, if in writing identify the document.

- (xii) Was the defendant not at all material dates to this action carrying on business under the firm name and style of "Construction and Developers Corporation" in Muindi Mbingu Street in Nairobi? Did not the "Thika Jaggery" enlist the services of the said "Construction and Developers Corporation" as regards the disposal of its farm produce and for obtaining of supplies for the said farm?

Was it not expressly agreed that the said "Construction and Developers Corporation" should charge commission on the disposal of produce, and a fee for his services in addition to the price of the aforesaid supplies? Doesn't a course of dealing over a number of years since 1992 further show that this commission and fee was payable, and had never been objected to by you? Did the principals of "Thika Jaggery" ever have a business of the same nature as and competing with that of the "Construction and Developers Corporation"? Was the said "Construction and Developers Corporation" under any obligation to forgo or not to charge its aforesaid fee or commission? If yes, state the nature of such obligation and the precise circumstances from which it was to be implied.

- (xiii) Has the defendant not supplied to you all accounts relating to and of "Thika Jaggery"? Has the defendant not further sent you the balance sheets of the said Jaggery for 2012, 2013 and 2014? Has your account not either many times or at least once stating which, not examined and checked the books of the said "Thika Jaggery"? Have you at any time complied or forwarded to the defendant any list of what you claim to be omissions or what you considered wrong debits?

- (xiv) Was the other litigation not successfully taken out by the defendant? Is the defendant not entitled to his costs of that litigation? Are you prepared to agree such costs, or to obtain an order therefor and to have them taxed? Do you consider Kshs.2 million as exorbitant for such costs?

State what you consider to be a proper and reasonable figure. Are you prepared to allow a reasonable figure to be paid to the defendant, or to allow him in ascertaining the indebtedness of one to the other as between the defendant and the party in the other litigation?

Having carefully gone through and considered all these proposed interrogatories, applying the general principles which govern when leave to administer interrogatories should be granted, advise accordingly with regard to the above proposed interrogatories.

8. The High Court of Kenya sitting at Eldoret has passed a judgement against Kaloki Karokora Mayanja to pay Olia Biabene a sum of Kshs.150 million. Kaloki seeks your advice on the civil procedure law and practice on what is, or may be, open to him and how to go about it to:

- (a) Overturn or alter that decision.
- (b) Suspend the enforcement of that decision (here set out the applicable principles guiding the forum where he makes his effort).

Provide him with the requisite legal advice.

9. In a suit brought for the recovery of Kshs.30,000 paid as the purchase price for a heifer, Kamau Otonglo, in a homemade pleading in answer to paragraphs 4,5 and 6 of the plaint, among other paragraphs, filed the following pleading:

"... Memorandum of Defence

4. I admit there was a contract between me and the plaintiff, as alleged in paragraph 4 of the plaint.
5. It is true I was paid Kshs.30,000 as the agreed price for my heifer.
6. I am in breach of the agreement."

After filing this document in court, Otonglo comes to you and tells you a very different story from what is stated above. He says there was never such a contract, no payment of any money to him and no breach of any agreement by him. He adds that in the alternative, and without any prejudice to any of these new assertions, if there was any such contract which he still vehemently denies, it was frustrated because the heifer died anyway, for no fault of his.

Kamau Otonglo has put the matter in your hands and you discover that the defendant in his pleading did not set up the real and substantial point of defence. Indeed, you as a learned advocate find the do-it-yourself pleading which he had manufactured is meaningless in the light of what he has told you.

Prepare one that reflects the substance and effect of Otonglo's defence on the basis of which you will be seeking leave to amend his pleading.

10. You have set up a lawyers' firm in Nairobi and the firm has quickly established fame for successful civil court litigation against the Government. A prospective investor who wishes to put up a subterranean bullet railway train transport system between Mombasa and Malaba, with the Government participation in selected aspects, seeks your written legal advice on any special features and procedure of enforcing civil judgements against the Government.

Set out the advice basing yourself the relevant substantive and procedural law on the subject.

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