

COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION

TO THE ROLL OF ADVOCATES

ATP 100: CIVIL LITIGATION

MONDAY 29TH JULY, 2013

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. Dominic Jumla Khandi, a dealer in rare paintings agreed in writing with Samson Shap Rara, that the latter would sell to him a rare oil painting known as "The Head of Patriot Kimathi Defying Colonialists and Contemptuous of Homeguards." The agreement between the two, who work and reside in Eldoret, was made and entered into on August 15, 2012. Dominic agreed to pay Kshs.100,000,000 for the painting. He has all along kept that amount of money in readiness to pay the agreed purchase price. To this day Samson has not delivered this painting to Dominic, who has made a number of demands to Samson to deliver the painting to him (Dominic). Dominic is disappointed. He instructs the firm of Lino and co. Advocates to file a suit against Samson and seek a judgement to force Samson to deliver the painting to Dominic as agreed and/or compensation in substitution for non-delivery, and costs of the suit. Lino & Co Advocates is a reputable firm of advocates located at Riparian Towers, Ground Floor, Middle Chambers, Kampala Highway, P O Box 7, Eldoret. This firm has recently employed you as a junior advocate. Senior Counsel in the firm is busy assembling together evidential documents and others which may be needed later. In the meantime, she gives you the above facts and asks you to draft a plaint which she will consider along with other documents which she is putting together. Draft the plaint she requires. **(15 marks)**

2. Tomlin Loliyong' Saikeri owns a large piece of land on which he lives with his family in an imposing house of its own class. Unknown to him, Amusolopagas Mchokosi had entered upon a hidden part of the land, dug a foundation to build and heaped up sand and ballast in readiness for building works to start on Saikari's land the following week. On discovering what was happening on his land, Saikari is furious, and comes to you for your legal opinion as to what he should do, using the court process, to end this blatant aggression by Mchokosi, and also to get rid of the building materials as well as the trenches dug on his land, and any contemplated return to the land by Mchokosi. Saikari tells you that he had actually identified that very part of his land for building a nursery school the construction of which was going to start in three weeks and he did not want any delay.

Write a concise legal opinion on the way forward for Saikari who needs immediate intervention by the court to protect his alleged rights between now and the time when those rights will be determined, and set out the legal principles which the court will be expected to follow when determining whether Saikari needs any immediate protection in the way you have advised him. **(15 marks)**

3. RAJIT Khan Paul, Loilo Gap, and Ching Hu Rob, were jointly hired to build the Great Middle Highway, for the County of Chap, under a well-paying contract. They were supposed to be paid a contract sum of Shs.150 million. They efficiently performed their part of the contract. The County of Chap has refused, failed or neglected to pay them their contractual dues. Loilo Gap and Ching Hu Rob have unsuccessfully pleaded with Rajit Khan Paul to contribute towards a fund to meet lawyer's fees to sue for the recovery of the Shs.150 million from the County of Chap. He is not interested. Anyway, ultimately Gap and Rob raise enough money to sue.

- a) State and explain who would be proceeding as plaintiff and against whom. Give reasons for your answer. **(7 marks)**
- b) Supposing the breach of the contract was by Paul, Gap and Rob, and the County wished to sue for damages, whom would the County sue? In answering part (b), explain the governing rule. **(8 marks)**

4. Ufanisi Micro Finance Ltd lent Mtaka Vyote a sum of Shs.3 million to set up a boutique business. After the business started off well, she set up many other branches across the country, resulting in her being financially overstretched. She fell into loan repayment arrears.

As at 30th January, 2013 she owed an accumulated sum of Shs.2.6 million. Ufanisi Micro Finance Ltd instructed Msafishaji & Co. Advocates to sue Mtaka Vyote to recover the said sum. On being served with a demand letter she replied saying that Ufanisi Micro Finance Ltd should wait until the economy improves after which she will resume repaying the outstanding money owed. Msafishaji & Co. Advocates sue her. Her advocate entered an appearance for her. Three days have passed since the appearance was entered. You are a pupil at the firm of Msafishaji & Co. Advocates. Your pupil-master in that firm puts the case file concerning this suit on your desk and asks you to carry out research and provide him with:

- a) An opinion on what course(s) may be taken next on behalf of Ufanisi Micro Finance Ltd; (7 marks)
- b) A brief discussion of the principles the court will apply in considering whatever course sought on behalf of Ufanisi Micro Finance Ltd. (8 marks)

Carry out these instructions from your pupil-master.

5. Under the Civil Procedure Act and the Civil Procedure Rules 2010, a party who is dissatisfied with a decision of a civil court may challenge that decision in two main ways. Critically discuss those ways, bringing out;

- a) What they are;
- b) How they differ (if they do, and if they do not, point out the similarities that you consider exist);
- c) The foundation on which one may pursue the available ways. (15 marks)

6. Maize Meal obtained a decree against Raz Maingano, for a sum of Shs.15 million. Rapid Auctioneers seized a Nissan Hardbody pick-up motor vehicle with a view to having it sold by public auction under a warrant of attachment and sale issued by the registry, High Court of Kenya at Kisii, in execution of the decree. Mlaji Mwema saw a 30 days' notice and proclamation of sale issued by the court brokers regarding a proposed sale by public auction of the attached pick-up. Mlaji Mwema claiming to be the owner of the vehicle gave notice of objection to the attachment.

- a) Describe the procedure from this point up to when the objection is determined. (6marks)
- b) What should be established by Mlaji Mwema for her to succeed on her objection? (4 marks)
- c) What orders is the court entitled to make after the hearing of an opposed objection? (5 marks)