

KENYA SCHOOL OF LAW



**EXAMINATION FOR ADMISSION TO
THE ROLL OF ADVOCATES**

CIVIL LITIGATION - ATP 100

21ST JULY, 2014

DURATION: 3 HOURS

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

PLEASE TURN OVER

1. Rigshaw Calabash Mwidaho and Rita Mwenda Smooth entered into a written agreement on June 15th 2014 whereby Rita sold 110,000 bags of cashewnuts at the total price of Kshs.60 million, which were to be delivered not later than June 30th, 2014. The payment was to be made upon delivery. Rigshaw agreed with Bingira Sashi to supply Sashi with the said quantity of cashewnuts on June 20th 2014 at the price of Kshs.70 million, and had purchased the cashewnuts from Rita for the purpose of supplying them to Bingira Sashi. This fact had been communicated to Rita at the time of entering into the contract with her. Rita has failed to deliver the cashewnuts. Rigshaw, on his part, could not purchase similar loads in the market to enable him effect delivery upon Bingira Sashi and has consequently lost the large margin in profits he would have realized upon re-sale. He has approached Rita at her business premises situated on the second floor of Dich Dich House located along Omesh Street in Nairobi to ask for delivery. Because of his frequent visits, thereafter, she has become hostile and abusive.

Rigshaw has now visited the firm of Bangi Mwingi Advocates located on the eighth floor of High Building along Clear Avenue of Nairobi where you are a pupil. He instructs the firm to write to Rita to honour the contract. The firm's letter has gone unanswered. Rigshaw thereafter, instructs the firm to sue. Your Pupil-master has instructed you to draft the necessary process for her perusal.

Carry out this instructions.

(15 arks)

2. Paragraph 5 of the plaintiff's plaint makes the following allegation:

"As a result of the collision arising from the defendant's negligent driving the plaintiff suffered personal injury and lost her personal effects; namely a handbag, mobile phone, hairpiece and false gold teeth"

Upon receiving the summons with the plaint, the defendant contends that he is not sure how to answer the allegations. He seeks the professional advice of the firm you are engaged as a pupil and pays the requisite professional fees:

Your pupil-master instructs you to:

- (a) (i) Briefly advise him on the defendant's response (5 Marks)
- (ii) Draft an answer for his perusal (5 Marks)
- (b) In reference to (i) and (ii) above what would be the consequences of your answer? (5 Marks)
3. (a) What are interrogatories? (5 Marks)
- (c) Shah Hashemi Karanja has been sued for negligence arising out of a road accident he caused while driving under the influence of alcohol. He was said to have been weaving from left to right and collided head on with the on-coming vehicle driven by the plaintiff.
- He is now being sued for negligence and by the plaintiff aside from the criminal charge leveled against him of driving under the influence of alcohol.
- The plaintiff who has sued him serves him with interrogatories to the following effect:
- (i) How many bottles of alcohol did you consume on the material night?
- (ii) Did your wife ring you asking you why you had delayed to get home that night?
- (iii) What made you instruct your advocate to deny liability after your initial admission to me at the scene of the accident?

Shah has now instructed the firm in which you are undertaking pupillage to act for him. In the matter, your pupil-master has asked you to prepare and draw up the right answers to these three questions, explaining briefly each answer and why you would respond in the manner you do.

Undertake to carry out these instructions.

(10 Marks)

4. Four years ago Samuel Swifty was medically treated by Dr. Money for a medical condition. Samuel's medical condition deteriorated and he suggested that Dr. Money had not exercised the prescribed standard of care. Samuel sought an alternative doctor and after undergoing a major surgery he recovered. Samuel has now turned 18 years as from last Saturday. He has filed a suit against Dr. Money alleging medical negligence. Dr. Money has filed a defense to the claim, denying responsibility and has counter-claimed for the balance of his professional fees which was outstanding from Samuel. Dr. Money has moved to court for Summary Judgement on the counter-claim and for dismissal of the suit against him by Samuel as the same is time-barred.

Explain whether Dr. Money would be successful in the motion he has filed on any or all prayers.

(15 Marks)

5. At the trial of a suit by Prudence Naliaka against Restless Mbakarira, who failed to stop his car at the red light and thereby injured Prudence after colliding with her car the advocate for the plaintiff calls her first witness, Observant Nasimiyu, who happened to be at the road junction on that day and saw what happened. After entering the witness box the proceedings were as follows:

1. Advocate: Please state your name.
2. Nasimiyu: My name is Observant Nasimiyu.
3. Advocate: Miss Nasimiyu, were you present at the junction of Lelo Avenue and Luno Road in the Municipality on June 10th last year?
4. Nasimiyu: Yes, I was.
5. Advocate: Did you see Restless Mbakarira fail to stop his car when the redlight signal showed against his direction?
6. Nasimiyu: Yes
7. Advocate: And you are sure, are you not, you did see?
8. Nasimiyu: Of course, I am sure of that
9. Advocate: Miss Nasimiyu, how can you be so sure that the defendant failed to stop at the redlight signal that day?
10. Nasimiyu: I was in my car right behind him and I saw the light signal turn red but the defendant ignored and drove on
11. Advocate: What happened after the defendant failed to stop?

12. Nasimiyu: He slammed into that lady's car, and both cars rolled sideways.
13. Advocate: Did you leave your car to check if you could be of some help?
14. Nasimiyu: Yes, I parked my car and ran to the lady, Prudence's car, and asked her if she was alright.
15. Advocate: What did the defendant say to you?
16. Nasimiyu: He said he thanked God that nobody had been killed.

Go through the above 16 stages of the examination-in-chief, and undertake the following;

- (a) identify whether, and if so, which of any of the phrasing of the questions are permissible.
- (b) give an explanation for permitting or disallowing each phrasing according to what you have identified in your answer in (a) above
- (c) rephrase the questions, if any, which you identify as not admissible, so as to make them unobjectionable.

(15 Marks)

6. Your pupil-master has informed you that a client who had been referred to the firm had called her to tell her he is on the way. As a way of exposing you to client-interviewing as a necessary component in civil litigation, she proposes that you undertake the client interview.

Explain what procedure you shall adopt to enable you to conduct a successful client interview.

(15 Marks)

7. Jabavu Rishmi a Director of Medieval Contractors Ltd, a tile manufacturing company entered into a contract with Pendo Moja for the delivery of 100 cartons of tiles to her construction site where she was erecting her residence. The project was being overseen by Just-In-Time Constructors Ltd. As per the terms of the contract, delivery was made on 26th May, 2014. The labourers on site unloaded the cartons and due to some mishandling 20 cartons were irretrievably damaged. Pendo Moja, who was on-site to receive the goods and make immediate payment upon delivery as agreed, handed over a cheque for Kshs.320,000 being the payment for the 80 undamaged cartons, insinuating that the balance amount should be claimed from Just-In-Time Constructors Ltd who had engaged the labourers.

Jabavu has now come to the offices of Demba Pasha Advocates, where you are a pupil. Subsequent to the client interview your pupil master requests you to engage on behalf of the firm in the matter.

- (a) (i) identify the initial communication you would refer to the liable party. **(1 Mark)**
- (ii) describe the contents of that initial communication, taking note to identify the right party. **(5 Marks)**
- (b) Should the firm file suit on behalf of Medieval Contractors Ltd against Pendo Moja:
- (i) identify the process she would apply to bring the liability against Just-In-Time Contractors Ltd. **(1 Mark)**
- (ii) explain the procedure to be undertaken to effect the process. **(8 Marks)**

8. On 6th July, 2009, Kris Junior, a performing artist made a deal with Rocco Record Inc. in their offices at Nairobi. The terms of the deal were that Kris Junior would write five (5) jingles to be used by an advertising company and 2 singles, all under the Rocco Records label to be used in the 2009 Pamoja Concert. Rocco Records in return made an advance payment of Kshs. 2.5 million to Kris.

After nine (9) months, Kris Junior relocated to Sweden where he became a naturalized citizen Rocco Records approached the Kenya Association of Music Producers, KAMP to resolve the matter between Kris and themselves.

When negotiations failed, KAMP approached Modise & Morgan Advocates, where you are a pupil to file suit on behalf of Rocco Records Inc.

- (a) Your Pupil-master instructs you to brief her on the procedure she would undertake to notify Kris Junior of the suit. Explain the procedure.

(9 Marks)

- (b) It is later determined that Kris Junior sold the rights of the developed work to the Larsson Group and they still hold the profits of the sale on behalf of Kris Junior.

KAMP now wants to right the wrong against Rocco Records Inc. by restoring the property in the works to them.

Explain how KAMP as an organization can successfully institute an action on behalf of Rocco Records Inc. against the Larsson Group.

(6 Marks)