

COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION  
TO THE ROLL OF ADVOCATES

**ATP 100: CIVIL LITIGATION**

MONDAY 14<sup>TH</sup> NOVEMBER, 2011

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. Mr. Odhiambo Martin owns land Title Number Kisumu/Municipality/2001. He intends to sell the land parcel to Onyino Alston. The two parties approach you Olufwafwa Jacob of Olufwafwa and Associates Advocates to act for both of them in the transaction. After exhausting the due diligence expected of you, you prepare an agreement for sale which is duly signed by both parties. The purchaser pays to you Kshs.100, 000 being 10% of the purchase price to hold pending conclusion of the transaction. The time set for conclusion of the transaction is 100 days. 120 days later, during which time you have never heard from either of the parties, Onyino Alston comes to your chambers alleging that Odhiambo has refused to facilitate the conclusion of the transaction. He informs you that he wants his money back. You call Odhiambo Martin who informs you that it is Onyino who failed to pay the balance of the purchase price and since it is not his (Odhiambo's) fault, he is entitled to the Kshs.100, 000. You do not know who to believe and who to give the money in your custody. You decide to prepare an appropriate application for the court to give guidance in the matter. Prepare the application that would unravel this conundrum for you.
 

**(15 marks)**
  
2. You act for a defendant in a matter that has reached the trial stage. Mr. Maxwell Ondago, Counsel for the Plaintiff is taking his first witness through the examination-in-Chief. He poses the following questions to his witness. State, with reasons, whether you would object to any of the questions. Each question must be handled independently.
  - (i) What is the registration number of the car that knocked you?
  - (ii) You were on the left side of the road by the time you were knocked, weren't you?
  - (iii) Is it your case that the driver of the motor vehicle was driving very fast?
  - (iv) What was the speed and how far from you was the car by the time the driver began breaking?
  - (v) What rumours did you hear on the state of sobriety of the driver at the time of the accident?
  - (vi) You are aware that this driver has been convicted for reckless and dangerous driving in other unrelated incidents, aren't you?
  - (vii) What injuries, if at all, did you suffer as a result of the accident?

**(15 marks)**
  
3. As an owner of an established law firm in town, you admit five students on the pupillage programme annually. As a firm policy, you train your students at the firm's boardroom on various aspects of the law relating to litigation. This coming Friday, your theme of discussion is "Methods of Disposal/Termination of Suits without Trial and the Principles Guiding Each Method." Let us read your detailed presentation notes.
 

**(15 marks)**
  
4. Steve Kinuthia sued Kithunzi Ltd in a personal accident claim. The trial took place before you, Haki Mheshimiwa, the Chief Magistrate at Taita Law Courts. According to Steve, he was riding his bicycle along the Maembe-Machungwa road when the driver of motor vehicle registration number KAB 2744W, who was trying to overtake a tractor, collided with his bicycle throwing him off the road. He was lucky to survive with a fracture at the arm. The area where the driver was over-taking was a blind corner with a big sign reading "no over-taking." The said motor vehicle KAB 2744W had writings in black ink "Kithunzi Ltd, P. O. Box 31 Eldoret." Steve did not conduct any search on the ownership of the vehicle since, according to him, the ownership was

self-evident from the inscriptions on the motor vehicle. According to Kithunzi Ltd, they are not liable for the accident since they were not the owners of the motor vehicle on the date of the accident. They had sold the motor vehicle to one Kennedy Wakulo three months before the accident and a transfer had immediately been done and registered in the name of the said Wakulo. They produced a search from the Registrar of Motor Vehicles confirming this position.

As a magistrate well-schooled in the essential contents of a judgement, write your judgement in this matter. Unnecessary verbosity is discouraged.

**(15 marks)**

5. You are a junior associate in the firm of Makutwa & Co. Advocates. When you joined the firm, a number of cases in which your firm was on record were pending with no action taken. Some of these files were brought to your desk to study them and take necessary action. One of the cases relates to your client James Likabo. He sued one Anyanzwa Johnstone claiming Kshs.250, 000. This claim arose from the cost incurred in repairing his motor vehicle registration number KBC 001 A after it collided with motor vehicle registration number KBE 200 Y owned by the defendant. Mr. Anyanzwa's lawyers Sijali & Co. Advocates entered appearance and soon thereafter the sole proprietor of the firm Mr. Sijali, left for holiday in Alaska. No defence has been filed for six months. Write an opinion to your managing partner on the way forward in the matter. How different would your opinion be had James Likabo been pursuing general damages for pain and suffering suffered following the accident?

**(15 marks)**

6. After six years of court battle, you have obtained a judgement and extracted the consequential decree for your client Mtu Macho. Mtu Macho had sued Jirani Mbaya who had buried the remains of his dead dogs on Mtu Macho's land. The court ordered Jirani Mbaya to pay Mtu Macho Kshs..... being general damages for trespass. In addition, the court ordered Jirani Mbaya to exhume and take away from Mtu Macho's land all the remains of the dogs within fourteen (14) days of the judgement. Thirty days later, Jirani Mbaya has neither paid the money nor exhumed the remains. He works at the Kenya School of Law with a monthly salary of Kshs.25,000. His salary is paid through a bank whose details were sneaked to your client by a very unethical member of staff after some bribe. Nonetheless, his account balance is Kshs.60, 000. He owns motor vehicle registration number KAW 222 V. You desire to execute the decree against Jirani Mbaya. As a policy of your firm, you normally render an opinion to your client before taking any action. Prepare an opinion to your client on the various methods of execution available to you in this matter.

**(15 marks)**

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COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION  
TO THE ROLL OF ADVOCATES

**ATP 100: CIVIL LITIGATION**

MONDAY 18<sup>TH</sup> JULY, 2011

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. Mureithi Quresh Ochich aged 35, a finance manager of Purity Banking Corporation Limited in Nairobi died along the Limuru-Nairobi road while driving his motor vehicle, Registration No. KXZ 9000AA Mercedes Benz. At a corner around Kinoo, a lorry Registration No. KQQQ 130YY hit his car from behind, killing Ochich on the spot. He was survived by a widow, Jacky Johnson Khaoya, but the couple had no children. Before his death he was on a monthly salary of Shs.400,000/- out of which he was spending Shs.300,000/- on his family, and the balance on himself. According to the police abstract report, the driver of the lorry was Charles Ole Matendechere. The registered owner of the lorry was Mate Mate Enterprises Limited. The lorry was insured by Bima Yetu Underwriters Limited.

You, practicing as an advocate at Twelfth View Park Towers, 11<sup>th</sup> floor, Cossy Street, under the firm name of Mulole & Co. Advocates, have obtained letters of administration for Jacky on her instructions. The lady has further instructed your firm to make a claim in a suit to be filed in a court, concerning the fatal accident.

Prepare the necessary claim and file in court the appropriate documents to commence the suit.

*(For the purposes of this particular question, the new requirements in the Civil Procedure Rules, 2010, will not be insisted on)*

**(15 marks)**

2. Jane Trader Asidza filed a suit in the court to claim shs.350,000 from Jackton Mercury Awuka. She claimed costs and interest from 1.2.2011 till payment in full. In the plaint it is alleged that the defendant had in January, 2011 ordered 350 bags of maize from the plaintiff at the price of Shs.1,000/- per bag.. Delivery of all the 350 bags was effected on 5.1.2011. Payment for the maize was agreed to be made by 1.2.2011. The payment date passed without payment being made and so Asidza went to court. She has in her possession the contract of sale setting out the above terms of sale, dated 1.1.2011. She also has got the delivery note countersigned by Omuka, acknowledging receipt of the maize under the contract. Omuka filed a defence in which he denied the existence of the contract, and the allegation in the plaint that he owes the plaintiff any money. Asidza instructs your esteemed firm of advocates, of which you are the sole partner, to procure for her a quick and early judgement in the matter without going through the rigours of a trial.

Explain how, and give reasons why, you will go about carrying out these instructions in the manner you adopt.

**(15 marks)**

3. Peter Ling Hu Lisamula owns premises within the area of jurisdiction of the City Council of Nairobi. On 22.2.2011 he got a notice from the City Council of Nairobi, dated the same day. It instructed him to demolish his premises said to contravene City Council planning by-laws. This, despite the fact that the premises were put up in strict compliance with the approved plans of the City Council. Certificates of occupation were issued by the Council. The National Environmental Management Authority recently approved the premises. On making inquiries at the Office of the Director of City Planning, Lisamula was informed that his only problem was belonging to an ethnic group not liked by the majority of Councilors, and that the Director could stand members of Lisamula's ethnic group to continuing to own premises in the city.

Lisamula instructs you to commence civil proceedings in the nature of judicial review to quash the decision of the City Council of Nairobi made on 22.2.2011, the same being an administrative malpractice adversely affecting Lisamula. Prepare the necessary documents that you will file in court.

**(15 marks)**

4. Give an outline of the objection proceedings by a non-party, following a proclamation made in execution of a civil judgement and decree.

**(15 marks)**

5. Kombokombo Swift is a freelance process server of the court. Bidii & Co Advocates instructed him on 6.5.2011 to serve a defendant, known as Madeni Mengi, with a plaint and summons to enter an appearance in Kwale Chief Magistrate's Court, Civil Case No.101 of 2011 in which Madeni Mengi is sued by Tom Ravanger. Swift comes back and informs the advocates that he found Madeni Mengi at Kula Raha Busaa Club on the same date of the instructions, where Madeni Mengi was imbibing an alcoholic substance ordinarily sold there. This was not the first time Swift served Madeni Mengi with court process. He had served him with many other summonses in many other cases. Nevertheless, Swift re-introduced himself and the purpose of his visit on this occasion. Madeni Mengi received the summons and the plaint, and acknowledged receipt thereof by signing the return copies and endorsing them with his national identity card number as well.

Kombokombo Swift asks you, as an advocate, to prepare for him an appropriate Affidavit of service for him to sign. Prepare the appropriate Affidavit of service.

**(15 marks)**

6. Makesiki filed a suit against Isa for alleged violation of intellectual property rights in certain published works of literature. Isa has been served with an application by Makesiki seeking the leave of the court to serve Isa with a written set of questions to him and to require him to answer those questions on affidavit before the trial of the case. Isa seeks advice from you, as a practising advocate as to the various available grounds on which this kind of application may be resisted by Isa. Set out those grounds and briefly explain what each of them means.

**(15 marks)**

-----END.....

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COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION  
TO THE ROLL OF ADVOCATES

**ATP 100: CIVIL LITIGATION**

MONDAY 1<sup>ST</sup> NOVEMBER, 2010

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. It is drizzling and as misty as it is chilly when Biashara Ya Kutosha, in a very agitated mood, walks into your famous law firm of Nyala Bulisividu Advocates, situated at Middle Avenue, Ground Floor, Pink Rooms, P.O. Box 00XW-000, Mombasa. She hands to you a plaint by which, she yellingly says to you, Mkora Tupu had had the audacity to file a suit against her after having inflicted a lot of losses to her. The plaint bears her out, in that by it, a civil suit, number 800 of early this year had been filed against her in the court of the Chief Magistrate at Mombasa. Paragraphs 1 to 9 of the plaint were as follows:

- "1. The plaintiff is an adult of sound mind, residing and working for gain in Mombasa, and his address of service for the purposes of this suit shall be care of Wakili Kurutu & Co. Advocates, 2Y7V8-00110, Mombasa.
2. The defendant is an adult of sound mind residing and working for gain in Mombasa, and her address of service shall be through the offices of the advocates for the plaintiff.
3. On or about 01.02.2010, the plaintiff entered into a contract with the defendant for the plaintiff to supply the defendant with white board pens at an agreed price to be paid by the defendant.
4. Pursuant to the said contract, on 05.02.2010 the plaintiff supplied, and the defendant received, 2,000 pens of the value of shs.200,000, which was the agreed price.
5. The contract provided that the purchase price of the pens would be paid within 15 days of the delivery of the pens to the defendant.
6. The defendant defaulted in paying the purchase price as agreed.
7. Demand and notice of intervention to sue have been issued but the defendant has failed, refused and or neglected to pay for the pens.
8. There are no pending proceedings, nor have there been any previous proceedings between the same parties involving the same subject-matter.
9. The cause of action arose at Mombasa within the jurisdiction of this Honourable Court.

REASONS WHEREFORE the plaintiff prays for judgement against the defendant for:

- (a) Shs.200,000
- (b) Costs of this suit
- (c) Interest on (a) and (b) above from the date of filing suit till payment in full.

Dated at Mombasa this.....day of.....2010

Signed  
Wakili Kurutu & Co  
Advocates for the plaintiff



Drawn & Filed by:

Wakili Kurutu & Co  
Advocates,  
Watu Building, 7<sup>th</sup> Floor,  
P O Box 2&7V8-00110,  
Mombasa.

To be Served Upon:

Biashara Ya Kutosha,  
Nairobi."

This plaint is accompanied by a summons to enter appearance, plus a verifying affidavit. You immediately enter an appearance in the suit. At a subsequent meeting with Biashara Ya Kutosha to get comprehensive instructions to enable you to draft an appropriate pleading in response to Mkora Tupu's plaint, Biashara Ya Kutosha admits the existence of the contract and supply of the pens at the agreed price. However, she tells you that the contract was for the plaintiff to supply 5,000 pens and not 2,000. She further tells you that as a matter of fact, the 2,000 pens supplied by Mkora Tupu were so defective that they could not write, and were not fit for their purpose. She says that she spent shs.50,000 to destroy the defective pens and she procured suitable pens from another supplier at the price of shs.500,000 which resulted in overspending by shs.300,000 on the fresh procurement of proper pens. Biashara Ya Kutosha instructs you to file an appropriate response to the suit against her, in which you seek to provide her with a shield as well as a recovery of the two sums she says she lost in these transactions.

Draft the necessary pleading to carry out your client's instructions. (15 marks)

2. Efforts at mediation, settlement out of court, and termination of the suit without reaching the trial stage, have come to nothing. Advocate Sim Sim is, therefore, forced to have the suit tried and determined by the court.

Set out the essential preparations which Advocate Sim Sim should make and put in place in readiness for the trial before the start of the trial process.

(15 marks)

3. Njuguna Omwifwi and Hasan Patrick Kipuri had a commercial transaction between them, in which a number of papers and other documentation passed. The transaction failed and after a letter of demand written on behalf of Omwifwi on 11.04.2010 to Kipuri for him to perform his part of the contract yielded no positive result, Omwifwi filed a suit for specific performance against Kipuri, despite the fact that these gentlemen had been very good friends as evidenced by the invitation card and note dated 10.03.2010 by Omwifwi inviting Kipuri to a sumptuous dinner at his palatial residence, and the letter of 12.03.2010 by Kipuri thanking Omwifwi for the dinner.

The commercial transaction over which the suit was filed can be seen from the quotation issued by the defendant Kipuri to the plaintiff Omwifwi which was dated 01.01.2010; a copy of the Purchase Order from Omwifwi to the defendant, dated 06.01.2010; the Delivery Note from the defendant to the plaintiff, dated 10.01.2010; the Invoice from Kipuri, dated 20.01.2010; the

plaintiff's Cheque Counterfoil, number 00131 dated 30.01.2010, for a cheque issued by Omwifwi to Kipuri under the transaction, the subject of the suit; a copy of the written instructions by Omwifwi to his advocate and in which he was also asking for the advocate's professional opinion regarding the commercial transaction, dated 01.03.2010; Letter of opinion by the advocate to Omwifwi, dated 02.03.2010; a Blind Copy of an opinion by the plaintiff's advocate's junior and legal assistant to the advocate, regarding the transaction, dated 28.02.2010.

Kipuri, has successfully obtained an order in the case in the High Court, for discovery of documents in the suit against the defendant.

Draft the appropriate document for discovery of documents by Omwifwi in compliance with the order of the court for discovery. (15 marks)

4. A so-called "expert" on burial disputes in Kenya, Sir Blinding Cataract, a Queen's Counsel arrives from England and immediately appoints you to assist him to prepare a record of appeal in an appeal from the High Court of Kenya at Kisumu in its original jurisdiction exercised in a burial suit between feuding widows of the late Dangerous Man. The intended appeal is to go to the Court of Appeal. Set out for Sir Blinding Cataract the list of documents to be contained in the record of appeal. (15 marks)

5. The Higher Education Loans Board, a body corporate, lent shs.160,000 to Borrowing Student to pursue his university studies at Enania University between 2006 and 2009. Upon completion, he was employed by Auditors Associates, an accountancy firm at Malaba. He defaulted in paying the education loan. The Board which has the power to sue, retains your firm, Lingondo and Pesa Advocates of Gajaraj House, 3<sup>rd</sup> Floor, West Wing, along Bright Street to sue him to recover the loan on behalf of the Board. After the demand letter with a notice to sue elicited no response from the Student, the Board gave your firm full instructions and paid what was required of it to commence a civil suit for the recovery of the money. Bearing in mind that this matter, going by previous similar loan recovery suits, is likely to be hotly contested on facts, go ahead and do the paper work required to commence the loan recovery suit desired by the Board. (15 marks)

6. Stephen Shivjee Karanja sued Apanje Toto in the High Court of Kenya at Machakos, in a suit filed on 20.03.2008. A summons to enter appearance was issued on 26.03.2008, and was served upon a man on a compound which the process server suspected to be the home of Apanje Toto, because the gate to the compound had the inscriptions "AT" which... initials of the names of the defendant. This service was effected on 06.09.2009, whereupon the process server filed an appropriate affidavit of service duly sworn by him. There having been neither a memorandum of appearance, nor a defence, filed in the suit, judgement was entered in default, whereupon a decree was obtained against Apanje Toto. Auctioneers proclaimed his goods. Apanje comes to you and, protesting that he knew nothing about the suit and what it was all about, he asks you to advise him on how, and on what grounds, the default judgement and consequent decree may be impugned with a view to ridding himself of the consequences of the default judgement. He pays you what you have asked him to pay for the advice he needs from you. (15 marks)

Set out your advice to him.



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COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION  
TO THE ROLL OF ADVOCATES

AUGUST/SEPTEMBER 2010

CIVIL LITIGATION

Instructions

- (a) Answer question ONE and any other three (3) questions
- (b) Question ONE is compulsory
- (c) All questions carry 15 marks each
- (d) Marks shall be lost for illegibility
- (e) Time allowed is 3 hours

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1. Following a road traffic accident, Mtafuta Kazi sustained personal injuries. He sued Mdosu Pesa for damages. The suit was filed in the Chief Magistrates Court at Milimani, Nairobi. Go Slow & Co Advocates represent Mdosu Pesa. Mtafuta Kazi is represented by Wakili Mdogo & Co Advocates.

A year ago Mdosu Pesa went to live in Pakistan and has not returned to Kenya. During that time Go Slow & Co Advocates never updated Mdosu Pesa regarding the case. Last week Mdosu Pesa instructed you in the firm of Sura Mpya Sheria & Co Advocates to take over the case from Go Slow & Co Advocates, and represent Mdosu Pesa. Mdosu Pesa informs you that he has no time to come to Kenya for the hearing of the case.

After filing and serving an appropriate notice of change of advocates, you receive instructions to find a lawful way of bringing the case to an end to save Mdosu Pesa the trouble of coming to Kenya for a hearing. After a thorough study of the state of the case, you find that after pleadings closed some two years ago Wakili Mdogo & Co Advocates were so busy with a protracted murder trial that they had not found time to follow up Mtafuta Kazi's case. In light of your client's expressed anxiety not to come for a hearing if that can be possible:

- (a) Explain what kind of application is available to him so that the case is concluded without the need for your client's attendance; and
- (b) Prepare the application.

(15 marks)

2. Your client, Shujaa Commercial Bank, Ltd has sent you a plaint and summons to enter appearance served upon them. The bank instructs you that it is true that the transactions referred to in the plaint took place, but according to the records of the bank, Mohamed Munyanya actually withdrew the cash in London, having been given all the security codes attendant to such withdrawal and signed for it accordingly. The plaint sent to you is in terms of the one set out below.

REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT NAIROBI  
MILIMANI COMMERCIAL COURTS  
CIVIL SUIT NUMBER 00X OF 2010

JOHN WANGECI MBERIA.....PLAINTIFF  
VERSUS  
SHUJAA COMMERCIAL BANK LIMITED.....DEFENDANT

PLAINT

- (i) The plaintiff is an adult of sound mind residing and working for gain in Nairobi within the Republic of Kenya and his address of service for purposes of this suit is c/o Tell-A-Tale and Company Advocates, Occidental Plaza, Fourth Floor, Muchichi Highway, Off Paka Patat Superway, P.O. Box 11789 -- 00400, Nairobi
- (ii) The defendant is a body corporate registered as such under the Companies Act (Cap 486, Laws of Kenya), and licensed to carry on the business of banking under the Banking Act. Service of the summons shall be effected through the plaintiff's advocates offices.
- (iii) At all times material to this suit, the defendant offered Western Union Money Transfer services through its University Way Branch.
- (iv) On or about 20.01.2009, the plaintiff sent Kshs.90,000 vide the defendant's money transfer service at the University Way Branch.
- (v) On or about 21.01.2009, the plaintiff sent a further sum of Kshs.80,000 through the said service at the same branch of the department.
- (vi) The recipient of both sets of payments was to be Mohammed Munyanya and the place of receipt was stated to be London where the said Mohammed Munyanya was expected to have a stop-over while on his way to the United States of America.
- (vii) The intended recipient of the said money failed to secure a stop-over in London due to his having been denied a visa for the purpose, and did not collect the money sent.
- (viii) The plaintiff demanded from the defendant a refund of his money, the said money still being in the account and unpaid.

- (ix) The defendant has alleged that the money was collected in London, and has failed, refused or neglected to refund the plaintiff's money despite demand for a refund, and notice of intention to sue having been given to the defendant.
- (x) The cause of action arose in Nairobi, within the jurisdiction of this Honourable Court.
- (xi) There have been no previous proceedings and there are no pending proceedings between the same parties involving the matters in question in this suit.

Reasons whereof, the plaintiff prays for judgement against the defendant for:

- (a) Kshs.170,000.00
- (b) Interest on (a) from 21.01.2009 till payment in full
- (c) Costs of, and incidental to this suit.

Dated at Nairobi this                      day of                      2010

Tell-A-Tale and Company  
Advocates for the plaintiff

**Drawn and filed by:**

Tell-A-Tale and Company  
Advocates  
Occidental Plaza, Fourth Floor  
Muchichi Highway, Off PakaPata Superway  
P.O. Box 11789 – 00400  
NAIROBI

**To be served upon:**

Shujaa Commercial Bank Limited  
Head Office  
P.O. Box 48400 – 00100  
NAIROBI



COUNCIL OF LEGAL EDUCATION  
EXAMINATION FOR ADMISSION  
TO THE ROLL OF ADVOCATES

JULY, 2009

CIVIL LITIGATION

Instructions

- (a) Answer questions 1 and 2 and any other Two questions.
- (b) All questions carry 15 marks.
- (c) Marks shall be lost for illegibility
- (d) Time allowed is 3 hours

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1. The Late Jared Olang' Ominge was a beloved son of Japheth Atoti Ominge and Dorry Asinya Ominge. He was a kindergarten student at St. Alvin School off Ngong Road in Nairobi, owned and managed by Mrs. Nellie Wanjiku Njuguna and Mr. Francis Njuguna who were also registered owners of Motor Vehicle Registration Number KBH 851P, an Isuzu bus which was driven, managed and or controlled by Zakayo Mainga, a driver employed as such by the school. The said Motor Vehicle was used for purposes of delivering students to and from school.

On the morning of 14.03.2007, the school bus picked Jared along with other students. An eye witness account has it that after delivering the students to school, and in the course of the students alighting from the bus and running up and down to find their way to classes, the driver caused the said bus to run over Jared causing him to sustain the following injuries:

- (a) Bruises on the head
- (b) A broken skull
- (c) Fractured ribs
- (d) Haemo-pneumo thorax
- (e) Bleeding into the abdominal cavity
- (f) Laceration of the liver

The school authorities rushed the child to the Nairobi Hospital but the child was pronounced dead on arrival. At the time of his death he was aged 3 years and 4months. The aforementioned injuries were set out in the medical report from the Nairobi Hospital.

Mr. and Mrs. Ominge hired a hearse for Kshs.40,000 to transport the remains of Jared to Nyalunga for burial in accordance with the revered dictates of Luo Customary Law. They paid Kshs.10,000 to Lee Funeral Home in respect of the storage of the body of Jared. The carpenter's bill in respect of the modest coffin was Kshs.20,000. A death and funeral announcement published in the Standard Newspaper cost Kshs.4,830. A message of appreciation to those who had joined hands with the family during the time of grief cost Kshs.13,317 to publish in the *Nation Newspaper* and Kshs.10,008 in the *Standard Newspaper*. A police abstract report was obtained at the usual cost of Kshs.100. Letters of administration have been pursued and issued in respect of the estate of Jared Olang Ominge by the High Court of Kenya in Nairobi. In the said succession cause Dorry Asinya Ominge consented to the letters being issued in the name of Japheth Atoti Ominge. The police abstract report indicated that Motor Vehicle Registration Number KBH 851P was insured with AIG Insurance Company Limited.

You are the sole proprietor of Wakili wa Haraka & Co Advocates. Mr. and Mrs. Ominge have instructed you to pursue the claim in respect of the above set of facts on their behalf, seeking compensation.

Issue an appropriate demand letter and other notices prior to commencement of court action.

**(15 marks)**

2. One month after you issued the notices in respect of the claim for Mr. and Mrs Ominge, there has been no response from either the school management or their insurers. Your clients instruct you to proceed and institute appropriate court proceedings.

Prepare the appropriate pleadings to be filed in court to ventilate the above claim.

**(15 marks)**

3. Kefa Ombati Shah is an Advocate of the High Court of Kenya practising as such with the firm of Kefa Ombati Shah and Company Advocates. On 12.08.2005, one Joe Ndirangu Smithson filed a petition in the High Court of Kenya and Nairobi's Milimani Commercial Courts being High Court Winding Up Cause No. 26 of 2005 for the winding up of Fire Rock Limited (hereinafter referred to as "the company"). Joe was a shareholder with 30% stake in the company. The other shareholder was Rosegirl Njambi with a 70% stake in the company's capital. In the said winding up cause, J Thongorina & Co Advocates acted for Joe while Kefa Ombati Shah & Co Advocates acted for Rose Njambi. Following out of court negotiations by the parties to the winding up cause, it was agreed that: (a) the company would sell its assets to one Nyali Kilo Motor Smootheners Limited

REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT NAIROBI  
MILIMANI COMMERCIAL COURTS  
CIVIL SUIT NUMBER 00X OF 2010

JOHN WANGECI MBERIA.....PLAINTIFF  
VERSUS  
SHUJAA COMMERCIAL BANK LIMITED.....DEFENDANT

VERIFYING AFFIDAVIT

I John Wangeci Mberia, resident of Nairobi within the Republic of Kenya, do hereby make oath and state as follows:

- (i) That I am the plaintiff herein, with the knowledge of the facts in this suit, and hence I am competent to swear this affidavit.
- (ii) That I have read, had explained to me and understood, the plaint herein and hereby confirm the factual contents therein as correct.
- (iii) That what is deponed to herein is true to my own knowledge, information and belief, sources and basis whereof have been disclosed.

Sworn at Nairobi )  
By the said John Wangeci Mberia ) Deponent  
This day of 2010 )

Before me )  
)  
Commissioner for Oaths )

**Drawn and filed by:**

Tell-A-Tale and Company  
Advocates  
Occidental Plaza, Fourth Floor  
Muchichi Highway, Off PakaPata Superway  
P.O. Box 11789 – 00400  
NAIROBI

Prepare an appearance and defence to the claim.

(15 marks)



3. Mwanasiasa Shupavu aspires to stand for a seat as a Member of Parliament for Lokinan Constituency. The seat fell vacant following the nullification of the election of its previous occupant, Chief Tintinya Omuchesi Muno. Mwanasiasa Shupavu comes to your famous firm of Sheria Shule and Company Advocates and seeks your advise on common grounds on which National Assembly Election Petitions are founded. He needs this advice to help him to guard against conduct by his compaign team which might expose him to a petition to nullify his election in case he wins the forthcoming by-election and for him also to be on the look-out for any conduct by his opponents or their agents just in case he is defeated in the by-election and might wish to seek the nullification of the election of one of his opponents.

Write out the opinion Mwansiasa Shupavu seeks, he having paid you in full as agreed for the opinion.

(15 marks)

4. The senior-most advocate in the firm of Sheria Kali & Co Advocates where you work places a pupil under your guidance. The pupil accompanies you to the courts for a civil hearing. During the hearing, your pupil observes that the court and the advocates make a lot of fuss over what goes on during certain stages of putting questions to parties and witnesses. At certain stages there would be little or no fussing. The pupil was particularly struck by what was going on during the stages of examination-in-chief, and also during cross-examination. On the way back to your office, the pupil enthusiastically asks you to let him know:

- (a) What examination-in-chief on one hand, and cross-examination on the other means;
- (b) The purpose which each one of these two stages of questioning serves; and
- (c) The types of questions which are permissible during each stage.

Set out your explanation to the pupil, so that when he is enrolled and sets up a practice or is employed as a court lawyer and conducts hearings, his questioning of parties and witnesses does not give rise to any or much fussing such as the one he witnessed.

(15 marks)

5. Your client, Mwangi Shilenje sued Mporaji Bank Limited seeking an injuction to restrain the bank from exercising a statutory power of sale, in relation to his property. He says that the bank gave him a two-month statutory notice instead of a three-months notice before exercising the power of sale.

The trial magistrate heard the arguments and dismissed the application, on the legal ground that a three month notice was not mandatory under the Registered Land Act (Cap 300, Laws of Kenya). In a totally different case Shilenje's application for another injunction, another magistrate dismissed the application on the basis of the bank's replying affidavit that the property in question had already been sold and therefore the application for an injunction had been overtaken by events.

You client has subsequently discovered that two months after this ruling, the same bank was looking for a buyer for the same property. This fact means that the magistrate's dismissal of the application was based on misinformation by the bank. There was no way Shilenje could have

known the true position at the time of the hearing of the application which was dismissed. Shilenje comes to you seeking your professional advice on:

- (a) Whether he should challenge the decisions of both magistrates or any of them by way of an appeal or by way of a review. State the reasons for whatever option you advise;
- (b) Which court Shilenje should go when preferring to challenge those decisions by:
  - (i) Appeal
  - (ii) Review

**(15 marks)**

6. Ajali Mbaya obtained judgement against Mrs. Margy Makaratasi and is now seeking to execute the decree, by way of attachment and sale of her property. The auctioneers proclaimed certain listed articles. Gordy Makaratasi, the husband of Margy, discovered that as a matter of fact everything that had been attached and proclaimed was his property, only that it was under his wife's care and custody. Gordy seeks your advice on how he may move to protect his property from imminent sale and to get the property released to him. You have already advised him that these facts do not present an ideal situation for any injunction.

Set out in detail the appropriate process to avert the sale after attachment. Ajali Mbaya still insists on going on with the attachment and sale of the property.

**(15 marks)**

COUNCIL OF LEGAL EDUCATION

EXAMINATION FOR ADMISSION  
TO THE ROLL OF ADVOCATES

NOVEMBER, 2009

CIVIL PROCEDURE

**Instructions**

- (a) Answer question ONE and any other two (2) questions
  - (b) Question 1 is compulsory and carries 20 marks
  - (c) All other questions carry 15 marks each
  - (d) Marks may be lost for illegibility
  - (e) Time allowed is 2 hours
- 

1. By an oral agreement between Karanja and Oluoch, Karanja allowed his friend Oluoch to build and operate a timber sales business on his plot known as LR No. ABC/XY. The following year, Oluoch died and his son Ouma was appointed personal representative of his estate. In order to run the business, Ouma registered a business known as Ouma Timberyard. Later on, Ouma decided to register a limited liability company known as Ouma Timberyard Limited with himself as the director and principal shareholder.

After the death of Oluoch, Karanja immigrated to South Africa and donated a general power of attorney to his brother, Ndegwa over all his property in Kenya. Ndegwa offered to sell the plot to Ouma at Kshs.4,000,000/= but he died before Ouma, who was keen to buy the plot could raise the purchase price. Ndegwa's wife, Nyokabi, who was named in his will as executrix of the will, subsequently sold the plot to Wafula for KShs.2,000,000/= as she was not aware of Ouma's interest in purchasing the plot.

Wafula had difficulties in securing vacant possession and therefore sought police assistance. He filed a complaint with the police that Ouma Timberyard was a hideout for stolen cars in Nairobi and that the vehicles were dismantled there and sold as spare parts. Upon receiving the complaint, Ouma was arrested by the police and charged with the offences of theft and robbery. After ten months, the court acquitted Ouma of the charges.

Dissatisfied with the acquittal, Wafula wrote to Ouma giving him three days to close down Ouma Timberyard and vacate the plot or risk forceful eviction.

You have been instructed by Ouma to institute appropriate civil proceedings in court to ventilate his rights over the plot and any other of his rights that may have been violated.

Draw the Plaintiff together with the verifying affidavit that you would file in court.

(20 marks)

2. (a) Under what circumstances may a court issue a garnishee order (5 marks)
- (b) Joseph Kitoto has obtained judgment against Martin Kapaso and a decree issued ordering Kapaso to deliver a disputed tractor (KBD2 000) or alternatively pay a sum of KShs.1,000,000/=, being its value plus costs and interest of the suit. Kapaso has sold off the tractor to John Mjanja using forged documents.
- What specific steps would you take under the Civil Procedure Rules to fully enforce the decree against Kapaso. (10 arks)
3. Green Enterprises Limited (GEL) deals with all sorts of electronic products. Of late, it has obtained videos of the shows of Vicheko, a top standup comedian, which GEL has been selling in the form of pirate Digital Video Discs and making huge profits. Vicheko has, as a result, lost a lot of income in the form of royalties.
- Vicheko has learnt that GEL is holding huge stocks of Digital Video Discs of his performances and which it is selling to unsuspecting customers at half the price of the original productions.
- Vicheko has approached you as an Advocate of the High Court to act for him and protect his interests. You have advised on litigation and he has accepted your advice and instructed you to proceed.
- (a) Identify the document(s) you would file and describe their contents. (10 marks)
- (b) What remedies would you be seeking? (5 marks)
4. Upon what grounds and at what stages in a suit may a party:
- (a) Object on a point of law. (5 marks)
- (b) Apply to strike out the opponent's pleadings. (5 marks)
- (c) Apply to amend his pleadings. (5 marks)
5. (a) State and discuss the rules that govern pleadings in a civil suit. (5 marks)
- (b) You act for Hardy Holdings Ltd which has sued the Nairobi City Council for breach of a contract for cleaning services rendered to the Council. Pleadings have closed and you notice that the plaint contains factual misstatements and typographical errors. The sum claimed for special damages is KShs.50,000 instead of Kshs.5,000,000/=. Another paragraph refers to Council Resolution Number 430 instead of 340.

- (i) What procedural steps would you take to correct the factual and typographical errors? (5 marks)
- (ii) What principles would the court apply in granting or declining to grant the orders you may apply for? (5 marks)

6. Write explanatory notes on;

- (a) Discovery. (5 marks)
- (b) Security for costs. (5 marks)
- (c) Mareva injunction. (5 marks)

for the sum of Ksh. 20,000,000; (b) The proceeds of sale of the company's assets would be apportioned between the two shareholders at the ratio of 70% for Rosegirl and 30% for Joe. Following the foregoing settlement, the company, Rosegirl and Joe on the one hand and Nyali Kilo Motor Smootheners on the other entered an agreement dated 28.10.2005 for the sale of the company's assets to Nyali Kilo Motor Smootheners Limited. Kefa Ombati Shah & Co Advocates acted for the company, Rosegirl and Nyali Kilo Motor Smootheners while J Thongorina acted for Joe. Among the assets of the company that were the subject matter of the sale agreement were one stone cutting machine and motor vehicle registration numbers KAH 629H and KAH 057M. At the time of executing the agreement, the stone cutting disk and the log books to KAH 629H and KAH 057M were in the possession, custody and or control of Joe. By letter dated 28.10.2005, J Thongorina & Co. Advocates wrote to Kefa Ombati Shah advocate informing him that the stone cutting disk had been taken to Nairobi Crancshaft Ltd for repairs and the log books aforesaid will be handed over to him (Kefa) in exchange for the cheque, being the value of the share of Joe in the proceeds of sale of the assets of the company. Kefa delivered the cheque in the correct value of Joe's share. He was given the two log books. In respect of the stone cutting disc, J Thongorina wrote and signed an irrevocable professional undertaking to pay back to Kefa's client the reasonable and ascertained cost of purchasing a stone cutting disc similar to the one which was alleged to be at Nairobi Crancshaft Limited in the event that the same could not be traced. On the strength of this undertaking, Kefa released the cheque to J Thongorina for onward transmission to Joe. To date, Joe has never traced the Stone Cutting Disc that was alleged to be at Nairobi Crancshaft Limited. A company known as Pavoni Construzioni Meccaniche of Italy, a reknown manufacturer of stone cutting machines has been putting adverts in the newspapers advertising the costs of their stone cutting disks. The one similar to the type that was alleged to be at Nairobi Crackshaft Limited has a value of Euros 12,000 (equivalent of Ksh. 1,700,000.00). Kefa writes to J Thongori seeking payment of the said value in honour of the irrevocable professional undertaking but J Thongorina does not respond to the said letter. Kefa happens to be a close friend of your senior partner, Wakili Machachari. Wakili Machachari instructs you to prepare the pleadings for the enforcement of the professional undertaking.

Prepare the appropriate formal pleadings for filing in court.

(15 marks)

4. Following instructions you have obtained from Akili Maji, a leading businessman in Butere township, you file the following Plaint:

REPUBLIC OF KENYA  
IN THE CHIEF MAGISTRATE'S COURT AT KAKAMEGA  
CIVIL CASE NUMBER 523 OF 2009

AKILI MAJI ..... PLAINTIFF

VERSUS

MKOPO DAIMA ..... DEFENDANT

PLAINT

1. The Plaintiff is an adult of sound mind residing and working for gain in Butere Township within the Republic of Kenya. His address of service for the purposes of this suit is C/o Wakili Mwanafunzi & Co Advocates, Kholera House, 2<sup>nd</sup> Floor, and P.O. Box 1135 Kakamega.
2. The Defendant is an adult of sound mind residing and working for gain in Kakamega town within the Republic of Kenya. Service of summons shall be effected through the Plaintiff's advocates' offices.
3. At all material times the Plaintiff was an owner of a hardware shop in Butere township.
4. On or about the 23.02.2008, the Defendant purchased on credit and took away *jembes* and *pangas* worth Ksh. 250,000.00 and undertook to pay within 33 days from the date of purchase.
5. At the end of the 33 days, the Defendant did not make good his promise.
6. As a result of the Defendant's failure to fulfil his promise the Plaintiff has suffered loss and damage.

**Particulars of special damage**

- a) Value of *jembes* and *pangas* obtained on credit Kshs.250,000.
7. Demand and notice of intention to sue have been issued but the Defendant has failed, refused and or neglected to make good his promise.
8. The cause of action arose in Butere within the jurisdiction of this Honourable Court.
9. There is no other suit and there have been no previous proceeding between the same parties involving the subject matter herein.

Reasons wherefor the Plaintiff prays for judgment against the Defendant for:

- a. Special damages Kshs.250,000.
- b. Costs of this suit.
- c. Interest on a and b above from 28.03.2008 till payment in full.

Dated at Kakamega this                      15<sup>th</sup> day of June 2009.

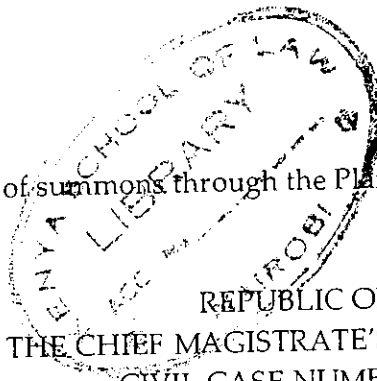
Wakili Mwanafunzi & Co  
Advocates for the Plaintiff  
Drawn & Filed By  
Wakili Mwanafunzi & Co  
Advocates  
Kholera House, 2<sup>nd</sup> Floor,  
P.O. Box 1135  
Kakamega



To Be Served Upon

MKOPO DAIMA

Kakamega (Service of summons through the Plaintiff's advocates office).



REPUBLIC OF KENYA  
IN THE CHIEF MAGISTRATE'S COURT AT KAKAMEGA  
CIVIL CASE NUMBER 523 OF 2009

AKILI MAJI ..... PLAINTIFF

VERSUS

MKOPO DAIMA ..... DEFENDANT

VERIFYING AFFIDAVIT

I, Akili Maji resident of Butere within the Republic of Kenya and of Postal address, Post Office Box C/o Eshisiru Primary School Box 55, Stendi Matope, hereby make oath and state as follows:

1. That I am the Plaintiff herein with the knowledge of the facts attendant to this suit hence I am competent to swear this affidavit.
2. That I have read, had explained to me and understood the contents of the Plaintiff herein and I hereby confirm that the factual content thereof is correct.
3. That what has been deponed to herein is true to my own knowledge.

Sworn at Kakamega

By the said Akili Maji

This day of

2009

}  
} .....  
} Deponent

Before Me

Commissioner for Oaths

Drawn & Filed By

Wakili Mwanafunzi & Co

Advocates

Kholera House, 2<sup>nd</sup> Floor,

P.O. Box 1135

Kakamega

Three days after you file and serve the Complaint, Akili Maji comes to your chambers and narrates to you the following details:

"By the way, I think I was cursed by my deceased grand father. You know I forgot to tell you something last time I was here. The correct goods I sold this fellow on that day were iron sheets that were green in colour. Their value is not 250,000. Each of them costs Ksh.1000 and I sold him 600 of them. He also took away sand and cement – you know – the Blue Triangle type. He undertook to pay Ksh. 75,000.00. In fact, the jembes and pangas I had told you he took on credit, he had taken two months earlier and he paid for them fully. I had just forgotten about that. I have no claim against Mkopo Daima in respect of the *jembes* and *pangas*. Even God knows that."

Proceed as appropriate to salvage Akili Maji's claim.

**(15 marks)**

5. Mr. Wakili Mjinga is an advocate of the High Court of Kenya of two years' standing. He is notorious for his disorganisation and failure to take clients' work seriously. Last year, he served as an associate with the firm of Wakili Mkali & Co Advocates. He was sacked owing to the number of cases that had been lost by the firm under his watch. One of the clients to the firm of Wakili Mkali & Co Advocates is Shamba Nunua. He entered an agreement of sale of land by which he undertook to sell land to Mkora Shupavu. Mkora Shupavu undertook to pay for the land in 30 days time. He did not pay any deposit. At the end of the 30 days, he had not made any payment. Strangely, after 60 days, Mkora Shupavu through the firm of Kizingiti Haki & Co Advocates wrote a letter to Shamba Nunua demanding a refund of Ksh. 100,000.00 which the said advocates claimed had been paid as deposit to Shamba Nunua by Mkora Shupavu for the sale of the parcel of land. Shortly afterwards, Shamba Nunua was served with a Complaint and Summons to enter appearance. He had apparently been sued by Mkora Shupavu through the same firm of Kizingiti Haki & Co Advocates. Shamba Nunua instructed the firm of Wakili Mkali to defend him in the matter. In the same suit he indicated that Mkora Shupavu had not paid him a single cent in respect of the said agreement of sale of land. Wakili Mkali opened a file in respect of the said matter and gave instructions to his then associate Wakili Mjinga to handle the matter. Apparently, Wakili Mjinga neither entered appearance nor filed a defence to the matter. Soon after the sacking of Wakili Mjinga, Wakili Mkali employs you as an associate in the firm. Two days following your employment, Shamba Nunua comes to the firm with proclamation notices from auctioneers who are apparently executing a decree against him in respect of the same suit that Mkora Shupavu had filed against him. You peruse the files and form an

opinion that there is need to halt the intended auction as well as set aside the default judgment that Mkora Shupavu had against Shamba Nunua.

Prepare the appropriate application.

(15 marks)

6. You are an associate with the firm of Wakili Zubaa & Company Advocates. Your firm was retained by Mr. Ballusconi, a wealthy businessman from Italy who also owns vast interests in land at the Kenyan coast. Mr. Ballusconi's 1500 acre parcel of land was issued after the government cancelled earlier titles fraudulently issued in respect of the entire 10 mile coastal strip to senior government bureaucrats. The former title holders have refused to vacate the land to give Mr. Ballusconi vacant possession. Mr. Ballusconi paid to the government of the Republic of Kenya 15,000,000.00 to be allocated the said parcel of land. The government bureaucrats have refused to facilitate the eviction of the previous title holders from the land in question. On his instructions, you file a civil suit against the Hon Attorney General, the Commissioner of Lands and the former title holders of land seeking an eviction order against the former title holders whom you now describe as trespassers. In the alternative, you seek damages from the Government of the Republic of Kenya. Your case has been scheduled for hearing following your compliance with all the pre-trial procedures. Mr. Ballusconi is apprehensive of the quality of legal practice in the country. He instructs you to procure the services of an English Barrister to help you prosecute the case. You have complied with all the processes antecedent to the foreign barrister, Sir Brown Mzungu, being allowed to conduct a case before the Kenyan High Court. Sir, Mzungu is not very familiar with Kenya's procedural laws. He requires a brief from you on the procedure of conducting a trial before the High Court of Kenya. Prepare a brief on behalf of your firm for Sir Mzungu.

(15 marks)

on 13.12.1991. The bank exercised its statutory power of sale and sold the property to ABD Limited on 21.10.1996. The Deed file with this title at the Lands Registry is Deed Plan No. 138625. In December 2004 ABD Limited reported to the Land Fraud Division of the Kenya police that John Chema holds a fake title deed over their parcel of land. By letter dated 28.01.2005 the police reply that "An immediate confirmation was carried out with the Ministry of Lands and it indicates that indeed the true owner is **John Chema**. ABD Limited take issue with the Registrar of Titles whose final report is that the title deed held by John Chema is a forgery "for reasons we cannot divulge as it is likely to reveal how government documents are made which can be exploited by fraudsters".

ABD Limited write to the Registrar of titles to, therefore, cancel the title held by John Chema but four years down the line, such cancellation is not forthcoming. In 2007 ABD Limited file a suit in court through your firm, Wakili Mchanga and Co Advocates for a declaration that the title deed held by John Chema is fake. They join the Attorney General to the suit for an order compelling the Registrar of Titles to cancel the title deed held by John Chema. John Chema files a defence and counter claim to this suit through Wakili Kurutu and Company Advocates relying on police investigations that indicated that he was the lawful owner of the suit land. It is December 2008, the case has not received a hearing date as yet.

ABD Limited is apprehensive that John Chema may in one way or another dispose of his interest in the suit property to complicate matters for the company's claim. They want you to commence the necessary application in court to forestall such an eventuality. Draft the necessary application. (15 marks)

6. You are a junior associate in the firm of Wakili Mnoma and Company Advocates, a leading firm in public and administrative law practice in the country. **Joseph Ole Nkuiya, Joseph Ole Suya, Simon Ole Koiseta, Simon Ole Nchoe, Gideon Ole Sakari and James K. Kaipoi** are the firm's new found clients. They have served as Chiefs and Assistant Chiefs in the Provincial Administration between the years 1990 and 2006 within Trans Mara District of the Republic of Kenya. On 09.12.2005, your clients received letters dated 26.10.2005 from one J.W. Mwasi on behalf of the Permanent Secretary, Provincial Administration and Internal Security through their District Officer, giving them 21 days from the date of authorship of the letters to make representations relating to the allegations contained in the letters, namely; that they were unable to effectively articulate government policies and decisions by failing to hold regular barazas within their areas of jurisdiction. They had failed to resolve conflicts within their areas of jurisdiction. They were unable to curb rising crime rates in their areas, they had been involved in brewing and consumption of illicit beer, and, they had failed to ensure school going children attend classes under the Free Primary School education. No further particulars were provided in the letters. The letters further stated that in the event that they did not make their representations within the period specified, they would be retired in public interest. Your clients contend that no public complaint or substantive report had been received against them to warrant such action. On 25.04.2005, one Giddy Ole Konche, then Member of Parliament for Kilgoris Constituency within Trans Mara District and Minister for Health and Sanitation had written to the Minister in charge of Internal Security and Provincial Administration claiming that the applicants were belligerent against his political agenda and ought to be retired or sacked. On 15.11.2005 at the District Commissioner's board room in Trans Mara Town, your clients, amongst other chiefs attended a meeting with the District Commissioner whereat the DC warned them of dire consequences if the Banana Camp (meaning government side) lost the vote during the then impending national Referendum on the Draft Constitution popularly known as the Wako Draft.

On 10.07.2006, your clients received letters from one D.O Ogada on behalf of the Permanent Secretary, Provincial Administration and Internal Security relaying the decision of the Public Service Commission that your clients were being retired from service in public interest and the decision was to take effect from 24.05.2006.

It is now 17.11.2006, when the client's reported to your firm and Mr. Sheria Umma, the Managing Partner at the firm called upon you to attend the session where instructions were received. At the end of the meeting, Mr Sheria Umma informs you that as a firm, you were going to pursue Judicial Review remedies on behalf of these clients. He instructs you to prepare an opinion for him spelling out the following:

- a) The precise order/orders that you are going to seek from the court for your clients.
- b) The ground/grounds upon which your prayers to court are going to be premised.
- c) The various stages of the court process that the matter is going to go through, including the documents to be filed at each stage, in seeking the remedies in question until its final determination.

Proceed. Unnecessary verbosity will earn you Mr. Sheria Umma's severe reprimand.

(15 marks)

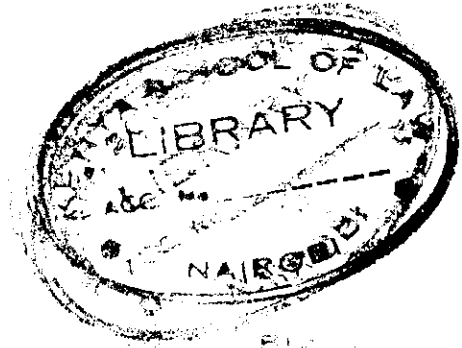
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# COUNCIL OF LEGAL EDUCATION

## EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES

DECEMBER, 2008

CIVIL LITIGATION



### Instructions

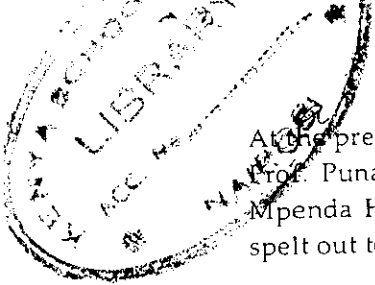
- (a) Answer questions 1 and 2 and any other two questions.
- (b) All questions carry 15 marks.
- (c) Marks shall be lost for illegibility
- (d) Time allowed is **3 hours**

- 
1. The National Council of Non-State Actors (hereinafter referred to the "the Organization") is a body that derives membership from organizations calling themselves Non-State Actors in the Republic of Kenya. For a long time, the organization was under the stewardship of the retired Ambassador Marie Rage Onduli, as chairperson. Sometime in the year 2007, certain Non-State Actors, expressing dissatisfaction with the leadership of Rtd Ambassador Marie Rage Onduli vowed to organize a civil coup within the leadership of the organization. They, therefore, organized an election for the post of chairperson. Rtd Ambassador Onduli and her Council of officer bearers decided that they would neither recognize nor to participate in this election. Nevertheless, the dissatisfied members proceeded and held the election on 21<sup>st</sup> November 2007 at which Professor Sammy Punani was elected the chairperson of the National Council of Non-State Actors. All print and electronic media houses were represented at this election.

By Notice in the Kenya Gazette, being Notice number 12111 of 7<sup>th</sup> December 2007, Vol CIX - No. 92 by the Minister for State for National Heritage (under whose portfolio the regulation of Non-State Actors falls), the Minister declared that "It is notified for general information to the public that the members of the National Council of Non State Actors at a Special General Meeting held on 21<sup>st</sup> November 2007 elected Sammy Punani (Prof) to be the Chairman of the Council with effect from 21<sup>st</sup> November 2007.

Following this election and Gazette Notice, Rtd Ambassador Onduli moved the High Court of Kenya at Nairobi for an order restraining Prof. Punani from holding himself out as the chairperson of the Organization pursuant to the Special General Assembly/Meeting and elections held on 21<sup>st</sup> November 2007 and from interfering with the properties, management, functioning and operations of the National Council for Non State Actors pending the hearing and determination of the substantive suit on the ground that his election was not in conformity with the constitution of the Organization. By a ruling delivered on 8<sup>th</sup> May 2008 by the High Court of Kenya in the cause the Hon Mr Justice Mpenda Haki dismissed the application. All print and electronic media houses were in court during this ruling.

*[Handwritten signature]*



At the press conference at the Zaico Regency Hotel within the Zimmerwoman area of Nairobi by Prof. Punani and other officials on May 9, 2008, following the Ruling by the Hon Mr Justice Mpenda Haki, the position of the leadership of the National Council of Non-State Actors was spelt out to the press. All media houses were represented at the press conference.

In the *Daily Citizen* issue of Wednesday May 28, 2008 at page 34 thereof, an advertisement entitled *The National Council of Non-State Actors, Public Notice* was carried and it occupied the full page. The said caption had the facial image of Prof Punani with his names under it.

In the said advertisement, It was stated as follows:

*The National Council of Non-State Actors is informed that one Prof. Sammy Punani (photographed above) is masquerading as the Chairperson of the National Council of Non-State Actors. ... The National Council of Non-State Actors informs the Development Partners, Government Ministries/Departments, Banking Institutions, Civil Society Organizations, Business Community and the General Public that the said Sammy Punani is not chairperson or official of the National Council of Non-State Actors and has no authority to transact any business on behalf of the National Council of Non-State Actors. The National Council of Non-State Actors shall not be responsible, obligated or liable to any person, institution, business or organization for any debts incurred or losses suffered as a result of the fraudulent schemes by the above individual.*

You are a practicing advocate practicing under the name, style and firm of Wakili Machachari & Associates, Advocates. Your firm is situated at Shule ya Sherija Building, Block D, Door No. 11. Your postal Address is P.O. Box 24154 – 00100, Nairobi. Prof. Punani walks into your chambers with the newspaper article, narrates the chronology of events as captured above and informs you that he wants you to take stern action against the newspaper. He instructs you to demand an apology and a publication for amends by the media house to correct the impression in the public domain and further to lay sufficient basis for an increased award should the matter go to court. Your search at the office of the Registrar of Books and Newspapers confirms that the registered proprietor and publisher of the newspaper is Loyal Media Limited.

- a) Issue an appropriate demand letter to the said newspaper. (10 marks)
  - b) Do an appropriate draft notice of amends and apology to be published by the newspaper. (5 marks)
2. Thirty days following your issuance of the demand letter to the newspaper in accordance with the instructions of Pro. Punani set out in detail in question 1 above, no response had been forthcoming. The Draft notice of amends and apology was also not carried by any subsequent issues of the newspaper. Prof. Punani comes to your chamber with a cheque of Ksh. 1,500,000.00 as legal fees and disbursements deposit with instructions that you proceed with speed to take the newspaper to court and enable him recover the necessary damages. His expectation is a cumulative award of Ksh. 15M in accordance with the recent trends in the enhancement and confirmation of awards by the Court of Appeal. Prepare the appropriate papers for commencing the court action. (15 marks)

3. Mrs. Mwema is a business man engaged in running fast food eateries. She recently purchased a fast food eatery along Tom Mboya Street within the city of Nairobi. she came across an advert in the Nation Digger Classifieds for the eatery together with the contact number. The advert was placed in the paper by an agent of the owner. On calling the contact number, the agent, Mr Shikuku organized a meeting and linked up Mrs Mwema to the owner of the eatery, one Pradip Kham. Following their negotiations, she paid Mr Kham Ksh. 1,200,000.00. One week after the transaction, the agent got back to Mrs Mwema and demanded to be paid what he described as a finder's fee – being his charge for helping her get a fast food eatery. With him was a draft agreement of debt which simply provided that Mrs Mwema owed her Ksh. 200,000.00 payable within thirty days. Mrs Mwema, for purposes of avoiding the nagging agent signed the agreement. Mrs Mwema paid Ksh. 100,000.00 to Mr Shikuku at the signing of the agreement. However, at the end of the thirty days, business was yet to pick and therefore, Mrs Mwema did not pay Mr Shikuku the balance of Ksh. 100,000.00. Mr. Shikuku filed a claim in the Chief Magistrate's Court at Milimani for recovery of the Ksh. 100,000. You were retained by Mrs Mwema on the 14<sup>th</sup> day after summons to enter appearance were served upon her. You entered appearance and filed the following defence:

**REPUBLIC OF KENYA  
IN THE CHIEF MAGISTRATE'S COURT AT NAIROBI  
MILIMANI COMMERCIAL COURTS  
CIVIL SUIT NO. 10280 OF 2008**

**DAN SHIKUKU** ..... PLAINTIFF

**VERSUS**

**MARY MWEMA** .....DEFENDANT

**DEFENCE**

1. Save what is herein expressly admitted, the Defendant denied each and every averment of fact as if the same were set out in here verbatim and traversed seriatim.
2. The Defendant admits the contents of paragraphs 1 and 2 of the Plaintiff so far as the same are descriptive of the parties save that her address of service for purposes of this suit is **C/o Wakili Mdogo & Company Advocates, Shule ya Sheria House, Block C, P.O. Box 24154 – 00100, Nairobi.**
3. The Defendant admits that there was an agreement between her and the Plaintiff but states that the same was frustrated by failure of the business to pick up within the anticipated period.
4. The Defendant pleads for the lenience of this court to have time to pay the debt once the business stabilizes.
5. The jurisdiction of this court is admitted.
6. It is true that there are no pending proceedings nor have there been previous proceedings between the same parties touching on the subject matter.

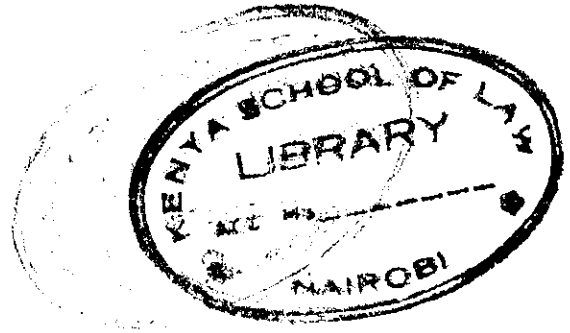
**Reasons wherefore the Defendant prays that the Plaintiff's suit be dismissed with costs.**

**Dated at Naitobi this                      day of    2008.**

**Wakili Mdogo & Company  
Advocates for the Defendant**



Drawn & Filed By  
Wakili Mdogo & Co  
Advocates  
Shule ya Sheria House, Block C,  
P.O. Box 24154 – 00100,  
Nairobi



To Be Served Upon  
Wakili Kurutu & Co  
Advocates  
Lenga House  
P.O. Box 20  
Thika

One week after you file your defence, you meet Mr. Wakili Shupavu your erstwhile pupil master. You immediately engage him in a discussion around this case. He is of the opinion that there was no agency relationship between Mr Shikuku and Mrs Mwema. He is further of the view that there was no consideration that was supplied by Mr Shikuku to Mrs Mwema to entitle him to the Ksh. 200,000.00. His advice is that, in fact, Mrs Mwema could counterclaim the Ksh. 100,000 already paid. You are persuaded by Mr Shupavu's insights. You undertake to prepare and file an amended Defence and Counterclaim before close of pleadings. Draft the amended statement of defence and counterclaim.

(15 marks)

4.

Adrian Radclare has instructed you to institute proceedings and secure orders entitling him to the ownership of Land Parcel No. Esirabe/Esirabe Block 130 (hereinafter referred to as "the suit land) within the new Nyansiongo district. He informs you that he has been living on the suit land with his beautiful wife and two mischevious children since August 1989. The registered proprietor of the suit land is John Cecil Hawley Ball. John Cecil Hawley Ball vacated the suit land in the 1960s at his instincts of bigotry that he and his family of the English royalty could not continue living in a country that was governed by a filthy African. Adrian moved into the neglected house in August 1989 and began repairs and the attendant compound. Adrian has paid all the utility bills inclusive of water, electricity, telephone and land rates. Prepare the appropriate pleadings to give effect to Adrian's instructions.

(15 marks)

5. John Chema is a male adult of sound mind residing in the Kilimani area of Nairobi. ABD Limited is a limited liability company registered in Nairobi within the Republic of Kenya. John Chema holds a title deed over LR No. 209/11151; Grant No. IR 47078. The proprietorship section of the title deed shows that the land was initially registered in the name of one Kiptoo Sawa Kositay (now deceased) on 20.04.1989. The land was then transferred to Sterno Kambo Keter at a consideration of Ksh. 10,000,000 on 13.12.1991. Mr Keter has since left the country to pursue a career as a professional athlete in Qatar. Mr Keter transferred the property to John Chema on 21.10.1996 at a consideration of Ksh. 15,000,000. The deed file with this title deed at the Lands Registry is Deed Plan No. 138623.

ABD Limited hold a title deed over L.R. No. 209/11151; Grant No. 47078. The proprietorship section of the title deed shows that the land was initially registered in the name of Obambo Limited (whose file has not yet been traced at the Companies registry) on 20.04.1989. The land was then mortgaged to National Lenders Bank of Kenya Limited (now wound up but whose records were severely damaged by the 1998 bomb blast in Nairobi) for a facility of Ksh. 10,000,000

COUNCIL OF LEGAL EDUCATION

EXAMINATION FOR ADMISSION TO  
THE ROLL OF ADVOCATES

JUNE 2009

CIVIL PROCEDURE

Instructions

- (a) Answer QUESTION ONE and ANY OTHER TWO QUESTIONS
- (b) QUESTION ONE is COMPULSORY and carries 20 marks
- (c) All other questions carry 15 marks each
- (d) Marks may be lost for illegibility
- (e) Two (2) Hours are allowed

- 
1. In addition to the ordinary courts of law, there are various quasi-judicial tribunals established by different statutes for purposes of dealing with specific types of disputes.

Identify five (5) such tribunals and indicate the following in respect of each:-

- i. Establishment;
- ii. Composition;
- iii. Jurisdiction;
- iv. Procedure of the tribunal

(20 marks)

2. The plaintiff (A) filed a suit for the recovery of all that parcel of land known as LR.NO.2079/98, a five acre property situated in Kitale, against the defendant (XYZ Ltd) in the High Court at Nairobi. The plaintiff resides in Kitale while the defendant company has its registered office in Kitale. The defendant entered appearance and objected to the jurisdiction of the court to try the suit and applied to have the suit transferred to the High Court at Kitale. The defendant relied on the provisions of Sections 11-18 of the Civil Procedure Act (Cap.21, Laws of Kenya) as read together with Order XLVI of the Civil Procedure Rules in support of the application for transfer.

The plaintiff relies on the case of Riddles Berger v. Robson (1958) EA 383, arguing that the provisions of Sections 11-18 of the Civil Procedure Act do not apply to the High Court. Further, the plaintiff argued that the High Court does not have power to transfer a suit from itself to any other court.

Assuming that you heard the matter, as the presiding judge, write a concise and clear ruling touching on all the issues canvassed by the parties before you.

(15 marks)

3. Jane Onyancha, without first obtaining the requisite letters of administration, instituted legal proceedings in the High Court of Kenya for recovery of damages under both the Fatal Accidents Act as well as the Law Reform (Miscellaneous Amendments) Act in respect of the death of her late husband John Onyancha who was fatally knocked down by a bus belonging to Obuya Bus Company Ltd (hereinafter called "the company"). The said company failed to enter appearance and consequently interlocutory judgment was entered in favour of Jane Onyancha. Aggrieved by the entry of Interlocutory Judgment, the company filed a Notice of Appeal under Section 74 of the Court of Appeal Rules and later on lodged the Record of Appeal

Jane Onyancha's advocate then applied to strike out the Notice of Appeal on grounds that it was filed out of time and without leave, which application was allowed by the Court of Appeal. The said company's advocates thereafter filed a chamber summons application under section 80 of the Civil Procedure Act as well as Order 44 of Civil Procedure Rules seeking inter alia:

- (a) An Order reviewing the Interlocutory Judgment on grounds of the existence of an error apparent on the face of the record as the plaintiff had no locus standi to institute the suit since she had not obtained the requisite letters of administration at the time she instituted the suit.

Or in the alternative

- (b) An order setting aside the interlocutory judgment on the grounds that the said company's failure to appear was caused by the fact that their appointed advocate fell ill and had to be hospitalized.

With the aid of decided cases, write a detailed legal opinion on the following issues;

- i. Whether the application for review offended the provisions of order 44 of the Civil Procedure rules
  - ii. Whether it was procedural to consolidate an application for review with an application for setting aside in one application and to bring the said application by way of chamber summons
  - iii. Whether there was an error apparent on the face of the record as alleged or at all
  - iv. Whether sufficient material had been placed before the court to support the setting aside prayer. (15 marks)
4. List and discuss the five possible orders that a court can issue after hearing an application for summary judgment under Order XXXV of the Civil Procedure Rules. (15 marks)
5. Upon what grounds and at what stages in a suit may a party:
- (a) Object on a point of law; (5 marks)
  - (b) Apply to strike out his opponent's pleadings; (5 marks)
  - (c) Apply to amend his pleadings. (5 marks)

6. (a) Briefly state and discuss the different methods of executing a court decree.

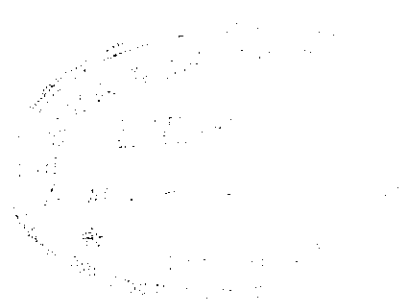
(5 marks)

(b) Briefly Wanyama has obtained a decree against John Cheruiyot from the Chief Magistrate's court at Eldoret compelling Cheruiyot to deliver a pick-up truck registration number KWZ (whose ownership was disputed) or in the alternative to pay a sum of KShs.500,000 being its value plus interest and costs of the suit. It has however emerged that Cheruiyot has sold off the vehicle in Uganda using forged documents.

What specific (and alternative) steps would you take under Order XXI of the Civil Procedure Rules to fully enforce the decree against Cheruiyot.

(10 marks)

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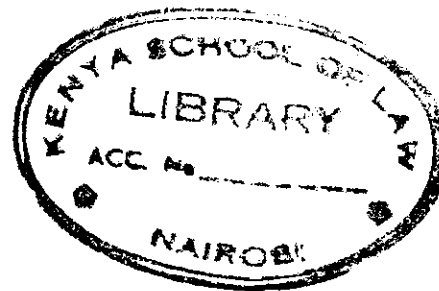


# COUNCIL OF LEGAL EDUCATION

## EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES

NOVEMBER, 2008

CIVIL PROCEDURE



### Instructions

- (a) Answer QUESTION 1 and ANY OTHER TWO (2) QUESTIONS
- (b) QUESTION 1 is COMPULSORY and carries 20 marks
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- 
1. Kamau Mjanja was a quantity surveyor who had established a successful practice in Nairobi. His gross monthly income from his professional practice is Kshs. 1,400,000/-. At the age of 50, Mjanja was a successful professional by any standards. Part of his income was used for the domestic needs of his family composed of his housewife spouse, Jemima (43), daughter Janet (20) a student at USIU and son James (15) a student at Nairobi School.

On the morning of 20 April 2008, Mjanja left Nairobi in his new Hummer (KBBD 0909D) to take the family to Mombasa for the Easter holiday. He had booked his family at the Three Sharks Hotel at the North Coast. The hotel had been heavily advertised by its proprietor Kenya Holidays Ltd as offering very competitive rates during the Easter season provided one booked before 15 March 2008 and stayed for four days. Mjanja had taken advantage of this offer.

Mjanja and his family arrived at the hotel at about 7pm on the same day. As they were very exhausted, they immediately retired to bed after dinner. The following day at 11am, Mjanja and his wife went to the beach and lay on beach beds under a coconut tree while the children went swimming. While lying there reading a newspaper, Mjanja heard some noise up the coconut tree and within a fraction of a second, two huge coconuts came down. Apparently this was caused by two Columbus monkeys belonging to the hotel fighting on the tree. There was no time to take evasive action. The larger of the two coconuts fell on Mjanja's face and he immediately lost consciousness. The smaller fell on Mrs. Mjanja's face, broke her sunglasses and she bled profusely from severe facial cuts. The family holiday was prematurely cut short as both Mr. and Mrs. Mjanja were admitted at the Pandya Memorial Hospital. A brain scan on the third day revealed extensive brain damage to which Mjanja succumbed and died on the sixth day. Mrs. Mjanja was prematurely discharged after two weeks before recovering from the shock she suffered to enable her participate in the funeral arrangements of her late husband.

Mjanja was buried at his rural home in Nyeri after two weeks. The total medical bill at Pandya Memorial Hospital was Kshs. 650,000/-, the coffin cost Kshs. 60,000/-, transportation of the body Kshs. 40,000/-, transport and entertainment for mourners Kshs. 300,000/- and miscellaneous items Kshs. 50,000.

Mrs. Mjanja has approached your firm Wakili & Company Advocates to sue the hotel for loss and damage suffered.

Draft the appropriate pleading fully stating her claim.

20 marks

2. i) State and discuss the different methods of executing a decree issued by the court

5 marks

ii) Kebati Mzungu has just obtained judgment against Chuma Mwafrika for a sum of Kshs. 600,000 being a friendly loan advanced together with agreed interest. Mwafrika has just obtained a Green Card to settle in the United States of America. He has disposed of all his assets save for as follows:

- (a) A sum of Kshs. 200,000/- which is held by Faida Commercial bank as a fixed deposit earning interest.
- (b) Motor vehicle KTT 420 an old Volkswagen valued at Kshs. 150,000/-. Mwafrika is in the process of transferring it to his brother Jeuri for Kshs. 20,000/-

Kebati Mzungu has sought your advice on how he can enjoy the fruits of his litigation. Advice him noting to indicate which provisions of the law you would invoke to attach the assets available and also protect Mzungu's interests.

10 marks

3. Symphony Electronics Ltd deal with all sorts of electronic products. Of late they have pirated the music of Queen Grace, a local musician which they have been selling in the form of compact discs and making huge profits and thereby denying Queen Grace income in the form of royalties. Queen Grace has learnt that Symphony is holding huge stocks of compact discs of her pirated music and which it is selling to unsuspecting customers at half the price of the original discs.

Queen Grace has approached you as an Advocate of the High Court of Kenya to act for her and protect her interest. You have advised on litigation as the avenue for protection of her interests and she has accepted your advice and instructed you to proceed.

- (a) Identify the documents you would file and describe their contents.

10 marks

- (b) What remedies would you be seeking?

5 marks

4. When *must* a successful litigant issue a notice to show cause before proceeding to execute a court decree?

15 marks

5. Different consequences ensue under our civil procedure when, on the day fixed for hearing:

- (a) Both parties are absent; or
- (b) The plaintiff is present but the defendant is absent; or
- (c) The defendant is present but the plaintiff is absent.

Set out the consequences in each of these situations.

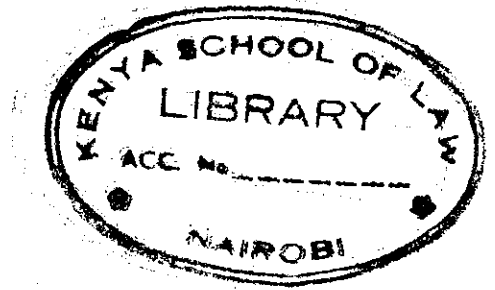
15 marks

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COUNCIL OF LEGAL EDUCATION  
EXAMINATION FOR ADMISSION  
TO THE ROLL OF ADVOCATES

JUNE, 2008

CIVIL PROCEDURE



Instructions:

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- 
1. Mpuke Road Ltd. is the registered proprietor of the land parcel known as LR 2220/420 located on Mpuke Road, Westlands. On the land is a development which consists of a five-storey building comprising of shops, offices, a restaurant and other usual amenities and conveniences connected thereto.

In the month of August 2001 one Dr. Shadrack Matoke, who describes himself as a 'double specialist' since he is a qualified surgeon and gynaecologist, was offered a lease for one of the shops to set up his clinic. The offer for the lease was made by Advocates for Alabama Holdings Ltd. Who have leased the property known as LR 2220/420 from Mpuke Road Ltd. For a period of 60 years from 1 January 1980.

Dr. Matoke signed the lease agreement for 6 years from 1 August 2001. The lease agreement contained an option to renew clause but on expiry, Dr. Matoke did not exercise the option. The rent payable under the agreement was Kshs.30,000/- per month inclusive of service charge. On several occasions the Advocates acting for the landlord called Dr. Matoke requesting him to confirm whether he would be exercising the option to renew the lease but Dr. Matoke ignored their enquiries. Dr. Matoke's attempts to pay rent for the first quarter after the lease had expired were rejected by the landlord's Advocates who insisted that he first executes a new lease agreement. Dr. Matoke continued to occupy the premises but did not pay rent. Attempts by auctioneers instructed by the landlord's Advocates to evict Dr. Matoke have been unsuccessful, as the clinic is closed most of the time after the landlord issued notice to vacate the premises.

Dr. Matoke insists that he is a protected tenant within the meaning of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 and that therefore he cannot be evicted. In one of the incidents of confrontation with auctioneers attempting to evict him, Dr. Matoke violently reversed his motor vehicle (Registration number KAAQ 2552Z) into a perimeter wall thereby knocking it down. The landlord rebuilt the wall at a



cost of Kshs. 850,000 and paid the auctioneers a bill of Kshs. 150,000 for services rendered. The landlord also claims loss of rent of Kshs. 300,000 because of three tenants moving out due to of Dr. Matoke's violent behaviour.

The landlord has approached you with instructions to file suit and recover possession of the premises and loss incurred as a result of Dr. Matoke's conduct.

Draw a plaint fully stating the landlord's claims against Dr. Matoke.

(20 marks)

2. Write explanatory notes on:

- a) Jurisdiction\* (5 marks)
- b) Res judicata (5 marks)
- c) Interpleader proceedings (5 marks)

3. State and discuss the different ways by which a party to a suit may attack the opponent's pleadings. (15 marks)

4. a) What are the methods of executing a court decree? (5 marks)

b) Joseph arap Kitoto has obtained judgment against Meles ole Kapaso and a decree issued ordering ole Kapaso to deliver a disputed tractor (Registration KAAZ 410A) or alternatively pay a sum of Kshs. 1,000,000 being its value plus interest and costs of the suit. Ole Kapaso has sold off the tractor across the Kenya/Tanzania border using forged documents.

What specific steps would you take under order XXI of the Civil Procedure Rules to fully enforce the decree against ole Kapaso.

(10 marks)

5. List and discuss the five possible orders that a court can make after hearing an application for summary judgment under Order XXXV of the Civil Procedure Rules. (15 marks)

6. Upon what grounds and at what stages in a suit may a party:

- a) Object on a point of law (5 marks)
- b) Apply to strike out his opponents' pleadings (5 marks)
- c) Apply to amend his pleadings (5 marks)