

COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

ATP 108: COMMERCIAL TRANSACTIONS

THURSDAY 24TH NOVEMBER, 2011

DURATION: 3 HOURS

Instructions to Candidates

- (a) Candidates should attempt **FOUR** questions
- (b) Answer question **ONE** and any other three questions (**candidates must attempt at least one question from each of the three sections**)
- (c) All questions carry **15 marks** each
- (d) Marks may be lost for illegibility

SECTION ONE

1. Commercial law is the branch of law that is concerned with rights and duties arising from, amongst others, the supply of goods and services.

(a) Discuss the significance of the following as sources of law on sale of goods and transactions:

- (i) Contract
- (ii) Uncodified custom and usage
- (iii) Codified custom and usage
- (iv) Domestic and international legislation **(9 marks)**

(b) Section 55 of the Sale of Goods Act (Cap 31, Laws of Kenya) states that:

“Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negated or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.”

Read the facts provided hereunder, and answer the question that follows:

The plaintiff and defendant entered into a contract in January 2011 for sale of 15,000 litres of diesel C.I.F Mombasa. There was a clause in the contract which provided that the contract “contains the entire agreement of the parties,... and there is no other promise, representation, warranty, usage or course of dealing affecting it.” A dispute arose and the defendant wanted to rely on a custom or usage for the retention of samples of oil being tested. The plaintiff contends that the contract does not admit such terms.

In view of the law and the facts provided, prepare a considered judgement on that particular aspect of the case.

(6 marks)

2. Modern Designs and Equipment Limited manufactures industrial filtration systems uses at a Ruiru plant. It uses a semi-refined material (which we will call “stuff”) in its manufacturing process. Stuff contributes about 20% of the manufacturing costs of Modern Designs products. The company requires about 30, 000 Kgs of stuff each month. It has been paying Kshs.200 per Kg of stuff. In 2003 Modern Designs negotiated with Supplier Ltd to supply stuff on a reliable basis. Supplier Ltd proposed to build a small refinery unit right on Modern Designs property at a cost of Kshs.50 million, which would permit it to profitably supply all of Modern Designs stuff needs at a reduced cost of Kshs.150 per Kg of stuff. Supplier Ltd has calculated that the plant would have at least an 8 year lifespan. A contract is signed on 2nd January, 2003 which provides that Supplier Ltd will be the exclusive supplier of stuff for Modern Designs for a period of not less than eight years on terms consistent with its proposal, with a provision for price adjustment and a guaranteed price of at least Kshs.150 per Kg and no more than Kshs.250 per Kg over the period of the contract.

Supplier Ltd constructed the unit and deliveries began. In May 2005 Neon, a competitor of Suppliers Ltd, introduced a new advanced technology for refining stuff, which reduced production time and cost. Neon sells its stuff at Kshs.50 per Kg. Modern Designs asks Supplier Ltd to reduce unit price to Kshs.60 per Kg. Supplier Ltd recognized that it could not afford to do

so and refused. Modern Designs is frustrated and knows that given the recent market changes it cannot continue making profits if it has to continue buying stuff at Kshs.150 per Kg. Modern Designs decides to close down its Ruiru operation, relocate to industrial area, Nairobi and refits its Nairobi plant with Neon technology. Supplier Ltd is enraged by this decision. Its investment will have a value of Kshs. 1 million as scrap if not used for its intended purpose at Modern Designs.

Supplier Ltd has instituted legal action for breach of contract. You are the judge with the task of determining this dispute. To decide on the matter you have to:

- (i) Construe the contract;
- (ii) Determine the relevant canons of interpretation of contracts and their application to the dispute.

Prepare a considered determination of the dispute between Supplier Ltd and Modern Design and Equipment Ltd. **(15 marks)**

SECTION TWO

3. (a) In relation to a bill of exchange, explain what is meant by "presentation" and outline at least five (5) rules which must be complied with in order to constitute a valid presentation.

(6 marks)

- (b) On 31st October, 2011, a farewell party was hosted at the prestigious Mbata International Hotel for the well-known business magnate, Gandala Lungu, who was due to return to her home country after twenty-two years of sojourn in this "home away from home" country.

Various gifts were exchanged between Madame Lungu's family and former business colleagues. Envelopes, whose contents were not revealed at the time, also formed part of the gifts exchanged. Two of such envelopes went to a dear family friend and another to a "soon-to-be County Governor." These two envelopes, it turns out, contained two bills which, respectively, ordered payments to "Fadha Atoti, the sum of Kenya Shillings Two Hundred Thousand on the day of the planned wedding of his daughter to Kijana Pambe," and to "Laro Lach, the sum of Kenya Shillings Five Hundred Thousand seven days after Kenya's next General Elections."

Messrs Fadha Atoti and Laro Lach who, as well as Madame Lungu, have been your long-time clients, approached you to advice on the validity of the two bills. Before she left, Madame Lungu had also retained your services to ensure that her business transactions are wound up in an orderly manner promising to make rapid transfers of funds to cover the bills should this be necessary.

Advise all three.

(9 marks)

4. (a) Discuss the use in Kenya of chattels as security for loans and explain the essential components of a chattels transfer instrument.

(8 marks)

- (b) Distinguish between Franchising and Distributorship and discuss four ways in which Franchising can be used.

(7 marks)

SECTION THREE

5. Otonglo & Co. Ltd, a private company limited by shares has been in business for the last five years having been incorporated in December 2006. You have recently been approached to take up the role of Company Secretary for Otonglo & Co. Ltd. Upon assumption of your responsibilities, you discover a number of legal requirements that, in your view, the company needs to comply with. You have also been asked to advise on the possibility of converting the company into a Public Company.

Explain the practical steps and legal requirements for:

- | | |
|---|------------------|
| (a) Holding an Annual General Meeting; | (3 marks) |
| (b) Completing and filing annual returns; | (6 marks) |
| (c) Converting a Private Company into a Public Company. | (6 marks) |

6. After working diligently as an associate at a leading law firm in Nairobi for three years, you now feel that you are up to the task of running your own private practice. You have approached one of your former classmates at the Kenya School of Law who has also been working as an associate in a leading firm and who has been pondering over a similar move. After holding several meetings you have finally agreed that you can start a joint legal practice.

- | | |
|--|-------------------|
| (a) Explain the practical steps that you will take to establish your envisaged business outfit and the information required in the various steps. | (3 marks) |
| (b) In the minds of the two of you, you are clear that a firm need not have a formal agreement, but as learned friends you are aware of and appreciate the significance of having a formal agreement. Discuss TEN critical provisions that ought to be incorporated while drafting the articles of partnership to effectively regulate your relationship/engagement. | (10 marks) |
| (c) After five years of successfully running the law firm, your partner has been appointed to work at the COMESA court, which he considers as a life-time opportunity. He has indicated his intention to resign from the partnership. In the meantime an experienced advocate has approached you and would like to join you as a partner. You have agreed that the name will not change. Explain the steps and details you will require to effect the changes. | (2 marks) |

COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

ATP 108: COMMERCIAL TRANSACTIONS

THURSDAY 28TH JULY 2011

DURATION: 3 HOURS

Instructions to Candidates

- (a) Candidates should attempt **FOUR** questions
- (b) Answer question **ONE** and any other three questions (**candidates must attempt at least one question from each of the three sections**)
- (c) All questions carry **15 marks** each
- (d) Marks may be lost for illegibility

SECTION ONE

1. Part 1 of the Sale of Goods Act (Cap 21 Laws of Kenya) at Section 2(4) states:

“Goods are in a deliverable state within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them”

Part III deals with the transfer of property as between seller and buyer and provides in part:

Sec. 18 “property in unascertained goods – where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained”

Sec. 19 “property in specific or ascertained goods passes when intended to pass

- (1) Where there is a contract for sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend to be transferred.
- (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

With the aid of the above, and any other relevant sections of the Sale of Goods Act, and other principles of law, present a legal opinion on the following cases:

(i) **Case A**

The plaintiff, Mr. Peter Brown (seller) sold to the defendant Mr. Atul Shah (buyer) all the trees in a named forest in 2010. According to the contract, all the trees which conformed to a certain stated minimum specification would be sold over a 15 year period. The defendant paid a first instalment of the agreed price, but before he could cut down much timber, the forest was nationalized. The seller (plaintiff) now claims that he is entitled to the balance of the agreed price whereas the buyer (defendant) claims that he is entitled to a refund of the first instalment besides damages for breach of contract.

Advise the parties.

(8 marks)

(ii) **Case B**

A company (GoldCorp) invited the public in 2010 to invest in gold coins and bullions (gold bars) at a stated price per unit. According to the terms of the agreement, the company would store the gold in a non-allocated basis (that is, in mass and not separated out into portions for each customer). The company gave a certificate of ownership to the investors, and represented that they owned the gold. Unfortunately, the company did not in reality have sufficient stock to meet its commitments. In 2011 a floating charge crystallized upon insolvency before investors could rescind contracts for misrepresentation.

The investors have come to you for advice as they want to lay a claim in the context of insolvency and need to establish that they hold proprietary rights/claims.

Advise the investors.

(7 marks)

2. Mrs. Fridah Oliech is a supplier and manufacturer of unique custom made assorted goods in Nairobi, and Miss Joy Ndunda is a hotelier and ranch owner who specializes in unique wedding and special occasions services and products in Kenya. Miss Ndunda has advertised that as part of her special services and products she will offer horse driven carriages to bridal parties. The carriages are to be made of unique and rare make and from materials that can take up to 2 years to source, but Mrs. Oliech has assured Miss Ndunda that she will be able to get the materials needed to make the carriages. Miss Ndunda will pay Kshs.5 million for each of the carriages. Mrs. Oliech has promised to manufacture the two carriages ready for use in four months from 1st June, 2011, (the date of the agreement). Miss Ndunda has relied upon that representation and has already advertised the special offer in the daily newspapers. In fact she has already received ten bookings for December 2011 based on that offer, and she anticipates making Kshs.5 million from the use of the carriages in December only.

Task

Draft a comprehensive agreement that captures and protects Miss Ndunda's interests and covers all contingencies.

(15 marks)

SECTION TWO

3. (a) Distinguish between a promissory note and a bill of exchange. **(5 marks)**
- (b) Muidekle Bank Limited, as a holder in due course, sued Makery in respect of a promissory note made by the latter. The note was duly endorsed to the bank but was dishonoured when presented for payment.
- Makery contested liability on the ground that the note had been materially altered, in that the place of payment, which had been left blank had been filled without his consent at the time of endorsement, a fact which the bank admitted.
- Advise Makery. **(10 marks)**
4. Write brief explanatory notes on the following terms: **(15 marks)**
- (a) Cheque truncation system
(b) EFT; and
(c) National payment system

SECTION THREE

5. "The Government of Kenya has finally approved the construction of an ultra-modern techno-city, christened the Konza Technology City - where Africa's Silicon Savanna begins. The city is to be located in the Machakos County. The project will entail the construction of a high-tech science and technology park, a residential estate, hotels for accommodation, universities and schools. This phenomenal project, set to be one of the most successful cities in Africa, competing economically and culturally with the best cities in the world is estimated to cost shillings in trillions with funding coming from the International Finance Corporation.

As a company we intend to participate in the tenders for the construction of the Techno-City. However, as you may well be aware as at now, this project requires real financial muscle on our part and as a company we may not single-handedly be up to it.

I have identified a Swiss Company and I have been in communication with the CEO and they are willing to partner with us in order to be able to participate in the tendering process and the construction of the techno-city in the event we are awarded the tender which I very much believe we will."

You are the Corporate Secretary of the Kenyan company that hopes to tender in the construction of the techno-city. The foregoing is an extract of a briefing from the MD/CEO of the company in the company's board meeting.

As the legal professional at the helm of the legal affairs of the company the MD/CEO wishes that you address a number of issues regarding the envisaged business which *inter alia* include the following:

- (a) Discuss the road map for entering into the joint venture between the Kenyan Company (your company) and the Swiss Company. **(5 marks)**
- (b) Discuss the critical matters that would have to be thoroughly negotiated and agreed upon between the two companies and the form of arrangement you will enter into, for the business venture to effectively be realized. **(10 marks)**
6. "My name is Tom Ondek. My friend named Dickson Okend and myself have been running a business of offering cleaning services, named Cleanico Enterprises. Even though the business is not registered, over time it has grown in leaps and bounds.

Just the other day, we came across an advert inviting for bids to tender for cleaning services to one of the big companies around. We have realized that the company has numerous offices in Nairobi and its environs and we may require extra financing to hire more staff and purchase other facilities to be able to meet such a client's needs.

On approaching our regular bank for financing we were informed that, although the bank had a lot of confidence in our business acumen and our ability to repay any loan advanced to our business, it was critical that the business first be transformed into a company. The legal officer indicated to me that this would wield a lot of advantages to our business."

This statement was made to you by a client who visited you in your Chambers, in the firm where you have been newly hired as an associate. The client requires that for his benefit you address a number of legal issues (substantive and procedural) regarding the following:

(a) The advantages of transforming the business into a company (beginning by identifying the nature of the business arrangement they are into currently).

(5 marks)

(b) The process of transforming the business into a company and noting to address *inter alia* the following matters:

- (1) The critical information that you would require from the client to be able to incorporate the company.
- (2) The documents that would have to be prepared and the import of the said documents.
- (3) The actual procedure of incorporating the company.

(10 marks)

COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

ATP 108: COMMERCIAL TRANSACTIONS

THURSDAY 11TH NOVEMBER, 2010

DURATION: 3 HOURS

Instructions to Candidates

- (a) Candidates should attempt **FOUR** questions
- (b) Answer question **ONE** and any other three questions (**candidates must attempt at least one question from each of the three sections**)
- (c) All questions carry **15 marks** each
- (d) Marks may be lost for illegibility

SECTION ONE

1. Mr. James Muganda is a sole trader, trading as a wholesaler/supplier of assorted cereals, grains and other food products. He has been in business in Nakuru for the past 20 years and is capable of supplying large or bulk quantities of the food products, upon request, and with at least one week's notice.

Mr. Peter Mwanafunzi has recently opened up a retail outlet for cereals, grains and related food products in Nairobi. He has been in business by himself for two years. Mr. Mwanafunzi is very excited because he has recently (in August 2010) been awarded a tender to supply River Hill Secondary School in Nairobi with all their grain and cereal requirements for the next five years commencing 1st September 2010, up to 1st September, 2015 as and when required, upon request by way of written order and notice of 2 weeks. The required quantities are to vary but are stated to be between 50kgs-200kgs per request for each of the cereals and grains. The products are:

1. Grade 1 long grain Pishori Rice
2. Nyayo Beans Type 2
3. Soya beans type 1
4. Maize sifted Grade 2
5. Green Grams polished Grade 1

Mr. Mwanafunzi has discussed the above, including price list, with Mr. Muganda, who has assured Mr. Mwanafunzi that he has the capacity to supply the products as and when required, provided notice is given, and one day allowed for transportation from Nakuru to Nairobi. It has been agreed that transportation costs will be borne by the supplier but factored into the price. Mr. Mwanafunzi is to make orders using Mr. Muganda's standard order form and price list which will be provided from time to time, and which is subject to change. The arrangement will be for a period of 5 years commencing 2nd September 2010 to 2nd September 2015, and each order is to constitute a separate contract. Mr. Mwanafunzi is anxious that everything goes on schedule as he hopes to get further business from the School, even new customers, provided that he is able to supply the school efficiently. The buyer is therefore adamant that as part of the agreement, it is crucial that the products be of the right quality, quantity and supplied in time, and comply with all relevant laws relating to such food products. The seller on this part is concerned that upon request for supply or order, the buyer should pay the full amount by way of banker's cheque within one week of supply.

Task

- (a) Propose the type of agreement that would best suit the above scenario giving reasons for such proposals. **(5 marks)**
- (b) Draft a contract for approval and execution by the parties, taking into account all the concerns of the parties and the relevant principles of law.

(10 marks)

2. (a) What distinguishes Hire Purchase contracts from simple hire contracts and contracts for the sale of goods?

(6 marks)

(b) A hirer who obtains possession of a refrigerator from its owner under a hire purchase agreement sells the refrigerator to a buyer who buys in good faith without notice of the right of the owner. Will this buyer get a good title to the refrigerator? State reasons for your answer and cite relevant statutory provisions and case law.

(9 marks)

3. Algon Nyandiga writes out a cheque drawn on Pesolith (Kenya) Bank Limited for Kshs.750,000/- in favour of 'Malaki Mbunesa or order'. Mbunesa loses it. Atila, a rogue, finds it and forges Mbunesa's endorsement and passes it on to Lungu Motors, motor car dealers, in exchange for a seven-year old 'Gandala', a new model of a car. Lungu Motors, in turn, endorse the cheque to Lolodi Limited, their landlords, in part payment of rent due to the latter.

In the meantime, Mbunesa has discovered the loss of the cheque and traced it to Lungu Motors' landlords. He now claims the return of the cheque or the proceeds.

- (a) Briefly discuss the rights of and remedies, if any, available to Lolodi Limited.

(9 marks)

- (b) Assuming that Lolodi Limited have cashed the cheque, would Mbunesa successfully claim compensation from the drawee?

(6 marks)

4. (a) State and describe briefly the common modes of payment in Kenya today. (5 marks)

(b) Helatele Commercial Bank Limited has given to your client, Sheikh Pandu, a card with which to operate a new account he has opened with them. Pandu, a World War II veteran is uncomfortable with this new arrangement with which he is unfamiliar. He seeks to know from you, among other things, if his funds will be safe and whether he can obtain any remedies from Helatele in case he loses money to fraudsters.

Advise Sheik Pandu, explaining to him, in particular, the uses to which he may put his card and the legal issues he may have to deal with in case his fears come to pass.

(10 marks)

5. Masumbuko Company Limited has recently been offered an exciting opportunity to buy over the custodial services of Wananchi Bank in Nairobi. At a meeting of the board of directors of Masumbuko, a decision was made to take the offer subject to the company being able to syndicate a long term borrowing arrangement. As a renowned expert in Company Law, the directors approach you for advice as to how the company can meet its capital needs.

- (a) Advise the Board of Directors of Masumbuko Company Limited on their options in raising capital through:

- (i) shares
- (ii) debentures

Give advantages and disadvantages of each approach.

(7 marks)

(b) According to the Companies Act (Cap 486), what document would Masumbuko be required to prepare for the benefit of potential investors? State at least five matters that should form the contents of this document and indicate the procedure of ensuring legal validity of the document.

(8 marks)

6. Borabora Road Construction Company Limited is a Kenyan Company which recently won a World Bank tender to construct a road linking Kenya and South Sudan from Kitale to Juba. The total contract price for the job is USD 248 million. The Managing Director of that company has come to you for legal advice and explained to you that his company would like to join hands with Massroads Inc., a US Company so as to be able to deliver on the World Bank tender. According to his narration, the proposal made between the Kenyan and the US companies is that the Kenyan company will transfer the road construction job to a new company to be formed to undertake the job (with the approval of the World Bank – which approval is guaranteed) while the US company would infuse equity into the new company. The Managing Director of Borabora Road Construction Co. Ltd would like to understand the nature of the proposed arrangement and the steps to be followed in negotiating and concluding the arrangement and some of the key provisions that would be featured in such an arrangement.

Prepare a detailed legal opinion for your client.

(15 marks)

COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

AUGUST/SEPTEMBER 2010

COMMERCIAL TRANSACTIONS

Instructions

- (a) Answer **ONE** question from each of the **THREE** Sections and a **FOURTH** question from any Section
- (b) All questions carry **15 marks** each
- (c) Marks may be lost for illegibility
- (d) Time allowed is **3 hours**

SECTION ONE

1. Mr. Nyangau, a dealer in specialized hospital and allied equipment for the past ten years, and Dr. Kamau, a hospital owner, wish to enter into an agreement for the sale of 2 units of assorted and highly specialized hospital equipment that are being sold at Kshs.2 million per unit, all costs inclusive. The equipment has been identified and described fully by way of supplier catalogue, available at the dealer's showroom, and the list is to be annexed to the contract.

Mr. Nyangau has assured Dr. Kamau that the equipment, which is to be imported from Canada, will be available in Kenya within 3 months, i.e. by 30th October 2010. He has further assured Dr. Kamau that she can take delivery on 15th November 2010. Dr. Kamau has emphasized that she intends to hold an important training session for her laboratory staff on the 16th November 2010, and therefore time is of the essence. She is also concerned that since the equipment is highly specialized, there must be a testing, inspection and trial period in relation to the equipment at the hospital by the seller's experts, and at his costs, to ensure that it is the right equipment as per the specification and is in good working order and complies with all applicable standards before taking delivery. The buyer shall have a right to reject in total if they fail the test. The consideration is to be paid in two instalments by way of banker's cheque, i.e. Kshs.2 million to be paid upon the signing of the agreement on 30th July 2010, and the other half within 15 days of successful trial, i.e. by 30th November. The parties have agreed that in case of any dispute, they shall refer the matter to an arbitrator at the first instance, otherwise each party is entitled to sue for breach of contract.

Draft an Agreement that fully reflects the intention of the parties, and protects the rights and obligations of the parties under the law.

(15 marks)

SECTION TWO

2. Alfred Njoroge owns a motor omnibus and borrows from Wananchi Bank Ltd a sum of Kshs.300,000/- on the security of the vehicle. On 12th October 2008, he gave the bank a chattels mortgage, which was duly registered in accordance with the provisions of the Chattels Transfer Act (Cap. 28, Laws of Kenya). A creditor of Njoroge obtained judgement against him and execution followed with attachment and sale by public auction of the vehicle by the court broker on 3rd February, 2009. The vehicle was purchased at that sale by Otieno for shs.200,000/-. Thereafter Otieno spent about shs.70,000/- on the vehicle and obtained a PSV licence and operated the vehicle between Nairobi and Limuru. On the 29th April 2010, the bank seized the vehicle while it was in the possession of Otieno.

(a) (i) What are the essential statutory requirements of a valid Chattel Transfer?

(ii) What are the consequences of non-compliance with any of those statutory requirements?

(b) Is the action by the Wananchi Bank Limited valid? Give reasons.

(15 marks)

3. Martin Odhiambo is a teacher at Kamboni High School in Thika. He wishes to buy a motor vehicle from Magari Traders Ltd. Magari Traders Ltd sells motor vehicles to its customers on both cash terms and on hire purchase. Mr. Odhiambo has come to you as his Advocate and tells you that he went to the showroom of Magari Traders Ltd and identified a motor vehicle which is going for Kshs.840,000 in cash terms and Kshs.1,380,000 on hire purchase. In the circumstances, your client seeks your advice on what it would entail if he were to buy the motor vehicle on hire purchase. He needs to understand the difference between hire purchase and other commercial transactions such as contract of sale, credit sale and simple contract of hiring. He would also like to know the formalities involved in this kind of hire purchase agreement under Kenyan law.

Proceed to advise him.

(15 marks)

4. (a) "The law of negotiable instruments is concerned with the content of the instrument itself rather than the knowledge, intention or state of mind of the parties thereto." *Anonymous*

Discuss this statement citing any specific statutory authority or case law to support your position.

(8 marks)

- (b) Briefly outline the steps involved in bankruptcy proceedings in which the debtor has failed to satisfy a court decree issued against him.

(7 marks)

SECTION THREE

5. Citing relevant statutory and judicial authorities, discuss the following legal problems:

- (a) A power of Attorney was given by Anyango to Bono, his agent, to present a document for registration. Anyango died before the document was presented for registration. The Registrar was aware of the death of Anyango and registered the document.

Examine the position and advise the estate of Anyango.

(3 marks)

- (b) Pangani, a Solicitor, entrusted all his work to his clerk and rarely attended to it himself. The clerk induced a client to sign a conveyance for her property under the impression that it was merely a Power of Attorney. Later, the clerk sold the property and absconded with the money. The client sued Pangani.

Is Pangani liable? Why?

(4 marks)

- (c) Z, a wholesale clothes dealer appointed Y as his agent for the sale of clothes on the basis of 5% commission on the sales made by Y. Y had an agreement with his principal Z that he (Y) could retain part of the sale proceeds to adjust the commission due to him. Z terminates the agency of Y. Y refuses to hand over the clothes in his possession claiming that he is vested with authority coupled with interest and that agency cannot be terminated.

How would you decide the dispute? Give reasons.

(4 marks)

- (d) Z instructs his lawyer to engage an estate agent to sell his house. The lawyer selects B, the leading estate agent in the town for the purpose. B is able to sell the house for a good price but he delays in remitting the sale proceeds to Z. Meanwhile Z becomes insolvent and holds his lawyer responsible for the loss.

Advise the lawyer.

(4 marks)

6. (a) Briefly describe the process of registration of a private Limited Liability Company in Kenya citing relevant statutory provisions.

(6 marks)

- (b) In the Matter of Ng'enda Location Ranching Company Ltd, [2005] eKLR, John Ndungu Gitaka and Samuel Kibebe Waitindi filed a petition under Section 211 of the Companies Act seeking to have Ng'enda Location Ranching Company Ltd (hereinafter referred to as the Company) wound up on the ground, *inter alia*, that the directors of the said company had failed to manage the company in accordance with the Memorandum and Articles of Association of the Company.

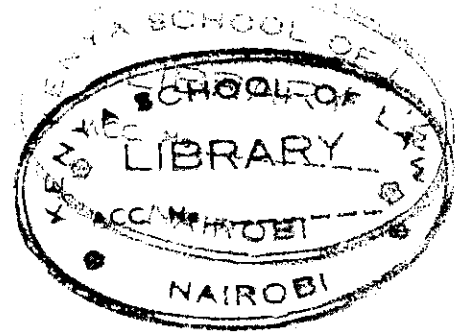
The petitioners sought a declaration that the affairs of the company were being run in a manner detrimental to the shareholders. They further averred that the assets of the company were being

COUNCIL OF LEGAL EDUCATION

EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

NOVEMBER, 2009

COMMERCIAL LAW



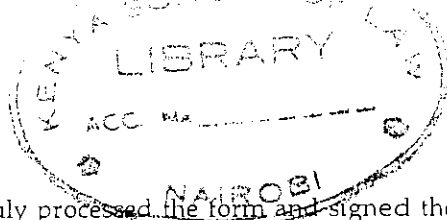
Instructions

- (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. Write short notes on the following:

- (a) The obligations of the seller and the buyer respectively in:-
 - (i) CIF and
 - (ii) FOB contracts of sale(5 marks)
 - (b) Commencement of bankruptcy proceedings and the doctrine of relation back; (5 marks)
 - (c) Acceptance of a bill of exchange; and (5 marks)
 - (d) The need for registration of a chattels transfer instrument. (5 marks)
2. (a) Briefly explain the nature of the relationship among the various parties in a hire-purchase agreement. (7 marks)
- (b) Boro wished to buy a particular car from Mburko Motors and the latter's Sales Manager gave him a hire-purchase form to complete and deliver to Pesa Advances Limited. A clause in the form stipulated that no contract would be valid unless duly executed by Pesa Advances Limited.

While arrangements were underway for the necessary signatures, Boro rejected the car and returned it to Mburko Motors. There the car was vandalized and badly damaged.



In the meantime, Pesa Advances Limited duly processed the form and signed the same unaware of the events of the intervening period. They have consulted you and seek to sue Boro for installments on the agreements.

Advise.

(8 marks)

3. (a) Under what circumstances and to what extent may a wife pledge her husband's credit?

(5 marks)

- (b) Nyapuoda hired O. Binju Transporters to deliver four lorries of bananas from RianaTown to Mariakani, some 850 kilometres away. One of the lorries broke down at Emali. Three days later the driver decided to sell the consignment which was now fully ripened and deteriorating, to the local residents. He received KShs.18,000/= for the sale. Much of the bananas had, in fact, been damaged and he received less than a quarter of the original value.

The driver wrote a report to his employer regarding what had happened and the action he had taken. When the transporters informed Nyapuoda of what they were compelled to do, the latter disagreed with them and filed suit for damages in court.

O. Binju Transporters have sought your advice. Do a brief written opinion, pointing out the rights, if any, of Nyapuoda as well.

(10 marks)

4. Ohiga received a bill of exchange duly endorsed from and by Sinawa. He noticed that the bill, originally drawn by Apoyo had been endorsed in favour of Sinawa by Lodoking'.

Examining the bill more closely, he noticed that the signature of Lodoking', with which he is quite familiar, had been forged.

Discuss Ohiga's rights if:-

- (a) Lodoking' had taken the bill in good faith without notice and

(8 marks)

- (b) Apoyo's signature had been forged as well.

(7 marks)

5. (a) In a contract of sale goods, explain when:-

- (i) the property; and
(ii) the risk
in goods sold pass from the seller to the buyer.

(6marks)

- (b) Torus sold to Kenuru a consignment of maize and Torus sent to the latter a bill of lading. Kenuru delivered the bill of lading to Bakili, who took it in good faith, in exchange for a

Mr. Kenya approached Mr. Patel on 20th June 2008 and informed him about his job, and he wanted to buy a new car that is fast, safe, durable, modern and of low fuel consumption. The cost is irrelevant to Mr. Kenya but he wanted assurance from Mr. Patel that the car will meet his requirements and expectations. Mr. Kenya also wanted the car to be delivered by 30th June, 2008 at his medical practice without fail. Mr. Patel assured Mr. Kenya that the 2007 model of vehicle V was the best suited to meet his needs, and was valued at Kshs.15 million. Mr. Kenya paid Kshs.15 million by banker's cheque and it was agreed that Mr. Patel would deliver the car, which was currently at the Mombasa branch on 30th June, 2008.

(a) Mr. Kenya has approached you to prepare a document to reflect the oral agreement between himself and Mr. Patel as a matter of urgency. He is particularly concerned that the document should reflect all his expectations and protect all his interests and rights.

(8 marks)

(b) In relation to (a) above, the following has occurred:

- (i) Unfortunately, Mr. Patel did not deliver the car on the agreed date.
- (ii) He delivered the car two weeks after the agreed date and insisted that Mr. Kenya take possession.
- (iii) Mr. Kenya took possession under protest.
- (iv) Mr. Kenya went to work one morning driving the new vehicle but was disappointed that it was not fast, had high fuel consumption rate, was not stable on the road and in fact stalled on the way to work.
- (v) When approached by Mr. Kenya, Mr. Patel said that "goods once sold cannot be returned" and that Mr. Kenya got value for money, and he was not liable for any defect at all, if any.

You are Mr. Kenya's advocate and he wants you to draft a legal opinion responding to each point raised above, preparing the course of action he should take, and suggesting the chances of success should he decide to take the matter to court.

(7 marks)

7. (a) Explain the distinction between societies, partnerships, companies registered under the Companies (Act Cap 486) and statutory corporations. What are unincorporated associations and why are they so called?

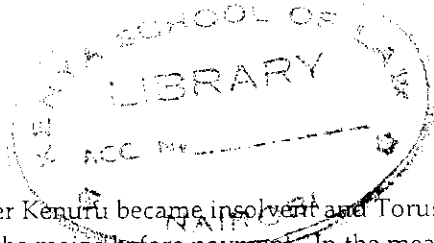
(8 marks)

(b) X and Y are the promoters of Kazi Mingi Ltd. Prior to incorporation of the company, X and Y enter into a contract "for and on behalf" of Kazi Mingi Ltd to supply some goods to Kenya Mpya Ltd. Some goods were supplied before incorporation while others were delivered after incorporation.

A dispute has now arisen between the suppliers and Kenya Mpya Ltd over quality issues and non-payment for past deliveries.

Advise all the parties involved in this matter on their respective rights and duties and the proper parties to any legal proceedings that may be commenced.

(7 marks)



trailer. Shortly thereafter Kenuru became insolvent and Torus attempted to stop the carrier from delivering the maize before payment. In the meantime, Bakili also became aware of the Kenuru's insolvency and claimed the maize.

Advise on who may lawfully obtain the maize.

(9 marks)

6. (a) Discuss briefly the meaning and effect of an adjudication order in bankruptcy proceedings and state the circumstances, if any, when such an order may be annulled.

(7 marks)

- (b) Dokita, trading as Kandito Hardware within Asego town lost most of his stock through a fire on 3rd January, 2009. The insurance company refused to pay compensation claiming that the fire appeared deliberate. Dokita appears to have relocated to an unknown town since that fire, and following a petition filed against him by a creditor on 18th January, 2009 was adjudged bankrupt on 10th July, 2009.

Dokita's only daughter, Giyoth, runs a restaurant in a prestigious building within the town, which building was given to her by Dokita on her wedding day on 20th December, 2008. The restaurant is registered in the name of Dokigiyo Limited, a company in which she and her father and mother are the only directors.

Dokita's trustee-in-bankruptcy has sought your advice on the creditors' unsettled debts against Dokita and the position of the family properties. Advise the trustee on the steps, if any which he may take to secure the creditors' interest.

(8 marks)

COUNCIL OF LEGAL EDUCATION

EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

JUNE 2009

COMMERCIAL LAW

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. Raki, the Manager of Sombro Millers, a firm of three brothers, ordered for the supply of 1000 bags of maize from Ndiche Farmers Limited at a cost of KShs.2,500/= per bag. It was also agreed that they would deliver this order in consignments of 100 bags to Sombro's milling factory every Monday for the following 10 weeks. For down payment the suppliers received a cheque of KShs.500,000/= signed by Raki "for and on behalf of Sombro Millers."

In the meantime, in the neighbouring country, a bumper maize harvest has occurred, with the result that the Kenyan market is now flooded with maize at prices of no more than KShs.1,200/= per bag. Sombro Millers have decided not to take further maize deliveries from Ndiche Farmers Limited, preferring to purchase whatever maize it needs from the open market. The millers argue that, in the first place, Raki made the orders for the maize without full consultations with or authority of the partners. Secondly, they disclose, the firm cannot afford to pay for the whole order following a bankruptcy order against one of the partners three weeks ago. In fact, a second cheque issued to the suppliers for KShs.500,000/= has just been returned dishonoured on presentation for payment, and Sombro millers insist that the Manager did not have the authority of the partners to issue the cheque.

Advise Ndiche Farmers Limited, outlining the principles of law applicable.

(20 marks)

2. Write brief notes on the meanings of the following terms and phrases:

- (a) The right of stoppage in transitu;
- (b) Acceptance of a bill of exchange;
- (c) The doctrine of relation back in bankruptcy;
- (d) The essentials of a valid chattels transfer instrument

(15 marks)

COUNCIL OF LEGAL EDUCATION

EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

DECEMBER, 2008

COMMERCIAL TRANSACTIONS

Instructions

- (a) Answer question ONE and at least ONE question from each of the THREE succeeding sections
 - (b) All questions carry 15 marks each
 - (c) Marks may be lost for illegibility
 - (d) Time allowed is 3 hours
-

1. You have been appointed by the Hon. Attorney-General of the Republic of Kenya as one man (woman) draftsman to re-draft the Bills of Exchange Act (Cap 27 of the Laws of Kenya). The Hon. Attorney-General has given you a blanket mandate to review international developments and best practices in the law of negotiable instruments and make proposals for amending the current law.

Write a detailed memorandum of intent to the Hon. Attorney-General suggesting the amendments you propose to introduce and why.

(15 marks)

SECTION ONE

2. Meshack Omboyi of P O Box 12345, NAIROBI has seen an advertisement in a daily newspaper as follows:

"Toyota RAV 4
Year 2001
Automatic; fully loaded
Asking price: KShs.800,000
Call Owner: Donald Kamau."

Omboyi comes to your law firm in the company of Kamau and they inform you that after negotiations they have agreed on a new price for the vehicle of KShs.780,000. They ask you to act for them in the transaction.

- (a) What documents do you require to obtain from Kamau for purposes of completing the transaction?

(3 marks)

- (b) Draw the necessary agreement for the parties. (7 marks)
- (c) What terms would the law imply into such an agreement even if not expressly stated by the parties. (5 marks)
3. (a) Your uncle is a newly-employed teacher and does not have enough funds to furnish his house. He has been advised by his colleagues that he can obtain goods from certain shops and pay for them later. He comes to your law offices and tells you that according to his information, a credit sale and a hire-purchase arrangement are one and the same and it is only lawyers who like complicating things.
- Explain to him concisely the legal and conceptual distinction between the two, noting to indicate the formalities necessary for a valid hire-purchase agreement (10 marks)
- (b) Michael obtains a refrigerator from Tender Traders Ltd under a hire purchase agreement. Requiring some money urgently, he sells the same to his housemate John who takes it in good faith. Michael defaults in his obligations to Tender Traders Ltd who have now come to collect the refrigerator. Advise John and Tender Traders Ltd on their respective rights. (5 marks)

SECTION TWO

4. Your client Musa Juma of P O Box 12345, Nairobi wishes to obtain credit facilities of KShs.400,000/= from a moneylender with his motor vehicle Reg. No. KBF000Z as the security.
- Explain to him the legal process required to perfect such a transaction and draw the necessary document. (15 marks)
5. You act for Kenya Business Concerns Ltd. Your client advanced to Mdeni K5hs.50,000/= which he failed to repay. Your client sued Mdeni and obtained a decree for K5hs.64,000/= which includes the decretal sum together with interest and assessed costs. All efforts to execute the decree have borne no fruit and Mdeni appears to be hiding to avoid any form of execution being levied against him. Your client has instructed you to pursue bankruptcy proceedings against Mdeni.
- (a) Explain the steps you will take and the documents you will prepare for filling in court in order to commence the bankruptcy proceedings and to enable the court make a Receiving Order. (8 marks)
- (b) Assuming Mdeni wishes to oppose your client's case, outline the process that will take place until final orders of the court (7 marks)

SECTION THREE

6. A, B, C and D are all equal shareholders and directors of African Technologies Ltd, a private limited liability company incorporated in Kenya and whose articles are in the form of Table A. All the four work for the company although no formal employment contracts have been drawn up. A dispute has arisen among the members, with A and B threatening to "kick out" C and D from the company, ostensibly for being lazy and not bringing any business to the company. C and D have approached you for legal advice on the following issues:

- (a) legal distinction between shareholder, director and employee of a company; (5 marks)
- (b) rights and duties of shareholders and directors; (5 marks)
- (c) possible remedies available to C and D in their various capacities and the proper parties to any proceedings you may commence; (5 marks)

7. Several options are available to a public company which intends to raise capital from members of the public.

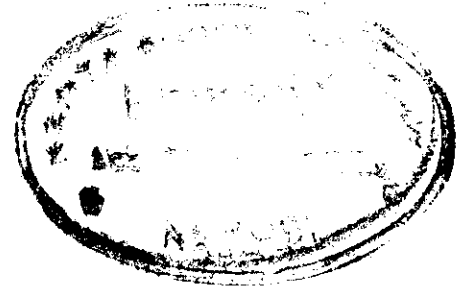
Discuss any FOUR such options indicating the legal procedures involved in each case.

(15 marks)

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

JUNE 2008

COMMERCIAL LAW



Instructions

- (a) Answer **QUESTION 1 and ANY OTHER TWO 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
 - (d) **Two (2) Hours** are allowed
-

1. Write notes on the following:
 - (a) Transfer of a bill of exchange.
 - (b) Effect of non-registration of an instrument of transfer under the Chattels Transfer Act (Chapter 28, Laws of Kenya).
 - (c) Duties of a trustee in bankruptcy.
 - (d) The right of the principal to revoke the agent's authority.

2. (a) What categories of property are legally unavailable to a trustee in bankruptcy?

- (b) Having been adjudicated bankrupt a year ago, Mawaya has lately secured employment with a charitable organization which pays him Kshs.120,000/- per month. His creditors in his bankruptcy have applied to have his salary channeled to pay his debts.

Mawaya has consulted you. He is married and has three children attending various colleges in the country. Advise him.

3. Discuss the circumstances in which a purchaser of goods may acquire a good title to them where the seller is neither the owner of the goods nor a person having authority of the owner to sell them.

3. Paul Molo is a former football player also famously known in his town by the nickname "Molo Pele." He runs a sportswear shop in Sokonyodhi town. Ravinde, a regular customer who has in the past paid for his orders in cash recently issued to Molo a cheque for Kenya shillings 60,000/= but, erroneously, in his nickname and left the cheque with Molo's shop assistant, Kimeo.

Kimeo had other ideas. He skillfully changed the name Molo Pele to read "Omolo Peter"; and using a space left between the printed words "Kenya shillings" and the handwritten words "Sixty Thousand", he added the word "One" He also squeezed the figure "1" before the figures "60,000" in the space for the amount in figures.

Kimeo persuaded his friend known as Peter Omolo to collect the payment on the cheque as altered, and promptly disappeared.

Advise both Molo and Ravinde.

(15 marks)

4. Discuss the following statement: "The principal has a right to unilaterally revoke the agency at any time before the agency has been completely performed by giving due notice."

Are there any exceptions to this assertion?

(15 marks)

5. State the essential features of a valid statutory hire-purchase agreement.

(15 marks)

6. On 2nd June last year, Mawaya deposited into his bank account a sum of KShs.430,000/=. He had earlier obtained an overdraft with the bank amounting to Kshs.200,000/=. Six (6) days later the bank received the proceeds of the cheque and proceeded to offset these against the overdraft.

On the day that the bank collected the proceeds of the cheque deposited, a receiving order was made against Mawaya regarding an act of bankruptcy reportedly committed thirty (30) days earlier.

Dayo Gowi was appointed Mawaya's trustee in bankruptcy ten (10) weeks later and seeks to recover the whole amount of the cheque which he had deposited on 2nd June last year into his bank account. The bank has resisted this attempt.

Advise the trustee, pointing out the rights, if any, of Mawaya's bank to the cheque proceeds or part of it.

(15 marks)

4. (a) Briefly explain the nature of the relationship between and among the various parties in a hire-purchase agreement.
- (b) Malipo Polepole Motors gave out a car to Oge on receipt of a cash deposit of Kshs.200,000/-, the balance of Kshs.550,000- to be paid in eleven (11) equal monthly instalments. The former's Sales Manager informed Oge that he would not regret buying the car as it was sound mechanically and issued to Oge a form to be delivered to Mikopo Finance Limited for the requisite funding of the balance on the car.

While arrangements were underway for the necessary signatures, the car broke down within a week. Oge returned it to Malipo Polepole Motors, and sought a refund of his deposit from Malipo Polepole Motors.

In the meantime Mikopo Finance Limited duly processed the form and signed the same unaware of the events of the intervening period. They seek to sue Oge for instalments on the agreement.

Give a legal opinion on the position of:

- (i) Malipo Polepole Motors.
- (ii) Oge.
- (iii) Mikopo Finance Limited.

5. (a) What are the statutory rules as to sale of goods by auction?
- (b) Ndekle requested Kinanda, an auctioneer, to sell a tractor on his (Ndekle's) behalf. They agreed to a reserve price of Kshs.720,000/-. On the day of the sale Kinanda, having forgotten the figure agreed, inadvertently knocked the sewing machine down to Baboyi for Kshs.705,000/-.

Ndekle seeks to retrieve the tractor. Discuss briefly the rights of each of the three parties.

6. (a) Give an account of the essential characteristics of negotiable instruments and examine the rights of a holder in due course.
- (b) A bill drawn "Pay Machinga or Order" is lost but found by Nena. Nena forges Machinga's signature and endorses it to Ndile who, in good faith, sells building materials and equipment to Nena. The forgery is discovered shortly thereafter.

Advise Ndile.
