



RIARA LAW SCHOOL

SECOND YEAR BACHELOR OF LAWS EXAMINATIONS

RLLB 204: CIVIL PROCEDURE I

AUGUST 2016

EXAMINER: GILBERT NYAMWEYA

INSTRUCTIONS:

- *Time allowed is three (3) hours.*
- *Please answer **ALL** the questions, each graded as follows:*
 - *Question One – 25 marks*
 - *Question Two – 25 marks*
 - *Question Three – 20 marks*
- *Only the Civil Procedure Act and the Civil Procedure Rules may be permitted in the examination room.*

QUESTION ONE (25 marks)

A. Using five Rules or Procedures in the Civil Procedure Rules illustrate the elements of the Overriding Objective. **(10 marks)**

B. In *Microsoft Corporation v Mitsumi Computer Garage Limited* [2001] 1 EA 124 Justice Ringera observed thus:

“In the interest of justice procedural lapses should not be invoked to defeat applications unless the lapse went to the jurisdiction of the court or caused substantial prejudice to the adverse party.”

Justice Ringera made this observation nearly 10 years before the promulgation of the Constitution of Kenya, 2010.

Did the Constitution of Kenya 2010 vindicate him and how? **(5 marks)**

C. Zapata Limited entered into a Distribution Agreement with Bremen Limited in January 2014. The agreement had an arbitration clause. Disputes under the agreement were to be adjudicated before a single arbitrator appointed by the consensual agreement of the parties. On 6th May, 2015, Zapata Limited complained that Bremen Limited had circumvented the Distribution Agreement and unfairly denied Bremen the benefits that would otherwise have accrued to Bremen Limited. Bremen Limited quantified the consequential losses at Kenya Shillings 20 Million. Bremen Limited initiated the arbitral process an Arbitrator named Brandon was appointed as the single arbitrator. The arbitrator heard and determined the dispute and awarded Bremen Limited Kenya Shillings 12 Million in an award issued on 28th September, 2015. In February 2015 Bremen Limited sold the whole of its business undertaking to Seaport Limited. The Business Acquisition Agreement transferred all the assets and liabilities of Bremen Limited to Seaport Limited.

QUESTION: Aided by the provisions of the Civil Procedure Act and judicial precedents analyse the following situations drawn from the above facts.

(i) In May 2016 Seaport Limited filed a civil case in the commercial division of the High Court at Nairobi against Zapata Limited. The facts forming Seaport Limited’s cause of action in this case were exactly the same as the facts Bremen Limited had pleaded in support of its claim in the arbitration. *Give Zapata a legal opinion on the response Zapata Limited may appropriately make in the circumstances.* **(6 marks)**

- (ii) How would the situation be different had the arbitrator ruled that he had no jurisdiction to adjudicate upon Bremen Limited's arbitral claim following Zapata Limited's objection to his jurisdiction? Support yourself with case law authorities. *(4 marks)*

QUESTION TWO *(25 marks)*

- A. Grindlays Limited had a longstanding contract for the supply of pozzollana rocks to Cement Limited as raw materials for the manufacture of cement. In the year 2014 Grindlays Limited supplied 2 tonnes of granite rocks instead of pozzollana rocks. Cement Limited paid Kenya Shillings 50 Million to Grindlays Limited as the price for this consignment. Cement Limited started feeding this consignment into its grinding plant. Within one day, the plant had consumed about 25% of the consignment. The running of the plant came to an abrupt halt at 3 pm. Cement Limited's engineers started investigating the breakdown. They discovered that all four of the plant's crankshafts were badly damaged.

Upon further investigation they discovered that the raw material that was being processed was actually granite rocks which is known for its hardness as opposed to pozzolla rocks that are soft and suitable for the manufacture of cement. In fact the plant cannot crush hard rock at all. Cement Limited was evidently left in great losses. It suffered loss of all the monies it paid as price. The plant would cost Kenya Shillings 25 Million to repair. From the moment the plant broke down it lost Kenya Shillings 5 Million in profits every week. Cement Limited issued a demand notice seeking compensation from Grindlays Limited for these losses. Grindlays Limited denied Cement Limited's claim.

Cement Limited approaches you as an Advocate for legal action against Grindlays Limited. Advise Cement appropriately and prepare the relevant pleadings in the implementation of your advice. *(10 marks)*

- B. Grindlays Limited's position is that the samples of the raw materials supplied which are the subject of (A) above had been tested by Cement Limited's chemical engineers. According to the contractual framework between Grindlays Limited and Cement Limited, the samples of the rocks extracted from the site where the raw materials are to be mined from were to be tested to verify that they were of the pozzollana type. The contractual duty of undertaking the tests was that of Grindlays Limited. In this

particular case the chemical engineers issued a certificate of testing certifying that the site was made of pozzollana rocks had been issued by Cement Limited to Grindlays Limited. So, by the time Grindlays Limited commenced mining and delivering the raw materials they were certain that the materials were made of pozzollana rocks. Soon after the mining and delivery of the consignment, Grindlays Limited's excavating machines broke down.

The mechanical engineers of Grindlays Limited discovered that the excavation of the material they had believed to be pozzollana was responsible for the breakdown of the excavating machines due to its extreme hardness. The machines were, according to the manufacturer's specifications, only meant for extraction of soft material. 20 machines were badly damaged. The cost of repairing them was projected at Kenya Shillings 5 Million. As a result of the break down, the mining operations of Grindlays Limited slowed down and Grindlays Limited was losing Kenya Shillings 2 Million in profits every week. Grindlays Limited blames Cement Limited for the confusion in mining granite rocks instead of pozzollana rocks, which they argued was the cause of all the consequential losses both parties had suffered.

Grindlays Limited has engaged you as its advocate. Prepare suitable pleadings noting to address:

- (i) the claim mounted by Cement Limited against Grindlays Limited; and
- (ii) any claim Grindlays Limited might sustain against Cement Limited.

(15 marks)

QUESTION THREE (20 marks)

A. Prof. Howard Nzeke is a pharmaceutical scientist. He has a situation with the following facts:

- In the course of his research he discovered and developed a drug that would cure diabetes. Kenya Industrial Property Institute granted him a patent for this invention.
- In June 2016 he entered into a contract with Chemipromo for the exploitation of the patent by mass production of the drug. Under this arrangement Prof. Howard Nzeke and Chemipromo were to share the profits of the exploitation of the patent equally.
- On 15th July 2016 it came to the notice of Prof. Nzeke that Chemipromo being seized with the formula of the drug by virtue of certain disclosures he had made to Chemipromo the latter had hatched a plan to exploit the patent. The exploitation

was to exclude Prof. Nzeke in all respects. Chemipromo would produce 1 million doses of the drug by 22nd July, 2016 and commence distribution immediately. The distribution was to take place in Kenya and also abroad.

- (i) Advise Prof. Nzeke on the immediate steps he may take under the framework of the Civil Procedure Rules to safeguard his rights and interests. **(4 marks)**
 - (ii) With the aid of decided case law prepare an outline of the arguments you would advance in support of the hearing of the application in (i) above noting to bring to the fore the applicable principles of law. **(6 marks)**
- B. C was a contractor in a contract involving the refurbishment of certain cranes in S sugar factory. C and S signed a contract for this undertaking. S paid C 50% of the price of the refurbishment works. The remainder of the price was to be paid upon completion and commissioning of the works. C executed their assignment to completion. In the course of execution S's mechanical and electrical engineers were on site giving C instructions. The site meetings were attended by S's production manager alongside S's engineers. Upon completion and commissioning of the works C billed S for the balance of the price. S refused to pay the remainder of the price alleging that the works were substandard. C filed a case against S for the recovery of the balance of the price. S defended the suit. S denied every averment in C's plaint. S further denied ever having such a contract with C. S further averred that it could not have dealt with C terming C "a nondescript busybody who is at best an imposter".

Citing relevant case law state how you would characterize S's defence and what strategy you would use to deal with it within the framework of the Civil Procedure Rules.

(6 marks)

- C. In part (B) above, S may take some steps to avoid adverse court orders pursuant to C's request to court. Assume that S is serious about the question of the quality of the works C executed. While supporting yourself with suitable case law illustrate an approach that C may take would be helpful in salvaging its Defence. **(4 marks)**

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