



RIARA LAW SCHOOL

SECOND YEAR BACHELOR OF LAWS EXAMINATIONS

RLLB 204: CIVIL PROCEDURE I

DECEMBER 2015

EXAMINER: GILBERT NYAMWEYA

INSTRUCTIONS:

- *Time allowed is three (3) hours.*
- *Please answer ALL the questions*
- *Only the Civil Procedure Act and the Civil Procedure Rules may be permitted in the examination room.*

QUESTION ONE (30 marks)

- A. Citing relevant Civil Procedure Rules and case law authorities critically analyse the Overriding Objective of the Civil Procedure Rules noting to illustrate the duties of the various users of the Rules. (8 marks)
- B. Select five Rules or Procedures from the Civil Procedure Rules and show how each assists in the achievement of the Overriding Objective. (10 marks)
- C. Article 159 (2) (d) of the Constitution of Kenya provides that: “(2) *In exercising judicial authority, the courts and tribunals shall be guided by the following principles – (d) justice shall be administered without undue regard to procedural technicalities;*”.

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.

The Civil Procedure Rules have been established to guide the conduct of civil litigation. These Rules ought to be observed, yet the statements above seem to suggest that these Rules do not matter after all. The statements seriously contradict the rationale for Rules. More often than not, this is a dilemma that confronts actors in civil litigation.

You are a judge faced with this dilemma in one of the cases you are handling. How would you resolve such contradiction, if any? (5 marks)

D. In January 2009, Econet Wireless Limited entered into a lease for a period of six years over a portion of the rooftop of Apex Plaza, owned by Apex Limited. In August, 2014 Econet Wireless Limited sent a notice to Apex Limited expressing their right to exercise the option for renewal of the lease under the underlying Lease instrument. Apex Limited declined to grant Econet Wireless Limited the renewal of the Lease sought by Econet Wireless Limited. Econet Wireless sued seeking a declaration that Apex Limited is obliged to grant them the renewal of the lease given that Econet Wireless had issued the requisite notice under the Lease instrument. Apex Limited contended that the notice issued by Econet Wireless Limited was deficient having been issued five months before expiry of the lease as opposed to six months. The High Court upheld Apex Limited's contention.

In the course of the year 2013 Econet Wireless Limited was contemplating abandoning its mobile telephony services business in Kenya. By the year 2014 this plan had crystallised. In June 2015 Econet Wireless Limited had entered into an agreement with Safaricom Limited for the takeover of the lease site. By the end of 2015, Econet Wireless Limited had wound up its business and left the Kenya market completely.

In January, 2016 Safaricom Limited attempted to access the lease site on the basis of the agreement with Econet Wireless Limited to take over the site. However, Apex Limited's managing director informed Safaricom Limited that it had no right to do so. He further informed Safaricom Limited that in fact Apex Limited had just granted Airtel Limited a lease over the site.

Safaricom Limited sued Apex Limited and Airtel Limited in a suit asserting their right over the site. Apex Limited instructs you to act for them in the suit. Analyse the position of Apex in this case noting to cite the relevant case law and provisions of the Civil Procedure Act and Rules. (7 marks)

QUESTION TWO (25 marks)

Prof. Wiltord Miller is an author of children books. He has a situation with the following facts:

- On 4th November 2015 he presented his unpublished book to Tebala Publishers Limited who had undertaken under contract to edit as well as publish the novel at a flat rate of K.Shs. 5,000,000. He paid the entire contract price to Tebala Publishers Limited on 10th November, 2015.
- One month later Prof. Miller discovered that Tebala Publishers Limited had published 10,000 copies of the book as their own. Tebala Publishers Limited was in the process of launching the book after which its sale, distribution and retailing would commence immediately at the price of K.Shs. 2,000 per copy. The book launch is scheduled on 15th December, 2015. This publisher has no plan of informing Prof. Miller of this development, nor of sharing the revenues of the book project with him.
- Prof. Miller had taken a loan facility of K.Shs. 5,000,000 from a commercial bank to facilitate the book project. He informed the bank of his predicament. Seeing the likely loss they would incur, the bank immediately required him to pay off the loan within three months of the book's launch and in any case not later than 15th March, 2016. The bank has now seized Prof. Miller's property worth K.Shs. 4,000,000.

Prof. Miller has come to your law office with instructions to institute a suit against Tebala Publishers Limited.

- (i) Prepare a suitable Complaint accompanied with a Verifying Affidavit in a relevant suit for this situation. (10 marks)
- (ii) Prepare the relevant application together with the accompanying supporting affidavit whose object is to offer Prof. Miller some interim measure of protection. (7 marks)
- (iii) 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 (ii) above noting to bring out the applicable principles of law. (8 marks)

QUESTION THREE (15 marks)

- A. You are employed at Njuaba Advocates. You are assigned to a case in which Njuaba Advocates had been retained to act for the Defendant. In that case the Plaintiff had alleged that the Defendant, an investment bank, had engaged in dishonest conduct. The Plaintiff also averred that the Act of Parliament under which the Defendant had been licensed to carry on the business of investment banking was tainted with immorality as it had been passed by members of the National Assembly after each receiving a bribe to support the underlying Bill. He further stated that the Defendant's senior officers were persons of unknown race. The Plaintiff categorically stated that he would not seek any relief against the Defendant.

Citing the relevant Civil Procedure Rules and case law authorities, prepare a brief showing how you would handle this case. (8 marks)

- B. Njuaba Advocates also assigned you a case in which they were representing the Plaintiff. The Plaintiff was a main contractor in the installation of a tea processing plant for a tea factory. In that case the subject matter was a sub-contract in which the Plaintiff had subcontracted the Defendant to install a drier for the tea factory's processing plant. There were letters and emails exchanged between the Plaintiff and the Defendant concerning this component of the sub-contract. The Plaintiff averred that he had given the Defendant specifications of the drier that implied that such a system would be sourced from France. The Plaintiff alleged that the Defendant installed a second hand drier sourced from Mongolia. The Defendant filed a defence that denied every averment in the Plaintiff. The Defendant denied ever knowing, or meeting, or dealing with the Plaintiff.

Citing relevant case law state how you would characterize the Defendant's defence and what strategy you would use to deal with it. (7 marks)