



**RIARA LAW SCHOOL  
UNIVERSITY EXAMINATIONS, 2015  
AUGUST 2015  
RLLB 210: CIVIL PROCEDURE II  
EXAMINER: GILBERT NYAMWEYA**

**INSTRUCTIONS:**

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

**QUESTION ONE** (20 marks)

**PROBLEM:** You are a lawyer trading as Attornex Advocates. Your client instructed you to issue the demand letter set out below. The debtor did not oblige. Your client asked you to file suit.

- (a) Please draft a suitable plaint together with the verifying affidavit. (12 marks)
- (b) Athman Ndorompe's position is that even though he was lent some money by Elizabeth Lunjera he repaid it. He states that in fact it is Elizabeth Lunjera who owes him K.Shs. 60,000/= in respect of supply of garments. Please prepare a defence to the Plaint. (8 marks)

**Demand Letter:**

4<sup>th</sup> September, 2014

Athman Ndorompe

**Nairobi** - *By Hand Delivery*

Dear Sir,

**Re: Debt of K.Shs. 100,000/= Due to Elizabeth Lunjera**

We act for our Client, Elizabeth Lunjera, who has instructed us to address you as hereunder:

1. By an agreement entered into on 12<sup>th</sup> April, 2013 between yourself and our client, our client agreed, upon your request, to lend you the sum of Kenya Shillings One Hundred Thousand (K.Shs. 100,000/=) (hereinafter called "the outstanding amount").
2. It was a term of the agreement that the sum aforesaid was to be repaid in full to our client by yourself on or before 31<sup>st</sup> May 2013 full particulars whereof are well within your knowledge.
3. However, in breach of the agreement as aforesaid refused, failed and/or neglected to pay the said sum within the time and in the manner aforesaid.
4. Please be advised that the outstanding amount has and is still accruing interest at the rate of 15% per annum from 31<sup>st</sup> May, 2013 until full and final settlement thereof.

5. On the premises of, and as a sequel to and circumstances set out in the foregoing paragraphs 1, 2, 3 and 4, our client's claim against yourself is for the sum of K.Shs. 100,000/= together with interest at the rate of 15% per annum from 31<sup>st</sup> May, 2013 until payment in full.
6. **OUR INSTRUCTIONS ARE TO DEMAND, AS WE HEREBY DO, AS FOLLOWS:**
  - (a) that you pay to ourselves, by bankers' cheque, the sum of K.Shs. 100,000/= **within the next ten (10) days from the date hereof**, i.e., by close of business on 14<sup>th</sup> September, 2014 for our onward transmission to our client; and
  - (b) that you pay to ourselves, by bankers' cheque, interest amounting to K.Shs. 55,000/= **within the next ten (10) days from the date hereof**, i.e., by close of business on 14<sup>th</sup> September, 2014 for our onward transmission to our client.
7. **TAKE NOTICE THAT** unless we receive the sum demanded hereinabove within the time and in the manner specified hereinabove, our instructions are take all steps to recover this sum including legal proceedings at your own peril as to the attendant costs of suit and other incidental consequences.
8. **PLEASE FURTHER NOTE** that our collection charges amount to the sum of K.Shs. 15,000/=, which sum shall also become due on 14<sup>th</sup> September, 2014.
9. **TAKE FURTHER NOTICE** no further reminders will be sent to yourselves, and that this constitutes the final demand and notice of intention to sue.

We trust that you will oblige to this demand.

Yours Faithfully,  
**Attornex Advocates**

QUESTION TWO (15 marks)

**PROBLEM:** You run the law firm of Rasul Dodhia & Company Advocates who is defending the Defendant, Roselyne Flowers. You prepared the Defence set out below:

<p><b>REPUBLIC OF KENYA</b> <b><u>IN THE RESIDENT MAGISTRATE'S COURT AT NAIROBI</u></b> <b><u>MILIMANI COMMERCIAL COURTS</u></b> <b><u>CIVIL CASE NO. 6682 OF 2013</u></b></p> <p><b>ROLTEX OIL (K) LIMITED.....PLAINTIFF</b> <b>-VERSUS-</b> <b>ROSELYNE FLOWERS LIMITED ..... DEFENDANT</b> <b><u>DEFENCE</u></b></p> <p>1. Save as is herein admitted by the Defendant, the Defendant denies each and every allegation made by the Plaintiff in the Plaintiff as if the same were herein set out verbatim and traversed seriatim.</p> <p>2. The Defendant admits the contents of paragraphs 1 and 2 of the Plaintiff in so far as the same are descriptive of the parties to this suit save that the address of service of the Defendant for purposes of this suit is care of Rasul Dodhia and Company Advocates, Khar House, Kharetum Drive P. O. Box 4409-00100 Nairobi.</p> <p>3. The Defendant denies the allegations set out in Paragraphs 3 and 4 of the Plaintiff and puts the Plaintiff to strict proof of thereof.</p> <p>4. The Defendant denies that any accident happened to the Plaintiff either as alleged in paragraph 4 of the Plaintiff as alleged or at all and puts the Plaintiff to very strict proof thereof.</p> <p><b>5. <u>Without any prejudice whatsoever</u></b> to paragraphs 3 and 4 hereinabove, the Defendant avers that if the alleged accident occurred, the same was not caused by the negligence or any negligence on the part of the Defendant as alleged in paragraph 4 of the Plaintiff or at all. The Defendant further denies that the alleged damage to the Plaintiff's vehicle was caused or occasioned by reason of the alleged or any negligence on the part of the Defendant as alleged. The particulars of negligence set out under paragraph 4 of the Plaintiff are denied as if the same were set out and traversed seriatim.</p> <p><b>6. <u>Further and in the alternative and without any prejudice whatsoever</u></b> to paragraphs 3, 4 and 5 hereinabove, the Defendant avers that the alleged accident and any damage which the Plaintiff may have sustained and any consequential loss or damage to the Plaintiff was wholly caused by or substantially contributed to by the negligence of the Plaintiff or its duly authorised agent</p> <p><b>Particulars of Negligence</b></p> <p>(i) Failing and/or neglecting to take any care or any proper while driving on a busy road.</p> <p>(ii) Braking suddenly.</p> <p>(iii) Failing and/or neglecting to maintain any or any proper look out for other motor vehicles.</p> <p>(iv) Failing and/or neglecting to take any cautionary measure to avoid being hit by the vehicle.</p>
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**QUESTION THREE** (15 marks)

Citing the relevant Civil Procedure Rules, case law authorities and hypothetical illustrations:

- (a) Please give five distinct scenarios where *res judicata* may be raised successfully by a defendant. (10 marks)
- (b) Please give two distinct hypothetical scenario where *res judicata* may not be successfully raised by a defendant. (5 marks)

**QUESTION FOUR** (20 marks)

Citing the relevant Civil Procedure Rules and case law authorities:

- (a) Citing relevant Civil Procedure Rules and case law authorities explain the purpose of the Civil Procedure Rules and in doing so discuss the Double "O" or Oxygen Principle. (5 marks)
- (b) 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;*". Reconcile this provision with the provisions of the Civil Procedure Act and the Civil Procedure Rules (5 marks)
- (c) With the aid of the relevant Civil Procedure Rules discuss the rules of pleading. (5 marks).
- (d) With the aid of the Civil Procedure Rules and caselaw please discuss the rules that govern amendment of pleadings. (5 marks)