



LAW SCHOOL

**FOURTH YEAR UNIVERSITY EXAMINATION FOR BACHELOR OF LAWS
(LLB) DEGREE**

ALTERNATIVE DISPUTE RESOLUTION

RLB 311

DECEMBER 2018

Examiner: Florence Shako

Instructions:

1. Time allowed is 3 hours. Reading time of 15 minutes is permitted
2. This exam is comprised of two sections. Section A is compulsory. Students should answer any TWO questions from Section B
3. Question One carries 30 marks while all other questions EACH carry 20 marks
4. This examination paper carries a total of 70 marks
5. This is a closed book examination. No illicit materials whatsoever (books, statutes, copies of the Constitution, students' own short notes, computers, mobile phones, etc) are allowed and this list is not exhaustive. This rule shall be enforced with strict liability upon you and will be recorded as an examination irregularity

SECTION A

QUESTION ONE (30 marks)

On 1st January, 2018, John, who has a construction company in Tanzania, entered into a contract to construct a house for Mary in Nairobi County in Kenya. One of the clauses in the contract read as follows:

“ARBITRATION

This Agreement shall be governed and construed in accordance with the laws of the Republic of Kenya.

In case of any dispute or difference arising between the parties hereto as to the construction of this Agreement or the rights, duties or obligations of either party thereunder every such dispute and matter in difference shall be referred to a single arbitrator in accordance with the Arbitration Act, (1995) Laws of Kenya. The said arbitrator shall be agreed upon mutually between the parties and failing agreement, within fourteen days from the date of the notice of the dispute.”

The construction work began and the foundation and the walls of the house were completed. On 1st September, 2018, a dispute arose regarding the construction of the roof. Mary alleged that John was deliberately extending the timelines given and overestimating the cost of the building materials to inflate the overall cost of the project. John, on the other hand, alleged that Mary was ‘penny-pinching’ and unwilling to spend the necessary amount of money to ensure proper construction of the house as agreed.

Mary has now decided to file a lawsuit against John at the Commercial Law Division of the Milimani High Courts for alleged breach of contract. John has approached you, an Alternative Dispute Resolution practitioner, for advice.

Required:

- a) John would like to enter a defence to the allegations set out in Mary’s claim. Advise John **(2 marks)**
- b) John would like to understand the meaning of the clause set out in the contract titled ‘ARBITRATION’ and its effect on their contract **(2 marks)**
- c) Mary and John have now decided to undertake arbitration as an alternative dispute resolution process but are unsure of the seat of arbitration since John’s company is in Tanzania. Advise the parties **(6 marks)**

- d) Mary has appointed an arbitrator but John was not consulted. Advise John on:
- i. The procedure for challenging this appointment (6 marks)
 - ii. Two alternative processes for appointing an arbitrator (4 marks)
- e) The arbitration process has now failed and the matter has gone back to court. However, John is shocked that he is now being re-directed to a process called 'court-annexed mediation.' He has been informed that it is a new project at the Commercial Law Division at the High Court that affects all commercial suits. Advise John on the procedure to be followed to undertake the court-annexed mediation process and any three challenges which he can anticipate in this project (10 marks)
- (TOTAL: 30 marks)**

SECTION B

QUESTION TWO (20 marks)

Peter and Sally had an arranged marriage. Although they had met each other a few times and had a handful of dates, they never really got to know one another. They were swept away by family and cultural pressures to get married.

Having been married for around eight months, it was obvious they had entered into marriage very lightly and had not considered their compatibility. Sally and her family had been dishonest about certain issues which had Peter known prior to the marriage, he would never have married her. These issues had come to his attention after the marriage and were the subject of daily arguments. It was clear that the marriage was not going to work. Peter and Sally decided that divorce was the best option for them. Sally left Peter and went back to live with her parents.

A few months passed and Sally's parents contacted Peter's parents and stated that they spent Kshs. 2 million on their daughter's wedding. They wanted certain gifts back and the money spent on the wedding. Peter's parents laughed this off stating that they had spent Kshs. 3 million on the wedding, so if anything Sally's parents owed them money, not the other way round.

Peter received a letter from Sally's advocate with a claim of Kshs. 2 million and identifying a large list of items which the parents wanted returned. Where items could not be returned as they had been used, they wanted an additional Kshs. 500,000 instead. Furious, Peter instructed his own advocate to make a counter claim of the Kshs.

3 million, highlighting the element of fraudulent misrepresentation, which had induced Peter into the marriage.

Just before formal proceedings were initiated, the parties come to you, a renowned mediator seeking advice on the following:

- a) Peter and Sally would like understand the role of the facilitative mediator in the mediation process **(5 marks)**
- b) The parties would like to understand what the source of the mediator's power would be since the process would occur outside of the court system **(5 marks)**
- c) The parties are surprised to find that the mediator is an advocate since litigation is an adversarial process. Advise them on the mediation skills an advocate can cultivate to become a good mediator. **(5 marks)**
- d) The parties have been informed that there are some psychological issues that might arise in mediation. Advise them on these issues **(5 marks)**

(TOTAL: 20 marks)

QUESTION THREE (20 marks)

Maina is a notorious thief who lives in Meru County in Kenya. His neighbors have repeatedly reported him to the police but after serving short sentences in a local prison, he usually goes back to his usual mischief. Rumor has it that Maina has now started to sell marijuana as well and is happy to accept stolen goods as payment for the illicit drug.

On 10th September, 2018, Maina received a radio from one of the teenagers in the area as payment for the supply of 700 kilograms of marijuana. Jane, the owner of the radio, reported to the police that it had been stolen. After investigating, the radio was found in Maina's home and he was arrested.

However, before Maina was charged in court, a heated debate ensued in the community on whether litigation was the proper channel for resolving this recurring matter. Samuel, a retired chief, suggested that the matter be taken before *Njuri Ncheke*, the council of elders, in the area. Jane is unsure that this would lead to justice and would like to see Maina prosecuted in a court of law and convicted for his crime.

Jane comes to you, an Alternative Dispute Resolution practitioner, for advice:

- a) Advise Jane on whether utilizing the council of elders to resolve the dispute will enhance access to justice **(5 marks)**
- b) Jane would like to know the suitability or otherwise of using the *Njuri Ncheke* to resolve criminal cases such as the alleged theft in question **(5 marks)**

- c) Advise Jane on any challenges which might be faced if this method of resolving disputes is utilized (5 marks)
- d) Advise Jane on principles that undergird the use of mechanisms such as the council of elders to resolve disputes (5 marks)

(TOTAL: 20 marks)

QUESTION FOUR (20 marks)

Martin and Owen are neighbors in a block of flats in Westlands, Nairobi, with their units sharing a common wall.

Martin writes for a living and works at home during the day. Owen is a musician. He works at night, and practices his electric guitar at home during the day. They have both lived in the building for approximately two years and have been in almost constant conflict the entire time.

Martin has called the police on numerous occasions with noise complaints against Owen. Both tenants have complained to the landlord many times. Martin has complained regarding Owen's noise disturbance while Owen has complained about Martin's harassment.

The landlord, tired of hearing from both of them, has given them an ultimatum to "work things out" between them or he will not renew either of their leases, which expire at the end of the month. They both like the units and wish to stay.

They have decided to seek an alternative means of resolving the dispute instead of going to court. They agree to use arbitration as their preferred choice. They approach you, an advocate well versed in arbitration law, for advice on the following:

- a) Martin and Owen agree to conduct the arbitration in Nairobi. They are unsure on how to commence arbitration. Advise them (2 marks)
- b) Martin and Owen would like to appoint an arbitrator but are unsure as to the criteria they should consider in choosing the sole arbitrator. Advise them on 4 factors they could consider (4 marks)
- c) Advise the parties on any four limitations on the powers of an arbitrator (4 marks)
- d) Martin and Owen are averse to litigation and would like advice on whether the court will play any role in the arbitral process (10 marks)

(TOTAL: 20 marks)