

Introduction to Law

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Revision Kit

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Acknowledgment

We gratefully acknowledge permission to quote from the past examination papers of the following bodies: **Kenya Accountants and Secretaries National Examination Board (KASNEB); Chartered Institute of Management Accountants (CIMA); Association of Chartered Certified Accountants (ACCA).**

We would also like to extend our sincere gratitude and deep appreciation to Mr. Jacob Gakeri for giving his time, expertise and valuable contribution, which were an integral part in the initial development of this Revision Kit. He holds the following academic honours, **LLM (1st Class), LLB, Diploma in Law (K.S.L), CPS (K)**, and is also an advocate of the High Courts of Kenya and a Member of the Law Society of Kenya among others. He is a senior lecturer at Strathmore University, School of Accountancy, Bachelor of Commerce (BCOM) and Bachelor of Information Technology (BBIT).

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Part I: Introduction

“Revision is the process by which you remind yourself of the material you have studied during your course, clarify any problem areas and bring your knowledge to a state where you can retrieve it and present it in a way that will satisfy the examiners.”

The paragraph herein- above captures the essence of revision. It is implicit that revision is nothing short of “fine tuning” the knowledge acquired in the course or making it more digestible for usage in an examination.

Revision is an integral part of examination preparation. It is not a substitute for a sustained preparation earlier in the course. The syllabus for Law II or Company Law is expansive and cannot be “hastily crammed” for purposes of the examination. A deliberate attempt must be made to study and appreciate the basic principles and concepts and their application. Revision must therefore be seen as a final stage in the study of any topic. Its utility is therefore undermined if earlier stages have not been completed.

As an integral part of the course revision must be commenced shortly after the commencement of the course. Initially this could take the form of a review of what has been covered in a week or two not a month as this may be inordinately long. Ideally, revision is necessary after every topic. Coverage of the topics must be incisive and indiscriminate.

The main purpose of this booklet is to help candidates preparing for the Law II KASNEB examination to make the best use of the last few weeks before the examination.

The booklet consists of three parts: part one consists of an introduction, the various revision and examination techniques. Part two consist of eight sets of past examination questions and answers. The object of this part is to demonstrate to the candidate the actual information required in responding to examination questions, the detail required and the variety of questions expected in the examination. This section demonstrates beyond question that a serious candidate must familiarize himself with the entire syllabus. Every topic ought to be accorded the requisite attention.

Part three consists of three sets of examination questions and answers. The twenty-four questions illustrate to the candidate the type of questions likely to appear in future examination papers. The purpose of this part is to expose the candidate to additional questions for better coverage of the syllabus and preparation.

Revision Techniques

I dare state at the outset that I am not an expert in revision techniques. However, it is quite in order to make a few suggestions. A candidates revision strategy should consist of two facets namely:

- Looking back to the work already covered.
- Looking forward to the examination.

Revision must not be boring. This demands application of numerous techniques at different times. At this level it is assumed that a candidate has tested a number of techniques and should adopt the most effective one(s). The basic revision techniques include:

- Highlighting key points and cases in lecture notes, textbooks and other materials used in the course.
- Using key terms, words or phrases so as to remember the essential concepts and cases in a topic.
- Reducing lecture notes and other materials to key ideas definitions and case law and committing them to memory.
- Practicing as many examination standard questions as possible. This is best accomplished by working to time under examination conditions if possible avoiding the temptation to look at the answer before completion.
- Practicing the art of writing at speed. This is something every Law candidate need.
- In the course of revision candidates are encouraged to think of situations and circumstances which exemplify concepts and ideas likely to arise in the examination. This enriches a candidates capacity to analyse problem related questions in the real examination.
- Candidates are encouraged to practice planning answers and then compare their notes with the answers provided. This is additional practice but must not substitute writing full answers.

Approach to Examinations

GENERAL EXAMINATION TECHNIQUES

Revision for an examination may assume various forms or a combination of forms. As many forms as possible ought to be used to enrich the candidate e.g.

- a) revision syndicate with candidates undertaking similar examinations
- b) fixed time for revision per day and the rest spent on healthy exercise
- c) spreading revision time throughout the semester spending some time each week revising the weeks material

As far as the actual examination is concerned it is necessary to note that *“Examinations are formidable even to the best prepared, for the greatest fool may ask more than the wisest man can answer.”*

- a) A candidate must read through the whole of the examination paper and jot down on the examination paper the names of the relevant cases he can remember and other ideas likely to elude him when he starts writing out the answer. Note that every question in the examination paper that the candidate is expected to and can answer should be answered.
- b) As a general rule, a candidate should divide up his time as equally as may be between all questions
- c) All law examinations give a certain choice of questions and the candidate must choose wisely as this ultimately determines the marks earned
- d) If a question is expressly divided into separate sub-sections, each of the sub-sections must be answered separately and if the sub-sections are numbered or lettered, the answer must be numbered and lettered in the same manner. The answer must be modelled to conform to the question. A question may be divided into parts even though numbers or letters are not used. Each part must be answered separately.
- e) In answering a question, a candidate must give as much detail as possible. Though it is at times possible to respond to a question literally in a couple of sentences this may be insufficient.
- f) If a candidate is asked to distinguish between two legal concepts or institutions he should give not only the difference in definition but also the difference of legal effect. It need hardly be added that the examiner wants reasons and authorities for the answer even though he does not expressly ask for them.
- g) The question of relevance is the candidate's greatest challenge. Whether a question is badly worded or not if it is reasonably clear, it almost invariably has a central kernel of meaning that is relatively clear. A candidate must answer this to begin with and then proceed to write on the doubtful part of the question. Attempt must be made to make the answer as attractive as possible. If a question is capable of being answered in a sentence, answer it as such and proceed to explanations thereafter. Within limits it is permissible (and often desirable) to divide up the answer into numbered points with sub-heading underlines. This

saves the candidates time and enables the examiner to see how the candidate has treated the subject

- h) The candidates handwriting must be legible and not atrocious
- i) Abbreviations of technical words and other expressions must be used very sparingly. However, if time is of the essence the best course is to reduce the answer to a bare note form. However, the most legitimate way to save time and energy is by omitting windy phrases b the adoption of a clear incisive style in which every word counts.
- j) In most cases whereas part (a) of the question consists of a bookwork question part (b) or (c) may consist of a problem. This enables the candidate to demonstrate his skills in both. If part (b) or (c) i application of part (a) the problem is easily digestible. The danger with problem questions is that if the “problem” is completely missed the result may be catastrophic.
- k) If the entire question is a problem though a rare occurrence such a question must only be answered if the issues at hand are clear and the relevant judicial or statutory authority is available. Otherwise there is a danger of being too brief which attracts a minimal mark

ANSWERING EXAMINATION QUESTIONS

An ordinary Law examination is characterised by three types of questions, namely:

- i) Single statement question
- ii) Structured question
- iii) Problem question

A single question may consist of the three types of questions.

A) Single Statement Question

These questions presuppose as candidates thorough understanding of the issue(s) at hand and are very rewarding if answered comprehensively. They are almost invariably bookwork questions and are therefore manageable, but must be avoided if the candidate is unsure of their purport. For example question 6 of June 2014 read:

Explain the conditions which are implied in a contract of sale of goods by the Sale of Goods Act Cap 31, Laws of Kenya.

A candidate familiar with sections 14, 15, 16 and 17 of the Sale of Goods Act can comfortably attempt this question. The actual technique entails stating the definition of a condition as stipulated in section 13 (2) of the Sale of Goods Act and then identifying and explaining the specific conditions implied.

A condition is a term of major stipulation of a contract. It is the central theme of the contract and runs to the root of the contract. Unless a different intention appears, the following conditions are implied in a Sale of goods contract

i. Right to Sell:

Under section 14 (a) of the Act there is an implied condition that the seller has a right to sell the goods when property is to pass.

ii. Correspond to description:

Under section 15 where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description and if by sample and description the goods must correspond with the sample and description.

iii. Fitness for Purpose:

Under section 16 (a) of the Act where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the sellers skill or judgement, and the goods are of a description which it is in the course of the sellers business to supply here is an implied condition that the goods shall be reasonably fit for such purpose.

iv. Merchantable Quality:

Under section 16 (b) of the Act where goods are bought by description from a seller who deals in goods of that description whether there is an implied condition that the goods shall be of merchantable quality.

v. Correspond with sample:

Under section 17 (2) (a) of the Act in a sale by sample there is an implied condition that the bulk shall correspond with the sample in quality.

vi. Comparing bulk and sample:

Under section 17 (2) (b) in a sale by sample there is an implied condition that the buyer shall be afforded a reasonable opportunity of comparing the bulk with the sample.

vii. Free form defect:

Under section 17 (2) (c) of the act in a sale by sample there is an implied condition that the goods shall be free from any defect rendering them un-merchantable which would not be apparent on reasonable examination of sample.

viii. Trade usage or custom:

Under section 16 (c) of the Act an implied condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

A second illustration is question 3 of June 2013 which read:

“It is a fundamental rule of the Law of contract that each party to a contract must perform completely and precisely what he has promised to do.”

Explain this statement and the circumstances in which the rule does not apply.

B) Structured Questions

This is the most common examination technique and a candidate must be well prepared for questions of this nature. The question may assume any of the following two forms:

(I) The inclusion of different questions in one question. For example question 1 of November 2013 read:

(a) **What is meant by “Stare decisis” or judicial precedent?**

(b) **When can or should a court refrain from following a binding precedent?**

Unlike in this case where the two questions are extracted from the same topic the questions may be from different topics e.g. Agency, partnership, sale of goods, or law of persons.

The answer to the question is:

- a. Stare decisis literally means decision stands or stand by the decision. This is a system of administration of justice whereby previous decisions of superior courts are followed in subsequent similar cases. Baldly stated the doctrine is to the effect that each court in the judicial hierarchy is bound by principles established by previous decisions of courts above it in the hierarchy and courts of co-ordinate jurisdiction are bound by their own previous decisions.

Stare decisis operates both vertically and horizontally. It only applies in circumstances in which the cases have similar legal issues or material facts e.g. the High court is bound by previous decisions of the Court of Appeal.

- b. A court of Law may refrain from a binding precedent in the following circumstances:
- i) Distinguishing: here the judge in the subsequent case demonstrates that the two cases relate to different points of law hence the earlier decision cannot be relied upon as a precedent.
 - ii) Changes in circumstances: if circumstances have changed so much so that applying the precedent would be ineffectual. This is the case where the precedent has been overtaken by events.
 - iii) Per incuriam: Per incuriam literally means ignorance or forgetfulness of law. Here the court demonstrates that the earlier decision was arrived at in ignorance or forgetfulness of law i.e. it is a wrong decision.
 - iv) Overruled by Statute: A precedent cannot be relied upon if it has been overruled by an Act of Parliament.
 - v) Improper conviction: In Kabui V.R. the High court of Kenya was emphatic that it could refrain from a binding precedent if its application perpetrated an improper or erroneous conviction in a criminal case.
 - vi) Obscure or wide rule: If the ratio decidendi of the previous decision is too wide or obscure, a court may refuse to rely on it.
 - vii) Conflicting decisions: If the decision relied upon as a precedent is one of the many conflicting decisions of a court of co-ordinate jurisdiction.
 - viii) Fundamental Principle of Law: If the ratio decidendi relied upon is inconsistent with a fundamental principle of law.

- (II) The inclusion of different parts in the same question. For example question 3 of May 2008 read:

“In relation to the administration of justice and Law, in Kenya or your country, explain the composition and jurisdiction of the Resident Magistrates Court.”

This question has two distinct parts namely, the composition of the Resident Magistrates Court and its jurisdiction.

Composition:

Under the provisions of the Magistrates Court Act Cap 10 Laws of Kenya the Resident Magistrates Court is duly constituted when held by a Chief Magistrate, Senior Principal Magistrate, Principal Magistrate, Senior Resident Magistrate or a Resident Magistrate duly appointed by the Judicial Service Commission.

Jurisdiction:

- a. Under Section 3 (2) of the Magistrates Court Act the Resident Magistrates Court has jurisdiction throughout Kenya.
- b. It exercises original and limited appellate jurisdiction
- c. It exercises both criminal and civil jurisdiction

d. Its civil jurisdiction is subject to financial or pecuniary restrictions as follows:

Value of subject matter	
Chief Magistrate	500,000
Senior Principle Magistrate	500,000
Principal Magistrate	300,000
Senior Resident Magistrate	300,000
Resident Magistrate	125,000

- It exercises original jurisdiction only in civil cases
- It has unlimited jurisdiction to hear and determine cases based on African customary law
- It exercises both original and appellate jurisdiction in criminal cases
- When held by the Resident Magistrate the maximum sentence is graduated as follows, imprisonment term 7 years, strokes of the cane 24, fine 20,000
- When held by the chief magistrate, Principal, Senior Principal Magistrate to the Resident Magistrate it has jurisdiction to impose any sentence as long as the offence in question is triable by the court.
- The court entertains criminal appeals from the District Magistrate 3rd class

(III) A structured question could also include a problem in its part (b) or (c) such a problem must be dealt with separately on the basis of the technique herein below outlined and illustrated.

C) Problem Questions

These questions are intended to test a candidates ability to apply principles of law. Generally problem questions are based on scenarios the candidate has come across in the course of preparing for the examination. The problem may be extracted from any part of the syllabus. However most problem questions are digestible. For example question 4 (c) of November 2009 read:

Inspector Sniff, offered a reward to anyone who would assist in giving information that could lead to the arrest and subsequent conviction of Rastara, a “most wanted carjacker” in the city. The reward of Kshs 100,000 was advertised in the local dailies. Ole Ndume who did not know of the reward volunteered information to inspector Sniff and Rastara was arrested and convicted. However inspector Sniff did not give Ole Ndume the reward. It is now three months since the arrest and Ole Ndume has learnt of the reward. He seeks your legal advice on whether he can successfully claim the reward.

Advice Ole Ndume.

Answering a problem question demands three things:

- i) The principle of law at issues i.e. what legal rule is being tested?
- ii) What is the factual situation and what does it illustrate and what is our advice?
- iii) What is the legal justification of the advice?

In our question, the problem is based on acceptance of offers. The specific rule of acceptance is that the offeree must have been aware of and intended to accept the offer. This rule is based on the logic that a person cannot accept an offer whose existence he was unaware of. In this case Inspector Sniff made an offer for Kshs 100,000 to any person who gave information leading to the arrest and conviction of Rastara. Ole Ndume gave the information while unaware of the offer and was therefore not accepting the offer. He cannot therefore claim the reward since there is no agreement

between him and the inspector. My advice to Ole Ndume is that he has no claim against inspector Sniff.

My advise is based on the decision in Crown V Clarke whose facts were substantially similar to those in this case. In this case Clarke was aware of the offer but gave the information for a different purpose, he was therefore not accepting the offer and was not entitle to the reward.

Question 6 (b) of November 2009 read:

Jambazi sneaked into Cassman Greens Compound with the intention of breaking into his car and stealing a radio cassette. As he was walking towards the car park, he fell into a pit which Green had dug to construct a reservoir. As a result Jambazi was seriously injured. Jambazi now seeks your legal advise as to whether he can successfully sue Green.

State the legal principle applicable to the above facts and advise Jambazi.

This question has two parts, namely, the legal principle and the advice.

This problem is based on the principle of occupiers liability as exemplified by the provisions of the Occupiers Liability Act Cap 34, Laws of Kenya. Under the provisions of the Act an occupier owes all invitees a common duty of care. Common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor is reasonably safe in using the premises for the purposes for which he is invited or permitted to be there.

- In this case therefore Cassman Green owed a common duty of care to his invitees.
- However, an occupier owes no common duty of care to trespassers
- In this case, Jambazi is a trespasser and had in fact sneaked into Cassman Green's compound to steal hence Cassman Green owed him no common duty of care and is not liable for the injuries Jambazi sustained
- My Advise to Jambazi is that he has no actionable claim against Cassman Green as he owned him no common duty of care. At the very worst Cassman Green owes Jambazi a duty of common humanity which is not actionable. Jambazi has no remedy in law.

Syllabus

PAPER NO.2: LAW

OBJECTIVE

To provide the candidate with a broad understanding of the sources and administration of Laws of Kenya and their application.

2.0 SPECIFIC OBJECTIVES

A candidate who passes this subject should be able to:

- Explain the nature and types
- Understand the sources of law in Kenya
- Appreciate the structure and process of administration of law in Kenya
- Apply legal principles relating to law of contract, persons, property and succession matters.

CONTENT**2.1 Nature and Classification of Law**

- Nature of law
- Classification of law; public and private law, civil and criminal law, substantive and procedural law, written and unwritten law.

2.2 Sources of Law

- The constitution
- Legislation
- Statutes of general application in force in England on the 12 August 1897.
- Substance of common law and doctrines of equity
- African customary law
- Islamic law
- Judicial precedent (Case law)

2.3 Administration of Justice

- Structure, composition and jurisdiction of the Courts of Appeal, High Court and Subordinate courts.
- Tribunals; The Rent Tribunal, Business Premises Tribunal, Industrial Courts
- Judicial Service Commission
- The role of the Attorney-General's office
- Arbitration
- Ethics and the law

2.4 Law of Persons

- Legal personality
- Corporations
- Unincorporated associations
- Partnerships

2.5 The Law of Contract

- The nature of a contract

- Formation of a contract: offer and acceptance; consideration; intention to create legal relations; capacity.
- Classification of contracts
- Formalities
- Terms of contract; exemption clauses, conditions and warranties.
- Unenforceable contracts
- Vitiating factors; mistake, misrepresentation, duress and undue influence
- Illegality
- Privity of contract
- Assignment of contractual rights
- Termination and discharge of a contract
- Remedies for breach of contract
- Limitations of actions

2.6 The Law of Property

- Real and personal property; movable and immovable, intellectual and intangible property, trade marks, copyright and patents
- Co-ownership
- Freehold and leasehold interests
- Creation and termination of leases
- Restrictive covenants
- Easements and profits
- Licences
- Mortgages and Charges
- Choses in action and choses in possession
- Registration of interests in land

2.7 Legal Principles relating to

- Sale of goods
- Agency
- Hire purchase
- Insurance
- Negotiable instruments
- Guarantees and indemnities
- Bailment
- Pledge

2.8 Law of Succession

- Definition of a dependant
- Wills: formalities and revocation
- Rules of intestacy
- Provision for dependents
- Gifts in contemplation of death
- Probate and administration
- Law of Succession Act (Cap. 160) Laws of Kenya

2.9 The Law of Tort

- The nature of tortious liability
- General defences in the law of tort
- Trespass
- Conversion
- Negligence
- Strict liability
- Occupiers liability
- Vicarious liability

- Defamation
- Limitation of actions.

PART II: Revision Questions and Answers

QUESTIONS – PAST PAPERS

LAW

JULY 2008 – PILOT PAPER

3hrs

Answer any FIVE questions.

ALL questions carry equal marks.

QUESTION ONE

- (a) Define Statute law and discuss its advantages. (10 marks)
- (b) Explain each of the following rules of Statutory Interpretation;
- (i) *Noscitur a sociis*; (3 marks)
 - (ii) *Ejusdem generic*; (3 marks)
 - (iii) Mischief rule. (4 marks)
- (Total: 20 marks)**

QUESTION TWO

- (a) Explain the nature and advantages of commercial arbitration as a means of settling disputes. (12 marks)
- (b) State four acts of commission that may constitute professional misconduct under the Accountants Act (Cap 531) Laws of Kenya. (8 marks)
- (Total: 20 marks)**

QUESTION THREE

- (a) Describe the advantages of carrying on business as a partnership as opposed to a limited liability company. (10 marks)
- (b) You have been asked to draft a partnership deed for a small retail firm of five partners. State the matters, if any, that you will omit from the partnership deed on the basis that they are implied by the Partnership Act (Cap 29) Laws of Kenya. (10 marks)
- (Total: 20 marks)**

QUESTION FOUR

- (a) When parties enter into a contract it is virtually impossible for them to include express terms to cover every eventuality. Explain the circumstances under which:
- (i) The courts
 - (ii) The statutes
- Will imply terms into the contract. (10 marks)
- (b) Kamau advertised the sale of his farm. He was approached by Keter who wanted to buy the farm. In the course of negotiating the price. Keter asked Kamau how many sheep could be reared on the farm and Kamau replied, "I have not used the farm for sheep rearing but I think it could support 2000 sheep."

Keter bought the farm and immediately purchased 2000 sheep to rear on it. However, the firm is unable to accommodate the 2000 sheep and Keter is aggrieved and intends to sue Kamau for misrepresentation.

Advise Kamau.

(10 marks)

(Total: 20 marks)

QUESTION FIVE

- (a) Explain the rules that govern the measure of damages in the law of contract. (10 marks)
- (b) Discuss the various equitable remedies which may be available to an injured party who is suing for breach of contract. (10 marks)

(Total: 20 marks)

QUESTION SIX

- (a) Explain the meaning of the rule “*Nemo dat quod non habet*” as stipulated in the Sale of Goods Act. (6 marks)
- (b) Discuss the main exceptions to the rule. (14 marks)

(Total: 20 marks)

QUESTION SEVEN

- (a) In relation to the law governing Negotiable Instruments, explain four types of endorsements that may be made on a Bill of Exchange. (8 marks)
- (b) Akili Mingi owns a house at Muthaiga in Nairobi valued at Sh. 20 million. He insured it against fire with Linda Mali Insurance Co. Ltd and Pokea Insurance Co. Ltd for Sh. 15 million and Sh. 10 million respectively. He also insured his household goods against burglary with Lipa Insurance Co. Ltd. for Sh. 5 million. One night while he was away, burglars broke into the house, stole all household goods and set the house on fire completely destroying it.

Akili Mingi claims the sum assured from the three insurance companies. Advise them.

(12 marks)

(Total: 20 marks)

QUESTION EIGHT

- (a) In relation to the law of property, explain the difference between each of the following;
- (i) Ownership and possession. (6 marks)
- (ii) Fee simple and leasehold. (6 marks)
- (iii) The “Harbinger,” a newspaper of wide circulation recently published an educational article in one part of its columns “the close structural resemblance between man and the gorilla.” It illustrated the point by two photographs. One was a man in a wrestling pose with the caption “Hamisi Nduati not fundamentally different from the gorilla in physique.” Mr. Hamisi Nduati has realized that the photograph was taken in one of his wrestling contests which he won. He alleges that he enjoys international reputation as an outstanding wrestler and he therefore argues that he has been defamed. He comes to you for legal advice.

Advise him.

(8 marks)

(Total: 20 marks)

MAY 2008

Answer any FIVE questions.

3 hours

ALL questions carry equal marks.

QUESTION ONE

- (a) Distinguish the following:
- (i) Law and Morality, (2 marks)
 - (ii) Public and Private Law (2 marks)
 - (iii) Common Law and Equity (2 marks)
 - (iv) Substantive Law and Procedural Law (2 marks)
 - (v) Ratio Decidendi and Obiter Dicta (2 marks)
- (b) Explain the following types of precedent:
- (i) Declaratory Precedent; (2 marks)
 - (ii) Original Precedent; (2 marks)
 - (iii) Distinguishing Precedent. (6 marks)
- (Total: 20 marks)**

QUESTION TWO

- (a) Define the term law in the strict sense of the word. (4 marks)
- (b) Explain eight sources of law in Kenya or your country. (16 marks)
- (Total: 20 marks)**

QUESTION THREE

In relation to the administration of justice and law, in Kenya or your country, explain the composition and jurisdiction of the Resident Magistrate's courts. (20 marks)

QUESTION FOUR

- (a) In relation to the law of persons outline six consequences of incorporation. (12 marks)
- (b) Outline the disabilities of a mentally disordered person in subject to. (8 marks)
- (Total: 20 marks)**

QUESTION FIVE

- (a) It is always necessary to communicate acceptance of an offer to the other party to the contract. Explain whether or not you agree with the above statement. (12 marks)
- (b) Arnold wrote to Ben offering to sell him a consignment of goods. In the letter he advised Ben to telephone his decision to Cecilia, Arnold's wife. Explain whether there is a valid contract between Arnold and Ben in the following situations:
- (i) Ben does not telephone Cecilia but writes to Arnold accepting his offer. (4 marks)
 - (ii) Ben sends a telex to Arnold accepting the offer. (4 marks)
- (Total: 20 marks)**

QUESTION SIX

- (a) Explain five implied conditions and warranties in a hire purchase agreement (10 marks)
- (b) Explain how a hire purchase agreement differs from:
- (i) A credit sale agreement; (6 marks)
 - (ii) A conditional sale agreement. (4 marks)
- (Total: 20 marks)**

QUESTION SEVEN

- (a) Explain the remedies available to an unpaid seller against:
- (i) The goods; (6 marks)
 - (ii) The buyer under the Sale of Goods Act. (4 marks)
- (b) In relation to the Sale of Goods Act, explain the circumstances when:
- (i) A buyer may reject the goods and repudiate the contract (6 marks)
 - (ii) The buyer may lose the right to reject the goods. (4 marks)
- (Total: 20 marks)**

QUESTION EIGHT

- (a) In relation to the law of succession:
- (i) Define a will; (2 marks)
 - (ii) Explain four formalities of a will. (8 marks)
- (b) Outline five classes of persons who may be classified as dependants for purposes of provision under the Succession Act. (10 marks)
- (Total: 20 marks)**

DECEMBER 2008**QUESTION ONE**

- (a) Describe the various branches of civil law. (10 marks)
- (b) Distinguish legal rights from equitable rights and outline the main equitable remedies available to an aggrieved party. (10 marks)
- (Total: 20 marks)**

QUESTION TWO

- (a) The Business Premises Rent Tribunals are established under section 11 of "The Landlord and Tenant (Shops, Hotels and Catering Establishment Act (Cap 301) Laws of Kenya.
- What purpose do these tribunals serve and what are their main and important powers as stipulated under the Act? (12 marks)
- (b) Describe the main function and composition of Judicial Service Commission. (8 marks)
- (Total: 20 marks)**

QUESTION THREE

- (a) Differentiate between a Memorandum of Association and Articles of Association of a registered company and detail the contents of the Articles of Association. (10 marks)
- (b) Explain three characteristics of a private limited company. (6 marks)
- (c) "A corporation may be defined as a legal entity or artificial person." Explain what is meant by this statement. (4 marks)
- (Total: 20 marks)**

QUESTION FOUR

- (a) How true is it to say that in order for a contract to be discharged by performance, the performance must be precise and exact? (10 marks)
- Annan agreed to paint Angela's house at an agreed price. When Annan had finished the work. Angela discovered that although most of the painting was satisfactory, Annan had forgotten to apply a coat of gloss paint on one of the doors. Annan fell ill and could not complete the work. Angela refused to pay Annan the contractual price, claiming that the contract had not been fully executed and that therefore he was entitled to be paid only a reasonable sum for the work he had actually undertaken. This, Annan claimed, was much less than the contract price.
- Advise Annan. (10 marks)
- (Total: 20 marks)**

QUESTION FIVE

- (a) In relation to the Law of Property, state five obligations of a lessor towards a lessee in a lease agreement. (10 marks)
- (b) Mrs. Hamilton borrowed Sh. 5 million from White Bank and offered her house at White Highlands Estate as a security. She has been unable to service the loan and is in arrears. The bank intends to realize the security and seeks your legal advice on what options they can take to realize the security.

Advise White bank.

(10 marks)

(Total: 20 marks)

QUESTION SIX

- (a) “An occupier of premises owes a duty of care towards persons who are lawfully on his premises. The Occupiers Liability Act does not affect the position of trespassers.” In relation to the above statement, what is the extent of potential liability of an occupier and to what extent can such an occupier safeguard such liability. (12 marks)
- (b) Due to Desmond’s carelessness in allowing excessive electric current to develop in his generator, the electricity supply to the locality cut after a few hours.

As a result, Derrick’s factory was at a standstill during this period and he lost Sh. 50,000 by way of profits from lost production.

Advise Derrick in regard to his rights, if any, against Desmond.

(8 marks)

(Total: 20 marks)

QUESTION SEVEN

- (a) In relation to the Law of Succession, what are the duties of a personal representative? (12 marks)
- (b) What liability is imposed on the seller of goods as regards their merchantable quality and their fitness for the purpose of those goods? (8 marks)

(Total: 20 marks)

QUESTION EIGHT

- (a) “A contract of insurance is a contract of *Uberrimae fidei* (utmost good faith)”. Explain this statement. (6 marks)
- (b) Briefly state the various kinds of crossing on a cheque. (4 marks)
- (c) Mr. Karanja signed blank cheques and left them with his wife to draw cash while he was away attending to business affairs. Mrs Karanja instructed Hatari, a clerk in the firm of Karanja and Karanja Associates to fill in the cheques. Hatari filled in the amount leaving a gap after the words “Sh.” and wrote the amount in words from the middle of the line without using a capital letter. Hatari showed the cheques to Mrs Karanja written “Sh. 50,000” and fifty thousand only.” He was authorized to encash the cheque. However before presenting the cheque for payment Hatari added figure “3” to the amount in figures and “three hundred” in the words. He encashed the cheque for Sh. 350,000. He then gave Mrs. Karanja Sh. 50,000 only. These facts have come to light after Hatari’s resignation and Mr. Karanja intends to sue his bankers.

Advise the bank.

(10 marks)

(Total: 20 marks)

MAY 2009

QUESTION ONE

- (a) Explain the difference between codification and consolidation of law and give examples of each. (6 marks)
- (b) Mwangi has stolen some goods from Simiyu. The police prosecute Mwangi for theft and Simiyu sues him for the return of the goods.
- (i) Explain under what law the action by the police will be based. (2 marks)
- (ii) In this action by the police, state what Mwangi will be called. (2 marks)
- (iii) Under what law would the action brought by Simiyu be and what would Simiyu be called? (2 marks)
- (c) Explain the key distinctions between common law and equity. (8 marks)

(Total: 20 marks)**QUESTION TWO**

- (a) Explain five advantages of arbitration as a form of settling disputes. (10 marks)
- (b) Custom is the oldest source of law. Explain the criteria which must be satisfied before a custom can be applicable as law. (10 marks)

(Total: 20 marks)**QUESTION THREE**

- (a) In relation to the law of persons, explain the following:
- (i) Corporation sole: (2 marks)
- (ii) Corporation aggregate. (2 marks)
- (b) Explain three characteristics of a public company. (6 marks)
- (c) Explain the conditions that have to be satisfied by an applicant before an adoption order can be granted by the court. (10 marks)

(Total: 20 marks)**QUESTION FOUR**

- (a) A partnership is basically a matter of agreement between the parties or partners in the business. Section 24 of the Partnership Act sets out rules which apply in the absence of express or implied agreement to the contrary. Outline five of these rules. (10 marks)
- (b) A partner has a right to seek for the dissolution of a partnership. Explain the circumstances under which the court will generally order the dissolution of a partnership. (10 marks)

(Total: 20 marks)**QUESTION FIVE**

- (a) Sauti Cleaners Ltd. offered to clean two garments for the price of one. A notice was displayed in the shop to this effect but with the addition in smaller print of a statement that the customer must agree in return to accept full responsibility if anything should happen to the garments.

A similar statement was printed on the back of the tickets which were handed to customers when they disposed the garments. Nabayi bought two garments for cleaning.

Because of poor eye sight. She was unable to read the small print on the notice and she put the ticket in her pocket without reading.

Some days later when Nabayi went to collect the garments, she saw that one garment had been badly torn. After wearing the other garment, she contracted a skin disease caused by a chemical which the cleaners had used.

Advise Nabayi. (10 marks)

- (b) Many contractual clauses in a contract purport to exclude liability for injury, loss or damage. Explain the general rules which will determine the effectiveness of such clauses. (10 marks)

(Total: 20 marks)

QUESTION SIX

- (a) The law provides for various remedies that are available to a person who has suffered following a breach of contract. Some remedies may be claimed as of right whilst other remedies will depend upon the exercise of discretion by the court.

Discuss this statement. (12 marks)

- (b) Mike is offered and accepts a post of an accountant to start work in three weeks. A week later he receives a letter from his prospective employer stating that his services will not be required.

Advise Mike. (8 marks)

(Total: 20 marks)

QUESTION SEVEN

- (a) Simiyu wishes to buy his son a car as a birthday present. Wheeler-Dealer offers to sell to Simiyu a second-hand car explaining that the brakes need attention and that he would reduce the price to take account of this. Wheeler-Dealer says that he will take no responsibility for this or other defects. Simiyu accepts the offer without examining the car. If he had done so, he would have seen that the tyres were badly worn out. Simiyu drives away the car but because of defects it fails to negotiate a bend in the road. The car loses control, strikes a wall and is damaged beyond repair.

Advise Simiyu of his rights, if any, against Wheeler-Dealer. (10 marks)

- (b) The Sale of Goods Act states that it is the duty of the seller to deliver goods and of the buyer to accept and pay for them in accordance with the terms of the contract of sale.

(i) Explain the meaning and effect of this Act. (4 marks)

(ii) Describe the seller's duties in connection with delivery and indicate what constitutes acceptance by the buyer. (6 marks)

(Total: 20 marks)

QUESTION EIGHT

- (a) In relation to the law governing insurance, explain five basic principles of insurance.

(10 marks)

- (b) Explain five duties of a landlord in a tenancy agreement.

(10 marks)

(Total: 20 marks)

NOVEMBER 2009

QUESTION ONE

- (a) Define the term "statute" and outline three categories of bills that may be presented to parliament to be enacted into law. (5 marks)
- (b) Discuss the limitation of Islamic Law as a source of Law. (4 marks)
- (c) Distinguish between *ratio decidendi* and *obiter dicta*. (4 marks)
- (d) Name the criticism"s that have been leveled against delegate legislation as a source of law. (4 marks)
- (e) State three circumstances under which the president may exercise prerogative of mercy. (3 marks).
- (Total: 20 marks)**

QUESTION TWO

- (a) Under Section 7 of the Hire Purchase Act Cap. 507, Laws of Kenya, certain provisions are deemed void if contained in a hire purchase agreement.

Identify and explain five such provisions. (5 marks)

- (b) Kinyago, a small scale farmer agreed to take a television set and a radio from Malipo Rahisi Ltd., a hire purchase firm last year.

The hire purchase price for both items was Sh. 90,000. He paid a deposit of Sh. 30,000 and the balance was payable by monthly instalments of Sh. 5,000. After paying instalments for six months, he defaulted. Malipo Rahisi ltd. Promptly repossessed the goods.

Discuss the legal position. (10 marks)

- (c) One of the principal duties of an agent is expressed by the maxim "delegates non potest delegare."

State and identify five circumstances under which this rule or maxim does not apply. (5 marks)

(Total: 20 marks)

QUESTION THREE

- (a) Explain the ways in which a Partnership may be dissolved without a court order. (6 marks)
- (b) State how the equitable principle of utmost good faith is manifested in the daily operations of a partnership. (6 marks)
- (c) Beeky and Beth entered into a partnership selling girls" clothing under the registered name of „Girlie." Becky, without consulting Beth set up a boy"s clothing shop under the registered name "BOYZ Clothes" while retainingher partnership with „Girlie". This has given rise to frequent quarrels between Becky and Beth. Beth has now refused Becky admission to the firm"s premises and will not discuss the position with Becky. Beth wishes to dissolve the partnership and would like Becky to account for profits she has derived from „BOYZ Cloths."

Advise Beth. (8 marks)

(Total: 20 marks)

QUESTION FOUR

- (a) Certain types of mistakes in the formation of a contract may affect the validity of a contract. Discuss this statement explaining the mistakes. (6 marks)
- (b) What is meant by the expression “contractual capacity”? Illustrate your answer with use of appropriate examples. (4 marks)
- (c) Inspector Sniff offered a reward to anyone who would assist in giving information that could lead to the arrest and subsequent conviction of Rastara, a “most wanted carjacker” in the city. The reward of Sh. 100,000 was advertised in the local dailies. Ole Ndume who did not know of the reward volunteered information to Inspector Sniff and Rastara was arrested and convicted. However, Inspector Sniff did not give Ole Ndume the reward. It is now three months since the arrest and Ole Ndume has learnt of the reward. He seeks your legal advice on whether he can successfully claim the reward.

Advice Ole Ndume.

(10 marks)

(Total: 20 marks)

QUESTION FIVE

- (a) Describe the various ways in which co-ownership of property may be terminated. (6 marks)
- (b) Explain the main characteristics of easements. (6 marks)
- (c) **Karanja has been a tenant in Wamalwa’s house for the last three months. The parties had executed a lease for a period of one year. However, Wamalwa is aggrieved as Karanja has broken all the doors in the house following several fights with his wife.**

Wamalwa now seeks your advice on the various ways in which he may terminate the lease agreement and lawfully evict Karanja. Advise Wamalwa.

(8 marks)

(Total: 20 marks)

QUESTION SIX

- (a) (i) Explain the legal principal in the Rule in *Rylands Vs. Fletcher*. (4 marks)
- (ii) Explain the defences available to a person sued in an action brought against him under this rule. (6 marks)
- (b) **Jambazi sneaked into Cassman Green’s compound with the intention of breaking into his car and stealing a radio cassette. As he was walking towards the car park, he fell into a pit which Green had dug to construct a water reservoir. As a result Jambazi was seriously injured.**

Jambazi now seeks your legal advice as to whether he can successfully sue Green.

State the legal principles applicable to the above facts and advise Jambazi. (10 marks)

(Total: 20 marks)

QUESTION SEVEN

- (a) Describe the ways in which a valid written will may be revoked. (6 marks)
- (b) Under what circumstances will a gift in contemplation of death “*Donatio Mortis Causa*” take effect? (6 marks)

- (c) Ann made an oral will while admitted at No Hope Medical Centre. She bequeathed all her property to her mother. However, her mother who had gone to see Ann in hospital died in a road accident as she was going back home. Ann has learnt of her mother's death and seeks your advice as to whether she can bequeath the same property to anyone else. Advise Ann.

(8 marks)

(Total: 20 marks)

QUESTION EIGHT

- (a) State and explain the duties of a bailee in a bailment contract. (6 marks)
- (b) What are the circumstances under which a principal may be estopped from revoking an agent's authority? (4 marks)
- (c) Mrs. Mutua employed Emmah as her sales agent. For several years Emmah sold goods to Mrs Cool, the proprietor of Ever Smart Boutique. Subsequently, Mrs. Mutua dismissed Emmah but did not inform Mrs. Cool of Emmah's dismissal.

After her dismissal, Emmah collected Sh. 50,000 from Mrs. Cool on behalf of Mrs. Mutua. Mrs. Mutua has demanded the Sh. 50,000 from Mrs Cool who has refused to pay as she had already paid Emmah. Mrs Mutua intends to sue Mrs Cool.

Advise Mrs. Mutua.

(10 marks)

(Total: 20 marks)

MAY 2010

QUESTION ONE

- (a) In relation to sources of law in your country:
- (i) State and explain four reasons for delegated legislation. (8 marks)
 - (ii) Explain four circumstances under which African customary law will be applicable in the courts. (8 marks)
- (b) Outline two types of classification of law. (4 marks)
- (Total: 20 marks)**

QUESTION TWO

- (a) In relation to the structure of courts in your country:
- (i) Explain the composition and jurisdiction of the Court of Appeal. (6 marks)
 - (ii) What is the composition and powers of the industrial court? (8 marks)
- (b) Name the courts that have jurisdiction to hear the following cases and give reasons for your answer.
- (i) A trial for murder. (2 marks)
 - (ii) A divorce case involving Asha and Mohammed both who confess Islamic faith. (2 marks)
 - (iii) An appeal case by Yusuf who has been convicted by a Chief Magistrate's court for committing a robbery with violence and sentenced to death. (2 marks)
- (Total: 20 marks)**

QUESTION THREE

- (a) In relation to the Sale of Goods Act:
- (i) Explain four rules that govern delivery of goods. (8 marks)
 - (ii) Outline the circumstances under which the unpaid seller may exercise his right of lien. (6 marks)
- (b) Ndolo attended an auction conducted by Fagia Auctioneers Ltd. The auction goods were displayed in three different lots. However, Ndolo bid for the goods under a mistaken belief that he was bidding for all the goods. Eventually, when he went to collect the goods, he found only one lot reserved for him. Ndolo is aggrieved and seeks your legal advice.
- Advise him. (6 marks)
- (Total: 20 marks)**

QUESTION FOUR

- (a) In relation to the Law of Agency, explain five circumstances under which an agent may be held personally liable to third parties. (10 marks)
- (b) Raju appointed Kariuki to transport fresh fish from Mombasa to Nairobi. As Kariuki was preparing to leave Mombasa to Nairobi, it rained heavily and the Thange River Bridge was swept off. As a result, Kariuki chartered a flight to Nairobi to deliver the fish as he feared the fish would go bad and he was unable to immediately contact Raju. However, upon arrival in Nairobi and delivery of fish, Raju refused to reimburse Kariuki charges for the flight. Kariuki intends to sue Raju. Advise him. (10 marks)
- (Total: 20 marks)**

QUESTION FIVE

In relation to the Law of Contract

- (a) Explain five essentials of a valid contract. (10 marks)
- (b) Jackson entered into a contract with Jacinta whereby Jackson was to introduce Jacinta to Tajiri with a view of Tajiri marrying Jacinta. Jackson asked Jacinta to give him Sh. 10,000 which she did. Jackson then introduced Jacinta to Tajiri and Tajiri promised to marry Jacinta in case his wife who was by then very ill in hospital passed away.

However, Tajiri's wife Juliana underwent a successful surgery and fully recovered from the illness. Tajiri has now refused to marry Jacinta.

Jacinta is aggrieved and wishes to sue Jackson and Tajiri. Advise her. (10 marks)

(Total: 20 marks)

QUESTION SIX

- (a) In relation to the Law of Contract, explain six ways in which a contract may be discharged. (12 marks)
- (b) Janet and Mary entered into a contract in which Janet was to sell a car to Mary, for Sh. 250,000. Unknown to the parties, the car which had been parked at John's garage had been burnt down that morning following a fire outbreak at the garage. Mary had paid Janet Sh. 100,000 as deposit. She now intends to sue Janet for breach of contract

Advise Janet.

(8 marks)

(Total: 20 marks)

QUESTION SEVEN

- (a) Explain four types of endorsement that may be made on a bill of exchange. (8 marks)
- (b) Alex is a customer at Pesa Bank. Three days ago, he visited the bank and complained that he had noticed from his bank statement that three unauthorized withdrawals had been made and his account debited. Investigations reveal that the withdrawals were made by Charles, Alex's office messenger who stole Alex's cheque book made out the payments and subsequently forged Alex's signature.

Explain the legal position of Pesa Bank.

(12 marks)

(Total: 20 marks)

QUESTION EIGHT

- (a) Outline four duties of a common carrier. (8 marks)
- (b) Explain the legal principles that govern double insurance of goods. (4 marks)
- (c) In relation to the law of Succession, explain the factors that the court will consider when making provisions for dependants not provided for in a will. (8 marks)

(Total: 20 marks)

NOVEMBER 2010

QUESTION ONE

- (a) Law is described as a body of rules for guidance of human conduct which is imposed upon and enforced among the citizens of the state. Discuss (6 marks)
- (b) Most of the legal systems have their origins in ancient customs of the nation. Customs could therefore be said to be the oldest source of law. However, in order to gain recognition and enforcement by the courts, the particular custom should have certain characteristics. State and explain these characteristics. (6 marks)
- (c) One of the recognized sources of law in a country are the Acts of Parliament. Explain the advantages of Acts of Parliament as a source of law. (8 marks)

(Total: 20 marks)

QUESTION TWO

On the grounds of public policy and in order to preserve and protect the cherished right of freedom of speech, certain statements which may be defamatory are protected by law. The public interest in free speech is allowed to override the private right of interest of a person whose reputation has been injured.

- (a) Define the term “defamation” and indicate the forms which defamation can take. (4 marks)
- (b) Explain in detail the occasions when a statement would enjoy privilege and hence not actionable in court. (12 marks)
- (c) Explain the four essential aspects of the defence of fair comment in an action for defamation. (4 marks)

(Total: 20 marks)

QUESTION THREE

- (a) With reference to a contract of sale of goods, explain the implied conditions on the part of the seller. (6 marks)
- (b) Explain the exceptions to the “*nemo dat*” rule. (6 marks)
- (c) A contract of sale of goods by sample between Ben and Sally provided that payment of the goods was to be made on arrival against the shipping documents.

Ben, who is the buyer, paid for the goods before he had the opportunity to examine the goods. Later, on examinations, Ben found that the bulk of the goods did not correspond with the sample. Explain in detail whether Ben can reject the goods.

(8 marks)

(Total: 20 marks)

QUESTION FOUR

- (a) Define a „pledge” and distinguish a pledge from a mortgage. (3 marks)
- (b) Explain the main characteristics of a pledge. (4 marks)
- (c) Discuss the ways in which a pawn can be redeemed. (8 marks)
- (d) Describe the remedies of a legal mortgage. (5 marks)

(Total: 20 marks)

QUESTION FIVE

A will is a declaration made by a person during his lifetime, of his intention concerning disposal of his property after his death. In relation to wills:

- (a) Explain the characteristics of a valid will. (3 marks)

- (b) Describe the formalities of a valid will. (6 marks)
(c) Explain the ways in which a will can be revoked. (8 marks)
(d) Give details of the duties of a personal representative. (3 marks)
- (Total: 20 marks)**

QUESTION SIX

- (a) Illustrate three ways in which property may be acquired. (3 marks)
(b) Give details of four types of tenancies. (4 marks)
(c) Terry is a tenant of Lucas under a lease agreement signed and executed by both parties. At the time of signing the lease, Lucas had promised Terry that he would repair a window which had broken. A year has lapsed and the window is not yet repaired.

In the meantime, Lucas has been constructing a house next to the house occupied by Terry. He has been using Terry's compound as a storage for timber and other construction materials.

Terry has been under constant disturbances by the builders requiring her to open the gate so that the building materials, could be bought in and taken out. This has made the compound dirty and noisy.

Terry seeks to know the rights which would protect her against these inconveniences under the lease agreement. Advise her. (8 marks)

- (d) Explain ways in which a lease may be determined. (5 marks)
- (Total: 20 marks)**

QUESTION SEVEN

- (a) Citing examples, write brief notes on the following:
(i) Contracts which must be under seal. (4 marks)
(ii) Contracts which must be in writing. (4 marks)
(iii) Contracts which must be evidenced in writing. (4 marks)
- (b) Explain the contents of the memorandum required as evidence of a contract. (8 marks)
- (Total: 20 marks)**

QUESTION EIGHT

The fundamental rights and freedoms of the individual are guaranteed by the constitution but are subject to respect for the rights and freedoms of others and for public interest.

With reference to life, liberty, security of the person and protection of law:

- (a) Explain circumstances when a person shall not be regarded as having been deprived of his life in contravention of the provisions of the Constitution if he dies as a result of the use of force. (4 marks)
(b) Cite instances when a person shall be lawfully deprived of personal liberty. (16 marks)
- (Total: 20 marks)**

MAY 2011

Answer any FIVE questions

QUESTION ONE

- (a) Explain the evolution of the doctrine of equity, indicating its contribution to the legal system of your country. (10 marks)
- (b) Write explanatory notes on the following:
- (i) Supremacy of the constitution. (3 marks)
- (ii) The rule of law. (3 marks)
- (c) Identify the factors that may undermine the rule of law in a country. (4 marks)
- (Total: 20 marks)**

QUESTION TWO

- (a) Highlight the establishment and jurisdiction of the following:
- (i) The Land tribunals. (4 marks)
- (ii) **The Kadhi's court.** (4 marks)
- (iii) The Court martial. (4 marks)
- (b) Explain the powers of the Business Premises Rent Tribunal as provided under the Landlord and Tenant Act of the laws of your country. (8 marks)
- (Total: 20 marks)**

QUESTION THREE

- (a) Citing relevant case law, discuss the doctrine of equitable estoppel, outlining the circumstances under which it arises. (12 marks)
- (b) Muthoga entered into a five year lease agreement for office premises with Njenga. After the end of the lease period, the parties agreed that Njenga would continue occupying the office premises for another five years. On that basis, Njenga made extensive renovations to the office premises.

Muthoga has now given Njenga notice to vacate the office premises claiming that the lease agreement had expired.

Advise Njenga on his legal rights.

(8 marks)

(Total: 20 marks)**QUESTION FOUR**

- (a) In relation to the law of tort, explain what is meant by the following:
- (i) Private nuisance. (3 marks)
- (ii) Public nuisance. (3 marks)
- (iii) Giving examples, outline the circumstances when a private individual may sue on his own behalf for public nuisance. (4 marks)
- (b) Namweya and Nabayi are both tenants and neighbours at a residential estate. Namweya runs a posho mill business on the premises adjoining the house of her neighbour Nabayi. The posho mill is diesel propelled and when in use causes a lot of vibrations.

Recently, as a result of the vibrations from the posho mill, a beam fell from the roof of the adjoining house occupied by Nabayi and injured her. Nabayi claims that the vibrations of the posho mill have been a nuisance and has as a result sued Namweya for damages.

Explain the legal principles applicable in this case and advise both Namweya and Nabayi.

(10 marks)

(Total: 20 marks)

QUESTION FIVE

- (a) In a contract of sale of goods:
- (i) Explain four categories of unascertained goods. (8 marks)
 - (ii) Explain the duties of the buyer towards the seller. (4 marks)
- (b) Mwisho bought goods from Mwezi and paid for the goods by cheque. When Mwezi presented the cheque to the bank for payment, it was dishonoured.

Advise Mwezi on his legal rights with regard to the goods.

(8 marks)

(Total: 20 marks)

QUESTION SIX

- (a) (i) What is ratification as used in the law of agency? (2 marks)
- (ii) In the law of agency, describe the legal requirements for a valid ratification. (8 marks)

- (b) Harry and Thuku agreed to meet for a business lunch at a restaurant in town. During the lunch, Chuma one of Thuku's friends joined the two and began to participate in the discussions. Chuma told Harry that he was Thuku's agent to which Thuku did not object.

A week later, Chuma obtained goods on credit from Harry, allegedly on behalf of Thuku.

Chuma has since disappeared and Harry is demanding payment from Thuku.

Advise Thuku.

(10 marks)

(Total: 20 marks)

QUESTION SEVEN

- (a) Outline the ways in which a bill of exchange may be discharged. (6 marks)
- (b) Outline the characteristics of a promissory note. (6 marks)
- (c) Explain the various forms of a qualified acceptance of a bill of exchange. (8 marks)

(Total: 20 marks)

QUESTION EIGHT

- (a) Distinguish between the following legal persons:
- (i) Incorporated and unincorporated associations (6 marks)
 - (ii) Partnership and a limited company (6 marks)
- (b) Citing decided cases, explain the doctrine of "*Ultra vires*." (8 marks)

(Total: 20 marks)

NOVEMBER 2011

QUESTION ONE

- (a) A statute may have a provision whose meaning is not clear. It is then the duty of the court to interpret it. In relation to the above statement, detail the rules that govern such statutory interpretation. (8 marks)
- (b) Distinguish a criminal wrong from a civil wrong. (6 marks)
- (c) (i) Explain the meaning of judicial precedent. (2 marks)
- (ii) State two forms of judicial precedents. (4 marks)

(Total: 20 marks)

QUESTION TWO

- (a) Describe the composition and jurisdiction of the High Court of Kenya or your country. (8 marks)
- (b) Explain the establishment and jurisdiction of the Rent Tribunal. (6 marks)
- (c) Describe the role of the office of the Attorney General in the prosecution of criminal offences. (6 marks)

(Total: 20 marks)

QUESTION THREE

- (a) In numbered paragraphs, distinguish between the following:
- (i) Statutory corporations and limited companies. (6 marks)
- (ii) A memorandum of association and articles of association. (8 marks)
- (b) Define the term prospectus and explain the contents of a prospectus. (6 marks)

(Total: 20 marks)

QUESTION FOUR

- (a) Giving illustrations, explain the postal rules that govern offer and acceptance where contracts are communicated and concluded through post. (8 marks)
- (b) Saida planned to stage a big band concert and engaged a number of eminent musicians. She paid each musician 10% of the agreed fee at the time the separate contracts were made. Five days before the concert, Saida was informed that three of the musicians Yvonne, Omar and Mike would not appear. Yvonne could not come as she was bed ridden with acute bronchitis. Omar was unable to attend the concert as his country was engaged in war and Mike could not show up because his fees was not large enough. Saida was concerned and feared that the concert would be a failure. Saida therefore decided to cancel the concert. Saida seeks your advice on her legal rights against the three musicians.

Advise Saida.

(12 marks)

(Total: 20 marks)

QUESTION FIVE

- (a) State and briefly explain the characteristics of joint tenancy. (6 marks)
- (b) (i) Explain the term "freehold interest in land." (4 marks)
- (ii) Stanley leased his house at Highlands Gardens to Oliver. The lease agreement was signed by both parties and the lease was to run for a period of two years. Stanley has been having domestic problems with his wife. Recently, Stanley's wife stormed into the premises lease to Oliver and threatened to evict him and

his family if they did not vacate the leased premises. Oliver has not breached any of the terms of the lease agreement and is aggrieved.

Advise Oliver on his legal rights and the remedies available to him. (10 marks)
(Total: 20 marks)

QUESTION SIX

- (a) State and explain four types of legacies. (8 marks)
- (b) Paul wrote a will and bequeathed all his property to his wife Nina. Two years later, Paul was diagnosed as suffering from a terminal disease. He blamed it on his wife Nina and then called his friends Mark and Matthew and verbally told them in case he died before Nina, she should not inherit his property, instead all his property should be inherited by his mother Tina. Paul died three weeks ago and Nina has sought to inherit his property under the will, but Paul's mother has vehemently resisted Nina's claim.

Discuss the legal position of Nina and Tina. (12 marks)
(Total: 20 marks)

QUESTION SEVEN

- (a) Distinguish between the seller's right of lien and the right of stoppage in transitu. (8 marks)
- (b) Explain the legal consequences of non-registration of a hire-purchase agreement. (4 marks)
- (c) Stephane issued a cheque in favour of Thorne. However, when Thorne presented it for payment it was dishonoured and returned marked "R.D.". It now transpires that when the bank clerk was checking on Stephane's balance he checked on the wrong account and as a result the cheque was dishonoured under a mistaken belief of lack of funds.

Explain Stephane's rights against the bank. (8 marks)
(Total: 20 marks)

QUESTION EIGHT

- (a) Explain the rights of an undisclosed principal in an agency relationship. (6 marks)
- (b) Describe the rules that govern limitation of actions in tort. (4 marks)
- (c) Mutuku employed Mwanzia as a petrol tanker driver. While petrol was being off-loaded from the tanker, Mutuku who was standing nearby lit a cigarette. Unfortunately the petrol caught fire and burnt the whole station and injured several people.

Mpole the proprietor of the petrol station seeks your advice on whom he can sue.

Advise Mpole. (10 marks)
(Total: 20 marks)

MAY 2012

Answer any FIVE questions.

QUESTION ONE

- (a) Explain the difference between:
- (i) Public and private law. (4 marks)
 - (ii) Procedural and substantive law. (4 marks)
- (b) The constitution provides that when a bill has been passed by the National Assembly it shall be presented to the President for assent.

Explain the stages that a bill shall go through before it comes into operation as an Act of Parliament. (12 marks)

(Total: 20 marks)**QUESTION TWO**

A contract is an agreement which is enforceable by the law.

- (a) What are the prerequisites of a valid contract? (6 marks)
- (b) Explain the validity of the following contracts entered into by Rita, aged 16 years:
- (i) A contract of apprenticeship as a hairdresser with Esther. (3 marks)
 - (ii) A contract of purchase share in Medium Mayenne Company Ltd. (4 marks)
 - (iii) A contract with Mrs. Bwisa Nyutu, a taxi driver to visit her mother in hospital. (4 marks)
 - (iv) A guarantee by Mrs. Kimani and Miss Tomno for an overdraft with a bank. (3 marks)

(Total: 20 marks)**QUESTION THREE**

- (a) Explain four defences which may be offered by a defendant to an action for trespass to the person. (8 marks)
- (b) Mrs. Karanja and Mrs. Waithaka are neighbours. Their sons, Mwaura Karanja and Mwangi Waithaka, had a fight and Mwangi was hurt.

In annoyance, Mrs. Waithaka hurled a stone at Mrs. Karanja but the stone did not hit Mrs. Karanja. Mrs. Waithaka rushed to her house and came out with a bucket of water which she splashed on Mrs. Karanja making her clothes wet. Mrs. Karanja intends to sue Mrs. Waithaka.

Advise Mrs. Karanja on the kinds of tort that she may seek redress from. (12 marks)

(Total: 20 marks)**QUESTION FOUR**

- (a) In relation to the Sale of Goods Act, Explain four circumstances when a seller may give a better title to the buyer than he himself has in the goods. (14 marks)
- (b) Kate delivered her clothes to Mary for repair and paid for the work in advance. It was agreed that Mary would deliver the clothes to Kate's house upon repair. However, Mary did not take the clothes back as agreed and in the process they were stolen when a burglar broke into Mary's premises. With reference to the above facts, highlight Mary's liability, if any. (6 marks)

(Total: 20 marks)

QUESTION FIVE

- (a) In relation to the Law of Property, distinguish between real property and personal property. (4 marks)
- (b) A lease agreement usually contains implied terms on the part of the lessor and lessee. State the terms implied on the part of the lessee. (4 marks)
- (c) Abdalla, the proprietor of Hesabu House, place a warning sign outside the entrance of the building that the floors of the premises were slippery. Makanyanga who was in a hurry to attend tuition classes did not see the notice. As Makanyanga was rushing to class, he slipped, fell and fractured his hand. He now seeks compensation from Abdalla.

Discuss the legal position of both parties. (12 marks)

(Total: 20 marks)

QUESTION SIX

- (a) (i) Define an easement. (2 marks)
- (ii) State and explain the characteristics of easements. (4 marks)
- (b) Wambura, a rich but illiterate freehold owner of property has leased his property for a number of years to Wanyonyi. Wambura wishes to repossess the property for his own use and seeks to know the various ways in which leases may be terminated.

Advise him. (8 marks)

- (c) Summarise the implied covenants by a landlord in a lease agreement. (6 marks)

(Total: 20 marks)

QUESTION SEVEN

With reference to the Law of Succession, write brief notes on the following:

- (a) Will (2 marks)
- (b) Probate (3 marks)
- (c) Codicil (3 marks)
- (d) Demonstrative legacy (3 marks)
- (e) General legacy (3 marks)
- (f) Pecuniary legacy. (3 marks)
- (g) Special legacy. (3 marks)

(Total: 20 marks)

QUESTION EIGHT

- (a) The President may, under section 27 of the Constitution, exercise the prerogative of mercy. Explain the circumstances under which the President may exercise the prerogative of mercy. (5 marks)
- (b) Citing relevant examples, give the instances as stipulated under section 71(2) of the constitution, where a person may be lawfully deprived of life. (5 marks)
- (c) Section 72 of the Constitution states that no person shall be deprived of his personal liberty. Explain the circumstances when a person may legally be deprived of his personal liberty. (10 marks)

(Total: 20 marks)

NOVEMBER 2012

Answer any FIVE questions.

QUESTION ONE

With reference to the nature and classification of law, differentiate between the following:

- (a) Constitutional and administrative law. (4 marks)
- (b) Codification and consolidation. (4 marks)
- (c) Civil burden of proof and criminal burden of proof. (4 marks)
- (d) Statute law and judicial precedent. (4 marks)
- (e) Law of succession and law of trust. (4 marks)

(Total: 20 marks)

QUESTION TWO

- (a) Explain the principle in the rule in *Dunlop Pneumatic Tyre Co. Vs. Selfridge & Co. Ltd. (1915)* and the exceptions thereof. (12 marks)
- (b) Mr. Jumbe who was vying for the national chairmanship of a political party, engaged Mr. Musika, a local musician to perform in a series of campaign meetings the political rallies were scheduled to be held at the Wazalendo Stadium. Mr. Jumbe paid Mr. Musika fifty thousand shillings as part payment for the performance fee.

Explain the legal position, if before the first rally can be held:

- (i) The dais and seats at Wazalendo Stadium are burnt down and the rallies have to be cancelled. (4 marks)
- (ii) Mr. Musika is found guilty of being in possession of narcotics and selling it to minors. He is arrested and sentenced to a one year jail term. (4 marks)

(Total: 20 marks)

QUESTION THREE

In relation to law of property:

- (a) Distinguish between ownership and possession. (4 marks)
- (b) Explain the ways in which ownership can be acquired. (6 marks)
- (c) Discuss the ways in which a person can lose ownership (6 marks)
- (d) Distinguish choses in action from choses in possession giving examples of each. (4 marks)

(Total: 20 marks)

QUESTION FOUR

- (a) Define the term “domicile” and citing examples, explain three types of domicile. (10 marks)
- (b) Outline the categories of persons eligible to be naturalized as citizens of your country. (5 marks)
- (c) Under what circumstances may a person who is a citizen under naturalization or registration is deprived of citizenship? (5 marks)

(Total: 20 marks)

QUESTION FIVE

- (a) In relation of the law of succession, explain the following:
 - (i) Doctrine of survivorship. (2 marks)

- (ii) Administrator cum testamento annexo (2 marks)
- (iii) Administrator pendente lite (2 marks)
- (b) Section 31 of the law of succession Act provides that a gift made in contemplation of death shall be valid despite there being no transfer. Explain the conditions which have to be fulfilled before such gifts can be valid. (10 marks)
- (c) Define the mutual will and list the requirements which must be met to make its doctrine operate. (4 marks)
- (Total: 20 marks)**

QUESTION SIX

- (a) With reference to the Occupiers Liability Act
- a. Define an occupier. (2 marks)
- b. Explain its main provisions in relation to liability of a person visiting a premises. (8 marks)
- (b) Advise an occupier whose employee, a window cleaner was injured when a window pane was shattered (4 marks)
- (c) Outline the general defences available to the occupier against liability to a trespasser. (6 marks)
- (Total: 20 marks)**

QUESTION SEVEN

- (a) Distinguish a special agent from a general agent. (4 marks)
- (b) Ratification where the principal adopts an unauthorized act of his agent as his own. What are the conditions which must be fulfilled for ratification to be effective? (8 marks)
- (c) What are the duties of a principal towards the agent? (8 marks)
- (Total: 20 marks)**

QUESTION EIGHT

- (a) Define the term source of law and outline the main sources of law. (6 marks)
- (b) What are the advantages and disadvantages of judicial precedent? (8 marks)
- (c) Explain the requirements which local customs should fulfill in order to gain registration and enforcements by the courts. (6 marks)
- (Total: 20 marks)**

KENYA ACCOUNTANTS AND SECRETARIES NATIONAL EXAMINATIONS BOARD

CPA PART 1

LAW

FRIDAY: 27 May 2013

Time Allowed: 3 hours.

Answer any FIVE questions.

All questions carry equal marks.

QUESTION ONE

- (a) Define the term “delegated legislation” and discuss its advantages and disadvantages. (10 marks)
- (b) Summarise the advantages of arbitration as a form of settling disputes. (6 marks)
- (c) State the composition of the Judicial Service Commission (4 marks)
- (Total: 20 marks)**

QUESTION TWO

- (a) Describe the ways in which a corporation may be established. (4 marks)
- (b) State and explain the contents of the memorandum of association. (4 marks)
- (c) Explain the advantages of a private company over a public company. (6 marks)
- (d) Highlight the circumstances under which a partnership would be dissolved on the application of a partner. (6 marks)
- (Total: 20 marks)**

QUESTION THREE

- (a) Highlight the essentials of a contract for the sale of goods. (4 marks)
- (b) Explain the rules that govern delivery of goods as stipulated in the Sale of Goods Act. (8 marks)
- (c) Describe the remedies available to the buyer for breach of a contract for the sale of goods. (8 marks)
- (Total: 20 marks)**

QUESTION FOUR

- (a) What is the difference between a condition and a warranty? (2 marks)
- (b) Explain the meaning of the term “privity of contract” and outline the exceptions to that rule. (5 marks)
- (c) For a contract to be discharged by performance, that performance must be precise and exact.
- Discuss this statement. (5 marks)

- (d) S. a former student at Masaku High School owes the school Sh. 50,000 as fees in arrears. Mr. P. the principal of the school wrote a demand letter to F. S's father threatening to sue S if the school fees in arrears was not cleared within seven days. F approached P and offered to make payment by delivering 30 bags of maize valued at Sh. 30,000. On condition that it would be full and final payment of the debt owed to the school.

Mr. P accepted the offer and the maize was delivered to the school. Two years later, S was employed and Mr. P now intends to sue him for the fee balance.

Discuss the legal position of S.

(8 marks)

(Total: 20 marks)

QUESTION FIVE

- (a) Explain the meaning of the term "Co-ownership" and state the ways in which co-ownership may be terminated. (6 marks)

- (b) Inventive Mind Co. Ltd. has developed a new drug to be used in the treatment of common cold. The directors wish to register the trademark for their new product.

Outline the items which must be contained in the application form for registration in order for the trademark to be registered. (4 marks)

- (c) Roy Simiyu, a successful businessman would like to obtain some funds for expansion of his business premises through a mortgage facility.

Roy Simiyu would like to know what options would be available to the bank with regard to the proposed security in the event of his business failing and his being unable to repay the loan.

Describe the options available to the bank.

(10 marks)

(Total: 20 marks)

QUESTION SIX

- (a) Explain the meaning of a dependant as provided in the Law of Succession Act. (4 marks)

- (b) What is a will and how may a testator revoke a written will? (4 marks)

- (c) Explain the duties of a personal representative. (6 marks)

- (d) Highlight the reasons that may cause a legacy to fail. (6 marks)

(Total: 20 marks)

QUESTION SEVEN

- (a) State the rule in Rylands -vs- Fletcher and explain the exceptions to that rule. (6 marks)

- (b) Explain the essential elements of negligence. (6 marks)

- (c) Hassan Payuka is the proprietor of Parrot Daily Newspaper which published an article two weeks ago to the effect that Mrs. Rose Brown the managing director of Child

Welfare Organisation had embezzled, Sh. 5 million from the organization to purchase a private residential house for herself and family. Investigations have revealed that Mrs. Rose Brown bought the house out of a loan of Sh. 6 million advanced to her by East Bank and secured on the house. Mrs. Rose Brown is aggrieved and seeks your legal advice.

Advise her.

(8 marks)

(Total: 20 marks)

QUESTION EIGHT

- (a) Explain the circumstances under which an agent may be held personally liable for contracts made on behalf of his principal. (10 marks)
- (b) Abraham instructed Sarah, an auctioneer to sell his house by auction. The sale was subject to a reserve price of Sh. 1 million. Sarah advertised the house stating that it was subject to a reserve price. However, she sold the house to her Sister Mary at Sh. 900,000. Abraham has refused to accept the proceeds and to transfer the house to Mary. Mary has demanded the transfer of the house by Abraham to her.

Explain the legal position of Abraham, Sarah and Mary.

(10 marks)

(Total: 20 marks)

KENYA ACCOUNTANTS AND SECRETARIES NATIONAL EXAMINATIONS BOARD

CPA PART 1

LAW

December 2013

Time allowed: 3 hours

Answer any FIVE questions

ALL questions carry equal marks.

QUESTION ONE

- (a) Name and briefly explain five categories of civil law. (5 marks)
- (b) Describe the limitations of common law which led to the development of the doctrines of equity. (5 marks)
- (c) Distinguish between a consolidating statute and a codifying statute. (4 marks)
- (d) Under the doctrine of judicial precedent, judges are said to make law. Explain the issues contained in a judgement. (6 marks)

(Total: 20 marks)

QUESTION TWO

- (a) Describe the composition and jurisdiction of the Court of Appeal in your country. (6 marks)
- (b) Identify the various orders or writs which the High Court may issue when exercising its supervisory jurisdiction. (4 marks)
- (c) Describe the principles and presumptions that the courts use in the interpretation of statutes. (10 marks)

(Total: 20 marks)

QUESTION THREE

- (a) Distinguish between a company limited by shares and a company limited by guarantee. (3 marks)
- (b) Explain the advantages of a partnership as opposed to a limited liability company. (6 marks)
- (c) Explain the duties and rights of a limited partner. (6 marks)
- (d) State five circumstances that may lead to the dissolution of a partnership. (5 marks)

(Total: 20 marks)

QUESTION FOUR

Mr. A, a car dealer sells second hand cars. On Thursday last week, he placed an advertisement in a daily newspaper which stated the following:

“Once in a lifetime, opportunity to own a one year old Nissan Caravan, low mileage, Kshs.500,000 cash. The offer is valid for only one day and the car will go to the first person who **accepts it.**”

When Mr. B saw the advertisement, he immediately posted a letter of acceptance of Mr. A’s offer.

Mrs. C also saw the advertisement and came to inspect the car after which Mrs. C offered Mr. A a cheque of Kshs. 500,000. However, Mr. A refused to accept the cheque stating that another potential buyer had already offered to buy the car.

Later in the day Ms D, another interested buyer telephoned Mr. A informing him that she was willing to buy the car but asked Mr. A if he would keep the offer open until she could go to her bank to obtain a loan. Mr. A accepted the request. However later, in the day, Mr. E, another potential buyer said that he would pay Sh. 600,000 in cash for the car. Mr. A agreed to sell the car to Mr. E.

On Monday morning, Mr. A received Mr. B's letter of acceptance. At the same time, Mr. E returned to complete the transaction. However, in the afternoon Mr. E telephoned Mr. A to say that he had second thoughts and he no longer wished to purchase the car.

Citing relevant decided cases where applicable, explain the legal principles in the case in relation to:

- (a) Mr. A (4 marks)
- (b) Mr. B (4 marks)
- (c) Mrs. C (4 marks)
- (d) Ms. D (4 marks)
- (e) Mr. E (4 marks)

(Total: 20 marks)

QUESTION FIVE

- (a) Explain the duties of an agent to his principal. (6 marks)
- (b) Outline the conditions implied in a contract of sale of goods. (6 marks)
- (c) Explain the rights and duties of the owner of goods in a hire-purchase agreement (8 marks)

(Total: 20 marks)

QUESTION SIX

- (a) Define the term "dependant" (2 marks)
- (b) State the formalities of a valid written will. (4 marks)
- (c) State the order of priority in which a deceased's property is distributed where he dies intestate leaving no spouse or children. (4 marks)
- (d) Highlight the circumstances under which a grant of representation may be revoked as provided for under the Law of Succession Act (Cap. 160) Laws of Kenya. (10 marks)

(Total: 20 marks)

QUESTION SEVEN

- (a) Explain the principle of "Res Ipsa Loquitur" (The thing speaks for itself). (6 marks)
- (b) In relation to the law of tort, explain the following rules:
 - (i) Reasonable foreseeability. (4 marks)
 - (ii) Egg shell skull (4 marks)
- (c) Peter Ole Yang, while driving his car down Valley View road suddenly realized the brakes of the car had failed. Unable to stop the car he crashed into a motor vehicle driven by James Kagio, damaging James Kagio's motor vehicle and injuring him.

Advise Peter Ole Yang as to his civil liability.

(6 marks)

(Total: 20 marks)

QUESTION EIGHT

(a) In relation to the law of property:

(i) Enumerate the characteristics of a joint tenancy. (4 marks)

(ii) State the various ways in which a lease agreement may be determined. (6 marks)

(b) Distinguish between the following:

(i) Real property and personal property. (6 marks)

(ii) Legal interests and equitable interests. (4 marks)

(Total: 20 marks)

KENYA ACCOUNTANTS AND SECRETARIES NATIONAL EXAMINATIONS BOARD

CPA PART 1

LAW I

FRIDAY: 26 May 2014.

Time Allowed: 3 hours.

Answer any FIVE questions.

ALL questions carry equal marks.

QUESTION ONE

- (a) Explain the meaning of the term “statute” and highlight the advantages of statute law. (6 marks)
- (b) Outline the extent to which common law differ from equity. (6 marks)
- (c) The constitution provides that when a bill has been passed by parliament, it shall be presented to the president for assent. However, there are instances when the president declines to assent a bill.

State the procedure the bill shall go through after it has failed to receive Presidential assent.

(8 marks)

(Total: 20 marks)

QUESTION TWO

- (a) Settling disputes through the courts can be slow and expensive.

State and explain five other forms of dispute resolution other than the courts of law.

(10 marks)

- (b) Explain the contribution of the courts of law to justice and social order in a country.

(10 marks)

(Total: 20 marks)

QUESTION THREE

- (a) With reference to the law of persons:
- (i) Distinguish between domicile of origin and domicile of choice. (6 marks)
- (ii) Specify the conditions that an alien must satisfy before being granted citizenship in your country. (6 marks)
- (b) Tamu Limau is a senior partner in a real estate business. He would like to know whether to continue the business as a partnership or convert it into a private limited company.

Advise him on the advantages of a private limited company.

(8 marks)

(Total: 20 marks)

QUESTION FOUR

- (a) When parties enter into a contract, the law provides that where a written contract does not accurately express the intention of the parties, the court may rectify the contract to make it express the true intentions.

State the facts that a party seeking rectification must prove before the court can rectify the contract. (4 marks)

- (b) Explain the concept of illegality of contracts and give three types of contracts that are considered illegal. (8 marks)
- (c) Simiyu Tito requested Wanyonyi Peter to lend him Shs. 5,000 (five thousand shillings) to be repaid within a month. Wanyonyi Peter enquired what Simiyu Tito needed the money for and Simiyu Tito replied that he needed Shs. 2,000 (two thousand shillings) to buy food for his children and Shs. 3,000 (three thousand shillings) to bribe someone who could fix for him a person who had been bothering him. Wanyonyi Peter lent Simiyu Tito the money. A month later, when Wanyonyi Peter asked Simiyu Tito for repayment of the Shs. 5,000 (five thousand shillings), Simiyu Tito refused to do so.

Explain the legal principles applicable in this case and advise Wanyonyi Peter. (8 marks)
(Total: 20 marks)

QUESTION FIVE

- (a) Distinguish a freehold from a leasehold ownership of land. (6 marks)
- (b) List four circumstances under which a leasehold may be terminated. (4 marks)
- (c) Identify the various ways in which an easement may be created. (4 marks)
- (d) Charlie Kabue leased his shop at High Pole Commercial centre to Ray Matata for a period of two years. In the lease agreement, Ray Matata was prohibited from using the shop for any other business other than for sale of groceries. Charlie Kabue has discovered that Ray Matata has rented out the room used as a store of the shop to Ben Chege. Moreover, Ray Matata is in rent arrears. Mr. Charlie Kabue is aggrieved and seeks your advice on the remedies available to him.

Advise him. (6 marks)
(Total: 20 marks)

QUESTION SIX

- (a) In relation to the law which governs negotiable instruments, list and briefly explain four types of endorsements. (6 marks)
- (b) Explain the meaning of the term “holder” in relation to a bill of exchange and outline the duties of a holder of a bill of exchange.
- (c) Abel Rigo received a bill of exchange for value from Boaz Ngao who had obtained the instrument fraudulently. Abel Rigo fearing that the bill might lapse, presented it for payment whereupon it was dishonoured.

State with reasons whether Abel Rigo can claim to be a holder in due course. (4 marks)
(Total: 20 marks)

QUESTION SEVEN

- (a) State and explain the circumstances under which the court may make a limited grant of administration as provided under the law of succession. (10 marks)
- (b) Explain the conditions to be fulfilled before a gift in contemplation of death can take effect. (6 marks)
- (c) State the powers of a personal representative. (4 marks)
- (Total: 20 marks)**

QUESTION EIGHT

- (a) Indicate the ways in which the tort of conversion may be committed. (5 marks)
- (b) Explain the legal principles applicable in each of the cases listed below:
- (i) B entered into C's land to recover a time rabbit which belonged to B's children. (5 marks)
- (ii) H pasted a poster on D's wall advertising a disco-dance competition meant for raising funds for a local charity.
- (iii) F cut down the branches of a mango tree belonging to G, his neighbour, which had extended to his land. He picked the ripe mangoes from the fallen branches and gave all of them to children in his vicinity. (5 marks)
- (Total: 20 marks)**

ANSWERS – PAST PAPERS

SUGGESTED SOLUTIONS

LAW

JULY 2008, PILOT PAPER

QUESTION ONE

(a) **Statute law;**

This law made by parliament directly in exercise of legislative power conferred upon it by the constitution. For example Judicature Act, Kadhis Court Act, Companies Act. Statute law is recognized as a source of Law in Kenya by Sec. 3 (I) (c) of the Judicature Act.

Advantages of statute law

- **Democratic in nature:** parliamentary law making is the most democratic approach to legislation. This is because parliament is composed of elected representative of the people hence statute law is a manifestation of the wishes of the people.
- **Uniformity:** Statute law applies indiscriminately, it regulates the conduct of all persons irrespective of their racial, religious and political background.
- **Dynamic:** statute law enables the society to keep pace with changes in other fields for example economic, social or political by enacting statutes, parliament provides the necessary regulatory framework.
- **Resolution of legal problems:** statute law enables society through parliament to resolve legal problems as and when they arise by enacting new statutes or amending those in existence. Parliament does this when the legal problem manifests itself.
- **General application:** statute law consists of general principles applicable at different times and circumstances.
- **Publicity:** it is widely published in that it attracts media attention and must be published in the Kenya Gazette, as a Bill and as law.
- **Supreme Source of Law:**

(b)

- **Noscitur a sociis**

This rule is to the effect that words of doubtful meaning derive the colour and precision from the words phrases with which they are associated.

- **Ejus dem generic**

This rule is applied to interpret things of the same kind, genus and species. The rule was explained in R. V. Edmundson as follows, where general words follow particular words in the statute, the general words must be interpreted as being limited to the class or person or things designated by the particular words. This rule is only applicable where the particular words form a class or persons or things. The rule was applied in Evans V. Cross to interpret the provisions of the Road Traffic Act, 1930.

- **Mischief rule (Rule in Heydons Case (1584))**

This is the oldest rule of statutory interpretation. Under this rule, the court examines the statute to ascertain the mischief it was intended to remedy and then interprets the statute so as to advance the remedy.

The rule was explained by Lord Coke in Heydons case (1584). According to the judge, four things must be discerned and considered.

- What was the common law before the making of the Act?
- What was the mischief and defect for which the common law did not provide?
- What remedy has parliament resolved and appointed to cure the disease?
- What is the true reason for the remedy?

The office of the judge shall then give such interpretation as shall suppress the mischief and advance the remedy.

The rule was applied in Smith V. Hughes to interpret the provisions of the street. It was a criminal offence for a prostitute to solicit “in a street or public place.” The accused had tapped on a balcon rail and “hissed” at men as they passed by below.

Question was whether she had solicited. It was held that since the purpose of the statute was to prohibit solicitation, it was immaterial from where the act took place. The accused was found guilty.

QUESTION TWO

(a) Arbitration

This is a dispute resolution mechanism whereby disputes are settled of court by arbitral tribunals which make arbitral awards as opposed to judgement.

This mechanism is only applicable in the settlement of civil disputes.

The law relating to Arbitration in Kenya is contained in the Arbitration Act, 1995.

This Act repealed the Arbitration Act Cap 49.

This Act applies to both domestic and international arbitration. Under sec 3 (1) of the Act, an arbitration agreement is an agreement by parties to submit to arbitration on all or certain disputes arising between them. An arbitral tribunal means a sole arbitrator or a KASNEB PANEL thereof. An arbitration agreement may take the form of a clause in the contract or a separate agreement between the parties.

A dispute may be referred to arbitration by:

- The parties to the dispute.
- A court of law, if the parties to the dispute agree
- Statute
- Arbitration falls under the purview of alternative dispute resolution mechanisms.

Advantages of arbitration

- **Speed:** it is faster method of dispute resolution.
- **Convenience:** parties are free to determine the venue of the proceedings, timing and the language to use for their convenience.

- **Informality:** arbitral proceedings are free from legal technicalities which characterize ordinary courts.
 - **Cheap:** it costs less to see a dispute through arbitration.
 - **Expertise:** parties to the dispute have an opportunity to appoint the most qualified/specialized person to determine their dispute.
 - **Privacy:** arbitral proceedings are conducted in private free from undue publicity.
 - **Flexibility:** arbitral tribunals are not bound by their previous decisions, there is room for exploration.
 - **Less acrimonious:** arbitral proceedings tune down the enmity between the parties.
- (c) Under Section 28 of the Accountants Act, a member of the institute is guilty of professional misconduct if:
- He allows any person to practice in his name as an accountant unless such person is an holder of practicing certificate or is in partnership with or is employed by him.
 - He enters for the purpose of or in the course of practicing as an accountant into partnership with a person who does not hold a practicing certificate or secures any professional business through the services of such a person or by means not open to an accountant.
 - He certifies or submits in his name or in the name of his firm a report of an examination of financial statements and examination of such statements and the related records have not been made by him or a partner or an employee in his firm.
 - He permits his name or the name of his firm to be used in connection with an estimate of earnings contingent upon future transactions in a manner which may lead to the belief that he vouches for the accuracy of the forecast.
 - He includes in any statements return of firms to be submitted to the council any particular knowing it to be false.
 - He is guilty of gross negligence.

QUESTION THREE

(a) Advantages of Partnership

- **Specialization:** creates room for specialization particularly the professional firms.
- **Sharing of losses:** this reduces the amount borne by a single partner.
- **Shared management:** partners participate in the decision making process and in the management of the firm's business.
- **Flexibility:** can change the nature of business with the consent of all partners.
- **Easy to form:** formation of partnership is not subject to legal formalities.

(b)

- Partners share profit or loss equally
- A partner who incurs loss or liability while discharging the firm's obligations is entitled to indemnity.
- A partner who lends money to the firm is entitled to interest at the rate of 6% per annum.
- A partner is entitled to take part in the management of the firm's business.
- A partner is not entitled to remuneration for taking part in the management of the firm's business.
- A person cannot be admitted as a partner without consent of all existing partners
- Difference in ordinary matters may be decided by majority of the partners

- The firm cannot change its business without the consent of all partners
- Every partner has the right of access to the firms books of accounts.
- A partner cannot be expelled by the others unless the power to do so by expressly vested on them

QUESTION FOUR

(a)

(i)

Courts of law imply terms into contracts when called upon to do so by either party.

However, they do so reluctantly. This is because the parties are responsible for drawing the contractual map. A contract ought to be self sufficient in its terms. Courts imply terms into contracts for two reasons:

- To give effect to the intention of the parties
- To give business efficacy i.e. facilitate commercial transactions.

Courts of law imply terms in contracts from trade usage or custom and by applying the reasonable by stander test.

Trade usage or custom

A court of law may imply a trade usage or custom into a contract if it is satisfied that the usage or custom,

- Exists
- Is certain
- Is reasonable
- Is known by the parties
- Had not expressly or impliedly been excluded or exempted from the contract by the parties. It was so held in Harilal Shah and Champion Shah V. Standard Bank Co. Ltd.

In Fluery and King V. Mohammed Wali and Another the court implied a custom into the transaction and held that the plaintiff was entitled to a reduction in the purchase price.

• Reasonable by stander test

A court of law will imply a term into a contract if a reasonable person over hearing the contract being made would imply the same. In The Moorcock Case (1888); the defendant who owned a jetty situated upstream river Thames agreed that the plaintiffs could unload at the jetty. During low tide, as the ship moved towards the jetty, it grounded on the river bed and was damaged. The plaintiff sued for damages. It was held that the jetty owner was liable. The court implied the term that the passage to the jetty ought to have been reasonably safe for the ship. In Hassan Ali Issa V. Jeraji produce shop the court implied the term that where a repaired item is not collected within a reasonable time, the party undertaking the storage is entitled to reasonable storage charges.

(ii) The Sale of Goods Act, Cap 31 implies both conditions and warranties in sale of goods contract. The Hire Purchase Act, Cap 507 implies conditions and warranties in hire purchase agreement. Terms implied by the Sale of Goods Act

Conditions

- **Right to sell:** the seller shall have the right to sell
- **Correspond to description:** the goods shall correspond to the description
- **Fitness for purpose:** the goods shall be reasonably fit for the specific purpose.

- **Merchantable quality:** the good shall be of merchantable quality
- **Sale of sample:** the bulk shall correspond to the sample
- **Trade usage or custom:** a condition may be implied by trade usage or custom.

Warranties

- **Quiet possession:** the buyer shall have and enjoy quiet possession.
- **Free from charge or encumbrance:** the goods shall be free from any charge or encumbrance.
- **Trade usage or custom:** a warranty may be implied by trade usage or custom.

The Hire Purchase Act implies the following conditions in all hire purchase agreements

- **Right to sell:** the owner will have the right to sell the goods when property is to pass.
- **Fitness of purpose:** the goods will be reasonably fit for the specific purpose.
- **Merchantable quality:** the goods will be of merchantable quality.

Warranties

- **Quiet possession:** the hirer shall have and enjoy quiet possession
- **Free from charge or encumbrance:** the goods shall be free from any charge or encumbrance in favour of a 3rd party.

(b)

- This problem is based on statements made by parties in the course of negotiations leading to a contract.
- In this case Kamau made a statement which influenced Keter to purchase the firm, but the statement turns out to be untrue and Keter feels aggrieved and has threatened to sue Kamau for misrepresentation.
- **It is apparent that Kamau's** statement is not an assertion of fact. It is an opinion for which Kamau cannot be sued.
- My advice to Kamau is that he is not liable even if sued by Keter as his statement was a mere opinion which does not amount to misrepresentation.
- My advice is based on the decision in Edington V. Fitzmaurice.

QUESTION FIVE

(a)

- **Compensation:** the purpose of a monetary award in the damages is to compensate the plaintiff for the loss suffered.
- **Proof:** the plaintiff must prove the loss or damage suffered. He must adduce evidence of the actual loss suffered.
- **Causation:** There must be a nexus or link between the plaintiff loss and the defendant's breach of contract failing which damages are said to be too remote and irrecoverable.

The rule on remoteness of damages was formulated in Hadley V. Baxendale (1864) where it was held that the profit were irrecoverable since its loss could not be traced to the defendant's delay hence it was too remote. This case is authority for the proposition that the plaintiff is only entitled to recover such loss as is reasonably foreseeable.

- **Knowledge**
If a party is in possession of special knowledge or more information about the contract, but he fails to act, the other party suffers loss, the party is liable for such loss. It was so held in

Victoria Laundry (Windsor) Ltd V. Newman Industries Ltd. The plaintiff company resolved to extend its business as well as take advantage of certain other lucrative contracts. It required a large boiler. The defendant, an engineering firm agreed to sell and deliver a boiler to the plaintiff on June 5th. However the boiler was damaged and was not delivered until Nov. 8th by which the plaintiff had lost a lot of business. Though the defendants were aware of the plaintiffs business, they had been informed more than once the urgency with which the boiler was required. It was held that since the defendant had a special knowledge about the contract but failed to act on it, they were liable for the loss suffered by the plaintiff company.

A similar holding was made in The Heron II where it was held that the respondent was entitled to the £4,100 as its loss was traceable to the appellants breach of contract.

■ **Mitigation of loss**

This principle is to the effect that when a breach of contract occurs, it is the duty of the innocent party to take every reasonable step to reduce the loss it would otherwise have suffered from the breach of contract. The innocent party is bound to act reasonably to mitigate its loss. Whether the party has acted reasonably depend on the facts of the case.

In Musa Hassan V. Hunt and Another the appellant had agreed to purchase all the respondents milk for one year. On one occasion the appellant rejected the milk on the ground that it was unfit for consumption. The respondent proved that it was fit for consumption. The respondent however, converted the milk to ghee and casein which fetched a lower price. The appellant argued that the respondent had not mitigated its loss reasonably. However, it was held that the respondent had acted reasonably. In Harris V. Edmonds it was held that if the charterer of a ship failed to provide cargo in breach of contract, the ship captain was obliged to accept goods from other persons to mitigate the loss. If a party fails to mitigate loss, the amount by which the loss ought to have been reduced is irrecoverable.

■ **Liquidated damages and penalties**

Parties to a contract may before hand fix the amount payable to the innocent party in the event of a breach. The amount specified may be liquidated damages or a penalty.

If the amount is a genuine pre-estimate of the loss likely to be suffered by the innocent party it is awarded by the court as such without proof of the actual loss. This is liquidated damages. If the amount has no relation to the loss, it is extravagant and unconscionable, it is said to be a penalty and is unenforceable. A penalty covers but does not assess loss. It is a sum to be forfeited whether the sum is liquidated damages or a penalty is for the court to decide on the basis of certain presumptions enunciated in Dunlop Pneumatic Tyre Co. Ltd. V. New Garage and Motor Co. Ltd.

(b) **Equitable remedies**

Specific performance

This is a court order which compels the defendant to perform its part of the contract as agreed. It compels the defendant to fulfill its promise in accordance with the contract without an option to pay damages. It is an equitable remedy which manifests the maxim that equity acts in personam. The remedy may be availed where;

- Monetary compensation is inadequate
- The subject matter is unique or has unfair characteristics

- A contract is breached in anticipation.

The award or refusal of remedy is discretionary. A court of law exercises its direction on the basis of the following principles.

- **Delay or doctrine of laches:** the decree of specific performance must be applied for at the earliest possible instance as delay defeats equity. The plaintiff may lose the remedy if he has kept on his rights for too long.
- **Hardship to the defendant:** specific performance cannot be decreed. If it is likely to subject the defendant to undue hardship. This is because he who seeks equity must do equity.
- **Clean hands:** the plaintiff must approach the court free from blame. This is because he who comes to equity must do so with clean hands. Evidence of misrepresentation, duress or undue influence disentitles the party the remedy.
- **Performance and supervision:** as a general rule, specific performance cannot be decreed if it is not possible for the defendant to perform or where performance requires constant supervision. This is because courts are reluctant to make ineffectual orders.
- **Doctrine of mutuality:** as a general rule, specific performance is not available in circumstances in which it would not have been available were the positions of the parties interchanged.
- **Contracts for personal service or performance:** Specific performance is not available in contracts of personal service for example employment contracts, as it is likely to perpetrate unfairness.

- **Injunction**

This is a court order which either restrains a party from doing or continuing to do a particular thing or compels it to undo what it has wrongly done.

An injunction may be prohibitory or mandatory.

A prohibitory injunction restrains a party from doing or continuing to do a particular thing.

A mandatory injunction on the other hand compels a party to put right what it has wrongly done. It is restorative in nature.

Injunctions are either interim or temporary and perpetual or permanent.

An injunction is an equitable remedy which may be granted in the following circumstances:-

- If money cannot adequately compensate the plaintiff
- If it is necessary to maintain the status quo i.e. maintaining things as they are

For an injunction to be granted the applicant must establish that:

- He has a prima facie case with overwhelming chances of success
- If the remedy is not granted he will suffer irreparable injury.

- **Quantum Meruit**

Literally means, as much as it is earned or deserved.

This is compensating a party on the basis of the proportion of work completed. It is an equitable remedy available in the following circumstances.

- Where a contract is divisible and the party was performed part of its obligations (Ritchie V. Atkinson).

- Where partial performance is accepted and the party has so performed
 - Where the contract does not specify the amount or sum payable.
 - Where the contract is substantially performed, the party that has performed is entitled to compensation for work done.
 - Where a party ready and willing to perform its part of the contract but is prevented from doing so by the other.
- Other equitable remedies include:
 - Account
 - Tracing
 - Appointment of Receiver
 - Winding up
 - Rescission

QUESTION SIX

(a)

- The common law rule of nemo dat quod non habet, literally means one cannot give what he has not.
- It means that a seller of goods cannot give the buyer thereof a better title than he himself has in the goods.
- This rule was developed by the common law to protect the interests of the true owners of goods.
- The rule is now embodied in section 23 (1) of the Sale of Goods Act Cap 31, which provide inter alia “...where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with consent of the owner, the buyer acquires no better title than the seller had.....”
- This rule is best illustrated by the decision in Cundy V. Lindsay and Company Ltd. Where a person who had acquired goods fraudulently purported to sell them to appellant. It was held that the apparent had no title in the goods as the fraudulent person had none to pass to him.

(b) Exceptions to Nemo dat

- **Estoppel:** under section 23 (1) of the Act, if the true owner of the goods, holds out someone else as owner and third parties deal with the person as owner, the true owner is estopped from denying the seller's authority to sell and the purchaser acquires a good title.
- **Sale of factor or Mercantile agent:** this is an agent who is entrusted with possession of goods and who sells in his own name. If a mercantile agent in possession of the principal's goods sells them to a third party in the ordinary course of business and the third party takes the goods in good faith for value without notice he acquires a good title.
- **Resale by seller in possession:** under sec 26(1) of the Sale of Goods Act, if a seller who has already sold goods but retains their possession resells them to a bonafide purchaser who takes them in good faith for value without notice, of the previous sale, he acquires a good title.
- **Sale of buyer in possession:** under sec 26 (2) of the Act, if a person who has agreed to buy goods obtains their possession or documents of title before ownership passes to him and as a consequence he sells to a bonafide purchaser who takes in good faith without notice of the original seller's Lien he acquires a good title.
- **Sale under voidable title:** under sec. 24 of the Act, if seller's title is voidable, but he sells the goods to a bonafide purchaser before the title is avoided and the purchaser takes in good faith for value without notice of the seller's defective title, the purchaser acquires a good title. As was the case in Phillip V. Brooks.

- **Sale under statutory power:** A sale made in exercise of a power conferred by statute, passes a good title. For example:
 - Sale by a liquidator under the Companies Act.
 - Sale under the Disposal of Uncollected Goods Act.
 - Sale by a charge or mortgagee under the Registered Land Act.
- **Sale under common law power:** A sale made in exercise of a power conferred by the common law passes a good title for example sale by an agent of necessity or by a pledge.
- **Sale by court order:** A sale made pursuant to an order made by a court of competent jurisdiction passes a good title
- **Sale in Market Overt:** market overt means “open, public and legally constituted market.” This the oldest exception to Nemo dat but does not apply in Kenya. At common law, buyers in market overt acquired a good title even in relation to stolen goods provided that:
 - The buyer took them in good faith without notice of any defect in title and
 - The sale took place in public place.

QUESTION SEVEN

(a)

- **Blank endorsement**

Section 34 (1) of the Bill of Exchange Act provides that an endorsement in blank specifies no endorsee. Its effect is to convert the order bill into a bearer bill.

- **Special endorsement**

A special endorsement is an endorsement which specifies the person to whom, or to order, the bill is to be payable. Sec 34 (4) provides that when a bill has been endorsed in blank any holder may convert the blank endorsement into a special endorsement by writing above the endorsee's signature a direction to pay the bill to the order of himself or some other person.

- **Restrictive endorsement**

An endorsement is restrictive which prohibits further negotiation of the bill e.g. a bill endorsed “pay x only” or “pay x for the account of Y.” This gives the right to the endorsee to claim payment on the bill but prohibits him from transferring the right of payment to anyone else.

- **Conditional endorsement**

Section 33 of the Act provides that where a bill purports to be endorsed conditionally, the condition may be disregarded by the payer, and payment to the endorsee is valid whether the condition has been fulfilled or not.

(b)

- This problem is based on the twin principle of contribution and apportionment of insurance applicable in circumstances in which a person takes out more than one policy on the same subject matter and risk.
- In this case Akili Mingi has taken out two policies on the house with different insurers and has also insured his household goods for Kshs. 5,000,000 and risk has attached.
- My advice to the insurance companies is that since risk has attached Lipa Insurance Co. Ltd is obliged to pay Akili Mingi Ksh. 5 million for the stolen goods.
- Linda Mali and Pokea Insurance companies are obliged to indemnify Akili Mingi for the loss suffered on the basis of apportionment of liability depending on the sum assured with each of them. Linda Mali Co. Ltd must pay

$$\frac{15,000,000}{25,000,000} \times 20,000,000$$

Kshs. 12,000,000

While pokea insurance co. Ltd must pay

$$\frac{10,000,000}{25,000,000} \times 20,000,000$$

Kshs. 8,000,000

- The total amount payable to Akili Mingi for the house is Kshs. 20,000,000.
- Our calculations are based on the assumption that he policies were not subjected to average otherwise the amount recoverable by Akili Mingi would have been Kshs. 15,000,000 as the house is under insured. In which case Lina Mali Co. Ltd would pay Kshs. 9,000,000 while Pokea Insurance Company Ltd would pay Kshs 6,000,000.

QUESTION EIGHT

(a) (i)

Ownership	Possession
<ul style="list-style-type: none"> • Is proprietary in nature as it confers basics rights over property for example right to exclusive use, misuse, possession and disposition. • The owner if legally entitled to part with possession. • It is a question of law. • May be acquired in different ways for example, inheritance, adverse possession, transfer etc 	<ul style="list-style-type: none"> • This is the act of holding or being in control of property and the intention to exert control. • It generally confers no proprietary rights. • It is a question of fact. • It is often said that possession is “nineteenth” of the law • May be converted to ownership in various ways.

(ii)

Fee Simple	Leasehold
<ul style="list-style-type: none"> • This is the largest estate a person can acquire from the state. • It confers unlimited right to use, abuse and to dispose. • It is disposable by deed or will. • It is unlimited in duration • It is a freehold estate • Can be inherited by anyone but escheats to the state in the event of failure of an issue. • It may be created by grant as well as entranchisement. 	<ul style="list-style-type: none"> • This is a secondary estate derived from a primary estate. • A lease is a transaction which creates the relationship between the landlord and tenant between the grantor and the grantee. • Leasehold is the <u>quantum</u> of rights demised by the lease. • It confers the right to possession and use. • Subject to numerous conditions. • It is for a defined premises for a specified duration but confers exclusive possession. • It is a contractual relationship. • A leasehold may be fixed term, periodic, service sufferance or at will. • It is terminable in various ways, for example notice, surrender forfeiture lapse of time etc.

(b)

- This problem is based on the tort of defamation with specific reference to libel.
- In this case, it is apparent that Hamisi Nduati has not been defamed by the article and caption in “The Harbinger.”
- This is because the article in question was educational in character and only uses Hamisi Nduati’s photograph to illustrate a scientific point. In any event an ordinary person reading the article and the caption would not discern a defamatory intention.
- At the very most Hamisi Nduati can only argue that he has been abused by “The Harbinger” for which he has no actionable claim.
- My advise to Hamisi Nduati is that he has no action for defamation.
- My advise is based on interalia the absence of the perquisites for defamation.

MAY 2008

QUESTION ONE

(a)

(i) **Law and Morality**

Morality is the sense of judgement between wrong and right developed by society. It consists of societal prescriptions. The society determines what is wrong or right to shape the behaviour of its members. Morality is not enforceable. Law consist of rules recognized and applied by the state in the administration of justice. It is based on customs and religious practices or emanates from parliament.

Law is enforceable and its sactions are visible. Law is superior and certain.

(ii)

- **Public law** consists of those fields or branches of law in which the state has a direct interest as the sovereign, for example; Constitutional law, Criminal law, Administrative law.
- It is concerned with the constitution and functions of the various organs of government, their relations with each other and the citizenry.
- It asserts state sovereignty.
- **Private law:** consists of those branches or fields of law in which the state has no direct interest. It is concerned with the legal relations between persons in ordinary transactions.
- It deals with the rights and details of parties in ordinary transactions example law of contract, law of property, law of succession, law of marriage, law of trust.

(iii) **Common law and Equity**

Common law may be described as a branch of the law of England which was developed by the ancient common law courts from the customs, usages and usages of the English people.

These courts applied the peoples way of life in the settlement of disputes thereby giving such customs the force of law. The courts standardized and universalized customs. The common law was characterized by the writ system and stare decisis.

The common law system of administration of justice was rigid, slow, had insufficient remedies, did not recognize trust and was highly technical. The courts could only award damages. Common law acts in rem.

Equity ordinarily means fairness or justice. It is that branch of the law of England which was developed by the various Lord Chancellors courts to supplement the common law. It developed to mitigate the harshness of the common law as well as fill in the gaps in the common law system. It is therefore an addendum to the common law.

Equity was developed by a different system of court and on the basis of different principles namely fairness.

Administration of justice was speedy and the system was very flexible. Equity developed the so-called maxims of equity, additional remedies, recognized trusts and enhanced protection of borrowers. Equity acts in personam.

If common law and equity conflict equity prevails.

Substantive Law

- Consists of rules themselves as opposed to the procedure of how to apply them. It defines the rights and duties of parties and prescribes or provides remedies e.g law of contract, law of torts.
- It also defines crimes or offences and prescribes punishment. Penal code

Procedural Law: This is adjectival law.

(α) It consists of the steps or guiding principles or rules of practice to be complied with in the application of substantive law or in the administration of justice for example Criminal Procedure Code, Cap, 75 and Civil Procedure Act Cap 21.

(vi)

- **Ratio decidendi:** literally means reason for decision. It is a principle or proposition of law based on the material facts of the case. It disposes of the case before the court.
- It is the binding element in a decision or precedent.
- It consists of a group of fact situations with those of the instant case as minimum.
- **Obiter dicta:** literally means „by the way“
- These are by the way statements of law or fact made by a judge in the course of judgement.
- They do not dispose of the case before the court and have no binding force. These statements strengthen or reinforce the decision of the court and can be relied upon by advocates in subsequent cases as persuasive authority.

(b) (i) Declaratory precedent

This is the application of an existing principle or proposition of law in a subsequent case.

(ii) Original precedent

This principle or proposition of law as formulated by the court. It is the law creating precedent.

(iii) Distinguishing precedent

This is a subsequent decision which effectively distinguishes the existing precedent. It becomes a precedent in its own right.

QUESTION TWO

- a) The term law has no assigned meaning. It has no specific definition. However, it has been used in a variety of sense by different writers who have attempted to explain it.
- The study of law is referred to as jurisprudence. According to Hart law is coercive instrument for regulating social behaviour.
 - Law has been described as a command backed by sanctions of the sovereign.

- The sovereign formulates the commands and enforces sanction. These two explanations of term law cannot accommodate all the branches of law in existence.
- According to Salmond, law consists of a body of principles recognized and applied by the state in the administration of justice. Law has also been defined as collection of binding rules of human conduct prescribed by human beings for the obedience of human beings.
- Law may be described as an aggregate of rules enforced by courts of law.

Constitution

- This is a body of basic rules and principles by which a society has resolved to govern itself or regulate its affairs.
- It contains the agreed content of the political system and the basic structure of government e.g. Executive, Legislature and the Judiciary.
- It can be written or unwritten.
- Section 3 (1) (e) of the Judicature Act recognizes the constitution as a source of law of Kenya. It is the supreme law of the land and prevails over all other laws (Okunda and Another V. R (1970))

Legislation or (statute law)

This is law made by parliament directly in exercise of legislative power conferred upon it by the constitution e.g. Judicature Act, Kadhis Court Act companies Act. It is recognized by section 3(1) (b) of the Judicature Act as a source of law under the phrase:

- Certain Acts of the UK parliament applicable in Kenya.
- Certain Acts of Indian Parliament
- Certain Acts of Legislative council.
- Acts of the parliament of Kenya.
- **Delegated legislation:** It also referred to as sub-ordinate, indirect or subsidiary legislation. It is law made by parliament indirectly. These are by-laws, orders, rules, regulations, proclamations made by sub-ordinate bodies for example local authorities, professional bodies, Government ministers and statutory bodies in exercise of delegated legislative power conferred upon them by parliament through an enabling or parent Act.
- **Statutes of General Application:** These are certain statutes enacted by the U.K parliament to regulate the conduct of the inhabitants of the UK generally. They are recognized as a source of law of Kenya by section 3 (I) (c) of the Judicature Act. However their application as a source of law is qualified.
- **Common Law:** may be described as a branch of the law of England which was developed by the ancient common law courts from the customs, usages and practices of the English people. These courts applied the peoples way of life in the settlement of disputes thereby giving such customs the force of law. It is an unwritten source of law whose application is qualified by the section 3(I) (c) of the Judicature Act.
- **Equity:** Equity ordinarily means fairness or justice. It is that branch of the law of England which was developed by the various Lord Chancellors courts to supplement the common law. It developed to mitigate the harshness of the common law. Its application is qualified by section 3 (I) (c) of the Judicature Act.
- **Case law of judge made law:** These are principles or propositions of law made by judges when deciding cases before them which are applied in subsequent similar cases. Judges make law when they formulate or enunciate principles or propositions of law where non-existent or in doubtful situations which are applied in subsequent similar cases. This source is recognized by section 3 (I) (c) of the Judicature Act and has wide application.

- **African Customary Law:** African customary law is based on customs, usages and practices of the various ethnic groups of Kenya. These customs and usages generally lack universality and so is African Customary Law. A custom embodies a principle of utility or justice. However, not all local customs may be relied upon by court of law in the settlement of disputes. A good local custom must be reasonable consistent with written law and must have been observed openly since time immemorial. It is recognized by section 3 (2) of the Judicature Act.

QUESTION THREE

The Resident magistrate court

- **Establishment**
It is established by section 3 (I) of the Magistrates Court Act, Cap 10, Laws of Kenya, as a sub-ordinate court.
- **Composition**
The court is duly constituted when held by; the chief magistrate, senior principal magistrate, principal magistrate. Senior resident magistrate or the resident magistrate duly appointed by the Judicial service commission.
- **Jurisdiction**
Under section 3(2) of the Magistrates Court Act, the court has jurisdiction through out Kenya. It exercises both original and appellate jurisdiction. It exercises jurisdiction in both civil and criminal cases.
- **Criminal Jurisdiction**
It exercises original and appellate jurisdiction in criminal cases. It has no appellate jurisdiction in civil cases.

When held by the Resident magistrate the maximum sentence it can impose is 24 strokes, 7 years imprisonment, or a fine not exceeding Kshs. 20,000. When held by the chief magistrate, senior principal magistrates, principal magistrate or senior resident magistrate, it has jurisdiction imposes any sentence as long as the court can try the offense.

- **Appellate Jurisdiction**
The court entertains criminal appeals from the District Magistrates Court 3rd class.
- **Civil Jurisdiction**
The courts civil jurisdiction is subject to pecuniary or monetary limitations.

Court	Value of subject matter
Chief magistrate	3,000,000
Senior principal magistrate	2,000,000
Principal magistrate	1,000,000
Senior resident magistrate	800,000
Resident magistrate	500,000

- The court has unlimited jurisdiction to entertain cases based on African customary law.

QUESTION FOUR

(a) Legal Personality

Once an unincorporated association is incorporated it becomes a body corporate with rights and subject to obligations, with certain capacities and incapacities. This is the most fundamental attribute of incorporation from which all other consequences flow. This is the so-called rule in Salomon V. Salomon and Co. Ltd (1897) vide: when a company is formed it becomes a legal person distinct and separate from its members and managers.

- **Limited Liability:** members as a general rule, are not liable to make good the debts of the corporation. In registered companies, members can only be called upon to contribute the amount due on their share or the amount they undertook to contribute the amount due on their share or the amount they undertook to contribute.
 - **Perpetual succession:** A corporation is a creation of law. It has not body, mind or soul. Its life lies in the intendment of law. Death of member has no effect on its existence. It has capacity to exist in perpetuity.
 - **Sue or be sued:** As a legal person with rights and subject to obligations a corporation has capacity to sue to enforce the rights and can be sued on its obligation. When a wrong is done on a corporation the corporation is prima facie the proper plaintiff. It was so held in Foss V. Harbothe (1973).
 - **Owning of property:** A corporation has capacity to own property. The Property of a corporation is vested in it and does not belong to its members. It can therefore insure such property since it has an insurable interest. It was so held in case of Macaura V. Northern Assurance Co. Ltd (1925)
 - **Capacity to contract:** An incorporated association has legal capacity to enter into contractual relationship in pursuit of its objects. In addition, it has capacity to hire and fire it was so held in Lee V. Lees Air Forming Co. Ltd (1981).
- (b) A mentally disordered person is subject to certain disabilities or incapacities for example.
- Has no capacity to enter into a contract.
 - Has no capacity to have a domicile of choice
 - Has no capacity to make a will.
 - Has no capacity to become a director of a company
 - Cannot be appointed auditor
 - Cannot sue directly

QUESTION FIVE

- (a) Acceptance is one of the basic elements of a contract. Acceptance of an offer gives rise to an agreement between the parties. Question is whether acceptance must be communicated to the offeror in all cases. The answer to this question is generally yes as:
- Acceptance must be communicated in the prescribed method, if any or in an equally expeditious method.
 - If no method is prescribed, the method applicable depends on the type of offer and the circumstances in which it is made.
 - As a general rule silence does not amount to acceptance. It was so held in Felthouse V. Bindley.

- Where parties negotiate by word of mouth in each other presence, acceptance is deemed complete when the offeror hears the words of acceptance, it was so held in Entores Ltd. V. Miles Far East Corporation Ltd.
 - Where parties negotiate by telephone, acceptance is deemed complete when the offeror hears the words of acceptance it was so held in Entores Ltd V. Miles Far East Corporation.
 - Where parties negotiate by telex acceptance is deemed complete when the offeree's message of acceptance is received by the offeror. It was so held in Entores Ltd V. Miles Far East Corporation
 - Where the offeror expressly authorizes the offeree to communicate acceptance by post, acceptance is deemed complete when the letter is posted whether it reaches its destination or not. As was the case in Adams V. Lindsell.
 - Where the offeror impliedly authorized the offeree to communicate acceptance by post, acceptance is deemed complete when the letter is posted whether it reaches its destination or not. As was the case in Byrne V. Van Tienhoven.
 - Where the offeror does not expressly or impliedly authorize the offeree to communicate acceptance by post, but he does so, acceptance is deemed complete when it is received by the offeror.
 - However, acceptance need not be communicated in all cases for an agreement to arise for example:
 - Where acceptance is by conduct as was the case in Carlill V. Carbolic Smoke Ball Co. Ltd there is no communication.
 - Where communication of acceptance is expressly or impliedly waived by the offeror. As was the case in Carlill's case.
- (b) (i) This problem is based on communication of acceptance.
- As a general rule, the mode of effecting acceptance is immaterial so long as the offeror receives the same.
 - In this case it appears that there is a contract between Arnold and Ben as Ben writes to Arnold accepting the offer, provided the letter was actually received by Arnold.
- (ii) In the second instance, there is a contract between Ben and Arnold as Ben communicated acceptance by telex and to the extent that Arnold received the same, there is a valid contract between the two.

QUESTION SIX

(a) Conditions

- **Right to sell:** Under sect 8(1) of the Hire purchase Act, there is an implied condition that the owner will have the right to sell the goods when property is to pass.
- **Fitness for purpose:** Under sec 8 (2) of the Act, if the hirer expressly or by implication makes known to the owner the particular purpose for which the goods are required, there is an implied condition that the goods will be reasonable fit for that purpose.
- **Merchantable Quality:** Under section 8(1), except where the goods are second hand, and the contract so provides, there is an implied condition that the goods will be of merchantable quality.

(b) Warranties

- **Quiet possession:** Under section 8(1) of the Act there is implied warranty that the hirer shall have and enjoy quiet possession of the goods.

- **Free from charge of encumbrance:** under section 8 (1) of the Act, there is an implied warranty that the goods will be free from any charge of encumbrance in favour of third party when property is to pass.

(c) **Credit sale**

This is a sale on credit. This is a contract of sale of goods whereby the purchase price is payable by five or more instalments. The property in this case passes on the payment of the first instalment and the owner loses his rights against the goods. This means the purchase can give a good title to a subsequent purchaser even when he himself has not completed the purchase. In Lee V. Butler (1893) Y bought furniture under a credit sale agreement and resold them to D before he had paid all the instalments. The original seller sued D for recovery and it was held that D had obtained a good title as under a credit sale agreement property in the goods passes with the payment of the first installment.

The distinction between a hire-purchase agreement and a credit sale is that whereas the latter is a contract of sale with an obligation to purchase the former is a hiring contract. The hire purchase agreement is a contract between the owner of goods and the hirer while in credit sale, the parties are seller and buyer.

(ii) **A conditional sale agreement**

A conditional sale is a contract of sale of goods whereby part of the purchase price is payable by installments. Property in the goods pass to the buyer when the condition(s) prescribed by the seller is fulfilled. It differs from a hire purchase agreement as in that it is a contract of sale whether a hire purchase agreement is a contract of hiring.

QUESTION SEVEN

(a)

Right of lien or retention of goods:

This is the right of unpaid seller in possession of the buyers goods to retain them as security for the price. This lien is possessory in character. It is exercisable by the unpaid seller over any goods in his possession. It is exercisable even where the seller holds the goods as the buyers agent. Under section 4 (1) of the Sale of Goods Act, the lien is exercisable in the following circumstances.

- If the buyer becomes insolvent
- If the goods have not been sold on credit
- If the goods have been sold on credit but the term of credit has expired.

Right of stoppage in transitee

This is the right of unpaid seller who has already parted with possession of the goods to resume such possession as long as the goods are in the course of transit. Under section 44 of the Act, the right of stoppage in transitu is only exercisable if the buyer becomes insolvent.

Under section 46 (1), the right of stoppage is exercisable either by:

- Taking possession of the goods
- Giving notice of the seller claim to the carrier or his principal

Once notice is given, the carrier must redeliver the goods in accordance with the seller's directions but at the seller's expense.

The unpaid seller right of stoppage in transitu is defeated in the following circumstances:-

- If the buyer or his agent intercepts the goods before their arrival at the appointed destination.
- If after arrival the carrier notifies the buyer or his agents that he is holding the goods on his behalf.
- If after the carrier wrongfully neglects or refuses to deliver the goods to the buyer or his agent.

Right of resale

Under section 47 and 48 of the Sale of Goods Act, the unpaid seller has the right to resell the goods in his possession to recover the amount payable. He passes a good title to the buyer in the following circumstances.

- Where the right to resell is expressly reserved in the event of the buyer's default.
- If the goods are of a perishable nature
- If the seller notifies the buyer his intention to resell the goods but the buyer does not pay or tender the price within a reasonable time.

Right to withhold delivery

Under section 49(2) where property in the goods has not passed to the buyer, the seller is entitled to withhold their delivery.

(a) Remedies against the buyer

- **Action for price**

Under section 49 of the Act, an unpaid seller has the right to maintain an action against the buyer for the price of the goods in the following circumstances.

- Where the property in the goods has passed to the buyer who wrongfully neglects or refuses to pay the price.
- Where the price is payable on a specified day but the buyer neglects or refuses to do so. An action for price is a suit for a liquidated sum of money due to the seller in respect of the goods.

- **Damages for non-acceptance**

Under section 50 (1) of the Act, if the buyer wrongfully neglects or refuses to accept or pay for the goods, the seller may maintain an action against him in damages for non-acceptance. The amount recoverable is the estimated loss directly and naturally resulting from the buyer's breach of contract.

(b) (I) The buyer can reject the goods for breach of a condition to be performed by the seller for example.

- If the seller delivers more goods than the quantity contracted for.
- If the seller delivers less goods than the quantity contracted for.
- If the seller delivers by instalments contrary to the terms of the contract.
- If the seller delivers goods mixed with those of a different description.

In such circumstances, the buyer incurs no liability and any price paid is irrecoverable. The buyer may lose the right to reject the goods:

- If he has accepted the goods and given something in earnest to bind the contract.
- If the duration if any prescribed by the contract has lapsed
- If no duration is prescribed by the contract but reasonable time has lapsed.

QUESTION 8

(a) (i) Under the provisions of the Law of succession Act,

A will is the legal declaration by a person of his intention or wishes regarding the disposition of his property after death duly made and executed in accordance with the provisions of the Law of succession Act. A will includes a codicil.

A codicil is a testamentally instrument made in relation to a will explaining, altering or adding to its dispositions and appointments, duly made and executed in accordance with provisions of the Act relating to the making of wills.

Under section 11 of the Law of Succession Act, a written will is characterized by the following formalities:

- **Writing:** there must be some writing. The law does not insist on any form. It may be handwritten, typed or printed. The law does not prescribe the wording of a will.
- **Signature or mark:** the will must contain the signature or mark of the testator or some other person who signs in the presence and in accordance with the directions of the testator.
- **Attestation:** the will must be attested to or witnessed by two or more competent witnesses. The law does not prescribe the form of attestation.
- **Position of signature or mark:** the position of the signature or mark must clearly show that it was intended to give effect to the writing as a will.
- **Presence of witnesses:** all witnesses must sign the will in the presence of the testator. However they need not be present at the same time.

(b) Section 29 of the Law of Succession Act, defines the term “dependant” by identifying the categories of persons who in law are deemed to be dependants.

- The wife or wives and former wife or wives of the deceased.
- Children of the deceased.
- Parents, grandparents and step parents as were being maintained by the deceased before death.
- Grand children, step children and children whom the deceased had taken into his family as his own as were being maintained by the deceased before death.
- Brothers and sisters who were being maintained by the deceased.
- The husband if he was being maintained by his wife before her death.
- Half brothers and half sisters who were being maintained by the deceased before death.

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QUESTION ONE

- a) **Law of Contract:** is concerned with rights, duties and remedies of parties to a contract. It defines a contract, prescribes its elements identifies its terms and their effect and lays out the vitiating elements. It prescribes how a contract may come to an end and sets out remedies.
- b) **Law of Torts:** is concerned with violations of personal and proprietary rights and prescribes remedies to aggrieved parties. It identifies what acts or omissions amount to torts e.g. negligence nuisance, defamation, passing off, trespass to goods, detinue conversion, assault, battery, false imprisonment etc. It also describes certain principles e.g. strict liability, vicarious liability, occupiers liability etc.
- c) **Law of Marriage:** is concerned with the various ways of contracting a valid marriage, rights and duties of the spouses and divorce.
- d) **Law of Succession:** is concerned with the disposition of a deceased's estate. It provides for wills, dependants gifts in contemplation of death, intestate succession and probate.
- e) **Law of Property:** is concerned with interest in land e.g. primary and secondary interest e.g. freehold and leasehold estates in land, servitudes and encumbrances. It defines the ways of acquiring interest in land and its extinguishment. It prescribes the rights and duties of persons who have an interest in land.
- f) **Law of Trust:** is concerned with the rights, duties and other incidences between trustees and beneficiaries.

(b)

Legal rights	Equitable rights
These are rights which originally could only be enforced by the common law courts.	These rights were originally enforceable by the Lord Chancellors Courts.
These rights are enforceable as of right i.e. once an infringement is established the aggrieved party is entitled to damages, for example breach of contract.	The enforcement of these rights is discretionary i.e. it is for the court to determine whether or not the remedy sought will be availed e.g. rights of trustees or beneficiaries.

The main equitable remedies include:

- **Injunction:** this is an order of the court which restrains a person from doing or continuing to do a particular thing or compels him to undo what he has wrongly done. May be temporal or perpetual.
- **Specific Performance:** this is a court order which compels a party to perform its contractual obligations as agreed. It compels a party to honour its part of the contract without an option to pay damages.
- **Rescission:** the essence of this remedy is to restore parties to a contract to the position they were before the contract.
- **Account:** this is generally an exposition of the utilization of money or goods coming into the hands of a person in a specific capacity e.g. agent, trustee or promoter. It entails the handing over of anything obtained in a manner inconsistent with the position e.g. secret profit.
- **Tracing:** this is a court order which enables a party to follow and recover assets or monies which change hands in certain circumstances for example: void contracts. The remedy is generally available only if the subject matter or its application is identifiable.
- **Winding Up:** is the legal process by which a company's existence is brought to an end, its assets realized, liabilities ascertained and paid and the balance if any distributed between the members.

- **Appointment of Receiver:** this is a person appointed by a debenture holder or the court at the instigation of a creditor to take over the borrower's security to facilitate payment of the amount owing.

QUESTION TWO

- Business premises tribunals have original jurisdiction to determine civil disputes between landlords and tenants of commercial or business premises if the tenancy is "controlled". A controlled tenancy is the tenancy of a shop, hotel or catering establishment which:
 - Has not been reduced into writing or
 - Has been reduced into writing but does not exceed 5 years and contains a method for termination otherwise than by breach
 - Decisions of the tribunal may be appealed against in the High Court.
 - To determine whether a tenancy is controlled or not.
 - To determine or vary the rent payable in respect of a controlled tenancy.
 - To permit the levy of distress for rent.
 - To apportion rent between tenants where a controlled tenancy is shared.
 - To determine the amount payable by a tenant as service charge in respect of a controlled tenancy.
 - Facilitate vacant possession of the premises to enable the landlord.
 - To authorize the tenant to carry out repairs in case of default by the landlord and deduct the cost thereof from the rent payable.
 - To vary or rescind any order made by the tribunal.
- (b) The Judicial Service Commission is established by section 68(1) of the Constitution. It consists of:
- The Chief Justice as chairman.
 - Attorney General
 - Two persons who are for the time being judges of the High Court and Court of Appeal appointed by the President.
 - Chairman Public Service Commission
 - High Court registrar as secretary.

Functions:

- **Advisory:** it advises the President of the appointment of judges of the High Court and Court of Appeal.
- **Administration:** it administers the Judiciary in that it is the principal administrative organ of the Judicial Department.
- **Appointment:** it engages or employs magistrates, High Court registrars, Kadhis, Clerks, interpreters and other staff of the Judiciary.
- **Discipline:** it disciplines magistrates, Kadhis, High Court registrars, Clerks, Accountants and other judicial staff.

QUESTION THREE

(a)

Memorandum of Association	Articles of Association
<ul style="list-style-type: none"> • It is one of the constitutive documents in company formation. • Every company must have a memorandum of association. • It is the company's charter or external constitution. • It regulates the relations between the company and 3rd parties. • It embodies the name of the company, domicile objects capital, liability date particulars of subscribers. • It prevails over the articles in the event of a conflict. • Some of its clauses are alterable. 	<ul style="list-style-type: none"> • It is one of the constitutive document • Every company must have a set of regulations as its articles. • A company may adopt Table A with or without modifications. • It is the internal constitution of the company. • It contains the rules of internal management. • It regulates the relations between the company and its members. • It is alterable by special resolution. • If a company adopts Table A as its articles, its contents include: <ul style="list-style-type: none"> ❖ Calls ❖ Forfeiture of shares ❖ Borrowing ❖ Transfer and transmission of shares. ❖ Convention and conduct of meetings. ❖ Capital ❖ Bonus shares ❖ Dividend ❖ Office of managing director ❖ Office of company secretary ❖ Auditors ❖ Account ❖ Division of powers between the general meeting and the board etc.

- Under the provisions of the Companies Act, a private company is any company whose articles of association:
 - Limit the number of members to 50 excluding current and former employees who are members.
 - Restrict the right to transfer its shares.
 - Prohibit any invitation to the public to subscribe for its shares or debentures.

Other Characteristics include:

- Has at least one director.
- Entitled to commence business from the date of incorporation.
- Not obliged to hold the statutory meeting.

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- Not obliged to publish accounts.
- (c)
- A corporation is an association of persons recognized as a legal entity. It has an independent legal existence. It is a body corporate or a juristic person. It is an abstraction of law. This statement is a correct observation.
 - A corporation is an artificial person in that inter alia, it is created through a legal process for example charter, statute or by registration. The person formed is juristic or abstraction of law. In company law, this is referred to as the rule in Salomon V. Salomon and Co. Ltd.
 - A corporation has several characteristics peculiar to it, for example:
 - **Perpetual Succession:** being a creation of law, it has capacity to exist in perpetuity, it can only be killed through a legal process.
 - **Sue or be sued:** a corporation has capacity to sue to enforce its rights and maybe sued on its obligations.
 - **Capacity to contract:** a corporation has legal ability to enter into contractual relationships. It can hire and fire.
 - **Owing of Property:** it has capacity to own property. The property of a corporation is vested in it. It has an insurable interest in it.
 - **Common Seal:** a corporation has a common seal to authenticate its transactions.

These characteristics clearly demonstrate that a corporation is an artificial person.

QUESTION FOUR

- (a) Among the various ways in which a contract may be discharged is performance which literally means fulfillment of the parties obligations as originally agreed. Originally, the common law did not acknowledge discharge by performance unless the obligations were performed precisely and exactly. This is the common law doctrine “precise and exact” which insisted that every part of the contract had to be performed i.e. contractual obligations had to be observed to the letter.
- This doctrine is best exemplified by the decision in Cutter V. Powell. Where it was held that Mrs. Cutter was not entitled to compensation as her husband had not performed his part of the contract precisely and exactly. This decision illustrates how unfair the doctrine of precise and exact can be in that Mr. Cutter had rendered services from August 2nd to September 20th when he died. Yet the employer is under no obligation to pay anything. This far it is evident that discharge by performance means performance must be precise and exact.

However, the doctrine of precise and exact has been modified and there are several circumstances in which performance need not necessarily be precise and exact for parties to be discharged for example.

- **Divisible Contracts:** if a contract can be divided into different compartments to be paid for separately, e.g. contract of carriage of goods payable per tonne, performance of part thereof entitles the party to payment on Quantum Meruit. As was the case in Ritchie V. Atkinson.
- **Substantial Performance:** if contractual obligations are almost fully performed the party performing is entitled to payment for work done. What amounts to substantial performance is a question of fact. This exception is illustrated by the decision in Marshides Mehta and Co. Ltd. V. Barrong Verhegen.

- **Partial Performance if accepted:** if a party to a contract expressly or impliedly agrees to pay for a partially performed contract, the party is bound to pay for the portion completed. The decision in Sumpter V. Hedges illustrates this exception.
- **Prevented Performance:** if a party ready and willing to perform its part of the contract is prevented from doing so by the other or the others fault, the party is entitled to payment on Quantum Meruit. The decision in Planche V. Colburn is explicit on this.
- **Frustration of Contract:** a contract is frustrated when performance of the obligations is rendered impossible by unforeseen or extraneous circumstances for which neither party is to blame. In such a case parties are discharged without precise and exact performance.

In summation, it is arguable that whereas it is true to surmise that for a contract to be discharged by performance, performance must be precise and exact, this is only the general rule to which there are many exceptions.

(b)

- This problem is based on the exceptions of the common law doctrine of precise and exact i.e. substantial performance.
- In this case it is clear that Annan has substantially performed his part of the contract and is therefore entitled to payment for work done.
- Angela is bound to pay Annan the contract price less the amount she is likely to spend to have the door painted as agreed and since Angela has paid a “reasonable” sum for Annan’s work, Annan has no cause of action against Angela. However if the amount is too low, he may have a cause of action for breach of contract.
- My advise to Annan is that he has no actionable claim against Angela. This advise is based on the decision in Marshides Mehta and Co. Ltd. V Barron Verhegen whose facts were substantially similar.

QUESTION FIVE

(a)

- **Duty not to derogate from the grant:** the landlord must not do anything inconsistent with the tenancy.
- **Duty to ensure quiet possession:** the landlord, his servants or agents must not interfere with the tenants enjoyment of the premises as he is entitled to quiet possession.
- **Duty to grant premises fit for purpose:** the landlord must ensure that the premises let to the lessee is fit for the particular purpose for which it is let.
- **Duty to adjust or suspend rent:** if the premises or part thereof is destroyed or damaged otherwise than through the lessee’s negligence rendering it or part thereof unusable, the lessor is bound to suspend or adjust the rent payable accordingly.
- **Duty to repair:** the lessor is generally bound to repair the roof, main walls, drains, common passages and installations.
- **Duty to put the tenant in possession:** the lessor is bound to hand over to the lessee the keys to the premises.

(b)

- This problem is based on the remedies of the mortgagee or chargee in property law. In this case White Bank as the Mortgagee or Chargee has several remedies in its favour.
- **Statutory Power of Sale:** the bank is entitled to sell Mrs. Hamilton’s house to recover the amount due. This may be the most effective remedy.

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- **Suit on Personal Covenant:** this is the right of the bank to sue Mrs. Hamilton for the amount due under the contract. This action leaves the security intact.
- **Fore Closure:** this is a court order which would bar Mrs. Hamilton from redeeming her security.

QUESTION SIX

(a)

- Under the Provisions of the Occupiers Liability Act Cap 34 an occupier owes a common duty of care to all invitees to his premises.
- This is the duty to take such care as in all the circumstances of the case is reasonable to see that the invitees or visitors are reasonably safe in the use of the premises or for the purpose for which they are invited or permitted to be there.
- It means that the occupier is liable if an invitee is injured while in the premises.
- The occupier must be prepared for children to be less careful than adults. This imposes a heavier duty on occupiers.
- The common duty of care owed by occupiers to invitees extends to persons permitted by law to enter into such premises.
- However, an occupier owes no common duty of care to trespassers. Though he must not injure them, he is under no obligation to ensure that they are safe and is not liable if they are injured in his premises.
- An occupier can guard against such liability in various ways.
 - **Sufficient warning:** to all invitees or visitors. Such warning must be clear as to what is expected of the invitees and must be conspicuously displayed.
 - **Accepted risks:** these are risks willingly accepted by the invitee for which the occupier is not liable.
 - **Independent Contractor:** an occupier is not liable if the invitee's damage is due to the faulty execution of a task by an independent contractor, provided that the occupier had acted reasonably in entrusting the task to the contractor and had taken reasonable steps to satisfy himself that the contractor was competent and that the task had been properly executed.

(b)

- This problem is based on the tort of nuisance and more specifically public nuisance. Desmond's carelessness in allowing excessive current to develop led to the public nuisance for which he is liable to prosecution by the Attorney General.
- Although public nuisance is a crime, it is also a tort to the extent that a person affected by it has suffered particular loss.
In this case Desmond's careless act made Derrick incur a loss of KShs. 50,000 from lost production.
- My advice to Derrick is that he has an actionable claim against Desmond in damages for public nuisance.

QUESTION SEVEN

(a)

- To provide and payout of the deceased's estate reasonable funeral expenses.
- To get in all the free property of the deceased including debts and monies payable to the personal representative.
- To pay out of the deceased's estate all expenses of obtaining the grant and other reasonable expenses of administration.
- To ascertain and pay all debts owed by the deceased.

- To give the court a full and accurate inventory of the assets and liabilities of the deceased within 6 months of the grant.
- To distribute or retain in trust all assets remaining after payment of expenses and debts.
- To complete the administration of the estate in respect of all matters other than continuing trusts and produce a full and accurate account of the administration within 6 months of confirmation of the grant.

(b)

- As a general rule, a seller of goods is not liable if the goods are not of merchantable quality or fit for the purpose for which they are obtained.
- This is the principle of **Caveat emptor**. However under section 16 (a) of the Sale of Goods Act, if the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to rely on the seller's skill or judgement, there is an implied condition that the goods shall be reasonably fit for that particular purpose. This condition is not implied if the goods are sold under a patent or other trade name.
- Under section 16 (b) of the Sale of Goods Act, where goods are bought by description from a person who deals in such goods in the ordinary course of business, there is an implied condition that goods shall be of merchantable quality.
- This condition is not implied if the buyer has examined the goods but failed to detect defects which such examination ought to reveal.

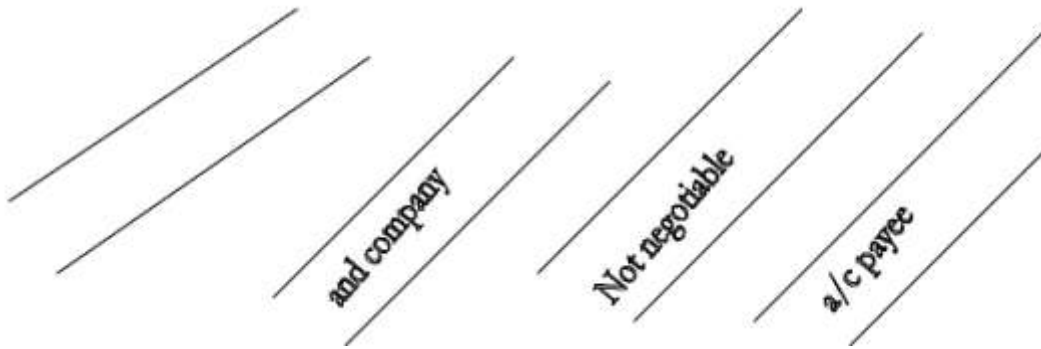
QUESTION EIGHT

(a)

- The contract of insurance is the Locus Classicus illustration of the so called contracts uberrimae fidei i.e. utmost good faith.
- It modifies the common law principle of caveat emptor
- Both parties are bound to disclose material facts. The duty to disclose on the part of the insurer and insured is voluntary and bilateral. It was so held in Carter V. Boehm.
- Parties are bound to disclose material facts in their actual and presumed knowledge.
- A fact is deemed material if a reasonable person in the circumstance of the insured and disclosed it.
- In the alternative, a fact is deemed material if it would have influenced the judgement of a prudent insurer in determining whether or not to take the risk and how much premium to charge.
- The duty to disclose generally exists throughout the negotiation period.
- Non-disclosure of a material fact renders the contract voidable at the option of the innocent party.
- Although the contract of insurance is one of the utmost good faith, certain matters need not be disclosed, for example unknown facts, matters of public notoriety insured's opinion, legal propositions or provisions etc.

(b)

- o A crossing consists of two parallel transverse lines on the face of the cheque. It is an instruction to the banker not to pay the proceeds of the cheque across the counter. There are two types of crossing namely; general and special.
- π **A general crossing** consists of two parallel transverse lines on the face of the cheque without the words "and company", "not negotiable" "account payee" etc. for example.



- **A Special Crossing** consists of two parallel transverse lines on the face of the cheque with the name of the banker with or without the words “not negotiable.”
 - An uncrossed cheque may be crossed generally or specially.
 - A cheque crossed generally may be crossed specially.

(c)

- This problem is based on the obligations of the customer in a banker-customer relationship.
- In this case Mr. Karanja has lost Kshs. 300,000 to Hatari who completed the cheque and encashed it.
- It is evident that there is a banker-customer relationship between Karanja and the banker. Karanja therefore owes the banker a duty of care when drawing cheques to avoid alteration.
- Mr. Karanja is not only careless but negligent by signing blank cheques. It is clear that Mrs. Karanja is equally negligent hence the loss. The Karanjas have no one to blame other than themselves.
- My advise to the bank is that there is no cause for alarm as the Karanjas have no sustainable claim against it if they were sue. The bank has a watertight defence of negligence on the part of the Karanjas.
- My advise is based on the decision in London Joint Stock Bank Ltd V. Mcmillan and Arthur whose facts were substantially similar.

MAY 2009 SUGGESTED SOLUTIONS

QUESTION ONE

(a) Codification: This is the bringing together of all rules or principles of law in a particular field to constitute a single statute for example the Sale of Goods Act Cap 31, it ordinarily relates to unwritten law.

Consolidation: This is bringing together the provisions of several statutes to constitute one statute.

- It relates to written law. For example, Companies Act, Cap 4, 86

(b)

(i) The action by police is based on **Criminal Law**.

(ii) In this action, Mwangi will be **accused**.

(iii) Simiyu's action is based on **Civil Law** and Simiyu is referred to as the **Plaintiff**.

Common Law	Equity
<ul style="list-style-type: none"> • This is a branch of the Law of England which was developed by the ancient common law courts from customs, usages and practices of the English people. • Developed as a complete system of law. • Common law act is <u>rem</u> • Developed from customs, usages and practices of the people. • Developed before equity • Common law rights are enforced as of right • Developed on the basis of the writ system and <u>stare decisis</u> • If common law and equity conflict, equity prevails. 	<ul style="list-style-type: none"> • This is a branch of the law of England which was developed by the various Lord Chancellor's courts to supplement the common law. • Was not a complete system. • Equity acts in <u>personam</u> • Developed on the basis of the principal of fairness or justice. • Developed to mitigate the harshness of the common law • Develop additional remedies e.g. injunction, specific performance, tracing etc. • Equitable rights are discretionary • Developed after the common law.

QUESTION TWO

(a)

Advantages of arbitration

- **Cheap** –it costs less to see a case through arbitration
- **Flexibility** –arbitral tribunals are not bound by previous awards or strict rules of procedure.
- **Speed** –it is a faster method of dispute resolution

- **Convenience** –parties are free to determine the venue, language and timing of arbitral proceedings.
- **Informality** –free from legal technicalities which characterize ordinary courts.
- **Privacy** –arbitral proceedings are conducted in private free from undue publicity.

(b) A custom is an embodiment of a principle of utility or justice that has commended itself. A custom may be relied upon as a source of law in the determination of certain civil disputes.

However, not every custom is applicable as law. For a custom to be relied upon as a source of law, it must exhibit certain qualities:

- **Reasonableness:** a good local custom must be reasonable. It must be consistent with the principle of justice.
- **Conformity with written law:** a local custom must be consistent with statute law. This is because parliament is the Supreme Law making body and has authority to render a rule of custom inoperative.
- **Observance as of right:** a good local custom is that which a community has observed openly and as of right, that is to say not by force or by stealth, nor at will.
- **Immemorial antiquity:** the local custom must have been observed since time immemorial. Time immemorial means that no living person can attest as to when the custom did not exist.
- **Civil cases:** a local custom can only be relied upon by a court of law in the resolution of civil disputes.
- **Subject to or affected by:** for a rule of custom to be relied upon as law one or more of the parties must be subject to it or affected by it.
- **Repugnance to justice and morality:** a custom will only be relied upon by a court of law if it is not repugnant to justice and morality.
- **Proof:** the party urging the court to rely on a particular rule of custom must prove by evidence, unless the custom is a matter of public notoriety.

QUESTION THREE

(a)

- The phrase independence of the judiciary means that:
 - There should be a distinct organ of government whose sole responsibility is administration of justice.
 - This organ must be as impartial or unbiased or as disinterested as possible.
 - This organ must administer justice without external interference and without fear or favour.
- The concept of independence of the judiciary is traceable to the doctrine of separation of powers propounded by Montesquieu.
- Independence of judiciary is an integral part of constitutionalism and serves certain purposes:
 - Acts as a check on the other organs of government.
 - Discourages tyranny and injustice
 - Enhances the liberty of man
 - Promotes the rule of law

(b) Characteristics of the public company

- Minimum a seven members but the maximum is unlimited
- Must have at least two directors

- Must obtain a certificate of trading in order to commence business.
- Is obliged to publish accounts
- Share are freely transferable
- Must hold the statutory meeting pursuant to section 130 (1) of the Companies Act.

(c)

- The person adopting must have attained the age of 25 or be at least 21 years older than the adoptee
- Must belong to the same race
- Must have lived with the adoptee for at least three months
- The adoptee must be infant
- The adopter must agree to be under the supervision of an adoption institution.
- The adopter and the adoptee must belong to the same sex.

QUESTION FOUR

(a) These are the rules applicable in the absence of a partnership deed.

- Partners share profit or loss equally
- A partner who incurs loss or liability in the course of the firms business is entitled to indemnity
- A partner who lends money to the firm is entitled to interest at the rate of 6% per annum
- A partner is not entitled to interest on capital before ascertainment of profit
- A person cannot be admitted as a partner without consent of all existing partners
- **Every partner is entitled to take part in the management of the firm's business**
- Differences in ordinary matters are resolved by a majority of the partners
- The firm can only change the nature of its business if all partners agree
- A partner cannot be expelled from the firm unless the power to do so is expressly vested on the partners.
- **Partners have access to the firm's books of account.**
- Partners are not entitled to remuneration for managing the firms business

(b) Under section 39 of the Partnership Act, a court may order the dissolution of a partnership on the following grounds:

- If a partner has become a lunatic or is permanently of unsound mind
- If a partner is continuously guilty of willful breach of the partnership agreement
- **If the firm's business can only be carried on at a loss**
- If a partner is permanently incapable of discharging his obligations as a partner.
- If a partner has conducted himself in a matter prejudicial to the firm and his continued association is likely to bring the firms name into disrepute.
- If it is just and equitable that the partnership be dissolved.

QUESTION FIVE

- This problem is based on exemption or exclusion clauses contracts.
- In this case it is clear that the transaction between Sauti Cleaners Ltd and Nabayi contained an exemption clause.

- It is also apparent that by reason of her poor eye sight Nabayi did not read the notice on the wall or on the back of the ticket given by Sauti Cleaners Ltd. and hence was not aware of the exemption clause.
 - The first question for determination is whether the exemption clause was an integral part the contract between Sauti Cleaners Ltd and Nabayi. The answer to this question is in the affirmative. It therefore follows that Nabayi is bound by the clause as the company had done enough to bring the same to her notice. She cannot therefore sue the company for the garments. However, she contracted a skin disease by reason of the chemical used by the cleaner.
 - My advise to Nabayi is that she has no claim against the company for the garment as the company had effectively exempted itself from liability for such damage and she was bound by the exemption clause.
 - This advice is consistent with the decision in L"Estrange V. Graucob (1934).
 - With regard to the skin disease my advise is that she has an action against Sauti Cleaners Ltd in damages for the suffering. This is because chemicals used by dry cleaning companies must not be harmful to the users of clothing after cleaning.
- (b) The effectiveness of exemption or exclusion clauses in contracts in determined by the following rules:
- The clause must be incorporated in the contract. It must be an integral part of the contract, as was the case in L"Estrange V. Graucob. A belated notice of an exemption clause has not effect as was the case in Olley V. Marlborough Court Ltd. and Lougher V. Kenya Lodges and Hotels Ltd.
 - If the clause is ambiguous, uncertain or vague, it is interpreted contra proferentes, i.e. restrictively against the party relying on it. This rule of construction is referred to as Contra Proferentm.
 - A person can only take advantage of an exemption clause in contract, if it is privy to the contract, i.e. has provided consideration. In Halal Shipping Co. V. Securities BremeAllegementine it was held that the defendant could not rely on the exemption clause as it was not party to the contract.
 - An exemption clause cannot be given effect if to do is a fundamental breach or nables a party escape its fundamental obligation as was the case in Karsales (Harrow) Ltd. V. Wallis.
 - If contractual terms are written, the exemption clause must be part of the written terms and if a party signs the document, it is bound by its terms. This is because signature Prima facie means acceptance.
 - If contractual terms are contained in a document, the document itself must have been part and parcel of the contract.

QUESTION SIX

- (a) Breach of contract entitles the innocent party to a remedy
- Remedies for breach of contract are either common law or equitable. Whereas a common law remedies are enforced as of right, i.e. the plaintiff is entitled to the remedy if a breach of contract or loss are proved, equitable remedies are discretionary i.e. the remedy is generally not available. Its availment depends on the court. The court exercises discretion in determining whether or not to grant the remedy.

The court's discretion is however, not exercises capriciously, it is exercised on the basis of established principles of equity for example:

- Doctrine of laches

- Hardship of the defendant
- Balance of convenience
- Clean hands
- Doctrine of mutuality

Common law remedies

- **Damages:** This is a monetary award by the court intended to compensate the plaintiff for the loss suffered. The plaintiff must prove the loss suffered and the amount awarded may be substantial or nominal. If the plaintiff's loss cannot be traced to the breach, it is said to be too remote and is irrecoverable as was the case in Hadley V. Baxendale.

Equitable remedies

- **Specific performance:** This is a court order which compels a party to perform its part of the contract. It orders the defendant to honour his contractual obligation as previously agreed. It manifests the equitable maxim that equity acts in Personam.
- **Injunction:** This is a court order which either restrains a party from doing or continuing to do a particular thing or compels a party to put right what it has wrongly done. It is either prohibitory or mandatory and is generally awarded in circumstances in which money cannot adequately compensate the person.
- **Tracing:** This is a court order which enables a party to follow and recover money or goods which change hands in certain circumstances for example under a void contract.
- **Rescission:** This is an equitable remedy whose essence is to restore the parties to the position they were before the contract.
- **Appointment of receiver:** This is a remedy available to debenture holders. The receiver may be appointed by the court on application or by the debenture holder in accordance with the terms of the debenture. The receiver protects and manages the security for the benefit of the debenture holder.
- **Winding up:** This is the legal process by which a company's existence is brought to an end, its assets collected, realized, liabilities ascertained and made good and the balance if any, distributed among the members.

(b)

- This problem is based on anticipatory breach of contract.
- In this case it is evident that there was a legally binding agreement between Mike and the employer. The employer's letter to Mike intimating that his services would not be required amounts to a breach of contract in anticipation for which Mike has an actionable claim.
- My advice to Mike is to sue the employer in damages for anticipatory breach as he has clearly intimated his intention not to honour his obligation on the due date.
- My advice is based on the decision in Frost V. Knight.

QUESTION SEVEN

(a)

- This problem is based on exemption clauses as well as the conditions implied in sale of goods contracts.
- In this case, Wheeler Dealer agreed to sell a second hand car to Simiyu at a particular price but at the same time disclaimed liability for the defective brakes and other defects. Simiyu bought the car but did not subject it to any examination and hence the accident.
- It is apparent that Simiyu acquired the car on "as is where is" basis (cave at emptor) and cannot therefore sue Wheeler-Dealer.

- My advise to Simiyu is that he has no action against Wheeler-Dealer as they had disclaimed liability and most important this was a second hand car which means that there was no implied condition that the same shall be of merchantable quality.

My advise is based on the general law of contract and the provision of the Sale of Goods Act.

(b) (i)

- This section means that unless otherwise agreed, delivery of goods and payment of the price are concurrent conditions, which means that the seller must be ready and willing to give possession of the goods to the buyer for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.
- The effect of this section is to underscore the salient obligations of the parties to a sale of goods contract.

(ii)

- Put the goods into a deliverable state.
- Deliver the goods the subject matter of contract
- Pass a good title to the buyer
- Supply goods of the right quantity
- Supply goods of the same quality

Under section 36 of the Sale of Goods Act, the buyer is deemed to have accepted goods if:

- He signifies his acceptance, to the seller or
- He does something in relation to the goods which is in consistent with the ownership of the seller.
- He retains the goods after expiration of the stipulated or reasonable time without signifying his rejection.

QUESTION EIGHT

(a) Principal of insurance

- **Insurable interest:** this is the financial or monetary or pecuniary interest which is at stake or danger if the subject matter is uninsured. It is the interest which a person has in subject matter, which he stands to lose in the event of attachment of risk. A person is deemed to have an insurable interest if he stands to gain by its existence and stands to suffer prejudice in the event of attachment of risk. There must be a direct relationship between the insured and the subject matter and the insured bears any loss arising.
- **Indemnity:** means that when loss occurs it is the duty of the insurer to restore the insured to the position he was before the loss. It means that the insured should be restored to the position he was before the loss. It means that there should be no more and no less than restitutio in integrum. This principle is only applicable to property insurance.
- **Subrogation:** means that after indemnity, the insurer is put into the shoes of the insured. Put in alternative, it means that after indemnity, the insurer becomes entitled to all legal and equitable rights respecting the subject matter previously exercisable by the insured. It is a latent and inherent characteristic of all contract of indemnity. It operates after full indemnity. It facilitates indemnity.
- **Salvage:** this is the recovery by the insurer of the remains of the subject matter after indemnity. It is an integral part of subrogation and facilitates indemnity.

- **Utmost good faith:** this is the principle of non-disclosure or uberrimae fidei. The insurance contract is one of the utmost good faith. Both parties are required to disclose material facts known to them (Carter V. Boehm). The duty of disclosure is voluntary and exists throughout the negotiation period. Failure to disclose renders the contract voidable at the option of the innocent party.
- **Contribution and Apportionment:** This twin principle of insurance is applicable where the insured has taken out more than one policy on the same subject matter and risk with different insurers. If risk attaches the insured can claim from all the insurers simultaneously whereby they share the loss between themselves i.e. apportionment. If the loss is made good by one insurer, he pays more than his lawful share of the loss and is entitled to contribution from the other insurers.
- **Abandonment:** this is the unconditional surrender by the insured of the remains of the subject matter for indemnity in case of partial loss. It entails the giving up of the rest by the insured for indemnity. The insured surrenders all documents of title to the insurer. The insured must notify the insurer of his intention of abandonment and the insurer may accept the same or treat it as partial loss.

(b) **Duties of the Landlord**

- **Put the tenant in possession:** the landlord must handover to the tenant such means as will enable him enter into occupation.
- **Duty of repair:** the landlord is bound to repair the roof, main drains, common passages and installations.
- **Ensure quiet enjoyment:** The landlord must not interfere with the tenant's enjoyment of the premises.
- **Grant Premises fit for purpose:** The landlord must not in such a way as to render the premises unfit for the purpose for which it is given.
- **Not to derogate from the grant**
- **Suspend or adjust rent:** The landlord is obliged to suspend or adjust rent if the premises is damaged by causes other than the tenant's negligence.

NOVEMBER 2009

QUESTION ONE

(a)

- “Statute” means an Act of Parliament or Legislation. This is law made by parliament directly in exercise of the Legislative Power conferred upon it by the constitution, for example The Childrens Act, Agriculture Act.
- It is recognized as a source of Kenya by the Judicature Act.
- **Government Bill:** this is a bill mooted by the government which it introduces to the National Assembly for debate and enactment of law.
- **Private Members Bill:** this is a bill mooted by a member of parliament which he introduces to the National Assembly for passage to law.
- **Public Bill:** this is government or private members bill which seeks to amend or introduce law applicable throughout Kenya.

(b)

- It is recognized as a source of law of Kenya by the constitution and the Kadhis Court Act. Its limitations include:
 - It can only be relied upon in the determination of civil disputes.
 - It is only applicable in the determination of questions of Muslim Law on marriage, divorce, succession and personal statuses.
 - It can only be relied upon in proceedings in which all parties profess Muslim faith.

(c)

- **Ratio decidendi:**
 - Literally means reason for decision.
 - This is a principle or proposition of law based on the material facts of the case.
 - It disposes off the case before the court.
 - It is the binding part in a precedent.
 - It comprises a group of fact situations with those of the instant case as minimum.
- **Obiter dicta:**
 - Literally means by the way.
 - These are by the way statements made by a court in the course of judgement.
 - They do not dispose off the case before the court and are not binding in subsequent similar cases.
 - They reinforce or strengthen the decision of the court.
 - May be relied upon by advocates in subsequent cases as persuasive authority.

(d)

- It is argued that delegated legislation is not as democratic as statute law in that it is not always made by representatives of the people.
- Neither parliament nor courts of law can effectively control delegated legislation.
- It is contended that the rules tend to be very detailed and technical and are therefore difficult to comprehend.
- Delegates often sub-delegate law making powers to other persons which may lead to abuse of power. This compounds the problem of control.

- This source of law receives minimal publicity if any. The rules are to a large extent unknown.

(d)

Under the provisions of the Constitution the president is empowered to:

- Grant pardon to a convicted person either free or subject to lawful condition.
- Grant respite to a person indefinitely or for a specified duration of the execution of punishment imposed by a court of law.
- Substitute a less severe form of punishment for a punishment imposed on a person for an offence.
- Remit the whole or part of a punishment imposed on a person for an offence.
- Remove the whole or part of the disqualification of a person imposed by a court of law under the National Assembly and Presidential Elections Act.

QUESTION TWO

(a)

- A provision which authorizes the owner or any person acting on his behalf to enter upon any premises for purposes of taking possession of goods let under a hire purchase agreement.
- A provision which relieves the owner from liability for such entry.
- A provision which restricts or denies the hirers right to terminate the hire purchase agreement.
- A provision which imposes greater liability upon the hirer for terminating the hire purchase agreement than is imposed by section 12 (1) of the Act.
- A provision to the effect that any person acting on behalf of the owner in relation to the formation or conclusion of the hire purchase agreement is deemed to be the agent of the hirer.
- A provision which relieves the owner from liability for acts or default of any person acting on his behalf in connection with the formation or conclusion of a hire purchase agreement.

(b)

- This problem is based on repossession of goods by the owner in a hire purchase agreement.

In this case Kinyago had paid $\frac{2}{3}$ of the hire purchase price but Malipo Rahisi Ltd repossessed the goods.

- The fundamental question is whether Malipo Rahisi Ltd was entitled to reposses the goods **on account of Kinyago"s default.**
- The answer is in the negative as Kinyago has already paid $\frac{2}{3}$ of the hire purchase price.
- The repossession of the goods by the company is in contravention of the provisions of the Hire Purchase Act, which provide inter alia that in such a case, the goods cannot be repossessed otherwise than by court action.
- In this case the contravention of the provisions of the Act attract certain consequences:
 - The hire purchase agreement is terminated.
 - The hirer is discharged from all liability under the agreement.
 - Kinyago is entitled to recover by action all sums paid under the agreement or under any security given.
 - The guarantor is entitled to recover by action from Malipo Rahisi Ltd, all sums paid under the contract of guarantee or under any security given.

(c)

- This maxim literally means that “delegates must not delegate.” This maxim does not apply where
 - The sub-delegation is authorized by the contract between the parties.
 - It is authorized by law.
 - It is effected with the principals knowledge.
 - It is authorized by trade usage or custom.
 - It is reasonably necessary for performance.
 - In cases of emergency.

QUESTION THREE

(a)

- Performance of the undertaking. Completion of the undertaking.
- Lapse of time-if the duration is fixed.
- At will: - a partner notifies the others of his intention to have the firm dissolved.
- Mutual consent. If all partners agree.
- Death of a partner. Unless the partnership deed otherwise provides.
- Bankruptcy of a partner. Unless the partnership deed otherwise provides.
- Illegality: if the firms business becomes illegal by reason of change of law.
- Charging of a partners by a court order for a private debt.

(b)

- A partner may not engage in a competing business without the consent of other partners.
- A partner who makes a secret profit without the consent of the other partners must account to the firm.
- A partner who has a personal interest in a contract made by the firm is bound to disclose the same to the other partners.
- A partner can only be expelled from the firm in good faith.

(c)

- This problem is based on the principle of utmost good faith in partnerships.
- Each partner is entitled to utmost fairness from the partners.
- The principle of utmost good faith manifests itself in partnerships in various ways for example a partner may not engage in a competing business without the consent of other partners.
- In this case Becky opened a new shop without Beth"s consent which is contrary to the principle of utmost good faith.
- Since Becky has refused to observe utmost fairness, Beth is entitled to sue for an account of all the profits obtained by Becky from the other business.
- Thereafter, Beth can apply to the court for the partnership to be wound up on the ground that it is just and equitable.

QUESTION FOUR

(a)

Mistakes of fact which affect the validity of a contract are referred to as operative mistakes. The law recognizes various types of operative mistakes for example:

- **Common or shared mistake:** this is a mistake as to the existence or ownership of the subject matter. Both parties make the same mistake. Each party appreciates the others

intention and accepts the same, but both are mistaken about an underlying fundamental fact. Common mistake renders a contract void in two circumstances.

- **Cases of res extincta:** the subject matter does not exist. This scenario is embodied in section 8 of the Sale of Goods Act, Cap 31. It is illustrated by inter alia the decision in Couturier V. Hastie.
- **Cases of res sua:** the subject matter belongs to the party purporting to purchase the same (Bingham V. Bingham).
- **Mutual Mistake:** this is a mistake as to the subject matter. The parties are at cross purposes or misunderstand each other. There is no agreement between them for want of Consensus ad idem. The purported agreement is void. The decision in Raffles V. Wichelhouse illustrates this principle.
- **Unilateral mistake:** this is a mistake as to the identity of the other party to the contract. It arises in circumstances in which a fraudulent person misrepresents his identity so as to obtain goods on credit or other favourable terms which he promptly sells to an unsuspecting third party or a bonafide purchaser. The dispute is ordinarily between the original seller and the bonafide purchaser. The goods or their value are recoverable if the original seller demonstrates that the contract between him and the fraudulent person was void for unilateral mistake. It must be evident that:
 - The seller dealt with a person other than the person intended.
 - The person dealt with was aware of this fact.
 - The identity of the person the seller intended to deal with was fundamental to the contract.

The decision in Cundy V. Lindsay and Co. exemplifies this type of mistake.
- **Mistakenly signed documents:** this is a mistake as to the nature of the contract i.e. signing the wrong contract. Such a mistake renders the contract voidable at the option of the innocent party.
- **Mistake as to quality of subject matter:** such a mistake renders the contract voidable at the option of the innocent party.

(b)

- This is the legal ability of a party to enter into a contractual relationship.
- Not every person has capacity to enter into any contractual relationship.
- A contract entered into by a person with no capacity to contract is unenforceable, for example an infant has no capacity to enter into money borrowing transactions. A registered company has no capacity to enter into transactions beyond the objects prescribed by the memorandum of association. A person of unsound mind has no capacity to contract.

(c)

- This problem is based on acceptance of offers by the offeree. In this case Inspector Sniff made the offer to any one who volunteered the requisite information.
- It is clear that Ole dume gave the information while unaware of the reward, which means that he was not actually accepting the offer as he gave information for a different reason.
- My advise to Ole dume is that he cannot successfully claim the reward. This is because one of the Cardinal Principles of acceptance is that the offeree must have been aware of and intended to accept the offer i.e. Ole dume must have been aware of the reward and given the information so as to claim it.
- In this case there is no Consensus ad idem between Inspector Sniff and Ole dume.
- My advise is based on the decision in Crown V. Clark whose facts were substantially similar.

QUESTION FIVE

(a)

- Partition of the property concerned by mutual consent.
- Transfer to a third party.
- Union in sole tenant i.e. becomes vested in one person.
- Severance i.e. conversion of a joint tenancy to a tenancy in common.

(b)

- There must be a dominant and servient tenement.
- The easement must accommodate the dominant tenement.
- The dominant and servient tenements must be owned or occupied by different persons.
- The easement must be capable of forming the subject matter of the grant e.g. there must be a capable grantor or grantee.

(c)

This problem is based on the ways in which the landlord or lessor may terminate a lease:

- **Lapse of time:** wait for effluxion of the duration prescribed.
- **Forfeiture:** Wamalwa is entitled to re-enter the premises to determine the lease prematurely by reason of Karanja's breach.

QUESTION SIX

(a) (i)

- This is the rule of strict liability or liability without fault.
- The principle in this rule is that a person who for his own purpose brings on his land and collects and keeps there anything likely to do mischief if it escapes does so at his peril and is prima facie answerable for all the damage which is the natural consequence of its escape.
- This principle was formulated in Rylands V. Fletcher where an employer was held liable for the negligence of an independent contractor.
- For this rule to apply, certain conditions are necessary:
 - Non-natural user of land
 - Bringing, collecting and keeping things.
 - Things must be capable of causing mischief if they escape.
 - Things must have escaped.
 - Interference with the plaintiffs use of his land.

(ii)

- **Statutory authority:** this is a complete defence if the accumulation of the thing was statutorily sanctioned.
- **Plaintiffs Consent or benefit:** the plaintiff cannot complain of the escape if he benefits from the accumulation or expressly or implied consented to it.
- **Contributory negligence:** this defence is available to the defendant if the plaintiff contributed to the escape. Its effect is to reduce the amount payable as damages.
- **Strangers or third parties:** the defendant is not liable if the escape was occasioned by an unforeseen act of a stranger.
- **Act of God:** this defence may be relied upon if the escape is wholly attributable to natural causes. The circumstances must be such that human foresight could not have recognized the escape as a possibility.

(b)

- The legal principle applicable in this case is whether an occupier owes a common duty of care to a trespasser.
- Under the Provisions of the Occupiers Liability Act, Cap 34, an occupier owes all invitees a common duty of care to ensure that they are reasonably safe in using the premises for purposes for which they are invited or permitted to be there.
- Under the Provisions of the Occupiers Liability Act, an occupier owes no common duty of care to trespassers. However, the occupier must not injure the trespasser.
- In this case, it is evident that Jambazi is a thief and that's why he sneaked into Cassman Greens compound. He is for all purposes a trespasser.
- My advise to Jambazi is that he has no actionable claim against Cassman Green for the injuries as Cassman Green owes him no common duty of care. He has no one to blame. My advise is consistent with the provisions of the Occupiers Liability Act.

QUESTION SEVEN

(a)

- **Another will or codicil:** this will or codicil must manifest the testators intention to revoke the previous will or codicil.
- **Destruction:** this is the burning, leaving or otherwise destroying the will. The destruction must be coupled with an intention to revoke the will. (Cheese V. Lovejoy)
- **Marriage:** the subsequent marriage of a testator revokes any will made, unless the will is made in contemplation of the particular marriage.

(b)

- The donor must have contemplating death either by reason or a present illness or present or imminent danger.
- The donor must have given the beneficiary a movable asset including a debt, otherwise disposable by will.
- There must have been delivery to the beneficiary, the property or documents of title.
- The circumstances must show that gift was intended to revert to the donor should he survive the illness or danger.
- The beneficiary must survive the donor.
- The donor must not survive the illness or danger.

(c)

- This problem is based on the validity of oral wills. It is clear that Anne made an oral will by which she bequeathed all her property to her mother who died in a road accident on her way home from hospital and Ann later learnt of the death.
- Since Anne is still alive and has capacity to make another will to revoke the former she is entitled to do so. In any event the intended beneficiary is dead.
- My advice to Ann is that she is legally entitled to make another will bequeathing her property to another person.

QUESTION EIGHT

(a)

- **Take delivery:** the bailee is duty bound to take delivery of the goods the subject matter of the contract.
- **Reasonable care:** the bailee is obliged to take reasonable care of the goods. He is not liable for ordinary wear and tear.

- **Ordinary manner:** the bailee must deal with the goods for the particular purpose for which the goods are bailed.
- **Insurance:** it is the duty of the bailee to insure the goods for the duration they are in his custody.
- **Return the goods:** the bailee must return the goods to the bailor as soon as the purpose for which they were bailed is accomplished.

(b)

- If the agent has exercised his authority in full.
- If the agent has incurred personal liability.
- If the agent's authority is coupled with interest.

(c)

- This problem is based on the liability of the principal for transactions entered into by the agent.
- As a general rule the principal is liable on contracts entered into by the agent within the scope of his authority.
- In this case it is implicit that Emmah had previously collected monies from Mrs. Cool having dealt with her on behalf of Mrs. Mutua. Hence she had authority to accept payment on behalf of Mrs. Mutua.
- Since Mrs. Mutua did not notify Mrs. Cool of the dismissal of Emmah as an agent, Mrs. Cool was discharged on payment to Emmah.

Mrs. Mutua has no actionable claim against Mrs. Cool as payment to the agent discharges the 3rd party if the agent has authority to accept payment.

MAY 2010 SUGGESTED SOLUTIONS

QUESTION ONE

(a) (i) Reasons for delegated legislation

- **Lack of parliamentary time:** parliament has insufficient time to legislate on all matters bethey national or otherwise. By delegating some of its law-making authority, parliament can save time to solve much more pressing problems.
- **Speed the procedure** of law making in parliament is slow and parliament is not always in session to cope with any emergency or urgent problem that may arise. The alternative to dealing with such a situation is to delegate some powers to a competent authority.
- **Technicality of subject matter:** sometimes the proposed legislation is so technical innature that it demands an expert to handle it. Since parliament is essentially a general body, rather than a body of experts, such legislation can best be dealt with by a minister assisted by experts in the area of the proposed legislation.
- **Flexibility:** Law making by parliament is field to rigid provisions of the constitution and the National Assembly Standing Orders, and if a situation arise which necessitates the immediate repeal or amendment of an Act, it has to be effected through this procedure.

A quicker way would be to have the ministerial rule or regulation in question withdrawn or amended by the minister who issued it.

(b)

- Criminal and civil law

Criminal law: this is the law of crimes or offences. A crime is often defined as an act or omission, committed or omitted in violation of public law.

It is a contravention of state law and suspects are generally arrested and prosecuted by the state.

Civil law: this is law concerned with rights, duties and powers of parties in ordinary transactions and include Law of Contract, Law of Torts, Law of Marriage, Law of succession, Law of Property.

- A person whose rights have been violated is said to have a cause of action i.e. reason to sue, for example breach of contract, negligence, defamation battery, assault, conversion.
 - The innocent party institutes proceedings against the alleged wrongdoer and prosecutes the same.
- Substantive and Procedural law

Substantive law: consists of the rules themselves as opposed to the procedure on how to apply them.

- It is concerned with the rights and duties of parties and provides remedies, for example law of contract, law of torts, law of succession. It defines offences and prescribes punishment for example penal code.

Procedural law : consists of the steps or guiding principles or rules of practice to be complied with in the application of substantive law.

It is often referred to as adjectival law.

It is the hand maiden of substantive law. Examples include Criminal Procedure Code Cap 75, Civil Procedure Act, Cap 21.

- National and International Law

National law: this is municipal or state law and consists of all rules of law operational within the boundaries of a given country. It generally regulates relation between citizens and the state and citizens inter se. It originates from acts of parliament as well as customary and religious practices of the people.

International law: this is a body of rules which regulates the relation between states or countries and other international persons for example the United Nations. International law is based on international agreements or conventions or treaties and customary practices of states.

QUESTION TWO

(a) Court of Appeal

Composition

Judges of this court are referred to as “judges of appeal” and are the Chief Justice and such other number not less than 2 as may be prescribed by the parliament. Currently the number is 8.

Jurisdiction

It is primarily an appellate court with jurisdiction to hear criminal and civil appeals from the High Court, however, it exercises limited original jurisdiction in that it has jurisdiction to stay the execution of an order of the high court pending on appeal and can punish contempt of court.

In addition it has jurisdiction to:

- Receive additional evidence
- Decide a case with finality
- To frame issues for the determination of another court.
- To order a retrial.

Decisions of the Court of Appeal are final and bind those of other courts in similar cases.

(ii) Repeated question 2 (b) Nov. 1999 replaced with a new question

What is the composition and powers of the Kadhis court

Composition

The court is duly constituted when held by the chief kadhis or a kadhi duly appointed by the judicial service commission.

Jurisdiction

It exercises original jurisdiction in civil cases only. Under section 66(5) of the constitution and section 5 (1) of the Kadhi court Act, its jurisdiction is limited to the determination of questions of Muslim law on marriage, divorce, succession, and personal status in proceedings in which all parties profess Muslim faith.

However, the court has no exclusive jurisdiction to hear such cases. Other courts have jurisdiction. The evidence applicable is governed by Islamic law all witnesses must be heard without discrimination. A decision of the court may be appealed against in the High Court.

- i) **High Court:** Only the high court has jurisdiction to hear a murder trial.
- ii) **Kadhis Court**

High Court**Resident Magistrates Court****District Magistrates Court.** These courts have jurisdiction to hear the case.iii) **High Court**

Appeals from the chief magistrate court can only be heard by the high court.

QUESTION THREE

(a) (i)

- Unless otherwise agreed, the place of delivery is the sellers place of business if any, if not, his residence.
- If specific goods, the subject matter of the contract are in some other place known to the parties, that other place is the place of delivery.
- If the goods are in the hands of a third party, delivery is complete when the third party acknowledges to the buyer that he holds the goods on his behalf.
- If the seller is bound to transmit the goods to the buyer, he must do so within the stipulated or reasonable time.
- Unless otherwise agreed, the cost of and incidental to putting the goods into a deliverable state is borne by the seller.

(ii) Under the provisions of the Sale of Goods Act, the unpaid sellers lien is exercisable if:

- If the buyer becomes insolvent
- If the goods have not been sold on credit
- If the goods have been sold on credit but the term of credit has expired

(b)

- This problem is based on sale of goods by auction in lots
- Ndolo bid for the goods in the mistaken belief that he bidding for all lots and the hammer fell. The auctioneer reserved only one lot for him.
- My advise to Ndolo is that he has no actionable claim against Fagia Auctioneers Ltd. This is because the auctioneers have acted in accordance with the law. Under the provisions of the Sale of Goods Act where goods are put up for sale by auction in lots, each lot is prima facie deemed to be the subject of a separate contract of sale.
- My advise is based on the provisions of the Sale of Goods Act.

QUESTION FOUR

(a)

- If the principal does not exist or has no capacity.
- If he expressly or impliedly personal liability. The third party may when contracting with an agent, create a condition that the agent should be personally liable on the contract, and if the agent agrees he will be personally liable for any breach of contract.
- If the custom of that particular trade makes him liable as in the case of del credere agent.
- If he signs a negotiable instrument in his own name without making clear, on the face of the document that he is signing as an agent.
- If he executes a deed in his own name, or while purporting to act as an agent when he is actually acting on his own behalf, or if there is no principal in existence.
- If the agent acts for a concealed principal, if he so desires. A concealed of the principal use the principal if he desires. A concealed principal is one whose existence or identity is not

disclosed by the agent at the time of entering into a contract. In this case, the third party and the agent become liable to each other on the contract.

- If the agent had exceeded his authority.

(b)

- This problem is based on the liability of the principal in an agency of necessity.
- In this case it is apparent that Kariuki was Raju's agent for the purpose of transporting the fish to Nairobi. It is also evident that the heavy rain created an emergency and it was impossible for him to seek instructions from Raju, he had to act in good faith as owner thereof.
- In the circumstances of the case, Kariuki became an agent of necessity and acted bona fide to safe guard the fish. Raju is therefore bound to reimburse Kariuki the flight charges.
- My advise to Kariuki is to sue Raju fro the charges, as he had presumed authority to incur the same.
- My advise is based on the decision in Great Northern Railway Co V. Swaffield.

QUESTION FIVE

(a)

- **Offer**

An offer has been defined as unequivocal manifestation by a party of its intention to contract with another party. It is clear intimation of intention to contract. The party that manifests the intention to contract is the offeror and the party to whom it is made is the offeree. An offer must be clear and definite and must be communicated to the offeree. May be general or specific (Carlills case).

- **Acceptance**

This is the external manifestation of assent by the offeree. It may be express or implied from the conduct of the offeree. In strict legal sense acceptance takes place when the offeree mentally accepts the offer as that is when the minds for the parties meet. Acceptance of an offer creates an agreement between the parties.

- **Capacity**

This is the legal ability of a party to enter into a contractual relationship. As a general rule, every person has capacity to enter into any contract. However, the law of contracts restricts or limits the contractual capacity of certain categories of persons such as infants or minors, drunken persons, persons of unsound mind, corporation and undischarged bankruptes.

- **Intention**

An agreement must be characterized by an intention in the part of the parties to create a contract. Both parties must have intended to create a legally binding agreement. This is because an agreement is unenforceable unless the parties to it so intended hence intention is one of the elements of a contract. Whether or not parties intended to create a legally binding agreement is a question of fact.

- **Legality**

The purpose for which an agreement is entered into must be lawful. A contract to promote an unlawful purpose is unenforceable.

- **Consideration**

At common law, a simple contract is unenforceable unless supported by some consideration. Consideration is one of the basic elements of a contract. It is the bargain element of the contract. It is nothing but mutuality. It is an act or promise offered by one party and accepted by the other as the price for that others promise.

(b)

- This problem is based on contracts prejudicial to the status of marriage.
- In this case the contract between Jackson and Jacinta under which Jackson was supposed to introduce Jacinta to Tajiri at a fee of Kshs 10,000, is a marriage brokerage contract and is void for being contrary to public policy.
- Secondly the promise by Tajiri to Marry Jacinta should his wife die is unenforceable as it is void for being prejudicial to the status of marriage.
- My advice to Jacinta is that she has no actionable claim against Jackson or Tajiri as the contracts between her and them are unenforceable as they are contrary to public policy.
- My advise is based on Wilson V. Cartiley (1908) where the defendant, a married man promised to marry the plaintiff after the death of his wife who was then ill. The plaintiff was at all material times aware that the defendant was married. It was held that the contract was void and hence unenforceable as it was contrary to public policy.

QUESTION SIX

(a)

- **Discharge by agreement**

A contract is discharged by agreement when the parties thereto agree to discharge it. It is justified on the premise that whatever is created by agreement may be extinguished by agreement. Discharge by agreement may be bilateral or unilateral.

- **Discharge of performance**

A contract is discharged by performance when both parties dutifully perform their obligations. Each party has performed its promise. At common law, discharge by performance was only possible if parties performed their obligations precisely and exactly. Contractual terms had to be observed to the letter. This is the common law doctrine of “precise and exact.” (Cutter V. Powell).

- **Discharge by impossibility or doctrine of frustration**

A contract is said to be frustrated when performance of the contractual obligations is rendered impossible, illegal and commercially useless by reason of extraneous and unforeseen factors for which neither party is to blame. The parties are discharge from performance. A contract may be frustrated by destruction of subject matter, non-occurrence of an event, illegality, state intervention, death and permanent incapacitation. When contract is frustrated, it is terminated.

- **Discharge of breach**

Breaching of contract does not discharge it. It only entitles the innocent party to treat the contract either as repudiated or subsisting. If it treats it as repudiated, it is not bound to perform its part. However, if it treats it as subsisting, it is bound to perform its part. It can only treat the contract as repudiated. If the term breached is fundamental. Breach of contract may be anticipatory breach or actual breach.

- **Merger**

If the terms of an oral contract are incorporated in a subsequent written agreement between the parties, the oral contract is terminated by operation of law as it has been swallowed up by the latter.

- **Lapse of time**

If parties to a contract specify the duration of their relationship, the contract terminates on expiration of the duration, for example indemnity contracts of insurance last for one year.

(b)

- This problem is based on frustration of contract.
- It is apparent that the destruction of the car by fire frustrated the contract between Mary and Janet and thereby discharged the parties as neither of them was blameworthy. However, the deposit of Kshs. 100,000 paid by Mary is recoverable.
- My advise to Janet is that there is no cause of alarm as there is no breach of contract. However, Mary is entitled to the Kshs. 100,000 deposit. Janet must refund the same.
- My advise is based on the provisions of the Law Reform (frustrated contracts) Act 1943 which deal with the adjustment of rights of parties when a contract is frustrated. Under the Act, when a contract is frustrated any money paid is recoverable.

QUESTION SEVEN

- **Blank endorsement**

This is an endorsement which does not specify the person to whom or to whose order the bill is payable. It's effect is to convert the order bill into a bearer bill.

- **Special endorsement**

This is an endorsement which specifies the person to whom or to whose order, the bill is payable.

- **Restrictive endorsement**

This is an endorsement which prohibits further negotiation of the bill e.g a bill endorsed "pay x only". This gives the right to the endorse to claim payment on the bill but prohibits him from transferring the right of payment to anyone else.

- **Conditional endorsement**

This is an endorsement by which the endorser makes the payment of the bill subject to a condition or conditions or limits or exempts himself from liability if the bill is not honoured.

(b)

- (α) This problem is based on the obligations of the banker and the customer.
- (β) Whereas the banker is bound to exercise the standard of care and skill of a reasonably competent and careful banker, the customer is bound to notify the banker of any irregularities affecting his account promptly.
- (γ) In this case there was a banker and customer relationship between Alex and Pesa Bank and each owed the other the respective duties.
- (δ) It is evident that there had been three unauthorized withdrawals from Alex's account through the forging of his signature by Charles but the facts do not indicate how long Alex's cheque book has remained stolen as this would determine whether the bank is liable. Alex does not appear to have reported the loss of his cheque book to the bank having broken his duty to the banker he cannot argue that the bank is liable to reimburse him.
- (ε) However, granted that Alex had not discovered the loss of his chequebook, then the bank is liable to credit his account with the total sum withdrawn by Charles, as it was presumed to know Alex's signature.
- (φ) It therefore follows that the legal position of Pesa Bank depends on:
 The duration between loss of the cheque and notice of the unauthorized withdrawal to the bank.
 Whether Alex had discovered the loss of cheque book.

QUESTION EIGHT

(a)

- To accept and carry goods of any person on payment of the reasonable charges of hire, provided there is room in his vehicle. But he is not bound to transport such goods as he does not profess to carry or those exposing him to extraordinary risk.
- To carry goods in his customary manner without unnecessary delay or deviation. If the goods face unavoidable deterioration in the course of transit, he can act as an agent of necessity in disposing of them at the best available market place.
- To deliver the goods on the completion of the transit to the consignee within a reasonable time. Where he causes unnecessary delay, he may be liable to pay damages unless the delay is inevitable due to some unforeseen circumstances.
- To deliver the goods to the right person at the right place. If a carrier delivers goods to the wrong person, he will be liable in case he departed from the ordinary course of business practices.
- A common carrier like the hotel proprietor, is an insurer of goods accepted by him for onward journey and is liable to make good all loss or damage whether caused by his negligence or not. The rule, however, is subjected to the following exceptions.
 - He is not liable if the loss or damage is due to an act of God.
 - He is not liable from any loss or damage caused by the enemies of Kenya with which the country is at war.
 - He is not liable for loss which arises from inherent defects in the goods carried.
 - He is not liable for loss caused directly through negligence of the consignor for example through defective or improper packaging.

(b) **Double insurance**

This is a situation where an insured takes out more than one policy on the same subject matter and risk with different insurers but where the total sums insured exceeds the value of the subject matter.

- The subject matter is said to be double insured by over insurance. If a subject matter is double insured, it is ordinarily underinsured.

The only advantage of this type of insurance is that if one of the insurers is insolvent when risk attaches the insured can enforce his claim against the solvent insurer.

(c)

- The nature and amount of the deceased property
- Any past, present or future, capital or income from any source of the dependant.
- The existing and future means and needs of the dependant
- Whether the deceased had made any advanced or gift to the dependant
- The conduct of the defendant in relation to the deceased.
- The situation and circumstances of other dependants any beneficiaries of the will if any.
- The general circumstances of the case including so far as ascertainable the reasons for not providing for the dependant.

NOVEMBER 2010– SUGGESTED SOLUTIONS

QUESTION ONE

(a)

- This exposition of the term law captures its essential ingredients, namely that it is a body of rules for the guidance of human conduct and is enforceable.
- Law is an aggregate or conglomeration of rules enforced by courts of law.
- According to Salmond, law consists of a body of principles recognised and applied by the state in the administration of justice.
- It is generally true to assert that law regulate human conduct. It has been defined as a set of binding rules of human conduct, prescribed by human beings for the obedience of human beings.
- However, whereas law may be imposed on the citizens, this is not always the case. Law may be a product of the people. But Marxist postulate the theory that law serves the interests of the dominant classes in society. According to Austin, law consist of commands of a superior who has power to impose sanctions for compliance. Law has also been defined as a coercive instrument for regulating social behaviour. Arguably, law may be imposed on the citizenry.
- The assertion that law is enforceable is true and correct as this distinguishes rules of law from other norms.
- In our view, this statement is a general description of the term law.

(b)

- **Reasonableness:** a good local custom must be reasonable i.e. consistent with the principle of justice.
- **Conformity with statute law:** a local custom must be consistent with statute law. This is because parliament is the supreme law making body, hence its law is superior.
- **Observance as of right:** a good local custom must have been observed openly and as of right i.e. not by force or by stealth nor at will.
- **Immemorial antiquity:** a local custom must have been observed since time immemorial. Time immemorial means no living person can attest as to when the custom did not exist.

(c)

- **Democratic in nature:** parliamentary law making is the most democratic approach to legislation. This is because parliament is composed of representative of the people. Arguably therefore, statute law is a manifestation of the wishes of the people.
- **Uniformity:** statute law applies indiscriminately, it regulates the conduct of all persons irrespective of their racial, religious or political background.
- **Dynamic:** statute law enable the society to keep pace with changes in other fields for example, economic, social or political. By enacting statutes, parliament provides the necessary regulation framework.
- **Resolution of legal problem:** statute law enable society resolve legal problems as and when they arise by enacting new statutes or amending those in existence. Parliament does this when the legal problem manifests itself.
- **General application:** statute law consists of general principles applicable at different times and circumstances.
- **Publicity:** compare to other sources of law, statute law is the most widely published. It is published in Kenya gazette as Bill and as Law. It also attracts media attention.

QUESTION TWO

(a)

- Defamation is the publication of a statement, which reflects on a persons reputation and tends to lower him in the estimation of right thinking members of society generally, and tend to make them shun or avoid him.
- It has also been defined as a statement calculated to injure the reputation of another person by exposing him to hatred, contempt or ridicule.
- This tort protects a persons reputation from unlawful interference. Every person has a reputation.
- Defamation is either; libel or slader.
 - **Libel**; this is a defamatory representation in some permanent form for example publication in a newspaper, pictorial illustration, sign. Libel is actionable per se i.e. the plaintiff need not prove loss or damage. It is both crime and a tort.
 - **Slander**; this is defamation by spoken word or gestures. It is transcient or temporal in character. It is a mere tort. It is generally not actionable per se. Loss or damage must be proved. However, slander is actionable per se in the following circumstances:
 - Imputation of crime; plaintiff has committed a criminal offence.
 - Imputation of disease. To impute that one is suffering from an infectious disease.
 - Imputation of unchastity. To impute that a woman is unchaste or has committed adultery.
 - Imputation of unfitness or incompetence;

(b) The meaning of the word privilege is that a person stands in such a relation to the fact of the case that he is justified in saying or writing what would otherwise be slanderous or libelous.

Privilege may be absolute and qualified. In case of absolute privilege, every communication irrespective of its being false or malicious is protected. In the case of qualified privilege, a person is entitled to communicate a defamatory representation.

Occasions of absolute privilege include;

- Statement made in parliament by a member
- Statements in parliamentary papers published by the order of parliament. • Statements made in court in the course of judicial proceedings.
- Statements by an offices of state in the course of official duty even if related to commercial matters.
- Statements made in professional communications between advocate or client. • Communication between husband and wife.

(c) For the defence of fair comment to be sustainable it must be evident that: • The matter commented was one of public interest.

- The statement was an opinion not as assertion of fact. • The opinion is based on facts.
- The statement was not maliciously made.

QUESTION THREE

(a)

- **Right to sell:** under sec 14 (a) of the Act, it is implied that the seller shall have the right to sell the goods when property is to pass.
- **Sale by description:** under sec 15 of the Act, in a sale by description there is an implied condition that the goods shall correspond to the description and if by description and the sample the bulk shall correspond with the sample and description
- **Fitness for purpose:** Under section 16 of the Act, if the buyer makes known to the seller the particular purpose for which the goods are required so that he relies on the seller's skill and judgement, there is an implied condition that the goods shall be reasonably fit for that purpose.
- **Merchantable quality;** under sec 16 (b) of the Act, if goods are bought by description from a person who deals in such goods, there is an implied condition that the goods shall be of merchantable quality.
- **Sale by sample;** Under section 17 of the Act, in a sale by sample there is an implied condition that:
 - The bulk shall correspond to the sample in quality
 - The buyer shall be afforded a reasonable opportunity to compare the bulk and the sample.
 - The goods shall be free from any defect rendering them unmerchantable.
- **Trade Usage or custom:** under section 16 (c) of the Act, a condition may be implied by trade usage or custom.

(b)

- **Estoppel:** Where the true owner holds out another person as owner and third parties rely on the representation to their detriment.
- **Sale by factor or Mercantile agent:** Such a sale passes a good title.
- **Resale by seller in possession:** this exception is embodied in section 26 (1).
- **Sale by buyer in possession:** this exception is contained in section 26 (2) of the Act.
- **Sale under voidable title:** a seller with a voidable title sells before his title is voidable.
- **Sale under statutory power:** a sale made in exercise of a statutory power.
- **Sale under common law power:** a sale made in exercise of a common law power.
- **Sale by court order:** a sale made pursuant to an order of a court of competent jurisdiction.
- **Sale in market overt:** this is an open, public and legally constituted market.

(c)

- This problem is based on sale of goods by sample.
- Under the provisions of the Sale of Goods Act, in a sale by sample, there is an implied condition that the bulk shall correspond with the sample in quality and that the buyer shall be afforded a reasonable opportunity to compare the bulk with the sample.
- In this case Ben paid for the goods before he had an opportunity to examine them. But on examination the bulk did not correspond with the sample.
- The legal position is that Ben is entitled to reject the goods as Sally has breached the implied condition that the bulk shall correspond with the sample in quality.
- Ben is therefore entitled to recover the amount paid to Sally.

QUESTION FOUR

(a)

Pledge	Mortgage
<ul style="list-style-type: none"> • This is a pawn • It is the delivery of goods by a debtor to a creditor as a security for the amount borrowed or advanced to the debtor. • Its salient feature is delivery of possession. • The creditor acquires possession while the debtor retains ownership 	<ul style="list-style-type: none"> • Mortgage is the conveyance of land or assignment of a chattel as security for the payment of debt or the discharge of some other obligation for which it is given. • Mortgage involves the use of land as security for a loan. • There is conveyance of the land to the mortgagee. • The mortgagor's right of redemption is a critical component of a mortgage.

(b) Characteristic of a pledge;

- There is delivery of possession from the Pawnor to the Pawnee.
- The right of ownership in the goods pledged as a security remains in the pawnor.
- A pledge is redeemable within six months, with seven days of grace added.
- If the pledge is destroyed by fire, the pawn broker is bound to pay the value of the pledge after deducting the amount of the loan and interest.

(c)

- The pawnor is entitled to redeem the goods pawned within the stipulated time or if no time is fixed, within a reasonable time after demand for payment has been made.
- If the pawnor does not redeem, the pawnbroker has a right to sell the articles pawned. However, any excess obtained by sale must be handed over to the pawnor.
- Every pledge is redeemable within 6 months, with seven days of grace added.
- After this period, pledges pawned for sixty shillings or less become the property of the pawnbroker.
- A pawn is generally redeemable by payment of the amount due to the Pawnee.

(d)

- **Fore closure:** this is a court order which extinguishes the borrower's equitable right to redeem the property. The interest of the borrower in the property is vested in mortgagee.
- **Statutory power of sale:** this is the right of the mortgagee to sell the security. This power arises as soon as the legal date for redemption has passed. However, the following conditions must be satisfied:
 - A three months notice must have been served on the mortgagor requiring payment of the outstanding loan and such notice has expired, or
 - Interest on the loan is in arrears for two months, or more
 - There has been a breach of some other covenant in the mortgage.
- **Possession of security:** this power is rarely exercised because of the rule in White v. City of London Brewery (1889) that a mortgagee who takes possession must account to the mortgagor for any loss to property caused by his default.

- **Suit on Personal Covenant:** this is the right of the mortgagee to sue the mortgagor for the amount due. The right is generally exercisable if the mortgagor has executed a personal covenant to repay.
- **Consolidation:** this is the equitable right of a mortgagee in whom several mortgages are vested to insist that all the mortgages be redeemed at the same time. However certain conditions must be fulfilled.
- **Appointment of receiver:** a receiver is treated as an agent of the mortgagor who becomes vicariously liable for his default. It is therefore advisable for the mortgagee to appoint a receiver than take possession himself. As his name suggests, the receiver is appointed to receive all the income from the land to repay the loan after paying rates, taxes prior claims and his own commission. Any balance is payable to the mortgagor.

QUESTION FIVE

(a)

- **Ambulatory:** a will is said to be ambulatory in that it only speaks after death. It distributes a person's property in death.
- **Revocability:** a will is revocable by the testator at any time when he has capacity to make it.
- **Capacity:** for a will to be legally valid the testator must have had the requisite capacity. Thus, not every person can make a will.
- **Formalities:** the validity of an oral or written will is dependent upon compliance with the formalities prescribed by law.

(b) Under section 8 of the act, a will may be made either orally or in writing.

The validity of an oral will is dictated by two factors:

- The declaration must be made before two or more competent witnesses.
- The testator's death must occur within three months of the declaration.

However, an oral will made by a member of the armed forces or merchant marine during a period of active service remain valid after three months provided death occurs during the same period of active service.

Formalities of a written will

- **Writing:** there must be some writing. The law does not prescribe any form. It may be handwritten, typed or printed. The law does not prescribe the wording of a will.
- **Signature or mark:** it must contain the signature or mark of the testator or some other person who signs in the presence of and in accordance with the directions of the testator.
- **Position of signature:** the signature or mark must be placed as to show that it was intended to give effect to the writing as a will.
- **Attestation:** the will must be attested to by two or more competent witnesses. The law does not insist on any form of attestation.
- **Presence of witnesses:** all witnesses must sign the will in the presence of the testator. However, they need not be present at the same time.

(c)

- **Another will or codicil:** under sec 18 (1) of the Law of Succession Act, the will or codicil revoking the earlier will must declare intention to revoke it.

- **Destruction:** under sec 18 (1) of the Act a will is revocable by burning, tearing or otherwise destroying it with an intention to revoke it. Such destruction may be by the testator or some other person acting in accordance with the directions of the testator. A person can only revoke a will by destruction, if he has capacity to make it.
- **Marriage** –Under section 19 of the Act, the marriage of the testator revokes the will unless the will is made with contemplation of a marriage with a specific person. Such a marriage does not revoke the will.

(d) Duties of the personal representative

- To pay out of the deceased estate reasonable funeral expenses.
- To collect in all the free property of the deceased including debts owned or money payable.
- To pay out of the deceased estate all expenses of obtaining the grant or administration of the estate.
- To ascertain and pay all the debts of the deceased.
- To give a full and accurate inventory of the assets and liabilities of the deceased within 6 months of the grant
- To distribute or retain in trust all assets remaining after payment of expenses and debts.
- To complete the administration of the estate other than in respect of continuing trusts within six months.
- To produce to the court a full and accurate account of confirmation of the grant or such other time as the court may permit.

QUESTION SIX

(a)

Property may be acquired in various ways some of which include:

- Asserting ownership over things not previously owned by anyone else.
- Adverse possession i.e. asserting ownership on abandoned land.
- Purchase from a previous owner.
- Inheritance.

(b)

- **Fixed period tenancy:** this is a tenancy created for a fixed term. It has a specific commencement and termination date. It determines on expiration of the duration.
- **Periodic tenancy:** this is a tenancy which continues indefinitely from a period of one year or less and may be express or implied.
- **Tenancy at will:** this is a tenancy whereby the tenant occupies the premises on terms that either party may determine the relationship at any time.
- **Tenancy at sufferance:** this is a tenancy which arises whenever a fixed period tenant holds over without the land lord's consent or dissent.

(c)

- This problem is based on the rights of the tenant in a tenancy.
- In this case there is a tenancy agreement between Terry and Lucas. Both parties are subject to certain obligations for example the landlord must not derogate from the grant while the tenant must not commit waste.
- It is apparent that Lucas is in breach of the tenancy agreement in various ways, namely failure to repair the window and making the premises unsuitable for Terry. In fact Lucas has already derogated from the grant and committed private nuisance, both actionable by Terry.

- My advise to Terry is to:
 - Apply for an injunction to restrain Lucas from using the compound as storage.
Lucas servants and agents should also be refrained from using Terry's gate to access the construction site.
 - Terry is also entitled to repudiate the tenancy agreement.
 - Terry is entitled to repair the window in question and deduct the amount spent from the rent payable to Lucas.

(d) A lease may be determined in various ways, namely:

- **Notice:** either party may notify the other its intention to terminate the lease. This is possible where the date of termination is not specified.
- **Lapse of time:** all fixed period tenancies determine on expiration of the stipulated time.
- **Forfeiture:** this is the right of the lessor, in the event of contain breaches, to re-enter the demised premises and thus prematurely terminate the lease.
- **Surrender:** this is the giving up by the tenant to the landlord of his interest in the premises.
- **Merger:** a lease determines if the interest of the lessor and the lessee in the property became vested in one person.
- **Conversion:**

QUESTION SEVEN

(a)

- **Contract under seal:**

This is a contract drawn and sealed by a party and submitted to the other for signature. Such a contract requires on consideration. Example include lease agreement, charge, mortgage.

- **Contract which must be in writing:**

This is a contract which must be embodied in a formal document. The law insists that it must be written. Examples include, hire purchase agreement, contract of marine insurance.

- **Contract which must be evidenced in writing**

This is a contract which must be evidenced by some note or memorandum. The law does not prescribe the form of note or memorandum. Examples include:

- ❖ Contracts of insurance other than marine,
- ❖ Contract of guarantee

(b) The note or memorandum evidencing the contract must contain the following information:

- Description of the parties sufficient to identify them.

- Description of the subject matter sufficient to identify it
- Signatures of the parties.
- Consideration

QUESTION EIGHT

(a)

- Under the provisions of the Constitution of Kenya, a person is not regarded as having been deprived of his life, if he dies in the following circumstances:
 - For the defence of any person from violence
 - For the defence of property
 - In order to effect lawful arrest

- To prevent the escape of a person lawfully detained.
- For the purpose of suppressing a riot, insurrection or mutiny.
- If he dies as a result of a lawful act of war.

(b) A person shall be lawfully deprived of personal liberty in certain circumstances:

- In execution of the sentence or order of a court in respect of a criminal offence of which he has been convicted.
- In execution of a court order punishing him for contempt of court.
- For the purpose of bringing him before a court of law in execution of an order of the court.
- Upon reasonable suspicion of his having committed or being about to commit a criminal offence.
- For the purpose of the persons education or welfare if below 18 years.
- For the purpose of preventing the spread of an infectious or contagious disease.
- For the purpose of care, treatment or protection, if the person is or is reasonably suspected to be of unsound mind, addicted to drugs or is a vagrant.
- For the purpose of preventing the unlawful entry of the person into Kenya or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Kenya or for the purpose of restricting the person while being conveyed through Kenya in the course of extradition or removal as a convicted prisoner from one country to another.
- To such extent as may be necessary in the execution of a lawful order requiring the person to remain within a specified area within Kenya or prohibiting him from being within such an area.

MAY 2011

QUESTION ONE

(a)

Equity means fairness or justice. It is a branch of the law of England which was developed by the various Lord Chancellors courts to supplement the common law. Equity developed to make the common law a complete system of rules. Its evolution is traceable to the early petitions to the King by persons dissatisfied with the common law system. Subsequently, the petitions were heard by the Lord Chancellor but it was not until the beginning of the 16th century that the Lord Chancellor's started handing down decisions binding in law – "doctrines of equity."

- Equity was developed by the Lord Chancellors courts on the basis of the principle of fairness. Administration of justice was fast and the system was flexible. Equity developed after the common law and acts in personam.
- By reason of inconsistent decisions but Lord Chancellors equity adopted the doctrine of stare decisis and developed the maxims of equity.
- Equity's contribution to the Kenyan legal system is enormous: It is one of the principal sources of law of Kenya.
- The maxims of equity developed by the Lord Chancellors courts guide Kenyan courts.
- The additional remedies the courts evolved assist in the administration of justice.
- The procedural mechanism of discovery of documents is applied in the administration of justice.
- The trust relationship, recognized by equity has a fairly wide application in Kenya.
- The principles of equity of redemption and equitable right to redeem have wide application in the law of mortgages and charges.

(b) (i)

- Supremacy of the constitution means that the constitution is the supreme law of the land. It means that it prevails over all other laws.
- It means that all other laws derive their validity from the constitution.
- The constitution embodies the basic rules and principles by which a society has resolved to regulate its affairs.

(ii)

- The concept of rule of law is a framework developed by Dicey on the basis of the English legal system. It is also described as the due process.
- According to Dicey rule of law comprises three distinct conceptions namely.
 - **Absolute supremacy or predominance of regular law** means that all acts of the state are governed by law. It means that a person can only be punished for disobedience to law and nothing else.
 - **Equality before the law:** means equal subjection of all persons before the law. It means that no person is exempted from obeying the law. All classes of persons are subjected to the same judicial process.
 - **The law of the constitution is a consequence and not the source of rights:** means that law is a manifestation of the will of the people.

(b)

- A judiciary without independence
- Violence of whatever character for example riots, mutiny insurrection.
- Selective prosecution of suspects

- Corruption
- Poverty
- Overzealous president and ministers (disobeying court orders).

QUESTION TWO

(a)

(i) The Land Tribunals

- These are tribunals created by the Land Disputes Tribunals, Act, 1990, to entertain civil disputes relating to:
 - Division of land
 - Determination of boundaries to land including land held in common
 - Claim to occupy or work land
 - Trespass to land.
- The jurisdiction of these tribunals is restricted to disputes relating to agricultural land.
- Cannot entertain statute barred actions or disputes which have been heard and determined by any court.
- There is a land disputes tribunal for every district (registration district) in Kenya. It consists of:
 - A chairman appointed by the District Commissioner from a KASNEB PANEL of elders appointed by the minister for each district.
 - Either two or four elders selected by the district commissioner from a KASNEB PANEL of elders appointed by the minister.
 - The tribunals applies African customary law.
 - Decisions are written, signed by all members and filed with the Resident or District Magistrates court.
 - Appeal lies to the Land Disputes Appeals Committee.

(ii) Kadhi Court

Establishment;

- It is established by the Constitution and the Kadhis Court Act as a court subordinate to the High Court.

Jurisdiction

- The court is duly constituted when held by the chief Kadhi or Kadhi. It exercises original jurisdiction in civil cases only. Under the constitution, its jurisdiction is limited to the determination of questions of Muslim law relating to marriage, divorce or personal status or succession in proceeding in which all parties profess Muslim faith.
- However, the court has no exclusive jurisdiction hear such cases. The Highcourt, Resident Magistrates court and the District Magistrates court have jurisdiction to hear and determine such matters.
- The evidence applicable is governed by Islamic law of evidence. All witnesses must be heard without discrimination.
- A decision of the court may be appealed against in the High court.

(iii) The Courts Martial:

Establishment

- It is established by section 85(1) of the Armed Forces Act as a Sub-ordinate court.

Composition

- The court is presided over by an officer who sits with not less than 2 other persons or not less than four if an officer is being tried or where the maximum penalty for the offence is death.

The court is assisted by a judge/advocate who advice on questions of procedure.

Jurisdiction:

The court exercises original jurisdiction in criminal cases relating to offence committed by the members of the armed forces within the jurisdiction of the court, for example, mutiny, disobeying lawful orders or desertion.

The court has jurisdiction to impose the following sentences:

- Imprisonment
 - Fine
 - Dismissal from the armed forces
 - Reprimand
 - Reduction of rank.
 - Capital punishment.
- A decision of the court may be appealed against in the High Court. The convict may be appealing against conviction or sentence or both.

(b)

- To fix the amount of service charge if included in the rent payable.
- To determine whether or not any tenancy is controlled tenancy.
- To determine or vary the rent payable in respect of any controlled tenancy.
- To a portion rent between tenant if a controlled tenancy is shared by tenants.
- To vary or rescind its orders
- To enter and inspect premises comprised in a controlled tenancy
- To award compensation for any loss incurred by a tenant by termination of tenancy.
- To facilitate recovery of possession of premises.
- To facilitate the levy of distress for rent.
- To employ valuers and other persons to enable it discharge its mandate.

QUESTION THREE

The doctrine of equitable estoppel was developed to mitigate the harshness of the common law rule of consideration where a promisee had relied upon a promise and changed his legal position to his detriment.

- It is an equitable intervention. The doctrine often referred to as the rule in High trees case, was explained by Lord Denning in Combe V. Combe as follows, "where parties have a legal relationship and one of them by word of conduct makes a representation to the other intended to affect their legal position and to be acted upon by the other, once the other has relied upon it and changed his legal position, the maker cannot be heard to say that their legal relations were different.

- For the doctrine of promissory estoppel to apply, the following conditions must exist.
 - A legal relationship between the parties
 - A representation by word or conduct intended to be relied upon.
 - Reliance upon the representation
 - Change in legal position as a result of the reliance.
 - It would be unfair for the maker to act otherwise.
 - In Central London Property Trust Ltd V. High Trees House Ltd: the plaintiff leased a block of flats to the defendant for 99 years at a ground rent of £2,500. The transaction took effect in 1937. However, by the time the second world war started most of the flats were unoccupied and the defendant could not make enough to pay the agreed rent. However, after some discussion the plaintiff agreed in writing to accept half of the rent as long as the conditions of war persisted. Between 1940 and 1945 the defendant paid half the rent. By 1945, all the flats were occupied but the defendant continued paying half the rent. The plaintiff sued for orders that the defendant pay:
 - The full rent
 - All the arrears
 - The court held that whereas it was fair for the defendant to pay the full rent it was unfair for the plaintiff to insist on the arrears. As they had made a representation which the defendant relied upon. They were estopped from insisting on the arrears.
 - A similar holding was made in Century Automobiles Ltd V. Hutchings Biemer Ltd.
 - The doctrine of promissory estoppel is defensive not offensive. It can only be used as a shield not as a sword.
 - This doctrine qualifies the common law rule of consideration. It enables a person who has not provided consideration to a promise to enforce it if he has relied upon it and changed his legal position to his detriment.
- (b)
- This problem is based on the equitable doctrine of promissory estoppel.
 - Muthoga and Njenga have a contractual relationship under which Muthoga is entitled to remain in occupation of the premises for five years.
 - Relying on this promise Njenga made extensive renovations of the premises only for Muthoga to give notice of termination.
 - It is inequitable for Muthoga to terminate the lease as Njenga relied on his promise and has changed his legal position to his detriment. Muthoga should be estopped from terminating the lease.
 - My advise to Njenga is to disregard the notice and wait for Muthoga to sue him. He can then plead promissory estoppel on the basis of Muthogas promise.
 - My advise is based on the decision in Century Automobiles V. Hutchings Biemer Ltd whose facts were substantially similar.

QUESTION FOUR

(a)

(i) **Private Nuisance:**

This is the unlawful interference of a person's use of land or right over or in connection with his land. It entails an unreasonable behaviour which interferes with another persons use of his land. It affects the individual in his capacity as such. The plaintiff must prove an interference with his land or any right connected with it. To some extent, nuisance overlaps with the rule in Rylands V. Fletcher. However, the defendant is not liable, if the plaintiff is over by the standards of reasonable man. However, he cannot escape liability by pleading that the plaintiff came to the source of the nuisance.

(ii) **Public Nuisance:**

Public nuisance is an act which interferes with the enjoyment of a right which all members of the community are entitled to, such as the right to fresh air, and passage. Public nuisance is a crime as well as a tort. The criminal aspect is actionable by the Attorney General via prosecution.

(iii)

An individual may sustain civil proceedings for public nuisance by establishing that he has suffered particular loss than the community and is entitled to damages or other relief for example where a Local Authority closes a public motor way cutting of the flow of customers to the plaintiffs shop and there no alternative access

Such a person must prove that the damage suffered by him is direct and substantial. In Campbell V. Paddington Council (1911) the defendants erected a stand across a certain highway to enable the members of the council to view the funeral procession of King Edward VII. The erection of the stand obstructed the views from the plaintiffs window. It was held that the plaintiff has suffered some special loss and was entitled to recover damages.

A similar holding was made in Soltan V. De Held (1851).

- (b) This problem is based on the tort of nuisance. The vibrations occasioned by **Namweya's mill amount to public nuisance and the neighbours are supposed to instigate** the arrest of Namweya for prosecution for public nuisance which is a crime.
- In the second case since Nabayi has suffered particular injury, as a result of the public nuisance, she has an action in damages against Namweya.

In Sturges V. Bringman (1879) the plaintiff a doctor built a new consulting room next to **defendant's premises**, where he used a pestle and mortar for some 20 years. Noise and **vibration interfered with the plaintiff's practice and he sued the defendant. It was held** that the defendant was liable. It was no defence that the plaintiff himself came to the place of nuisance.

QUESTION FIVE

(a)

- (i) Categories of unascertained goods.
- Goods to be manufactured by the seller
 - Crops to be grown by the seller
 - Purely generic goods
 - An unidentified portion of a special bulk or whole.

Duties of the buyer towards the seller:

- **Take delivery**
Under section 28 of the Sale of Goods Act, it is the duty of the buyer to take delivery of the goods the subject matter of the contract failing which he is liable in damages for non acceptance.
- **Pay the price**
Under section 28 of the Sale of Goods Act, it is the duty of the buyer to pay the price for the goods, failing which the seller may maintain an action against him for the price.

(b)

- This problem is based on the remedies of the unpaid seller.
- In this case Mwezi is an unpaid seller within the meaning of the provisions of the Sale of Goods Act
- Since property in the goods has already passed to Mwisho, Mwezi has no rights against the goods. He can only maintain an action against Mwisho for the price.
- However, if Mwezi has possession of the goods Mwezi may exercise alien on them and thereafter resell them if Mwisho does not pay or tender the price within a reasonable time.

QUESTION SIX

(a)

- This is the adoption or affirmation by the “principal” of a contract previously entered into by another person purporting to act on his behalf.

Ratification creates agency after the “agent” has acted. The relationship arises when the “principal” adopts or affirms the acts of the “agent.” The principals authority is backdated to the date of the transaction. By ratifying the transaction, the relationship between the principal and agent is created.

(ii)

- The “agent” must have purported to act for a “principal”
- The agent must have had a competent principal i.e. a natural or artificial person capable of being a principal.
- The “principal” must have had capacity to enter into the transaction when the agent did so and when he ratifies.
- The “principal” must have been aware of all the material facts relating to the transaction.
- The transaction must be capable of ratification i.e must not be illegal or void.
- The “principal” must ratify the transaction in its entirety.
- The “principal” must ratify the transaction within a reasonable time.

(b)

- This problem is based on agency by estoppel
- In this case it is apparent Thuku represented Chuma as his agent and Harry subsequently dealt with Chuma as Thukus agent. Thuku cannot be heard to say that Chuma was not his agent. He is estopped from so denying and is liable. My advise to Thuku is that he is liable to Harry. My advise is based on the decision in Freemans case.

QUESTION SEVEN

(a) A bill of exchange may be discharged in the following ways:

- Payment in due course
- Acceptor the holder at maturity or merger
- Cancellation
- Material alteration
- Non-presentation for payment
- Renunciation or waiver

(b)

- It is an unconditional promise
- It must be written and signed by the maker

- It contains an engagement to pay a sum certain in money
- The sum is payable on demand or at a fixed or determinable future time.
- The sum is payable to the bearer, a specified person or his order.

(c)

- A qualified acceptance of a bill of exchange varies or modifies the terms of a bill. Such an acceptance may take the form of
 - **Conditional:** payment by the acceptor is dependent on the fulfillment of a condition.
 - **Partial:** this is an acceptance to pay part of the amount for which the bill is drawn.
 - **Local:** this is an acceptance to pay only at a particular specified place.
 - **Qualified as to time**
 - **Acceptance by one or more drawees but not by all.**

QUESTION EIGHT

(a)

Incorporated Association	Unincorporated Associations
This is an association of persons recognized as a legal entity.	These are associations of persons who come together to promote a common and lawful purpose.
It has an independent legal personality with rights and subject to obligations.	They have no legal existence of their own.
Such a corporation may be brought into existence by registration, charter or by statute and	Property if any is jointly owned or held in trust for all members.
Examples include corporations sole, corporations aggregate, Registered corporation, chartered corporation, statutory corporation.	Members rights are enshrined in the constitution of the association.
Characteristics of incorporated associations.	Members are liable for debts and other obligations of the association.
Legal personality	The association can sue or be sued through its principal officers.
Limited liability	In the event of dissolution members are entitled to share in whatever remains.
Perpetual succession.	The law which regulates the association is the law which regulates the activities it engages in.
Owning property	Examples include:
Sue or be sued	Partnerships
Capacity to contract	Trade unions
	Political parties
	Welfare associations
	Clubs
	Staff unions.

Partnership	Limited Company
A partnership is the relation which subsist between persons carrying on a business in common with a view of profit	This is a body corporate incorporated under the Companies Act and may be public or private.
It may be general or limited.	All companies are legal entities or incorporated.
It is an unincorporated association.	Liability of members is limited by shares or guarantee.
Consists of 2-20 members.	It has perpetual succession.
Liability of members is generally unlimited	Has capacity to sue or be sued.
It is a contract of the utmost good faith.	Has capacity to contract and own property.
Property is jointly owned by the partners.	A private company consists of 2-50 excluding employees who are members.
Every partner is an agent of every other and the firm.	A public must have a minimum of 7 members but has no maximum.
A partnership is a profit motivated concern.	Companies are subject to the doctrine of <u>Ultra vires</u> .
The firm name is registrable under the provisions of the Registration of Business Names Act.	A company must have directors, at least one for a private company and at least two for a public company.
	All companies are incorporated by registration in accordance with the provisions of the companies act.

(b)

- Ultra Vires literally means beyond the powers.
- This is a rule of capacity of registered companies contained in the provisions of the Companies Act.
- This rule is to the effect that a registered company can only enter into transactions provided for by the objects clause and those that are reasonably incidental to the attainment of such objects. Other transactions are beyond the powers and therefore unenforceable.
- The doctrine of ultra vires was first incorporated into the Companies Act in 1844, but it was not until 1875 that it was accorded a judicial interpretation in Ashbury Railway Carriage and Iron Co. V. Riche where the court was emphatic that the capacity of a registered company was restricted to transactions expressly stipulated in the objects clause. Other transactions were Ultra vires.
However, in Attorney General V. Great Eastern Railway Co. Ltd, it was held that in addition to the express objects, a company had capacity to engage in transaction reasonably incidental to the attainment or pursuit of such objects.
- This decision expanded the contractual capacity of companies and weakened the doctrine of ultra vires.

- An Ultra Vires transaction remains Ultra vires and nothing can be done to render it Intra vires. It was so held in the Rolled steel case as well as in Brady V. Brady.
- An ultra vires transaction cannot be rendered intra vires by estoppel, lapse of time, delay, acquiescence or ratification.
- The doctrine of ultra vires in company law has been weakened so much so that companies enjoy almost unrestricted capacity.
- One of the most common approaches to giving companies unrestricted capacity is the use of subjective clauses in the objects clause, for example “the company can engage in such other trade or business which can in the option of the board of directors be carried on advantageously for the company as was the case in Bell Houses Ltd V. City wallproperties Ltd.

NOVEMBER 2011 - SUGGESTED SOLUTIONS

QUESTION ONE

(a)

- **Literal rule**

This is the basic rule statutory interpretation. It is to the effect that if the words of the statute are clear and exact, they should be given their literal or plain or dictionary meaning. Sentences should be given their ordinary aramatical meaning.

- **Golden rule;**

This rule is to some extent an exception to literal rule. It is applied to avoid arriving at an absurd or repugnant interpretation under the literal rule.

Under this rule, the court is free to vary or modify the literal meaning of the word, phrase or sentence so as to get rid of the absurdity or repugnancy.

The rule was explained in Becke V. Smith and in Grey V. Pearson, it was used in R. V. Allen, independent Aistomatic sales and knows and foster.

- **Mischief rule:** (Rule in Heydons case)

This is the oldest rule of statutory interpretation. Under the rule, the court examines the statute to ascertain the mischief it was intended to remedy and then inteprete it in such a way as to advance the remedy and suppress any mischief.

This rule was explained by Lord Coke in Heydons case (1584) and applied in Smith V. Hughes (1961)

- **Ejus dem generic**

This rule is applied to interprete things of the same kinds, genus and species. This rule was explained in R. V. Edmundson as follows, where general words follow particular words in a statute, the general words must be interpreted as being limited to the class or person or thing designated by the particular words; This rule is only applicable where words of general signification follow particular words in a statute.

It is only applicable where the particular words from a class or persons or things. The rules was applied in the case of Evans V. Cross to interprete the interpretation of Road Traffic Act, 1930.

- **Noscitur a sociis**

This rule is of the effect that words of doubtful meaning derive the colour and precession from the words and phrases with which they are associated.

- **A statue must be interpreted as a whole;**

This is the wholistic rule of interpretation. All words, phrases and sentences must be given their due meaning unless they are meaningless conflicting clauses must be reconciled unless they are irreconcilable.

- **Expressio unius est exclusion ulterius**

This rule means that the expression of one thing implies the exclusion of another. The rule is to the effect that where a statute uses particular words which are not followed by general words then the statute only applies to the instances mentioned.

- **Rendendo Singular Singulis**

This rule is to the effect that where a word, phrase or sentence variously used is the statute, it must be accorded the same meaning through out the statute.

- **Rank principle**

- **Statutes in parimateria**

Criminal wrong	Civil wrong
<ul style="list-style-type: none"> • This is an act or omission committed or omitted in violation of public law. • It is a wrong against the state. <ul style="list-style-type: none"> • Examples include murder, rape, drunken driving, incitement to violence causing death by dangerous driving, incest assault, theft by servant uttering a false document. • Persons who commit criminal wrongs are generally arrested by the state. They are then charged in a court of law and prosecuted by the state. • If convicted they may be fined, imprisoned, or subjected to capital or corporal punishment. 	<ul style="list-style-type: none"> • This is the violation of a persons rights by another. • It is a wrong against a person i.e. human being, corporation or the state. • Examples include breach of contract, negligence, assault, battery, false imprisonment, defamation, nuisance, passing off deceit, conversion. • The plaintiff sues the defendant for the wrong and must prove his case. • Remedies for the plaintiff include damages, injunction, specific performance tracing account, winding up.

- (c) (i)
- This is stare decisis
 - It is a system of administration of justice whereby previous decisions are relied upon in subsequent similar cases.
 - The precedent or earlier decision becomes the source of law for subsequent cases.
- (ii)
- **Original precedent:** this is law making precedent. It is the principle or proposition of law as formulated by the court.
 - **Declaration precedent:** this is the application of an existing principle of law.
 - **Binding precedent** –the earlier decision binds the court in which it is used.
 - **Persuasive precedent** –the earlier decision is used to persuade the court to decide the case similarly.

QUESTION TWO

(a) Circumstances in which an offer may lapse.

- **Insanity:** the unsoundness of mind of the offeror or offeree terminates an offer. The offer lapses when the fact of insanity is communicated to the other party.
- **Failure of a condition subject to which the offer was made:** a conditional offer lapses if the condition upon which it is based fails to materialize.
- **Death:** the death of the offeror or offeree before acceptance terminates the offer. The offer lapses when death of the one is made known to the other. (Morgan V. Manser).
- **Stipulated time:** where the offeror specifies the duration the offer is to remain open for acceptance, if not accepted or revoked earlier, such offer lapses on the expiration of the duration.
- **Reasonable time:** if no duration is prescribed the offer lapses on expiration of reasonable time. What is reasonable time is question of fact and varies from case to case. For example.

In Ramsgate Victoria Hotel Ltd. V. Montefiore, the defendant made an offer to buy 40 shares of the plaintiff company. In June 1864. However, the shares were not allotted to him until Nov. 23 1864 by which time the defendant has given up. He refused to take the shares and was sued. It was held that he was not bound to take up the shares as his offer has lapsed. It had not been accepted within a reasonable time.

A similar holding was made in Virji Khimiji V. Chutterbuck where the defendant offered to buy a quantity of timber from the plaintiff and required it urgently. The plaintiff did not reply but delivered the timber 4½ months later. The defendant refused to take delivery and was sued. It was held that he was not bound to take delivery as his offer had lapsed for non acceptance within a reasonable time.

(b) RENT TRIBUNAL

- **Establishment:** it is established by section 4 (1) of the Rent Restriction Act, Cap 296.
- **Composition:** it consists of a chairman appointed by the minister. To qualify for appointment as chairman, one must be an advocate of not less than 5 years standing.
- **Jurisdiction:** It exercises original jurisdiction in civil cases between landlord and tenants of residential premises whose monthly rent does not exceed Ksh. 2500.

The rent tribunal has jurisdiction to:

- Assess the standard rent of any premises on application or at its instance.
- Determine the date from which such rent is payable
- Apportion service charge between tenants if a tenancy is shared.
- Permit the levy of distress for rent.
- Decisions of the tribunal may be appealed against in the High Court.

(c) Under section 26(3) and 4 of the Constitution the Attorney General is empowered to;

- Institute and undertake criminal proceedings against any person before any court other than a court martial for any alleged offence.
- Take over and continue any criminal proceeding instituted and undertaken by any other person or authority.
- Discontinue at any state before judgment is delivered any criminal proceedings instituted or undertaken by himself or any other person or body.
- Order the commissioner of police to investigate any alleged or suspected criminal act. The commissioner must oblige and report to the Attorney General.

- The Attorney General is the public prosecutor.
- He is the only amicus curie.

QUESTION THREE

(a) (i)

Statutory Corporations	Limited companies
<ul style="list-style-type: none"> • These are incorporated associations created by statute. They owe their existence to an Act of Parliament. • The Act provides them with a name and prescribes its objects • The corporation is a body corporated with perpetual succession limited liability capacity to contract sue or be sued and own property. • Examples include Agricultural Finance Corporation, Kenya Wildlife Services, Kenya Air Ports Authority Public universities. • All state corporations belong to the state hence have one member. • Interest may be transferred by the government. 	<ul style="list-style-type: none"> • These are incorporated associations created by registration • Promoters must comply with the Provisions of the Companies Act. • On registration the association becomes a body corporate by the name contained in the memorandum of association. • Their objects are prescribed by the memorandum of association. • Their features are generally similar to those of statutory corporations. • However registred companies are different in that • Membership is prescribed by law for example the minimum number of members is two for both public and private companies. However, where as the membership of a public company is unlimited, a private company cannot have more than 50 members unless the excess members are or have been employees of the company. • Members interest in the company is transferable. • Companies are managed by directors. • There are two types of registered companies namely public and private.

(ii)

Memorandum of Association	Articles of Association
<p>This is one of the so called constitutive documents.</p> <p>It is the external constitution of the company.</p> <p>It regulates the relations between the company and third parties.</p> <p>It is the company's charter.</p> <p>Contents include, name of the company, domicil objects, capital, liability association or declaration particulars of subscribers and the date.</p>	<p>It is a constitutive document</p> <p>It is the internal constitution of the company.</p> <p>It contains the rules of internal management.</p> <p>It regulates the relations between the company and its members.</p> <p>Company may adopt Table A as its articles of association.</p> <p>Contents of Table A include:</p> <ul style="list-style-type: none"> - Transfer of shares - Powers of directors - Forfeiture of shares - Lien on shares. - Calls - Office of managing director - Office of company secretary. - Dividend - Voting

(b) Section 2(1) of the Companies Act, Cap 486, Laws of Kenya defines a prospectus as **“any prospectus, notice circular, advertisement or other invitation offering to the public for subscription or purchase any shares or debentures of a company.”**

The contents of a prospectus include:

- Directors interest in the promotion of the company.
- Particulars of directors and remuneration
- Share qualification of directors
- Voting and class rights
- Minimum subscription
- Promoters remuneration
- Particulars of material contracts
- Amount payable on application and allotment
- Particulars of options on shares or debentures
- Length of time the company has carried on business if less than 3 years.

QUESTION FOUR

(a) Postal rules of acceptance

Where the offeror expressly or by implication authorises the offeree to communicate his acceptance by post, acceptance is deemed complete when a properly addressed and stamped letter is posted notwithstanding any miscarriage in the course of postage. It is so held in ByrneV. Van Tienhoven.

In the words of Lindley J in Adams V. Lindsell. "it may be taken a settled that where an offer is made and accepted by letters sent through the post, the contract is concluded when the letter accepting the offer is posted even though it never reaches its destination."

- **Express authorization**

In Adam V. Lindsell the offeror expressly authorized the offeror to use the post. On Sept 2, 1817 the defendant made an offer the plaintiff to sell a quantify of wood and required an answer in the "course of the post." The defendant misdirected letter arrived on Sept. 5th. The plaintiff accepted the posted letter on the same day. The letter of acceptance was received by the defendant on Sept. 9th. On sept 8th the defendant sold the wood to a third party. Question was whether there was a contract between the parties.

It was held that there was a binding contract between the parties conducted on Sept 5th and the defendant was liable in damages for breach of contract.

- **Implied authorization**

In Household Fine insurance Co. V. Grant, Grant posted a letter on Sept 30th 1874 offering to buy 100 shares in the plaintiff company. On Oct. 20th 1874 the company secretary made out of a letter of allotment of 100 shares in favour of Grant and entered his name in the register of members.

The letter was posted but never reached Grant. Grant refused to take up the shares and was sued by the company for the amount due on the shares. Grant argued that he was not a member since his offer had not been accepted. However, it was held that he was liable as a binding contract came into existence when the letter of allotment was posted to him.

A similar holding was made in Henthorn V. Fraser.

(b)

- This problem is based on remedies for breach of contract and termination of contracts.
- In this case it is apparent that there is a contractual relationship between Saida and the musicians. The respective parties were bound by their obligations.
- Five days before the date of performance, the scenario changes as three musicians would not appear for various reasons; Yvonne for acute bronchitis, Omar by reason of war and Mike for inadequate remuneration:
 - As far as Yvonne's reason is concerned, this amounts to incapacity as she cannot sing and the contract is frustrated as neither party is to blame.
 - With regard to Omar, the war in his country frustrates the contract as it was unforeseen.
 - Mike's reason for non-appearance is not sustainable as it amounts to anticipatory breach of contract for which Saida has an action in damages.
 - My advice to Saida is to sue Yvonne and Omar and Mike for the return of the amount paid in advance. This is because under the provisions of the Law Reform (Frustrated Contracts) Act, 1943, when a contract is frustrated any money paid is recoverable.
 - To sue Mike in damages of anticipatory breach of contract. As was the case in Frost V. Knight.

QUESTION FIVE

(a)

Joint tenancy arises where two or more persons own something jointly. It has the features of single proprietorship. It is characterized by the right of survivorship i.e. jus accrescendi and the four unities, namely:

- **Unity of possession:** all possess any part of the land
- **Unity of interest:** all tenants have equal but undivided shares
- **Unity of time:** the interest are acquired at the same time.
- **Unity of title:** the tenants acquired title either by the same instrument or by operation of the same statute or through the same process of adverse possession.
- Each tenant holds nothing by himself and at the same time holds the entire property collectively as co-owners.

(b) (i) **Freehold interest inland**

- This is the largest interest a person can have in land. It confers the largest Quantum of rights and has no time limitation.
- It confers the right to use and alienate.
- Example include: fee simple and absolute proprietorship.

(ii)

- This problem is based the rights of the lessee and duties of the lessor as well as the remedies available to either party for breach.
- It is evident that there is a tenancy agreement between Oliver and Stanley for 2 years which means that Oliver has exclusive possession of the house for the duration subject to the implied obligations of the lessee.
- **Since Stanley's wife is not privy to the lease agreement she has over stepped her mandate** by threatening to evict and storming the house.
- Oliver has reason to feel aggrieved as his right to quiet possession of the house has been violated.
- **My advise to Oliver is to sue Stanley's wife for an injunction to restrain her from interfering with the quiet enjoyment of the house.**

QUESTION SIX

(a)

- **Demostrative legacy:**

This is a testamentary gift which is in its nature general but which manifests an intention that the gift shall be primarily satisfied out of a fund or a specified part of the property of the testor, but shall upon failure of that fund or property, be met from the general estate.

- **General legacy:**

This is a testamentary gift whether specific or general described in general terms to be provided out of the general estate of the testor whether or not also charged on any specific part of his estate.

- **Pecuniary legacy:**

Include an annuity in the general legacy, demonstrative legacy so far as it is not discharged out of the specified fund or property, and any other general direction by the testator for the payment of money including all death duties free from which any gift made to take effect.

- **Special legacy:**

This is a testamentary gift of a particular part of the property of the testator. It identifies that part by a sufficient description whether in specific or general terms, and manifests an intention that that part shall be enjoyed or taken in the state and condition indicated by that description.

(b)

- This problem is based the validity of wills and their revocation. It is clear that Paul made a written will bequeathing all his property to Nina and though he blames Nina for his illness he did not revoke the will. It therefore follows that Nina is entitled to inherit all his property under the will.
- The oral will purportedly made by Paul before Mark and Mathew has no effect as it purports to revoke the earlier will which was written. This is because under the provision of the Law of Succession Act, an oral will cannot revoke a written will. Tina cannot therefore purport to inherit **Paul's property under the purported oral will. Her** resistance is of no consequence as she has no claim under the sons will. However, if **Tina was Paul's dependant, she can challenge the disposition of Paul's property under** the will in exercise of the right conferred by the provisions of the Law of Succession Act.

QUESTION SEVEN

(a)

Lien	Stoppage
<p>This is the right of unpaid seller in possession of the buyers goods to retain them as security for the price. This lien is possessory in character. It is exercisable by the unpaid seller over any goods in his possession. It is exercisable even where the seller holds as the buyers agent.</p> <p>Under section 41 (1) of the Sale of Goods Act, the seller Lien is exercisable in the following circumstances:</p> <ul style="list-style-type: none"> • If the buyer becomes insolvent • if the goods have not been sold on credit • If the goods are sold on credit but the terms of credit has expired. 	<p>This is the right of unpaid seller who has already parted with possession of the goods to resume such possession as long as the goods are in the course of transit.</p> <p>Under section 44 of the Sale of Goods Act, the right of stoppage in transitu is only exercisable if the buyer becomes insolvent.</p> <p>Under section 45 of the Act goods are deemed to be in “course of transit” from the time they are delivered to a carrier for transmission to the buyer until the buyer or his agent obtain lawful possession.</p> <p>Under section 46 (1) of the Act the right of stoppage in transitu is exercisable either by:</p> <ul style="list-style-type: none"> - taking possession of the goods. - giving notice of the sellers claim to the carrier or his principal. <p>Once the notice is given, the carrier must deliver the goods in accordance with the sellers directions and at the expense of the seller by exercising the right of stoppage in transitu the seller has the opportunity to exercise alien over the goods.</p> <p>Whereas the right of lien is based on possession, the right of stoppage in transitu is not.</p>

(b) Under section 5 (4) of the Hire Purchase Act, if a hire purchase agreement is not registered.

- No person can enforce it against the hirer.
- The owner cannot enforce any rights to recover the goods from the hirer.
- Any contract of guarantee relating to the hire purchase agreement is also unenforceable
- Any security given by the hirer or guarantor under their respective contracts is unenforceable.

(c)

- This problem is based on the duties or obligations of the banker to his customer.
- In this case there is a banker and customer relationship between the banker and Stephane.
- One of the principal duties of a banker to the customer is to honour all cheques drawn by the customer provided other conditions are fulfilled. The banker is also bound to exercise care and skill in his dealings with the customer.
- In this case, it is evident that the banker acted negligently and thus dishonoured the cheque.

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- Stephane has an action in damages against the banker for breach of duty.

QUESTION EIGHT

(a) Rights of undisclosed principal

- If the third party elects to sue the principal and not the agent, he must allow the principal the benefit of all the payments made by him to the agent on account of the contract before the agency was disclosed.
- If a cause of action has arisen in favour of undisclosed principal he can enforce his rights under the contract against the third party, provided that agent had the authority to act on his behalf at the time the contract was made. But an undisclosed principal has no right that his is the principal himself.

(b)

- Causes of action in tort or on contract must be enforced within the duration prescribed by the Provisions of the Limitation of Actions Act, Cap 22 failing which the action becomes statute barred.
- All actions based on tort must be enforced within 3 years. However, an action based on defamation must be enforced within 1 years.
- Time start running from the date the cause of action arises. However, the running of time may be postponed in certain circumstances, for example
 - If the prospective plaintiff is an infant, time start running when it attains the age of majority or dies whichever comes first.
 - If the prospective plaintiff is of unsound mind, time start running when he becomes of sound mind or dies whichever occurs first.
 - If the plaintiff is laboring under fraud or ignorance of material facts time start running when he ascertains the facts or when a reasonable person would have done so.

(c)

- This problem is based on the principle of vicarious liability.
- **In this case, it is apparent that Mwanzia is Mutuku's servant as a truckdriver.**
- It therefore follows that Mutuku is vicariously liable for torts committed by Mwanzia in the course of his employment. It is apparent that Mutuku was at the material time acting in the course of his employment and Mutuku is liable for any tortious acts committed by Mwanzia. Although Mwanzia was negligent by lighting the cigarette Mutuku is liable as the master. As the servants conduct is irrelevant.
- My advise to Mpole is to sue Mutuku for the loss of the petrol station.
- This is because Mutuku is vicariously liable for torts committed by Mwanzia.

MAY 2012 SUGGESTED SOLUTIONS

QUESTION ONE

(a)

(i) **Public and Private Law****Public law:**

Comprises those branches or fields of law in which the state has a direct interest as the sovereign.

It is concerned with the constitution and functions of the various organs of government, including local authorities, their relations with each other and the citizenry. Examples include Constitutional law, Administrative law and Criminal law. It asserts state sovereignty.

Private law

Consists of those fields of law in which the state has no direct interest as the state. It is concerned with the rights and duties of persons in ordinary transactions e.g. law of contract, torts, marriage, succession, trust, property etc.

(ii) **Procedural and substantive law****Substantive law**

Consists of the laws themselves, as opposed to the procedure on how to apply them. It is concerned with the rights and duties of persons and prescribed remedies e.g. law of torts, law of marriage, law of contract, etc.

It defines offences and prescribes punishment e.g. the penal code Cap 63 Law of Kenya.

Procedural law

Consists of the steps or the guiding principles or the rules of practice to be complied with in the application of substantive law or in the administration of justice. Examples include Civil Procedure Act and the Criminal Procedure Code.

(b) A Bill may be defined as draft law or legislation. It is statute in draft or law in its draft form. The constitution of Kenya and the National Assembly Standing Orders prescribe the stages through which a Bill must pass to become an act of parliament.

Publication in the Kenyagazette Readings:

- **First reading** –The Bill is read for the first time; no debate takes place
- **Second reading** –The Bill is read for the second time and it is debated on
- **Committee stage** –The Bill is referred to a select committee for a critical analysis.
- **Report stage** –The chairman of the select committee reports to the National Assembly.
- **Third reading** –The Bill is read for the third time and if adopted it is voted on.
- **President's assent** –Section 46 (2) of the Constitution
- **Publication in the Kenya gazette** –Section 46 (6) of the constitution.

QUESTION TWO

- (a) A contract is simple legal parlance is a legally binding agreement made between two or more parties. For an agreement to be enforceable at law it must be characterized by certain elements.
- **Consensus** –Comprises offer and acceptance. Is the foundation of any contract.
 - **Capacity** –This is the ability to enter into a contract.
 - **Intention** –The parties must have intended to bind themselves in law
 - **Consideration** –The act or promise offered by one party as the price for the other's promise.
 - **Legality** –The contract must not be illegal or unlawful
 - **Formalities if any** –e.g. writing, signature consent, written evidence.
- (b)
- (i) **A contract of apprenticeship as a hairdresser with Esther**
This contract binds Rita and Esther. Both are obliged to honour their obligations failing which either party may sue and other in damages for breach thereof.
 - (ii) **A contract to purchase shares in Medium Moyenne Ltd.**
This contract is voidable by Rita at any time during infancy or within a reasonable time after attaining the age of maturity. During infancy, Rita is not liable on the contract and cannot be sued on it.
 - (iii) **A contract with Mr. Bwisa Nyutu, a taxi driver to drive her mother in hospital.**
This contract is void and unenforceable by Rita or Bwisa as it is not recognized by the law of contract as binding.
 - (iv) **A guarantee by Mrs. Kimani and Mrs. Tomno for an overdraft with a bank.**
This guarantee is void and unenforceable by or against Rita. Since money borrowing by infants is void by virtue of the Infants Relief Act, 1874, any guarantee or security given is also void. (**Valentini V. Canali**)

QUESTION THREE

- (a)
- **Volenti non fit injuria:** This is the defence of voluntary assumption of risk applicable incircumstances in which the plaintiff has consented to the act which causes the harm.
 - **Defence of the person:** the defendant may rely on this defence if the committed the thetrespass while defending his person from a threatened invasion. The defence is sustainable only if the force used is proportional to the threat.
 - **Defence of property:** this defence is available to a defendant who commits trespass whiledefending his property provided the force used is proportional to the threat.
 - **Inevitable Accident:** the defendant may rely on this defence if the trespass to the plaintiffwas accidental and no reasonable step could have been taken to prevent the same.
 - **Mistake:** a defendant can rely on this defence if the trespass was committed to the wrongperson and the defendant had reasonable ground to believe that the plaintiff was the party concerned.
- (b) This problem is based on the law of torts. In this case Mrs. Waithaka hurled a stone at Mrs. Karanja but missed but subsequently succeeded in splashing Mrs. Karanja with water making her clothes wet. Mrs. Karanja is aggrieved by the acts of Mrs. Waithaka and has a number of causes of action for which she can seek judicial redress. Firstly the hurling of the

stone by Mrs. Waithaka to Mrs. Karanja amounts to **assault** as is created apprehension of some contact with her person. Secondly, the splashing of Mrs. Karanja with water amounted to **battery** as there was a physical contact with her person.

It therefore follows that Mrs. Karanja can sue Mrs. Waithaka in damages for assault and battery.

These torts are actionable per se and Mrs. Karanja does not have to prove any loss for Mrs. Waithaka to be held liable.

My advice to Mrs. Karanja is based on the general law of torts.

QUESTION FOUR

- (a) This question is based on the exceptions to the common law principle of *nemo dat quod non habet* i.e. one cannot give what he has not. However, there are many instances in law where a seller of goods can give the buyer a better title thereto than he himself has, for example:

- **Estoppel**

Under section 23 (1) of the Sale of Goods Act the buyer gets a better title if the **owner is by his conduct precluded from denying the seller's authority to sell. i.e. the owner has represented some other person as the owner.** He can not deny the apparent ownership. However, the requirements of estoppel must exist.

- **Sale by mercantile agent or factor**

Under the provisions of the factors Act 1889, which applies in Kenya as a statute of general application, (**Kapadia V. Laxmidar**) a sale by factor passes a good title if:

- The agent has possession with the principal's consent
- The agent sells in his capacity as mercantile agent
- The agent sells in the ordinary course of business as a mercantile agent
- The buyer takes in good faith and for value

- **Sale under voidable title**

Under section 24 of the Act if the seller's title is voidable but he sells the goods to a bona fide purchaser who takes without notice of the seller's defective title, before the title is avoided, he passes a good title, as was the case in Phillips V. Brooks Ltd. and in Lewis V. Avery. In Phillips V. Brooks Ltd. though Mrs North's title to the ring was avoidable for fraudulent misrepresentation, he pledged it to Brooks Ltd before his title was avoided and hence Brooks Ltd. got good title.

- **Resale by seller in possession**

Under section 26 (1) of the Act, if a seller who has already sold goods but retains their possession or documents of title disposes them off to a bona fide purchaser for value without notice of the previous sale, he passes a good title.

Other exceptions include:

- Sale by buyer in possession
- Sale under statutory power
- Sale by court order
- Sale under common law power.

- (b) This problem is based on the law relating to contracts of bailment. In this case Kate is the bailor as she delivered her clothes to Mary for repair only and paid for the same in advance. Mary the bailee had no other mandate other than repair and return the goods to Kate which is the essence of the bailment. As a bailee Mary is bound to take reasonable care of the goods the subject matter of the bailment. As a bailee Mary is bound to take reasonable care of the goods the subject matter of the bailment. In this case Mary did not return the goods to Kate as agreed and were then stolen. The loss of

is traceable to Mary's failure to return them to Kate after repair. It would appear to follow that Mary is liable in damages for breach of duty.

QUESTION FIVE

- (a) **Real property:** This generally refers to immovable property or realty e.g. land which includes buildings and trees on it.
Personal property: Generally refers to the movables e.g. Chattels.
- (b) Terms implied on the part on the lessee include:
- To pay the rent reserved
 - To pay rates and other taxes
 - To put the landlord in possession on termination
 - Not to transfer, charge or sublet.
 - not to erect fixtures
 - Permit the lessor to view the premises.
 - Not to commit waste.
 - To make reparation for any breach.
 - To make material disclosures.
- (c) This problem is based on the provisions of Occupier's Liability Act, Cap 37 Laws of Kenya. Under the provisions of this Act, an occupier owes all his visitors and invitees a common duty of care i.e. the duty to take such care as in all the circumstances of the case is reasonable to see the visitor is reasonably safe in using the premises for the purpose for which he is invited or permitted to be there. In this case Abdallah is the occupier and owes all his visitors a common duty of care. However, under the provisions of the Act, an occupier escapes liability by showing that he had given sufficient or adequate warning of the danger. In this case Abdallah had placed a warning sign outside the entrance of the building. The facts do not tell us whether the sign was conspicuously displayed and was thus sufficient. It is our submission that displaying a sign that the floors are slippery without anything more is an inadequate warning. In our view Abdallah cannot escape blame. On the other hand Makanyanga was in hurry to attend class and did not see the notice. Perhaps this is an indication that it was not conspicuously displayed. The fact that he was rushing is therefore of no consequence and Abdallah is liable for the loss arising.

QUESTION SIX

- (a) (i) An easement has been defined as a right attached to a parcel of land which allows the proprietor of the land to use the land of another in a particular manner or to restrict its use in particular extent.
 The essence of an easement is that it may be positive or negative. An easement is characterized as a right in alieno solo.
- (ii) Characteristics of easements
- **Dominant and servient tenement:** for an easement to subsist there must be adjacent parcels of land where one serves the other.
 - **Owned or occupied by different persons:** the dominant and servient tenements must be owned and occupied by different persons.
 - **Accommodate the dominant tenement:** the easement must accommodate the dominant tenement i.e. enable the tenement enjoy the right or rights in question.

- **Subject matter of grant:** the circumstances must be such that the easement is capable of forming the subject matter of the grant, i.e. there must be a capable grantor and grantee. The rights must be specific and must belong to a class capable of being granted.
- (b)
- Surrender – Tenant gives up the premises to the landlord.
 - Forfeiture – Landlord re-enters the premises
 - Notice – if date of termination is not prescribed either party may notify the other its intention to terminate the tenancy.
 - Effluxion or lapse of time – duration lapses
 - Merger – interest of both parties vest in one person.
 - Conversion – Lessee converts the leases to another interest.
 - Enlargement
- (c)
- To put the tenant in possession
 - Not to derogate from grant
 - Ensure that the premises are fit for the purposes for which it is let.
 - Ensure quiet possession by the client
 - Maintain the main walls, passages, roof etc (duty of repair)
 - To suspend or adjust rent if the premises or part thereof is rendered unusable otherwise by reason of the tenant's negligence.

QUESTION SEVEN

- (a) **Will:**
 This is the legal declaration by a person of his wishes or intentions regarding the disposition of his property after death duly made and executed in accordance with the provisions of the Law of Succession Act.
 A will includes a codicil.
 A will may be oral or written.
- (b) **Probate:**
 This is a certificate of a court of competent jurisdiction that the will of which a certified copy is attached in the case of a written will has been proved a valid will, with a grant of representation to the executor in respect of the estate.
- (c) **Codicil:**
 This is a testamentary instrument made in relation to a will explaining, altering or adding to its dispositions or appointments duly made and executed as required by the provisions for the making and execution of a will.
- (d) **Demonstrative legacy:**
 This is a testamentary gift which is in its nature general but which manifests an intention that the gift shall be primarily satisfied out of a fund or a specified part of the property of the testator, but shall upon failure of that fund or property, be met from the general estate.
- (e) **General legacy:**
 This is a testamentary gift whether specific or general described in general terms to be provided out of the general estate of the testator whether or not also charged on any specific part of his estate.

(f) **Pecuniary legacy:**

Includes an annuity in the general legacy, demonstrative legacy so far as it is not discharged out of the specified fund or property, and any other general direction by the testator for the payment of money including all death duties free from which any gift made to take effect.

(e) **Special legacy:**

This is a testamentary gift of a particular part of the property of the testator. It identifies that part by a sufficient description whether in specific or general terms, and manifests an intention that that part shall be enjoyed or taken in the state and condition indicated by the description.

QUESTION EIGHT

(a) The president may:

- Grant pardon either free or subject to lawful conditions a person convicted of an offence.
- Grant to a person a respite either indefinite or for a specified period of the execution of a punishment imposed on that person.
- Substitute a less severe term of punishment for a punishment imposed on a person for an offence.
- Remit the whole or part of a punishment imposed on a person for an offence or of a penalty or forfeiture.
- Remove in whole or in part the non-qualification or the disqualification of a person arising out of or in consequence of the report of an election court.

(b)

- For the defence of property
- For the defence of any person from violence
- In order to effect a lawful arrest
- To prevent the escape of a person lawfully detained
- For the purpose of suppressing a riot, insurrection or mutiny
- In order to prevent the commission by that person of a criminal offence
- If a person dies as the result of a lawful act of war.

(c)

- In the execution of an order of a court established in Kenya or elsewhere
- In execution of an order of the High Court or Court of Appeal punishing him for contempt of court
- In the execution of an order of a court made to secure the fulfillment of an obligation imposed on him by law.
- For the purpose of bringing him before a court in execution of an order of a court
- Upon reasonable suspicion of his having committed or being about to commit a criminal offence under the law of Kenya.
- For the purpose of his education or welfare, in the case of a person who is below the age of 18.
- For the purpose of preventing the spread of an infectious or contagious disease
- In the case of a person who is or is reasonably suspected to be of unsound mind, addicted to drugs or alcohol, for the purpose of his care or treatment or the protection of the community.

- For the purpose of preventing the unlawful entry of that person into Kenya, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Kenya.
- To such an extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Kenya or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during a visit that he has made to a part of Kenya in which he, in a consequence of the order, his presence would otherwise be unlawful.

NOVEMBER 2012 – SUGGESTED SOLUTIONS

QUESTION ONE

(a) **Constitutional law:**

- This is a branch of law which creates the principal organs of government.
- It sets out the powers and functions of these organs.
- It generally lays down the fundamental principles of a limited government.

Administrative law:

- This is a branch of law which is concerned with the relations between various state bodies and officers.
- It is concerned with the exercise of power by state bodies and officers.

(b) **Codification:**

- This is the process of bringing together all the unwritten law in a specific area to constitute a comprehensive code.
- It relates to unwritten law e.g. Sale of Goods Act.

Consolidation

- This is the process of bringing together into one statute the provisions of other statutes.
- It relates to written law e.g. Companies Act.

(c)

- Burden of proof in civil cases is borne by the plaintiff i.e. it is the onus of the plaintiff to prove his allegations.
- The standard of proof is on a balance or preponderance of probabilities.
- The burden of proof in criminal cases is borne by the prosecution.
- It is the duty of the prosecution to prove the accused guilty.
- The standard of proof is beyond any reasonable doubt or shadow of doubt or shadow of doubt.

(d)

- Statute law is law made by parliament directly.
- It creates new law where none existed or amends existing law.
- It creates rules to regulate future conduct.
- It is formal and supreme over unwritten law.
- Judicial precedent or **stare decisis** or caselaw is a system of administration of justice whereby previous decisions are relied upon in subsequent similar cases.
- The **ratio decidendi** of an earlier decision is relied upon in a subsequent similar case.
- It does not always create new law.
- It is based on reasoning and is unwritten.
- It is subordinate to statute law.

(e)

- The law of succession is concerned with the disposition of property after death.
- It deals with the devolution of a deceaseds estate.

- It is concerned with ascertaining and giving effect to the wishes of the deceased and providing for dependants.
- The bulk of the law of succession in Kenya is contained in the Law of Succession Act Cap 160.
- The law of trust is concerned with circumstances in which persons expressly, impliedly or constructively hold property on behalf of others.
- It deals with the rights and duties of trustees and beneficiaries.
- It also prescribes remedies for breach of trust.

QUESTION TWO

- (a) The principle enunciated or applied in this case is the fundamental rule of privity of contract which is to the effect that
- Only a person who is party to a contract can sue or be sued on it.
 - Only a person who has provided consideration is privy to a contract.
 - A stranger to consideration cannot sue or be sued on the contract even if it was intended to benefit him.

The common law doctrine of privity of contract has several exceptions for example:

- **Agency:** A principal may sue or be sued on a contract entered into by the agent. This exception is more apparent than real in that in law, the agent represents the principal who is therefore party to the contract.
- **Negotiable Instruments:** a holder of a negotiable instrument can sue on it in his own name even though he has not provided consideration. This exception is contained in section 27 (1) of the Bills of Exchange Act.
- **Third Party Insurance:** under the provisions of the Insurance (Motor vehicles Third Party Risks) Act Cap 45, a victim of a motor accident is entitled to compensation by the insurer for any injuries sustained. The insurer is liable as long as the motor vehicle was in the hands of the insured or an authorized driver.
- **Legal assignment:** if a creditor assigns his debt to a third party e.g. pursuant to the provisions of the Indian Transfer of Property Act, 1882, the assignee is entitled to sue the debtor as if he were the original creditor.
- **Trust:** the beneficiary is in certain circumstances permitted to sue the trustee notwithstanding the absence of privity between the two.
- **Contracts or Covenants running with land:** certain benefits and liabilities attached to or imposed on land are in certain circumstances enjoyed by subsequent holders of the land upon whom liability may also attach.

(b) (i)

- This problem is based on a contract subsisting between the parties. Musika had agreed to perform and Jumbe to pay. A down payment had even been made.
- The cancellation of the rallies frustrated the contract and discharged both parties from their obligations. Jumbe is therefore entitled to the Kshs. 50,000 paid to Musika as none of the parties is to blame.
- He is not bound to pay the balance.

(ii)

In this case Musika is in breach of contract by reason of self-disablement and Jumbe has an action against him in damages for the breach.

QUESTION THREE**(a) Ownership:**

- Confers certain basic rights over the property for example rights to exclusive use, possession, misuse and disposition.
- The proprietor may part with possession by choice.
- It is a question of law.

Possession:

- This is the mere fact of holding or control of the property.
- It does not generally confer proprietary rights.
- It is a question of fact.

(b) Acquisition of ownership

- Asserting ownership over things not previously owned by any other person.
- Adverse possession
- Purchase from a previous owner
- Without the owners consent, e.g. by court order
- Inheritance
- Intestacy.

(c) Loss of ownership

- By a voluntary act e.g. transfer
- Retransfer
- Operation of law, e.g. death or bankruptcy
- Displacement by new owner (adverse possession).
- Destruction of tangible assets.
- Lapse of time or discharge for tangible assets.
- Abandonment.
- Extinction or forfeiture

Chose in action

- These are intangible rights which can only be enforced by court action.
- They are not capable of physical possession e.g. debts, patents etc.

Chose in possession

- These are tangible things or subject matter, capable of physical possession e.g. land, motor vehicles etc.

QUESTION FOUR**(a) Domicil:**

- This is the country of permanent residence.
- It is the country in which a person has or is deemed by law to have a permanent home.
- Kenyan law on domicil is contained in the Law of Domicil Act, Cap 37.
- Under the provisions of this Act there are three types of domicil namely.
 - **Domicil of origin:** this is the domicil a person acquires at birth e.g. a legitimate infant acquires the fathers domicil while an illegitimate infant acquires the mothers domicil.

- **Domicil of dependence:** this is the domicil of dependants. The domicil of the dependant changes with that of the other person e.g. the domicil of an adopter infant depends on that of the adopter while that of an illegitimate infant depends on that of the mother.
 - **Domicil of choice:** this is the domicil a person acquires by choice. Every person of sound mind, who is not a minor has capacity to acquire a domicil of choice by:
 - Taking up residence in the country of choice.
 - Having an intention to make the country his permanent home.
- (b) Under section 93 (1) of the Constitution, any foreigner desirous of becoming a citizen of Kenya may apply to the minister for naturalization. The constitution prescribes the minimum conditions an applicant must fulfill. The minister must be satisfied that the applicant:
- Has attained the age of 21.
 - Is of good character.
 - Has adequate knowledge of the Kiswahili language.
 - Intends to continue residing in Kenya if naturalized.
 - Has been ordinarily and lawfully resident in Kenya for 12 months immediately preceding the application.
 - Has been ordinarily and lawfully resident in Kenya for a period of 4 years or for periods amounting in the aggregate to not less than 4 years during the 7 years immediately preceding the 12 months.
 - The minister may thereupon grant the applicant a certificate of naturalization.
- (c) Section 94 (1) of the Constitution sets out the grounds upon which the minister may revoke the citizenship status of a registered or naturalized citizen. The minister must be satisfied that the citizen:
- Has by act or speech shown himself to be disloyal and disaffected towards Kenya.
 - Has during a war in which Kenya was involved unlawfully traded, communicated or engaged with enemies while aware that such trade assisted the enemy in the war.
 - Has continuously resided outside Kenya for 7 years while not in the service of Kenya or other international body of which Kenya is a member etc.
 - Has within 5 years of registration or naturalization been convicted for a criminal offence and sentenced to imprisonment for 12 months or more.
 - Obtained the registration or naturalization by means of fraud, false representation or concealment of material facts.

QUESTION FIVE

(a) (i)

- This doctrine is to the effect that where two or more persons die in circumstances rendering it uncertain as to which of them survived the other (s) the death is presumed to have occurred in the order of seniority and accordingly, the younger survives the elder.
- In the case of spouses they are presumed to have died at the same time.

(ii) **Administrator *cum testamento annexo*:**

- This is a person appointed by the court to administer a deceased's estate in accordance with the will as though he were an executor.

- The appointment is made on application if the testators will does not appoint an executor, or if the appointment fails to take effect.
- The person appointed administers the estate as per the will.

(iii) **Administrator Pendente Lite**

- This is an administrator appointed by the court to safeguard the testators estate while legal proceedings concerning the validity of the will are pending in court.

(b) Under section 31 of the Law of Succession Act, Cap 160, Laws of Kenya, a gift in contemplation of death is valid only if:

- The donor is at the time contemplating death by reason of a present illness or present and imminent danger.
- The gift involves movable property disposable by will.
- There is delivery of possession or documents of title to the intended beneficiary.
- The donor does not survive the illness or danger.
- The beneficiary survives the donor
- The gift is made in circumstances which show that the donor intended it to revert to him should he survive the illness or danger.

(c)

- A mutual will is an arrangement between two people usually a husband and wife to execute mutual wills making provision for each other with the remainder to a third party usually a child.
- There must be an agreement to the effect that the survivor cannot revoke the arrangement.
- On the death of either party leaving his or her will unrevoked the arrangement becomes binding.
- It is an equitable doctrine developed to prevent an unconscionable revocation of a will.

QUESTION SIX

(a) (i) An occupier is any person who has overall control of any premises whether he is physically available at such premises or not.

(ii)

- A visitor is a person who has express or implied permission to enter upon and/or remain within certain premises.
- An occupier owes all his visitors a common duty of care concerning dangers arising from the state of the premises, thing done or omitted to be done.
- The occupier is bound to take such care as in all the circumstances of the case is reasonable to see that the visitor is reasonably safe in the use of the premises for the purpose for which he is invited or is permitted to be there.
- In determining whether an occupier has discharged the common duty of care, regard is had to:
 - Whether the occupier had adequately warned the visitors of the danger.
 - Whether the visitor has willingly accepted the risk.
 - Whether the visitor was discharging his calling.
 - Whether the visitor or invitee is an infant

- (b)
- This problem is not based on occupiers liability as such. It is based on the liability of an employer for injuries sustained by an employee in the course of his employment.
 - The occupier in this case is not liable for the injuries sustained by the window cleaner.
 - The employer is liable for not providing protective clothing to the employee.
 - The occupiers liability is based on the common law.
- (c)
- An occupier owes a trespasser no common duty of care.
 - A trespasser injured in a persons premises has no actionable claim against the occupier.
 - This question appear to be founded on the assumption that a trespasser has the same remedies as a visitor. The occupier may rely on the following defences:
 - Consented to the risk i.e. (**volenti non fit injuria**).
 - The occupier had given adequate warning of the danger.
 - Liability was excluded by the contract between the parties.
 - The injury is a consequence of the faulty execution of a task by a competent independent contract and the occupier has satisfied himself that the contractor had discharged the same reasonably.

QUESTION SEVEN

- (a) **General agent:**
- This is an agent who has authority to do a particular act or engage in a transaction in the ordinary course of his business trade, profession or occupation as an agent.
 - His authority is based on the contract.
- Special agent:**
- This is an agent whose authority is limited to doing some act or representing the principal in a transaction not in the ordinary course of his business trade profession or occupation as an agent.
 - The scope of his authority depends on the contract.
- (b) **Requirements or conditions for ratification**
- The agent must have purported to act for a principal.
 - The agent must have had a competent principal.
 - The principal must have had capacity to enter into the transaction not only when the agent did so but when he ratifies the same as well.
 - The principal must have been aware of the material facts affecting the contract.
 - The transaction entered into by the agent must be capable of ratification i.e. not illegal or void.
 - The principal must ratify the contract in its entirety.
 - The principle must ratify the transaction within a reasonable time.
- (c) Obligations of the Principal to the agent include:
- **Remuneration:** the principal is obliged to remunerate the agent for services rendered. This obligations may be express or implied. The agent must earn his remuneration by rendering services but it is immaterial that the principal has not benefited from the agents performance. However, the principal is not bound to remunerate the agent if he has acted negligently or has made a secret profit without disclosing.

- **Indemnity:** the principal is bound to compensate the agent for any loss or liability arising in the course of discharging his obligations. However, the principal is only liable to indemnify the agent for liability arising while the agent was acting within the scope of his authority.

QUESTION EIGHT

- (a) The phrase “Sources of Law” literally means where rules of law are found. However, the phrase has been used to describe:
- The origins of the rules and principles which constitute the law applicable in a country at a given time.
 - The source of force or validity of the rules or principles applicable as law in a country.
 - The materials from which rules of law developed.
 - The factors which influenced the development of the rules of law.

The main sources of law of Kenya are:

- The constitution
- Legislation or statute law
- Delegated legislation
- Statutes of general application
- Common law
- Equity
- Case law

(b) **Advantages:**

- **Certainty and Predictability:** In Dodhia V. National and Grindlays Bank the Court of Appeal was emphatic that “a system of law requires a considerable degree of certainty.” Case law makes a legal system certain and predictable.
- **Consistency and uniformity:** case law facilitates consistency and uniformity in the administration of justice as similar cases are decided in alike.
- **Rich in detail:** many decisions which constitute precedents have been made.
- **Practicality:** judicial precedent is practical in that principles or propositions of law are formulated on the basis of practical circumstances that demand legal solutions.
- **Flexibility:** it is contended that case law is flexible in that judges in subsequent cases attempt and sometimes succeed in distinguishing earlier decisions so as to justify departing from them.

Disadvantages:

- **Rigidity:** strict application of judicial precedent makes a legal system inflexible and unresponsive to changes. This could perpetuate incorrect decisions.
- **Over-subtlety:** when judges in subsequent cases attempt to distinguish indistinguishable cases so as to depart from them, they develop technical distinctions or distinctions without differences. This arguably makes case law artificial and may lead to uncertainty.
- **Bulky and complex:** case law is by its nature bulky as many decisions have been made and there is no index as to which of them are precedents in what cases. Closely allied to this problem is the challenge of extracting the **ratio decidendi**.
- **Piece-meal:** principles or propositions of law are enunciated by courts in bits and pieces i.e. there is no deliberate attempt to make law in a comprehensive matter.

(c)

- **Reasonableness:** a good local custom must be reasonable to the persons affected by it. This is because law is founded on the principle of justice.
- **Conformity with statute law:** The custom must be consistent with written law. This is because parliament is the supreme law making body and has power to render a particular custom inoperable.
- **Observance as of right:** the custom must have been observed openly and as of right, i.e. nec vi, nec clam, nec precario. It must be recognized as binding by those affected by it.
- **Immemorial antiquity:** the custom must have been observed since time immemorial, i.e. for a long time. Time immemorial means no living person can adduce evidence as to when the custom did not exist.

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QUESTION ONE

(a)

- This is indirect, subordinate or subsidiary legislation.
- It is law made by parliament indirectly.
- These are by-laws, rules, orders, regulations statutes or proclamations made by subordinate competent bodies for example local authorities, professional bodies, statutory boards, government ministers etc in exercise of delegated legislative authority or power conferred upon them through an enabling or Parent Act.

Advantages:

- **Compensation of parliamentary lost time:** law making time not made use of by parliament is made use of by the delegates.
- **Speed:** it is a faster method of law making. It is therefore responsive to urgent needs.
- **Flexibility:** the law making process is not tied to rigid provisions of the constitution.
- **Technicality of subject matter:** technical subject matter is dealt with by experts in the field.

Disadvantages:

- **Less democratic:** it is not as democratic as statute made law.
- **Difficult to control:** neither parliament nor courts of law can control it effectively.
- **Inadequate publicity:** the rules are not widely published.
- **Sub-delegation and abuse of power:** complicates the problem of control.
- **Detail and technical:** some of the rules are too detailed or technical to be understood.

(b)

- **Informality:** free from technicalities which characterize ordinary courts of law.
- **Speed:** it is a faster method of dispute resolution.
- **Cheap:** there is a saving on cost.
- **Less acrimonious:** it tames or tones down acrimony.
- **Convenience:** parties are free to choose the timing, language and venue of the proceedings.
- **Relieves overburdened courts:** entertains disputes which otherwise would have gone to court.
- **Expert knowledge and specialization:** parties are free to appoint the most experienced arbitrator to hear their case.
- **Privacy:** proceedings are conducted in confidence, free from public scrutiny.

(c)

Under the provisions of the Constitution, the Judicial Service Commission consists of:

- Chief Justice, as chairman,
- Attorney General
- Two persons who are for the time being judges of the High Court and Court of Appeal appointed by the president.
- Chairman, Public Service Commission.
- Registrar of High Court acts as secretary.

QUESTION TWO

(a)

- **By registration:** these are companies incorporated pursuant to the provisions of the Companies Act. Their creation is evidenced by a certificate of incorporation. The company may be public or private.
- **By statute:** these are corporations created by Acts of parliament. The Act establishes the body, gives it a name and prescribes its objects. E.g. Kenya Wildlife Services, Kenya Revenue Authority.
- **By charter:** these are private universities that have been given a charter in accordance with the Universities Act, e.g. Catholic University for Eastern Africa.

(b)

- **Name clause:** describes the name of the company with “Limited” or “Ltd” as the last word thereof for companies Limited by shares or guarantee.
- **Registered office clause:** states that the registered office of the company will be situated in Kenya.
- **Objects clause:** sets out the purposes for which the company is incorporated. It describes the contractual capacity of the company. It delimits the company's contractual capacity.
- **Capital clause:** specifies the capital with which the company proposes to be registered and the divisions thereof.
- **Liability clause:** states whether members liability is limited or unlimited and whether limited by shares or guarantee.
- **Association or declaration clause:** states the desire of the subscribers to be formed to a company.
- **Particulars of subscribers:** name of the subscribers postal addresses, occupation, number of shares taken.
- **Date:** a memorandum must be dated.

(c)

- Subscribers are in a position to control membership.
- Transfer of shares is restricted, members determine who may join.
- It is the best vehicle for family business.
- Subject to less statutory formalities e.g. need not publish annual accounts or hold the statutory meeting.
- Entitled to commence business on the date of incorporation.

(d)

- A partner has become a lunatic or is permanently of unsound mind.
- A partner is permanently incapable of discharging his obligations as a partner.
- A partner is continuously guilty of willful breach of the partnership agreement.
- The partnership business can only be carried on at a loss.
- Circumstances are such that it is just and equitable that the partnership be dissolved.
- A partner has behaved in a manner unfairly prejudicial to the firm and his continued association is likely to bring the firm's name into disrepute.

QUESTION THREE

(a)

- Parties are invariably the buyer and the seller. The seller sells or agrees to sell while the buyer buys or agrees to buy goods.
- Transfer or passing of property from the seller to the buyer. Property in goods must pass from the seller to the buyer.
- It always involves goods e.g. personal chattels, emblements industrial growing crops etc.
- It is characterized by price. This is the consideration provided by the buyer to support the contract. It must be monetary in character.
- The contract may be oral, written or implied from conduct of the parties.
- Both parties must have the requisite capacity.

(b)

- Whether it is for the buyer to take delivery or the seller to transmit them to the buyer depends on the terms of the contract.
- Unless otherwise agreed, the place of delivery is the seller's place of business if any, failing which his residence.
- If specific goods are in some other place known to the parties that other place is the place of delivery.
- If the goods are in the hands of a third party, delivery is deemed complete when the third party intimates to the buyer that he holds the goods on his behalf.
- Unless otherwise agreed, the cost of and incidental to putting the goods into a deliverable state is borne by the seller.
- If the seller is bound to transmit the goods to the buyer he must do so within a reasonable time.
- Unless otherwise agreed, the buyer is not bound to accept delivery by instalments.
- Delivery by common carrier is prima facie complete when the goods are handed over to the carrier.
- If the seller delivers less goods, the buyer is entitled to reject the goods or accept them and pay at the contract rate.
- If the seller delivers more goods the buyer may reject all of them or accept only those included in the contract or accept all and pay at the contract rate.

(c)

- **Damages for non delivery:** this remedy is available to the buyer if the seller wrongfully neglects or refuses to deliver the goods as agreed.
- **Specific Performance:** this remedy may be applied for if the seller wrongfully neglects to deliver specific goods.
- **Damages for breach of warranty:** this remedy may be available if the buyer has agreed or is compelled to treat breaches of conditions by the seller or breaches of warranties and the seller is in breach thereof.
- **Recovery of price:** this remedy is available where consideration for the payment has totally failed.
- **Rejection of goods:** if more or less goods are delivered, or the goods delivered are mixed with those of a different description, the buyer is entitled to reject them.

QUESTION FOUR

(a)

Condition	Warranty
<ul style="list-style-type: none"> • This is a major term of a contract or a term of major stipulation. • It runs to the root of the contract. • It is part of the central theme of the contract. • If breached it entitles the innocent party to treat the contract as repudiated and sue in damages for the breach. As was the case in <u>Poussard V. Spiers and Pond</u> where it was held that the singers non appearance from the beginning of the season amounted to a breach of a condition and the organizers were entitled to treat the contract as repudiated. 	<ul style="list-style-type: none"> • Is a minor term of a contract or a term of minor stipulation. • It is a collateral or peripheral term of the contract. • It does not ran to the root of the contract. • If breached, it entitles the innocent party to an action in damages but the contract remains enforceable. The party is therefore bound to honour its part. In <u>Bettini V. Gye</u> it was held that the term broken was a warranty.

(b)

- This phrase means that only a person who is party to contract can sue or be sued on it. Dunlop V. Selfridge.
- It means that by providing consideration a person becomes party to a contract. Tweddle V. Atkinson.
- It means that a stranger to a contract cannot sue or be sued on it even if it was entered into for his benefit Scruttons Ltd V. Midland Sillicones Ltd.

However there are several exceptions to this rule where persons who have not provided consideration or are not privy to a contract can sue or be sued on it.

- Agency relationship
- Legal assignment
- Trust relationship
- Covenants running with land
- Third Party motor insurance.
- Negotiable instruments.

(c)

Discharge of contract by performance means that the performance must be precise and exact. This proposition is generally true as it encapsulates the common law doctrine of precise and exact which ordains that contractual obligations be observed to the letter. Each part of the contract must be performed failing which there is no payment or discharge. The decision in Cutter V. Powell exemplifies this doctrine. However, due to the unfairness of the doctrine particularly in promoting unjust enrichment exceptions have been admitted and performance need not be precise and exact. The above proposition does not apply in the following circumstances:

- **Divisible Contracts:** this exception is illustrated by the decision in Ritchie V. Atkinson.
- **Substantial performance:** as was the case in Marshides Mehta and Co. Ltd. V. BarronVerhegen.

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- **Partial performance if accepted:** the decision in Sumpler V. Hedges demonstrates that there must be an express or implied acceptance of the partial performance for a party to be entitled to payment for work done.
- **Prevented performance:** this exception is vividly illustrated by the decision in Planche V. Colburn.
- **Frustration of Contract:** if an extraneous or unforeseen occurrence or event makes it impossible for the parties to perform their obligations, the contract is discharged.

In summation it is arguable that whereas it is true to say that performance of contract must be precise and exact, this assertion is subject to several exceptions.

(d)

- This problem is based on the rules of consideration and in particular the rule that payment of a lesser sum on the day in satisfaction of larger is not sufficient consideration for the creditors promise to accept the sum in full settlement of the debt. This is the rule in **Pinnels Case (1602)**. However, this rule is subject to several exceptions.
- The legal position is that S is not liable to P at all as his obligation has been discharged in toto. This position may be justified on two arguments:
 - P accepted payment of a lesser sum from a 3rd party and such a promise is binding. This is consistent with the decision in Welby V. Drake.
 - One of the salient exceptions to the rule in Pinnels Case is that payment of a lesser sum in the form of an object extinguishes the entire debt. In Pinnels Case Brian C. J. was emphatic that the gift of a horse, hawk or robe is sufficient consideration. It therefore follows that P's acceptance of the bags of maize valued at Kshs. 30,000 extinguished S's obligation to him.

QUESTION FIVE

(a)

This is a situation where two or more persons are entitled to the simultaneous enjoyment of land. A co-ownership may be a joint tenancy or tenancy in common. A joint tenancy is characterized by jus accrescendi and the four unities. A tenant's interest cannot be disposed of by will or pass to a beneficiary. In a tenancy in common, each tenant has a distinct fixed share in property which has not yet been divided among the co-tenants. A tenant's interest is disposable by will.

Co-ownership may be terminated in various ways for example,

- Partitioning of the property concerned by mutual consent.
- Union in a sole tenant i.e. becomes vested in one person.
- Sale of the property to another person.
- Severance i.e. conversion of a joint tenancy to tenancy in common.

(b)

- Name of the applicant i.e. Inventive Mind Co. Ltd and its postal address.
- A short description of the drug in question.
- A drawing of the trade mark.

(c)

- **Statutory Power of Sale:** this is the power of the mortgagee to sell the security if Roy fails to repay the loan. The mortgagee must give the requisite notices to the mortgagor i.e. Roy.

- **Fore Closure:** this is a foreclosing order which bars the mortgagor from redeeming his security.
- **Appointment of receiver:** the bank is ordinarily empowered by the mortgage to appoint a receiver to take over the security given by the mortgagor to facilitate payment of the debt.
- **Suit on personal covenant:** This is the right of mortgagee to sue the mortgagor in the event of default. It is an action for recovery of the amount due from the mortgagor.

QUESTION SIX

(a)

Under the provisions of the Law of Succession Act, “dependant” means

- Wife or wives and former wife or wives and children of the deceased whether or not maintained by him before death.
- Such of the deceased parents, grandparents, step parents, brothers, sisters, half brothers and half sisters, children the deceased had taken into his family as his own, grand children, step children, as were being maintained by him immediately before death.
- Husband if he was being maintained by his wife before her death.

(b)

Under the provisions of the Law of Succession Act, a will is the legal declaration by a person of his intentions or wishes regarding the disposition of his property after death duly made and executed in accordance with the provisions of the Act.

- A will includes a codicil.
- A will may be oral or written.

A will may be revoked by the testator in three ways:

- **Another will or codicil:** manifesting an intention to revoke the earlier will.
- **Burning, tearing or otherwise destroying:** the will for purposes of revocation.
- **Marriage of the testator:**

(c)

- Provide and pay out of the deceased’s estate, reasonable funeral expenses.
- Get in all the free property of the deceased including debts.
- Pay out of the deceased’s estate, all expenses of obtaining the grant of representation and administration.
- Ascertain and pay all the deceased’s debts out of the estate.
- Provide a full and accurate inventory of assets and liabilities of the deceased before the court within 6 months of the grant.
- Distribute or retain in trust all assets remaining after payment of expenses and debts.
- Complete administration of the estate in respect of all matters other than continuing trusts within 6 months of confirmation of the grant or such longer time as the court may allow.
- Produce to the court a full and accurate account of the completed administration within 6 months of confirmation of the grant.

(d)

- **Lapsing:** a legacy lapses in circumstances in which the beneficiary predecease the donor.
- **Ademption:** a legacy deems if a particular subject matter bequeathed to a particular beneficiary does not belong to the testator or does not exist.
- **Abatement:** a legacy abates if the testator’s estate cannot satisfy all legacies.

- **Uncertainty:** a legacy fails if there uncertainty as to the beneficiary or the subject matter of the legacy.
- **Illegality:** a legacy fails if the gift its subject matter is illegal by law.

QUESTION SEVEN

(a)

The rule in Rylands V. Fletcher is the rule of strict liability or liability without fault.

- This rule is to the effect that a person who for his own purpose brings to his land and keeps there anything likely to do mischief if it escapes must do so at his peril and is prima facie answerable for all the damage which is a natural consequence if its escape.

This rule was formulated in Rylands V. Fletcher where an employer was held liable for the negligence of his independent contractor.

The principal exceptions to this rule include:

- Contributory negligence
- Act of stranger or third party.
- Plaintiffs consent or benefit.
- Act of God.
- Statutory authority.
- Things naturally on the land.

(b)

In Blyth V. Birmingham Water Works Co. negligence was defined as **“the omission to besomething which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not have done.”**

In order to succeed in an action based on negligence the plaintiff must establish certain elements. These are the essentials of negligence and are:

- **Legal duty of care:** the plaintiff must show that the defendant owed him a legal duty of care in the circumstances i.e. the defendant knew or reasonably ought to have known that acting negligently would injure the plaintiff. (Donoghue V. Stevenson).
 - The defendants degree of care depends on the transaction. Ordinarily, the degree of care is that of a man of ordinary prudence. In the case of professionals it is that of a reasonably competent professional in the field. However, in certain circumstances the defendant owes the plaintiff no legal duty of care. As was the case in King V. Phillips. These are circumstances in which the defendant could not reasonably have foreseen the plaintiff suffering any damage.
- **Breach of duty:** the plaintiff must demonstrate that the defendant broke his duty of care i.e. did not act in a manner consistent with a reasonable man. It must be evident that the defendants conduct amounted to a negligent act or omission. The plaintiff must adduce evidence to that effect. However, in certain instances negligence is presumed. These situations are referred to as res ipsa loquitur which literally means it speaks for itself. It means that the occurrence cannot be explained in a manner inconsistent with the defendants negligence. As was the case in Scott V. London and St. Catherines Dock Co. In such a case, it is for the defendant to demonstrate the occurrence without his negligence.
- **Loss or damage:** the plaintiff must establish that as a result of the defendants breach of duty he suffered loss or damage. These must be anexus between the plaintiff's loss and the

defendants breach of duty failing which damages are said to be too remote and irrecoverable. **The Wagon Mound II** the defendant is generally liable for such loss or damage as is reasonably foreseeable as was the case in Bradford V. Robinson Rentals Ltd.

(c)

- This problem is based on the tort of defamation and particular libel which is a defamatory representation in some permanent form as it is in this case.
- Libel is actionable per se i.e. Mrs. Rose Brown is not obligated to establish loss or damage.
- It is evident that Parrot Daily Newspaper defamed Mrs. Rose Brown by making these allegations. The statement in question is defamatory in the ordinary sense, they refer to Mrs. Rose Brown, were published by the newspaper and the publication was maliciously made in that the Newspaper did not bother to ascertain the factual situation.
My advice to Mrs. Rose Brown is to sue the newspaper and the proprietor in damages for defamation.
- The action must be instituted within one year of publication of the defamatory representation.

QUESTION EIGHT

(a)

- If the agent has expressly or implied consented to personal liability.
- If the principal does not exist or has no capacity to contract (Kelner V. Baxter).
- If the agent had represented or held himself out as the principal.
- If the agent has exceeded his authority i.e. breach of warranty of authority.
- If the agent has executed a document ordered in his own name. (Schack V. Anthony).
- If the agent signs a negotiable instrument in his own name.

(b)

- This problem is based on the fiduciary obligations of an agent and the consequences of breach thereof.
- An agent is bound to act in good faith for the benefit of the principal and must avoid conflict of interest by disclosure of any personal interest in contracts.
- In this case, the agent acted contrary to the principal's instructions and is guilty of breach of the fiduciary obligations by selling the house to a relative.

Abraham is entitled to have the house back. In addition he is entitled to sue Sarah in damages for breach of duty. Mary is entitled to a refund of the amount paid as the sale is fraudulent as she is deemed aware of the reserved price.

SUGGESTED**SOLUTIONS December****2013 QUESTION ONE**

(a)

Law of Contract:

This is a branch of commercial law which deals with the rules governing contracts generally e.g. types of contracts, elements of a contract, terms vitiating factors, illegality, discharge remedies et.c.

Law of property:

This branch of law deals with the jurisprudence of interest in land as well as proprietary transactions e.g. leases, mortgages charges, easements.

Law of succession

This is a branch of law concerned with the disposition of a **deceased's property** **intestate and** intestate succession.

Law of torts

This branch of law is concerned with the protection of personal and proprietary rights. Its core fields include principles of tort and the individual torts.

Law of trust:

This is a branch of equity concerned with the rights and duties and other principles regarding the holding of property of one person by another.

Family law

This branch of law is concerned with the dynamics of the family as a social unit.

(b)

- The writ system
- Delay
- Procedural technicalities
- Inadequate remedies
- Absence of appellate function
- Non-recognition of trust
- Encouraged bribery
- Inadequate protection of borrowers

(c)

- **A Consolidating Statute:** is one which brings together into a single Act of Parliament the contents of a number of Acts in a particular subject for example the Companies Act, Cap 486.
- It does not usually change the law.
- **A codifying statute:** is one which arranges all existing law both statutory and case law in a particular subject into a statutory form.
- It brings together scattered laws in a particular subject for example the Sale of Goods Act, Cap 31.

(d)

“Judgement” in this context is construed to mean the “script” read out by the judge or magistrate in a particular case. In the premise, a judgement contains.

- a summary of evidence
- findings of fact both direct and inferential
- principles of law applicable to the relevant case
- the decision for example guilty or not guilty.
- sentence or order.

QUESTION TWO

(a)

Composition

- Judges of this court are known as “judges of appeal” and are the chief justice and such other number as prescribed by parliament but not less than two.
- The full court consists of five judges, though ordinarily three judges sit on substantive matters.

Jurisdiction

- This is an appellate court with jurisdiction to hear appeals in criminal and civil cases from the High court.
- Decisions of this court are final.
- The court exercises limited original jurisdiction in that it has capacity to punish contempt of court and can stay the execution of an order of the High court.

(b)

Declaration:

- This is a high court order which authoritatively articulates the legal position of the matter before the court for example and a declaration of a persons individual rights.
- The order is incapable of being executed.

Prohibition:

- This is an order directed to usurpers forbidding them from commencing or proceeding in a cause pending before them.
- It is ordinarily made in circumstances in which a court tribunal or official has no jurisdiction to proceed in a particular manner e.g. improper constitution, non-compliance with an essential preliminary requirement.
- The order prevents a court of tribunal from exceeding or continuing to exceed its jurisdiction or infringing the rules of natural justice.
- Disobedience is punishable by contempt of court.

Certiorari:

- This is an order of the high court to a subordinate court, tribunal or authority requiring it to produce a certified copy of a particular case for review and if found inappropriate the decision is quashed.
- The order enables the high court to examine proceedings in other bodies to determine whether there have been any irregularities and may be made where a court, tribunal or authority has:
 - Exceeded jurisdiction
 - Violated the rules of natural justice.

- An error on the face of the record.

Mandamus:

This is an order of the High Court directed to any person corporation or court requiring the same to do a particular thing appertaining to a public office or duty if the same has been refused by the official or public authority. It secures performance by tribunals, courts, public officials and administrative authorities.

Habeas Corpus:

- Literally means produce body.
- This is an order of the high court directed to a detaining authority demanding the production of the body of the detainee, before the court to show cause why he should not be released forthwith.
- It tests the legality of the detention or imprisonment.
- Its function is to secure the release of a person in unlawful custody.
- It is generally availed in circumstances in which a persons right of personal liberty is violated.

(c)

Literal rule:

- This is the plain meaning rule.
- It is to the effect that if the wording of the act is clear and exact, it should be accorded the literal natural or dictionary meaning sentences should be given their ordinary grammatical meaning.
- No word is added or removed.
- Technical terms must be given their technical meaning.

Golden rule

- This rule is to some extent an exception to the literal rule.
- It is to the effect that if the literal or plain meaning of a word, phrase or sentence is absurd or repugnant its meaning may be varied or modified so as to avoid the absurdity or repugnancy.
- This rule was explained in Grey V. Pearson.

Mischief rule:

- This rule is also referred to as the rule in Heydons case (1584) and is the oldest rule of construction.
- To apply the rule, the court examines the statute to be interpreted so as to ascertain the defect or mischief it was intended to remedy, so as to interpret the same in such manner as to suppress the mischief and advance the remedy.
- To apply the rule the court must decipher and discuss four matters alluded to in Heydons case.

Ejusdem generis:

- This rule is applied to interpret things of the same genus and species.
- It is to the effect that where general words follow particular words in a statute, the general words must be interpreted as being limited to the class of persons or things designated by the particular words. The rule was explained in **R.V. Edmundson.**

Noscitur a sociis:

This rule is to the effect that words of doubtful meanings derive their colour and precision from the words and phrases with which they are associated.

Expressio unius est exclusio alterius

- Literally means the expression of a thing implies the exclusion of another.
- This rule is to the effect that if words of particular signification in a statute are not followed by words of general signification, the statute only applies to the instance identified.

Other rules include:

Rank principle**Statutes in Pari materia**

A statute must be interpreted as a whole.

Presumptions

- The statute was not intended to change or alter the common law.
- The statute was not intended to interfere with individual vested rights.
- The statute was not intended to apply retrospectively.
- The statute was not intended to have extra-territorial effect.
- The statute was not intended to affect the presidency.
- The statute was not intended to impose liability without fault.

QUESTION THREE

(a)

Company limited by shares:

- This is a limited liability company.
- Limitation of liability by shares means that a member can only be called upon to contribute to the assets of the company the amount if any outstanding or unpaid on the shares held beyond which the member is not liable.

Company limited by guarantee:

- This is a limited liability company.
- Limitation of liability by guarantee means that a member can only be called upon to contribute to the assets of the company the amount he undertook to contribute if the company was wound up during his membership or within one year of cessation of membership beyond which the member is not liable.

(b)

- Sharing of loss reduces the amount borne by a single partner.
- Partners enjoy relative privacy as the firm is not obliged to publish anything.
- Easy to form in that there are no legal formalities to be complied with.
- Partners are entitled to participate in the management of the firm's business.
- Partnerships enjoy the requisite flexibility in that a firm is free to change the nature of business, if all partners agree.
- In the event of insolvency, a creditor is entitled to attach personal assets of the individual partners.
- Partners can freely dispose of their interests to other partners.

(c) Obligations of a limited partner

- Not to take part in the management of the firms business.
- Not to compete with the firm.
- Disclose any personal interest to avoid conflict of interest.
- Not to withdraw or receive back his share during the currency of the firm.

Rights of a limited partner

- To inspect the firms books of accounts.
- To assign his share to another person.
- To receive his share of profit.
- Right not to be compelled to contribute to the assets of the company.

(c)

- Death of a partner unless the articles of partnership provide otherwise.
- Performance of the undertaking.
- Lapse of time
- Termination at will
- Illegality
- Charging of a partners interest by a court order for a private debt.
- Bankruptcy of a partner unless the partnership deed otherwise provides.
- Mutual consent: if all partners agree.
- Lunacy or permanent insanity.
- Permanent incapacitation.
- Continuous and willful breach of the partnership agreement.
- Firms business can only be carried on at a loss.
- Circumstances are such that it is just and equitable that the firm be wound up.
- Partners conduct or behaviour is prejudicial to the firm.

QUESTION FOUR

(a)

The advertisement by A is an invitation to treat. A is simply inviting would be buyers of the motor vehicle to make an offer to buy the same at that price which offer A may accept or reject. This position is consistent with a sale by display where a seller displays goods with cash price tags. The prospective buyer makes the offer.

This reasoning is consistent with the decision in Fisher V. Bell.

(b)

Though acceptance is an integral part of a contract, in this case there was no acceptance as Bs letter was merely an offer to A to take the car at that price. In any event, there is no express or implied intimation by A that anything be communicated by post.

(c)

There is no contractual relationship between C and A on account that after he had inspected the car and satisfied himself that it was accepted to him, C made all offer to take it at Kshs. 500,000 but the offer was rejected. This effectively terminated Cs offer to A.

(d)

There is no contractual relationship between D and A. Since D did not even make an offer to buy the motor vehicle. The fact that A agreed to her request to go to the bank cannot render A liable.

(e)

There is a contractual relationship between A and E. This is because A accepted Es offer to take the car at Kshs. 600,000. This created a legal obligation on the part of E to take the car. His change of mind amounts to a breach of contract for which he is liable in damages A is therefore entitled to sue E. This position is consistent with the decision in Byrne V. VanTienhoven where the offeror purported to revoke the offer after it had been accepted by the offeree.

QUESTION FIVE

(a)

- Performance: discharge of the undertaking as agreed.
- Obedience: acting in accordance with the principals instructions or authority.
- Accountability: explain application of money or assets coming into his hands.
- Care and skill: exhibit a degree of care and skill appropriate to the circumstances.
- Personal performance or non delegation: must perform the undertaking personally.
- Estoppel: must respect the principals title.
- Bona fide: act in good faith for the benefit of the principal
- Disclosure: must disclose personal interest to avoid any conflict of interest.
- Confidentiality: must not disclose his dealings with the principal to third parties.
- Separate accounts: must maintain separate accounts of his assets and those of the principal.
- Keep the principal informed of his dealings with third parties.

(b)

Right to sell:

the seller has the right to sell the goods when property is to pass.

Correspond to description:

In a sale by description, it is implied that the goods shall correspond with the description.

Fitness for purpose:

Where the buyer expressly or impliedly makes known to the seller the particular purpose for which the goods are required it is implied that the goods shall be reasonable fit for such purpose.

Merchantable quality:

If goods are bought by description from a seller who deals in such goods, it is implied that the same shall be of merchantable quality.

Correspond with sample:

In a sale by sample it is implied that the goods shall correspond with the sample in quality.

Compare bulk with sample:

In a sale by sample it is implied that the buyer shall have a reasonable opportunity of comparing the bulk with the sample.

Free from defect:

In a sale by sample it is implied that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of sample.

(c) **Rights**

- recovery of installments in arrears
- sue in damages for breach
- retention of the sum paid
- to be notified of any change in location of goods
- repossess the goods should circumstances justify.

Duties

- deliver the goods to the hirer.
- confer a defect free title.
- ensure that the goods are reasonably fit for the purpose for which they are hired.
- ensure that the hirer has quiet possession of the goods.
- inform the hirer the cash and hire purchase price of the goods.
- furnish a copy of the hire purchase agreement to the hirer.
- disclose any defects in the goods or title.

QUESTION SIX

- (a) This is a person who fully or wholly depended on the deceased for maintenance. However section 29 of the Law of Succession Act, Cap 160 provides a comprehensive definition of the term.
- (b)
- **Writing:** there must be some writing the law does not insist on any special form or wording.
 - **Signature or mark:** the will must contain the signature or mark of the testator or that other person who signs in the presence and in accordance with the directions of the testator.
 - **Position of signature or mark:** the same must be place as to show that it was intended to give effect to the writing as a will.
 - **Attestation:** the will must be attested to by at least two competent witnesses who must have seen the testator or that other person sign or had received a personal acknowledgment of the signature or mark.
 - **All witnesses must sign the will in the presence of the testator** but need not be present at the same time.
 - The law does not prescribe any special form of attestation.
- (c)
- Father, if dead,
 - Mother, if dead,
 - Brothers and sisters and children of deceased brothers and sisters in equal shares, if dead,
 - Half-brothers and half-sisters and children of deceased half-brothers and half-sisters in equal shares, if dead,
 - The closest relative up to and including the 6th degree of consanguinity, if none,
 - Devolves upon the state and paid into the consolidated fund.

(d)

- The proceedings to obtain the grant were defective in substance.
- The grant was obtained fraudulently by making false statements or concealment of something material to the case.
- The grant was obtained by means of an untrue allegation of facts.
- The person to whom it was granted has failed to apply for its confirmation within one year or such longer period as may be allowed even after notice.
- The person to whom it was granted has failed to proceed diligently with the administration of the estate after due notice and without reasonable cause.
- The person to whom it was granted has failed to produce to the court any inventory or account of administration as required by law.
- The person to whom the grant was made has produced to the court any inventory or account of administration which is false in any material particular.
- The grant has become useless and inoperative through subsequent circumstances.

QUESTION SEVEN

(a)

- The plea of **res ipsa loquitur**: literally means it speaks for itself.
- This is a rule of evidence applicable in cases of negligence where want of care is presumed.
- It may be relied upon by the plaintiff where the occurrence cannot be explained otherwise than the defendants negligence.
- For the principle to be applicable the following conditions are necessary:
 - **absence of explanation** i.e. the plaintiff has no evidence of the negligent actoromission of the defendant.
 - **such a thing does not ordinarily happen if care is taken** i.e. the occurrence must be consistent with the defendants negligence.
 - **whatever occasioned loss or injury was within the exclusive control of the defendant, his servants or agents.**
- The principle of **res ipsa** provides **prima facie** evidence of negligence on the part of the defendant.
- Once pleaded by the plaintiff, it shifts the burden of proof to the defendant who must now explain the circumstance and if the explanation is reasonable, the plaintiff loses the case for want of prosecution.
- This principle was applied in Scott V. London and St. Catherines Dock Ltd.

(b) (i)

- The principle of reasonable foreseeability is applied in determining whether the defendant is liable for the loss or damage arising.
- It is the likelihood of the loss or damage being caused by the negligent act or omission of the defendant.
- The defendant is only liable if a reasonable person would have foreseen the likelihood of the loss or damage otherwise the same is said to be too remote and irrecoverable.
- This principle was applied in The Wagon Mound Case where it was held that the negligent ship captain was not liable as the loss in question was not reasonable foreseeable.
- Under this principle, the defendant is liable for the loss or damage irrespective of its character, if some form of loss or damage was reasonably foreseeable. As was the case in Bradford V. Robinson Rentals Ltd.

(ii)

- This is a rule applicable in the recovery of damages by the plaintiff.
- It is to the effect that the defendant must take the victim as he finds him.
- Simply put, the defendant cannot allege that the victim would have suffered no injury or less injury but for his unusually thin skin or weak heart.

This is the case in circumstances in which the plaintiff's injury is aggravated by a combination of his abnormality and some external force which foreseeably and naturally intervenes after the accident.

(c)

- This problem is based on the tort of negligence. In this case Peter Ole Yang should contemplate the possibility of a claim against him in damages for negligence i.e. crashing into James Kagios Motor Vehicle and injuring him.
- This is an obvious case of negligence on the part of Ole Yang and cannot escape liability. Although there is no evidence why the brakes failed, such a thing does not ordinarily happen if a motor vehicle is properly maintained.
- As a road user, Peter Ole Yang owed other road users including Kagio, a legal duty of care. He knew or reasonably ought to have known that using a defective motor would endanger other road users. Kagio can easily establish this element of negligence.
- It is also relatively easy for Kagio to prove loss or damage i.e. damage to his motor vehicle and injury.
- What may appear problematic, though not quite is establishing breach of duty, as he is unaware of the cause of the crash. But he may conveniently plead **res ipsa loquitur**. Since the facts speak for themselves and the court will presume negligence on the part of Peter. In such a case, the burden of proof shifts to Peter to explain the accident and can only escape liability by proving that the accident occurred without any actor omission of negligence on his part which in this case is a tall order.
- In our estimation Peter will be held liable for negligence.

QUESTION EIGHT

(a) (i)

- Joint tenancy is a situation in which property is owned by two or more persons.
- The property enjoys all the properties of a single proprietor.
- It is characterized by the "four unities" i.e.
 - Unity of title
 - Unity of possession
 - Unity of interest
 - Unity of time
- It is also characterized by the right of survivorship i.e. **jus accrescendi** i.e. proprietary rights of a deceased proprietor devolve upon the survivors.

(ii)

- **Notice** - applies to leases for undefined duration.
- **Effluxion of time or expiration of time.**
- **Forfeiture** –under the forfeiture clause or breach.
- **Surrender** –to the immediate landlord.
- **Merger** –tenant acquires the reversion, the lease and reversion must be vested in the same person.

- **Enlargement** – a lease may enlarge to a fee simple if the tenant executes a deed of enlargement.
- **Becoming a satisfied term:** if a lease is granted as a security for the payment of money, the term becomes satisfied and the lease automatically ceases when all the money has been paid.
- **Disclaimer:** a right to disclaim a lease arises only by statute. The effect of a valid disclaimer is the same as if there had been a surrender.
- **Frustration:** in *National Carriers Ltd. V. Panalpina Ltd (1981)* the House of Lords held that the doctrine of frustration can apply in a rare case to a lease of land so as to bring a lease to an end.

(b) (i)

- Generally signifies interest in land, immovables, traditionally could be restored to the owner.
- Personal property: this is personalty or movables sometime said to be chattels or chattels real. Traditionally not recoverable if dispossessed. However, leaseholds are deemed to be personalty.

(ii)

- Legal interest: this is a right over the land of another. E.g. easement, legal mortgage.
- It is an interest which is capable of subsisting or being conveyed or created at law.
- It is enforceable against every one.
- Equitable interest: this is a right recognized by equity only and enforceable against all others except a *bona fide* purchaser of a legal interest without notice of the equitable interest, examples include restrictive covenants.

MAY 2014

SUGGESTED SOLUTIONS

QUESTION ONE

- (a) “Statute” literally means Act of Parliament. This is law made by parliament in exercise of the legislative power conferred upon it by the Constitution. A statute begins as a Bill which goes through several stages to become so. Examples include Agriculture Act, Companies Act, Judicature Act, Kadhis Court Act.

However, the term „statute“ can be used to describe a category or type of delegated legislation e.g. under the Universities Act, Councils of Public Universities are empowered to make “statutes.” Statute law enjoys certain advantages. These include:

- **Resolution of legal problems:** It enables society resolve legal problems as and when they arise by enacting new statutes or amending those in existence.
 - **Dynamism:** enable society keep pace with changes in other spheres e.g. economic, political etc.
 - **Democratic:** it is made by representatives of the people and is therefore democratic.
 - **General application:** consists of general principles applicable at different times.
 - **Uniformity:** regulates the conduct and activities of all indiscriminately.
 - **Superiority:** it prevails over all other sources of law other than the Constitution.
 - **Publicity:** it is the most widely published source of law.
- (b) Common law may be described as a branch of the law of England which was developed by the ancient common law courts e.g. Court of Exchequer, Kings Bench and Common Pleas from customs, usages and practices of the English people. These courts applied the peoples customs in dispute resolution, thereby elevating the customs to rules of law. They universalized and standardized the customs. The evolution of common law is tied to the doctrine of stare decisis and the writ system. The growth of the common law was characterized by various challenges, for example procedural technicalities, delay, inadequate remedies, writ system, non recognition of trusts etc. Common law differs from equity in many respects:
- It developed before equity i.e. it is an older system of rules.
 - It was developed by a different court system. Equity was developed by the Lord Chancellors Courts.
 - The common law courts were guided by the writ system and doctrine of stare decisis. Equity courts relied on other principles, for example fairness.
 - Common law had only one remedy, namely damages, while equity developed many others e.g. injunction, rescission, specific performance etc.
 - Common law acts in rem while equity acts in personam.
 - If the two sources of law conflict equity prevails.
 - Common law developed as a complete system of rules while equity did not.
- (c)
- Under section 46 (4) of the Constitution of Kenya, if the president refuses to assent to a Bill, he must within 14 days thereof submit the speaker of the National Assembly, a memorandum indicating the specific provisions of the Bill which in his

opinion should be reconsidered by the National Assembly including his recommendations.

- The National Assembly must reconsider the Bill taking into account the comments of the president and must either:
 - Approve the president's recommendations with or without amendment and resubmit the Bill to the president for assent or
 - Refuse to take the president's recommendation and approve the Bill in its original form. If the resolution approving the Bill in its original form is supported by not less than 65% of all members of the National Assembly (excluding the *ex-officio* members) the president must assent to the Bill within 14 days of passage of the resolution.
- Under section 46 (6) of the Constitution “A law made by parliament shall not come into operation until it has been published in the Kenya Gazette.” However, parliament is empowered to postpone the coming into operation of a law and may make laws with retrospective effect.
- A statute comes into operation on the date of publication in the Kenya Gazette or on such other date as the minister concerned may thereafter appoint by a notice in the Kenya Gazette.

QUESTION TWO

(a)

- **Negotiation:** this is an alternative dispute resolution mechanism which involves the process of interaction between disputing parties and without compulsion by a 3rd party adjudicator, the parties endeavour to come to an interdependent joint decision concerning the terms of agreement on the issues between them. It enables disputing parties come to an agreeable and acceptable settlement, usually a compromise. It proceeds through exchange of information thereby permitting a learning process by which each party formulates, modifies and readjusts expectations, preferences and proposals.
- **Mediation:** this is a dispute resolution mechanism in which a neutral and impartial third party assists disputing parties to negotiate an acceptable settlement of contested issues to avoid or overcome an impasse or if the parties are unable to negotiate.
 - It is merely the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party with no authoritative decision making power. It is facilitated by negotiation.
 - The mediator assists the parties to reach their own agreement.
 - It is the least intrusive form of third party involvement in a dispute.
- **Arbitration:** this is a method of settlement of civil disputes out of court by arbitrators or arbitral tribunals that make arbitral awards. A dispute may be referred to arbitration by the disputing parties, statute or a court of law. Arbitrators may be appointed by the parties, a 3rd party of a court of law on application. Arbitrators enjoy certain powers;
 - An arbitral award may be set aside by a court of law in application.
 - The law on arbitration is contained in the Arbitration Act, 1995.
- **Tribunals:** these are bodies created by statute to adjudicate specific disputes. They exercise judicial or Quasi judicial functions, examples include industrial court, licensing boards, committees etc. These bodies enjoy certain advantages over ordinary courts e.g. cheap, speed, informality, flexibility, convenience, specialization etc.
- **Mini trial:** this is a dispute resolving hybrid process that structures private negotiation by combining elements of negotiation, mediation, and adjudication in a new way. It first developed in California. The parties to the dispute appoint an experienced person to preside at a two day information exchange. Each party presents its case. Officials from both sides confer to evaluate the case and come to a settlement, failing which the presiding

officer gives his view of how the case would be resolved in court. The parties discuss the case and if there is no settlement the case goes back to court.

- **Med-Arb** this is a dispute resolution mechanism whereby an arbitrator acts as a mediator in a single dispute.
- **Rent-a-judge (private judge)**: this is a situation where arbitration employs experienced persons e.g. retired judge to arbitrate difficult cases.
- **Summary jury trial**
- **Neutral expert fact finding.**

(b)

- **Prevention of anarchy**: Courts of law assist in the prevention of anarchy in that they act as guardians of the law by ensuring that people do not take the law into their hands. They ensure that giants, dwarfs, young, old, women, men, healthy, sickly, clever ignorant, the good and evil, the cruel and the kind are treated equally.
- **Social agents of peace**: courts assist in dispute resolution with binding decisions. They defuse tension in society and enhance togetherness.
- **Restoration and Maintenance of social equilibrium**: Courts restore the equilibrium in social order if disrupted by conflict, friction or dispute by resolving disputes. They provide remedies to aggrieved parties legal remedies reaffirm social norms.
- **Protection of expectations**: persons can foresee the consequences of their individual and collective conduct which builds confidence in society e.g. in the law of contract courts uphold patterns of behaviour and expectations in society thereby enabling person predict what others will do and thus organize their conduct.
- **Adjusters of law**: law is a system of rules for social ordering. Courts apply the law to resolve specific disputes since society is dynamic courts adjust the law to ensure that it keeps pace with such changes. They do so through redefinition of legal terms and expressions interpretation of written law on the basis of social conditions, linguistic context, practices and attitudes.

QUESTION THREE

(a) (i)

Domicil of Origin	Domicil of Choice
<ul style="list-style-type: none"> • This is the domicil which a person acquires at birth. • Under Kenyan law a person acquires a domicil or origin as a matter of course. For example. • A person born legitimate acquirers the domicil of the father. • A person born illegitimate acquires the domicil of the mother. • An infant legitimated by the marriage of its parents the domicil of the father. • A person born posthumously acquires the domicil of the father as at the date of death. • An adopted infant acquires the dominal of the adaptor. • Domicil of origin cannot be lost. It can only be suspended when a domicial of choice is acquired. 	<ul style="list-style-type: none"> • This is the domicil which a person acquires by choosing which country to make his permanent home or residence. • Only a person who has attained the age of majority and has the requisite capacity can acquire a domicil of choice. • The person must: <ul style="list-style-type: none"> ○ Take up actual residence in the country of choice. ○ Have an intention of making the country his permanent house. • Once a person acquires this domicil, the domicil of origin is held in abeyance but is reverted to if the domicil of choice is lost.

(ii) An alien may become a citizen of Kenya by naturalization or registration.

- **Naturalization:** under section 93 (1) of the Constitution any alien may become acitizen of Kenya by making a formal application to the minister. The minister must be satisfied that the applicant has fulfilled certain minimum conditions: The applicant must:
 - have attained the age of 21.
 - have adequate knowledge of the Kiswahili language.
 - be of good character.
 - intend to continue residing in Kenya if naturalized.
 - have been ordinarily and lawfully residing in Kenya for 12 months onthis immediate date before the application.
 - have been ordinarily and lawfully resident in Kenya for a period of 4years or for periods amounting in the aggregate to not less that 4 years during the 7 years. Immediately receding the 12 months above.
 - The minister may thereupon grant of applicant a certificate ofnaturalization.
- **Registration:** An alien may be registered as a citizen of Kenya. Pursuant to a formal application to the minister and must fulfill any of the following conditions:
 - a woman married to a citizen of Kenya is entitled to be registered onapplication. Such application may be made during the lifetime of the husband.

- a citizen of any common wealth country who has been ordinarily and lawfully resident in Kenya for at least 5 years.
- a citizen of any African country which registers, Kenyans as her own citizens, provided the applicant has been ordinarily and lawfully resident in Kenya for at least 5 years.
- any person born in Kenya before 11.12.1963 where neither parent had been born in Kenya.
- a person born outside Kenya whose mother is a citizen of Kenya.
- The minister may register the applicant as a citizen of Kenya.

(b)

- A private company has a wider capital base by reason of the wide spectrum of membership.
- Shares or other interest in a private company are transferable.
- A private company enjoys perpetual succession.
- It has limited liability i.e. members liability to contribute to the assets of the company is limited by shares or guarantee.
- Has specialized or qualified management.
- Can borrow by floating charge.
- Has capacity to own or hold property and therefore can invest.

QUESTION FOUR

(a)

- Rectification is the process whereby a document, the meaning of which has already been ascertained is rectified so that it gives effect to the intention of the parties.

It is a remedy concerned with defects not in the making but in the recording of a contract. It is equitable in character and therefore discretionary.

Before the court can order rectification the party seeking the same must prove certain facts, namely:

- Convincing proof or evidence showing that the document fails to record the intention of the parties. (Joscelyne V. Nissen (1970)). A High degree of proof is needed so that certainty is not undermined.
- The document does not embody the intention of both parties.
- The document was proceeded by a concluded contract or a continuing common intention.
- The applicant has sought rectification of the document at the earliest possible opportunity or instance and the defendant is not a bona fide purchaser for value without notice. This is because delay defeats equity.

- (b) Illegality does not necessarily mean that a criminal offence is involved. It means that the contract cannot be enforced by reason of being contrary to the public good or does not promote the public good. It is contrary to public policy. A contract may be declared illegal by an Act of parliament or court of law. An illegal contract is unenforceable.

Examples of illegal contracts

- A contract to pay wages or salary in kind is illegal by virtue of the provisions of the Employment Act.
- A contract to commit a crime tort or fraud (Bigos V. Boostead).
- A contract prejudicial to public safety e.g. trading with alien enemies.
- A contract prejudicial to the administration of justice e.g. champerty or maintenance.

- A contract liable to promote corruption in public (Parkinson V. College of Ambulance and Another.)
- A contract liable to promote sexual immorality. These are contracts Contra bonos mores.
- A contract liable to defraud state revenue (Miller V. Karlinski).

(c)

- This problem is based on borrowing and illegality. The borrowing by Simiyu Tito is on the face of it an ordinary contract between a lender and a borrower. However the contract is tainted with illegality in that part of the money borrowed is being used to promote corruption as well as facilitate the commission of a crime since Wanyonyi Peter is aware of the illegality the borrowing is unenforceable. This is because illegality renders a contract unenforceable and the operative principle in such a case is that gains and losses remain where they have fallen. Though part of the loan was used for a lawful purpose the entire contract is tainted with illegality.
- My advise to Wanyonyi Peter is that he cannot recover the amount borrowed from Simiyu Tito as he has no enforceable rights.

QUESTION FIVE

(a) **Freehold ownership of land:** this is a situation where the bundle of rights conferred upon the holder are exercisable for an indefinite duration. The state cannot determine the duration though it is the granting authority. A freehold owner can transmit the rights to future generations indefinitely.

- The proprietor has the right to use, misuse and dispose the land.
- Freehold ownership may be the land acquired by inheritance, enfranchisement, registration, transfer consolidation, conversion from other registers etc. Examples include fee simple and absolute proprietorship.
- If there is no one to inherit a freehold ownership is devolves upon the state by bonavacantia or the doctrine of escheatment.

Leasehold ownership of land

- This is a situation whereby a person acquires a secondary interest on the land of another for a specified duration.
- A lease creates a relationship of landlord and tenant between the grantor and the grantee.
- Leasehold consists of the quantum of rights conferred upon the lessee or grantee e.g. exclusive possession.
- The lessee acquires the right to exclusive possession of defined premises for a certain duration and the rights conferred are definite or capable of being defined.
- Leaseholders are acquired by contract and may terminate in various ways e.g. effluxion of time, surrender forfeiture, merger etc. whereupon the land reverts to the grantor. Examples include fixed period tenancy periodic tenancy, tenancy at will, at sufferance etc.
- Both the lessor and lessee are subject to various obligations.

(b) A lease may be terminated in any of the following ways:

- **Notice:** either party may notify the other its intention to terminate the lease where the tenancy does not specify the date of termination or intends to terminate the same earlier.

- **Forfeiture:** This is the right of the landlord or grantor to re-enter the demised premises and thus prematurely terminate the lease. This will be actuated by certain breaches. It is exercisable pursuant to a forfeiture clause.
- **Expiration or lapse of time:** All fixed term leases generally terminate or expiration of such time.
- **Surrender:** this is the giving up by the tenant to the landlord of his interest in the premises. It must be made in a prescribed form executed by the tenant. It may also be implied from the conduct of the tenant.
- **Merger:** under the provisions of the I.T.P.A a lease of immovable property determines if the property in question becomes vested in the lessee. Under the R. L. Act a merger must express.
- **Conversion.**

(c) An easement may be created in the following ways:

- **Express grant or reservation:** this is a situation whereby the proprietor of land or lease gives an easement over his land or land comprised in the lease. The transaction is effected by execution of an instrument in a prescribed form.
- **Statute:** the public roads and roads of Access Act give the minister power to create easements.
- **Prescription:** a person acquires an easement over another's land through uninterrupted usage for 20 years with knowledge of the owners. Such an easement must be registered against the servient tenement.

(d)

- This problem is based on the obligations of the lessee in a tenancy agreement.
- As a lessee Ray Matata is bound to observe certain obligations. For example, he is bound not to sub-let the premises without Charlie Kabue's consent.
- In addition the lease provides that the premises must not be used for any other purpose.
- It is evident that Ray Matata is in breach of the lease agreement in two ways namely:
 - Sub-letting the lease premises to Ben Chege.
 - Rent arrears.
- Charles Kabue is entitled to feel aggrieved and has certain remedies for redress. My advise to him is to:
 - (i) Sue in damages for breach of the lease agreement.
 - (ii) Sue for the amount outstanding as rent (action for money).
 - (iii) Terminate the lease by notice or forfeiture as the circumstances justify. However, he cannot terminate the lease by forfeiture unless the lease contains a forfeiture clause.

QUESTION SIX

- (a) Order bills are negotiable by endorsement and delivery. There are four types of delivery namely:
- **Blank endorsement:** this is an endorsement which does not specify the endorsee. The endorsement converts an order to a bearer bill capable of further negotiation.
 - **Special endorsement:** this is an endorsement which specifies the person to whom or to whose order the bill is payable.
 - **Restrictive endorsement:** this is an endorsement which prohibits further negotiation of the bill. It renders the endorsee the payee but has no capacity to negotiate it further.

- **Conditional endorsement:** this is an endorsement which either exempts the endorser from liability if the bill is dishonoured (sans recours) or inserts a condition subject to which the amount is payable.

(b)

- A “holder” is a person who is in possession of a bill as of right either as the payee or endorsee or bearer.
- A bona fide holder acquires a defect free title and can sue on it in his own name.
- A holder of a bill may be a holder for value or holder in due course.
- The obligations of a holder of a bill depend on the point at which the bill is held. These duties include:
 1. **Presentation for acceptance:** the holder is bound to present the bill to the drawee for acceptance. This duty arises where the holder receives a bill which has not been accepted.
 2. **Presentation for payment:** it is the duty of the payee to present the bill to the acceptor for payment. It must be presented within a reasonable time of negotiation or on the date it falls due or within the three days of grace. Presentation for payment is essential for all bills and mandatory in every case unless excused.
 3. **Notice of dishonour:** in the event of dishonour the payee is bound to notify the party or parties liable that the bill has been dishonoured. No particular form of notice is essential. It may be verbal or written.
 4. **Noting and protesting:** If a foreign bill is dishonoured, by non-acceptance or non-payment the payee is bound to have the same noted and protested by a notaries public. Failing which the drawer and endorsers are discharged.

(c)

- This problem is based on negotiation and dishonour of bills of exchange.
- Abel Rigo is the recipient of the bill of exchange and for value. It is apparent that the bill was obtained fraudulently by Boaz Ngao and Abel Rigo appear to have been aware of the fraud hence the fear that the bill might lapse. But on presentation the bill was dishonoured. In view of the foregoing it is evident that Abel Rigo is not a holder in due course.
 - Firstly, Abel Rigo is not bona fide transferee since he was aware of the fraud.
 - Secondly, he was aware that Boaz Ngao had a defective title.

In summation, it is arguable that Abel Rigo, cannot claim to be a holder in due course since the circumstances in which he holds the bill are not similar to those prescribed by section 29 of the Bills of Exchange Act which defines a holder in due course.

QUESTION SEVEN

- (a) A court of law may make a limited grant either in terms of time or purpose in certain circumstances.
- Where a will has been lost or mislaid since the testator's death or has been destroyed by wrong or accident but a copy thereof has been preserved.
 - Where the will is in the possession of a person residing outside Kenya who has refused or neglected to deliver the same but has transmitted a copy to the executor.

- Where there is no will forthcoming but there is reason to believe that there is one in existence.
 - Where the executor is absent from Kenya and none other is willing to act, a grant may be granted to the attorney of the executor for the use and benefit of his principal.
 - Where any person to whom, if present, letters of administration might be granted is absent from Kenya, the same may be made to his attorney.
 - Where person entitled to administration in the case of intestacy is absent from Kenya and no person equally entitled is willing to act letters of administration may be granted to the attorney of the person.
 - Where there are two or more minor executors and none has attained the age of majority the grant is limited until one of them attains full age.
 - Where there is a pending suit touching on the validity of the will of the deceased person or for obtaining or revoking any probate or any grant of letters of administration (administration pendente lite).
 - Where an executor is appointed for any limited purpose specified in the will the grant shall be limited for that purpose.
 - Where an executor appointed generally gives authority to an attorney to prove a will on his behalf and such authority is limited to a particular purpose the letters of administration shall be accordingly limited.
 - Where a person dies leaving property of which he was the sole or surviving trustee or had no beneficial interest on it in his own account and leaves no general representative or one who is unable or unwilling to act a limited grant may be made to the person beneficiary interested in the property or some other person on his behalf.
- (b) Under section 31 of the Law of Succession Act, for a donatio Mortis Causa to take effect the following conditions must be fulfilled.
- The donor was at the time contemplating death by reason of a present illness or present or imminent danger.
 - The donor gives movable property (including debts) capable of being disposed of by will.
 - The donor delivered to the intended beneficiary possession or means of possession of the property, documents or other evidence of title thereto.
 - The gift is made in circumstances that show that the donor intended the same to revert to him should he survive the illness or danger.
 - The donor must not survive the illness or danger.
 - The beneficiary must survive the donor.
- (c)
- Enforce by suit or otherwise all causes of action surviving the deceased or arising out his death for his estate.
 - Sell or otherwise turn to account all or any part of the assets vested in him if necessary or desirable.
 - Assent to the vesting of special legacies in the beneficiary at anytime after confirmation of the grant.
 - Appropriate at anytime after confirmation of the grant any of the assets vested in him in its actual condition or state of investment towards the satisfaction of any legacy bequeathed by the deceased or any other interest or share of his estate.

QUESTION EIGHT

- (a) The tort of conversion may be committed in any of the following ways:
- Taking another's goods or dispossessing.
 - Destroying or altering another's goods.
 - Receiving another goods
 - Misdelivery of goods
 - Disposition with delivery.
 - Disposition without delivery.
 - Refusal to surrender on demand.
- (b) (i)
- The entry by B into Cs land is unauthorized the reason for the entry notwithstanding and amounts to trespass to land. It is evident that B has made an intrusion on the Cs land. There is a direct infringement of the plaintiffs possession.
 - C has an action in damages against B and since the tort of trespass to land is actionable per se C is not obliged to proof any actual damage.
 - Cs action is based on the premise that Bs entry into his land was unjustified. Judicial authority on this point is very clear i.e. a person cannot justify entering the land of another against his will for the purpose of reclaiming anything that has escaped from its enclosure (Keavry V. Pattinson(1939) or (Dean V. Clayton (1817)).
- (ii)
- The pasting of the poster by H on Ds wall amounts to trespass to land for which D has an action in damages. This is because the wall in question is part of Ds land and the pasting of the poster on the wall is a direct infringement of the plaintiffs possession. At common law it is trespass to place anything on or inland in the possession of another for example placing rubbish against the wall or growing a creeper up the wall of another (Simpson V. Weber(1925)).
- (iii)
- The over hanging branches on Fs land constituted the tort of nuisance which is not actionable per se.
 - In this case F was entitled to cut down the overhanging branches of the mango tree to abate the nuisance. But F did something more in that he gave away all the ripe mangoes from the fallen branches to children.
 - The legal principle in this case is that whereas the branches overhanging Fs land amounted to nuisance and F did the needful by cutting them down the ripe mangoes from the branches belonged to G and giving them away amounted to conversion for which G has an action against him in damages.
- This position is consistent with the common law which postulates that where overhanging branches of fruit trees extend beyond the boundary of the owners land, a neighbour, though entitled to lop the overhanging branches is guilty of conversion should he appropriate the fruit growing thereon. (Mills V. Booker (1919)).

Part III: Comprehensive Mocks Examinations

QUESTIONS - MOCKS

COMPREHENSIVE TEST 1

QUESTION ONE

- (a) Explain the term judicial precedent
- (b) What is the importance of *stare decisis* in the doctrine of precedent.
- (c) Explain what is meant by:
 - i) Ratio decidendi
 - ii) Obiter dicta

QUESTION TWO

- (a) Explain the ways in which arbitral tribunals may be appointed.
- (b) In what circumstances may the High court set aside an arbitral award?

QUESTION THREE

- (a) What is a holder in due course and how does he differ from a holder for value?
- (b) Examine the rights and duties of a holder of a bill of exchange.

QUESTION FOUR

- (a) In what circumstance will a gift in contemplation of death be defeated.
- (b) Mokuia married Kemunto in 1970. Both have lived happily with their Jon Joash until Mokuia died in a tragic road accident in November 1991. Unfortunately Mokuia had not made a will in respect of all his free property. Kemunto does not know her rights over the property left by her husband. She comes to you for advice. Advise her. Would your advice be different if they had no child?

QUESTION FIVE

- (a) Write short notes on the following:
 - (i) Cover note
 - (ii) Parties to an insurance contract.
- (b) Kariuki entered sunset supermarket, picked up one of the wire baskets provided and filled it with groceries from the shelves. As he was approaching the cashier he realized that his purse had been stolen and decided to replace the good on the shelf. The manager of the supermarket who had been observing Kariuki's movements instructed one of his assistants to approach Kariuki and tell him that the goods had been sold and he could not replace them on the shelves. Advise Kariuki.

QUESTION SIX

- (a) How may a contract that has been validly concluded be otherwise declared unenforceable?

- (b) A agreed with B that B would buy from a ten tones of sugar. The sugar was described to be stored in a go down in Nyeri. Subsequent to the agreement, the following facts have come to light:
- i) That when the agreement was being concluded, B held a gun in his hands and A could see the gun.
 - ii) That the goods were destroyed by fire a day after the contract was concluded.
 - iii) That B was infact a minor.

Discuss the legal position

QUESTION SEVEN

- (a) Explain the phrase professional misconduct.
- (b) Section 28 of the Accountants Act (Cap 531) identifies acts and omissions, which constitute professional misconduct by a certified public accountant. Enumerate the salient commissions and omissions which constitutes professional misconduct?

COMPREHENSIVE TEST 2**QUESTION ONE**

What is delegated legislation? What are the advantages and disadvantages of delegated legislation as a source of law of Kenya?

QUESTION TWO

- (a) Distinguish between a condition and a warranty in the law of contract?
- (b) S sells a car to P. the agreement contains the following clause; "since the car is sold cheaply, on no condition or warranty that the car is roadworthy is given." The car fails to move from the show room. S insists a legitimate deal has been concluded. Advise P.

QUESTION THREE

- (a) To what extent is it true that a contract does not arise until acceptance is communicated to the offeror?
- (b) What is meant by the phrase "contract uberrimae fides"

QUESTION FOUR

- (a) Describe the rule in Rylands V. Feltcher. What defences are available to it?
- (b) A builds a factory for the manufacture of chemical called synoyd. After the factory is completed and becomes operation, it turns out that it emits a lot of fumes which in themselves are a nuisance to A"s neighbours. What is worse, it has also transpired that when it rains, the fumes after mixing with the rain-water produce a substance that is destroying fish in the nearby lake. As neighbour are unhappy and wish to sue him. Advise them.

QUESTION FIVE

- (a) How may a contract be discharged by
- (i) Breach
 - (ii) Frustration
- (b) How are the rights of the parties adjusted following frustration of their contract?

QUESTION SIX

"A belated notice of an exemption clause has not legal effect on a contract" Discuss.

ANSWERS –MOCKS

SUGGESTED ANSWERS TO MOCK EXAMS

COMPREHENSIVE TEST 1

QUESTION ONE

(a)

- Judicial precedent or stare decisis literally means decision stands.
- It is a system of administration of justice whereby previous decisions of courts are relied upon as law in subsequent similar cases. For example decisions of superior courts bind subordinate courts in subsequent similar cases.
- This system of administration of justice makes case law a source of law.

(b)

- **Certainty and predictability:** stare decisis enhances certainty in law and predictability in the legal system. In Dodhia case Newbold observed that a system of law required a considerable degree of certainty.
- **Consistency and uniformity:** stare decisis promotes consistency in decision making. This is because similar cases are decided alike. This enhances or promotes uniformity in the administration of justice.
- **Rich in detail:** many decisions have been made. Case law is one of the richest areas of law.
- **Flexibility:** it is contended that when judges in subsequent cases attempt to distinguish earlier decisions of other judges, this introduces some flexibility into the legal system.
- **Aptitude to growth:** it is argued that case law grows with time in that superior courts are free to depart from previous decisions if circumstances justify.
- **Convenience:** Judges in subsequent cases apply the law as formulated in previous decisions, thus case law is convenient in application in that judges are not obliged to formulate principles all the time.
- **Practical:** propositions of law are formulated on the basis of prevailing circumstances. It is a practical approach to resolution of legal problems.

(c) (i) **Ratio decidendi** literally means reason for decision. It is a principle or proposition of law based on the material facts of the case.

- It disposes of the case before the court.
- It is the binding element in a decision or precedent.
- It consists of a group of fact situations with those of the instant case as minimum.

Obiter dicta literally means „by the way“: These are by the way statements of law or fact made by judge in the course of judgment.

They do not dispose of the case before the court and have no binding force. These statements strengthen or reinforce the decision of the court.

They may be relied upon by advocates in subsequent cases as persuasive authority.

QUESTION TWO

(a)

- By the parties the dispute
- By a third party as agreed upon by the parties.
- By the High Court on application of either party.
- Under section 12 (1) of the Arbitration Act, the High Court will appoint an arbitral tribunal at the instance of a party if:
 - The parties cannot agree who the single arbitrator shall be
 - Either party has failed to appoint an arbitrator within 30 days of receipt of the other parties notice to do so.
 - The two arbitrators appointed by the parties have failed to appoint a third within 30 days of their appointment.

(b) The High Court will set aside an arbitral award if satisfied that:

- A party to the arbitration agreement was under some incapacity.
- The arbitration agreement is not valid under the law to which the parties have subjected it
- The applicant was not given proper notice of the appointment of the arbitrator or the proceedings or was unable to present his case.
- The arbitral award deals with a dispute not contemplated by the parties.
- The composition of the arbitral tribunal or the procedure was not in accordance with the agreement of the parties.
- The subject matter of the dispute is not capable of settlement by arbitration under the law.
- The award is in conflict with the public policy of Kenya.

QUESTION THREE

(a) Section 29 of the Bill of Exchange Act defines a holder in due course as a holder who has taken a bill.

- Which is complete and regular on the face of it;
- Before it was over due
- Without notice that the bill has previously been dishonoured if such was the fact:
- In good faith and for value
- Without notice, that the person who negotiated it to him had a defective title.

A holder for value on the other hand is any person who has provided, or who is deemed to have provided consideration on a bill of exchange.

Rights of the holder:

- To sue on the bill in his own name
- To hold the bill free from any defects of title of the prior parties.
- To negotiate the bill.

Duties of a holder

- It is the duty of the drawer to present the bill to the drawee for acceptance.
- It is the duty of the payee to present the bill to the acceptor for payment.

Duties of a Payee

- If the bill is dishonoured, it is the duty of the payee to have it noted and/or protested.
- If the bill is dishonoured, it is the duty of the payee to notify the endorser.

QUESTION FOUR

(a)

- If the donor's death is caused by suicide
- If the donor lawfully requests for its return before death.

(b)

- This problem is based on intestate succession as provided by the provisions of the Law of Succession Act.
- In this case it is apparent that Mokuia had a child. Joash hence the provisions of section 35 (1) of the Act applies.
- Kemunto is entitled to:
 - All personal and household effects of Mokuia absolutely.
 - A life interest in the remainder of the net intestate estate.
 - The power of appointment over the net intestate estate of Mokuia.
- If Mokuia had no child, Mokuia's net intestate estate would devolve in accordance with the provisions of section 36 of the Act and Kemunto would be entitled to:
 - The first Kshs 10,000 out of the net intestate estate or 20% thereof whichever is greater.
 - A life interest in the residue of the net intestate estate.
 - All the personal and household effects of Mokuia absolutely.

QUESTION FIVE

(a) Cover note is the name used to describe the temporal insurance cover extended to the proposer by the insurer during the interim period between submission of the proposal form and its formal acceptance or rejection.

- It is a legally binding contract between the parties. It may be a formal agreement or a letter from the company stating that cover has been extended. If loss arises during the currency of the cover note the insured generally recovers as if he had a policy in force or in accordance with the terms of the cover note. It is generally effective for 30 days.
- In **Juliet Praet V. HG Polland Ltd**, Pearson J observed that cover note "covers the assured and puts the undertakers on risk for the period while the proposal is being considered and until a policy is either granted or refused. The assured is therefore entitled to enforce the contract contained in the cover note provided he has complied with its conditions, such as payment of the premium.
- Issuance of a cover note may be justified on the following grounds:
 - It is argued that the insurance industry is formal and certain stages have to be followed before a policy is issued.
 - It extends immediately over to the proposer.
 - It affords the insurers sufficient time to assess the risk.

b) Parties to the contract

- **Insurer:** This is the person who promises or undertakes to pay the sum assured or its equivalent if the insured event occurs. The insurer must be a body corporate licensed by the commissioner of the insurance to transact insurance business.

- **Insured:** This is the person who takes out an insurance policy. The insured may be a human being or a corporation. The insured must have an insurable interest in the subject matter.

(b)

- This problem is based on revocation of offers.
- In this case Kariuki made an offer by conduct by picking the goods from the shelves. However, since the offer had not been accepted by the time he realized that his wallet had been stolen, he was at liberty to revoke the offer in the manner he purportedly did.
- The shop assistant has no business questioning his conduct as his offer had not been accepted.
- My advise to Kariuki is that there is no cause for alarm as he is under no legal obligation to purchase the goods in question.
- Having revoked the offer he is free from liability
- My advise is based on the decision in Dickinson V. Dodds which is authoritative for the proposition that an offer is revocable at any time before it is effectively accepted.

QUESTION SIX

(a)

- A contract validity entered into may be rendered unenforceable by:
 - **Illegality:** if for any reason the contract becomes illegal, it is unenforceable.
 - **Duress:** if evidence suggests that the contract was procured by actual violence or threats thereof.
 - **Undue influence:** if it is proved that one of the parties did not make an independent decision on the contract.
 - **Mistake:** if the contract is vitiated by an operative mistake for example common, mutual or unilateral
 - **Frustration:** where further performance of the obligations become impossible by reason of extraneous circumstances for which neither party is to blame.

(b)

- (i) This contract is voidable at as option for being vitiated by duress. The gun was intended to threaten A. A can therefore escape liability by establishing the circumstances in which the agreement was entered into.
- (ii) This contract is frustrated thereby discharging A and B as none is to blame for the destruction. This position is consistent with the decision in Taylor V. Caldwell. Any amount paid by B is recoverable. Otherwise nothing is payable.
- (iii) This contract is void and therefore unenforceable by A or B as B had no capacity to enter into such a contract.

QUESTION SEVEN

- (a) This is an act or omission, committed or omitted by a practicing accountant in contravention of the Accountants act or any other rules or regulations made there under. It is conduct which is inconsistent with the professional standards of the accounting profession.
- (b) A member of the institute is guilty of professional misconduct if he:
 - Allows any person to practice in his name of an accountant unless such person is a holder of a practicing certificate or is in partnership with or is employed by him.
 - Enters for the purpose of or in the course of practicing as an accountant into partnership with a person who does not hold a practicing certificate or secures any

professional business through the services of such a person or by means not open to an accountant.

- **Certify** or submit in his name or in the name of his firm a report of an examination of financial statements and examination of such statement and the related records have not been made by him or a partner or an employee in his firm.
- Permits his name or the name of his firm to be used in connection with an estimate of earning contingent upon future transactions in a manner which may lead to the belief that he vouches for the accuracy of the forecast.
- Included in any statement returns of forms to be submitted to the council any particular knowing it to be false.
- Guilty of gross negligence.
- Solicits or touts for work.
- Advertises professional and or academic achievements.

SUGGESTED SOLUTIONS

COMPREHENSIVE TEST 2

QUESTION ONE

Delegated legislation is also referred to as sub-ordinate, indirect or subsidiary legislation. It is law making by parliament indirectly. These are by laws, orders, rules, regulations, proclamation, made by subordinate competent bodies e.g. local authorities, professional bodies, government ministers and statutory bodies in exercise of delegated legislative power conferred upon them by parliament through an enabling or parent Act.

By-laws are operational within the administrative area of a local authority. Ministers, statutory boards and professional bodies makes rules, regulations, order or proclamations.

Characteristics of delegation legislation

- All delegated legation is made under the express authority of an Act of parliament
- It is a written source of law of Kenya.
- Delegated legislation must be consistent with the enabling or parent Act.
- It must be published in the Kenya Gazette before coming into force.

Advantages of delegated legislation

- **Compensation of lost parliamentary time:**
Since members of parliament are generally busy, law making time not made use of by parliament is made use of by the delegates when they make law.
- **Speed:**
If law is urgently required, the same may be made by a Governmental Minister or Professional body delegates are responsive to urgent needs.
- **Flexibility:**
It is relatively easy to make and unmake delegated legislation. Delegates are not generally subjects are not generally subjected to rigid and binding procedures.
- **Technicality of subject matter:**
By delegating legislative power, rules and regulations are made by experts in the particular field. Delegates are free to consult experts on various issues.

Disadvantages

- **Less democratic:** delegated legislation is not as democratic as statute law as it is not always made by representatives of the people.
- **Difficult to control:** neither parliament nor court of law can effectively control delegated legislation.
- **Inadequate publicity:** delegated legislation receives minimal publicity and in most cases the rules or regulations are unknown.
- **Sub-delegation and abuse of power:** delegates often sub-delegate law making power to other persons. This compounds to problem of control and may lead to abuse of power by the sub-delegate.
- **Detail and technicality:** Rules or regulations made by professional bodies or experts are often detailed and technical for the comprehension of ordinary citizens.

QUESTION TWO

Condition

This is a term of major stipulation of a contract. It runs to the root of the contract and is part of the central theme of the contract. If broken, the innocent party is entitled to repudiate the contract and sue in damages.

In Poussand V. Spiers and Pond An Actress was engaged to play a leading role in a French Opera from beginning of the season. Owing to ill health she was unable to take up her role until a week after the season had started. The organizers were compelled to engage a substitute and declined the services of the actress and she sued. It was held that her promise to perform from the first night was a condition and its breach entitled the organizers to treat the contract as repudiated. A condition may be express or implied.

Warranty

This is a term of minor stipulation of a contract. It is a peripheral or collateral term. It is not part of the central theme of a contract. If broken, the innocent party is entitled to sue for damages but the contract remains enforceable hence the party must perform its obligation and other shows.

In Bettini V. Gye, a singer was engaged for the whole season to perform in concerts and theatre. She additionally agreed to appear for rehearsals for six days in advance but appeared for only three days. It was held that her promise to appear for rehearsals was collateral to the main engagement.

A similar holding was made in Kampala General Agency V. Modys (EA) Ltd. A warranty may be express or implied.

(b)

- This problem is based on exemption clauses with specific reference to the concept of fundamental obligation theory.
- It is apparent that the contract of sale between S and P has an exemption clause by which S is excluding himself from liability if the car turns out to be unroadworthy. However, the interesting thing is that the car sold by S is incapable of self-propulsion, yet S insists that a legitimate deal has been concluded.
- It is evident that S has committed a fundamental breach of contract and hence cannot rely on the exemption clause to escape liability. My advice to P is to institute proceedings against S in damages for breach of contract. Although the exemption clause is an integral part of the contract, it cannot be given effect by a court of law as doing so enables S to evade the fundamental obligation of the contract.
- My advice is based on the decision in Karsales (Harrow) Ltd V. Wallis whose facts were substantially similar. It was held that the plaintiff could not rely on the exemption clause to escape liability.

QUESTION THREE

(a)

- Acceptance is the external manifestation of assent by the offeree. Acceptance of an offer may be oral, written or implied from conduct of the offeree. Once an offer is accepted an agreement arises between the parties. It is generally true to say that a contract cannot arise until acceptance is communicated to the offeror.

- (u) Where no method of communication is prescribed the method applicable depends on the type of offer and the circumstances in which the offer is made.
- (uu) As a general rule, silence does not amount to acceptance as was held in Felthouse V. Bindley.
- (w) Where parties negotiate by word of mouth in each others presence, acceptance is deemed complete when the offeror hears the word of acceptance from the offeree. It was so held in Entores Ltd V. Miles Far East Corporation Ltd.
- (ww) Where parties negotiate by telephone, acceptance is deemed complete when the offeror hears the words of acceptance. It was so held in Entores Ltd V. Miles Far East Corporation Ltd.
- (wt) Where parties negotiate by telex, acceptance is deemed complete when the message of acceptance is received by the offeror. It was so held in Entores Ltd V. Miles Far East Corporation Ltd.
- (wu) Where the offeror expressly or impliedly authorizes the offeree to communicate acceptance by post, acceptance is deemed complete when the letter of acceptance is posted, whether it reaches its destination or not. It was so held in Byrne V. Van Tienhoven. The decision in Henthorn V. Fraser illustrates the postal rule of acceptance where the offeror impliedly authorizes the offeree to communicate acceptance by post.
- (wu) However, a contract could arise without any communication of acceptance by the offeree, for example.
- Where such communication is expressly or impliedly waived by the offeror. As was the case in Carlill V. Carbolic Smoke Ball Co. Ltd.
 - Where acceptance is by conduct as was the case in Carlill's case.
- (b)
- Contract Uberrimae fides literally means contract of the utmost good faith.
 - These are contracts excepting the common law principles of caveat emptor.
 - Both parties are legally bound to disclose material facts about the transaction.
 - Failure to disclose a material fact renders the contract voidable at the option of the innocent party. Examples include:
 - Contract of insurance
 - Partnership agreement.

QUESTION FOUR

(a)

- This rule is to the effect that a person who for his own purpose brings and keeps things capable of causing mischief if they escape is prima facie answerable for all the damage which is the natural consequence of their escape.
- This is the rule of strict liability or liability without fault.
- The rule was enunciated in Rylands V. Fletcher where an employer was held liable for the negligence of an independent contractor, he had engaged.

Defences to the rule:

- **Contributory negligence:** this defence can only be relied upon if the plaintiff contributed to the escape.
- **Plaintiff's benefit/consent:** if the plaintiff consented to the bringing of the thing or benefits from it, an action against the defendant for its escape is unsustainable.
- **Acts of a stranger:** this defence is available if the escape is occasioned by the unforeseen acts of a third party.

- **Statutory authority:** the defendant has a complete defence if the accumulation is authorized by an act of parliament and he acted in accordance with the provisions of the Act.
 - **Act of God:** this is a defence where the escape is wholly attributable to natural causes without human intervention and no human foresight. Could have recognized it was a possibility.
- (b)
- This problem is based on the tort of nuisance.
 - It is apparent that the fumes emitted by A's factory amounts to public nuisance which is actionable as a crime and as a tort.
 - My advise to A's neighbours is to instigate the arrest of A for prosecution by the state for the public nuisance.
 - In addition, if any of A's neighbour is suffering particular or specific loss from the nuisance such a person has a personal action against A for the loss for example if one of A's neighbours is a fish trader such a person can sue A for an injunction.

QUESTION FIVE

(a) (i)

- Breaching a contract by a party does not discharge it at all. It only gives the innocent party an opportunity either to treat the contract as repudiated or as existing.
- If the innocent party treats the contract as existing, it is bound to honour its part of the contract but has an action in damages.
- If the innocent party treats the contract as repudiated the contract is terminated and the party is not bound to perform its part.
- A party can only treat a contract as repudiated if the breach is fundamental as was the case in Poussard V. Spiers and Pond.
- Breach of contract may be anticipatory or actual
- Anticipatory breach takes place if a party to a contract expressly or impliedly intimates to the other in advance its intention not to perform at the due date in which case the innocent party may, sue in damages for the breach or wait for the date of performance or sue for the decree of specific performance.
- Actual breach takes place if the party fails to perform or tender an unsatisfactory performance.

(ii)

- A contract is frustrated when performance of the obligations becomes impossible by reason of unforeseen or extraneous circumstances for which neither party is to blame.
- This common law doctrine is an exception to the doctrine of absolute contractual obligations.
- A contract may be discharged by frustration in the following circumstances:
 - **Destruction of subject matter:** a contract is frustrated if the subject matter, the basis of the contract is destroyed without the fault of either party. As was the case in Taylor V. Caldwell.
 - **Non-occurrence of event:** a contract based on a particular event or state of affairs obtaining at a particular time may be frustrated, if the event or state of affairs fall to materialize. As was the case in Krell V. Henry. However, it must be evident that the event or state of affairs was the sole foundation of the contract.

- **Illegality:** if performance of contractual obligations becomes illegal by reason of change of law the contract is frustrated and the parties discharged as there is no obligation to perform what has become illegal.
 - **Death or permanent incapacitation:** a contract of personal service or employment for example employment is frustrated if the person dies or becomes permanently incapacitated.
 - **Government or state intervention:** if state policies, acts or proclamations render the performance of a contract impossible, it is frustrated and the parties discharged. As was the case in Metropolitan Water Board V. Dick Kerr & Co.
 - **Supervening events:** these are events which delay performance and thereby change the commercial characteristics of the contract. In such a case the contract is frustrated.
- (b) Under the provisions of the Law Reform (Frustrated Contracts) Act, 1943, when a contract is frustrated the rights of parties are adjusted as follows:
- The contract is terminated
 - Any money paid is recoverable
 - Money paid ceases to be payable
 - If a party has suffered loss as a result of performance, the court may order the other party to pay a sum of money for the loss.
 - If a party has derived a benefit other than financial, the court may order such party to pay to the other a sum of money which must be less than the benefit so derived.

QUESTION SIX

- An exemption or exclusion clause is inserted in a contract by the stronger party exempting itself from liability or limiting extent of any liability arising under the contract.
- Exemption clauses are common in the so-called standard form contracts for example hire purchase agreement.
- For a court of law to consider the effect of an exemption clause it must be satisfied that it was an integral part of the contract. It must be satisfied that the party affected by the clause was aware of its existence when the contract was entered into.
- An exemption clause may be made an integral part of the contract by notice or signature.
- We agree with the assertion that a belated notice of an exemption clause has no effect on the contract. Such a clause is not deemed to be an integral part of the contract.
- Such a clause is not deemed to be a term of the contract. In Olley V. Marlborough Court Ltd the exemption clause was brought to the notice of the plaintiffs after the contract has been concluded. It was held that the defendant could not rely on the clause to escape liability. A similar holding was made in Lougher V. Kenya Safari Lodges and Hotels Ltd. where the exemption clause near the Hotels swimming pool had not been brought to the plaintiffs notice.
- In Dodd V. Nanda it was held that although the plaintiff had been to the defendant's garage before, he was not aware of the exemption clause and hence the defendant could not rely on it.

Part IV: Revision Questions and Answers

Questions

REVISION PAPER 1

QUESTION ONE

Write explanatory notes on:

- a) Option
- b) Government Bill
- c) Private members bill
- (d) Public Bill
- (e) Private Bill

QUESTION TWO

“The office of the chief justice is a critical office in the judiciary of a country” Discuss

QUESTION THREE

- (a) With the aid of decided cases explain the salient rules of consideration
- (b) Distinguish between bilateral and unilateral discharge of contract.

QUESTION FOUR

- (a) Discuss the doctrine of separation of powers highlighting its importance.
- (b) Outline the various ways in which the independence of the judiciary may be achieved and maintained in a country.
- (c) What is the significance of rule of law in a country?

QUESTION FIVE

- (a) “For an agreement to be legally binding offer and acceptance must be communicated”. State and briefly explain the exceptions to this rule.
- (b) Explain whether there is a binding agreement in each of the cases below.
 - (i) Dick posted a letter offering to sell goods to Harman on certain terms. Upon receipt of the letter, Harman posted a letter accepting the offer. However, the letter never reached Dick.
 - (ii) Tom wrote to Jerry offering to sell his car to him at 500,000. Jerry accepted Tom’s offer subject to the price being reduced to Sh. 450,000. It has become apparent that Tom is not willing to sell the car for Sh. 450,000.

Jerry now writes to Tom agreeing to buy the car for Kshs. 500,000.

QUESTION SIX

- (a) How may a will be revoked.
- (b) Mpenda Raha traveled to London to watch the Golden Jubilee celebration of the Queen’s ascension to the throne. Mpenda Raha hired a room in a hotel from where he would have an advantage view of the Queen’s procession. On the appointed day, Mpenda Raha could not view the procession due to crowds which obstructed his view of the Queen’s procession. Mpenda Rah is seeking for refund of his money which he

had paid to the hotel. Citing relevant legal principles, explain whether Mpenda Raha will be successful in getting a refund of the money paid to the hotel.

QUESTION SEVEN

- (a) Distinguish between a cheque and a bill of exchange.
- (b) Examine the salient obligations of the banker and customer in a banker and customer relationship.

QUESTION EIGHT

- (a) Distinguish between testate and intestate succession.
- (b) State the main provisions that govern intestate succession under the Law of Succession Act, cap 160.

REVISION PAPER 2**QUESTION ONE**

- (a) Distinguish between:-
- i) Law and morality
 - ii) National and international law.
- (b) What are the functions of law in society?

QUESTION TWO.

Write brief notes on:

- a) Judicial service commission.
- b) Judges.

QUESTION THREE

- a) Attempt a classification of cheques
- b) Mutiso owned a bakery in Kangundo Town. He sold it last year to Munyao. He agreed, as part of the sale, not to carry on a bakery business for a period of 3 years within 200 miles radius of the bakery he had sold. He has now decided to open a bakery in Machakos Town and seeks your advice as to whether he can legally do so. What advice would you give him?

QUESTION FOUR

- a) In relation to the law of tort, explain what constitutes the tort of negligence.
- b) Identify the tort that may have been committed in the instances listed below and explain the possible defenses available to the defendant.
 - (i) Mrembo visited Beutex shop to buy cosmetics. Owing to the slippery nature of the floor, she slid and broke her leg.
 - (ii) Msafiri boarded a public service vehicle as a paying passenger. A worn out tyre of the bus burst and Msafiri was injured. He went to hospital where he was treated and discharged. Five years later Msafiri brings action against owners of the vehicle for recovery of damages.

QUESTION FIVE

- (a) Courts of law are not the only means by which disputes may be resolved. Administrative tribunals have been held to be alternatives to the courts of law in the dispensation of justice.

In light of the above statement:

- i) What do you understand by administrative tribunals?
 - ii) Explain four advantages of administrative tribunals over courts of law.
- (b) Explain the differences between the burden of proof in civil cases and the burden of proof in criminal cases.

QUESTION SIX

- (a) Explain how an unpaid seller may lose the right of lien and stoppage in transitu.
- (b) Outline the salient remedies of the buyer in a sale of goods contract.

QUESTION SEVEN

- (a) Examine the circumstances in which a banker has no authority to honour a cheque drawn on him.
- (b) Onyango signed a cheque and crossed it "not negotiable." He told Atieno, his secretary, to fill in a certain amount and to X's name as payee. Atieno filled in a large amount made the cheque payable to Nairobi Harambee Secondary School and gave it to her brother to take it to the school in order to pay the outstanding school fees. The Nairobi Harambee secondary school cashed the cheque in good faith. Onyango wants to know his rights, if any, against the school. Advice onyango.

QUESTION EIGHT

- (a) Distinguish between a contract guarantee and a contract of indemnity.
- (b) State the circumstances in which the guarantor will be discharged.

REVISION PAPER 3**QUESTION ONE**

- (a) What do you understand by the phrase "Source of law"?
- (b) Identify the various sources of law of Kenya.
- (c) Distinguish between principal and subsidiary sources of law.

QUESTION TWO

Write brief notes on:

- (a) Islamic law
- (b) Hindu law
- (c) Types of jurisdiction.

QUESTION THREE

- (a) In what circumstance will a contract be vitiated by common mistake?
- (b) Shah, in response to an inquiry by Onyango regarding the possible sale of his (Shah's) car, wrote to Onyango stating, "I have decided to sell to you my car for \$5,000. If I hear nothing from you before next Sunday, I will take it that you have accepted." Onyango considered the price to be too high and decided to look for another car but forgot to reply to Shah's letter. Shah is now threatening to sue Onyango for breach of contract. Advise Onyango.

QUESTION FOUR

In relation to partnership law write explanatory notes on the following:

- (i) Expulsion of a partner
- (ii) Incapacities of an assignee Partner
- (iii) Admission of a new partner
- (iv) Circumstances in which a court may order the dissolution of a partnership.

QUESTION FIVE

Discuss the statutory Provisions governing occupiers liability in Kenya.

QUESTION SIX

Discuss the contractual capacity of:

- (g) Persons of unsound mind
- (h) Undischarged bankrupts
- (i) Corporations

QUESTION SEVEN

- (a) Define the term "a cheque"
- (b) Explain the type of crossing that may be made on a cheque, highlighting the significance of each type.
- (c) Hesabu, an accountant of Speed Company Ltd, prepared a bearer cheque for Haraka's signature who was the duly authorized signatory. The amount appeared in figures as Sh. 2000, but the amount was not written in words. Haraka signed a cheque. Hesabu then altered the amount to read Sh. 20,000 and he indicated the amount in words, withdrew Shs. 20,000 from the company's account. Hesabu handed over Sh. 2000 to Haraka but pocketed the 18,000 being the difference between Sh. 20,000 and Sh. 2,000. Speed

Company Ltd has ascertained the true position and is insisting that the bank credit its account with the sum of Kshs. 18,000. Advise the bank.

QUESTION EIGHT

- (a) How are arbitrators appointed
- (b) In what circumstances may a party challenge an arbitral award in the High Court?

REVISION PAPER 4**QUESTION ONE**

- (a) How is the supremacy of the constitution as a source of law manifested?
- (b) What were the weaknesses of the common law?

QUESTION TWO

Write explanatory notes on

- (a) duties or obligations of an advocate
- (b) law society of Kenya

QUESTION THREE

- (a) Discuss the rules that affect the effectiveness of exemption clauses.
- (b) K. Kemei want to buy a new car for G. N Motors Ltd. He selected a new and nice looking car and was informed by G. N. Motors Ltd that the car was new and free from any defects K. Kemei signed a sale agreement with the motor company which partly read **“.....no condition or warranty that the vehicle is road worthy or as to its age or fitness for any purpose is given or implied by the seller. Goods once sold cannot be returne.”**

When the car was delivered to K. Kemei after paying for it, he discovered to his surprise that it was a second hand car of the same make as the car he had selected but with several major mechanical defects.

G. N Motors Ltd. insists that he sale was validly concluded and that they cannot be liable to K. Kemei under any circumstances. Advise Kemei.

QUESTION FOUR

- (a) What is meant by the phrase **“fundamental rights and freedoms of the individual.”**
- (b) Outline three rights and three freedoms of the individual guaranteed by the constitution of your country.

QUESTION FIVE

- (a) Explain the principle of vicarious liability.
- (b) Examine the extent to which an employer is liable for the torts committed by an independent contractor.
- (c) Atieno and Nafula are neighbours in Kijiji Bandi village. Last year, Atieno quarreled with Natula’s employee, Nafula’s employee collected stinking rubbish from a compost heap in Nafula’s compound and threw it into Atieno’s compound. Atieno is aggrieved by this action and seeks your legal advice. Advice as to her legal rights and course of action to take.

QUESTION SIX

“Payment of a lesser sum of the day is satisfaction of a large sum is not sufficient consideration for the creditor’s promise to accept such payment in full settlement of the debt.” Discuss.

QUESTION SEVEN

- (a) List and explain the general duties of a bailee and the bailor in a contract of bailment.
- (b) What is a lien? Explain the various types of lien.

QUESTION EIGHT

- (a) Identify and explain the various types of corporations.
- (b) Discuss the consequences of incorporation.

REVISION PAPER 5**QUESTION ONE**

“Both parliament and courts of law have in various ways attempted to control delegated legislation however, neither organ can effectively do so by reason of inherent and operational weaknesses” Discuss”

QUESTION TWO

Write briefly on:

- (a) Court Martial
- (b) Industrial Court.

QUESTION THREE

State and explain the various types of offers

QUESTION FOUR

In relation to partnership law: discuss

- (a) Registration of a limited partnership
- (b) Incapacities of a limited partner

QUESTION FIVE

- (a) Why is it important to determine when property in goods passes from seller to buyer?
- (b) What are the rules that govern the passing of property?

QUESTION SIX

Discuss the liability of parties to a bill of exchange.

QUESTION SEVEN

- a. What are the advantages from a legal point of view of converting an unincorporated association to a corporation?
- b. Discuss the doctrine of ultra vires in relation to companies.

Answers

REVISION PAPER 1

QUESTION ONE

- (a) **Option:** this is the consideration provided by the offeree for the offeror to keep his offer open for a specified duration.
- The offeror cannot revoke the offer before such duration expires. It can also be defined as an agreement between the offeror and the offeree by which the offeror agrees to keep his offer open for a specified duration.
- (b) This is a Bill mooted by the government which it introduces to the National Assembly for purposes of being enacted to law. Such Bills are drafted by the Attorney General.
- (a) This is a Bill mooted by a member of parliament in his capacity as such which he introduces to the National Assembly for purposes of being enacted law e.g. the Hire Purchase Bill, 1968.
- (b) This is a Bill which seeks to introduce, amend or repeal laws applicable throughout Kenya. It may be a government or private members Bill.
- (c) This is a Bill which seeks to introduce, amend or repeal laws applicable in some parts of Kenya only or laws which regulate specific groups of persons. It may be government or private members Bill.

QUESTION TWO

The office of the chief justice is established by the Constitution. It is a constitutional office and therefore one of the important offices in a country.

The occupant of the office is appointed by the president. The Constitution does not expressly prescribe the qualification for the holder of the office. However, once appointed he becomes a judge of the High court and Court of Appeal.

Under the provisions of the constitution, the chief justice is the most senior judge. The importance of the office may be exemplified by a discussion of its function:

Administrative function

- The chief justice is the chairman of the Judicial Service Commission
- He is the principal administrative officer of the judiciary.
- Determines where the High court sits
- Overseas administration of courts
- He is responsible for the efficiency delivery of judicial services
- He appoints the duty judge
- He makes judges available for various duties.

Judicial function

- As a judge of the High court and Court of Appeal he participates in the adjudicatory process.

Legislative function

- The chief justice is empowered to make law by various statutes.

- Under the Judicature Act, Kadhis Court Act and the Magistrate Court Act, he is empowered to make law to regulate the practice and procedure of courts.
- Under section 84 of the Constitution, he is empowered to make law to facilitate the enforcement of fundamental rights and freedoms of the individual.

Political function

- He administers oath to the person elected to the office of the president.
- He represents the judiciary in all state functions.

Legal education and profession

- The chief justice or his nominee is the chairman of the Council of Legal Education
- He admits advocates to the bar
- He issues practicing certificates to advocates
- He appoints commissioner for oath and notaries public.

Enhancement of jurisdiction

Under the provision of the Magistrates Court Act, the chief justice is empowered to increase the civil jurisdiction of the Resident Magistrates Court. This is effected by a notice in the Kenya Gazette.

The chief justice retires at the age of 74 and enjoys some security of tenure. He can only be removed from office on the ground of either;

- Misbehaviour, or
- Inability to discharge functions of his office,

Provided a tribunal appointed by the president has investigated the allegations and recommended that he be removed.

Our discussion clearly demonstrates that the office of the Chief Justice is an important one.

QUESTION THREE

(a)

- **Mutual love and affection is not sufficient consideration:** it was so held in Bret V. J.S. and illustrated by Thomas V. Thomas.
- **Consideration must be legal:** the act of promise offered by the promisee must be lawful. Illegal consideration invalidates the contract.
- **Consideration must not be past:** as a general rule past consideration is not sufficient to support a contractual claim, as there is no mutuality. The decisions in re McArdle's Case and Roscorla V. Thomas are illustrative of this position. However, in certain circumstances, past consideration is sufficient to support a contractual claim.
- **Consideration must be something of value in the eye of the law:** this rule means that consideration must be real though it need not be adequate. It must be sufficient. In Thomas V. Thomas, the one pound Mrs. Thomas to remain in her late husband's house was sufficient consideration.
- **Consideration must flow from the promisee:** the person to whom the promise is made provides consideration and by so doing becomes party to the contract. This is the doctrine of privity of contract as exemplified by the decision in Dunlop V. Selfridge and Tweddle V. Atkinson. However, the doctrine of privity of contract has many exceptions.

- **Consideration must be something in excess of a public duty:** put in the alternative performance by the plaintiff of a public duty imposed upon him by law is not sufficient consideration for a promise. As was the case in Collins V. Godefroy. However, doing some more amounts to consideration. As was the case in England V. Davidson.
- **Consideration must be something in excess of an existing contractual obligation:** performance of an existing contractual obligation is not sufficient consideration for a promise. The decision in Stilk V. Myrick is illustrative of this position. However, doing something more amounts to consideration as was the case in Hartley V. Ponsonby.

(b)

- **Bilateral discharge:** this is one of the approaches to the discharge of contract by agreement. It is to the effect that, if neither party has performed its part of the contract, the obligations are said to be executory and the discharge is bilateral i.e. each party discharges the other from performance.
- **Unilateral discharge:** this is the discharge of a contract by agreement where either party has performed fully or partially. The party that has performed discharges the other hence the discharge is unilateral. A unilateral discharge may take the form of contract under seal, novation or accord and satisfaction.

QUESTION FOUR

The so-called doctrine of separation of powers is a framework propounded by a French jurist named Montesquieu who sought to create a legal framework to avoid the over-concentration of political power in the hands of one person or group.

- His framework envisions a constitutional structure characterized by non sharing of responsibility.
- It is based on the assumption that governmental organs can operate in water tight compartments.
- Montesquieu's thesis was that governmental powers should be devolved to different organs namely Judiciary Executive and Legislature. That these organs exercise different functions and that no person should be a member of more than one organ.
- According to him such dispersal of powers creates a system of checks and balances.
- This is the so-called classical doctrine of separation of powers which is for all intents and purposes impractical unless modified.

(b)

- The concept of independence of judiciary has its origins in the doctrine of separation of powers. The famous articulation of Montesquieu that "There is no liberty yet if the power of judge" bear this testimony.
- Independence of the judiciary may be achieved by inter alia vesting judicial authority in the judiciary. In the first instance courts should be free from interference or control from any quarter.
- A judicial authority should be the employer of all judicial personnel.
- Judicial officers should enjoy security of tenure of office.
- Judicial officers should enjoy immunity from actions arising in the course of discharging their duties.
- Judicial staff should have their own code of service, terms and conditions of service.
- The appointment of judges should be strictly on merit, professionalism, personal integrity and commitment to the rule of law.
- Terms and conditions of service should be commensurate with their responsibility.

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(c)

- The rule of law is a constitutional principle which implies a system of governance that is founded on legal rules. The basic idea behind this rule is that the government should be operating according to the laws of the land.
- The rule of law envisions a situation where the government acts within the confines of the law and that the law remains supreme.
- The principle is based on the premise that all are equal before the law, and all must obey the law.
- It postulates that, law should manifest the will of the people.

QUESTION FIVE

Acceptance is the external manifestation of assent by the offeree. By accepting an offer the offeree creates an agreement between the parties.

- As a general rule acceptance must be communicated to the offeror. Silence does not as a general rule amount to acceptance. It was so held in Felthouse V. Bindley.
- However, in certain circumstances acceptance need not be communicated for an agreement to arise between the parties. For example if the offeror expressly or impliedly waives the communication. As was the case in Carlill V. Carbolic Smoke Ball Co. (1893). Where Mrs. Carlill was not bound to communicate the purchase and consumption of the smoke balls.
- Secondly, where acceptance is by conduct. As was the case in Carlill V. Carbolic Smoke Ball Co. Ltd.
- An offer need not be communicated if it is by conduct e.g public transport.

(b) (i)

- This problem is based on the postal rule of acceptance of offers.
- In this case it is apparent that Dick impliedly authorized Harman to communicate acceptance by post and Harman posted his letter of acceptance though it never reached Dick.
- It is obvious that there is a binding agreement between Dick and Harman. This is because at common law if the offeror expressly or impliedly authorizes the offeree to communicate acceptance by post, acceptance is deemed complete when the letter is posted whether it reaches its destination or not. Our position is consistent with the decision in Byrne V. VanTienhoven.

(ii)

- This problem is based on counter offers in the law of contract.
- In this case, it is evident that Jerry did not accept Toms offer and as such there is no contract between them. Jerry's counter offer of Kshs. 450,000 terminated Toms offer of Kshs. 500,000.
- Jerry's willingness to pay Kshs. 500,000 for the car is not an acceptance as there was no offer existing at the time as there is no evidence that Tom had revived the offer.
- This position is consistent with the decision in Hyde V. Wrench whose facts were substantially similar.

QUESTION SIX.

(a)

- **Another will or codicil:** such will or codicil must manifest an intention to revoke the earlier will.

- **Destruction:** a will is revocable by burning, tearing or otherwise destroying it with an intention to revoke it.
- **Marriage:** under sec 19 of the Act, the marriage of the testator revokes the will unless the will is made with contemplation of a marriage with a specific person.

(b)

- This problem is based on frustration of contract.
- In this case it is apparent that Mpenda Raha had hired a room in a hotel to enable him view the Queens procession but could not do so due to the huge crowds.
- It is obvious that Mpenda has no one else to blame but himself.
- The contract is not frustrated and he cannot seek a refund of the amount paid.
- This was a contract based on the happening of a particular event which took place as scheduled. Mpenda Raha's rights have not been violated.

QUESTION SEVEN

(a)

Bill of exchange	Cheque
<ul style="list-style-type: none"> • Can be drawn on any person including a banker. • Is payable on demand or at a fixed or determinable future time. • Is discharged if not presented. • Cannot be crossed. • Notice of dishonour must be given. • May be noted and/or protested. • May be discounted. 	<ul style="list-style-type: none"> • Can only be drawn on a banker. • It is payable on demand. • May be crossed. • Notice of dishonour need not be given. • Is not discharged by non-presentation. • Cannot be noted and/or protested.

(b) Duties of the banker

- **Reasonable care:** must take reasonable care in his dealings with the customer. It is standard of care is that of a reasonably competent banker.
- **Professional advise:** a banker is bound to provide professional advise to the customer if called upon to do so.
- **Honour cheques:** must pay all cheques drawn by the customer provided all other conditions are met.
- **Confidentiality:** must not disclose his dealings with the customer to third parties. However, there are certain exceptions to this duty.
- **Duty not to pay without authority:** a banker must not pay out monies out of the customer's account without his express or implied authority.

Duties of the customer:

- **Duty of care:** a customer is bound to exercise care when drawing cheques to avoid alteration.

- **Notice of irregularities:** must notify the banker of any irregularities affecting his account. Any delay may amount to estoppel.

QUESTION EIGHT

- (a) Under section 34 of the law of succession Act, a person is deemed to intestate in a respect of all his free property of which he has not made a will capable of taking effect.

In such a case the net intestate estate is distributed in accordance with the rules of intestacy. However, under section 32, the minister may by a notice in the Kenya Gazette disqualify the rules of intestacy in the distribution of agricultural land, crops and livestock in any part of Kenya. In such a case, the law applicable in the distribution of such property is the law or custom of the community or tribe in question.

Testate succession: this is the disposition of a deceased's estate in accordance with his will as approved by the court.

- (b) (i) **Spouse and child or children:** under section 35 (1) of the Act, where the intestate is survived by a spouse and a child or children the surviving spouse is entitled to:

- Personal and household effects of the deceased absolutely.
- A life interest in the residue of the net intestate estate. This life interest terminates upon the remarriage of a spouse if she is a widow.
- Power of appointment: this is the power of a person to distribute another's property. The surviving spouse must exercise the power fairly and without undue delay. If the spouse takes too long or exercises the power unfairly any child may apply to the court to compel the spouse to exercise the power for a variation.

- (ix) **Spouse but no children:** under section 36 of the Act where the intestate is survived by a spouse but no child or children the surviving spouse is entitled to:

- Personal and household effects of the deceased absolutely
- First Kshs. 10,000 out of the net intestate estate or 20% thereof whichever is greater.
- Life interest in the remainder. The life interest terminates upon the remarriage of the spouse if she is a widow.

- (x) **Child (ren) but no spouse:** where the intestate is survived by a child or children but no spouse, the net intestate estate devolves upon the child or the children and is held in trust for it or for them in equal shares until they attain the age of majority.

- (xi) **No spouse or children:** under section 39 of the Act, if the intestate is survived by neither spouse, nor child or children, the net intestate estate devolves upon the relatives in the following order of priority:

- Father, if dead
- Mother, if dead
- Brothers and sisters and any children of deceased brothers and sisters in equal shares, and if none,
- Half brothers and half sisters and any children of deceased half brothers and sisters in equal shares and if none.
- The closest relative up to and including the 6th degree of consanguinity in equal shares, if none,
- It devolves upon the state and is paid into the consolidated fund.

- (v) **Polygamously married** –under section 40 (1) of the Act, if the intestate was polygamously married, the net intestate estate devolves upon all the houses and is divided between them on the basis of the number of children and adding one unit in the case of a surviving spouse.

REVISION PAPER 2

QUESTION ONE

- (a) (i) Law may be described as an aggregate or conglomeration of rules or principles enforced by courts of law at a given time.
Rules of law are enforceable or binding i.e. demand compliance failing which there is a sanction.
Rules of law are certain and emanate from customary and religious practices.

Morality on the other hand is a sense of judgement between right and wrong by reference to certain standards developed by society over time. It consists of prescriptions of society. The society imposes sanctions. Morality is not enforceable.

- (ii) **National law:** this is municipal or state law. It consists of all rules of law operational within the boundaries of a given country. It regulates the relations between the state and its citizens and the citizens inter se. It emanates from parliament as well as customary and religious practices.

International law: This is a body of rules, which regulates the relation between the states or countries and other international persons e.g. United Nations. International law is based on international agreements or conventions or treaties and customary practices of states.

- (b)
- Facilitates administration of justice.
 - Promotes peaceful co-existence or prevents anarchy.
 - Promotes good governance by limiting powers of government.
 - Acts as standard setting and control mechanism for speech manufacturing construction etc.
 - Resolving social conflict.
 - Facilitates and effectuates private choice.

QUESTION TWO

- (a) **Establishment:** it is established by section 68 (1) of the Constitution.

Membership

- Chief justice.
- Attorney General
- Two persons who are for the time being judges of the High court and Court of Appeal appointed by the president.
- Chairman of the public service commission.
- Registrar of the High court as secretary.

Powers of the commission

- To make rules to regulate its procedure.
- To act independently
- To delegate its functions to a judge of the High court.
- To confer powers and impose duties on public officers with consent of the president.

- To act notwithstanding a vacancy in its membership but decision must be supported by the majority.

Duties or functions:

- **Advisory role:** it advises the president on the appointment of judges of the High Court and Court of Appeal.
- **Administration:** it is the principal administrative organ of the judiciary. It administers the judicial department.
- **Appointment:** it appoints and promotes magistrates, Kadhis, High Court Registrars and other officers in the Judiciary.
- **Discipline:** it is responsible for disciplining magistrates Kadhis, Registrars and other employees of the Judiciary.

(b) Under the constitution of Kenya, a judge may be puisne or judge of appeal.

Appointment

All judges are appointed by the president acting in accordance with the advice of the Judicial Service Commission.

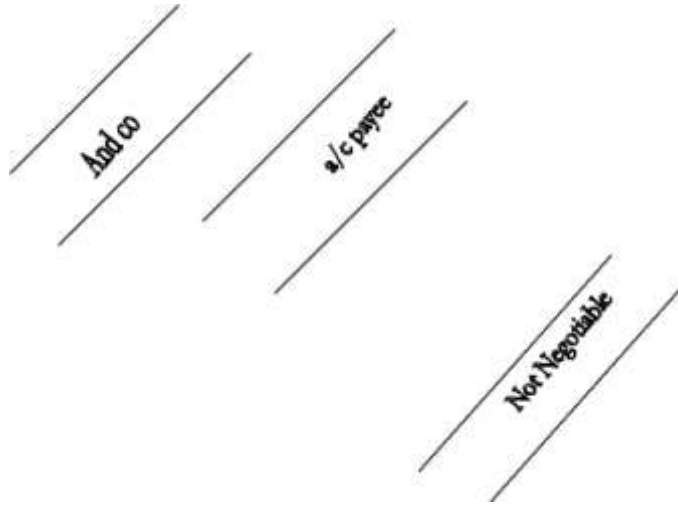
Qualification: To qualify for appointment one must either:

- Be an advocate of the High court of the not less than 7 years standing.
- Is or have been a judge of a court with unlimited jurisdiction in criminal and civil matters in some part of common wealth or republic of Ireland.
- Is or has been a judge of a court with jurisdiction to hear appeals from a court with unlimited jurisdiction in criminal and civil matters in some parts of common wealth or republic of Ireland.
- Under section 63 of the Constitution upon appointment a judge must take and subscribe to the oath of allegiance and such other oath as prescribed by parliament.
- Judges enjoy some security of office. A judge can only be removed from office on the ground of either.
 - Misbehaviour or
 - Inability to discharge the functions of his office, provided a tribunal appointed by the president has investigated the allegations as a matter of fact and recommended that the judge be removed. Otherwise judges retire at the age of 74.

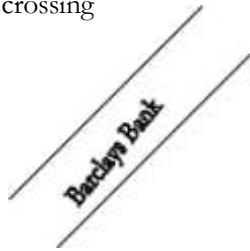
QUESTION THREE

- A cheque is a bill of exchange, drawn on a banker payable on demand.
- Cheques may be classified as:
 - Bear and order
 - Open and crossed
 - **Bearer:** this is a cheque payable to the holder.
 - **Order:** this is a cheque payable to the order of a specified person.
 - **Open:** this is a cheque whose proceeds are payable to the payee across the counter.
 - **Crossed:** this is a cheque which contains two parallel transverse lines on its face. A cheque may be crossed generally or specially.

General crossing



Special crossing



(b)

- This problem is based on contracts in restraint of trade.
- It is evident that Mutiso covenanted not to set up a similar business within a radius of 200 miles from Munyao's business for 3 years.
- The legal issue is whether Mutiso can open a similar business in Machakos town which is less than 100 miles from Kangundo.
- As matters stand, Mutiso is bound by the contract with Munyao and cannot legally open the bakery.
- However because this restraint is too unfair to Mutiso, I will advise him to apply to the High court for the contract to be declared void pursuant to section 2 of the Contracts in Restraint of Trade Act.
- My advise is based on the above statute as the restraint is unreasonable. It confers upon Munyao more protection than is reasonably necessary.

QUESTION FOUR

- (a) In the words of Anderson B. in Blyth V. Birmingham Water Works Co. negligence is the "omission to do something which a reasonable man, guided upon those consideration which ordinarily regulatethe conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

It is the doing of what a reasonable man would not have done in the circumstances or not doing what he would have done.

In order to succeed in an action based on negligence, the plaintiff must establish the elements of the tort i.e:

- Legal duty of care
- Breach of duty
- Loss or damage.

These are the elements of the tort of negligence.

(b) (i)

- This problem is based on occupiers liability.
- Beutex shop owed all its visitors a common duty of care.
- The shop owed Mrembo this duty but now that she was injured there in, she has a claim in damages against the owners of the shop.
- The owners of Beutex may argue that they had displayed a warning sign informing visitors not to use the wet floor but Mrembo ignored the same.

(ii)

- This problem is based on the tort of negligence.
- The bus company owed Msafiri a legal duty of care but due to a breach of that duty i.e. the failure to maintain the bus, Msafiri was injured.
- From the date of the accident Msafiri has a cause of action against the bus company but did not do so until after five years.
- Msafiri has no enforceable action against the bus company as it is statute barred.
- Under the provisions of the Limitation of Actions Act, Cap 22, actions based on the tort of negligence become statute barred after three years.

QUESTION FIVE

(a) (i)

- Administrative tribunals are bodies created by statute to determine certain types of disputes.
- They supplement ordinary courts in the administration of justice.
- These tribunals are guided by the principles of natural justice.
- A decision of the tribunal may be appealed against or be challenged in the High court.
- Examples include Insurance Appeals Tribunal, Capital Markets Tribunal, Co-operative societies tribunal, University senate.
- These tribunals exercise quasi judicial functions.

(ii)

- **Speed:** tribunals are faster in dispute resolution since their diaries are not clogged.
- **Cheap:** it is relatively cheaper to see a dispute through a tribunal. There is a saving oncost.
- **Informality:** tribunals are generally free from technicalities which characterize ordinary courts. They are more accessible.
- **Expert knowledge and specialization:** tribunals are better placed to promote expertise as they deal with specific disputes.
- **Policy and other matter:** Tribunals take into consideration policy and other matters which courts do not refer to. Their decisions are more balanced.

(b)

Criminal cases	Civil cases
<p>The burden of proof is borne by the prosecution.</p> <p>The prosecution is bound to adduce evidence to prove its case against the accused.</p> <p>The standard of proof is very high as it is beyond any reasonable doubt.</p> <p>The court must be satisfied beyond any reasonable doubt that the accused committed the crime as charged.</p>	<p>The burden of proof is borne by the plaintiff.</p> <p>The plaintiff must adduce evidence to prove his allegations against the defendant.</p> <p>The standard of proof is on a balance of probabilities or preponderance of probabilities.</p> <p>It must be more probable than improbable that the plaintiffs allegations are true.</p>

QUESTION SIX

(a)

- By waiver thereof
- Delivery of the goods to a common carrier for transmission to the buyer without reserving the right of disposal.
- If the buyer or his agent obtain delivery of the goods.
- Payment of the price.

- If the buyer or his agent intercept the goods before arrival at the agreed destination.
- If the carrier wrongfully neglects or refuses to deliver the goods to the buyer or his agent.
- If on arrival, the carrier notifies the buyer or his agent that he holds the goods on his behalf.

(b) Remedies of the buyer include:

- **Damages for non-delivery:** if the seller wrongfully neglects or refuses to deliver the goods as agreed the buyer may maintain an action against him in damages for non-delivery.
- **Specific performance:** if the seller wrongfully neglects or refuses to deliver specific goods, the buyer may apply for the decree of specific performance.
- **Damages for breach of warranty:** if the buyer elects or is compelled to treat breaches of conditions by the seller as breach of warranties he is entitled to sue the seller in damages whenever such a breach occurs.
- **Recovery of price:** if the buyer has already paid for the goods but the same are unavailable he is entitled to recover the price as consideration for the payment has totally failed.
- **Rejection of goods:** under the provisions of the Sale of Goods Act, the buyer is entitled to reject goods in certain circumstances without incurring any liability, for example if the quantity delivered is more or less.

QUESTION SEVEN

(a) The authority of a banker to pay a cheque drawn on him by a customer is determined in the following ways:

- Countermand of payment: where a customer gives instruction to the banker not to honour a cheque.
- Notice of customers death
- Notice of bankruptcy petition against the customer
- **Notice of drawers' insanity**
- A garnishee order:
- Insufficient funds.
- **Holders' defective title: the holder has obtained a cheque through fraud or theft.**
- Closure of account
- If the cheque is irregular.

(b)

- **This problem is based on cheques crossed generally but with the words "not negotiable"**
- In this case it is apparent that Atieno had no title to the cheque and could not negotiate it to Nairobi Harambee Secondary School. The school therefore acquired no title to it or the amount.
- The amount is therefore recoverable.
- My advise to Onyango is to sue Nairobi Harambee Secondary School for the amount.
- My advise is based on the decision in Wilson and Meeson V. Pickering whose facts were substantially similar.

QUESTION EIGHT

Contract of Guarantee	Contract of Indemnity
<p>This is a contract whereby a party referred to as a guarantor or surety undertakes to be collaterally or secondarily responsible for the acts or defaults of another known as the principal debtor.</p> <p>The undertaking is made to the creditor.</p> <p>It is a tripartite agreement.</p> <p>A contract of guarantee may be sole, continuing or fidelity.</p> <p>It consists of three parties, namely the guarantor principal debtor and creditor.</p> <p>The guarantor liability is secondary.</p> <p>The guarantor has no direct interest in the contract between the creditor and the principal debtor.</p>	<p>This is a contract whereby a party known as indemnifier undertakes to be primarily responsible for the performance of a particular thing.</p> <p>The contract consists of two parties, the indemnifier and the party to be indemnified.</p> <p>The indemnifier has a direct interest in the contract.</p> <p>The indemnifiers liability is primary.</p>

The contract must be evidenced by some note or memorandum.	
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(b)

- Variation of the terms of the contract without the guarantors knowledge.
- If the guarantor extends the duration within which the principal debtor must fulfil his obligation.
- If it is apparent that the guarantee was obtained by concealment of material circumstances.
- If evidence shows that the guarantee was obtained by fraud.
- Revocation of a continuing guarantee by the guarantor.
- Discharge of the principal debtor.
- Failure by the creditor to take any step necessary to protect the guarantor.
- Release of a co-guarantor.
- If the creditors action against the principal debtor is statute barred.
- Fulfilment of obligation by the principal debtor.
- Supervening illegality.

REVISION PAPER 3

QUESTION ONE

- (a) The phrase “source of law” literally means where rules of law are found. However, the phrase is often used to describe
- The origins of the rules and principles which constitute the law applicable in a country at a given time. These are the formal sources.
 - The source of force and validity of the rules and principles applicable as law in a country. These are the legal source.
 - The materials from which rules and principles of law developed. These are the material sources.
 - The factors that influenced the development of the rules of law. These are the historic sources. Hence the phrase „source of law“ refers to the historical, material, formal and legal sources of law.

The Judicature Act Cap 8 identifies eight sources of law of Kenya:

- Constitution
- Legislation (statute law) “All other written laws”
- Delegated legislation
- Statutes of General Application
- Common law
- Equity law
- Case law or judge – made law
- African customary law
- The constitution and the Kadhis court act identify Islamic Law as a source of law.
- The Hindu Marriage and Divorce Act and the Hindu Succession Act, identify Hindulaw as a source of law.

Principal sources of law are those sources of law of Kenya applicable throughout Kenya. They regulate all persons in Kenya. Examples include:

- Constitution
- Common law
- Legislation
- Equity
- Statutes of general application
- Caselaw
- Delegated legislation

Subsidiary sources of law are those sources of law which regulate certain transactions of certain peoples of Kenya, for example:

- Islamic law
- Hindu law
- African Customary law.

QUESTION TWO

This is a source of Law of Kenya

- (a) It is based on the Muslim Holy book the Quran and the teachings of prophet Mohammed contained in his sayings known as "Hadith." It is a subsidiary source of law of Kenya recognized by the Constitution and the Kadhi's Court Act. It is only applicable in the settlement of civil disputes relating to marriage, divorce, succession or personal status in proceedings in which all parties profess Muslim faith.
- (b) Hindu law is based on the Hindu Religion and Philosophy. It is a subsidiary source of law of Kenya recognized by the Hindu Marriage and Divorce Act and Hindu Succession Act. It only applies in the determination of civil cases relating to marriage, divorce succession or personal status in proceeding in which all parties profess Hindu faith.
- (b) This is the power of court to hear a case. If a court can entertain or hear a particular case it is said to be a court of competent Jurisdiction.

Types of jurisdiction

Jurisdiction can be classified in various ways:

- **Original jurisdiction:** this is the power of a court to hear a case of first instance i.e. to hear a case for the first time e.g. the High court, Resident magistrate court, Kadhis court, courts martial.
- **Appellate jurisdiction:** this is the power of court to hear or entertain a case on appeal e.g. Court of Appeal, High Court.
- **Territorial jurisdiction** –This is geographical jurisdiction. This is the power of a court to entertain cases from within a defined geographical area, referred to a judicial district. The District magistrate of the 3rd class can only hear cases from within the district in which it is established.
- **Pecuniary jurisdiction** –This is financial or monetary jurisdiction. The court can only entertain civil cases whose value of subject matter does not exceed a specified maximum.
- **Criminal jurisdiction:** - this is the power of a court to entertain or hear criminal cases on first instance or on appeal, for example the High Court.
- **Civil Jurisdiction:** - this is the power of a court to hear civil cases of first instance or on appeal. For example the high court.

QUESTION THREE

- (a)
- Common mistake is said to exist when both parties make the same mistake.
 - Each party knows the others intention but both are unaware of an underlying fundamental fact.
 - This is a mistake as to the existence or ownership of the subject matter.
 - Common mistake renders a contract void in two circumstances:
 - **Cases of res extincta:** these are circumstances in which the parties are unaware that the subject matter does not exist. For example in Couturier V. Hastie. In such a case the contract is void. Section 8 of the Sale of Goods Act embody this mistake.
 - **Cases of res sua:** these are circumstances in which the person purporting to buy has legal title in the subject matter. As was the case in Bingham V. Bingham.

(b)

- This problem is based on communication of acceptance by the offeree. As a general rule silence does not amount to acceptance.
- In this case Shah's statement to Onyango to the effect that "I have decided to sell to you my car for \$ 5,000" is an offer to which Onyango did not respond.
- This amounted to a rejection of Shah's offer. It therefore follows that Shah has no actionable claim against Onyango as there is no contract between them.
- My advice to Onyango is that there is no cause for alarm as Shah has no action against him.
- My advice is based on the decision in Felthouse V. Bindley whose facts were substantially similar.

QUESTION FOUR

(i)

- Under the provisions of the Partnership Act a partner can only be expelled from the firm if the power to do so is expressly vested upon the others.
- In addition a partner can only be expelled in good faith.

(ii)

- He does not become a partner in the firm
- He cannot interfere with the management of the firm's business.
- Cannot demand an account from the partners.
- He has no access to the firm's books of accounts.
- If a limited partner assigns his interest the assignee becomes a limited partner.

(iii)

- A person may be admitted as a partner in a firm if all existing partners agree. However, in a limited partnership a person may be admitted as partner without consent of the limited partner.

(iv)

Under the provisions of the Partnership Act, a court of law may order the dissolution of partnership if:

- A partner has become a lunatic or is permanently of unsound mind.
- A partner is permanently incapable of discharging his obligations as a partner.
- A partner is continuously guilty of willful breach of the partnership agreement.
- The firm's business can only be carried on at a loss.
- A partner has behaved in a manner unfairly prejudicial to the firm and his continued association is likely to bring the firm's name into disrepute.
- Circumstances are such that it is just and equitable that the firm should be wound up.

QUESTION FIVE.

- Under the provisions of the Occupiers Liability Act, cap 34, laws of Kenya, an occupier owes all invitees a common duty of care. This is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor is reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there.
- An occupier owes this duty to all other persons permitted by law to enter upon his premises.

- In determining whether an occupier has discharged his common duty of care regard must be had to
 - Whether the invitee is a child
 - Whether the invitee was exercising his calling
 - Whether the visitor was injured through the faulty execution of a task by an independent contractor
 - Whether the invitee had consented to the risk
 - Whether the occupier had given adequate warning and displayed the same conspicuously
 - Whether the person injured is a trespasser.

QUESTION SIX

(a)

- If a person who is of unsound mind enters into a contract such a contract is voidable at his option by establishing that
 - He was too insane to understand the nature or effects of his acts.
 - The other party was aware of his mental condition
 - By proving these facts the party escapes liability. As was the case in Imperial Loan Co. Ltd v. Stone where the defendant escaped from liability on the ground of insanity.
 - Under the Sale of Goods Act if a person of unsound mind is supplied with necessaries he is liable to pay a reasonable price.
- (b) Undischarged bankrupts are persons who have been declared bankrupt of by a court of competent jurisdiction. Their contractual capacity is restricted by the provisions of the Bankruptcy Act.
- (c) The contractual capacity of artificial persons is determined by law. In the case of statutory corporations, contractual capacity is conferred by statute. It can only enter the transactions stipulated by the statute and those that are reasonably incidental thereto.

The contractual capacity of registered companies is determined by the objects clause of the memorandum. At common law a registered company can only enter into transactions set forth in its objects and those that are reasonably incidental to the attainment or pursuit of those objects. Other transactions are ultra vires and therefore null and void. It was so held in Ashbury Railway Carriage Ltd v. Riche. In Attorney General v. Great Eastern Railway (1880) it was held that in addition to the express objects, a company had capacity to enter into transactions reasonably incidental to the attainment or pursuit of those objects. An ultra vires transaction is not capable of being ratified.

QUESTION SEVEN

- (a) Under the provisions of the Bills of Exchange Act, cheque is a bill of exchange drawn on a bank payable on demand.
- (b) Type of crossings
- **General crossing:** a general crossing is one which consists of two parallel transverse lines on the face of the cheque with or without the words, “and company.” “a/c payee”
 - **Special Crossing:** consist of two parallel transverse lines on the face of the cheque with the name of the banker in between.
 - **Account payee:** this crossing consists in addition to the general or special crossing, the words “account payee” or account payee only or account x only: such crossings

area direction to the banker collecting payment that the proceeds when collected are to be credited to the account of the payee named on the face of the cheque.

- Not negotiable: these are words that a holder may add to a cheque crossed generally or specially.

(c)

- This problem is based on the obligations of the customer towards the banker.
- The customer is bound to exercise reasonable care when drawing cheques to avoid alteration.
- In this case Speed Company Ltd acted negligently in drawing the cheque and this facilitated the change by Hesabu.
- **My advise to the bank is that it is not liable to credit the company's account** as the company failed to observe its duty of care.
- This position is consistent with the decision in London Joint Stock Bank V. MaCMillanand Arthur whose facts were substantially similar.

QUESTION EIGHT

(a) Arbitrators or arbitral tribunals may be appointed by:

- Parties to the dispute
- Third party or body as agreed upon by the parties, for example law society of Kenya.
- High court in the circumstances set forth in section 12 of the Arbitration Act.
 - Where the parties have failed to agree as to who to appoint as a sole arbitrator
 - Either party has failed to appoint an arbitrator within 30 days of receipt of the other party's notice to do so.
 - Where the two arbitrators appointed or the parties themselves fail to appoint a third arbitrator.

(b) The High Court may set aside an arbitral award on application if it is satisfied that:

- One of the parties to agreement had no capacity to contract
- The arbitration agreement was not valid in law.
- The award is contrary to public policy in Kenya
- The arbitral tribunal was not appointed in accordance with the agreement.
- The dispute was not capable of resolution by arbitration
- The applicant was not afforded an opportunity to appoint the arbitrator.
- The arbitral award deals with a dispute not contemplated by the parties.

REVISION PAPER 4

QUESTION ONE

(a)

- The constitution of Kenya is the supreme law of the land and prevails over all other laws. Its supremacy as a source of law is manifested in the following ways:
 - **Validating norm:** All other laws derive their validity from the constitution.
 - **Proclaims supremacy:** Section 3 of the Constitution is emphatic that it is the supreme law and any other law inconsistent with it is void to the extent of the inconsistency.
 - **Organs of government:** the constitution creates the principal offices and organs of government i.e the legislative, executive and the judiciary, office of the Attorney General, Auditor General, commissioner of police, the electoral commission and the public service commission
 - **Special amendment procedure:** under the provision of the constitution a Bill seeking to amend the constitution must be supported by not less than 65% of all members excluding the ex-officio members during the second and third readings.
 - **Fundamental rights and freedoms:** chapter five of the constitution guarantees the fundamental rights and freedoms of the individual. Under section 84 (1) of the constitution a person whose right or freedom has been, is being or likely to be violated has Locus Standi to seek judicial redress.

(b)

- **Writ system** –this system did not recognize all possible complaints and delayed administration of justice.
- **Inflexibility or rigidity;** the common law system of administration was too rigid by reason of the doctrine of stare decisis.
- **Delays:** administration of justice at common law was excruciatingly slow by reason of lengthy procedure and defendants. Often relied on standard defences known as essoins to delay the cause of Justice by pleading sickness, being away on a crusade or being cut by floods.
- **Procedural technicalities:** common law courts paid undue attention to procedural niceties.
- **Inadequate remedies:** common law courts could only award damages:- it could not decree specific performance or grant an injunction.
- **Non-recognition of trust:** - at common law trustee and beneficiaries had no enforceable rights or duties. Since the relationship was not legally recognized. Beneficiaries had no remedies against errant trustees.
- **Inadequate protection of borrowes;** borrowers who failed to honour their contractual obligations within the required duration often lost their securities. All loans had to be repaid within the contraction period, failing which the security was forfeited.

QUESTION TWO

(a)

- **Duty to the court:** as an officer of the court, an advocate is bound to assist the court in the administration of justice by urging the facts and the law correctly.
- **Duty of client:** he owes his clients, a legal duty of care to represent them in the best manner possible. He is liable in damages for professional misconduct or negligence for failing to exercise reasonable care.

- **Duty to the profession:** as a member of a profession, an advocate is bound to maintain the highest possible standard of conduct and integrity by observing the rules and ethics of the profession.
- **Duty to society:** as a member of society, an advocate is bound to participate in the social, political and economic development of the society.
- **Establishment:** The Law society of Kenya is established by section 3 of the Law Society of Kenya Act Cap 18, as a body corporate by name Law Society of Kenya with perpetual succession and a common seal and capacity to sue or be sued.

Membership: it consists of the following categories of members;

- Practicing advocates
- Non-practicing advocates
- Special members
- Honorary members.

The affairs of the society are managed by a council elected by members

Under Section 4 (1) of the Law Society of Kenya Act, the objects of the society are:

- To maintain the standards of conduct and leaning of the legal profession.
- To facilitate acquisition of legal knowledge by members and others
- To assist the government and the courts in all matters relating to legislation and administration of law.
- To protect and assist members of the legal profession in relation to the condition of practice of law
- To assist and protect members of the public in all matters touching or incidental to law
- To acquire or dispose off assets.
- To raise funds.
- To do everything necessary to accomplish its objects.

QUESTION THREE

(a)

- For a court of law to consider the effect of an exemption clause in a contract, it was in the first instance be satisfied that the clause was an integral part of the contract. The party affected by the clause must have been aware of its existence.
- An exemption clause may be made part of a contract by signature or notice.
- If the clause is embodied in a document signed by the parties, the court must be satisfied that the document contained the terms of the contract. As was the case in L'Estrange V. Graucob.
- The court must in the same breath be satisfied that the party affected by the clause signed the document voluntarily. Signature prima facie means acceptance. However the signature is voidable at the option of the innocent party if its contents were misrepresented. As was the case in Curtis V. Chemical Cleaning and Dyeing Co.
- The party affected by the clause must have been aware of its existence when the contract was entered into. A belated notice of an exemption has no effect on the contract. As was the case in Lougher V. Kenya Safari Lodges and Hotels Ltd.
- If an exemption clause is ambiguous or uncertain, it must be interpreted Contra Proferentes i.e. strictly against the party relying on it. As was the case in Houghton V. Trafalgar Ins. Co.

- As a general rule a third party cannot take advantage of an exemption clause in a contract it was not party to. As was the case in Halal Shipping Co. Ltd V. Securities BremerAllegemeine.
- An exemption clause cannot as a general rule be given effect if doing so enables a party to the contract evade the fundamental obligation of the contract. As was the case in Karsales(Harrow) Ltd V. Wallis where it was held that although the exemption clause had been incorporated into the contract, it could not be given effect as doing so amounted to a fundamental breach of contract by the plaintiff.
The party alleging fundamental breach must prove it.

(b)

- This problem is based on the enforcement of exemption clauses with specific reference to fundamental breach or obligation theory, which is to the effect that an exemption clause will not generally be given effect if doing so amounts to a fundamental breach or enables the stronger party evade the fundamental obligation of the contract.
- In this case K. Kemei bought a new and nice looking car from G.N. Motors Ltd, but the motor vehicle supplied by the seller is fundamentally different in that is second hand and has many mechanical defects.
- This obviously amounts to a fundamental breach of contract by the company and K. Kemei has reason to feel aggrieved.
- Giving effect to the exemption clause would enable G.N. motors Ltd evade the fundamental obligation of the contract.
- My advise to K. Kemei is to refuse to take delivery of the motor vehicle and sue the company in damages for the breach. The company cannot effectively rely on the exemption clause as a defence.
My advise is based on the decision in Karsales (Harrow) Ltd V. Wallis whose facts were substantially similar.

QUESTION FOUR

(a)

- Human rights or fundamental rights are certain values shared by all human beings by reason of being God's creation.
- They are rights attributable to all human beings and are enjoyable by all irrespective of any contractual or other relationships.
- These rights enhance the dignity of humanity.
- In Kenya the fundamental rights are freedoms of the individual are guaranteed by chapter V of the Constitution and their enjoyment is generally qualified on the ground of rights and freedoms of others and public interest.

(b) **Rights**

- **Right to life:** this right is protected by section 71 (1) of the constitution.
- **Right to personal liberty:** this right is protected by section 72(1) of the court.
- **Right to protection of law:** this right is guaranteed by section 77 of the constitution.
- **Right to property:** this right is protected by section 75 of the constitution.

Freedoms

- **Freedom of conscience:** this freedom involves freedom of thought one should be able to from own ideas and follow them e.g. religious belief.
- **Freedom of expression:** everyone has the right to freedom of expression

- **Freedom of assembly and association:** everyone has the right to meet and to form groups with others e.g. the right to form and join trade unions.
- **Freedom of movement:** right to move all over the country. Restrictions to this right includes: if under police custody due to criminal offence, if a member of discipline forces is required to stay in barracks and in a state of emergency.
- **Freedom from discrimination or discriminatory laws.**

QUESTION FIVE

- (a) Vicarious liability is the liability of one person for the torts committed by another person by virtue of their relationship. The concept of vicarious liability is founded on the fact that employees are usually people of meager means and it is therefore only fair that the injured person is allowed to recover damages from the employer. Thus where there is a relationship of master and servant, the former is always liable for torts of the servant if committed in the course of employment even without his express approval. But the master is not liable for torts committed beyond the scope of employment unless he has expressly authorized such acts or subsequently ratifies them.

For the master to be held vicariously liable the plaintiff must establish that:

- There was a master and servant relationship between the parties i.e a contract of service between them.
- The tort was committed by the servant in the course of his employment. For example in Lister V. Romford Ice and Cold Storage Ltd.

The employer is liable notwithstanding the fact that the employee was acting negligently, criminally, deliberately wantonly or for his own benefit.

However, the employer is not liable for torts committed by the employee while engaged on a "frolic of his own." As was the case in Beard V. London General Omnibus.

- (b) An independent contractor is a person engaged by another to render a particular service i.e. there is a contract for services between the parties.
- He is his own master and exercises his discretion in accordance with the terms of the contract with the employer.
 - He is generally liable for torts committed by his servants and agents. However, in certain circumstances the employer is liable for such torts, for example.
 - If the employer retains control or interferes with the discharge of the obligation.
 - If the independent contractor's obligation amounts to a tort.
 - If the tort in question is one of strict liability e.g. rule in Rylands V. Fletcher.
 - If the ordinary discharge of the independent contractor's obligation amounts to the commission of a tort.
 - If the independent contractor negligently discharges a duty imposed upon the employer by law.
- (c)
- This problem is based on the principle of vicarious liability.
 - In this case Nafula is the master and her employee the servant.
 - As the master, Nafula is liable for torts committed by her employee in the course of her employment.
 - It is apparent that by throwing rubbish into Atieno's compound, Nafula's employee was not acting in the course of her employment and Nafula is therefore not liable.

- My advise to Atieno is that since her proprietary rights have been violated she has an **actionable claim against Nafula's employee** in damages.

QUESTION SIX

- This is one of the rules of consideration. Payment of a lesser sum by the debtor does not extinguish the debt as he has provided no consideration for the creditors promise.
- This is the rule in Pinnels case (1602) as enunciated by Brian C. J. This rule was upheld in Foakes V. Beer (1884).
- However in certain instances payment of a lesser sum extinguishes the entire debt. These are exemptions to the rule in Pinnels case.
 - Where the lesser sum is paid in advance and accepted by the creditor in full settlement of the debt.
 - If the lesser sum is paid in the form of an object which is accepted by the creditor in full settlement of the debt.
 - Where the lesser sum is at the creditor request paid at a different place and accepted in full settlement of the debt.
 - If the lesser sum is at the creditor request paid in a different currency and accepted in full settlement of the debt. However, payment of a lesser sum by cheque in lieu of cash is not a different from of currency. In D and C Builders Ltd V. Rees.
 - Where the lesser sum is paid in addition to the an object and accepted by the creditor in full settlement of the debt.
 - If the lesser sum is paid by a third party and accepted by the creditor in full settlement of the debt. In Welby V. Drake the defendant owed the plaintiff 18 pounds. However, the plaintiff accepted 9 pounds from the defendant for the balance. It was held that the action was unenforceable as the payment by the defendants father had extinguished the entire debt.
 - If the debtor enters into an agreement with his creditors to compound his debts whereby he agrees to pay a portion of the amount owed to each creditor, and the creditors agree to accept the same and promise not to insist in full payment, payment of a lesser sum by the debtor extinguishes the entire debt.

QUESTION SEVEN

(a) Duties of the bailor

- Deliver the goods the subject matter of contract to the bailee.
- Disclose any defect in the goods or in his title to the bailee.
- Indemnify the bailee from any loss or liability arising by reason of his defective title.

Duties of the bailee

- Take delivery of the goods bailed.
- Take reasonable care of the goods bailed. He is not liable for ordinary wear and tear.
- Deal with the goods in a manner consistent with the bailment.
- Return the goods to the bailor as soon as the purpose for which they were bailed is accomplished.

(b)

- Alien is a right conferred upon a person by trade usage or custom or by the law in certain circumstances, as a security for the fulfillment of an obligation owed by another or others.

A lien may be possessory, equitable or maritime.

- **Possessory lien:** this is the right of person in possession of anothers goods toretain them to compel the owner to fulfill an obligation owning. It may be particular or general and is dependent on possession which must be lawful and continuous. It is a self-help remedy.
- **Equitable lien:** this is the right of a person to have certain property applied ina particular manner. It is independent of possession and is enforceable by court action.
- **Maritime lien:** this is the right to have a ship or its cargo sold and the proceedsapplied in a particular manner. It is independent of possession and is enforceable by court action.

QUESTION EIGHT

(a)

Types of corporations

- **Corporation sole:** this is a legally established office distinct from the holder and canonly be occupied by one person at a time after which he is succeeded by another. It is a legal person in its own right, with perpetual succession, capacity to contract sue or be sued e.g. office of the Public Trustee, office of the permanent secretary to the Treasury.
- **Statutory Corporations:** this is a corporation created by an act of parliament forexample Agricultural Finance Corporation.
- **Registered corporations:** these are companies formed in accordance with theprovisions of the Companies Act. Examples are public and private companies.
- **Chartered Corporations:** these are corporations created by charter granted by therelevant authority under the Universities Act. For example Private Universities e.g. Baraton University.

(b)

- **Limited liability:** members are as a general rule not liable to make good the debts ofcorporation. In registered companies, members can only be called upon to contribute the amount unpaid on their share or the amount they undertook to contribute.
- **Perpetual succession:** a corporation is a creation of law. It has no body, mind or soul.Its life lies in the intendment of law. Death of a member has no effect on its existence. It has capacity to exist in perpetuity.
- **Sue be sued:** as a legal person with rights and subject to obligations, a corporation hascapacity to sue to enforce the rights and may be sued on its obligation. As was the case in Foss V. Harbottle (1843).
- **Owning of the property:** a corporation has capacity to own property. The property ofa corporation is vested in it and not on its members. It can therefore insure such property as it has an insurable interest in it. It was so held in Macaura V. Northern Assurance Co. Ltd. (1925).
- **Legal or corporate personality:** corporations are legal persons in their own right i.e.they have an independent legal existence with distinct rights and subject to obligations. In company law, once a company is formed it becomes a legal person, distinct and separate from its members – it was so held in Salomon V. Salomon and Co. Ltd.
- **Capacity to the contract:** corporations have legal capacity to enter into contractualrelationships in pursuit of their objects. Additionally, they have capacity to hire and fire. It was so held in Lee V. Lees Air Farming Co. Ltd (1961)

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REVISION PAPER 5

QUESTION ONE

This statement is a correct observation of the prevailing circumstances. This is because in the first instance parliamentary safeguards or mechanisms are ineffective.

- Parliament delegates legislative power to specific persons or bodies, for example governments, ministers, professional bodies, local authorities and statutory bodies.
- Parliament prescribes the scope and procedure of law making. The delegates can only exercise their legislative power in accordance with such scope and procedure.
- The enabling or Parent Act may require or insist that the draft legislation be circulated to interested parties of comments for example by-laws.
- The enabling or Parent Act may require or provide that the rules and regulations made may be laid before the minister concerned for approval.
- Under section 27(1) of the Interpretation and General Provisions Act, (Cap 2), unless otherwise provided all delegated legislation must be published in the Kenya Gazette before coming into operation. However, the date of commencement may be backdated.
- Under section 34 (1) of the Interpretation and General Provision Act, Cap 2, unless otherwise provided delegated legislation must be laid before parliament for approval. However, parliament is empowered to annul the rules by resolution to the effect.

- **Judicial control**

Courts of law attempt to control delegated legislation through the doctrine of UltraVires, which literally means beyond the powers. A court of law is empowered to declare delegated Legislation ultra vires where upon the rules become null and void and therefore in operative.

A court of law may declare delegated legislation substantively or procedurally UltraVires.

- **Substantive ultra vires**

A court of law may declare delegated legislation substantively ultravires if on application it satisfied that.

- The delegate has exceeded the power prescribed by the enabling or Parent Act.
- The delegate acted unreasonably.
- The delegate exercised his powers for a purpose other than that for which the power was conferred.

- **Procedural ultra vires**

The procedure of law making prescribed by the enabling or Parent Act is mandatory and must be complied with by the delegate. Delegated legislation made without compliance with the procedure thereby prescribed is procedurally defective and may be declared procedurally ultra vires if challenged before a court of law. In Maina and Mwangi V. R (1950) the appellants were convicted by Resident Magistrates Court in Nairobi for overcharging a hair cut contrary to the Defence Control Regulations 1948. These regulations empowered the price controller to fix charges for various services including a hair cut. He had fixed the price of a haircut at 50 cent. The appellants had charged Sh.1. On appeal, the appellants argued that their conviction and sentence was null and void as the rules under which they had been convicted were procedurally defective in that they had not been published in Government Gazette as required by law. Since the rules were procedurally defective they were declared procedurally ultra vires and the appellants conviction and sentence was set aside.

Courts of law cannot effectively control delegated legislation by reason of their passive nature. Secondly, an application must be made to the court and the applicant must at the very least discharge the burden of proof.

QUESTION TWO

Establishment: it is established by section 85 (1) of the Armed Forces Act as a subordinate court.

Composition: the court consists of a presiding officer who sits with not less than two other persons or not less than four others if an officer is being tried or where the maximum penalty for the offence is death. The court is assisted by a Judge/Advocate who advises on questions of procedure.

Jurisdiction: it exercises original jurisdiction in criminal cases relating to offences committed by the members of the armed forces within its jurisdiction e.g. mutiny, disobeying lawful order or desertion.

The court had jurisdiction to impose the following sentences:

- Imprisonment
- Fine
- Dismissal from the armed forces
- Reprimand
- Reduction of rank
- Capital punishment

A decision of the court may be appealed against in the High Court. The convict may appeal against conviction or sentence or both.

Establishment: it is established under section 14 (1) of the Trade Disputes Act. It was established in 1964.

Composition: it is presided over by a judge appointed by the president. The judge sits with two other persons selected by him from a KASNEB PANEL of four persons appointed by the minister for labour in consultation with COTU and Federation of Kenya Employers. At the moment there are two industrial court judges.

Jurisdiction: it exercises original jurisdiction in civil matters, namely, industrial disputes for example, employers and employees. Disputes may be referred to the court by the minister for labour or a registered trade union. Decisions of the court are known as AWARDS and are final i.e. cannot be appealed against, stayed or reviewed.

- An award must be published in the Kenya Gazette where upon it becomes effective.
- The Industrial court maintains a register of all collective agreements registered with it.
- The principal function of the industrial court in determining industrial disputes is to promote industrial harmony.

QUESTION THREE

- **Cross offers**

This is a phenomenon whereby a party submits an offer to another who has already dispatched a similar offer and two offers cross in the course of transmission. No agreement arises between the parties for lack of consensus ad idem.

- **Counter-offer:**

This is the variation or modification or change of the terms of the offer by the offeree. The offeree in such a case gives a qualified or conditional acceptance which is not an acceptance in law. A counter offer is an offer in its own right and if accepted by other offeror, an agreement arises.

Effect of a counter offer

The legal effects of a counter offer is to terminate the original offer. It therefore remains as the offer. In Hyde V. Wrench (1940). On June 6th the defendant made a written offer to sell a farm to the plaintiff for 1000 pounds on 8th June the plaintiff wrote back accepting to buy the land for pound 950. On June 27th the defendant wrote refusing the pound 950. On June 29 the plaintiff wrote accepting to pay 1000 pound for the farm but the defendant declined. It was held that there was no agreement between the parties as the plaintiff counter offer of 950 terminated the original offer of the defendant which therefore did not exist when the plaintiff purported to accept it. An offer differs from an inquiry or request for information.

Standing offer

This is an offer which arises when a persons tender to supply goods or services is “accepted” by the other party. Such “acceptance” is not an acceptance in a legal sense. In converts the tender to a standing offer for the duration specified and the offeror is bound to supply the goods or services whenever requested by the offeree. However, a standing offer may be revoked by the offeror or at any time before an order or requisition is made unless the parties have by a separate contract agreed that the offeror is to keep his standing offer open. Such a contract is referred to as an “option.”

In Great Northern Railway Company V. Witham the plaintiff company invited tenders for the supply of “stores” for 12 months. The defendants submitted a tender indicating his desire to supply the stores for 12 months. Such quantities as required by the company. The plaintiff company accepted the defendants tender and subsequently made a requisition for stores within the 12 months but the defendants failed to supply and was sued. It was held that the defendant was liable in damages for breach of contract as his standing offer had been accepted by the railway company.

QUESTION FOUR

- (a) Under the provisions of the Limited Partnership Act a limited partnership must be registered with the registrar of companies. To facilitate registration, a memorandum containing the following particulars must be delivered to the registrar:
 - Name of the firm
 - General nature of the business
 - Principal place of business
 - Full name of each partner
 - The term, if any, for which the partnership is entered into at the date of its commencement.

- A statement that the partnership is limited and a description of every limited partner.
- The sum contributed by each limited partner and whether paid in cash or otherwise.

If during the subsistence of a limited partnership any change occurs in the afore mentioned particulars, a statement to that effect must be delivered to the registrar within 7 days of the change.

If a limited partnership is not registered, it is deemed to be a general partnership.

(b)

- Cannot withdraw or receive back his interest during the currency of the firm.
- May not take part in the management of the firms business. If he does, he becomes a general partner for the duration he acted and may be held personally liable.
- does not bind the firm
- Cannot dissolve the partnership by notice.
- His death or bankruptcy or insanity does not lead to dissolution.
- Charging of his interest for a private debt does not lead to dissolution.
- Unless otherwise provided the firms affairs are wound up by a general partner.
- A person may be admitted as partner without consent of the limited partner.

QUESTION FIVE

(a)

- It is the essence of the contract of the sale of goods that property in the goods pass to the buyer.
- It determines when risk in the goods pass to the buyer hence the party is liable in the event of loss or destruction.
- It determines the remedies available to the parties, for example, the seller can only sue for the price after property in the goods had passed.

(b) Property in goods passes to the buyer at different times in different contracts hence the passage of property is governed by the following rules:

- **Sale of unascertained goods**

Under section 18 of the Act, where there is a contract for the sale of unascertained goods, property passes to the buyer when the goods are ascertained.

- **Sale by auction**

Under section 58 (1) of the Sale of Goods Act where there is a sale by auction, property passes to the buyer when the auctioneer announces its competition by the fall of the hammer, or in such other customary manner. Until the hammer falls, the bidder may retract his bid.

- **Sale by reservation**

Under section 21 (1) of the Act, where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract but the seller reserves the right of disposal of the goods until certain conditions are fulfilled, property in the goods pass to the buyer when the conditions imposed by the seller are fulfilled.

- **Sale by description**

Under section 20 (e) (i) of the Act where there is a contract for the sale of unascertained goods by description, property in them passes to the buyer when:

- Goods of that description,
- In a deliverable state,
- Are unconditionally appropriated to the contract,
- By the buyer with consent of the seller or by the seller with consent of the buyer.

- **Sale by approval or on sale or return**

Under section 20 (d) of the Act where goods are delivered to the buyer on approval or on sale or return or other similar terms, property in them passes to the buyer.

- When he signifies his approval or acceptance or
 - When he does any other act adopting the transaction e.g. reselling or pledging the goods or
 - When he retains the goods after expiration of the stipulated or reasonable time without signifying his rejection.
- **Unconditional sale of specific goods in a deliverable:** under section 20 (d) of the Sale of Goods Act, where there is an unconditional Sale of Specific goods in a deliverable state, property passes to the buyer when the contract is made.
 - **Sale of specific of goods to be put into a deliverable state:** under section 20 (b) of the Act where there is a contract for the sale of specific goods and the seller is bound to do something for the purpose of putting the goods into a deliverable state, property in them passes to the buyer when they are put into a deliverable state and he is notified.
 - **Sale of specific goods to the weighed, measured or tested:** under section 20 (c) of the Act, where there is a contract for the sale of specific goods but the seller is bound to weigh, measure, test or do some other act or thing for the purpose of ascertaining the price, property in the goods passes to the buyer when they are weighed, measured, tasted, or that other thing is done and the buyer is notified.

QUESTION SIX

Under the provisions of the Bills of Exchange Act,

- A bill of itself does not operate as an assignment of funds in the hands of the drawee available for payment of the bill. The drawee of a bill who does not accept it is therefore not liable on it (53).
- The acceptor of a bill, by accepting it according to the tenor of his acceptance engages that he will pay it according to the tenor of his acceptance is precluded from denying to a holder in due course.
- The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill.
- In the case of a bill payable to the drawers order, then the capacity of the drawer to endorse, but not the genuineness or validity of his endorsement.
- In the case of the bill payable to the order of a third person, the existence of the payee and his capacity to endorse, but not the validity or the genuineness of his endorsement.

The drawer of a bill by drawing it

- Engages that on due presentment, it shall be accepted and paid according to its tenor, and if it be dishonoured he will compensate the holder or any endorser who is compelled to pay it, so long as the requisite proceedings on dishonour by duly taken.

- Is precluded for denying to a holder in due course the existence of the payee and his capacity to endorse.

The endorser of a bill by endorsing it.

- Engages that on due presentment, it shall be accepted and paid according to its tenor, and if it be dishonoured he will compensate the holder or subsequent endorser who is compelled to pay it so long as the requisite proceedings on dishonour be duly taken.
- Is precluded from denying to a holder in due course the genuineness or regularity in all respects of the drawers signature and all previous endorsements.
- Is precluded from denying to his immediate or subsequent endorsee that the bill was at the time of his endorsement a valid and substituting bill, and that he had then a good title thereto.

QUESTION SEVEN

- (a) By incorporating a partnership, it becomes a company limited by shares and certain advantages accrue there from:
- **Limited Liability:** members liability for debts and other obligations is limited by shares. They are not liable to pay more.
 - **Perpetual succession:** the death of a member or members of the corporation has no effect on its existence. This encourages investment.
 - **Owning of property:** the property of a corporation does not belong to its member. The company has capacity to invest to promote its profitability.
 - **Suing or being sued:** members are not bound to sue to remedy wrongs done to the company and cannot generally be sued for the wrongs of the company.
 - **Capacity to contract:** the fact that a company can enter into contractual relationships means that it can engage in commercial transactions for the benefit of its members and society.
 - **Wide capital base:** compared to other forms of business associations registered companies have the widest capital base by reason of the wide spectrum of membership.
 - **Qualified management:** companies are managed by directors elected by members. Members have the opportunity to elect qualified persons as managers.
 - **Transferability of shares:** under the Provision of the Companies Act the shares or other interest of any member shall be movable property transferable in manner provided by the articles. Company shares are transferable, thus membership keep on changing from time to time and the company could take advantage of the entrepreneurial skills of new members.
 - **Borrowing by floating charge:** a registered company is free to utilize the facility of floating charge to borrow. This is an equitable charge securing a debenture on the assets of a going concern but which remain dormant until crystallization. A floating charge:
 - Enables companies with no fixed assets to borrow
 - Enhances the borrowing capacity of companies with fixed assets.
 - Enables companies to use future assets as security.
 - Does not interfere with the ordinary business of the company.

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