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COUNCIL OF LEGAL EDUCATION

EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES

REGISTRATION NUMBER:

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VENUE: Co-operative University ☐ Kenya School of Law ☐ KNEC ☐

ATP100: CIVIL LITIGATION

Examination Series: November 2024

Date: 14th November 2024

Time: 09:00AM-12:00PM

Duration: 3 hours

Instructions to Candidates:

- Enter your registration number and tick the exam venue in the space provided.
- Answer **FIVE (5)** questions, including question **ONE** which is **COMPULSORY**.
- Question **ONE** carries **20 Marks**. All other questions carry **10 Marks** each.
- Attempt each question in the space provided. Additional space is provided at the back of the booklet.
- Answers **MUST** be supported by relevant statutory provisions and case law where required.
- Do not write your name in the booklet.
- Ensure your handwriting is **LEGIBLE**.

FOR EXAMINER'S USE ONLY

Question Number	Examiner		Internal Moderator		External Moderator		Quality Assurer	
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QUESTION ONE

You are a newly admitted advocate. On 1/11/2024, you secured employment as an associate advocate at the firm of Onyala Biosi and Company Advocates. A previous associate advocate, Esihingwa Esinu, left employment at the firm last month after three years of service. You were employed to fill up the vacancy, and you have found a number of files that Esihingwa Esinu had been handling on behalf of the firm, which you are tasked to review and continue with.

In one of the files, you have come across a defence that had been prepared and filed by your predecessor. The defence reads as follows:

REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATES COURT AT NAIROBI
MILIMANI COMMERCIAL COURT
CIVIL CASE NUMBER E006 OF 2022

SIELO MONGUTI PLAINTIFF

VERSUS

SIOLO OMULAMA DEFENDANT

DEFENCE

1. Save what is expressly admitted in this defence, the Defendant denies each and every averment of fact contained in the Plaint as if the same were set out in here verbatim and traversed seriatim.
2. The Defendant admits the contents of paragraphs 1 and 2 of the Plaintiff in so far as the same are descriptive of the Parties save that his address of service for purposes of this suit is **C/o Onyala Biosi and Company Advocates, OB Building, Ground Floor, PO Box 11 - 00100 Nairobi. Email: onyalabiosiadvocates@hotmail.com**
3. The Defendant denies that he is known to the Plaintiff as alleged in the Plaint or at all. The Defendant puts the Plaintiff to strict proof of the same.
4. The Defendant denies that the Plaintiff lent him any money as set out in the Plaint or at all. The defendant puts the Plaintiff to strict proof of the same.
5. The Defendant denies that he received a demand notice or notice of intention to sue. The Defendants puts the Plaintiff to strict proof of the same.
6. The Defendant denies that this court has jurisdiction over this matter. At an appropriate time, the Defendant shall apply to strike out the suit *in limine*.

Reasons wherefore the Defendant prays that the Plaintiff's suit be dismissed with costs.

Dated this 5th day of March 2022.

**Esihingwa Esinu and Company
Advocates for the Defendant**

Drawn & Filed By
Onyala Biosi & Company Advocates
OB Building, Ground Floor
P.O. Box 11 - 00100
Nairobi



To Be Served Upon
Omutiti Advocate
Shirembe Business Centre
P.O. Box 10 - 00100
Nairobi

Your review of the file reveals that these general denials are in fact contrary to the client's written instructions to the firm. The client's instructions to the firm had been conveyed by way of a formal email and a print out of the email is on the physical file. The client, Petro, had instructed the firm that he had a contract with Monguti. Monguti was to supply him with hides and skins. In turn, Petro would then sell the hides and skins to Bata Shoes Company Limited.

Under the contract between Petro and Monguti, the latter undertook to supply one tonne of hides and skins every month. In turn, Petro had a tender to supply Bata Shoe Company with one tonne of hides and skins every month. Petro had intended to buy the hides and skins from Monguti at an agreed rate of Ksh. 100 per kilogramme and sell the same to Bata at an agreed rate of Ksh. 300 per kilogramme. Thus, Petro had expected to make profits of Ksh. 200,000 per month from the said supplies.

The contract between Petro and Bata Shoe Company Limited was to run from January to December 2024 and was subject to renewal. The contract between Monguti and Petro was to run from January to December 2024, to enable Petro to meet his obligations to Bata Shoe Company. To assure performance, Bata Shoe Company had required Petro to furnish a performance guarantee of ten million shillings (Ksh. 10,000,000) from a bank.

At the beginning, Monguti supplied Petro with one tonne of hides and skins in January and another tonne in February 2024. However, from March to June 2024, Monguti only supplied 300 Kilograms of hides and skins. This meant that Petro was not able to meet his contractual obligations to Bata Shoe Company. Therefore, at the end of June 2024, Bata Shoe Company called in the bank guarantee from Petro's bank, Equator Shiners Bank Limited and cancelled the contract for breach of fundamental terms of the contract.

For the four months between March and June 2024, Bata Shoe Company had not paid Petro for the supplies, because it fell far below the agreed quantities. Hence, Petro did not have the money to pay Monguti for the supplies.

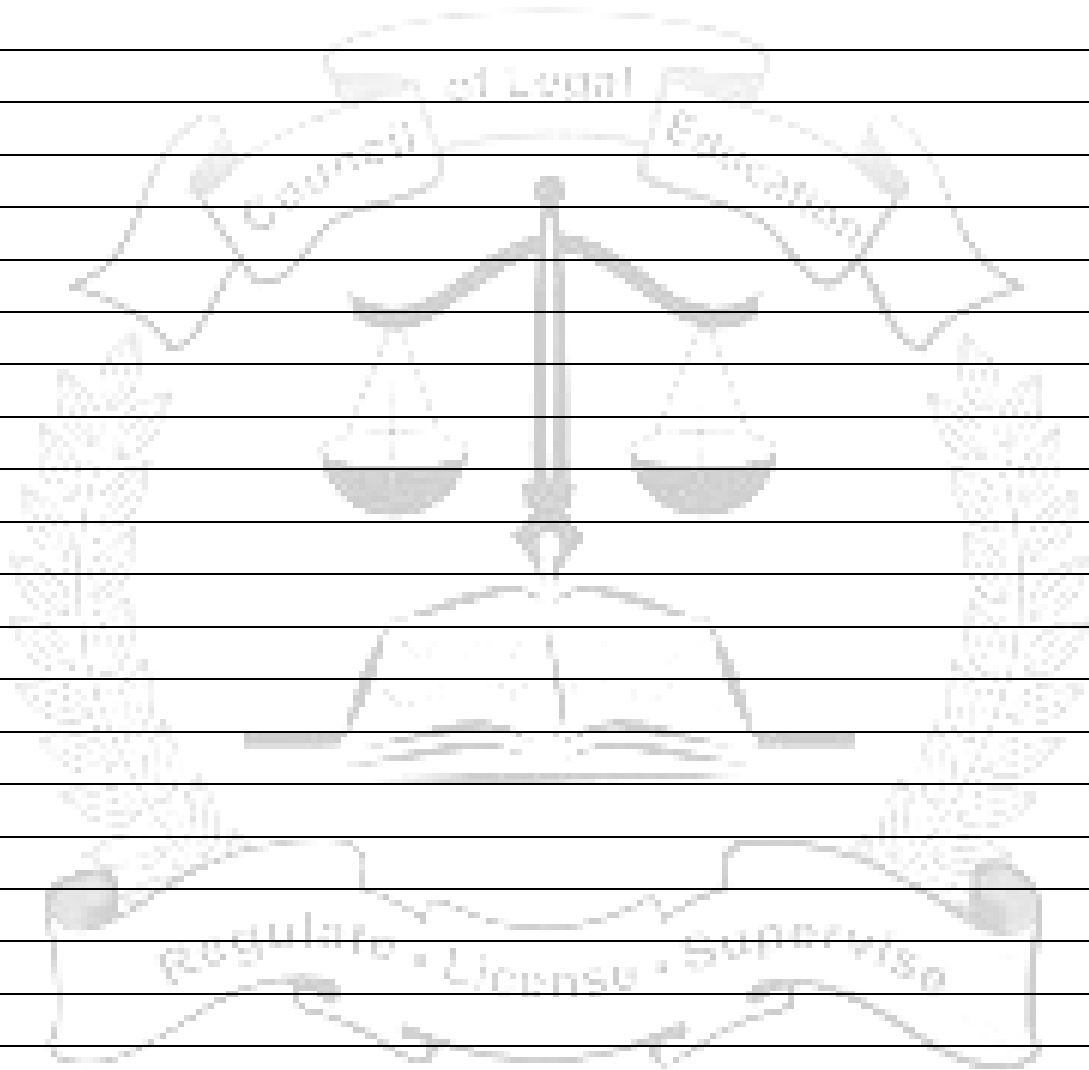
Monguti's suit, the subject matter of the above defence, was for Ksh. 120,000 together with interest at court rates from date of judgment until payment in full. Petro's instructions was to defend this suit and to claim from Monguti the Ksh. 10,000,000 bank guarantee that Bata had called in. He also wanted to claim the lost profits that he would have made had Monguti not breached the contract for the supply of the hides and skins for the contract period.



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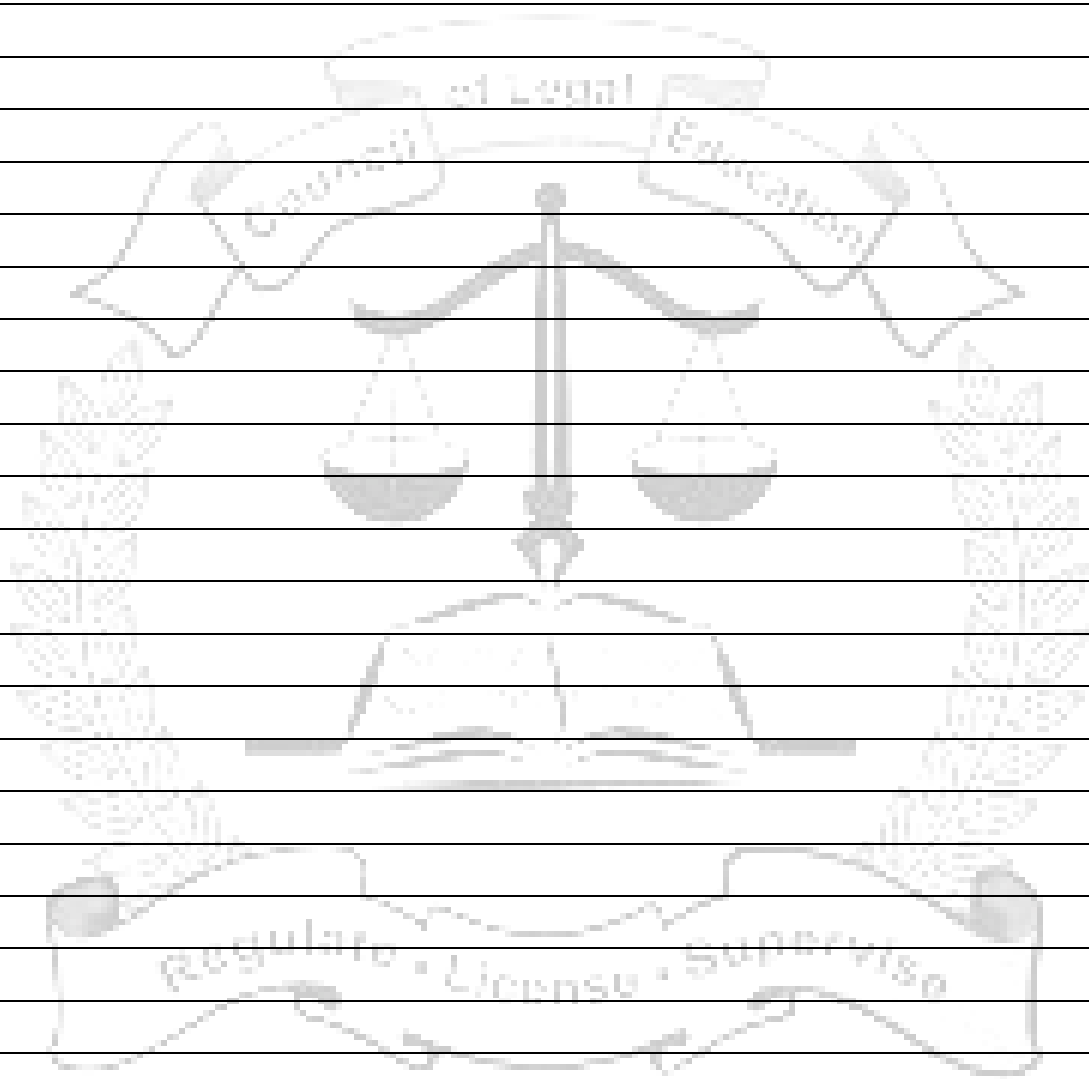
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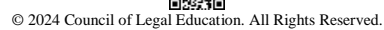
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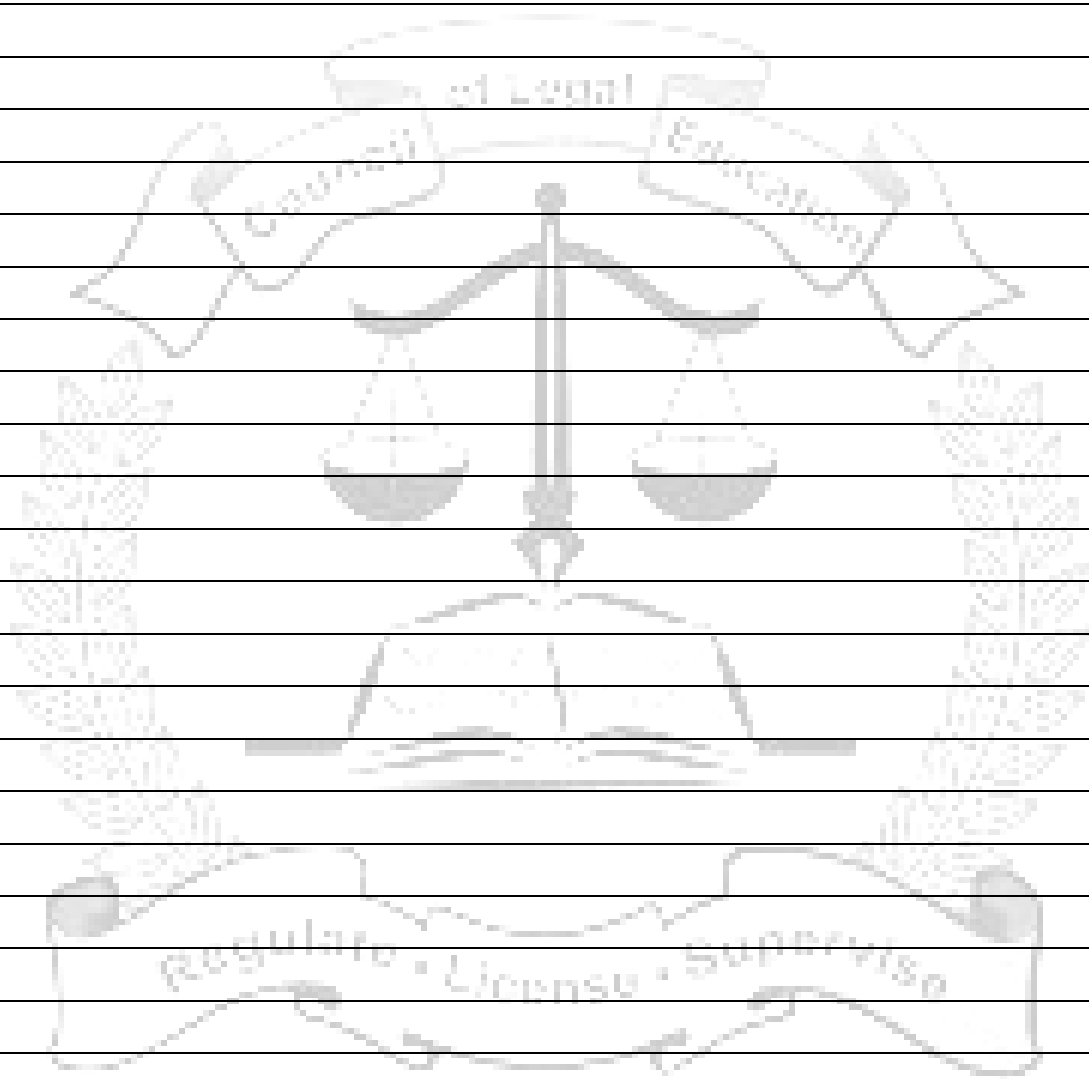
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QUESTION TWO

Upon conclusion of a long and protracted suit, judgement was entered in favour of Medza Mzee, who was the plaintiff in the suit. To his relief, the Court also awarded him costs of the suit. You were acting for Medza Mzee throughout and he therefore expects you to help him realize the fruits of his judgement, including the awarded costs. The suit was heard and determined by the High Court at Kisumu.

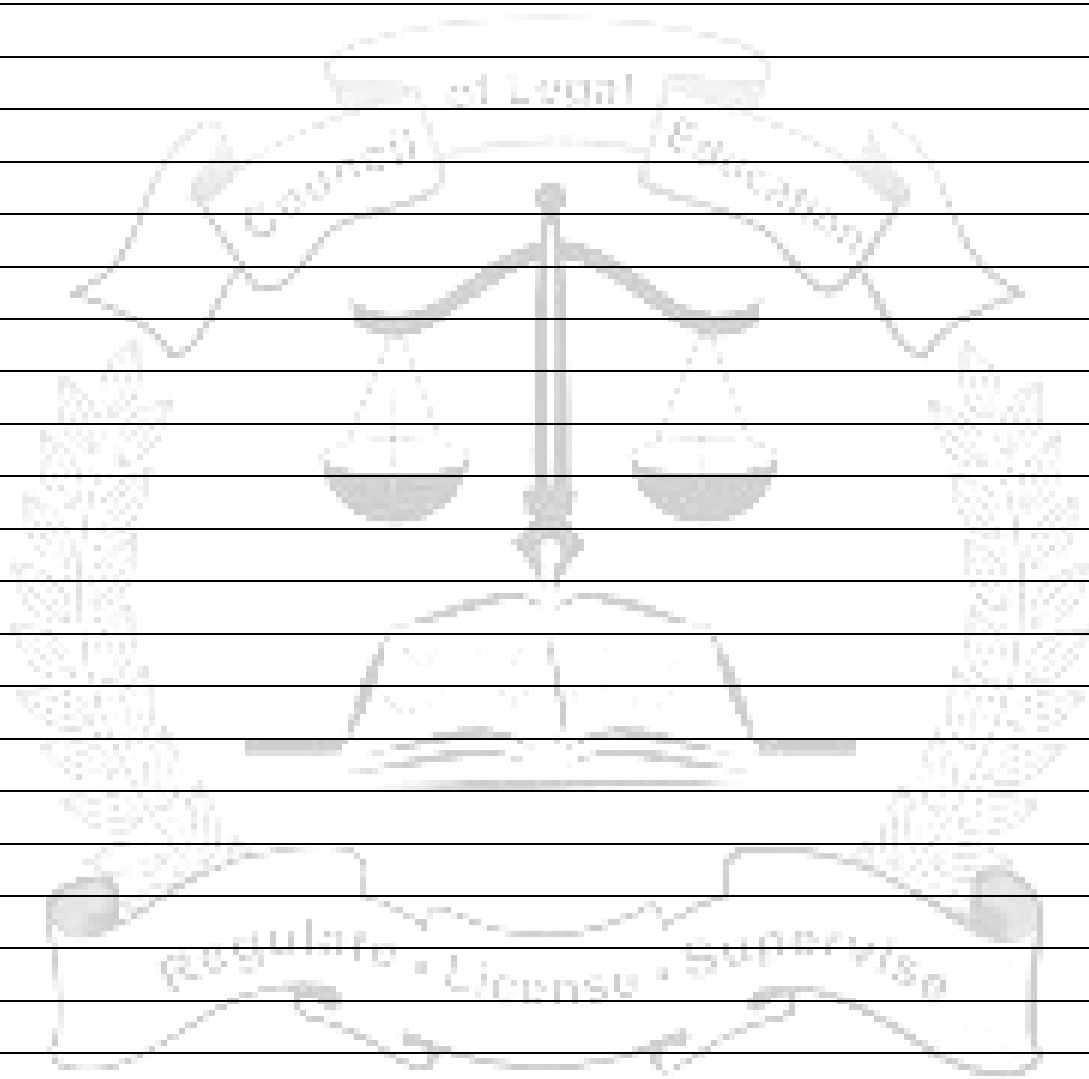
- a) What steps will you take to realize the costs awarded to Medza Mzee? (3 Marks)
- b) What considerations will a taxing officer take into account while assessing instruction fees. (5 Mark)
- c) Explain the difference between party and Party Costs and Advocate and Client Costs. (2 Marks)

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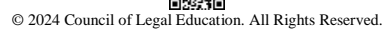
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QUESTION THREE

On 4th August 2024, a judgment was delivered against your client, Bwana Shida, whereby he was ordered to pay the defendant Kshs. 25,000,000/= in damages for defamation, damage to property and assault. The judgement was delivered after the parties were heard. Each party had also produced evidence and called witnesses. Dissatisfied with the judgment of the High Court at Nairobi, Bwana Shida who was your client at the High Court has instructed you to appeal against the judgement. Your client, without substantiating his claims insists that he will not be given a fair hearing at the Court of Appeal therefore he would like you to Appeal to the Supreme Court.

- a) Write a sound opinion to your client advising him on the right forum to lodge the appeal while distinguishing the jurisdiction of the Court of Appeal and the Supreme Court. (6 Marks)
- b) While discussing the matter with one of the Partners in your law firm, the partner asked you whether you have considered filing an application for review against the judgement. Give well thought answer explaining the circumstances under which an application for review may be filed against a judgement. (4 Marks)

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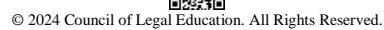
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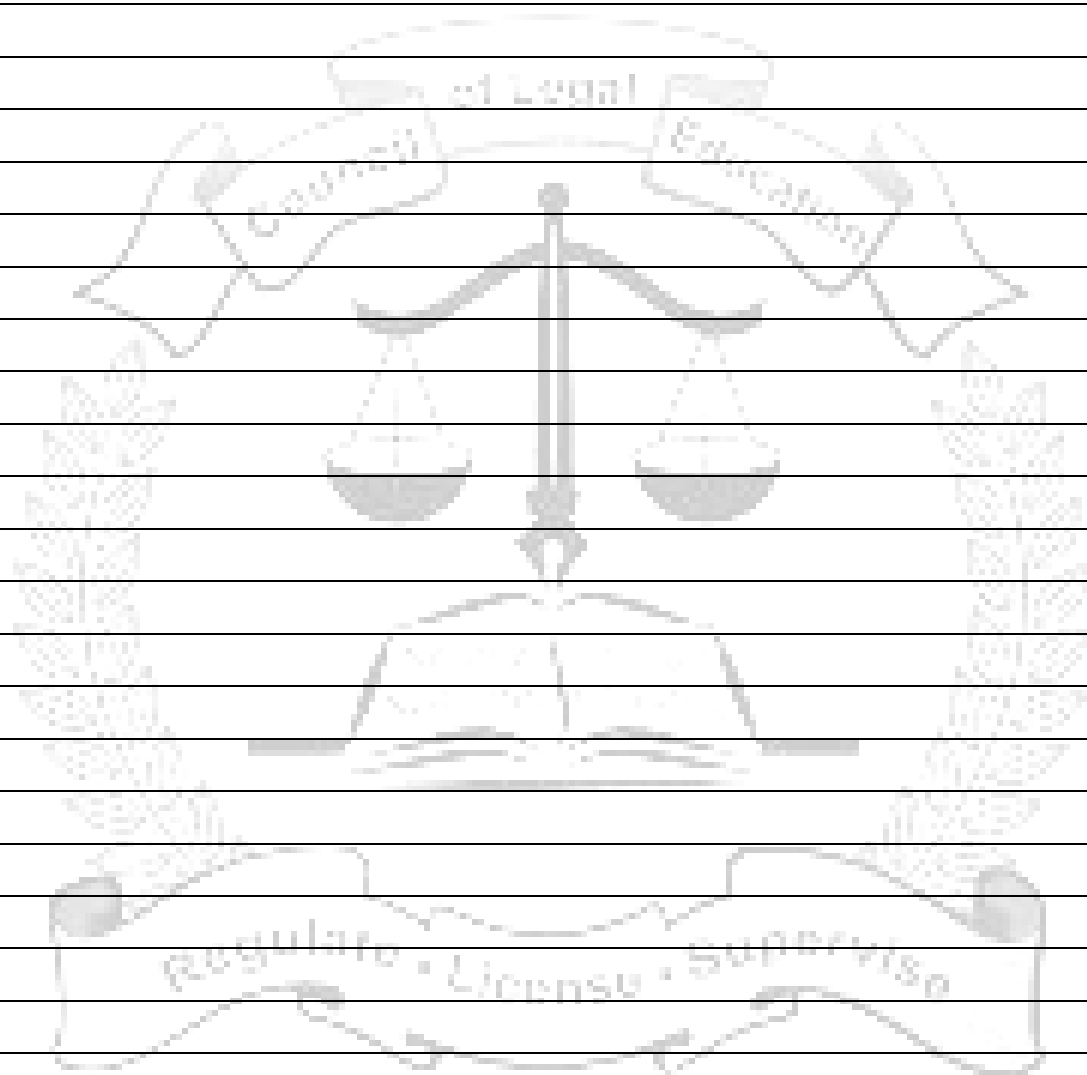
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QUESTION FOUR

John Newton sued several defendants claiming certain amounts of money. He was represented by Gregory Isaac. During the pendency of the suit, there was a purported settlement where it was agreed that the 1st Defendant pays a sum of Kshs 100,000/= to Gregory Isaac and be nonrefundable under any circumstances. The 1st Defendant paid the said sum of money by a cheque drawn by FIL Limited in which he is a director. On the same day of payment, a dispute arose as to the terms of the purported settlement and as to the conditions under which the money was paid. The settlement was never effected and the money was retained by John's advocate. The parties exchanged several correspondences but would not reach any settlement. In the meantime, the 1st Defendant passed away.

John Newton has filed Nairobi Chief Magistrates Court Civil Case Number E457 of 2024 against Gregory Isaac claiming the money. David Jones, one of the two executors of the 1st defendant and FIL Limited are also claiming to be entitled to the money.

You are a legal assistant at Wakili Mwema & Company Advocates, D& D House, 2nd Floor
P.O. Box 6565-00100 Nairobi. Tel. 029876555, Email: mkmlp@gmail.com which has been
instructed to act for Gregory Isaac.

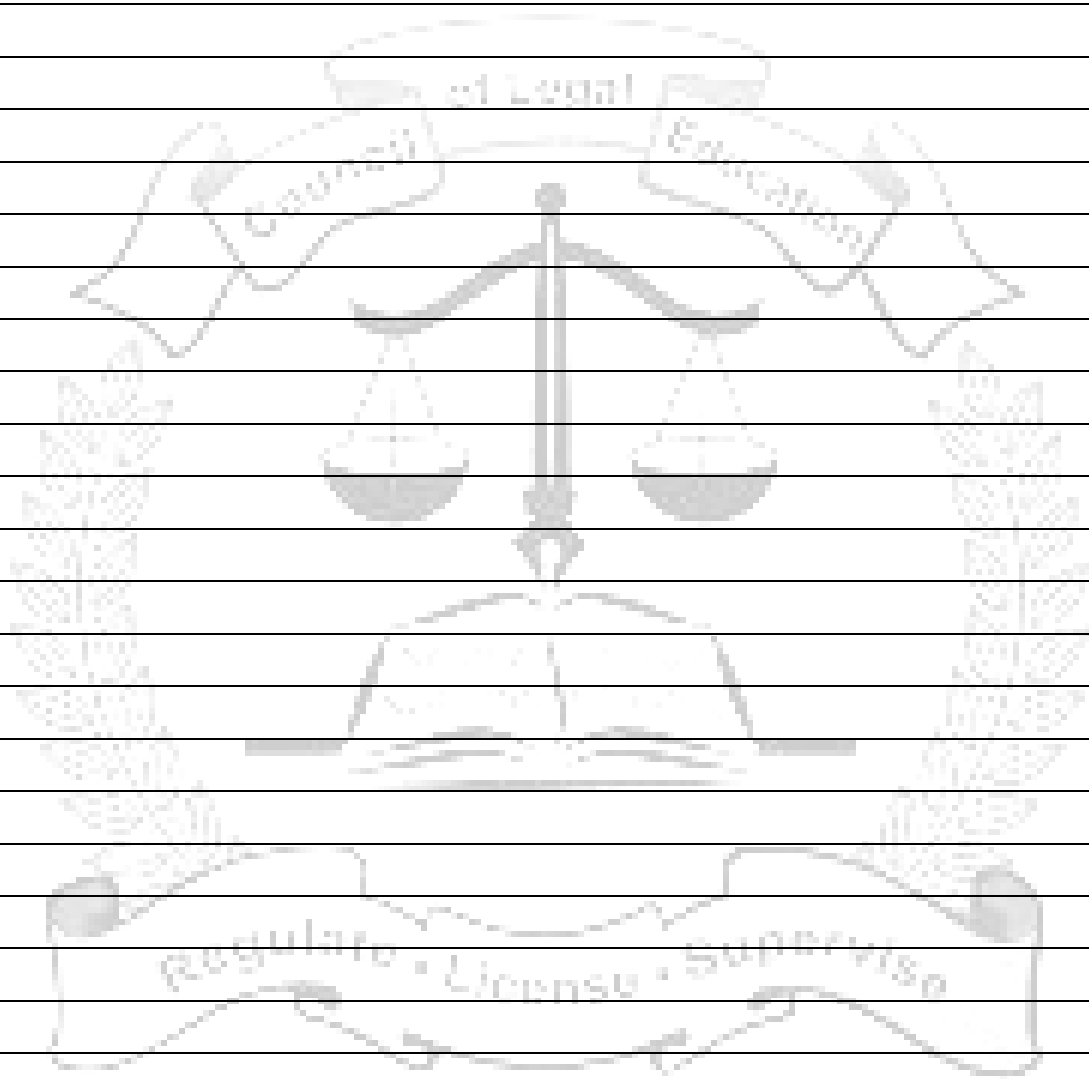
Write a legal opinion on the steps Gregory needs to take to successfully defend the claim against him. (10 marks)

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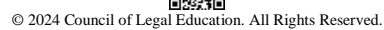
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QUESTION FIVE

On 3rd August 2024 Mzima Meja received a call from Moto, who introduced himself as a process server. Moto requested to meet Mzima urgently. Upon the two meeting, Moto handed Mzima a set of papers and requested Mzima to sign an acknowledgement of service, which Mzima did without hesitation. Upon perusal of the documents, Mzima was shocked to find that it was a judgement issued by the High Court at Nairobi against him together with a Decree which had been extracted from the judgment. The judgement was dated 1st July 2024 and the Decree was dated 15th July 2024. The orders issued were as follows:

- i. Judgement is hereby issued against the defendant in the sum of Kshs 10,000,000/= with interest from the date of filing suit.
- ii. The defendant to bear the costs of the suit.

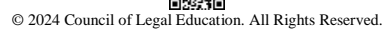
The suit had been filed by Hela Kaka who was once a Mzima Meja's client. In the suit, which was filed through Mtetezi & Co Advocates, Hela Kaka had claimed that Mzima supplied him with a faulty motor vehicle (Truck Registration Number KRC 111X) from his car sale hub on 30th June, 2024. Hela had claimed in the suit that Mzima had refused to replace the vehicle or refund the purchase price despite various demands to do so. What surprised Mzima most is that he had not come across any proceedings or pleadings relating to the suit until he was served with the judgment and the decree. In addition, according to his records, he sold the subject motor vehicle to XTY Holdings Limited but not Hela Kaka as alleged. Hela Kaka is a shareholder and a Director in XTY Holding Limited.

Mzima Meja, having learnt that you are one of the renowned advocates at the Firm of Fanya Kazi & Co Advocates has come to your chambers to seek legal advice. He is apprehensive that the decree may be executed against him any time.

- Draft an appropriate application that you should file in court to protect Mzima's interests. (7 Marks)
- What factors will guide the court in determining your application? (3 Marks)

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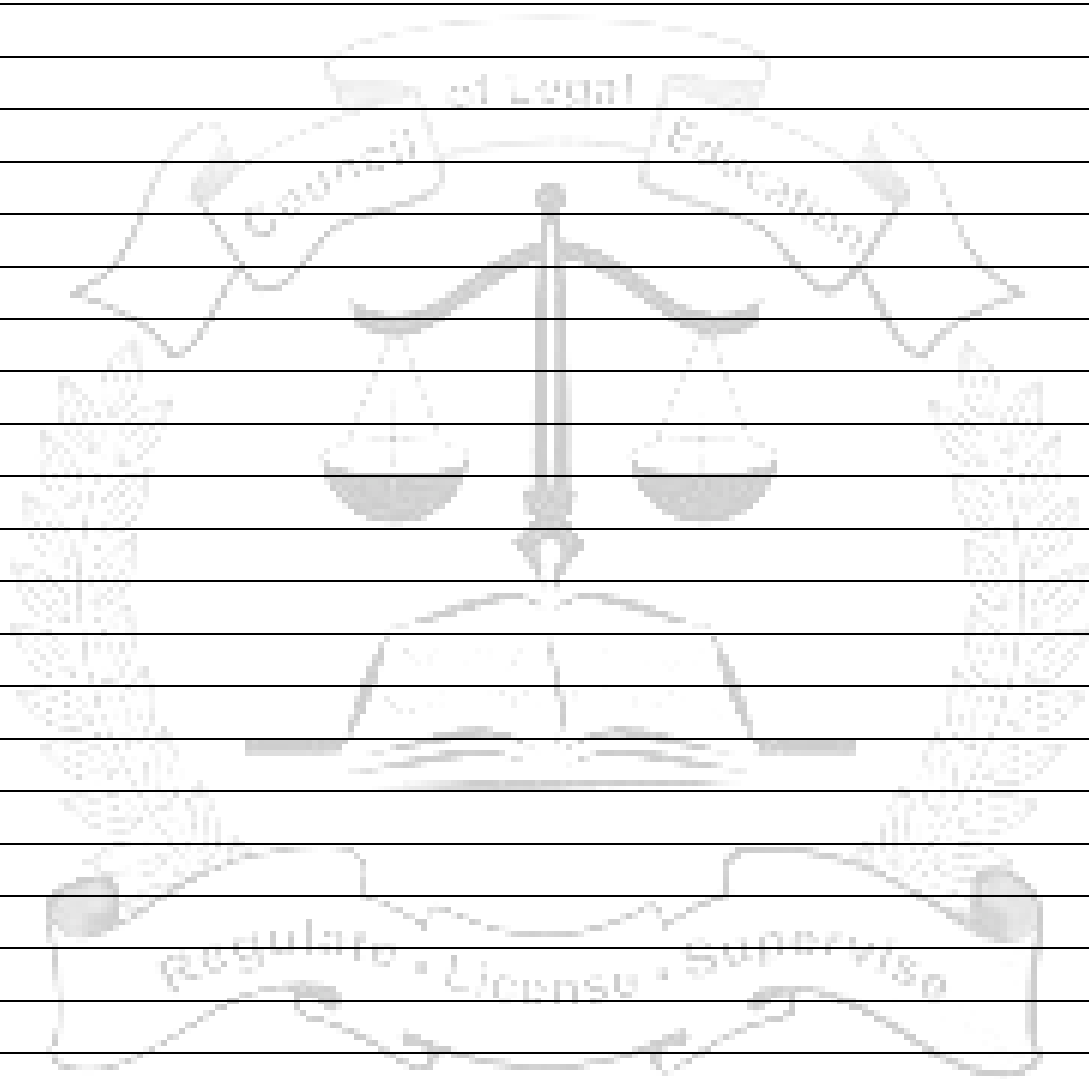
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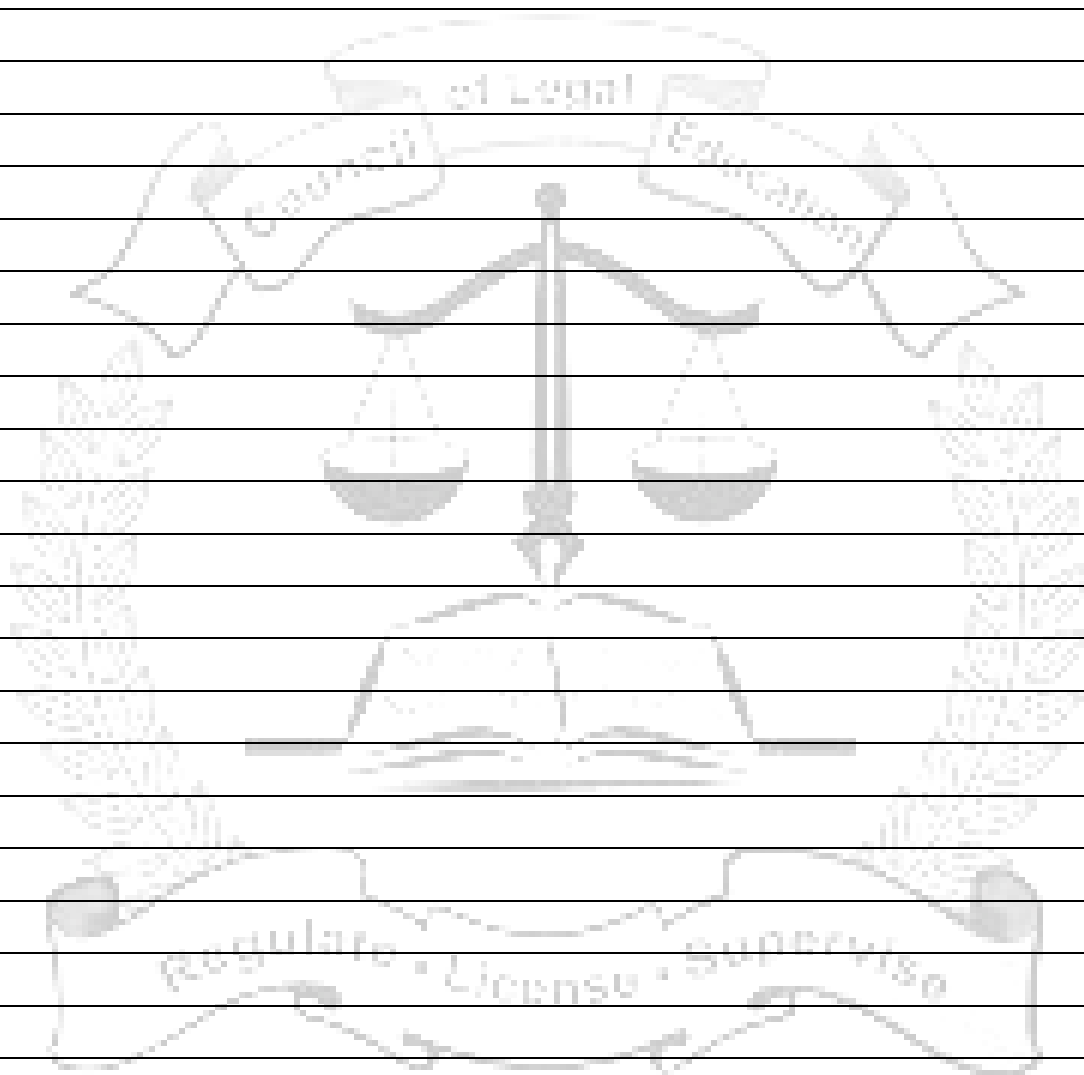


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QUESTION SIX

Mwanawira, Otulo, Kongo and Khadija (renowned activists) have recently filed a matter at the Small Claims Court in relation to alleged embezzlement of funds in 2017 by some public officers in Maendeleo County within Sisi Wote Republic. They describe themselves as “the Claimants” in the matter, which is lodged through a substantive Notice of Motion without first seeking leave of the Court. They argue that, “we are in a new dispensation. Hence, pleadings should be filed untrammelled by procedural technicalities as enshrined in Article 159 of the Constitution.” It is also their argument that the Court has jurisdiction to determine claims relating to violation of human rights pursuant to section 8(1) of *the Magistrates’ Courts Act, Cap 10 of the Laws of Kenya*. They state that the sum subject of the suit is within the pecuniary jurisdiction of the Court.

The brief facts are that, there is an Auditor General’s Report stating that Ksh. 900,000/= cannot be accounted for in the Imprest Account of the County. However, the Report is yet to be tabled before the County Assembly for adoption as required. The suit also raises concerns about the penchant for the Governor, Mr. Chapa Kazi, for attending funerals every day and barely being in the office. According to the claimants, this is conduct unbecoming of a public officer, which merits appropriate sanctions by the Court. Hence, they argue that the Governor should be declared unfit to hold public office. To this end, they seek “judgment against the Governor for Ksh. 900,000/= to be paid to the Claimants” and for “conservatory orders to bar the Governor from accessing his office”.

In their joint response, the respondents contend that the originators of the motion are busybodies who have no *locus standi* to file the matter. They also state that there are active impeachment proceedings before the Senate against the Governor. Further, they argue that the Notice of Motion is fatally defective and incompetent and should be struck out. They also attack the remedies sought, arguing that the motion suffers from poor draftsmanship and the prayers sought are untenable. However, the Respondents do not explicitly raise the issue of jurisdiction.

You are the magistrate at the Small Claims Court and at the end of the oral submissions by the respective parties, you have reserved a date for the delivery of the ruling to enable you to holistically considered all the aspects in the case.

Write a concise ruling highlighting your position on the matter.

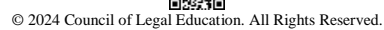
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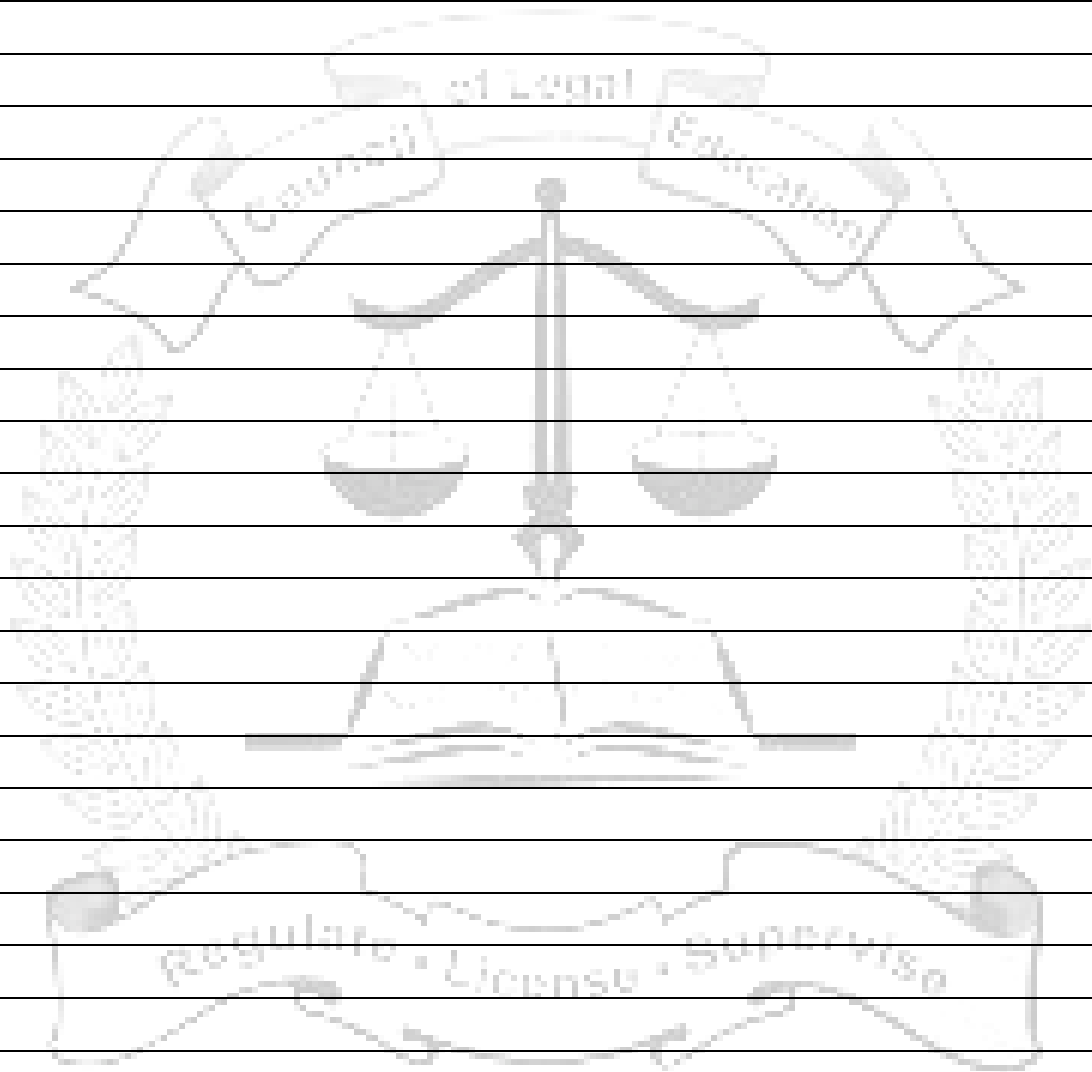
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