

QUESTION ONE

You have recently passed the Bar examinations, been duly admitted as an Advocate of the High Court of Kenya and secured your first job as an Associate at a busy corporate law firm in Nairobi.

Your first assignment is to review a number of draft commercial contracts. In the course of reviewing these drafts, you come across the following clauses which have all been marked: “problematic to re-draft.”

- (i) A “non-compete” clause in a draft Agreement to be executed by your client who is retiring as a partner in an accounting firm which reads:

“for good and valuable consideration the receipt of which is hereby acknowledged, PPP (the retired partner) hereby agrees not to directly or indirectly compete with the business of ABC Enterprises (the Partnership) and/or its successors, PPP shall not, anywhere in Kenya, own, manage, operate, consult or be employed in a business substantially similar to or competitive with the present business of the partnership.”

- (ii) An “Indemnity” clause in a building contract to be executed by your client who is the contractor, which reads as follows:

“The contractor shall indemnify and hold harmless the owner... from and against ALL claims, damages, losses and expenses... arising out of or resulting from the performance of the contract...”

- (iii) A sale Agreement to be executed by your client from the “Diaspora” who has indicated that he will be “visiting home” sometime in the summer” whose opening line reads as follows:

“This sale Agreement is made on the 1st day of July 2017 and is made between...”

Given your broad knowledge of the applicable doctrinal rules and “best practices” in commercial contractual agreements, negotiation and drafting, you are required to:

- (a) Briefly but adequately state and give legal support for the “problematic” aspect of each of the flagged clauses.
- (b) Re-draft each clause so as to address and adequately provide for the legal “problems” identified.

Marks distribution:

- The non-compete clause: 9 marks
- The Indemnity clause: 7 marks
- The Sale Agreement: 4 marks