

COUNCIL OF LEGAL EDUCATION.



**EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES.**

ATP 100: CIVIL LITIGATION

THURSDAY 11th APRIL, 2024.

DURATION: 3 HOURS.

Instructions to Candidates:

- (a) This paper contains **Eight (8)** printed pages including the cover page, with a total of **SIX (6)** questions.
- (b) A Candidate **MUST** answer **FIVE (5)** questions.
- (c) **Question ONE** is compulsory and carries **20** marks.
- (d) **All other** questions carry **10** marks each.
- (e) Answers **MUST** be supported by relevant case law and statutory provisions where required.

PLEASE TURN OVER

QUESTION ONE

On 14th March 2023, Gifted Spirits General Services Limited and Happy Bank Limited (the Bank) executed two Debenture Agreements in respect of various machineries owned by Gifted Spirits General Services Limited. The Bank extended credit facilities to the company for a collective sum of KSh. 61,000,000/=.

One Debenture Agreement was specific in respect of a refinery machine known as Grand Mortar, Serial Number 111wi976 valued at KSh. 45,000,000/=. The other Debenture Agreement was general for any other property/machinery owned by the company but not specifically mentioned in the Specific Debenture Agreement. Save for the difference in the type of properties covered in each of the Agreement, most clauses of the two Agreements were strikingly identical. Clause 7 of both agreements stipulated that the principal sum was repayable within one year plus profits with a monthly installment of KSh. 10,000,000/= to cover for both profits and interest.

The two Debenture Agreements were subject to the provisions of *the Movable Property Security Rights Act*.

The sole director/shareholder of the company also signed a separate agreement as the grantor to be personally bound within the meaning of *the Movable Property Security Rights Act*.

The company defaulted but instead sued the Bank on the pretext that the Bank was in the process of selling all the company assets through public auction scheduled in the next two weeks. To the contrary, the company had defaulted by not remitting any periodic sums and also clandestinely sold the refinery machine known as Grand Mortar, Serial Number 111wi976 valued at KSh. 45,000,000/= without the knowledge of the Bank. The Bank had intended to exercise its right to sue as a secured creditor under section 68 of *the Movable Property Security Rights Act* for the Plaintiff's wrongful act of selling the property without the knowledge and concurrence of the Bank and default by the Plaintiff.

All the company's assets which are subject of both Agreements are in Nairobi but the Agreements were signed in Mombasa. The company's place of business is Kisumu whereas the Bank plies its trade in Machakos town.

The Complaint filed by the company reads as follows:

REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT KISUMU
KISUMU LAW COURTS
CIVIL CASE NO. E400 OF 2024

GIFT SPIRITS GENERAL SERVICES LIMITED..... PLAINTIFF

-VERSUS-

HAPPY BANK LIMITED..... DEFENDANT

PLAINT

1. The Plaintiff is a limited liability company duly incorporated under the relevant provisions of *the Companies Act, No.17 of 2015* currently carrying out its business within Kisumu County. The Plaintiff's address for service for purposes of this suit is care of Messrs Wakili Advocates LLP, Mawakili Centre, 5th Floor, New Wing, P.O. Box 304 - 00100, Nairobi; email info@wakilillp.com.
2. The Defendant is a limited liability company currently providing banking services within the meaning of *the Banking Act, Cap 488 of the Laws of Kenya*.
3. The Plaintiff avers that on 14.3.2023 it executed two Debenture Agreements with the Defendant in respect of various machineries owned by the Plaintiff.
4. The Plaintiff further avers that pursuant to the Debenture Agreements the Defendant Bank extended credit facilities to the Plaintiff for a collective sum of KSh. 61,000,000/=.
5. The Plaintiff hastens to add that one Debenture Agreement was specific in respect of a refinery machine known as Grand Mortar, Serial Number 111wi976 valued at KSh. 45,000,000/= owned by the Plaintiff whereas the other Debenture Agreement was general for any other property/machinery owned by the Plaintiff but not specifically mentioned in the Specific Debenture Agreement.
6. Clause 7 of both agreements stipulated that the principal sum was repayable within one year plus profits with a monthly installment of KSh. 10,000,000/= to cover for both profits and interest.
7. It was also understanding of the parties that the two Debenture Agreements be subject to the provisions of *the Movable Property Security Rights Act*.
8. The Plaintiff states that it has honored its obligation under the Debenture Agreements and it does not owe the Defendant any sums under the Agreements.
9. To the Plaintiff's utter dismay, the Defendant has without any justification whatsoever purported to schedule a public auction of the Plaintiff's assets on 20.2.2024.
10. The Plaintiff is apprehensive that the Defendant will proceed with the impugned auction unless the Honorable court intervenes.

11. The Plaintiff served the Defendant with a letter of demand prior to this action but the Defendant ignored thereby rendering this suit necessary.
12. There is no suit pending between the Plaintiff and the Defendant over the subject matter and there has never been such civil action determined between the two parties.
13. This court has jurisdiction to entertain the suit.

REASONS WHEREOF the Plaintiff prays that:

- a) A declaration that the Plaintiff is not indebted to the Defendant under the two Debenture Agreements executed on 14.3.2023.
- b) An order of permanent injunction restraining the Defendant from selling the Plaintiff's assets on 20.2.2024 or any other subsequent public auction.
- c) Costs of the suit to be borne by the Defendant.

DATED at NAIROBI this 7th day of February, 2024.

WAKILI ADVOCATES LLP
ADVOCATES FOR THE PLAINTIFF

DRAWN BY:

Wakili Advocates LLP
Mawakili Centre, 5th Floor, New Wing
P.O. Box 304 - 00100
NAIROBI
Email info@wakilillp.com

TO BE SERVED UPON:

Happy Bank Limited
Banking Centre, 10th Floor
P.O. Box 2399 - 00100
NAIROBI

- a) Advise the Bank on the defects in the pleading and what should be done to have the suit struck out *in limine*. (5 Marks)
- b) Draft the appropriate pleading that you will file on behalf of the Bank to realize the Bank's intention under (a) above. (5 Marks)
- c) The Bank still intends to exercise its right to sue as a secured creditor under section 68 of the *Movable Property Security Rights Act* for the Plaintiff's wrongful act of selling the property without the knowledge and concurrence of the Bank, and default by the Plaintiff hence the Bank has instructed you to proceed. Assuming that there are no defects in the Plaintiff's suit, draft the

relevant pleading to take care of the Bank's interest, noting the appropriate forum. (10 Marks)

QUESTION TWO

Hassan Mjanja sought the services of **Alpha & Omega Advocates LLP** to represent him in a breach of contract claim against Mpyaro Moses. The matter was filed in court on January 1, 2016. The hearing of the case was concluded on April 23, 2023. The damages sought in the claim were Ksh. 10 million. Soon after the close of the defence case and the filing of the closing submissions as directed by the court, Hassan Mjanja got his son **Wakili Kurutu**, a lawyer in his own right, to file a notice of change of advocates taking over the conduct of the matter from Alpha & Omega Advocates LLP. Alpha and Omega Advocates LLP filed a Bill of Costs against Hassan Mjanja. The same has been taxed at Ksh. 5.2 million out of which Ksh. 5 million is in respect of instruction fees. Hassan Mjanja has filed a reference from the decision of the taxing master challenging only one aspect of the taxation, that is, the instruction fees awarded.

Write a reasoned ruling on this application. (10 marks)

QUESTION THREE

David Joseph, a 3rd year student, is an active student leader at Nasa University. In July 2023 he was elected as the President of the Nasa Students' Association. He has been critical of the University Administration and does not fear speaking out his mind openly. Since his election, he has held several meetings and rallies with students to enlighten them of their rights within the University. There is no love lost between the Vice-Chancellor and him. The Vice-Chancellor has on several occasions threatened him verbally that his days at the University are numbered and his expulsion is imminent.

On 15th December 2023, the University security officers went to his hostel and gave him a letter which read as follows: -

15th December 2023

Dear David,

RE: SUSPENSION FROM THE UNIVERSITY

The above matter refers.

Please note that you have, with immediate effect been suspended for one academic year because of engaging in illegal activities meant to incite other students. Take note that you have no right of appeal. You are, therefore, required to vacate the University premises immediately. You will be considered a trespasser if you are found within the University premises during your suspension.

*Yours Sincerely
Academic Registrar*

The University Statutes provide that no student can be expelled or suspended for any reason without a disciplinary hearing which must be done within 30 days from the date of the student being informed in writing of any allegations made against him or her. The statutes further provide that the reasons for the intended suspension or expulsion must be detailed in a notice to show cause why disciplinary action should not be taken against the student and that the student must be given an opportunity to show cause in writing before any disciplinary hearing can take place. The Statutes also provide for a procedure of appeal against the decision of the Disciplinary Committee to the University Senate.

David has written to the University Senate complaining that his suspension is against the University Statutes and has requested the Senate to intervene and follow the due process but he has not received any response. The Vice-Chancellor who is the Chair of the Senate has refused to call for an urgent Senate meeting to deliberate on the matter in view of the fact that David will miss his end of semester examinations. David is frustrated because he seems to have no option within the University administration in which his grievances will be handled. He has approached a firm of advocates who have filed an application seeking leave to commence judicial review proceedings in the nature of certiorari against the University to bring to the court for purposes of quashing the decision contained in the letter dated 15th December and an order that the leave sought do operate as a stay of the said decision in order to enable him to sit for his end of semester examinations.

You are the duty judge handling matters filed under certificate of urgency, proceed to consider the application and write a ruling. (10 marks)

QUESTION FOUR

You successfully represented Honkas Kombu in Engineer Chief Magistrate's Courts whereupon judgment of KSh. 10,000,000/= plus costs and interests at court rates was delivered in favour of your client.

The Defendant, Gonza Limited changed its registered place of business immediately after the judgment in a bid to evade execution. It is not known whether it has properties registered under its name but a report availed to you by the private investigator that you appointed to help in tracing the company's assets, indicates that the company recently transferred its two motor vehicles (Toyota Land Cruiser VX V8 and Range Rover Vogue) whose total approximate value is KSh. 14,000,000/= to its sole director/shareholder, a Mr. Gonzales Canga. You conducted a search in the eCitizen Government platform and confirmed that indeed the two vehicles are registered in the name of Mr. Gonzales Canga.

On 3rd December, 2023 the company Judgment Debtor issued six cheques for KSh. 500,000/= for part settlement of the decree but the cheques were dishonored for insufficient funds in the Company's accounts.

Your client wants to realize the fruits of his judgment without any undue delay and relies on you to ensure that the decretal amounts are fully settled by the Defendant/Judgment Debtor company.

Advise your client on the steps you will take against the company until payment of the decretal amount is made to your client and the conditions to be met for the application to succeed. **(10 Marks)**

QUESTION FIVE

Top Security PLC offers security services in many towns and cities in Kenya. In 2018, it offered security services to Ubora Bank PLC in all its branches in Kenya. In 2020, a dispute arose concerning the amount due for the services rendered. Top Security PLC is claiming a sum of Kshs 39,509,610/=. After exchange of several correspondences over the matter Top Security PLC withdrew its services and filed a suit claiming the sum of Kshs 39,509,610/=.

Ubora Bank PLC filed a defence and denied owing the amount due on the ground inter alia that there is in existence wrangles and disputes amongst the Plaintiff's directors and as such the defendant should be not held liable for the payment of any money. The court has held the case management conference and has certified the matter ready for hearing. The parties are not able to take a hearing date for hearing of the main suit because the court's diary for the year is full. One of the Plaintiff's directors has come across a letter written by the Defendant's legal officer admitting that the amount claimed in the plaint is indeed due to the Plaintiff. The Plaintiff is desirous of obtaining judgment without waiting for the matter to go for full trial.

- a) Write a legal opinion on the nature and scope of two applications which the Plaintiff can make to achieve that purpose. **(6 marks)**
- b) With the aid of decided cases, discuss the nature and scope of an application which the Plaintiff would have to use to achieve that purpose at any time after the Defendant has entered appearance but not filed defence. **(4 marks)**

QUESTION SIX

Hon. Hakim Matata was recently seized of a civil dispute at Kato Chief Magistrate's Court. The subject matter was a material damage claim pitting Konda Koko as the Plaintiff (the suit was brought on his behalf by his insurers, Good Premiums Insurance Limited under the doctrine of subrogation) and Dereva Mlevi as the Defendant. Through the Plaintiff, the insurance company had sought KSh. 2,500,000/= in the plaint as

recompense for costs of replacing their insured's motor vehicle registration number KDP 111X which had been completely damaged due to a road accident that occurred on 2nd February, 2023 along Nyeri Nairobi Highway.

At the end of the trial, the magistrate rendered himself on 5th February 2024, thus:

"JUDGMENT

This matter is rather straightforward and is as clear as the sun.

The Plaintiff did not prove the case beyond reasonable doubt.

suit is dismissed with costs.

That's all for now. Bye everyone."

The insurance company is aggrieved by the decision. They fault the judgment for being so casual and not reasoned at all. They also contend that Dereva Mlevi, the driver of motor vehicle registration number KTH 356G was at the time of the accident negligent and extremely drunk in a manner that he could not control the vehicle and there is the infamous *alco blow* evidence as well as the conclusion on Dereva Mlevi's state at the material time to that effect in the police abstract filed in court.

Your law firm was recently enlisted in the panel of lawyers of the insurance company owing to your prowess and unrivaled success in road accident claims. The file containing the judgment and the pleadings has been handed over to you from the insurance's previous Advocates so that you proceed and challenge the judgment.

- (a) Write a concise legal opinion to the insurance company on the timelines to be observed for the envisaged appeal to succeed, the relevant pleading to be filed, and how the judgment ought to have been structured by the trial magistrate as provided for under *the Civil Procedure Act* and the appurtenant *Rules*. (6 Marks)
- (b) Draft the relevant pleading that you intend to file in the appellate court. (4 Marks)