

**COUNCIL OF LEGAL EDUCATION.**



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

**ATP 100: CIVIL LITIGATION**

**THURSDAY 16<sup>th</sup> MARCH, 2023.**

**DURATION: 3 HOURS.**

**Instructions to Candidates:**

- (a) This paper contains SIX (6) 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

As a student in the Advocates Training Programme at the Kenya School of Law, you double up as an intern at the law firm of Onyala Biosi and Company Advocates. The law firm is based at Shule ya Sheria Plaza, Ground Floor along the Lang'ata South Road in Nairobi County. The law firm's email address is [onyalabiosi@onyalabiosi.co.ke](mailto:onyalabiosi@onyalabiosi.co.ke).

Fumo Liyongo, a client, has come into the office and you were assigned to take instructions from him. He gives you the following information:

On 9/8/2022 he was going to vote in the general election at Westlands Primary School. Having alighted from a matatu that he had boarded from Kangemi to Westlands, he had to cross Waiyaki Way to get to the polling centre at Westlands Primary School. While crossing at a duly designated and marked pedestrian crossing point, motor vehicle registration number UBA 007M that is registered in the neighbouring Republic of Uganda drove so fast "as if from nowhere" and knocked him down causing him multiple injuries.

The police abstract in his possession shows that the owner and driver of the motor vehicle was one Kyadundu Ssempebwa, a Ugandan national who was visiting Kenya for a conference. Ssempebwa's statement with the police at the nearby Parklands Police Station indicates that at the time of the incident, he was rushing to Kula Shiba Hotel along Mombasa Road for a conference. The address on the said statement is P.O Box 35 Jinja. His email address is also provided as kssempebwa@gmail.com.

Medical reports from Pona Karaka Hospital in Parklands area where Fumo Liyongo was treated for 4 months show that he suffered a broken leg, a broken arm as well as multiple bruises on the head and the stomach. Receipts in the possession of Fumo Liyongo show that he had already spent Ksh. 2,500,000 on medical treatment. The doctor projects that post-discharge medical reviews and procedures will cost Fumo another Ksh. 500,000.

Your research on relevant case law for similar injuries shows that the expected compensation for pain and suffering and loss of amenities is in the range of Ksh. 3,000,000 to Ksh. 3,500,000. This is by virtue of recent awards by the courts in similar cases.

Fumo's greatest concern is that the criminal proceedings in the traffic case that Mr Ssempebwa has been facing from this incident, comes for judgment in two weeks' time.

By law, the exhibit Motor vehicle that has been at the Parklands Police Station will be released to the accused after 14 days from the date of judgment in the criminal traffic case. Mr Ssempebwa will certainly drive the said vehicle back to Uganda. Mr Ssempebwa has no other proprietary interests in Kenya and he ordinarily lives in Uganda. His presence in Kenya on 9/8/22 was purely for conference attendance and his subsequent

presence has been to attend to his traffic case. Fumo is therefore concerned that whatever compensation that he may be awarded by the courts against Mr Ssempebwa, will not be realizable in execution unless the Motor Vehicle UBA 007M remains within the boundaries of the Republic of Kenya.

You have just briefed the managing partner at the firm, Mr Onyala Biosi, who in turn has instructed you to prepare a draft letter of demand together with draft pleadings and a draft of the necessary application that addresses Mr Fumo's concerns on execution of any favourable judgment that may arise from this case as expressed above.

You have a reputation for generating impeccable drafts at the office.

- (a) Prepare the draft demand letter. (5 marks)
- (b) Prepare the appropriate draft pleading for this case. (8 marks)
- (c) Prepare a draft of the necessary application that will address Mr Fumo's concerns on execution as expressed in the instructions. (7 marks)

## QUESTION TWO

David Mungala filed a suit against John Doe claiming adverse possession over all that parcel of land known as Ngong/Ngong Block 1/47577. In March 2019, he obtained judgement and the court ordered John Doe to transfer the parcel of land to him. David never followed up the matter to have the land transferred to him. John Doe passed away in June 2020.

Peter Doe, John's eldest son who was away for studies in the United States of America returned home and found David Mungala on the parcel of land. He obtained letters of Administration and filed a suit against David seeking to have him evicted from the suit land.

David has raised a preliminary objection on the propriety of the suit filed by Peter on the ground that it is an abuse of the court process. The matter has been placed before you and the parties have made their rival submissions on the preliminary objection.

With the aid of decided cases, write a ruling on the preliminary objection. (10 Marks)

## QUESTION THREE

The Kenya School of Law has introduced a tutorial programme in its Advocates Training Programme. Under this programme, students are allowed to lead discussions in class on various themes in the curriculum. The students who lead discussions in the tutorial programme are called lead discussants. Admission into the tutorial programme as a lead discussant is highly competitive. Over time, it has emerged that students who graduate

from the school having been certified as lead discussants are highly sought after by employers in the legal sector. Students must prepare very persuasive presentations under specified themes to be permitted to lead class discussions under those themes.

You desire to lead the class discussion on *constitutional litigation*. The course instructor has directed that the first class in *constitutional litigation* will focus on the sub-theme “*Entry Points in Constitutional Litigation in Kenya.*” The lead discussant is expected to thoroughly examine the constitution of Kenya, 2010 and specify avenues in the constitution through which causes may be taken before specified courts seeking application or interpretation of the Constitution.

For purposes of this discussion, an *entry point* is a provision of the constitution that vests jurisdiction in a specified court or courts to litigate a specific subject matter under the Constitution. 20 students have expressed interest in leading this discussion but the course instructor can only allow one student to lead the discussion. He has therefore, set high standards that a presentation must pass for the author to be considered as a lead discussant. You are among the 20 students that are interested in this opportunity to be a lead discussant.

Discuss five (5) avenues in the Constitution of Kenya 2010 that provide a basis for litigating constitutional questions specifying the subject matter that can be litigated under each avenue and the court(s) to which that avenue will lead the litigation lawyer filling the cause. (10 marks)

#### QUESTION FOUR

James filed a suit against Mla Leo a teacher employed by the Teachers Service Commission for the recovery of a sum of Ksh. 2 million at the Chief Magistrate Court. The judgement was issued in his favor. James extracted a decree from the judgement. Mla Leo was in court when the judgement was delivered. He sought a stay of execution for thirty (30) days, which the court granted. It is now three (3) months since the date of the judgement. Mla Leo is yet to pay the decretal sum.

James has tried to accommodate Mla Leo by asking him how he intends to pay the decretal sum but Mla Leo is non-committal. James has even paid Mla Leo several visits at his farm in Ngong, which he owns, but nothing is forthcoming. Zacharia, a colleague of Mla Leo has informed James that Mla Leo’s salary is usually paid through an account at KCB Bank Ngong Branch and he is certain that Mla Leo has at least half a million shillings in that account. Mla Leo even bought a motor vehicle in the recent past for personal use.

Advise James on the five (5) possible ways through which he can recover the decretal sum from Mla Leo. (10 Marks)

#### QUESTION FIVE

In Muiru General Store v. Attorney General and another (High Court of Kenya at Nairobi Civil case number 1603 of 1971; (1972) KHCD NO. 104 OF 1972). The plaintiff claimed special damages for the loss of their vehicle which was wrecked after colliding with a GSU lorry. The defendant, despite requests by the plaintiff, withheld photographs and sketch-map of the scene of the accident until at a later stage in the hearing. The court decided on the weight of the evidence that the driver of the plaintiff's vehicle was wholly to blame for the accident and dismissed the suit. After reserving judgement on the issue of costs, the court remarked that although the defendant had no legal obligation to supply to the plaintiff the photographs and sketch-map, their conduct led the plaintiff to think that they had a good cause of action hence the suit. The court therefore invited the defendant to show cause why they should not be deprived of costs.

As a counsel working for the defendant, draft a legal opinion explaining circumstances under which a successful defendant will be deprived of his costs. (10 marks)

#### QUESTION SIX

The Republic of Kiza has a constitution and standing orders like those of the Republic of Kenya. Musa is a sitting elected Member of Parliament for Umbea Constituency within the said Republic.

On 31<sup>st</sup> November 2022, Musa was in attendance in a joint sitting of parliament during the state of the nation address by H. E. the President of the Republic of Kiza. Musa on several occasions during the sitting, raised points of orders to draw the attention of the President on the suffering of his constituents. He did this pursuant to his constitutional right to picket as envisaged under Article 37 and the right of his constituents to representation.

The Speaker of the National Assembly, in utter disregard of the provisions of Article 201 of the Constitution, unlawfully ordered Musa out of the National Assembly without according him an opportunity to be heard. His attempts to catch the attention of the Speaker to explain himself were unlawfully and unjustly construed as disobeying orders of the Speaker.

The Speaker invoked the provisions of the Standing Order No.111 of the National Assembly and suspended him for the remainder of the session. The speaker disregarded clear provisions of the Constitution, laws of natural justice and fair administrative action. He publicly declared that his decision was final and would not be rescinded and that Musa would not be given any room to appeal against the decision to suspend him.

Attempts by Musa to explore internal remedial measures to get justice have all been frustrated. He has effectively been barred from accessing the precincts of parliament and cannot therefore discharge his constitutional duty of representation, to the prejudice of his constituents.

Musa has approached you to challenge the decision of the Speaker. Write a legal opinion on the nature and scope of the pleadings you will advise Musa to file to successfully challenge the decision of the Speaker. (10 mark)