

**COUNCIL OF LEGAL EDUCATION.**



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

**ATP 104: TRIAL ADVOCACY**

**TUESDAY 16<sup>TH</sup> APRIL, 2024.**

**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

Jovial Pharmaceuticals, a prominent pharmaceutical company in Kenya, obtained a patent for a proprietary herbal formula known as “VitaHerb” on April 1, 2019. “VitaHerb” was developed after years of research and is known for its unique medicinal properties as a natural dietary supplement. The patent protects the specific combination of herbal extracts that form the “VitaHerb” formula.

Botanical Biotech, a newer entrant in the herbal supplement market in Kenya, introduced a product called “BioVital” in December 2019. Botanical Biotech advertised “BioVital” as a natural health enhancement product with properties similar to those of “VitaHerb” as marketed by Jovial Pharmaceuticals. Jovial Pharmaceuticals has sued Botanical Biotech alleging infringement of its “VitaHerb” patent.

To further strengthen its case, Jovial Pharmaceuticals engaged Dr. Grace, a prominent herbalist and specialist in traditional medicine, to analyze the chemical composition and medical properties of “VitaHerb”. Dr. Grace conducted an in-depth study and prepared a detailed report highlighting the unique ingredients and medicinal benefits of “VitaHerb”. Jovial Pharmaceuticals intends to call Dr. Grace as an expert witness.

During the pre-trial phase, Botanical Biotech sought to discredit the novelty and originality of “VitaHerb”. The defence obtained a report from Prof. Michael Omundu, a renowned chemist and expert in herbology, challenging the uniqueness associated with “VitaHerb” formula. Prof. Omundu’s report attempts to cast doubts on the validity of the patent protecting “VitaHerb” and questions the distinctiveness of the formula.

Botanical Biotech has vehemently denied the allegations of intellectual property rights and asserts that “BioVital” is a distinct and independently developed herbal supplement. Botanical Biotech intends to rely on Prof. Omundu’s analysis to challenge the authenticity of “VitaHerb” and offer an alternative interpretation of the chemical composition of herbal supplements in the market.

- a) You are an Advocate of the High Court of Kenya and have been retained by Botanical Biotech to represent them in this case.
- i. Draft five (5) critical questions you will pose to Dr. Grace in cross examination. Assume that introductory questions have already been put to the witness. **(5 marks)**
  - ii. As you prepare for trial, you need to identify critical documents that will be necessary to support your client’s case. In relation to Prof. Omundu, explain three (3) critical documents you will require from him to support his expert testimony. **(3 marks)**

- iii. Examine two (2) critical issues you would discuss with Prof. Omundu as you prepare him to testify to ensure that you discharge your duties to your client and to the court. (2 marks)
- b) You are an Advocate of the High Court of Kenya and have been retained by Jovial Pharmaceuticals to represent them in this case.
- i. Prepare your opening statement to be presented in court. (5 marks)
  - ii. Draft five (5) critical questions you will put to Dr. Grace in examination in chief. Assume that all introductory questions have been put to the witness. (5 marks)

## QUESTION TWO

You have been retained by Roba who has been charged with Robbery with violence contrary to section 296(2) of the Penal Code. The facts captured in the charge sheet are as follows;

That the accused on the 24<sup>th</sup> day of January 2024, armed with a revolver pistol at around 6:00pm raided an Mpesa shop along Moi Avenue in Nairobi and forcefully took Kenya Shillings Two Hundred Thousand from one Monica.

The following questions were posed to Roba by the prosecutor during the trial.

“Is it true that you robbed Monica?”

“Is it true that you pointed a pistol at the complainant and that you actually wanted to kill her if she did not give you money?”

“Why do you think the complainant identified you positively during the identification parade?”

“I am told you belong to a gang called ‘Shoot and Go’, is that so?”

“Is it true that you have served jail term before for a similar offense?”

In defense of your client, discuss the grounds if any on which you would object to each of the five questions posed by the prosecutor. (10 Marks)

## QUESTION THREE

John Doe, an Advocate of the High Court of Kenya, is representing the Plaintiff, Camphor Limited in a high-profile case involving a land dispute against Mimosa Limited. After the delivery of a ruling by the court in favor of Mimosa Limited, Mr. Doe takes to social media to express his dissatisfaction with the ruling. He makes derogatory remarks about the presiding judge alleging incompetence and bias. These remarks quickly gain

public attention and are widely circulated in legal circles. This caused an uproar leading to petitions seeking the removal of the judge adversely mentioned. The suit comes up for further hearing before the same judge. Mr. Doe is in attendance on behalf of his client.

- a) You are an Advocate of the High Court of Kenya representing Mimosa Limited. Advise your client on the strategy going forward in view of the foregoing. (5 marks)
- b) Assuming that you have been appointed to take over from Mr. Doe as Camphor Limited's Advocate, what is your strategy going forward noting that the court has raised the issue of the derogatory remarks made by Mr. Doe? (5 marks)

#### QUESTION FOUR

ShambaCare Company manufactured and sold a liquid weed killer, Glyphosate. Patel brought a personal injury suit against ShambaCare when her children developed breathing problems after ShambaCare's weed killer was applied on her kitchen garden. ShambaCare entered into an agreement with Daniel from KANL Advocates, to defend ShambaCare in the action. Daniel is a member and financial supporter of Environmental Justice Movement (EJM), a consumer group that is currently lobbying for environmental regulations that would remove chemicals such as ShambaCare's weed killer, Glyphosate from the market as unsafe.

Daniel provided pro bono free legal advice to EJM in the past regarding an unrelated corporate matter, but did not enter into a formal Advocate-client relationship with EJM. Since Daniel is convinced that his association with EJM will not affect his representation of ShambaCare, he did not tell ShambaCare about his relationship with EJM. ShambaCare is impressed with Daniel's reputation as a litigator, and Daniel did not want to jeopardize losing ShambaCare as a client by discussing his private concerns about their chemicals. In response to an anonymous questionnaire sent to all EJM members, Daniel mentioned the publicly available information regarding Patel's complaint filed against ShambaCare, but did not provide any other details. One week after Daniel returned the questionnaire to EJM, Daniel received a call from the Chief Executive Officer of ShambaCare, who said a representative of EJM had called to ask about Patel's lawsuit. Daniel told the CEO that he did not know where EJM would have received that information from and recommended that ShambaCare not disclose any details about the lawsuit.

- a) Daniel has just entered appearance on behalf of ShambaCare. Discuss ethical violations, if any, that Daniel has committed. (5 marks)

- b) ShambaCare has just discovered that Daniel is a member of EJM and has expressed serious concerns on his representation and want him out. They have sought your advice. Proceed while noting to clarify the main grounds and prayers to be sought. (5 marks)

### QUESTION FIVE

Andrew stopped in Naivasha to have lunch. Shortly thereafter, he fell ill. Although he thought he might have indigestion, he was short of breath and was experiencing chest pains, well-known symptoms of a heart attack. He drove himself to the Salgaa Metro Hospital. At the emergency room, Andrew described his symptoms to Nelly, an experienced screening nurse. Dr. Hope was the physician on duty. She had already worked a twelve-hour shift and was eager to go home. Without examining Andrew, Dr. Hope concluded that he had indigestion, relying on Nelly's statement of his symptoms. She sent him home, recommending that he takes some bicarbonate of soda. As soon as he joined the highway, on his way to Kisumu, just after Salgaa, Andrew collapsed behind the wheel of his car. He veered into oncoming traffic, struck a truck, and died instantly. Miraculously, his 12-year-old nephew who was accompanying him survived unscathed.

You are well reputed litigation lawyer, Jane, the mother to the deceased has approached you with instructions to institute a suit.

- a) Analyze the critical steps that you will take before trial. (5 marks)
- b) Prepare your case theory. (5 marks)

### QUESTION SIX

The Employees of Fanaka Industries Ltd through their union, have issued a Strike Notice to their employer. In their notice they claim that if their salary increments promised in the previous year are not implemented within fourteen (14) days of the date of the notice, they will down their tools.

The management of Fanaka Industries Ltd worried of the possibility of the strike, attempted a reconciliation of their dispute before a conciliator appointed by the Ministry of Labour and Social Services.

The conciliation efforts did not bear fruit as the workers were unyielding about giving the company more time to source for funds to effect the increment.

Fanaka Industries Limited has instructed your firm to seek conservatory orders to halt the impending strike.

You argue your application for conservatory order before Justice Hakika. Mr. Matata is appearing for the workers Union.

You: My Lord, Good morning, if it may please the court...

Mr. Matata: Have your seat you imperialist. This court is not going to be addressed by the representatives of slave masters.

You: Pardon me my Lord, counsel is rudely interrupting!

Justice Hakika: Take your seat Counsel Matata.

Mr. Matata: My Brother Justice Hakika before I resume my seat remember during our school days you hated slave masters. We cannot entertain them here.

Justice Hakika: Mr. Matata you stand warned.

- a) In light of the above proceedings, explain five (5) etiquette lapses witnessed in court that day. **(5 Marks)**
- b) What techniques would you deploy during hearing of this case? **(5 Marks)**