

COUNCIL OF LEGAL EDUCATION



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

ATP 105: PROFESSIONAL ETHICS & PRACTICE

FRIDAY 17TH 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

You are a newly admitted advocate of the High Court of Kenya and you are making your maiden court appearance. Before your matter proceeds, you are listening to the following account. Senior Counsel Mr. Mukiji of Mukiji Advocates law firm filed a change of notice of advocates replacing the firm of Noxy Advocates. The client in question is KJM Hoteliers. Senior Counsel Mukiji did not inform Noxy Advocates of this change. This change was endorsed by the Deputy Registrar of the Court. Senior Counsel Mukiji and Senior Counsel Ms. Noxy are both before the Judge. They both argue that they represent KJM Hoteliers.

The issue before the Judge is, who is on record for KJM hoteliers. The Judge is not amused that he has to deal with such mundane issues. He goes on a shouting tirade of abuse to both Senior Counsels. The atmosphere in the Court changes due to the negative energy emitted by the Judge. Eventually, the Judge composes himself and informs the parties that he will issue a short ruling after a ten-minute recess. Before the court rises, Senior Counsel Noxy addresses the court. She informs the Court that she has logged into the Law Society of Kenya website and found out that Senior Counsel Mukiji was recently suspended from practice so he ought not to be addressing the Court. She contemptuously berates Mr. Mukiji, calls him unspeakable names and thoroughly demeans him. Her diatribe rivals that of the Judge. Everyone is stunned because Senior Counsel Mukiji is her senior and mentor in the profession. Senior Counsel Mukiji on his part sheepishly admits, that it is true that he was recently suspended from practice but has not told his client KJM because he did not want to lose face as the client is one of the biggest hotel businesses in the country.

The Court adjourned and when it resumed, the Judge made a ruling premised on repealed legislation to the utter shock of Senior Counsels Mukiji and Noxy. You are visibly shaken by these ongoings. Especially since you have always held members of the bar and the bench in such high regard. The profession you are entering into now scares you a little. Nevertheless, you must argue your matter before the Court. Compose yourself and explain the following:

- (a) Duties owed to Senior Counsel Mukiji by Senior Counsel Noxy. (4 marks)
- (b) The conduct of the Judge making reference to the Bangalore Principles of Judicial Conduct and the Judicial Service Code of Conduct and Ethics. (4 marks)
- (c) The duties owed to the Court by the Senior Counsels in the circumstances of this case. (4 marks)
- (d) Senior Counsel Mukiji is aggrieved by his suspended practicing certificate as it is affecting his livelihood. Advise him on the action he can take to address his situation. (2 marks)

- (e) Based on what you have witnessed in Court today, explain how you will enhance the legal profession's ethical values? (6 marks)

QUESTION TWO

Janet had recently been admitted to the Bar as an Advocate of the High Court of Kenya. While in Court, another Advocate, one Karumba Kofu, requested Janet to hold brief for him in his matter due to an emergency. Kofu's matter involved a mention to confirm parties' compliance with pre-trial requirements, and the issuance of the hearing date. Janet undertook the task, but was concerned whether an advocate-client relationship could have been established between her and Kofu's client due to her accepting and conducting the brief.

- (a) Evaluate whether an advocate-client relationship was established between Janet and Kofu's client in this instance. (2 marks)
- (b) Explain the various ways in which an advocate-client relationship may be established between Janet and potential clients. (5 marks)
- (c) The Kenyan legal system is generally adversarial rather than inquisitorial. Explain why the adversarial nature of the legal system presents greater likelihood for professional misconduct by advocates such as Janet. (3 marks)

QUESTION THREE

Soph is a thriving Senior Public Prosecutor in the Office of the Director of Public Prosecutions. She is renowned for her tenacity in the court room. She leaves no stone unturned while prosecuting a case. She is also head of her department which she runs military style. She is revered and respected in equal measure. All the junior State Prosecutors want to work with her. She is also known to be quite a mentor and anyone she trains soars in the prosecution world. She normally does not participate in the recruitment of members in her department but a wicked turn of events sees her chairing the recruiting panel. She is shocked when her half-sister, whom she loves dearly walks in as the next interviewee. She asks for a break and steps out to contemplate this conundrum. While on this break, she receives an alert from her bank that a sum of Ksh. 50 million has been deposited in her personal account. She also receives an email explaining that the money is from a State Corporation which her department and the ODPP as a whole regularly collaborates with. The money is to thank her for all the fantastic work that she does. She starts planning in her head how she will use that money to improve her department's infrastructure. Before she walks back in to interview her half-sister, she overhears two newly recruited Junior Public Prosecutors having a robust discussion on how thrilled they are to have joined the ODPP. Their next

mission is to fill out the forms to take their first ever practicing certificate. Their excitement is palpable.

- (a) Making reference to applicable statutes, explain how Soph should deal with the ethical issues facing her. (4 marks)
- (b) Discuss the ethical issues, making reference to applicable statutes, arising from Ksh 50 million deposit. (4 marks)
- (c) Advise the newly recruited junior State prosecutors on their mission. (2 marks)

QUESTION FOUR

- (a) Prime Confectioneries Limited is the manufacturer of a new type of chocolates under the brand name “Delizy”. and the Company was a client of Bantu & Associates Advocates some five years ago. In one of the suits Prime Confectioneries Limited had been sued for trade mark infringement in respect to biscuit products. The Marketing Manager of Prime Confectioneries Limited had acknowledged to Oscar Keli, (a then Partner in the Firm of Bantu & Associates Advocates) who was handling their case that they usually adopted a product name significantly similar to a popular brand in order to achieve market entry success. Oscar Keli resigned from the Partnership of Bantu & Associates Advocates a year ago, when the matter had already been concluded.

Uniqy Confection Limited is the manufacturer of the highly popular “Delisio” brand of chocolates. It is concerned that the brand names “Delizy” and “Delisio” are significantly phonetically similar as to confuse consumers that the two distinctive brands of chocolates are the same, or that they are from the same manufacturer. Further, it is of the view that Prime Confectioneries is deliberately infringing its popular “Delisio” trade mark in order to achieve market benefits. Consequently, Uniqy Confection has approached Mwene Mwesi, a Partner in the Firm of Bantu & Associates Advocates, to institute a trade mark infringement suit against Prime Confectioneries in court.

Discuss Five (5) professional ethics issues that Mwene Mwesi has to consider and act upon before accepting to institute legal proceedings against Prime Confectioneries Limited. (5 marks)

- (b) Concerned about the continuing erosion of professional ethics by advocates in Kenya, you have decided to write a commentary on the issue, to be published in the *Business Daily* newspaper. In the commentary, you propound the view that

professional ethics are an indispensable necessity in the practice of law. Highlight the justifications that you will enumerate in support of the proposition. (5 marks)

QUESTION FIVE

In preparation for the 2024 Law Society of Kenya Annual Conference, you have been selected by the Committee on Continuing Professional Development to prepare a concept paper to be presented to the Young Lawyers Induction Session. The paper is required to highlight legal entrepreneurship and self- advertising.

- (a) From your lessons on Professional Ethics and Practice classes, explain three (3) requirements to be met before setting up own law practice in Kenya. (3 marks)
- (b) Explain three (3) items expressly or impliedly prohibited by the Advocates (Marketing and Advertising) Rules, 2014. (3 marks)
- (c) Your best friend who is new to the bar wants to venture into an online business totally divorced from his legal occupation. Explain to him four (4) ethical considerations that must be satisfied for him to keep out of trouble with the Law Society of Kenya. (4 marks)

QUESTION SIX

Konde, is an Associate in the Firm of Komu & Associates Advocates, and as a “side hustle”, also operates a bar that includes a discotheque at Kilimani, in addition to being the proprietor of a big electronics shop in Ngong Town. The bar and restaurant were recently the focus of discussion in the mainstream and social media due to extensive noise pollution at the wee hours of the night. He is not involved in the operation of the bar and electronics shop, as he has employed sufficient staff in both establishments. Konde acted for the purchaser in a conveyancing transaction involving the purchase of half an acre of land located off Kiambu Road for Kshs 50,000,000.00. The purchaser had only Kshs 40,000,000.00. He applied for a loan at the United Credit Bank to cover the deficit but there was delay in processing and dispensing the money. Konde was concerned that delay in making payments by the purchaser would result in the property being sold to a third party, with the consequence that he would lose a hefty bonus he was entitled to upon the settlement of the legal fees by the purchaser. Consequently, Konde convinced the purchaser to pay to the vendor the Kshs 40,000,000.00 for the purchase of the property before advancement of the deficit by the Bank. He then wrote to the vendor’s advocate stating that their Firm would facilitate the payment of the balance of Kshs 10,000,000.00 and as such, the vendor should execute the transfer documents.

The vendor proceeded to execute the transfer documents, which Konde promptly lodged at the Land Registry for the registration of the transfer. Two weeks later, the Bank informed the purchaser that a further evaluation of his financial status indicated that the maximum that could be advanced to him was Kshs 5,000,000.00. The money was deposited in the purchaser's account, who in turn transferred the cash to the vendor's account. The purchaser was unable to clear the Kshs 5,000,000.00 balance.

Consequently, the Vendor's advocate issued a formal demand to the Firm of Komu & Associates Advocates to immediately make the payment. Konde wrote a response on behalf of the Firm of Komu & Associates Advocates citing the principles of frustration and impossibility of performance in respect to the purchaser's inability to complete payment of the purchase price, and stated that the transfer of the property would be stopped. Based on the above stated facts:

- (a) Evaluate whether the above actions by Konde constitute a professional undertaking and provide justification for your answer. (3 marks)
- (b) Discuss the strategies that Konde can utilize in order to avoid liability in the context of professional undertaking in both conveyancing and litigation matters. (4 marks)
- (c) Explain three (3) ways in which the Advocates Disciplinary Tribunal may punish an errand advocate. (3 marks)