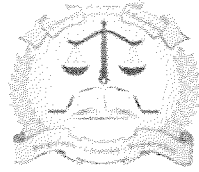


COUNCIL OF LEGAL EDUCATION



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

ATP 108: COMMERCIAL TRANSACTIONS

FRIDAY 24TH 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

A. Alfa Kenya Co. Ltd. (Alfa), is a large private non-listed company, incorporated in Kenya, with two main business operations i.e. mining and shipping, and manufacturing of mining and shipping machinery and equipment. Alfa is in the process of considering whether or not to undertake a restructuring programme. Alfa's annual turnover is USD \$12 million. Five Alfa members of the Board of Directors (who own 60% of the equity share capital in total) hold the view that the restructuring programme would not only simplify the company's structure, but also, and most importantly, become a tool for raising extra funds for expansion of mining and shipping business. According to these members, few years after the implementation of the proposed restructuring programme, a reverse takeover should be undertaken to obtain a listing on the Nairobi stock exchange in order to raise new finance.

However, the other four members of Alfa's Board of Directors (who own 40% of the equity share capital in total), have raised doubts about the restructuring programme and the reverse takeover, and are of the opinion that the company should either join hands or purchase one of the two foreign corporate entities - Indaba Mining Ltd., a Ugandan company that is the market leader in manufacturing equipment for mining sector in Uganda or Ethiopian Shipping Services Ltd, that holds 40% of the local market share in Ethiopian shipping industry. Both foreign entities seem very attractive for acquisition. This is because Indaba's Mining Ltd. annual turnover in the Common Market amounts to USD \$10.2 million and the company has its subsidiaries in Rwanda and Egypt with export revenues of USD \$ 5 million from both countries. The Ethiopian company's annual turnover in the Common Market amounts to USD \$10.5 million and the company also has two subsidiaries - one in Mauritius and the other in Seychelles, which accrue sales revenue in excess of USD \$ 5 million. Such expansion, according to four members of Alfa Board of Directors, will have a huge positive regional impact.

- i. Should Alfa Kenya Co. Ltd., decide to proceed to negotiate a merger with one of the foreign entities, typically, what documents will the company be expected to execute during the initial preparatory stage of a merger and acquisition (M&A) transaction noting to explain their general content. (5 marks)
- ii. Advise Alfa Kenya Co Ltd. on the jurisdictional thresholds for notification of M&A transactions, explaining whether there are any exceptional circumstances in which Alfa Kenya Co Ltd. may be exempted from notification requirements. (6 marks)

- iii. What conditions would have to be present, should the Board of Directors of Alfa Kenya Co. Ltd. decide to form a Joint Venture. (4 marks)

B. You represent Nawiri PLC, a client of many years. Muhatia, the chief executive officer of Nawiri recently came to your office and indicated that Nawiri has been in talks with Tarajia PLC concerning a possible acquisition of Tarajia by Nawiri. Muhatia further indicated that Nawiri and Tarajia are in agreement that the proposed transaction makes commercial sense and should be progressed to its conclusion. Tarajia has shared a Letter of Intent with Nawiri and Muhatia indicating that the content in the Letter of Intent accurately reflects preliminary discussions between the two firms. Nawiri's Board is very keen on signing the Letter as a good faith gesture to facilitate further negotiation and due diligence.

Muhatia has sought your legal advice on the wisdom or otherwise of agreeing on a Letter of Intent, having heard from various sources that Letters of Intent have both risks and benefits.

Advise Muhatia on the risks and benefits of the parties agreeing on a Letter of Intent and whether Nawiri should proceed to sign the draft. (5 marks)

QUESTION TWO

Timely Limited is a limited company that is incorporated and has its registered office in South Africa. The company is desirous of setting up a branch in Kenya to carry out their watch making business. Due to your expertise on matters company law, the directors have approached you in your offices to discuss how they may go about setting up their watch making business in Kenya. Advise them on the following aspects:

- a) Requirements for registering a foreign company branch in Kenya. (4 marks)
- b) In their discussions with you, the directors would like to know in detail the different shares that are available for issue in a company. (4 marks)
- c) The directors would like to further understand the need and process of disclosure of Beneficial Ownership of Companies in Kenya. (2 marks)

QUESTION THREE

Ponda Mali is an astute businessman who could identify opportunities in areas which no one had thought of. At one point, he identified an important plant in Sehe Forest and sold it to a local pharmaceutical company which in turn paid him millions of shillings for this discovery. In a recent business encounter, he came across some rare earths in

one remote village. Upon further analysis, he realized that the rare earths could be used to make explosives if mixed with certain chemicals. Excited about the prospects of making billions of shillings, Ponda Mali literally invested all he had in buying machineries and equipment in preparation. Unfortunately, as fate would have it, his license to commercialize the rare earths was denied on national security grounds and as a matter of fact, the government nationalized the grounds in which the rare earths could be found and gave their military control over it. Ponda Mali received no compensation and this affected his financial situation since some of the machineries and equipment had been purchased via loans. He has to date financial obligations to his creditors and the shareholders of his company who are worried that their investments would soon be lost.

- (a) Ponda Mali is aware that he is staring at bankruptcy. He approaches you, as his legal advisor, to explore whether there are alternatives to bankruptcy. Advise him. (3marks)
- (b) Ponda Mali is still concerned that one of the creditors who has been sending him angry letters may apply for a bankruptcy order. He has asked you to write a legal opinion discussing the requirements or conditions to be satisfied regarding when a creditor may apply for a bankruptcy order in respect of debtor. (3 marks)
- (c) Ponda Mali fortunately enjoys a very cordial relationship with his bank despite his recent misfortunes. Using this special relationship with the bank, he has managed to identify some farmers who were willing to supply him with beans for exportation. His suppliers have asked for a letter of guarantee, and, as the legal officer, you have been requested to draft one and hand it over for signing by the bank manager.
Prepare a draft letter of guarantee mentioned above. (4marks)

QUESTION FOUR

Your friend, Mamboleo works as a Kiswahili Language Tutor for a local institution, a job he has done for the last eight years. During that time, demand for tutors in the language has steadily increased, especially as the country has become a business hub in the region, attracting investors and students from abroad. He is keen on leaving his current employment to start his own business but is short on capital. He has some livestock in his rural home, a motorbike that he uses for transport and sundry household items. He is not sure whether he can raise capital using these assets as security.

Mamboleo has approached you for advice on the specific nature of the security agreement he needs to enter into with a would be lender, the requirements for the agreement to be valid and the steps regarding registration of the agreement. Advise Mamboleo. (10 Marks)

QUESTION FIVE

Loriane has been running her own ice cream business independently, for the last couple of years. The business initially started slowly but has grown during the last 12 months. To help out with the administrative side of the business, her brother-in-law, Ian became involved 8 months ago. Initially, Loriane was paying him a nominal wage but more recently, 4 months ago to be precise, she began to add to the wage, 5% of the businesses' monthly profit. Ian who has recently taken early retirement has been looking for a project to get involved in, given his previous commercial experience.

Loriane is currently rethinking her business relationship with Ian, because she has established that he is using the business premises and office equipment for other consultancy work that he does. To add to that, she discovered that the other consultancy services have been rendered to 2 neighborhood businesses, one of which is an ice cream parlor located within a local supermarket. Ian has been able to attract the consultancies due to the success of Loriane's business.

Citing relevant legal authorities, advise Loriane on whether she could bring any claim against Ian. (10 marks)

QUESTION SIX

Milky Way Ltd. is a Kenyan company that manufactures and distributes for sale and sells dairy products such as yoghurt, whipped cream and creamy cheese. In March 2022, Milky Way Ltd. received two tax assessments from the Kenya Revenue Authority (KRA), both for the period 2010-2018. One assessment was in respect of corporate income tax liability for Kshs.10 million and the other one, in respect to Value Added Tax (VAT), which was for Kshs. 5 million. Both assessments were issued on the basis of under-declaration (income and VAT receipts) by the taxpayer.

Milky Way Ltd. contends that they had correctly self-assessed their tax liability and duly paid the required taxes, while KRA argues that the company attempted to evade the tax liability, and demands immediate payments.

Milky Way Ltd. have come to you for a legal opinion on the following questions:

(a) Whether KRA can issue Milky Way Ltd. with an assessment for 2010-2018?
(6 marks)

(b) As a taxpayer dissatisfied with the KRA's assessment, what are the major steps that Milky Way Ltd should take before going to the Tax Appeals Tribunal?
(4 marks)