

**COUNCIL OF LEGAL EDUCATION.**



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

**ATP 100: CIVIL LITIGATION**

**THURSDAY 18<sup>TH</sup> NOVEMBER 2021.**

**DURATION: 3 HOURS.**

**Instructions to Candidates:**

- (a) This paper contains **Five (5) printed pages** including the cover page, with a total of **Six questions**.
- (b) Candidates **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 or about the 25<sup>th</sup> day of January 1997, Richard Joseph of PO Box 11110-00100 Nairobi was employed by Ushirika University PO Box 12011-00100 Nairobi as an Administrative Assistant. While in employment, he enrolled for the University's Master of Business Administration (MBA) degree. He pursued the said programme between 2005 and 2007. He was conferred with the degree of Master for Business Administration (Human Resource Management) on 10<sup>th</sup> August 2008, having complied with all the academic requirements to the satisfaction of the University. Upon graduation he was promoted to the position of Assistant Registrar.

On 1<sup>st</sup> July 2019, he received a letter from the Corruption Prevention Committee of the University alleging that he had graduated without satisfying the University's Board of Examiners in one course, inviting him to attend an interview on 2<sup>nd</sup> July 2019. He requested the University to supply him with information, materials and evidence relating to the allegations, but none was supplied. He nevertheless, appeared before two members of the committee and was questioned on the basis of an anonymous complaint letter which he had not been given.

In the meantime, the University was in the process of interviewing its members of staff with a view to promoting them. Richard had received a letter inviting him to attend and interview for review and promotion to the position of Senior Assistant Registrar on 4<sup>th</sup> October 2019. Richard wrote to the University and requested to be given information relating to his academic records but the University did not respond.

Sometime in January 2020, Richard learnt that he had been excluded from the interview for review and promotion. On 27<sup>th</sup> July 2020, he learnt that the University Senate had acted on a report by the Corruption Prevention Committee and appointed a Senate Committee to *inter alia* find out how he progressed in his MBA degree. On 27<sup>th</sup> September 2020, he learnt that the University Senate had received a report of its Committee that recommended *inter alia* that his Master's Degree be withdrawn. He was not invited to attend any of the sittings of the Senate Committee.

Richard contends that the University has violated his rights protected under Articles 10,27,28,29,35,41,53 and 50 (1) of the Constitution of Kenya and intends to seek legal redress.

You are an intern at the firm of Mwalimu Mkuu and Company Advocates, Shule House, 3<sup>rd</sup> Floor, PO Box 30129-00100 Nairobi, Tel: 02011120111 Email: [mwalimu@gmail.com](mailto:mwalimu@gmail.com)

You have been requested by the Managing Partner of the firm to study the facts, take instructions from Richard and draft pleadings to be filed in Court.

- a) Discuss the issues you will consider before drafting any pleadings (5 marks)
- b) Draft appropriate pleadings for filing in Court (15 marks)

## QUESTION TWO

1. An application by Notice of Motion dated 15<sup>th</sup> February 2021 has been filed by the Plaintiff Bomoma Investment Ltd in the Commercial and Tax Division; High Court Nairobi.
2. The orders sought are:-
  - a) To compel the Defendant Kilimo Bank Ltd to submit to the Plaintiff inspection and records in relation to Bank Account 1234567 within seven (7) days.
  - b) That all monies held in the Bank Account 1234567 be frozen pending the hearing and determination of the application.
  - c) That the cost of the application be borne by the Defendant.
3. The grounds upon which the application is based are:-
  - a) The Plaintiff's tenants have been making payments to the aforementioned bank account, an account the Plaintiff is unaware of.
  - b) The Plaintiff suspects fraud by its former employees.
  - c) The exhibits show that its former employees registered a company named Bonom Investment Ltd and the cheques issued by the Plaintiff's tenants were diverted and paid into their newly formed company's account
  - d) The plaintiff requested information on the suspect account and the request was declined on the grounds that the information sought is confidential.
4. The Respondent opposed the application in the Replying Affidavit sworn on 25<sup>th</sup> February 2021.
5. The Respondent contends that they are bound to uphold the principle of customer confidentiality and therefore could not disclose customer information to a third party.

Draft a ruling on the legal issues raised as well as the merits and demerits of the case. (10 marks)

## QUESTION THREE

There are several cases that have been scheduled for a Case Management Conference. Ten of the cases are injury claims where the Plaintiffs were passengers in a public service motor vehicle that belongs to Joe, the Defendant. The motor vehicle was involved in an accident which led to injury claims being filed in Court. One Advocate represents the Plaintiffs in the matter and informs the Court of the following concerns:

- i. The Doctor is the expert witness in all the matters but witness statements have not been filed.
- ii. The Defendant admits that an accident occurred but disputes that he should be held solely responsible for the accident.
- iii. The Defendant further disputes the nature of injuries suffered by the Plaintiffs.
- iv. There is a pending application in one of the files seeking to stop the Defendant from disposing off his property.
- v. The Defendant does not oppose the application in (iv) above.

Write a concise opinion on the directions the Court is likely to give in the above matter. (10 marks)

#### QUESTION FOUR

Pam has a judgement in her favour. The decretal sum is Kshs. 1 million owed by Ben, the judgement debtor. Ben has not paid Pam. Ben owns a parcel of Land LR 47/2055 worth Kshs. 2 million the particulars of which are well known to Pam. Pam is convinced that Ben's property should be used to settle the decretal amount. Pam has come to your law firm for assistance.

Advise Pam on the steps to be taken in order to get her debt paid by Ben.

(10 marks)

#### QUESTION FIVE

A pupil in your law firm presents you with a Notice of Motion Application with the following caption:

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. \_\_\_\_\_ OF 2021

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF MANDUMUS DIRECTED TO THE PERMANENT SECRETARY, OFFICE OF THE PRESIDENT REQUIRING HIM TO PERFORM HIS PUBLIC DUTY AND PAY TO THE APPLICANT DECRETAL DUES ARISING FROM CMCC NO. 795 OF 2012 BETWEEN CHRIS BOR PLAINTIFF VS. ATTORNEY GENERAL

CHRIS BOR ..... PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL ..... DEFENDANT

There is a clause in the said application that reads;

*"The plaintiff seeks from the defendant the following orders:*

- 1. This Honorable Court do issue an order of mandamus by way of judicial review directed to the Permanent Secretary, Office of the President on behalf on the Commissioner of Police to the pay ex parte applicant, the decretal sum in CMCC No. 795 of 2012"*

Further, the pupil perused the Court file and found that there was no prior application before the Notice of Motion application.

Using applicable law and citing relevant case law, identify the anomalies in the extracts of the pleadings above.

(10 marks)



#### QUESTION SIX

Jay has sued Peter for injuries he sustained in an accident. He discovered that the vehicle that ran him over did not belong to Peter but to Kiru Police Station. The police vehicle was driven by Constable James.

Jay was advised by his wife that it is not possible to sue the police because they are powerful. Jay knows that he will not succeed if he continues to sue Peter and does not know what to do. As an associate in a law firm, Jay approaches you for advice.

Using applicable law, advise Jay on the procedure to be followed in order to enjoin the right party in the Suit. (10 marks)

**BEST PERFORMED**

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**COUNCIL OF LEGAL EDUCATION**  
**EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES**

UNIT CODE: 

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 SUBJECT/UNIT ..... CIVIL LITIGATION .....

REGISTRATION NUMBER:

DATE: 18<sup>TH</sup> NOVEMBER 2021 .....

**INSTRUCTIONS TO CANDIDATES**

1. Enter the Unit code, Subject of the Examination, Admission Number and Date in the spaces provided. The admission number should be as it appears on the Examination Card.
2. Do not write your name anywhere in this booklet.
3. Attempt each question on a fresh page of the booklet.
4. If an additional booklet is used, it MUST be fastened at the END of this booklet.
5. Insert in the column headed 'Question Number' the numbers of questions answered in the order in which you have attempted them.
6. Kindly ensure your handwriting is LEGIBLE.

Question Number	Examiner		Moderator		Quality Assurer	
	Mark	Initials	Mark	Initials	Mark	Initials
2	10	✓ JICA				
3	5	✓ JICA				
4	9	✓ JICA				
5	06	✓ LM				
1	15	✓ JICA				
	7	1				
<b>TOTAL MARKS</b>	45 CM					



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Questions ..... Two .....Do not write  
either margin

Draft a ruling on the legal issues raised as well as merits and demerits of the case.

THE REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI  
COMMERCIAL AND TAX DIVISION  
MISC CIVIL APPLICATION NO 21 OF 2021

BOMOMA INVESTMENT LTD

~~RESPONDENT~~ APPLICANT

- VERSUS -

KILIMO BANK LTD

~~APPLICANT~~ RESPONDENT

## RULING

1. The <sup>Applicant</sup> ~~Respondent~~ herein namely Bomoma Investment Ltd, filed a Notice of Motion application on 15<sup>th</sup> February 2021, against the <sup>Respondent</sup> ~~Applicant~~, Kilimo Bank Ltd.

2. The <sup>Applicant</sup> ~~Respondent~~ sought orders:

- i) Compelling the <sup>Respondent</sup> ~~Applicant~~ to submit to the <sup>Applicant</sup> ~~Respondent~~ inspection of records in relation to Bank account 1234567.
- ii) Prohibitory orders to freeze all monies held in the Bank account 1234567 until determination of this suit.
- iii) Costs be borne by the ~~Applicant~~ Respondent.

3. The Applicant avers that the Applicant's tenants have been making payment to the aforementioned bank account, an account which the Applicant is ~~unaware of~~ unaware of. Further, the ~~Respondent~~ Applicant suspects fraud by the Applicant's former employees.

The Applicant has previously requested information on the suspect account which request was declined on the grounds that the information sought was confidential.

The Respondent, on <sup>its</sup> ~~his~~ part, opposed the application in a Replying Affidavit dated 25<sup>th</sup> February 2021. The Respondent contends that it is bound to uphold the principle of customer confidentiality and cannot disclose customer information to a third party.



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### ISSUES FOR DETERMINATION.

~~Is the ~~ag~~ suit instituted~~

1. Does the application have merit?

2. Can the Respondent be compelled to submit to the Applicant inspection and records relating to Bank account 123456?

### LAW APPLICABLE.

1. Banking Act.

2. Consumer Protection Act.

3. Constitution of Kenya - 2010

4. Any relevant statute.

### ANALYSIS.

The Respondent herein has a right to protect the privacy of its customers subject to the provisions of the Constitution of Kenya and the Consumer Protection Act. The Applicant has not given reasonable and adequate factual information to compel this Court to issue the orders sought.

The Applicant has not demonstrated at which point they discovered that the tenants have been making payment to Bank Account 123456 and further, ~~why they~~ which employees they suspect of committing the fraud.

### CONCLUSION

~~That Application herein lacks merits~~


Subject to the foregoing, I make the following orders in this application:

1. THAT the Application be dismissed ~~with~~.

2. THAT each party bears its own costs.

DELIVERED AND SIGNED THIS

day of February 2021

  
JUDGE.

10



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Questions ..... THREE .....Do not write  
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Write a concise opinion on the directions the court is likely to give in the above matter.

18<sup>th</sup> NOVEMBER 2021.LEGAL OPINIONFACTUAL ISSUESThe Plaintiffs18<sup>th</sup> November 2021LEGAL OPINIONFACTS

There are ten (10) cases scheduled for Case Management Conference against the Defendant, Joe, the registered owner of public service motor vehicle KBS 741 R. The said motor vehicle was involved in an accident where the Plaintiffs were some of the passengers. The accident led to injury claims being filed in court.

ISSUES FOR DETERMINATION

1. Is there any pending suit/application against any party for the same cause of action?
2. Option of conducting a trial suit
3. Can the cases be consolidated to save court's time?
4. Are the injury claims similar?
5. Did an accident occur?
6. Who is liable for the accident?
7. Are there any expert witnesses not party to the suit?

LAWS APPLICABLE

1. Civil Procedure Act.
2. Civil Procedure Rules
3. Constitution of Kenya.
4. Evidence Act.

ANALYSIS

The court has the discretion of adjourning the matter before it until



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determination of the pending application seeking to stop the Defendant from disposing of his property. Since the Defendant is not opposing the said application, the Court may require the Defendant to attach the property, subject to matter of the subsequent application, ~~now~~ before judgment on the claims against him.

~~There~~ Since there are 10 (ten) separate injury claims against the Defendant, the court, in exercising its jurisdiction, may decide to conduct a trial suit which will set precedence on the other cases. Consolidation of suits in this case ~~can~~ delay court process as each party has a different claim of injury suffered. A test suit would be best to guide the court and parties on how to proceed in general damages and costs as each party will have a separate claim for special damages. An example of this is a situation where one Plaintiff is seeking special damages for an amputated leg while another is seeking damages for head injuries.

It is already established that an accident occurred as the Defendant has admitted to the same. However, should the Defendant be held solely liable. If the public service vehicle was being driven at the ordinary course of business then the Defendant and his driver are liable for the accident. ~~Now~~ as per the principles of tort of vicarious liability.

An expert witness is required for this matter, the expert being a doctor. When claiming for special damages, a Defendant may fault the amount claimed for if there is no documents supporting the claim for costs. In such a situation where the Plaintiff has ~~no~~ certified and original receipts of payment for treatment, X-ray and CT scan pictures/documents, a doctor can be an adequate asset in pleading the case. However, such a doctor is required either to file witness statements or the court can make an order for commission.

CONCLUSION.

Subject to the aforementioned analysis, the Defendant by his own admission



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has a case to answer.

The court in exercising its inherent Jurisdiction is at ~~liberty~~ liberty to exercise this jurisdiction in a manner it deems fit for <sup>an</sup> ~~the~~ expeditious and fair trial.

MSAADA MKOBKIA.

ADVOCATE.

5



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Questions ..... FOUR .....

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Advise Pam on the steps to be taken in order to get her debt paid by Ben.

18<sup>TH</sup> NOVEMBER 2021.

PAM MWELU  
NAIROBI.

The first thing is to ensure whether a decree was ever extracted after judgment. A decree is an order drawn by an Advocate of the Decree Holder for orders of execution against the Judgment Debtor after a Judgment has been delivered. If no decree has been drawn, the first step will be for ~~you, Pam, to instruct your~~ your Advocate to draw a Decree in your favour and have it signed and sealed by the Deputy Registrar.

Once a decree is drawn, you, through your advocate, will have to file an application for execution. There are different modes of execution which can be included in this application. The first mode of execution is attachment and sale. This will stop and/or restrain the Judgment Debtor from selling property before your decretal sum is paid. Another mode of execution is appointing a receiver. The receiver will be responsible for all dealings until execution is complete. The Judgment Debtor may also be arrested, on your application, if it is seen that he is acting against the court's orders - in contempt of court. Another option of executing is attachment of debt. This is where you as the Decree Holder can claim against a 3<sup>rd</sup> party known as the Garnishee who owes the Judgment Debtor.

The most appropriate mode of execution is ~~all~~ applying for orders of attachment and sale, and arrest and detention. The purpose of arrest and detention is because, though Ben is aware that Judgment was entered against him, he has continued to default in making payment. This mode, in practice, is usually carried out as the last option once all most suited modes are exhausted.

Attachment and sale is where property is attached through an injunction under Order 40 of the Civil Procedure Rules. This application is made by way of notice of motion ~~and~~ under Order 51 and a Supporting Affidavit which prohibits both the Judgment Debtor, his agents



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or any third parties from disposing of the subject matter property.

Once the court has issued the orders restraining any of the ~~aporemintioned~~ aforementioned persons from disposing or claiming the property, the court will issue further orders on how the sale is to be conducted.

The Judgment Debtor can file a Notice to Show Cause Application if he has other means to repay the decretal sum. Further, a third party claiming that the Judgment Debtor is not the sole owner of the subject property can file objection proceedings against the Judgment Debtor and the Decree Holder before the parcel of land is sold.

Sale of this land will be advertised by public notice. This notice will be affixed at all conspicuous public places and advertised for public auction. The parcel will be surveyed and assessed to determine the reserve price. The reason for public notice is to ensure that any creditor or claimant having claim to the suit can come forward and also any interested parties willing to purchase the land. The public notice will set out when, where and how the sale is to take place. You as the Decree Holder cannot take place in the auction unless with leave of court.

On the set date for the auction, the officer in charge of the process will conduct the auction which will be concluded at the fall of the hammer. The proceeds will be deposited in court where you as the Decree Holder will be paid your decretal sum and any balance will be ~~for~~ given to the Judgment Debtor.

9



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Questions ..... FIVE .....

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Using applicable law and citing relevant case law, identify the anomalies in the extracts of the Pleadings

The pleadings provided ~~is~~ an application for Judicial Review. Judicial Review proceedings are provided for in the Fair Administrative <sup>Justice</sup> Act, Section 8 and 9 Law Reform Act, Constitution of Kenya 2010 and Order 53 of the Civil Procedure Rules and Civil Procedure Act.

The caption of the suit as provided is incorrect. It fails to disclose that it is a Judicial Review application. When filing a Judicial Review application in its substantive stage, the caption/headings should read:

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

JUDICIAL REVIEW DIVISION

J.R. NO 141 OF 2021

The Pupil further erred in totality by failing to first seek leave of court before applying for Judicial Review. Order 53 of the Civil Procedure Rules dictates that leave must first be sought before lodging a substantive application for Judicial Review. Leave is sought 'ex parte' by the aggrieved parties through Chamber Summons which are to be supported by a ~~Statement~~ Statutory Statement, and a Verifying Affidavit. Once leave is granted, then the Applicants can institute a Judicial Review application by way of Notice of Motion application and a Supporting Affidavit. If leave of court is not sought, a Judicial Review of orders cannot be issued or granted.

The Pupil failed to include the relevant laws supporting their application for Judicial Review. It has to be shown that a body acted in excess of the powers conferred against it in the Constitution of Kenya and all other relevant statutes and laws. For the application to be amended it should read as follows:

IN THE MATTER OF: AN APPLICATION FOR ~~AMENDED~~ JUDICIAL REVIEW



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ORDER OF MANDAMUS

- AND -

IN THE MATTER OF SECTION 8 AND 9 LAKE REFORM ACT

- AND -

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT

- AND -

IN THE MATTER OF THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

BETWEEN

CHRIS BOR

APPLICANT

- VERSUS -

THE HON ATTORNEY GENERAL

RESPONDENT

NOTICE OF MOTION

(Under Order 53 Civil Procedure Rules)

The Pupil erred in drafting of a clause which clause can be cured by stating that;

~~The Applicant~~

" REASONS WHEREFORE, the Applicant seeks the following ORDERS:

1. An Order of Mandamus compelling the Respondent to pay the decretal sum of 5,000,000. as stipulated in CMCC NO 795 of 2012 "

The Pupil failed to give the proper description of parties in the heading.

Chris Bor is the Applicant and the Attorney General is the Respondent in the Notice of Motion Application.

06/10

CM



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Questions ..... ONE. (a) .....

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Q) Discuss the issues you will consider before drafting <sup>any</sup> pleadings

The Pleadings are ways in which an aggrieved party can seek redress from the courts. ~~that~~ Before drafting any pleadings, an Advocate must consider a few factors and advise their client on the same. These factors include:

1. Was there a cause of action? Generally, while instituting a civil suit, there must be a relevant cause of action which when pleaded in court, the Plaintiff / Claimant can have redress.

The cause of action must be prescribed in the relevant law. One cannot plead what does not exist in law.

2. Where did the cause of action take place? Jurisdiction is an important factor to consider before instituting a suit. Jurisdiction can either be pecuniary jurisdiction or territorial jurisdiction. Pecuniary jurisdiction states the limit of a case for example, small claims are for suits involving Kshs 49,999 or less.

3. Who are the parties to the ~~suit~~? It must be identified who the Plaintiff / Claimant is and who the Defendant is.

4. What is the relief sought? Which remedies does the Plaintiff / Claimant seek from the court. It could be monetary damages or equitable relief. Monetary damages ~~is~~ for a certain amount. Equitable relief involves ~~specific~~ orders for specific performance, injunctions, restitution, quiet title etc.

5. Is there any pending case before another court? Doctrine of '~~sub judice~~' and 'Sub Judice' and 'Res Judicata' will also be determined. This is to ensure there is no pending suit in a different court on the same matter and such a suit was never decided before.

6. Has a demand letter been sent? A demand letter sent by a Plaintiff / Claimant to the Respondent / Defendant is necessary in proving correct procedure was followed before suit was instituted.



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Questions .....

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THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC CIVIL APPLICATION OF 2021

IN THE MATTER OF ~~WEAVE~~ AN APPLICATION FOR LEAVE TO FILE  
JUDICIAL REVIEW APPLICATION FOR ORDERS OF MANDAMUS,  
CERTIORARI AND PROHIBITION

- AND -

IN THE MATTER OF ARTICLES 10, 27, 28, 29, 35, 41, 53 AND  
50 (1) OF THE CONSTITUTION OF KENYA.

- AND -

IN THE MATTER OF SECTION 8 AND 9 LAW REFORMS ACT

- AND -

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT

- AND -

IN THE MATTER OF THE CIVIL PROCEDURE ACT

- BETWEEN -

REPUBLIC

APPLICANT

- VERSUS -

USHIRIKA UNIVERSITY

RESPONDENT

EX PARTE APPLICANT - RICHARD JOSEPH.

## CHAMBER SUMMONS

LET ALL PARTIES involved appear before the Honourable Judge in  
Chambers on day 4 October 2021 at 9 o'clock in the  
forenoon or soon thereafter for the hearing of this Application

REASONS WHEREFORE the Applicant bases his Application on the  
~~following grounds and seeks the following ORDERS:~~

~~1. THAT the Applicant was employed by the Respondent,~~  
grounds set in the annexed Statutory Statement and Verifying Affidavit



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Questions .....

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and seeks the following ORDERS:

1. A declaration that the Applicant holds a valid Master of Business Administration Degree.
2. An injunction restraining the Respondents from withdrawing the Applicant's Degree Certificate.
3. Costs of this application.

DATED in Nairobi this      day of October 2021.

ADVOCATE FOR APPLICANT.

DRAWN & FILED BY:  
TO BE SERVED UPON:

2. Statutory Statement

(Caption as per Chamber Summons)

RICHARD JOSEPH

APPLICANT

- VERSUS -

USHIRIKA UNIVERSITY

RESPONDENT

### STATUTORY STATEMENT

I, RICHARD JOSEPH, of PO BOX 11110-01000 Nairobi, the Appl Ex Parte Applicant herein do hereby state the following facts:

1. I am an adult male of sound mind, duly employed by the Respondent herein.
2. That on or about the 25<sup>th</sup> day of January, 1997, I was employed by Ushirika University, the Respondent herein.
3. That the Respondent's address is Ushirika University, P.O. Box 12011-00100 Nairobi.
- 3.4. That I was employed by the Respondent as an Administrative Assistant on or about the 25<sup>th</sup> day of January, 1997.
4. While in employment, I enrolled for the Respondent's Masters in Business Administration (MBA) degree.
5. I pursued the said programme between 2005 and 2007.



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Questions .....

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either margin

6. I was conferred with the degree of Master for Business Administration (Human Resource Management) on 10<sup>th</sup> August 2008 having complied with all academic requirements to the satisfaction of the Respondent.

7. Upon graduation, I was promoted to the position of Assistant Registrar.

~~8. I received a letter~~ Respondent's

8. On 1<sup>st</sup> July 2019, I received a letter from the Corruption Prevention Committee alleging that I had graduated without satisfying the Respondent's Board of Examiners in one course.

9. On 2<sup>nd</sup> July 2019, I was invited to attend an interview where I requested the Respondent to supply me with information materials and evidence relating to the said allegations.

10. That no such evidence was provided.

11. That I appeared before two members of the Committee and was questioned on the basis of an anonymous complaint letter.

12. That I was not given a copy of the purported complaint letter.

13. That I received a letter inviting me to attend an interview for review and promotion position to Senior Assistant Registrar.

DATED AT Nairobi this                      day of October 2021.

APPLICANT

DRAWN AND FILED BY

MWALIMU MKUU & CO ADVOCATES

GHULE HOUSE - 3<sup>RD</sup> FLOOR.

P.O. BOX 30129-00100

NAIROBI,



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Questions .....

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TO BE SERVED UPON

USHIRIKA UNIVERSITY

P.O. BOX 12011-00100

NAIROBI

3. Verifying Affidavit

(caption as per Chamber Summons)

VERIFYING AFFIDAVIT

I, Richard Joseph of P.O. Box 111100-00100 NAIROBI do hereby  
make oath and state as follows:

1. THAT I am the author of the statutory statement.
2. THAT I depone the statement to the best of my belief.
3. THAT what is stated herein

BEEOP

DATED AT NAIROBI

BY THE SAID RICHARD JOSEPH

THIS day of October 2021

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Questions .....

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- List of documents

- List of witnesses

- Witness statements

**WORST PERFORMED**



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**COUNCIL OF LEGAL EDUCATION**  
**EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES**

UNIT CODE:

A T P 100

SUBJECT/UNIT

CIVIL LITIGATION

REGISTRATION NUMBER:

DATE:

18/11/2021

**INSTRUCTIONS TO CANDIDATES**

1. Enter the Unit code, Subject of the Examination, Admission Number and Date in the spaces provided. The admission number should be as it appears on the Examination Card.
2. Do not write your name anywhere in this booklet.
3. Attempt each question on a fresh page of the booklet.
4. If an additional booklet is used, it MUST be fastened at the END of this booklet.
5. Insert in the column headed 'Question Number' the numbers of questions answered in the order in which you have attempted them.
6. Kindly ensure your handwriting is LEGIBLE.

Question Number	Examiner		Moderator		Quality Assurer	
	Mark	Initials	Mark	Initials	Mark	Initials
1	00	HK	0	ED		
6	01	CM	1	"		
4	02	WK	2	"		
3	03	WK	3	"		
2	01	WK	1	"		
	1	1				
<b>TOTAL MARKS</b>	07	CM	07	GD		



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Questions ..... 2 .....

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1) The issues to consider include how Richard Joseph was admitted to pursue the University's Master of Business Administration (MBA) degree. To confirm if Richard Joseph met the programme requirements the entry requirements for the Masters of Business Administration (MBA) is the basis of judgement. The admission letter from the University in accepting Richard Joseph having satisfied to have met the University requirements. In this case Richard Joseph should provide admission duly ~~issued~~ ~~and~~ signed and issued by the University of Ushirika. ~~Then~~ Richard Joseph should provide ~~ad~~ academic requirements to the satisfaction of the University as documentary evidence. See

Richard Joseph should further produce transcripts of the units for the entire course of Masters of Business Administration from the University to ~~check~~ ensure all the units of the programme were met. Beside provide the Certificate of the Masters of Business Administration (MBA). Richard Joseph was not supplied with any information of complaint



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Questions .....

Write on both sides of the paper

in which he was to rely on allegations against him. There were no materials for him to assist him in defending himself on the interview of 2nd July 2019 by Committee of the University Corruption Committee. His rights were violated by the University. This was unfair for Richard Joseph by the Committee having not given him the information and materials which were to assist him defend the allegations. See

The University had used the Master of Business Administration (MBA) degree to promote him to the position of Assistant Registrar which was an indication that the degree had been verified and the recruitment had done their due diligence before giving him the promotion.

The two members of Committee who interviewed Richard Joseph on basis of an anonymous complaint letter which he had not been given had not carried out the investigations of the complaints before questioning Joseph Richards. Richard Joseph did not have access to contents of the letter.



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Questions .....

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either margin

Which would enable prepare  
to answer the allegations.

The University was unfair  
to deny Richard having requested  
his academic records to which  
the University did not respond.  
His Constitutional rights were  
denied by the University.

Richard had received a letter  
for invitation to attend interview  
for the position of Senior Assistant  
Registrar on 4th October 2019, which  
he was excluded.

b) The pleadings of Richard  
Joseph. *Nature of pleadings  
unclear*

~~Re: Dr. Richard Joseph~~

Repl. Republic of Kenya

In the Commercial Court Milimani

Nairobi

Cause No. 10 of 2020

Richard Joseph - - plaintiff  
- vs -

Ushirika University - Respondent

by order Articles 10, 27, 28, 29, 35, 41, 53, 56

of Pleading the Constitution of Kenya

1. I Richard Joseph of Box  
10 Nairobi am an adult  
of sound mind residing  
at Embakasi East Nyayo



Estate.

2. I Work for Vshinka University  
as an Assistant Registrar  
Since 10th August 2008.

3. I bring this Matter to the  
Court and there no Similar  
Cases filed by Me in any  
Court.

4. On 1st July 2019 I received  
a letter from the Corruption  
prevention Committee of the  
University alleging fraudulent  
Acquisition of the Master  
of Business Administration  
degree.

5. The Corruption Prevention  
Committee invited me on  
to attend an interview  
on 2nd July 2019. I requested  
the University to supply me  
with information and  
materials on the allegations  
which they declined to  
give.

6. In January 2020 I learnt  
to have been excluded from  
the interview for review of process  
This after I learnt that on  
22nd July 2020, the University



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Questions .....

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Senate acted on the report of the Corruption Prevention Committee which was unfairly decided.

7. On the 27th September 2020 the University Senate withdrew his Masters Degree. His rights have been violated and request the Court to have his degree to be reinstated for that it was illegally withdrawn which will make him suffer.

9. I pray for the cost of the Case and re-instatement of his degree.

~~Drawn by:~~ Mwalimu M'Kun & Co. Advocates

Drawn by:  
Mwalimu M'Kun and Co. Advocates  
Shule House, 3rd Floor  
P.O. Box 30129-00100 Nairobi  
Tel: 0201112011  
Email: mwalimu@gmail.com

do

WIK



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either margin

Questions ..... 6

Write on both sides of the paper

Jay was over run by police vehicle which was driven by Constable James. The police vehicle was for Kivu police station.

Jay can apply for police abstract from police station in the area of accident. Where there will be details of the police vehicle registration number time of accident. Accompanied with the police abstract he can have his medical report detailing the injuries by the doctor. The report will mention sustained which will warrant him to file a case against Constable James as the driver driving dangerous hurting Jay.

The degree of injuries should be clear by the expert doctor.

Besides the driver Jay will join the Attorney General who represents the Government as a second respondent.

Peter who was initially taken mistaken to be the owner of the vehicle will be a witness.

This matter will be before the law of compensation under



Write on both sides of the paper

Questions .....

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either margin

Commercial Court. The applicable  
law of this is under Traffic  
Act offence.

01/10  
CM

①



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either margin

Questions

4

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Pam has a decretal amount of Kshs 1 million owed by Ben, judgment debtor. Ben owns parcel of land LR 47/2051 worth Kshs. 2 million.

Pam should first confirm the decree and since she has the details of the parcel of land she can apply for orders to have the land created so that Ben will not be able to transfer the parcel of land. Having placed the caveat Pam can now pursue the decretal having safeguarded the parcel of land.

Pam can now apply for attachment of parcel of land which will be auctioned so that Pam can receive the decretal amount Kshs 1 million.

The orders to be used is that of Mareva where the court restricts any interference within the jurisdiction.

The orders can be used once the decree has been confirmed and registered to effect action on attachment of the parcel of land.



Write on both sides of the paper

- i. The Court should ask for the Doctor's Statement witness should be filed before the Court. This form is key ~~and~~ in ascertaining the injuries inflicted on the accident victims. Compensation on injuries on passengers is based on the degree of injuries sustained.
- ii. The defendant Joe admits the accident having occurred because it was his vehicle which was involved. The driver of his vehicle should also be held responsible for causing the accident. The Court will have Joe the defendant to compensate for the injuries while the driver will be charged on causing the accident.
- iii) The defendant disputing the injuries caused to the plaintiff is because the Doctor's statements are there to give medical report to be relied upon. It's therefore important to have the doctor's statement for the Court to decide on the compensation awarded to the plaintiffs of



of the accident.  
✓ The Court can have the orders through application by the plaintiffs ~~not~~ seeking to stop the disposing of the property till the matter of compensation is determined. The Mareva order by the plaintiff is more applicable.

✓ The Court will go ahead to issue orders from disposing the property until judgment is delivered as a way of complying with the Court order to as to safeguard the interests of the plaintiffs who need to be compensated on the injuries sustained.

The Court will direct the Doctor's statements to be filed before the Court as evidence of the expert facts of the injuries inflicted on the plaintiffs.

The owner of the vehicle which caused accident should also be responsible for the accident as a respondent with the driver who caused the accident.

The Court will direct that we should not dispose the



Write on both sides of the paper

Questions .....

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either margin

property until the judgment is delivered.

Q2 WK

3



Draft of ruling of legal issues

The plaintiff's tenants were making

payments to Kilimo Bank Ltd

Order should be issued to Kilimo

Bank Ltd on application so

that statements and inspection

of records. The Court can

issue orders once applied for.

The plaintiffs have been making

payments to the a forementioned

bank account, where they suspect

of fraud by the employees

The exhibits show the former

employees to have registered

a company named Bonoro

Investment Ltd with similar

names of that Bonomo Invest

ments Ltd.

The money held in the Bank

to be frozen immediately and

not within the seven (7) days

for it will give time for

the withdrawal of funds.

The plaintiff should seek

orders by way of application

to get information on the

suspect account which will

be part of evidence to be

relied. This will bring out the

cheque issued by the plaintiffs

tenants diverted to another

account.

The defendants cannot oppose



Write on both sides of the paper

Questions .....

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either margin

the application in Registering Affidavit sworn on 15th February 2021 but can argue out on facts therein.

The Customer Confidentiality cannot be said to have been inflicted on act of fraud. This cannot be relied on by the Respondent because they are before the Court and all facts should be adduced to give justice. The plaintiff and Respondents should once before the Court they have to give facts and produce evidence in order the Court to do justice to all.

It is all clear that there was ill intention of the former employees in registering a company in the name of Bonoma Investment Ltd similar to Bonoma to confuse so as to defraud the plaintiffs. The documentary evidence should be produced in Court through applications for orders to be issued.

The pleading here is not a RSony/ any semblance of one.

(87)



**COUNCIL OF LEGAL EDUCATION.**



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

**ATP 101: CRIMINAL LITIGATION**

**FRIDAY 26<sup>TH</sup> NOVEMBER, 2021.**

**DURATION: 3 HOURS.**

**Instructions to Candidates:**

- (a) This paper contains **FOUR (4) printed pages** including the cover page, with a total of **Six (6) questions**.
- (b) Candidates **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

Police officers on mobile patrol along Sio-Port/Busia road arrested one John Mgeni. He was found walking at around 9 pm, and upon seeing the police vehicle, began running into the bushes. The officers threatened to shoot him and he stopped. He had with him a gunny bag which had a blood stained Panga and some other items. He remained mute on interrogation. He was taken to Busia police station. While there, the officers found a crowd who had come to witness the recovery of a body some short distance from where Mgeni was arrested. The officers visited the scene with John Mgeni. Police Constable Maisha noted that Mgeni was sweating and fidgety. As they neared the body, Mgeni began to cry uncontrollably. He mumbled words in a dialect PC Maisha attributed to Kiganda. Mgeni went on his knees and in broken English, he told PC Maisha and his colleagues to comb the scene for more shallow graves where he had buried more bodies. Mgeni guided them towards the river bed where they found three bodies in a shallow grave and a fourth one under a tree; all with extensive cut wounds. PC Maisha alerted the Homicide Section of the Directorate of Criminal Investigations (D.C.I), Busia and the crime scene personnel visited the scene. Mgeni was carted away for fear that he could be lynched by irate members of the public and relatives of the victims who flooded the scene.

- a) You are the officer in charge of prosecutions at Busia. The DCIO has asked for your assistance in investigations. Citing relevant laws, discuss in detail the basis for, the form and assistance you will offer. (10 Marks)
- b) In the course of investigations, the Director of Public Prosecution (D.P.P) receives information from his counterpart in Uganda that John Mgeni is wanted as a suspect in a series of murders in Tororo. Four bodies were recovered with similar injuries as those in the Busia case. They seek his extradition ostensibly because he is a Ugandan national and a deserter from their police force.

Explain the process of extradition and the merits in this case.

(10 Mark)

## QUESTION TWO

Mr. James Greenleaf and his son Jacob Greenleaf reported at Kilimani police station on Nairobi on 29<sup>th</sup> December 2015 at 7.00am that a Robbery with Violence incident had occurred along Kilimani Road involving Mr. Jacob who was then driving Motor Vehicle Registration No. KCX 3448Y Toyota AXIO blue in colour. The vehicle in question was registered in the name of Mr. James Greenleaf (his father). The robbery incident is said to have occurred on 25<sup>th</sup> December 2015 at 8.00pm.

The complainant who works with an audit firm in Thika reported that at the material time and date, he came from his work place in Thika while driving the said motor vehicle. Upon reaching Kilimani Road within Kilimani area, he was accosted by three people all male. One approached him at the Driver's window. He pointed a pistol at him. The other two approached the vehicle from the back side. The person holding the gun ordered the complainant to come out of the driver's seat and take the passenger seat. The complainant complied. All the robbers entered the vehicle and drove it for about one kilometre.

The complainant was ordered to surrender his wallet, phones and any other computer accessory. He handed over his wallet which had his identify document, his phone make Iphone2, his ASUS laptop which was registered in the name of the company in the name of EET-Auditors. His wallet did not have any money. They then ordered him out of the vehicle and drove off. The robbers were hooded and none of them spoke to each other. They were tall and well built. None of his items were recovered, the report was booked as OB.NO. 12/29/12/2015.

The Motor Vehicle Registration Number was circulated by the Police. On 30<sup>th</sup> December 2015, the said vehicle was spotted on Thika Road. It was intercepted by traffic police officers and handed over to the investigating officer. The driver Mr. Darius Nash alleged to be the owner of the vehicle having purchased it from one James Greenleaf on 20<sup>th</sup> January 2015. He said the motor vehicle had been in his possession for one year.



He produced a signed sale agreement, original log book, identification documents of the seller who he alleged were from Mr. James Greenleaf. These documents were subjected to investigation and were found to be a forgery. Mr. James Greenleaf equally produced his logbook and his identification documents which were subjected to investigation and were found to be genuine. He denied ever selling the car or signing any sale agreement.

Mr. Darius Nash was arrested, the motor vehicle was towed to the police station. The file has been submitted to the Director of Public Prosecutions for determination on the most appropriate charge(s).

- a) Identify the possible charge and draft the Charge Sheet. (6 Marks)
- b) Citing relevant caselaw, discuss the doctrine of recent possession and apply it to the facts above. (4 Marks)

### QUESTION THREE

*"Pre-Trial detention should..... be a measure of last resort, and the criminal justice institutions should make every reasonable effort to avoid Pre-Trial detention" Ogola, J in Daniel Ogwoka Manduku Vs D.P.P & 2 Others ( 2019) eKLR.*

Citing relevant case law, analyse the holding in light of the emerging jurisprudence on bail and bond (10 Marks)

### QUESTION FOUR

B.M is charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act, No. 3 of 2006.

He is charged with defiling Q.N a girl aged 4 years. At the time of the alleged offence, B.M was 17 years 2 Months. His Advocate Mjuaji Sana advised him to plead guilty to the charges and the Court promptly entered a finding of B.M being a child in conflict with the law.

The facts include that Q.N was so damaged by the violent sexual act that she required hospitalisation and surgical reconstruction to fistula. The Court is now left to determine the sentence.

Discuss the options available to the Court, making reference to the relevant statutes in your response. (10 Marks)

### QUESTION FIVE

Sentencing is a critical aspect of judicial authority which must take consideration of various factors before being meted out. Prior to development of the judiciary sentencing policy guidelines, judicial officers' exercise of discretion in sentencing often resulted in variances in sentences imposed by judicial officers.

Critically examine how the judiciary sentencing policy guidelines in Kenya have facilitated a fairer, objective and transparent approach to sentencing by judicial officers. (10 Marks)



#### QUESTION SIX

J.M.O was a Form 4 student and boarder at Mkia Secondary School. At one time he was suspended from school. The decision to suspend J.M.O was made by the Deputy Principal. He was out with his fellow students for a school function chaperoned by the Deputy Principal. On the way to school, he fell ill, touching his stomach in agonising pain. The Deputy Principal stopped another vehicle and rushed J.M.O to Afya Bora Level 4 Hospital where J.M.O was pronounced dead on arrival. The Deputy Principal informed the Principal the next morning. He in turn informed the school community and the parents of J.M.O. The parents suspected foul play and instantly blamed the Deputy Principal for the death of their son. The matter was reported to Mkia Police Station and was eventually forwarded with recommendation for the Court to conduct a public inquest.

Citing the relevant law, discuss the process of conducting an inquest with reference to this case.  
(10 Marks)



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Citing the relevant law, discuss the process of conducting an inquest with reference to this case.  
(10 Marks)



**BEST PERFORMED**



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**COUNCIL OF LEGAL EDUCATION**  
**EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES**

UNIT CODE: 

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 SUBJECT/UNIT ..... CRIMINAL LITIGATION .....

REGISTRATION NUMBER: [REDACTED] DATE: 26/11/2021 .....

**INSTRUCTIONS TO CANDIDATES**

1. Enter the Unit code, Subject of the Examination, Admission Number and Date in the spaces provided. The admission number should be as it appears on the Examination Card.
2. Do not write your name anywhere in this booklet.
3. Attempt each question on a fresh page of the booklet.
4. If an additional booklet is used, it MUST be fastened at the END of this booklet.
5. Insert in the column headed 'Question Number' the numbers of questions answered in the order in which you have attempted them.
6. Kindly ensure your handwriting is LEGIBLE.

Question Number	Examiner JM		Moderator ENK		Quality Assurer	
	Mark	Initials	Mark	Initials	Mark	Initials
1	18	JM	18			
2	09	JM	08			
3	08/10	JM	10			
4	07	JM	07			
5	10	JM	10			
<b>TOTAL MARKS</b>	<b>54</b>	<b>JM</b>	<b>53</b>			



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Questions ..... 1.1

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- The prosecution is established under the office of director of public prosecutions which is created by article 157 of the constitution.
- Article 157 provides the director of public prosecutions the power to institute proceedings in the name of the Republic and charge the offenders in a court of law.
- The Director of public prosecutions is also empowered to take over proceedings from a private prosecutor.
- The laws that govern the work of the director of public prosecutor are the constitution under article 157 and also the director of public prosecutions Act.
- The director of public prosecution in collaboration with the police and director of criminal investigations ensures that an accused offender is brought to justice right from the arrest to sentencing.
- The police are incharge of arresting an offender with or without a warrant.
- As soon as an offender is arrested, the police should touch or confine the offender so as to effect arrest this is provided for under ~~article~~ ~~24~~ section 24 of the criminal procedure code.
- The police should then take the offender to the police station and charge him and be informed of his rights as an arrested person these includes; Right to be presumed innocent until proven guilty, Right to remain silent,

2



Right to have an advocate or a third party of his choice, to be arraigned in court within 24 hours of his arrest. These are provided for under the constitution in Article 49.

- After preparation of the offenders file, the police submit the file to the director of public prosecution who is to commence the case against the accused.

- At the court the offender is now the accused and the charges are read to him which he is expected to answer. A plea of guilty is entered as per the rules laid down in Adnan vs Republic which laid down as follows;

1. The charge is read to the accused in a language that he understands.

2. The accused response is recorded in his exact words as possible, where he enters a plea of ~~guilty~~ guilty.

3. The prosecution then reads again the charges and <sup>allow record</sup> the accused to dispute or add or deny certain facts of the charges.

4. If the accused denies certain facts or does not agree with what the prosecution has stated, a change of plea is entered.

5. If no change of plea has been entered and the accused does not deny the facts are read to him, the court ~~prosecution asks the court to enter a plea~~ enters a plea of guilty for the accused. And the case proceeds to conviction of the accused and finally sentencing.

- If the accused does not agree with the charges preferred against him, a plea of not guilty is entered.



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Questions ..... 1a

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- Where an accused pleads not guilty or not guilty, the prosecution is tasked to bring such records to the court to show that truly the accused was charged and acquitted or convicted thus not to subject him to double jeopardy.

- During bail and bond hearing which the constitution guarantees the arrested person as a constitutional right in Article 19(1)(b). The prosecutor can raise factors that the court can consider so as to not grant bail. Such factors are but not limited to flight risk, likely to abscond trial or committing a more serious offence.

- The prosecution is tasked with starting the trial by the principle that who alleges must prove. Thus goes first to establish the guilt of the accused beyond reasonable doubt. This is done by bringing in prosecution witnesses, exhibits and other documentary evidence in support of their case.

- Upon finding that the accused has a case to answer, the court proceeds to convict the accused, and the prosecution is invited to give aggravating circumstances during the sentence hearing.

- Aggravating circumstances basically are meant to ask the court to give the accused a harsher sentence. The circumstances are provided for in sentencing policy and include but not limited to; multiple victims of the offence, use of brutal weapons and a repeat offender among others.

Throughout the hearing, the prosecution has a chance



To challenge the way the accused has to be dealt with in the legal process will in court.

Even during the appeal the prosecution can still challenge an acquittal by the court of an accused person without being told they have subjected the accused on double jeopardy. Since the presumption of Innocence is no longer operative. ①

In conclusion the prosecution plays a major role in criminal justice systems thus a major stakeholder in ensuring justice is served, communities are protected from offenders and law and order are kept and observed.



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Questions 1bDo not write in  
either margin

Extradition is the process where a fugitive is surrendered from one sovereign state to another sovereign state for charging.

Extradition is only operative between states that have extradition treaty or agreements between them, or Acts that bind both states.

Kenya under article 2 of the constitution is bound by treaties that it has ratified.

Between Kenya and Uganda, the Extradition (Commonwealth Act Cap 77) guides extradition of fugitives.

- Extradition also operates on certain principles such as:
  - a) dual criminality - which means that the offence charged must be an offence in both states.
  - b) Principle of speciality - the offence must be extraditable in both states.
  - c) Double jeopardy - that a fugitive should not be subjected to punishment over an offence that he was already convicted or acquitted.

Extradition process between commonwealth states is provided for between section 5 to section 13 of the Extradition (Commonwealth Act Cap 77).

The process is as follows:

- a) Requisition - The requesting state makes a request to the host state through the office of foreign affairs represented by the attorney general. Upon receiving the request to extradite a fugitive, the attorney general acts on it.



b) order. After acting on the request and establishing the offence is extraditable and that the fugitive is in Kenya, the attorney general issues an order to have the fugitive arrested.

c) Issuance of an arrest warrant

The magistrate in a court with which the fugitive is believed to be issues a warrant if in jurisdiction issues a warrant of arrest and directs the police to arrest the fugitive.

d) Arraignment in court - The fugitive is arraigned in court and charged with the offence before the court since it is both an offence in Kenya and Uganda. Just like any other accused he is entitled to lawyer representation and bail.

e) Hearing of the case. Upon arraignment, the case is open for both the prosecution to prove charges on the accused and also the accused has the chance to come up with his defence.

- Upon finding that the accused has a case to answer, he is put on his defence and eventually convicted.

f) Committal or discharge upon conviction, the accused fugitive is jailed in the Kenyan prisons awaiting his committal to Uganda for sentencing. Basically if the fugitive has not been committed within 2 months, he can be discharged.

This case has merits since John Nguni is a serial killer which is both an offence in Kenya and Uganda and these two states are bound by the Extradition (Commonwealth Act cap 71).

18/20

max 10 marks

18/20



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Questions 29

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either margin

The possible charges were an ① Robbery with violence  
contrary to section 296 (2) of the penal code

② Forgery contrary section 347 as read with section  
349 of the Penal code

③ Handling stolen property contrary to section 322  
of Penal code

### National Police Service

#### CHARGE SHEET

OB NO 12/24/12/2015

Police case No 29/K/2015

Accused.

Darius Nakh

Count 1.

Statement of offence.

Robbery with violence contrary to section 296 (2) of the penal  
code.

Particulars of offence.

On 25<sup>th</sup> December 2015 at around 8:00 pm Darius Nakh and a  
others robbed Jacob Greenleaf at a gun point while  
driving motor vehicle Registration No. KCX 3448 Toyota  
Axis blue in colour along Kilimani Road.

Alternative charge to count 1

Statement of offence

Handling stolen property contrary to section 322 of  
the penal code

Particulars of the offence

On 30<sup>th</sup> December 2015 Mr. Darius Nakh was intercepted



by the police during driving the motor vehicle KEX 3448  
7.

Other counts: see over leaf

Date of arrest 30th December 2015

Kilith or without a warrant - Kilithout

Date of arraignment: 31<sup>st</sup> December 2015

Kilithuses: Investigating officer

Count 2

Statement of offence

Forgery contrary to section 341 as read with 349 of  
Penal code

Particulars of offence

on 30th December 2015 Davius was found in possession  
of forged documents alleged to be documents for purchase  
of motor vehicle KEX 3448 7 from James Greenleaf  
on 20th January 2015 and had had the vehicle  
for a year

OCS Kilimani Police  
Station.

Officer in Charge

06  
✓  
06



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Questions 2 b. ....

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either margin

- The doctrine of recent possession is a doctrine that points out the guilt of a person who is found to be in possession of stolen property.

- It is upon him to prove that the property is not stolen and it belongs to him.

- The principle in the doctrine of ~~recent~~ recent possession was laid down in the case of Aslam v R as follows.

1. The property was recently stolen from the complainant.
2. The accused is found in possession of the stolen property.
3. The complainant has positively identified the stolen property as his.
- 4.

- The prosecution is always tasked to start the case but in case of doctrine of recent possession, insanity and alibi defence, the defence is tasked to begin the case to prove against anything that might arise from the said defence.

08/10

09/10



Pre-trial detention should be a measure of last resort since it ~~rob~~ robs an accused person the right to be presumed innocent until proven guilty. This is provided for under article 49 on the rights of an ~~acc~~ arrested person and article 50 on the right to fair hearing.

- Article 49 (1) (h) provides that every arrested person has a right to reasonable bail and bond.

- Therefore holding an arrested or an accused person in detention is like the courts and prosecution have formed up ~~their~~ <sup>accused</sup> mind on the guilt of the ~~arrested~~ <sup>accused</sup> person.

- Article 49, Article 50 and article 48 on access to justice together with bail and bond policy support the principles that have emerged as the new jurisprudence in bail and bond policy.

① Presumption of innocence - Every ~~accused~~ <sup>accused</sup> person has a right to be presumed innocent until proven guilty thus pretrial detention should not be part of his treatment since he is guaranteed to be free on bail ~~or~~ <sup>and</sup> awaiting trial.

② Right to liberty - The ~~accused~~ <sup>accused</sup> person ~~the~~ <sup>has</sup> the right to be free and interact with other people thus should not be confined if he can have an opportunity to be out on bail.

③ The accused commitment to attend trial - If the ~~accused~~ <sup>accused</sup> can be trusted to attend trial without failing, then he ought to be released on bail. That is considering his past record such as not absconding court attendance while out on bail.

④ The right of the accused and the public - The accused has a right as an individual so does the public.



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Questions ..... 3

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since people could be affected by his acts as he might go out and commit further offences.

5. ~~Adherence~~ Adherence to international laws and treaties and national laws. The courts must adhere to the laws of international treaties which Kenya is a party to that protect both the rights of the accused and society at large.

Other factors considered are;

1. the nature of offence. How serious is the offence

R. V. Danson Ngungu.

The accused was charged with a capital offence and was released on bail.

This shows a shift from section 123 of the criminal procedure code that deals with bailable and non bailable offences.

2. flight risk - Is the offender a flight risk, does he possess another citizenship.

3. Effect on the victims - can he interfere with the victims by intimidation, and finally but not least

A. public security. Is the offender a threat to public security.

~~18/10~~

10/10

18/10



- A child is defined as a person who is below the age of 18 years Section 2 childrens Act.

- A child who is in conflict with the law is charged with in a childrens court.

- A child may not be convicted or sentenced as provided for under Section 189 of childrens Act rather a finding of guilty is entered.

- Section 190 also provides that a child found guilty should not be sentenced to imprisonment or death Penalty passed against him or her.

- Article 53 of the constitution provides the rights of a child. In case of an arrest, the child should be held in the shortest time possible and in separate place away from adults and also consideration of his age and sex.

- Section 185 also ~~provi~~ of the childrens act also provides that a child be ~~not~~ released on bail pending determination of the case. This can be possible by help of a surety or a recognizance of his own.

Since B.M is not a child of tender age, he can not be subject to vore dire examination since he understands the nature and requirements of taking an oth.

- A child of tender age was defined in as a child under the age of 14 years in R.v. Kibagani.

Thus B.M will be charged under Section 191 which provides non-exhaustive list of ~~chatt~~ sentence on



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Questions ..... 4 .....

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either margin

child in conflict with the law. These include

1. Discharge
2. Entering into a recognizance of his own or by a surety.
3. Fines payment
4. Placed under the care of ~~court~~ parent or guardian
5. Since ~~him~~ is above 15 years of age, he will be placed on ~~Boastal~~ Institution for his rehabilitation.
6. Community service order can also be preferred.
7. Probation order is also an option under the supervision of probation officer.

Finally all matters concerning children, article 53 (2) provides that the child's best interest is of paramount importance.

07/10

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Sentencing is a penal sanction preferred on an accused person who has been convicted. There are many sentences ranging from life imprisonment to fines or even probation orders.

- Sentencing in Kenya are provided for under the Penal code and also Sentencing policy guidelines have come into place to ensure that there is a fairer and just way of sentencing in Kenya.

- Some of the objectives of sentencing include retribution, deterrence, rehabilitation among others.

- The sentencing policy guidelines embodied the following principles such as principle of proportionality, Accountability, Parity among others.

- To realise the above objectives and also fulfil the above principles judicial officers conduct pre-sentencing which include sentence hearing.

Sentence hearing - allows the accused to give mitigating circumstances such as first time offender, remorseful, sole provider of the family so as to get a lighter sentence.

- The prosecution also gives mitigating aggravating circumstances such as multiple victims, repeat offender, use of cruel weapons so as to attract a harsh punishment for the offender.

- Victims are also not left out. Victim includes primary victim or family of the victim. They are also



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Questions ... 5 .....

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invited to give ~~their~~ concerns via victim impact  
Statements. To ~~show~~ how the crime had affected their  
lives.

2

With consideration of both ~~aggravating~~ mitigation and  
victim impact assessments, judicial officers thus end  
up giving fairer, objective and a more transparent <sup>to</sup> sentence  
each and every case before.

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Questions <sup>5</sup> .....

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invited to give ~~their~~ concerns via victim impact statements. To ~~show~~ how the crime had affected their life.

2

With consideration of both ~~aggravating~~ mitigation and victim impact assessments, judicial officers thus end up giving fairer, objective and a more transparent <sup>sentence</sup> to each and every case before.

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**COUNCIL OF LEGAL EDUCATION**  
**EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES**

UNIT CODE: 

A	T	P	I	O	I
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 SUBJECT/UNIT CRIMINAL LITIGATION

REGISTRATION NUMBER:

DATE: 26<sup>th</sup> November 2021

**INSTRUCTIONS TO CANDIDATES**

1. Enter the Unit code, Subject of the Examination, Admission Number and Date in the spaces provided. The admission number should be as it appears on the Examination Card.
2. Do not write your name anywhere in this booklet.
3. Attempt each question on a fresh page of the booklet.
4. If an additional booklet is used, it MUST be fastened at the END of this booklet.
5. Insert in the column headed 'Question Number' the numbers of questions answered in the order in which you have attempted them.
6. Kindly ensure your handwriting is LEGIBLE.

Question Number	Examiner <span style="color: red;">FK</span>		Moderator		Quality Assurer	
	Mark	Initials	Mark	Initials	Mark	Initials
5	03	FK				
6	00	PM				
3.	00	FK				
2	00	FK				
1.	02	P.M				
<b>TOTAL MARKS</b>	<span style="color: red;">05</span>	<span style="color: red;">P.M</span>				



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Questions .....5:.....

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5. Critically examine how the judiciary sentencing policy guidelines in Kenya have facilitated a fairer, objective and transparent approach to sentencing by judicial officer (10mks).

⇒ Equality in the sense that it makes it equal and people/citizens charged with crimes don't feel that others are better than them.

⇒ It sets the bar in that judicial officers have a precedent to work with rather than estimating sentences.

⇒ It destroys favouritism with judicial officers in case they are bribed to offer a short sentencing.

⇒ It is an open book which makes citizens more comfortable and not disgusted with the opinions of others' sentences.

⇒ It is easily referable with different cases and sentences making it easier to decide on civil, criminal cases while still maintaining the boundaries of each criminal offence.

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Questions ..... 6 .....

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6. Citing the relevant law, discuss the process of conducting an inquest with reference to this case. (10Mks)

⇒ J.M.O being suspended doesn't come off as having malice or intent to commit a crime as she was doing her job and corporal punishment resulted to suspension.

⇒ The deputy actually making an effort to take J.M.O. to the hospital and in fact getting means of transport actually shows the deputy principal was genuinely concerned about her student's health.

⇒ She was able to communicate to the school about the death of J.M.O meaning she didn't have malice and was just doing his/her job and was transparent with the issue.

⇒ Her duty as a deputy principal may include punishments and suspension and also communicating such information about his loss is part of her job.

⇒ The family should also consider having an autopsy done to understand why J.M.O passed away that quickly and from there be able to determine their next step.

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Questions .....3.....

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3. Citing relevant case law, analyse the holding light of the emerging jurisprudence on Bail and Bond (OMTs). //

⇒ This helps hold someone in contempt before charged for the criminal / civil cases committed. (Bail).

⇒ Bonds give assurance that a person who has <sup>committed</sup> ~~committed~~ a heinous / Huge crime is able to continue with the case and bond is more of assurance

⇒ I feel like it instills discipline that is costly which makes the offender understand the degree of their actions (Bail & Bond). hence paying and held accountable till all costs are cleared

⇒ The detention is worth it considering they can tamper with evidence or <sup>an</sup> have evidence changed if they are not in detention ~~after~~. which is tantamount to payment as leverage.

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Questions ..... 2 .....

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2. a) identify the possible charge and draft the charge sheet.  
(6MKS)

⇒ Possession of fire arms

⇒ Threat to kill harass and scare.

⇒ Stealing of Mr. Jacob greenleafs car.

⇒ Highjacking

⇒ Stealing his wallet, phone and accessories. (Laptop)  
which is registered in the company name of EET-  
Auditors.

⇒ Falsifying documents: (Log book, identification of fake sellers.)  
forgery.

b) Citing relevant case law discuss the doctrine of recent  
possession and apply it to the facts above. (4MKS)

If its with the possession of the car I'd say that. he'd  
actually, that is Mr. James greenleaf would have  
been aware of the sale of his vehicle and  
been notified. and would have had all the facts.

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Questions .....1.....

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1 a). You are the officer in charge of prosecutions at Busia. The DDO has asked you for your assistance in investigations. citing relevant laws, Discuss in Detail the basis for the form and assistance you will offer. (10Mks)

1. Identify the bodies and how long ago the bodies were killed. (Number of bodies to be precise)

2. Charge him with Murder (1<sup>st</sup> Degree).

3. Check his mental health. (Insanity) Health practitioner.

4. Talk to the appropriate family members of the deceased. to know on their disappearance to identify time frame.

5. Turn in evidence of the gummy bag with a blood stained panga.

6. Check the DNA with forensics to ensure they match as well. with the weapon they confiscated from him.

7. Find a language translator to ascertain the information

8. Write down that the suspect pleaded guilty and confessed and was able to show

2/10



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Questions .....1.....

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either margin

b) In the course of Investigations..... Explain the process of extradition and the merits in this. (10 marks)

Extradition is the process of charging a criminal in another country as criminal out of the criminal acts he has committed in another country and his own.

1. He was also wanted and in his country on ~~same~~ ~~charges~~ the same charges.
2. He confessed to the crime making it easier for investigation investigations.
3. He is also charged with the same acts in his country.
4. The bodies had the same markings and cuttings.
5. He also confessed to other Murder Charges and uncovered the bodies.

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**COUNCIL OF LEGAL EDUCATION.**



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

**ATP 104: TRIAL ADVOCACY**

**TUESDAY 30<sup>TH</sup> NOVEMBER, 2021**

**DURATION: 3 HOURS.**

**Instructions to Candidates:**

- (a) This paper contains **FOUR (4) printed pages** including the cover page, with a total of **Six (6) questions**.
- (b) Candidates **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

John, James and Andrew were jointly charged with the offence of murder of Mr. Smith contrary to Section 203 as read with Section 204 of the Penal Code. Before the hearing, the learned State Counsel Mr. Mutua on 4<sup>th</sup> May 2020 raised an objection to Mr. Osman an Advocate appearing for the three accused persons. He sought to have the Advocate disqualify himself from acting in the matter.

The brief facts of the matter are that Mr. Osman is a Partner in the Firm of Osman and Kiteta Advocates. The Firm had previously been engaged by the family of the deceased to hold a watch brief for them. At the time, the complainant's case was handled by Mr. Kiteta, his partner.

The prosecution relied on Rule 9 of the Advocates (Practice) Rules and submitted that the Rule barred Mr. Osman whose Firm had previously represented the complainant's family.

Upon the death of Mr. Smith, on 1<sup>st</sup> June 2019, the Firm of Osman and Kiteta was engaged by the family of the deceased to watch brief. At the time, Mr. Osman was out of the country on study leave. At the material time, the family only dealt with Mr. Kiteta.

Upon his return from overseas, studies in 2002, Mr. Osman was engaged by the accused persons. He believes that it is his constitutional right to represent clients of his choice and further that the principles of the "Chinese wall" were applicable.

- a) You are a pupil in the Firm of Osman and Kiteta Advocates, analyse three (3) Grounds of Opposition to the Application by the State Counsel. (6 Marks)
- b) You are a researcher attached to the office of the presiding Judge. You have been tasked to analyse any five (5) principles applicable in considering disqualification of Counsel. Proceed in the context of this case above. (10 Marks)
- c) Assuming you act on behalf of the complainants in this case, why should the court compel Mr. Osman to cease acting for the accused persons? (4 Marks)

## QUESTION TWO

The Global Focus, an international Company advertised for a position of Senior International Finance Associate and included a job description in the advertisement. The advertisement indicated that the location was New York, USA and Nairobi, Kenya, Africa.

Mary Kemunto applied for the position and after the interview, the Global Focus wrote to her on 9<sup>th</sup> October 2018 to offer /confirm to her full-time regular employment as a Senior International Finance Associate. She was entitled to among others a Basic Salary, House Allowance, overtime and leave allowances.

The letter advises Mary that the employment would be governed by the Global Focus Personnel Policies and further that the employment was at will and was not for a fixed period. Termination would be at the option of either party at any time.

On 1<sup>st</sup> April 2020 at the height of the COVID-19 pandemic in Kenya, the Global Focus wrote to Mary Kemunto to inform her that the position of Senior International Finance Associate was being eliminated due to restructuring and therefore her services would no longer be required.

The Termination Notice also advised her that the last day of work would be on 1<sup>st</sup> April 2020 and that her health insurance would remain effective upto 1<sup>st</sup> April 2020 and also that under terms of the Severance Agreement and Release, the equivalent of 3 months of premium only would be paid.

Mary Kemunto felt that the separation was not legally justified under Kenyan Law; and on 1<sup>st</sup> May 2020, her Advocate wrote a Demand Letter to the Global Focus seeking admission of liability and dues amounting to Kenya Shillings Ten Million (Kshs. 10,000,000).



On 20<sup>th</sup> May 2020 Mary Kemunto's Advocate wrote a letter to the Global Focus decrying the stopping of her health insurance cover before the effective date as of 1<sup>st</sup> April 2021. Seeing no resolution in sight, Mary Kemunto moved to Court on 1<sup>st</sup> July 2020. As an Advocate for the Global Focus:

- a) Identify five (5) issues for determination by the Court. (5 Marks)
- b) Draft five (5) questions that you would ask Ms. Mary Kemunto during cross-examination (5 Marks)

### QUESTION THREE

Brown was charged with the offence of defilement contrary to Section 8(1) of the Sexual Offences Act, with the alternative charge of committing an indecent act contrary to Section 11 of the Sexual Offences Act in a criminal case at the Magistrate's Court.

The particulars of the offence were set out for each count. He pleaded not guilty to both charges and the matter proceeded for trial. By Judgement delivered on 1<sup>st</sup> April 2021 by the Senior Principal Magistrate, Brown was convicted of attempted defilement and was sentenced to 20 years imprisonment.

He is dissatisfied with both the Judgement and sentence meted by the trial courts and prefers an appeal. He has approached your Firm of Advocates. You are a newly admitted Advocate in the said Firm.

- a) Analyse three (3) critical steps that you would take to ensure a successful Appeal. (6 Marks)
- b) Identify two (2) fundamental issues for determination that would inform the Grounds of Appeal that you intend to rely on. (4 Marks)

### QUESTION FOUR

*"The Courtroom is a theatre where the stories of the litigants' lives are played out before judges who, themselves become part of the play. It is a place where warriors wage fierce war using intellect and storytelling as their weapons. It is a place where morality and meaning of human conduct is judged. It is a place where rules of right and wrong in our society are affirmed. It is a place where souls and aspirations of both the judged and the judges are examined closely. It is a place of honour"*  
Dr. Richard Waiteo

In the context of the above quote:

- a) Analyse five (5) qualities of an effective trial lawyer. (5 Marks)
- b) Analyse five (5) duties of a Trial Lawyer. (5 Marks)

### QUESTION FIVE

In a Tort claim arising from a road accident, evidence has been adduced that the Plaintiff was injured by the Defendant while crossing the road. It was argued that the Defendant was driving at high speed in an area that was usually frequented by pedestrians owing to the presence of a popular supermarket.

Although there was no pedestrian-crossing at the scene of the accident, it was not uncommon for people to cross the road at that place. As a result of the accident, the Plaintiff suffered a fractured arm and lacerations on the face and required medical treatment, whose cost amounted to Kshs. 200,000. There was also a possibility that he would require physiotherapy for at least 3 months for him to fully recover.



In light of the foregoing facts;

- a) Draft the closing arguments for the Plaintiff capturing the essential ingredients of the evidence adduced. (6 Marks)
- b) Prepare closing arguments that would be sustainable for the Respondent on the matter. (4 Marks)

#### QUESTION SIX

In a Criminal Court before the Resident Magistrates Court in Butali, File Number 121 of 2021, James Ooko was charged with the offence of taking part in unlawful assembly contrary to Section 79 of the Penal Code.

It was alleged in the charge that James Ooko, together with others not before the court, being assembled outside the gate of Masinde Muliro University of Science and Technology conducted themselves in such a manner as to cause persons in the neighbourhood reasonable fear that the assembled would commit breach of the peace by carrying poles and shouting that they "will ensure that the university is closed by all means if it cannot pay its employees their dues".

It is the Defence case that the prosecution has not made its case as it has not shown that there was unlawful assembly as per Section 78 of the Penal Code since only James Ooko was before the Court facing these charges.

Furthermore, it is argued that Ooko was exercising his Legal and Constitutional rights as a Lecturer in the University to assemble, demonstrate, picket and petition under Article 37 of the Constitution, before he was arrested and that the carrying of poles and twigs for which they are charged was also exercising their freedom of expression under Article 33 of the Constitution as upheld by various case laws.

In order to expedite the process, the presiding Magistrate has asked the parties to file their skeletal arguments.

You are representing James Ooko in the matter. Assuming other relevant attributes in favour of your Client, draft the arguments you will file. (10 Marks)



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**COUNCIL OF LEGAL EDUCATION**  
**EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES**

UNIT CODE: 

A	T	P	1	0	4
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 SUBJECT/UNIT TRIAL ADVOCACY.

REGISTRATION NUMBER:

DATE: 30<sup>TH</sup> NOVEMBER 2021

**INSTRUCTIONS TO CANDIDATES**

1. Enter the Unit code, Subject of the Examination, Admission Number and Date in the spaces provided. The admission number should be as it appears on the Examination Card.
2. Do not write your name anywhere in this booklet.
3. Attempt each question on a fresh page of the booklet.
4. If an additional booklet is used, it MUST be fastened at the END of this booklet.
5. Insert in the column headed 'Question Number' the numbers of questions answered in the order in which you have attempted them.
6. Kindly ensure your handwriting is LEGIBLE.

Question Number	Examiner J.O		Moderator		Quality Assurer	
	Mark	Initials	Mark	Initials	Mark	Initials
✓ 4	10	VL	10			
✓ 1	13	J.O	12			
✓ 2	10	J.O	25			
✓ 5	09	VL	09			
✓ 3	08	VL	08			
<b>TOTAL MARKS</b>	<b>50</b>	<b>VL</b>	<b>44</b>			



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Questions ..... 4A.

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## Qualities of an effective trial lawyer.

### 1. Honesty and due diligence

A trial lawyer must conduct himself and his business with utmost honesty to the client or court and to act in due diligence when representing a matter.

An advocate must be honest with the client when dealing with his matter such that he is bound to disclose all material facts which should be apparent to the client case.

A trial lawyer should also perform his duties with due diligence while representing a client. This could be through extensive legal research on the matter or conducting investigations where necessary.

### 2. Clarity and command of language

An effective trial lawyer should be clear in terms of what he is stating to the court and when representing before an open court, put forward arguments in a clear and unambiguous way.

A good trial lawyer should also have a command of language where they should communicate to the court and the client in a formal language and in a manner that is easily understood, that is, simple language.

### 3. Loyalty

An effective trial lawyer must remain loyal to the client or to the court during representation. He should not change course despite constigation by public when representing a controversial case.

An advocate owes fidelity to the law and as such, being a judicial officer, he is required to uphold the rule of law.



4. Effective Representation

A good and effective trial lawyer should zealously represent his client competently and diligently to the best of his ability.

A good trial lawyer should ensure that the interests of his clients are addressed to. However where there is a conflict between the duty of the advocate to the court and duty to the client, the duty to the court shall prevail.

5. Judgment

A good effective trial lawyer should be impartial in giving his decision on an issue. Before giving a determination on the course of action, he must consider all relevant and material facts.

A good judgment stems from integrity and as such a trial lawyer should ensure that at all times his integrity is not compromised.



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Questions ..... 48 .....

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## DUTIES OF A TRIAL LAWYER.

### 1. Duty to Court

A trial lawyer has various duties to court because being that first and foremost an advocate or lawyer is an officer of the court.

A trial lawyer has a duty to respect the rules of the court which guide their conduct during a proceeding and failure to which may amount to contempt of court.

A trial lawyer also has a duty to ensure that the course of justice is not without causing any unnecessary delays.

### 2. Duty to client.

A trial lawyer has a duty to effectively represent a client in a matter which will require his competency and skills. He must advise the client appropriately on the status of his case.

A trial lawyer also has a duty to maintain confidentiality with the client. He should not disclose any information given in the course of their engagement without an express consent.

### 3. Duty to Public.

A trial lawyer has a duty to the public to ensure that they do not cause harm in their dealing. Where there is a conflict between his duty to a client and duty to the public, the lawyer's duty to the public shall prevail. He is also under a duty to ensure that the public do access justice effectively and affordably by not charging too much of legal fees on the client.

3



4. Duty to Opposing Counsel.

The trial lawyer also has a duty to the opposing counsel to ensure that they respect each other during the trial process and avoid any situations that may cause an embarrassment to the lawyers and the profession.

A trial lawyer is also under a duty to disclose any information in the course of communication with the opposing counsel on a matter. This includes oral communication as well as documentary evidence.

5. Duty to the Profession.

A trial lawyer has a duty to uphold the dignity and reputation of the profession by avoiding or engaging in matters that may disrepute the profession's image.

A trial lawyer is under a duty to act in a civil manner with colleagues and other third parties both in private and public life in a way that does not demean the rules of the Profession.

Total Qtn 4 - 10 Mk



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Questions ..... 1(a) .....

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Grounds of Opposition to the Application by State Counsel.

The State Counsel has made an application for disqualifying Mr Osman from acting in the matter. There seem to be a conflict of interests in the set of facts.

A conflict of interest arises where an advocate chooses to represent two or more clients in a similar matter. The rule is that an advocate should not refuse to represent a brief, but exception is where there is incompetency or conflict of interest.

Where conflict of interest arises, the advocate is under a duty to disqualify themselves from acting unless they receive an informed decision from the client to continue with the brief.

The test of conflict of interest is what is with the court to consider whether there is a real mischief to be occasioned or prejudice if the advocate continued to represent the client.

Having considered what conflict of interest is, the following are the grounds of opposition to the application made by the state counsel:

(a) That the advocate cannot disqualify themselves from representing the accused as it is in the interest of justice envisaged in the constitution that every accused person has a right to be represented by dint of Article 50 of the constitution.

(b) The second ground of opposition would be that there will be no mischief or prejudice that will be occasioned when Mr Osman will represent the clients to the extent that justice is served.



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Questions ..... 197

Write on both sides of the paper

c) Lastly, the application will be opposed on the ground that the family of the deceased engaged the firm to watch brief and had not communicated to Mr Arman who was out of the country on study leave.

From the grounds stated above, it is therefore conclusive to state that the application by State Counsel could be dismissed including where there was the Chinese Wall. Secondly Mr Arman did not ~~rep~~ watch the brief but was his partner Mr Kitaka.

~~8~~ 02



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Questions ..... 16

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Principle applicable in considering disqualification of counsel.

Where there is a conflict of interest, the rule is that an advocate should disqualify themselves from acting after informing the client on the dangers that may occasion should he continue to act on the same matter.

In disqualifying a counsel, the following are considerations to be made:

a) Form of conflict.

An advocate can be disqualified where there is a conflict between his interests on the matter and client's interest. Where such occurs, the advocate should disqualify themselves from acting in such a suit as his impartiality would be affected.

Where the conflict interest of the advocate and the interest of the client are in contention, the advocate is under a duty to disqualify himself failure to which may amount to professional misconduct.

b) Where the representation may occasion real mischief and prejudice.

An advocate should disqualify themselves from representing a matter that may cause a real mischief. This occurs where an advocate represents a matter knowing that an injustice may be occasioned by still chooses to continue with representing.

Also an advocate should disqualify themselves from acting where it will cause real prejudice to either the party or client or court. This occurs when the advocate has interest of the clients only and avoids his duties to the court and third party including public.



c) Where it would cause high level of embarrassment to the Profession

An advocate should disqualify himself from acting as representing a matter that will cause an embarrassment on the profession and demean the integrity and reputation of both the client and the advocate.

d) Where there is a conflict of duties of representation.

Where there are conflicting duties as to representation of a client, the advocate may disqualify themselves from acting in such a suit.

Conflict as to representation includes aspects such as successive representation or adverse representation or concurrent representation.

In any case, the court should consider whether any of the above issues would affect the outcome of the case in question.

e) Whether injustice will be suffered.

An advocate should disqualify themselves from acting where there is eminent danger of miscarriage of justice or that one party would adversely be affected in terms of damages or conviction.

In light of the above narrative, a conflict of interest has emerged, however, in considering whether to disqualify a counsel, the court should consider the above principles before deciding whether or not to disqualify counsel.

From the set of facts the conflict that arises is about representation of the accused, where this is the case, the court shall consider the Chinese Wall to allow accused persons to be represented but still there would be a mischief occasioned



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Questions ..... 10 .....

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Compel Osman to Cease Acting.

The court may compel an advocate to cease acting where they can show that irreparable harm will be occasioned.

This implies that Mr Osman will cease to represent because they are already under an instruction by the family of the deceased.

The court should compel Mr Osman to cease acting because the cause of action is of criminal nature. This means that where an action of such a nature, including murder, is of public interest and as such the ends of justice should be met.

The court will also compel them to act as they already have an obligation with the family of the client - and therefore should avoid having a conflicting interest with the firm partner.

02



Issues of determination by Court.

In order to determine whether disqualification of Mary Kemunto was justified or not, the court will need to determine the following issues.

a) Whether there was an employment contract between the two parties

b) Whether the termination of Mary Kemunto was legally justified.

c) Whether there was adequate notice of termination given to the claimant

d) Whether it was justifiable, by Global Focus, in stopping the medical or health insurance cover before the effective date.

e) Whether the claimant is entitled to the severance pay as per the agreement.

24



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Questions ..... 26 .....

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either maQuestions During Cross Examination.

1. Were you aware of the terms in the agreement as to termination of the employment? ✓

2. How long have you been working with Global Four. ✓

3. Has the stopping of the medical insurance cover affected your daily duties? ✓

4. Was the severance pay as agreed in the Severance Agreement and release paid to you? ✓

5. Was the notice of termination sufficiently communicated to you? ✓

07



### Closing Arguments for the Plaintiff.

The Plaintiff in the case has suffered a tortious act. He has been put in a position which he did not intend to be placed by the negligent act of the defendant.

This is a case of ignorance of the law is not a defence. The defendant was driving at a high speed in an area that is usually frequented by pedestrians as well as owing the presence of a popular supermarket. The defendant was negligent in his actions and ignorant of the fact that the area was a busy area.

Secondly, as a result of his ignorance, he owed a duty to pedestrians crossing the road at that place. However, he did not consider any such situation and as a result, the Plaintiff suffered in his hands. The cause of his ignorant action has affected the Plaintiff adversely.

The Plaintiff suffered a fractured arm and lacerations on the face which require urgent medical treatment. Moreover, the Plaintiff will require physiotherapy for at least 2 months for him to fully recover.

~~It is therefore our prayer to this hon.~~ ISSUE

Therefore, the issue in this case is whether the actions of the defendant amounts to a tortious claim by the Plaintiff.

#### RULE

The rule is that, where an action of negligence is apparent the court must consider whether the defendant has a duty of care. Secondly the court should consider that his actions were unreasonable and lastly that due to his negligence harm was caused.



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Questions ..... 597 .....

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### APPLICATION.

In applying the facts and issue to this case, I will draw the attention of the court to the famous case of *Donoghue v. Stephenson* where the learned judge laid out the test for tort of negligence.

From the above set of narrative by the plaintiff, it ~~can~~<sup>is</sup> proved that the defendant was negligent in his action by driving at a high speed where he should not have been doing so.

Secondly that because of his negligent act, the plaintiff suffered harm and damage. He has a broken arm and laceration on the face that require medical treatment as well as physiotherapy to afford him full recovery.

### CONCLUSION

We therefore ask this court to find the defendant liable for negligence and ask this honourable court to award damages to the plaintiff with regards to the negligent act of the defendant.



Closing Argument sustainable for the respondent.

The Plaintiff has portrayed the defendant as a negligent member of the society and as such his actions have amounted to harm. However, certain issues need to be addressed to condemn the defendant.

### 1. ISSUES

a) Whether there were any indications or road signs along the area indicating whether there was a pedestrian walk or supermarket.

b) Whether there were any signs on the road that showed the limit in terms of speed when approaching the market area.

### 2 RULES

Under the Traffic Act and Rules, the act requires that the authority is under a mandate to put up signs across and along roads to show pedestrian walking or a market.

Secondly under the Traffic Act, it provides that the road authority shall put up signs along the road indicating the speed limits that needs to be adhered to while approaching certain areas.

### 3 APPLICATION.

There were no indications along the road that there was a pedestrian crossing area. Secondly at the time of the incidence, the only person present was the Plaintiff thus negating the busy nature of the road at the



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Secondly, there were not road signs showing what speed limit a driver should use in approaching such an area.

### CONCLUSION

It is therefore our prayer that this matter be dismissed as the defendant was not ignorant or negligent in his action.

Total Qm 5 + 9 Mk

03



Steps to ensure successful appeal.

1. Obtain all documents and evidence including the decision of the magistrate court.

This is to ensure that while preparing the memorandum and notice of appeal, the advocate is aware of all the facts and the reasoning of the sitting magistrate. This will also allow the advocate to deduce points of law that will be discussed at the appellate level.

2. Jurisdiction of the Court.

Jurisdiction is the ability of the court to sit and determine an issue before it. Where jurisdiction is in question, an advocate may raise an objection, usually a preliminary objection.

3. Accused and witness

An advocate shall ensure that the accused and the witnesses are present during the appeal as their statements are with the records of appeal.

The accused must be present during the appeal in case his input will be needed.

4. Sentence meted.

In appealing the case, advocate should also consider the sentence given by the trial court. If the sentence is more severe than the actual offence, this may form a ground for appeal.

DP



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Questions ..... 3 b) .....

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Fundamental Issue for determination.

1. Question of law.

The law in this scenario is Section 5(1) of Sexual Offences Act. On appeal an advocate is only allowed to address questions of law. In this matter, the only question of law would be if the sentence noted was proportional to the crime committed of-

The accused has been sentenced to 20 years for attempted defilement. The sentence would be inappropriate.

2. Whether the accused was rightly convicted on the charges preferred to him.

The charge against the accused was of defilement and committing an indecent act.

3. Jurisdiction of the Court.

Does the Magistrate Court have jurisdiction to entertain cases on sexual offences.

Total Q 3 → 8 Marks



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**COUNCIL OF LEGAL EDUCATION**  
**EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES**

UNIT CODE: 

A	T	P	1	0	4
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 SUBJECT/UNIT TRIAL ADVOCACY

REGISTRATION NUMBER:

DATE: 30<sup>th</sup> November 2021

**INSTRUCTIONS TO CANDIDATES**

1. Enter the Unit code, Subject of the Examination, Admission Number and Date in the spaces provided. The admission number should be as it appears on the Examination Card.
2. Do not write your name anywhere in this booklet.
3. Attempt each question on a fresh page of the booklet.
4. If an additional booklet is used, it MUST be fastened at the END of this booklet.
5. Insert in the column headed 'Question Number' the numbers of questions answered in the order in which you have attempted them.
6. Kindly ensure your handwriting is LEGIBLE.

Question Number	Examiner <u>J-O</u>		Moderator		Quality Assurer	
	Mark	Initials	Mark	Initials	Mark	Initials
<u>4</u>	<u>06</u>	<u>VL</u>	<u>04</u>	<u>[Signature]</u>		
<u>2</u>	<u>0</u>	<u>J-O</u>	<u>00</u>			
<u>5</u>	<u>01</u>	<u>VL</u>	<u>01</u>			
<u>3</u>	<u>00</u>	<u>VL</u>	<u>00</u>			
<u>1</u>	<u>0</u>	<u>J-O</u>	<u>00</u>			
		<u>/</u>				
<b>TOTAL MARKS</b>	<u>07-VL</u>		<u>05</u>			



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Questions ..... 4

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4. In the context of the above quote:

a) Analyse five (5) Qualities of an effective trial lawyer (5MKS).

⇒ Well spoken / Eloquent

⇒ Well dressed for the court

⇒ Has the right information with regards to the case.

⇒ Has their facts. (on the case) Witnesses, papers

⇒ Is conversant with the legal principles

b) Analyse five (5) Duties of a trial lawyer.

⇒ Prepares client for court.

⇒ Gathers facts on case.

⇒ Maintain client confidentiality.

⇒ Gives client information on the status and findings of the court

⇒ Total Q 4 → 20MKS



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Questions ..... 2 .....

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2 a) Identify 5 (issues) for determination by the court.  
(5mks)

⇒ There was a presence of a contract that ~~strictly~~  
mentioned that they would end it on 1<sup>st</sup> April 2020

⇒

⇒

⇒

⇒

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3 b) Draft 5 (5) questions that you would ask Mary  
Kemundo during cross examination (5mks)

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Questions ..... 5 .....

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5. a). Draft the closing arguments for the plaintiff capturing the essential ingredients of the evidence adduced (6mks)

⇒ The defendant's driving was wreckless considering people/drivers should maintain a certain speed limit and act with decorum which was wrong.

⇒ We see the defendant's negligence on the matter considering he was driving at a fast speed despite the awareness that there are ~~passer~~ pedestrians owing to the presence of the popular supermarket.

⇒ In light of that statement we also we deem the defendant ~~unworthy~~ very negligent considering that is a place that was not uncommon for crossing roads yet he still went speeding and caused harm to another life.

b). Prepare closing arguments that would be sustainable for the Respondent on the Matter! (4mks)

⇒ Maybe the place did not have a zebra crossing making the defendant not liable.

⇒ Maybe the passenger was reckless crossing the road despite there being a popular supermarket and people frequented the place.

Total Qn 5 → 1 Mark



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Questions .....<sup>1</sup>.....Do not write  
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1. a) You are a pupil in the firm of Osman and Kiteta Advocates, analyse three (3) Grounds of opposition of the Application by the state council. (6mks)

⇒

88



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Questions ..... 3 .....

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3 a) Analyse 3 critical steps that you would take to ensure successful Appeal.

⇒ A good lawyer who is able to defend him.

⇒ Good behaviour on the account before the appeal.

⇒ New facts or evidence to support his case.

b) Identify two fundamental issues for determination that would inform the grounds of Appeal that you intend to rely on.

⇒ New evidence and facts.

⇒ Behavior of the client.

Total Qm 3 → 0



# COUNCIL OF LEGAL EDUCATION



## EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES

### **ATP 105: PROFESSIONAL ETHICS & PRACTICE**

THURSDAY 25<sup>TH</sup> NOVEMBER 2021

DURATION: 3 HOURS

#### **Instructions to Candidates:**

- (a) This paper contains **FOUR (4) printed pages** including the cover page, with a total of **Six (6) questions**.
- (b) Candidates **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

Dr. Fisi Mapesa is a renowned and highly connected business mogul dealing solely in high-value pharmaceutical products. He calls himself a doctor because he has been trading in pharmaceutical products for over four decades and has accumulated considerable knowledge and experience, despite his modest formal education which terminated at high school level.

He says that he is a Pharmaceutical Drugs Trading Professional (PDTP). He has made a considerable fortune from trading and being a very generous man, he is highly respected in the Pharmaceutical industry in Kenya and abroad. He always insists that he is a professional like any other formally trained doctor, engineer, lawyer, teacher etc.

Recently, he landed a multi-million shilling contract as the sole importer, supplier and distributor of the COVID-19 Vaccine in Kenya. However due to reasons he has declined to disclose, the tender was cancelled and re-awarded to a company called Quick Fix Limited. He is infuriated.

Your Aunt who works for Dr. Fisi has floated your name to him. Dr. Fisi has approached you to represent him. It is barely a month since your admission as an Advocate of the High Court of Kenya. This presents a grand opportunity for you to accumulate fast capital to set up your own law firm.

Having looked at the relevant documents, you are convinced that the case can go either way but with diligent research and industry you can win.

Dr. Fisi insists that this is a must-win case, a do-or-die. He is prepared to pay you any amount as fees as long as you win. He wants you to do everything possible to win the case. He insists you must have the case fixed before a specific judge he has named which is not a difficult task for you. He wants you to get the money first and talk about ethics later. You need the money anyway.

He also wants you to rope in any Advocate that may come on record for the opposing party. He is ready to talk to him or her and pay. He is eager, ready, willing and able. You are anxious but feel very excited, you are raving to undertake the task but some fears and questions keep coming up in your mind and you want answers.

Discuss the following;

- a) Is the observance of professional ethics a priority in the face of once-in a-lifetime opportunities and harsh economic times occasioned by the COVID-19 pandemic? (4 Marks)
- b) Is pharmaceutical product trading a profession like any other as Dr. Fisi claims? (6 Marks)
- c) Are there parameters that inhibit you from asking for any amount of money as legal fees, since the client is ready to pay any amount? (6 Marks)
- d) As an officer of the Court illustrate at least two compelling duties you owe to the Court that prevent you from ceding to Dr. Fisi's request to have his case fixed before a specific judge. (4 Marks)



## QUESTION TWO

Justice Clarence Thomas, the longest serving Associate Justice of the United States Supreme Court stated;

*"Good manners will open doors that the best education cannot"*

- a) What do you understand by the term "Courtroom etiquette"? (2 Marks)
- b) Your friend is making a maiden appearance as a lawyer in an open Court. Illustrate any four rules of etiquette he/she should observe. (4 Marks)
- c) The Advocate shall also be making a maiden appearance in a virtual Court via the Zoom Platform. Discuss whether rules of etiquette apply on virtual platforms and how? (4 Marks)

## QUESTION THREE

On 3<sup>rd</sup> March 2021, two weeks after completing the Advocates' Training Programme, Njeri attended a session of the Advocates Disciplinary Committee hearings at the Professional Centre, in Nairobi.

She was taken aback by the sheer number of Advocates being prosecuted. She thought the number was too high compared to the total number of Advocates in Kenya. Of particular interest were three Advocates, one being her relative while the other two are her mentors. These three cases baffled her.

1. Advocate Kula Yote who is her relative is alleged to have represented the Vendor and the Purchaser in a transaction involving a sale of a prime plot in Karen, Nairobi. He persuaded the two parties to retain him to reduce the cost of legal fees as well as for expediting the transaction. The Purchase Price was Kshs. 40,000,000, which the Purchaser deposited with him in full but one year later, the Vendor has not received any payment. The transfer is yet to be registered.
2. Renowned Advocate Kunywa Mingi is alleged to have been absent from Court in a matter and on dates fixed by the Court in his presence and by consent. That although the case was coming up for full hearing, his client came to learn about it from the Court Clerk when he went to complain that the Court is delaying his case. He did not prepare for the case and apparently, he never diarised the dates hence members of his staff at the office were not even aware that the case was coming up.
3. Advocate Sungura is alleged to have received Kshs. 2,000,000 and disappeared. He did not inform his client that he received the money after sending a demand letter. He cannot be reached on phone and his last known office address is no longer in use.

From your knowledge in professional ethics and practice, explain to Njeri the following;

- a) At least two instances of professional misconduct committed by each of the three Advocates, if the facts are held to be true and accurate. (5 Marks)
- b) The Disciplinary Procedure that was followed to the point where Njeri attended the sessions on 3<sup>rd</sup> March 2021. (3 Marks)
- c) What possible sanctions could be meted out against any or all of the Advocates if found guilty of the alleged breach of professional conduct. Explain at least two. (2 Marks)



#### QUESTION FOUR

You have been acting for Ms. Clean a former Procurement Officer at the County Government of Mara. She was charged in Court with an offence relating to a tendering process undertaken while she was in charge where bids were switched to favour her former school mate. She assisted her school mate in securing a tender for the supply of Malaria Drugs to the County.

The case has been adjourned several times at her request but now it is set for hearing and it may not be adjourned any further.

During preparations for trial she informs you that she intends to give a sworn statement giving correct facts of the matter but with little exaggerations and untruths just to ensure that she is released. If she does not tinker with the facts a bit, her chances of succeeding are slim and she stands a higher chance of being convicted. You are very sympathetic to her, she has also paid your fees in full.

- a) Would you help her to give untruthful testimony on oath? Why? (2 Marks)
- b) What would you do if she insists on giving the untruthful testimony she has proposed? Give reasons for that decision (2 Marks)
- c) What grounds would compel you to cease acting for a client who has paid you so well? (5 Marks)

#### QUESTION FIVE

- a) As a prospective young Advocate, what do you consider to be the main purpose or object of the Advocates Training Program? (2 Marks)
- b) What are some of the professional challenges young lawyers face and you are likely to face in legal practice in Kenya? (4 Marks)
- c) Suggest how you will tackle some of these challenges to realize a good measure of success in your career. (4 Marks)

#### QUESTION SIX

A practicing lawyer owes a duty to various categories of people operating in the legal system in Kenya.

State and explain at least two principle responsibilities owed by an Advocate to each of the following;

- a) Clients (2 Marks)
- b) Professional colleagues (2 Marks)
- c) The Court (2 Marks)
- d) The public (2 Marks)
- e) Opposing party (2 Marks)



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**COUNCIL OF LEGAL EDUCATION**  
**EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES**

UNIT CODE: 

A	T	P	1	0	5
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 SUBJECT/UNIT PROFESSIONAL ETHICS

REGISTRATION NUMBER:  DATE: 25th November 2021

**INSTRUCTIONS TO CANDIDATES**

1. Enter the Unit code, Subject of the Examination, Admission Number and Date in the spaces provided. The admission number should be as it appears on the Examination Card.
2. Do not write your name anywhere in this booklet.
3. Attempt each question on a fresh page of the booklet.
4. If an additional booklet is used, it MUST be fastened at the END of this booklet.
5. Insert in the column headed 'Question Number' the numbers of questions answered in the order in which you have attempted them.
6. Kindly ensure your handwriting is LEGIBLE.

Question Number	Examiner		Moderator		Quality Assurer	
	Mark	Initials	Mark	Initials	Mark	Initials
1	20	C.O.	20	dm		
2	10	C.O.	10	dm		
4	10	C.O.	10.0	dm		
6	08	DN	9.5	dm		
3	10	DN	10	dm		
<b>TOTAL MARKS</b>	<b>58</b>	<b>DN</b>	<b>59.5</b>	<b>dm</b>		



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Questions ..... 1

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(a) Professional ethics defines what is right and what is wrong based on morality. Non compliance with professional ethics standards as set out in the Law Society of Kenya Standards of Professional Practice and Ethical Conduct results in professional misconduct. In *Allison v General Medical Council*, it was held that professional misconduct refers to conduct that is dishonorable and brings disrepute to the profession. There an Advocate, as a professional must at all times act in accordance with ethical standards regardless of whether there are harsh economic times or not. Furthermore, an advocate must note that although he may act as an agent for his client, he is not a mere agent in the ordinary sense as he owes professional duties to the court and to the interests of justice as held in *Rondel v Worsley*. Also, Robert Gordon noted that an advocate is not a hired gun meaning that he must uphold ethical standards at all times regardless of the circumstances he faces. Moreover, an advocate should not chase money and once-in-a-lifetime opportunities at the expense of the rule of law and justice. This is based on the independence of the bar such that an advocate must be free from the intention to win at all costs for his client.

(b) Pharmaceutical product trading is not a profession but rather, a business. A business is defined as carrying on of a trade for the purpose of profit making whereas a profession entails the provision of services for the benefit of the public. According to the Report of the British Royal Commission, distinguishing marks of a profession include:

- (i) Possession of special knowledge and skills - Dr. Firi does not possess special skills or knowledge as he has not undergone extensive training and only studied until high school level.
- (ii) There is a register of members of the profession - Dr. Firi must note that professions keep and maintain a register of members.



which is not the case for traders like ~~see~~ him.

(iii) There are restrictions on entry - The A profession has restrictions on entry e.g. one needs to pass a certain professional exam or undergo training in a specific manner. This is not the case for traders as anyone can engage in trade.

(iv) Fiduciary relationships exist in professions - This is based on trust and confidence. This doesn't exist in trade as everyone exercises self-interest.

(v) A profession aims at rendering services for the benefit of the public - whereas this is not the case in trading as Mr. Fisi carries business for his own benefit.

(vi) There are rules of professional standards and ethics within a profession. This is not the case in a business/trading activity. Therefore, Mr. Fisi is not a professional as his business of trading in pharmaceutical products does not meet the requirements of a profession.

(c) In terms of legal fees, an advocate is bound to comply with the Advocate's Remuneration Order which sets a scale for how advocates may charge clients.

Moreover, section 36 of the Advocates Act provides that it is an offence to undercut meaning the charging of fees below the scale set out in the Advocate's Remuneration Order. In the case of ~~see~~ Ahmednassir Abdikadir v National Bank of Kenya, it was held that undercutting was prohibited so as to maintain the dignity of the profession.

In charging a client, an advocate may also consider factors such as: (i) the level of

However, it is also not ethical to charge exorbitant fees as this hinders access to justice and may lead to the commercialization of the profession.

Other considerations an advocate takes into account when



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Questions ..... 1

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charging clients include:

- (i) the reputation and experience of the lawyer in the matter.
- (ii) the value of the subject matter of the case.
- (iii) ~~the time the workload required to~~
- (iii) the workload involved eg. research and preparation of documents.
- (iv) the relationship the advocate has with the client for example if the client has been a long time client you may give them a discount but within the confines of the Remuneration Order.

(d) ~~First~~ First and foremost, an advocate is an officer of the court as per section 55 of the Advocates Act. An advocate owes the following duties to the court:

- (i) A duty to uphold the interests of justice - In *Rondel v Worsley*, ~~here~~ it was held that an advocate owes an overriding duty to the court and to the interests of ~~the~~ justice. This was also held in the case of *Aaron Ringera v Paul Muire*. Therefore I cannot act for Mr. Firi.

Therefore, although I am obligated to act for Mr. Firi ~~as~~ by virtue of the cab rank rule, I must not act in a manner that undermines the rule of law and the attainment of justice.

- (ii) Also, I have a duty to ~~uphold~~ not mislead the court. By Mr. Firi wanting me to win at all costs and even fix the judge as well as make a deal with the opposing counsel, he is pushing me to commit an illegality. I must note that I have an overriding duty to the court and I am not ~~to~~ a hired gun. Therefore, I must argue the case on evidence available without fabricating evidence or misleading the court as held in *Abraham v Juroun* and also seen in the case of ~~see~~ *David Westerfield*. I must represent Mr. Firi within the confines of the law. Also a judge is bound to avoid conflict of interest and bias as provided by the Judicial Code of Conduct and Ethics. therefore Ceding to Mr. Firi's request ~~what~~ would there be against upholding the integrity of the court.

4

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(a) Courtroom etiquette refers to conduct that is courteous and generally regarded as good manners by virtue of common sense. One should carry themselves with general decency when in a courtroom.

(b)

(b) My friend should observe the following rules of etiquette:-

(i) Refer to the judge by the 'proper' title for example ~~'My Honour'~~ 'Your Honour' 'Your Lordship' & This is respectful to the presiding judge.

(ii) Bow when the judge/magistrate enters the courtroom. This is also a sign of respect and acknowledges the presence of the judge and signals the beginning of the court session.

(iii) Observe and keep time. This ensures that the court session runs smoothly. It also shows that you respect the court's time.

(iv) Do not leave the courtroom before the judge. It is courteous to let the judge leave the courtroom first when the session ends. You can then leave after him/her.

(v) Do not generally engage in unprofessional conduct such as chewing gum in court and coming to court drunk, among others.

(c) The rules of etiquette apply also during a virtual court session. This is because a court is not defined by the physical space in which a judge sits in but rather it is wherever a judge hears a matter which could include virtually. Therefore, lawyers are still bound to observe the same rules of etiquette.

Since Covid-19 began the courts have required advocates to maintain the same rules of etiquette by:

(i) Logging in to court from quiet places so as to clearly not address the court without background noise and distractions.

(ii) Advocates are to mute their microphones when they are not addressing the court.



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Questions ..... 2 .....

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(iii) Advocate must log into court sessions on time and have a duty to download the cause list in good time.

(iv) Advocate must still address the judges by their correct titles e.g. 'Your Honour' 'My Lord' etc.

10

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(a) I cannot help her give untruthful testimony on oath because ~~if~~ as an officer of the court, I have an overriding duty to the court and to the interests of justice as held in *Rondel v Worreley* and *Aaron Ringera v Paul Muite*. Also, I am under a duty to ~~not~~ mislead the court by falsifying evidence as held in *Abraham v Justsun*. I am under a duty to argue the case ~~but~~ within the confines of the law, to the best of my ability.

(b) The first step I should take is to advise her that I have ~~an~~ giving <sup>the</sup> untruthful testimony is illegal as it amounts to perjury. I should also advise her of my overriding duty to the court and to the interests of justice as held ~~to~~ in *Rondel v Worreley*. This duty overrides ~~her~~ my duty to her. If after this, she ~~is~~ still insistent on giving the untruthful testimony I am permitted to stop acting for her in the matter. This is based on my duty ~~not~~ to take part in an illegality where I have knowledge of it.

(c) Usually, I am obligated to defend/act for a client who can pay me based on the cab rank rule as held in the case of *Rondel v Worreley*. This is based on the right to access justice under Article 48 of the Constitution as well as a person's right to a lawyer. I may however refuse to act for a client for the following reasons:-

(i) Where a conflict of interest arises - This ~~could~~ mean I have an interest in the matter or where acting for a particular client would mean acting against a former client. In *Re-a-Firm of Solicitors*, the case of *Delphic Bank* as well as the case of *Uhuru Highway Development v Central Bank of Kenya*, it was held that the test for whether conflict of interest arises



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- is whether real mischief or real prejudice would in all human probability occur. if the advocate was allowed to act.
- (ii) Where I do not have enough time to take up a new matter as I am already handling several other matters.
- (iii) Where I do not possess the necessary competence in the particular field. I may instead refer the client to someone in that field.
- (iv) Where I may be called as a witness in the matter. as ~~the~~ held in the case of Francis Mugo.
- (v) I can also stop acting for a client who has paid me well where the client seeks to further an illegality ~~to~~ or commit an illegality in court, against my advice.
- (vi) I can also stop acting for a client where there has been a breakdown of trust and confidence between us thus making the advocate-client relationship unsustainable.

6

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(a) Duty to clients.

(i) An advocate owes a fiduciary duty to the client. This is because the advocate-client relationship is based on trust and confidence. This was held to be in the case of ~~Nocton v Arb~~ Nocton v Lord Ashburton. A lawyer must always act in the client's best interests.

✓ (ii) A lawyer owes a duty of care towards the client. This was held in the case of ~~Gran Gelato v Richcliff~~ Gran Gelato v Richcliff. This is based on the fact that a lawyer possesses special skill and knowledge and when he/she acts or gives advice, a person may rely on such advice ~~be~~ based on the knowledge the lawyer possesses. This duty of care was also discussed in Hedley Byrne v Heller & Partners.

(b) Duty to the professional colleagues.

(i) Duty to maintain ~~and~~ professional conduct in all dealings and to avoid professional misconduct. In Allison v General Medical Council it was held that professional misconduct is conduct that brings dishonour or disrepute to the profession. Therefore ~~by~~ if a lawyer engages in professional ~~&~~ misconduct, this may by extension, tarnish the image of colleagues since the image of the profession as a whole is harmed.

✓ (ii) Duty to be respectful to other colleagues. Lawyers should avoid power-play in the courtroom or other dealings and must remember that they are all members of the learned profession. Therefore, lawyers should use courteous language with one another and cooperate in ~~&~~ upholding the rule of law.

~~And (c)~~

(c) Duty to the public

(i) The duty to promote access to justice for the public as enshrined in Article 48 of the Constitution. Lawyers may do this by charging reasonable fees, offer ~~pro bono~~ pro bono services and



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promote alternative dispute resolution.

(ii) Duty to be a defender of human rights and promote the rule of law. Lawyers have a duty to alleviate human suffering by advocating for rights of the marginalized and other sections of the ~~perp~~ population that are disadvantaged.

2/2

(e) Duty to opposing ~~source~~ party

(i) Duty to not communicate with the opposing party without having their lawyer present. This is to ensure the rights of the opposing party are respected and to also ensure the advocate does not interfere with the opposing party.

2/2

(ii) Duty to not embarrass the opposing party especially when they appear as witnesses during cross-examination. This ensures fairness is maintained in the courtroom.

08/10

9.5/10



(a) (i) Advocate Kula Yote.

~~A~~ - He committed professional misconduct when he did not pay the purchase price of Ksh. 40,000,000 to the vendor. This goes against the fiduciary duty owed to a client as ~~held~~ provided in the LSK Standards on Professional Practice and Ethical Conduct. He is under a duty to hold client money in trust for the client and to account for the money by rightfully paying it to the vendor.

~~He~~ - He also breached the duty of competence and diligence by acting negligently. He did so by not completing the sale transaction as required by law. This amounts to professional negligence. This duty of care is also imposed on him by the case of *Gran Gelato v Richcliff*.

~~(ii) Advocate Kunywa Mingi~~

~~- He breach his duty of competence and diligence by failing to appear in court~~

(ii) Advocate Kunywa Mingi

- He breached his duty of professionalism by failing to appear in court and failing to communicate with his client.

5/5 - He breached his duty of care towards the client by negligently omitting to disclose the dates for the case as well as prepare for the case in good time.

(iii) Advocate Sungura

- He breached the duty to account to his client for money held by ~~not~~ not paying the Ksh. 2,000,000 to the client.

- He has breached his duty to communicate with the client by not informing the client that the demand in the demand letter has been settled.



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(b) ~~The~~ The Advocates Disciplinary Committee is established under section 57 of the Advocates Act. It can receive ~~complaints~~ ~~from~~ forwarded to it by the Advocates Complaints Commission or lodged directly to it by a complainant.

Once a complaint is lodged, the Committee notifies the advocate against who the complaint has been made and gives them adequate time to prepare their defence.

Next, the committee hears the complainant and the advocate in question.

(c) The Advocates Disciplinary Committee can make the following orders:

- (i) Admonish the advocate in question.
- (ii) Suspend the advocate from practice for a period not exceeding five years.
- (iii) Strike the advocate's name off the Roll.
- (iv) Impose a fine of not exceeding ~~£~~ one million.
- (v) Order the advocate to compensate the complainant an amount not exceeding five million Kenya shillings.

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**COUNCIL OF LEGAL EDUCATION**  
**EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES**

UNIT CODE: 

A	T	P	1	0	5
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 SUBJECT/UNIT ..... PROFESSION ETHICS & PRACTICE

REGISTRATION NUMBER:

DATE: ..... 25<sup>th</sup> / 11 / 2021

**INSTRUCTIONS TO CANDIDATES**

1. Enter the Unit code, Subject of the Examination, Admission Number and Date in the spaces provided. The admission number should be as it appears on the Examination Card.
2. Do not write your name anywhere in this booklet.
3. Attempt each question on a fresh page of the booklet.
4. If an additional booklet is used, it MUST be fastened at the END of this booklet.
5. Insert in the column headed 'Question Number' the numbers of questions answered in the order in which you have attempted them.
6. Kindly ensure your handwriting is LEGIBLE.

Question Number	Examiner		Moderator		Quality Assurer	
	Mark	Initials	Mark	Initials	Mark	Initials
4	04	DN	4	DM		
5	03	DN	3	DM		
6	05	CO	5	DM		
3	06	CO	6	DM		
1	09	DN	9	DM		
<b>TOTAL MARKS</b>	27	CO	27	DM		



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Questions ..... 4a .....

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either margin

1 WHETHER I WOULD HELP MR CLEAN GIVE FALSE TESTIMONY  
ON OATH

As an Advocate of the High Court of Kenya I would not help Mr Clean give false testimony on oath because of the following Compelling reasons:

- (1) Standard 12 of the LSK Standards of Professional Practice and Ethical Conduct 2016 on Honesty.

All advocates are required to be honest which is a duty to the Court. Failure can lead to professional misconduct of an advocate as per Section 60 Advocates Act cap 16

2/2

- (2) ACCESSORY TO PERJURY

Perjury is an indictable offence under the penal code and assisting Mr Clean makes me an accessory. If found I could be liable for professional misconduct under Section 60 Advocates Act and lose my practicing certificate.

- (3) PROFESSIONAL MISCONDUCT

Section 60 Advocates Act provides for dishonourable behaviour of an advocate and the sanctions.



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either margin

Questions ..... 46 .....

Write on both sides of the paper

WHAT I WOULD DO IF MS CLEAN GIVES FALSE TESTIMONY  
In the event Ms Clean insists on giving false testimony to  
the court I would do the following:

(1) CEASE ACTING FOR THE CLIENT

1/2 (2) REPORT THE MATTER TO THE COURT AND TO THE LAW SOCIETY  
OF KENYA

(3) REPORT THE MATTER TO THE ETHICS AND ANTI-CORRUPTION  
COMMISSION



Write on both sides of the paper

Questions ..... 4C .....

Do not write  
either margin

Grounds TO MAKE ME CEASE ACTING FOR ME CLEAN

The following grounds would compel me to cease acting for me Clean even after being paid well:

(1) STANDARD 12 OF THE LAW SOCIETY OF KENYA STANDARDS OF PROFESSIONAL PRACTICE AND ETHICAL CONDUCT 2016 provides for an advocate to be honest and disclose any actions of crime or fraud.

SECTION 53 ADVOCATES ACT (Cap 16) Laws of Kenya provides for the Advocates disciplinary Commission which could prefer disciplinary action against me

(2) PROFESSIONAL MISCONDUCT under Section 60 Advocates Act would make me lose my practicing certificate if I continued was found out after investigations

(3) SECTION 134 (1) EVIDENCE ACT (Cap 80) Laws of Kenya allows an advocate to divulge information to the court if it is for furtherance of a crime or fraud.

(4) SECTION 55 ADVOCATES ACT (Cap 16) Laws of Kenya the L.C.K has standards if disobeyed could lead to disciplinary action

Section 56 ADVOCATES ACT (Cap 16) Laws of Kenya provides for the Sanctions of the Chief Justice or Judge the Advocates Complaints Commission which could prefer disciplinary action on me.



PURPOSE AND OBJECT OF ADVOCATES TRAINING PROGRAM

(1) INSTILL NECESSARY SKILLS and ~~provide~~ diligent advocates  
as provided by Standard 3 of the Standards of professional  
practice and Ethical Conduct of advocates

✓ 12

Y<sub>2</sub>

(2) STANDARDS IN QUALIFICATION

(3) PUBLIC INTEREST / SOCIETY

(4)



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Questions ..... 56 .....

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## PROFESSIONAL CHALLENGES YOUNG LAWYERS FACE IN KENYA LEGAL PRACTICE

(1) Advertising

(2) Undercutting

①

(3) CHAMPERTY

(4) Payment "IN KIND"

(5) SOCIAL MEDIA

(6) OUTSIDE BUSINESSES AND ENGAGEMENTS

(7) PROFESSIONAL UNDERTAKINGS

(8) DIVULGING PRIVILEGED INFORMATION

7  
Not clear  
really  
what  
student  
(candidate)  
mean

1/4



## How I would Tackle THE CHALLENGES

(1) Professional undertakings →

(2) Advocacy →

(3) Undercutting → prohibited by Rule 3 Advocates (Practice) Rules  
and Rule 5 Standards for professional practice and  
ethical conduct of advocates (COPPEE)

(4) Champerty →

(5) Payment in kind → payment in kind is prohibited under the  
Standards for professional practice and Ethical  
Conduct of advocates (COPPEE)

(6) Social media →

(7) Outside business and Engagements →

(8) Privileged Information →

07/10

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Questions ..... 6

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## 6(a) DUTY TO CLIENTS

(1) Fiduciary Duty → Rule 5 Standard of professional practice  
and Ethical Conduct of advocates

(2) Duty to be honest → Rule 12 SOPREC

(3) Duty not to divulge Confidential information → as provided by  
Section 134(1) Evidence Act cap 80

## 6(b) DUTY TO PROFESSIONAL COLLEAGUES

(1) Social media — not to libel other advocates on social  
media and chat app

(2) Duty not to advertise — Duty not to advertise as provided by  
the Advocate (Advertising and marketing) Rules 2006

(3) Duty to be honest — as provided by Standard 12 of the  
SOPREC.

## 6(c) DUTY TO COURT

(1) Duty to divulge crime →

(2) Duty to be honest → as provided by Rule 12 Standards of  
Practice and Ethical Conduct of Advocates (SOPREC)

(3) Unqualified persons → Section 31 prohibits employing unqualified  
persons as well as Section 39 Advocates  
Act Against



### 6(d) Duty to current public

① Social media →

see

② Fees →

③ Diligence →

### 6(e) Duty to opposing party

① Duty to be honest →

② professional undertakings →

see

③ outside business and engagements →

see

⑤

⑥



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Questions ..... 39

Do not write  
either marginINSTANCES OF PROFESSIONAL MISCONDUCT COMMITTED BY EACH  
OF THE THREE ADVOCATES

(1) Advocate Kula yoti.

(a) Dishonesty - ~~see~~

(b) Undercutting - ✓

(c) Failure to account - ✓

(2) Advocate Kungwa mingi.

(a) Failure to represent client - ✓

(b) Failure to inform client - ✓

(c) Lack of preparation - ~~see~~

(3) Advocate Sungura. 1.

(a) Dishonesty - ~~see~~

(b) Failure to inform client - ✓

(c) Fraud - ~~see~~



### DISCIPLINARY PROCEDURE

(1) Aggrieved party makes a complaint ✓

(2) Section 55 <sup>Advocates Act cap 16</sup> ~~Law Society of K~~ ✓

(3) Section 56 Advocates ACT cap 16 ✓



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Questions ..... 3c .....

Do not write  
either marginSANCTIONS FOR PROFESSIONAL MISCONDUCT

(1) Section 60 Advocates Act (Professional misconduct)

(2) Loss of practising certificate

(3) Liable in a civil claim to return money owed

(6)

OG



WHETHER OBSERVANCE OF PROFESSIONAL ETHICS IS A PRIORITY IN COVID-19 CHALLENGING TIMES

The observance of professional ethics during these health economic times is a priority because of the following reasons:

(1) Public Interest

(2) Consumer Rights

Article 46(1) Constitution of Kenya 2010 protects the public against provision of sub-standard goods and services

(3) Social Media

(4) Independence

(5) Confidential Information

(6) Conflict of Interest

In conclusion even if there is a lot of depression occasioned by the Covid-19 pandemic adhering to professional ethics is still essential.



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Questions ..... 16 .....

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WHETHER PHARMACEUTICAL PRODUCT TRADING IS A PROFESSION LIKE ANY OTHER AS DR. FISI CLAIMS

Pharmaceutical product trading is not a profession just like any other as Dr. Fisi contends because of the following reasons:

(1) Independence and Regulation

There exist set standards and laws regulating how drugs are to be dispensed to the public as well as regulating the conduct of health professionals.

(2) Fiduciary Duty

All members of the trade have a fiduciary duty to the client and the government.

(3) Conflict of Interest

(4) Accounts

Professionals in the trade are required to keep records and accounts.

(5) Honesty

(6) Confidential Information

In conclusion pharmaceutical product trading is a profession that has standards and regulation to ensure the public consumer rights are protected.

2/6



### PARAMETERS FOR CHARGING LEGAL FEES

There exist parameters restricting and regulating the asking of legal fees by an advocate. They include the following:

(1) Rule 3 Advocates (practice) Rules 1984 on under cutting prohibits charging for fees below the fees prescribed in the Advocate Remuneration Order

(2) The Advocate Remuneration Order

The Advocate Remuneration Order (ARO) gives guidance on the fees chargeable by an advocate.

1/6

(3) Chief Justice Mutunga Guidelines on Probono Services by Advocates

The former Chief Justice laid down rules to guide the charging of probono services and remuneration of an advocate in probono service by putting the cap at 30,000 KSh.

(4) Section 55 Advocates ACT cap 16

An advocate being a member of the Law Society of Kenya is under duty to follow all rules, regulations and laws regulating advocates or risk sanction by the L.S.K

(5) Section 60 Advocate ACT cap 16

provides for professional misconduct as a punishable act which deters an advocate from asking just for any amount from a client.

(6) Article 46(i) Constitution of Kenya 2010 provides for the Guardian rights of the public and the state has obligation to ensure all citizens get good services from advocates

In conclusion as an Advocate one does not have the leeway to charge as he or she likes due to existence of principles and standards in the legal profession.



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### ADVOCATE DUTY TO THE COURT

As an officer of the Court an advocate has the following duties to the Court:

#### (1) Duty to be honest

Standard 12 of the LK Standards of professional practice and Ethical conduct provides for an advocate to give true information to the court

4/4

#### (2) Duty to honour Court orders and Laws

As an officer of the Court, an advocate has the duty to follow the Law and adhere to the Law.

#### (3) Upholding Public Interest

Due to the existence of Consumer Rights for the public under Article 46(1) Constitution 2010, it is incumbent on the advocate to ensure the public gets justice as taxpayers.

In conclusion an Advocate has duty to the court and (4) Can lead to disciplinary actions in the event the advocate fails to follow laid down standards and principles

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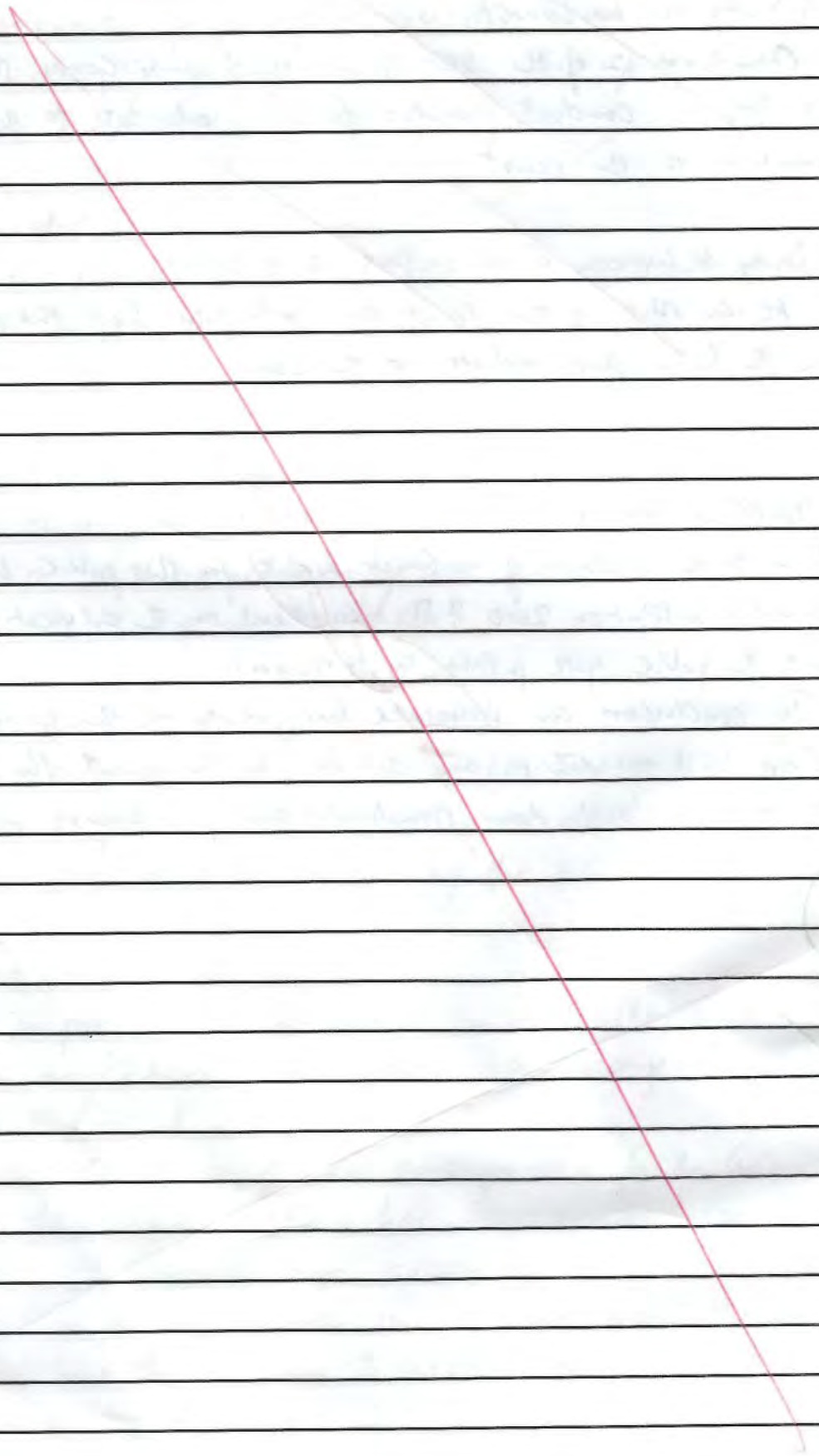
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**COUNCIL OF LEGAL EDUCATION.**



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

**ATP 107: CONVEYANCING**

**MONDAY 22<sup>ND</sup> NOVEMBER, 2021**

**DURATION: 3 HOURS**

**Instructions to Candidates:**

- (a) This paper contains **Four (4) printed pages** including the cover page, with a total of **Six questions**.
- (b) Candidates **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

Mr. Vincent Paul intends to purchase some property in Kajiado North. He instructs your law firm to represent him in the purchase. He also forwards you a copy of a Certificate of Lease in the name of the Vendor and a Letter of Offer stipulating the terms of the sale. Some of the terms of sale are as captured below: -

- i. Purchase Price - Kenya Shillings Ten million (Kshs. 10,000,000) payable in full on or before execution of the agreement for sale to the vendor's account details to be provided.
  - ii. Documents to be availed by the vendor/his Advocates. Copy of title, ID & PIN certificate for vendor's spouse and an original registry index map for the property.
  - iii. Completion period - 60 days from the date of execution of the agreement for sale.
- a) You are averse to proceeding with the stated mode of payment. Guided by the LSK Conditions of Sale, advise your client on the best practice to adopt with respect to payment of the purchase price as well as its significance. Your advice should be based on the protection mechanisms available under the law to safeguard a purchaser's interest in the property as well as the funds payable. (5 marks)
- b) Other than the completion documents to be prepared/procured by the purchaser's Advocates, identify at least five (5) other documents that the Vendor's Advocate must forward to your office to enable you progress the transaction. (5 marks)
- c) The Vendor's Advocates have compiled the requested documents. Your client requests to be guided on the next steps until the matter is concluded and interest in the property passes to the Purchaser. Discuss the steps required to facilitate the transfer of the property. (10 marks)

### QUESTION TWO

Miss Penda has been in search of an investment for her five (5) acre piece of land in Kiambu. Due to scarcity of land among other factors, she has opted to put up forty (40) apartments for sale. The title to the land however indicates that she can only put up a single dwelling house.

- a) Describe the steps that you as Miss Penda's Advocate would endeavour to take to ensure that your client obtains an approval for the construction of the 40 apartments. (2 marks)
- b) Penda has successfully sold a good number of units and the funds applied towards reduction of a loan obtained from Developers Bank for the construction. However, a few buyers have been unable to complete. The said buyers were being represented by Mr. Rama, a partner at BMC & Company Advocates (i.e. the Purchaser's Advocates). Mr. Rama had given you a professional undertaking for the balance of purchase price. He however claims that the buyers had promised to remit the cash to his client's account hence his subsequent professional undertaking to your firm so as to avoid cancellation of the sale by virtue of delay. You need a training manual for the purpose of training your firm's lawyers which captures the following pertinent issues relating to professional undertakings:
- i. The nature of a professional undertaking
  - ii. General principles of a professional undertaking
  - iii. Obligations imposed by a professional undertaking



- iv. When not to give a professional undertaking

Using the case study of BMC & Co. Advocates to cite examples where necessary, prepare the Training Manual. (4 marks)

- c) Discuss the consequence likely to befall Mr. Rama for dishonouring his undertaking. (4 marks)

### QUESTION THREE

- a) Mkulima House Ltd have given a lease to Bidii bank. Due to unforeseen circumstances, Bidii bank wishes to discontinue with the lease. The bank had actually remitted its quarterly rent the previous week. The lessor has however objected to the option to opt out arguing that the lease didn't have a termination clause. Advise the bank on how to proceed. (4 marks)
- b) One of your clients wishes to appoint an Attorney to manage his properties, bank accounts, and virtually handle any other matter(s) that the donor would have handled in his personal capacity. Advise your client on the document you wish to prepare and draft the relevant document. (6 marks)

### QUESTION FOUR

You are a Pupil Master to Nani. You have prepared an invoice for Kshs. 240,000 for Stamp Duty payable by your client in the purchase of land.

- (a) Explain to Nani the steps taken to arrive at the stamp duty payable on a transfer of property in Kenya. (4 marks)
- (b) At some point before registration of the documents, but after payment of stamp duty, you are alerted that the transaction was fraudulent. The fraud was occasioned by the Seller's Advocate. Explain to Nani the remedy available to the client in relation to the stamp duty paid other than seeking redress in court. (4 marks)
- (c) As a Pupil Master, highlight the action(s) the Ministry of Lands and Physical Planning should take to reduce or eliminate such fraudulent transactions. (2 marks)

### QUESTION FIVE

Mr. and Mrs. Makini own property in Nairobi valued at Kshs. 50,000,000/-. They are in urgent need of a loan of Kshs. 20,000,000/-. Unfortunately, they owe Box Bank Kshs. 10,000,000/-. Box bank is willing to advance them only Kshs. 5,000,000/-. The couple approaches Tin Bank on the side. Tin Bank is willing to advance them Kshs. 30,000,000/- against their title which is at Box Bank as security for the Kshs. 10,000,000/- advanced to them.

- (a) What would be the nature of transaction(s) between Mr. and Mrs. Makini and the two banks? (2 marks)
- (b) Explain the step(s) and actions to be taken by:
- i) The Advocate acting for Box Bank
  - ii) The Advocate acting for Tin Bank
  - iii) The Advocate acting for Mr. & Mrs. Makini (4 marks)



- (c) The couple are unable to repay the loan advanced to them. What remedies does a bank have in such a case? (2 marks)
- (d) Explain the steps to be taken by the bank's Advocate in exercising the remedies (2 marks)

#### QUESTION SIX

Your client Makena seeks legal advice from you. She is taking a loan from Vuma Bank and has received a preliminary appraisal on which she qualifies for a Kshs. 5,000,000 loan to be repaid over 15 years. The only issue is that the bank requires a suitable security which it can hold as security for the loan. Makena has submitted 3 properties as follows: -

- i. Plot No 24 c Kayole Estate Nairobi. The plot was acquired on a Tenant Purchase Scheme arrangement with the then Nairobi City Council. She holds a rates booklet showing she owns the plot. Titles are yet to be issued for all residents in the estate.
- ii. Title No. Kajiado / Kisaju / 7000 which has been valued at a forced sale value of Kshs. 2,300,000.
- iii. Certificate of Lease for L.R. 19279 / 1800 Nairobi. The property is leasehold for 99 years from 1<sup>st</sup> January 1929 with annual rent of Kshs. 75.

Vuma bank has rejected the 1<sup>st</sup> and 3<sup>rd</sup> properties saying the Kayole property is not suitable for "perfection of the security" and that L.R 19279 / 1800 does not have a suitable tenure. Finally, the bank states that Kajiado / Kisaju / 7000 is insufficient considering its forced sale value.

Please advise Makena on the following: -

- a) Discuss the concept of perfection of security in relation to charges and explain to Makena why Plot 24c Kayole is not suitable for perfection of the security as indicated by the bank. (2 marks)
- b) Explain what the bank means by tenure with reference to L.R. 19279 /1800 and why the bank considers the tenure of the same unsuitable? (2 marks)
- c) Advise Makena on what process she can undertake to cure the issue of unsuitability of tenure. (2 marks)
- d) With reference to statutory provisions, briefly explain: -
  - i. The concept of forced sale in relation of charges. (2 mark)
  - ii. Why the bank considers Makena's property Kajiado/Kisaju/7000 insufficient as security for the loan. (2 marks)



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**COUNCIL OF LEGAL EDUCATION**  
**EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES**

UNIT CODE: 

A	T	P	1	0	7
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 SUBJECT/UNIT ..... *Conveyancing* .....

REGISTRATION NUMBER:  DATE: ..... *22-11-2021* .....

**INSTRUCTIONS TO CANDIDATES**

1. Enter the Unit code, Subject of the Examination, Admission Number and Date in the spaces provided. The admission number should be as it appears on the Examination Card.
2. Do not write your name anywhere in this booklet.
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6. Kindly ensure your handwriting is LEGIBLE.

Question Number	Examiner		Moderator <i>ESD</i>		Quality Assurer	
	Mark	Initials	Mark	Initials	Mark	Initials
<i>1</i>	<i>11</i>	<i>E-M.</i>	<i>14</i>			
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<i>5</i>	<i>10</i>	<i>AM</i>	<i>10</i>			
<i>6</i>	<i>9</i>	<i>AM</i>	<i>09</i>			
<del><i>2</i></del>	<del><i>07</i></del>	<del><i>A.M.</i></del>	<del><i>07</i></del>			
<b>TOTAL MARKS</b>	<i>37</i>	<i>44</i>	<i>44</i>			



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either margin

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(a) As guided by the LSK Conditions of Sale the best practice to adopt with respect to payment of the purchase price is to make an initial deposit amounting to ten percent (10%) of the purchase price to be deposited with the vendor's advocate. An agreement for sale is only executory and does not confer ownership. Ownership is transferred only after all the necessary consents have been obtained and the transfer documents have been registered then the purchaser is under the obligation to make full payment of the purchase price. The completion period is significant in safeguarding the purchaser's interest in the property as it is during this time that due diligence is conducted. During the completion period the vendor has a duty to ensure they discharge all encumbrances over the land and ensure that all the land rates and rent are paid. Should the vendor fail to meet their obligations within the completion period the purchaser can issue a completion notice to the offending party. The LSK Conditions of Sale provides for a twenty one (21) day notice period which upon lapsing the vendor being the offending party, is compelled to refund the deposit for breach of contract. Additionally the purchaser may request the vendor's advocate to give a professional undertaking over the transfer of the interest in the property to the purchaser. Whereby the purchaser decides to pay the purchase price in full before the transfer has been duly registered, sections 71-74 of the Land Registration Act allows for any person with an interest in a property to register a caution as against the title of the property. This prevents the vendor from otherwise disposing of the property without the knowledge of the purchaser who placed the caution.

83

- (b) - original title - statutory consents e.g. NEMA, KCAA, KANHA, Railways  
 - spousal consent - stamp duty valuation and receipt  
 - rent clearance certificate - capital gains tax receipt  
 - rates clearance certificate - transfer document in triplicate  
 - Land control board consent - three passport photos of vendor  
 - County land management board consent - consent of the Commissioner of lands

85



(c)

The first step would be to receive instructions from the purchaser and agreeing on legal fees. An engagement letter is then executed for you to act for them as your client.

Next you receive the documents from the vendor and their advocate.

Using the copy of the title one can identify the property so as to conduct due diligence. Engage the services of a valuer and surveyor for a physical site visit together with the client. Look for defects in the property, confirm boundaries, location of property, size of property and if it contains any fixtures or fittings. Confirm also whether or not property is vacant and if occupied confirm if tenants will need to be issued with a notice to vacate.

Obtain a valuation report from government valuer to ascertain if the purchase price is fair as per its market value.

After physical search conduct a personal search at the lands registry, companies registry, probate registry and survey department upon application and payment of prescribed fee. One could also conduct a historical search from the parcel file or deed file. From the searches a diligent lawyer would make requisitions from the vendor's advocate and question any discrepancies they might have come across.

Upon confirming that the vendor is the bonafide owner and that the property is suitable I would amend the agreement for sale so as to have terms and conditions favourable to the purchaser's interest.

Once we can agree on an agreement for sale we can engross the same, have it executed by both parties, verify and attest to the execution. I confirm my client has enough funds to purchase property and request them deposit the monies in the client account. I would then pay ten percent of the purchase price to the Vendor's advocate's account.

Once I receive the transfer forms from the vendor's advocate I ensure they are duly filled before being executed. I would then have the transfer evaluated for stamp duty before payment then have the transfer registered ensuring compliance with all necessary consents. Consents required include spousal consent, land control board consent, among others. I would also confirm that should there be a



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change in user then the same is approved. I would also confirm that there are no encumbrances over the land and where present then a discharge be procured. Upon registration of the transfer I will obtain a new title over the land and do a search to confirm that the property is indeed under the name of the purchaser. Once I have confirmed the new ownership I will release the balance of the purchase price to the vendor's advocate. I will account for the money received to the purchaser and upon payment of my legal fees I will release the title to the new owner.

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Total 11



(a)

The Land Act and Land Registration Act provides for periodic leases. Whereby the lease does not specifically provide for a lease term then the lease is only valid until when the period a tenant normally pays rent the rent falls due. The bank should give a notice period of at least one month to lessor of their intention to terminate the lease.

Should the lessor insist on enforcing the lease terms beyond the notice period the bank should move to court to seek orders for the rescission of lease contract, specific performance compelling lessor to terminate lease and pay any dues; and damages for any loss the bank suffer as a result of lessor refusing to terminate lease.

(b)

### POWER OF ATTORNEY

This POWER OF ATTORNEY is hereby made by DEED on the 22<sup>nd</sup> day of November two thousand and twenty one as between MIKE SONKO of P.O. Box 247 Nairobi, in the Republic of Kenya, hereinafter referred to as (the "Donor"), and CECIL MILLER of P.O. Box 330 Nairobi, in the Republic of Kenya (the "Attorney") and is agreed and executed as follows:

#### 1. Donation

The Donor voluntarily authorizes the Attorney to act for, speak on behalf of, represent and perform any act or omission that is in the best interest of the Donor in accordance to the powers of this deed.

#### 2. Security

The Donor authorizes the Attorney in respect of bank account number 0722525254 and bank account number 0726920350 held in Pesakubwa Bank (the "Bank") to make payments into, with drawings out of and draw cheques from said accounts that ~~he~~ the donor would otherwise operate in his personal capacity.



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Questions .....

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either margin

The Donor authorizes the Attorney to deal with, dispose of or transact any transactions regarding properties LR No 2021/2022 and LR number 047/0016 in so far as any interest over the land belongs to the Donor.

### 3. Ratification

The Donor ratifies any action or omission of the Attorney and any action or omission taken by the Attorney in the performance of their obligations from this deed are deemed to be ratified by the Donor.

### 4. Irrevocability.

This deed shall not be revoked unless with the consent of the Attorney. It shall not be revoked by the Donor's death, incapacity or bankruptcy.

### 5. Governing law

This Power of Attorney is governed by the laws of the Republic of Kenya

IN WITNESS THEREOF:

SIGNED SEALED AND DELIVERED

~~MIKE SONKO~~  
MIKE SONKO  
265451189

SIGNED SEALED AND DELIVERED

~~CECIL MILLER~~  
CECIL MILLER  
P.No15/2022

Drawn ~~and~~ by  
Wakili Bora Advocates  
P.O Box 254 - 00100  
info@wakili.com

Total 07

07/10



(a)

Mr and Mrs. Makini could either opt to have a further charge registered as against their title to receive a second loan from Box Bank or they could request an undertaking from Tin Bank for the loan amount so they procure a discharge of the 20,000,000 charge and then charge the 30,000,000 loan in favour of Tin Bank.

b)

i) Request a letter of offer from Tin Bank for the bank facility.

Request a professional undertaking from Tin Bank's advocates

Do a discharge of charge

Upon receiving payment of loan principle, interest and fees, I release the title to Tin Bank

ii) Prepare a letter of offer for the bank facility

Draft and execute a professional undertaking for the payment of funds

Conduct a search to ensure title is free of encumbrances

Follow up on the disbursement of the bank loan

Obtain title documents from Box Bank

Register a charge over the title

Conduct search to confirm registration of charge

iii) Execute the letter of offer

Follow up on disbursement of loans

Make payments of loan, interest and fees

Conduct search to ensure they are legal owners of title

Provide any documentation requested by either bank

c)

Bank can exercise its right of lien and retain possession of the title documents.

Upon following legal procedure the bank can exercise its statutory power of sale.



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(d)

Upon lapse of the repayment period the bank may choose to offset some of the monies owed from any money left in the accounts held by the bank for the Muanikis.

If there is still a balance left then bank is to give them ~~not~~ written notice of their intention to exercise their statutory power of sale. The bank then allows for a notice period of at least ninety (90) days. The bank hires the services of a registered auctioneer.

Auctioneer place a public advertisement informing the general public of the time and place of auction as well as a reserve price.

Public auction is conducted and property sold to highest bidder. Transfer of property to the new owners is registered.

Total 10



a)

Perfection of security in relation to charges is whereby the owner of a registered title of land uses the title as to secure a facility. The person or institution advancing the owner the money would then register their interest over the land under the title at Registry. The charge acts as an encumbrance thus securing the chargor's interest as no disposition of the land can take place without the consent of the chargor. Plot 24c Kuyila is not suitable as the title is yet to be issued thus a charge cannot be registered as against a non-existent title.

b)

Tenure with regard to leasehold property is the period in time which the owner of the leasehold interest, the lessee, enjoys possession and ownership of the land. Once the leasehold tenure expires then reversionary interest goes back to the head lessor. In the case of L.R. 19279/1800 the remainder of the tenure would be seven (7) years before it reverts while the loan repayment period is fifteen (15) years thus bank is not assured of realization of their security should Makena fail in her loan repayments past the seven year mark.

c)

Makena should pay all outstanding rates and rent arrears then obtain a rates and rent clearance certificate. Attach those to the original title document, pay the prescribed fee and apply for an extension or renewal of lease.

d)

i) The Land Act and Land Registration Act provide for a statutory power of sale to chargor even the chargee's interest in property. Where land has been used as security or collateral to secure a loan whereby they are unable to meet repayment obligations then the chargor can after a notice period seek the services of an auctioneer.



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Upon the ~~the~~ strike of the auctioneer hammer/gavel then the property is sold to the highest bidder. The chargee loses ownership of said property and the price sold, which is usually less than market price, is not determined by chargee but rather on how the auction was conducted. This price fetched at auction is what is referred to as forced sale value.

ii) The property Kajialo/Kisaju/700 fetched a forced sale value that is lower than the loan amount she qualifies for thus cannot act as sufficient security as the bank will not be able to realize the full amount they will loan plus interest and fees.

Total 09



d)

Make application to county physical planning office requesting change of use. (1)

Obtain consent of the County Land Management Board (1)

Obtain Land Control Board consent

Conduct an environmental impact assessment

b)

A professional undertaking is a formal pledge to perform a certain action or refrain from certain actions. (1)

A professional undertaking from one advocate to another is taken very seriously and failure to perform obligations in an undertaking can lead to disciplinary action as well as liability.

A professional undertaking should only be done if an advocate has taken out professional indemnity insurance and valid practising certificate. (1)

One should not make a professional undertaking with regards to a client unless the client has proven clearly and beyond any doubt their capacity and willingness to perform said actions. (1)

c)

Mr Rama faces disciplinary action before advocates disciplinary tribunal (1)

Mr Rama can be sued for ~~pro~~ negligence (1)

Mr Rama can be struck off the roll of advocates (1)

Total 07

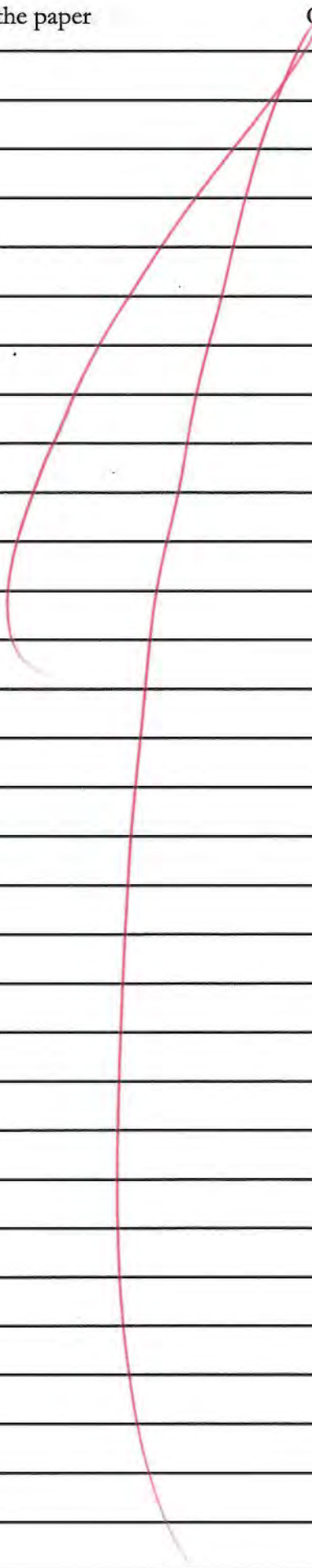
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**COUNCIL OF LEGAL EDUCATION**  
**EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES**

UNIT CODE: 

A	T	P	I	0	7
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 SUBJECT/UNIT ..... CONVEYANCING .....

REGISTRATION NUMBER:  

DATE: ..... 22<sup>nd</sup> NOVEMBER 2021 .....

**INSTRUCTIONS TO CANDIDATES**

1. Enter the Unit code, Subject of the Examination, Admission Number and Date in the spaces provided. The admission number should be as it appears on the Examination Card.
2. Do not write your name anywhere in this booklet.
3. Attempt each question on a fresh page of the booklet.
4. If an additional booklet is used, it **MUST** be fastened at the **END** of this booklet.
5. Insert in the column headed 'Question Number' the numbers of questions answered in the order in which you have attempted them.
6. Kindly ensure your handwriting is **LEGIBLE**.

Question Number	Examiner		Moderator <u>FOO</u>		Quality Assurer	
	Mark	Initials	Mark	Initials	Mark	Initials
Q 1	05	EM	05			
Q 2	01	AM	04			
Q 5	0	MM	00			
<b>TOTAL MARKS</b>	06		00			



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Questions ..... ONE (b) .....

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To be able to the law firm representing Mr. Vincent Paul; the purchaser the vendor's advocate must forward the following documents -

1. A copy of the title deed ~~or~~ an abstract of the title deed which entails detailed report on the land, ownership of the land by the vendor, location of the land and its boundaries.
2. Since the terms of sale captures the purchase price of the property to be payable in full on or before execution of the agreement of sale; The vendor's advocate must forward proof of payment or intended payment method that would be used at the sale of the property.

This will include the name, receipt (issued on payment) and if the vendor is using a bank; then the Name, Bank name, Account number and Bank branch must be indicated.

3. The vendor's advocate must also provide a KRA certificate of the vendor containing the KRA pin and all subsequent debits.
4. Three valid passport sized photos of the vendor must also be provided in an official manner.
5. The other document needed will be one indicating any Rent and Rates pertaining to the property.

All these documents must be a true representation of both the property and the vendor as the owner of the said property. They must all be free of fraud or defect as such would be grounds to the breach of the Sale agreement.



After receiving the vendor's compiled documents, the next cause of action will be to conduct a search of the property.

In the search, a representative of the registrar's office will physically go to the said property in Kajiado North. They will carry a map of the said property and ensure that the boundaries are set correctly. The boundaries are usually mainly set out by beacons. This is to ensure the measurements of the said property are correct on the ground and also correctly recorded in the Lands Registry. The representative will also value the land and give a detailed report of the same. This will aid the purchaser to be informed on the best value price of the property before purchase.

As the law firm representing the purchaser, we must ensure that the property in question is free from any encumbrances. This would entail any fixtures or fittings on the property not listed by the vendor's Advocate, Any tenants or illegal squatters on the property or any incorrect documents issued by the vendor's Advocates.

The said property must also be well recorded in the Lands Registry and the correct measurements set. The vendor should also be the legal owner of the said property and all payments due from the vendor cleared before the sale of land.

When all these requirements are met to the satisfaction of the Vendor and his Advocate and the purchaser and his Advocate, then a Sale of Agreement is drafted.

The Sale of Agreement will include -

The names of the purchaser and the Vendor together with their representors; in this case the Advocates.

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Questions ..... ONE C .....

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2. The details of the property on sale listing its registration number, location and boundaries / measurements
3. The intention of the vendor to sell the said property and the intention of the purchaser to buy the said property.
4. The LSK conditions of sale and the capacity of the parties to be bound legally by those conditions
5. Method of payment agreed upon by both parties. Where a bank is involved, the agreement must include the -
  - a) Name
  - b) Account Number
  - c) Bank name
  - d) Bank branch. - And must include purchase price
6. Encumbrances; where a course of action will be followed when there is breach of contract. This would include Arbitration or court proceedings.
7. A list of the required documents provided by the vendor; i.e. Title deed or abstract, KRA pin etc.
8. Special conditions that states that time would be of the essence and all documents be in writing.
9. Signatures by both the Vendor and the purchaser and witnessed.

After all parties are in compliance with the sale agreement and the purchase price received by the Vendor, then a form will be filled at the Land Registrar requesting transfer of ownership. This file will be attached with the sale agreement and the original title deed. After Approval Land Registration board, a new title deed will be issued at payment of stamp duty and the new title deed indicating the purchaser as the new owner of the said property.



A)  
According to the current status of Miss Penda's land, the intended use is only to put up a single dwelling house as opposed to forty (40) apartments for sale. Her best cause of action would be to file for a change of user.

First, she must fill a PPA 1 form requesting for change of user. This would in turn give her permission to put up multiple apartments for sale as opposed to the required single dwelling.

A notice will then be passed on to two national wide news papers and radio stations inviting the public to give objection to this permission being granted; if any. Miss Penda also has to show proof that the desired change of user would not cause any neighbourhood disturbance. The land must also be free from any pending rates and duties owed to it.

When all conditions are met without any discrepancies by the public, the form and reports will go through a committee and upon their certification will issue form PPA 2 allowing for the change of user.

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Questions ..... FIVE A & B .....

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A) Currently Mr. and Mrs. Makini owe Box Bank Ksh. 10,000,000/- however the bank is willing to advance them a total of Ksh. 5,000,000/-. In turn, Mr. and Mrs. Makini will owe Box Bank a total of Ksh 15,000,000/-. Box Bank will use their current property in Nairobi as collateral which is valued at Ksh. 50,000,000/-.

- With Tin Bank, Mr. and Mrs. Makini will receive an advance of Ksh. 30,000,000/-. They too are will use the title of the property currently held at Box Bank as security whereas Mr. and Mrs. Makini will advance Ksh 10,000,000/- to Tin Bank.

Therefore Mr. and Mrs. Makini will have used their property valued at Ksh 50,000,000/- as security to pay of a sum of 15,000,000/- to Box Bank and a sum of Ksh 20,000,000/- to Tin Bank.

B) i) The Advocate acting for Box Bank will draft a document to Mr. and Mrs. Makini indicating the amount owed to the bank and include a term to hold the title of the property until the debt is fully paid and in the stipulated time. The document will also include Tin Bank as an interested party to the agreement. He will also send a document to Tin Bank indicating the property title and the corresponding value due to them.

ii) Tin Banks Advocate will also issue a document to Mr. & Mrs. Makini on the terms of the loan



indicating the amount and expected due date. It will also reflect the 10,000,000/- advanced to them. He will also issue a document to Box Bank requesting for joint attachment to the property currently held by Box Bank in form of the title. This will also include the amount due to be recovered from such property.

iii) Mr. & Mrs. Makini's Advocate will also issue two documents. The one to Box Bank will be to indicate the money owed and acknowledgment that the title to the property in Nairobi is held by the Bank as security. To Tin Bank; the Advocate will state the Ksh. 10,000,000 issued to them for partial security for the loan of Ksh. 30,000,000/-. The other part of security would be tied to the property owners' parcel in Nairobi; the title of which is currently held by Box Bank.



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Questions FIVE C, DDo not write in  
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C) A bank shall at this case have authority to the title used as security. If the title is still owned by the owner; where the bank only has a copy; the Bank's Advocate can file a petition to court to cease the property. This will restrain the owner from either re-selling or damaging the property under security. The Bank can regain damages on breach of contract by the couple.

D) File a petition to cease the property used as security.  
Involve auctioneers at the aim of seeking damages to repay amount owed.  
Serve the couple's Advocate with document of breach of contract and stipulate a time limit for response before seeking court proceedings.  
Offer an arbitration sitting to clear the dispute outside court or otherwise face court case.

6/2/00



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Questions .....

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