

COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

ATP 108: COMMERCIAL TRANSACTIONS

THURSDAY 22ND NOVEMBER, 2012

DURATION: 3 HOURS

Instructions to Candidates

- (a) Candidates should attempt **FOUR** questions
- (b) Answer **one question from each section** and a **fourth one from any of the three sections**
- (c) All questions carry **15 marks** each
- (d) Marks may be lost for illegibility

SECTION ONE

1. (a) Briefly outline the ways in which agency may be terminated. **(6 marks)**
- (b) What is a power of attorney? **(4 marks)**
- (c) Outline in detail the factors which you must take into account when preparing a power of attorney for an individual. **(5 marks)**
2. (a) State the essential characteristics of a negotiable instrument and explain whether and in what ways, if any, the electronic digital variants thereof satisfy the requirements of the existing relevant law. **(7 marks)**
- (b) Mr. Majani and his wife Maria opened a joint trust bank account for their minor son, Mututho. Both of them are mandatory signatories. While her husband was away overseas, she decided to pay off her sister's hospitalization bill following a domestic fight between the sister and her "come-we-stay" boyfriend. She persuaded Mututho to sign, "on behalf and as agent of your father" a cheque for Kshs.450,000/- drawn on the trust account, explaining that, after all, the money was his (Mututho's). In any case Kshs.50,000/- of this cheque, she said, was to go towards his college-related expenses, too.
- Three months after his return to the country, Mr. Majani noticed on bank statement posted to him, that there was a withdrawal of Kshs.450,000/- from the trust bank account, which he was not aware of. He immediately raised this with the bank. The bank explained that they paid the cheque to his wife because it had what looked like his signature. Mr. Majani insists that the bank must refund the amount into the trust account. The bank contests this, saying that the proceeds were, in any case, used by his family when in need.
- He seeks your advice, adding that he completely repudiates the "unjustified and fraudulent" action and trickery of his wife. **(8 marks)**

SECTION TWO

3. (a) Distinguish the Objects of a company from its Articles of Association. **(4 marks)**
- (b) Citing relevant cases, explain the common law duties of directors of a company in Kenya. **(3 marks)**
- (c) Directors of Amuka Twende, a publicly listed company have approached you on concerns they have on statutory requirements of the Capital Markets Authority and Company Law in Kenya. Their concerns are informed by the recent court ruling in the matter of CMC Motors (Kenya) Ltd where some long serving and well known directors were barred from holding board positions in any publicly listed company in Kenya.

Advise the directors on at least five principles of corporate governance in Kenya as established in accordance with the guidelines of Centre for Corporate Governance or OECD principles of governance. **(8 marks)**

4. Mr. Fanya Kazi, a large-scale farmer, wishes to secure a big loan from a finance corporation for further development of his business. He informs you that although he owns the current land on which he carries on farming and animal husbandry, it is charged to a bank, which has kept his title deed as security for another loan he had taken earlier.

He has several barns in the farm in which he keeps thousands of tons and bags of various crops as well as hundreds of ruminants. He owns ten tractors and three combine harvesters. He confides in you, too, that he has some cash in the bank to finance part of the development plan.

(a) Advise Mr. Fanya Kazi how else, if at all, he may use his possessions as collateral to obtain a loan in the absence of land. **(5 marks)**

(b) Explain to him by way of a brief draft the requirements and essential contents of any document he may have to execute in favour of the finance corporation. **(5 marks)**

(c) Thomas, a well-known businessman lent out a motor car to his lady friend, Ms Clara, a student mother of their kindergarten going son to facilitate her transportation.

On the sides, however, Clara is in a secret supplies business partnership with a college-mate, Mr. Fulani. She routinely drives the car, with their business name "Besto & Co." pasted on the side of the car, whenever she goes to supply goods to various customers in the city

Mr. Thomas has since learnt the truth about the use of his car following a court order vesting the business name's property in one Mr. Pole, and that his car has been impounded by the said Pole.

Advise Mr. Thomas, stating the legal principles involved. **(5 marks)**

SECTION THREE

5. (a) "A Hire Purchase agreement is described as a hybrid form of contract that is neither a simple bailment or a Contract of Sale but combines both." Discuss this statement outlining the essential elements of each category of contract. **(5 marks)**

(b) The Hire Purchase Act, 2010, is categorical regarding:

- (i) The consequences of non-registration of hire purchase agreements;
- (ii) Provisions or requirements that must be in an agreement; and
- (iii) Provisions deemed void at law or excluded if contained in an agreement.

Draft a hire purchase agreement reflecting the above provisions. Remember to highlight each of the above provisions as appropriate. **(10 marks)**

6. (a) Discuss and explain the place of implied and fundamental terms under Sections 12-17 of the Sale of Goods Act, Cap.31 of the Laws of Kenya.

(6 marks)

(b) Under Section 10 of the Sale of Goods Act, Supra, the price may, among others, be "left to be fixed in a manner thereby agreed."

Madame Midosi, a prominent businesswoman engaged in sale of goods, has noted the problem with this provision and seeks your advice as to the meaning and potential challenge with the provision.

Advise her and make proposals on how she may avoid possible pitfalls that may arise from this ambiguous provision in practice.

(9 marks)
