

COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

ATP 105: PROFESSIONAL ETHICS & PRACTICE

MONDAY 21ST NOVEMBER, 2011

DURATION: 3 HOURS

Instructions to Candidates

- (a) Answer Question ONE and any other THREE Questions
- (b) All questions carry 15 marks each
- (c) Marks may be lost for illegibility

PLEASE TURN OVER

1. Kero disagrees with his advocates Melito & Co. (Melito) and instructs Bwibo & Company Advocates (Bwibo) to immediately take over the conduct of his suit, (a claim for general damages against Banco Limited following a road traffic accident in which Kero sustained serious bodily injuries). Kero is unable to immediately raise the sum of Kshs.100, 000 due to Melito as legal fees and convinces Bwibo to pay Melito on his behalf, subject to the sum attracting interest at 20%. The sum shall be recovered from the general damages ultimately awarded in the suit. Upon conclusion of the suit Bwibo recovers the sum lent to Kero, as well as his legal fees for services rendered in the matter. Kero, dissatisfied with the statement of account given by Bwibo, files an originating summons in the High Court seeking orders that Bwibo deposits the decretal sum recovered into court. An interim order is granted to the effect that if Bwibo does not deposit the sum into court, Bwibo will be committed to civil jail. Bwibo immediately files an application for stay of execution and secures the requisite orders. Kero in turn files a complaint with the Advocates Complaints Commission which entertains the complaint and refers it to the Disciplinary Committee. The DC makes orders adverse against Bwibo as follows:
 - (a) "The Advocate is to refund the sum of Kshs.527, 385 together with interest at 12% with effect from 9th July, 2004 to the date of full payment to the complainant within 90 days and in default, he will stand suspended from practice for a period of three months (as) from the date of default;
 - (b) The advocate is to pay a fine of Kshs.30, 000 to the Law Society of Kenya;
 - (c) The Advocate is to pay costs of Kshs.10, 000, each to the Law Society of Kenya and the Complaints Commission;
 - (d) The matter be mentioned on 12th April, 2010 to confirm compliance."

Bwibo files an application seeking to bring into the High Court and to quash the decision of the Disciplinary Committee on the basis that the decision in question entailed excess of jurisdiction for "the respondent being an inferior tribunal should not proceed with a matter pending in the High Court and with respect to which the High Court had already issued orders of stay in favour of Bwibo. Bwibo avers that he was not accorded a fair hearing before the Disciplinary Committee and that the latter had acted in contravention of the rules of natural justice as the proceedings before the Disciplinary Committee showed that no hearing at all took place; no evidence was taken, and no submissions were made. Bwibo contends that his affidavit which was indeed placed before the Disciplinary Committee was not considered and that the Disciplinary Committee had, "proceeded as if there was no affidavit by Bwibo." Bwibo submitted that the proceedings before the Disciplinary Committee showed error on the face of the record: "the record is not consistent and does not show what exactly took place;" it does not show when the complainant was heard, and what exhibits if any, were considered; and it appears that "the panel that gave the judgement is not the one that heard the matter if any hearing took place at all;" "the panel that passed the sentence is also not the same as the previous one."

The Secretary of the Law Society deposed that the Disciplinary Committee received a complaint from the Complaints Commission, regarding the conduct of Bwibo as an advocate. The Commission raised a complaint about the professional conduct of Bwibo and lodged *Disciplinary Cause No. 114 of 2008*, preferring charges against Bwibo. The Secretary of the Law Society deposed that the Complaints Commission had written to and communicated the particulars of the complaint to the applicant (by letters dated 20th February, 2008), but no response was received. He deposed that the date *18th September, 2008* was fixed for plea-taking and Bwibo was served with plea notice, but he failed to turn up; and as a result, the Disciplinary

Committee entered a plea of *not guilty*, and ordered that Bwibo files a replying affidavit and a statement of account within 21 days and the matter be set down for hearing on *3rd November, 2008*. Bwibo was "dully served with the hearing notice, the complaint and all other pleadings in the complaint before the Disciplinary Committee." It was deponed that on hearing day, *3rd November, 2008* Bwibo did not turn up; and so, on the application of the Complaints Commission, the matter proceeded in his absence. The deponent deposes that it was well after the set judgement date, that Bwibo on *16th February, 2009* applied for arrest of judgement and asked the Disciplinary Committee to consider his affidavit before delivery of judgement. Judgement was not delivered on the scheduled date (*8th December, 2008*), but on *2nd April, 2009* and Bwibo was found guilty of the charges preferred against him. The deponent deposed that at the time of passing judgement by the respondent, Bwibo admitted that he "had not paid Kero the entire decretal amount and that Bwibo had informed the Disciplinary Committee that he needed time to sort out the same, and sought for time until *August, 2009*." The Disciplinary Committee, after entertaining Bwibo's plea "deferred sentencing until the end of *August 2009*;" and the Disciplinary Committee fixed the matter for mention on *9th September, 2009*. He deposed that when *9th September, 2009* came, Bwibo "fought for more time to file an affidavit to prove how the monies should have been paid;" and "the Disciplinary Committee indulged Bwibo with an order that he files a replying affidavit including the Court proceedings," and the matter was stood over for mention on *9th November, 2009*.

When *9th November, 2009* (the date of mention) came, Bwibo had *not* filed his affidavit, and the matter was stood over to *22nd February, 2010*, for *mitigation and sentence*. Bwibo who had been served with the mention date, *22nd February, 2010* failed to turn up and the Disciplinary Committee on that occasion, proceeded to pass sentence against Bwibo.

It was common ground that Bwibo had instructed an advocate to represent him before the Disciplinary Committee and this advocate swore an affidavit on *23rd March, 2010* carrying the following notable depositions:

- (i) "THAT I am on record for Bwibo the applicant herein, and I have on several occasions appeared on his behalf before the Disciplinary Committee.
- (ii) "THAT I recall sometime on *9th November, 2009* receiving an affidavit sworn by Bwibo dated *6th November, 2009* with instructions to present the same before the Disciplinary Committee.
- (iii) "THAT I do recall appearing before the Committee and presenting the same when the matter was called out.
- (iv) "THAT to the best of my knowledge the Disciplinary Committee did accept Bwibo's affidavit as part of the Bwibo's defence."

- i) What Ethical issues arise? **(6 marks)**
- ii) Write a detailed and well-reasoned ruling **(9 marks)**

2. After your grand admission party, you find these instructions at your desk at your new employer's offices, Messrs Biko & Company Advocates:

'Hey, Sani sorry I couldn't be there this morning as I have had to rush to Garissa. Hemed, a former colleague at Fisher's, suffered a massive stroke over the weekend. What a pity! Anyway, there are some urgent things that you need to do. First, Sally, a former client does not wish to pay our fees and so she has threatened us with a professional negligence suit. You know, one can never be absolutely safe in matters of practice so you just never know what she is likely to come up with. We have reached an agreement with her to write off the fees in exchange for her releasing any claims against us. Have Sally execute the usual standard discharge. My secretary Michael will assist you in this regard. Second, around noon grab the file with our public speeches and head down to the "Women and Progress" monthly luncheon and deliver our speech "How a Lawyer Can Protect You from Domestic Violence." After the speech, hang around and see if you can lure some prospective clients. If they are worried about the costs assure them that we will take a modest percentage of the sum finally awarded by court. Third, in our case for Jairo, extract some interim fees. His case has dragged on for quite a while and he might require an explanation from us. Oh well, just tell him that with the current backlog in our courts it is not possible for us to move the case forward faster. Fourth, there is that one page affidavit we filed in court in error yesterday. Have Kaibi, our court clerk, organize to pull out the document and replace with the correct version. And by the way, do not feel overwhelmed by all the tasks you need to execute. Have the pupils attend to and advise clients who visit us in our offices. It is amazing just how much one can achieve by harnessing this potential. Oh and by the way, assign someone to look through the schedule of the pending commissions. Premium Estate Agents must, particularly, be very unhappy with us considering all the business they have brought our way. We shall relax this weekend somewhat. Justice Bright has invited us to his house for a barbecue. I guess he will roast the succulent bull he received as a gift at the fund raiser for Pacho Welfare Society last week. You know, I have heard some colleagues complain that Justice Bright is ill tempered and discourteous towards them. Far from the truth! If you spare advocates the iron fist, they will just take you for granted. I am reminded, also, that Jessie, our former associate who joined the judiciary as a magistrate just 3 months ago, has been threatened with disciplinary proceedings. Do please give her some quick advice on the expected procedures. Oh well, see you later.'

- (a) What ethical issues arise in this narrative and how would you resolve them? **(12 marks)**
 (b) What would be your advice to Jessie? **(3 marks)**

3. As the elections for Chairman and Council of Law Society draw near, you receive a long email from Babito, a candidate for Chairman entitled 'My Vision for LSK'

'Dear Colleagues,

RE: BABITO: BID FOR CHAIRMANSHIP OF LSK

In the year 2009, I run for Council of LSK and, as you will recall, I lost by a few votes. I do think, though, that we have all learnt from our past mistakes and the hasty decisions made. The repercussions, though, are difficult to erase. The outgoing Council has performed dismally and sadly, it will take very hard work by all of us to restore LSK to its past glory. I am the woman for the job and I can assure you that I shall tirelessly nurture our gem and restore its gloss. You see, the problem with decision-making is the scattered membership of Council. By the way, there is such a critical mass of advocates in Nairobi that we do not need to argue with the rest of Kenya. This should, also, reduce the expenses of Council.

My desire and ambition is that this society shall remain the united force that it ought to be. I desire to carve a facilitative niche for the younger members of our profession. You are I am sure aware of the special challenges that beleaguer this valued number in our lot and I will be calling upon all of us to caucus and find out how the lawyers who are undergoing pupillage, holding over in law firms, and advocates newly employed or nascent in practice can better be facilitated to actualize some achievable goals. In this regard, the Young Lawyers' Committee should be re-launched and clear objectives pursued.

There are numerous challenges and concerns that members have continually informed me of. The practicing certificate has become such an expensive piece of paper that most advocates can barely afford to hold one. The litany of compliance requirements is overwhelming and we need to reduce these. During my tenure, practicing certificates shall be issued by Council within 7 days of lodging of applications. I personally do not understand why our members should be harassed in court merely because they delayed in renewing their practicing certificates by as few as 60 days.

Senior Counsels were last nominated in 2003. All of these are grey haired men – it is true there are no women Senior Counsel- and the young Counsel who are the majority are clearly discriminated against. I can assure you that with the extensive statutory power that is vested in the Chairman, the old order shall soon be wiped out. I will nominate new faces for the position during my tenure.

The Disciplinary Committee of the Law Society has arrogated itself powers that it does not legally possess. Have we forgotten that our members should not be harassed and harangued as has been the norm in recent years? Clients perennially owe us fees and the numerous other expenses we bear on their behalf yet the refrain is that lawyers are thieves, have failed to account for client's funds...huh! Please give us a break! With the 2012 general elections looming large, the legal fraternity must be a visible and constant presence!

Judges have also been harassing our members. You recall that just last week, Karaukee was locked up in the basement cells by Justice Jairus. Should we not declare three days of protest against the Judiciary and put a freeze to all attendances in court during that period? Who listens to advocates these days anyway and do we even have a voice in the judiciary?

I am persuaded that now more than ever, our society needs a man or woman at the helm, who will be sensitive to the needs and concerns of the society – a neutral voice that shall not be swayed by partisan politics either within the larger national constituency or the society itself.

Together, we shall have a memorable year ahead.

Does Babito's vision resonate with the expressed mission and vision (and more importantly, the mandate) of the Law Society and what ethical issues, if any, arise? **(15 marks)**

4. Sonia and Walia, sweethearts since high school and fondly referred to as 'SoWali' by their friends, are admitted as advocates of the High Court of Kenya, and come into some big money- a commission earned from securing representation for some 60 victims of a recent fire tragedy at the Kwao informal settlement. The corporation responsible for the accident settled the claims

through Kelly & Company Advocates and both budding advocates have earned a neat 10% of the general damages negotiated for the claimants, and all of this within five months of admission as advocates. Kelly, enthused by the industry of SoWali invites both counsel into partnership and the duo are ecstatic to be part of Kelly & SoWali Advocates. As limited partners the duo each makes a capital contribution of Kenya Shillings One Million. They also bring a new important client, 'Wa Bermuda,' an informal association of 500 stall owners of Bermuda Market who are facing imminent eviction by the City Council. The Chairperson and treasurer of Wa Bermuda regularly consult SoWali. Pursuant to the donor funded SME City Trust, the City Council proposes resettlement of 'Wa Bermuda' by granting each member a sum of Kshs.100, 000, which proposal is readily accepted by the chairperson and treasurer of Wa Bermuda. A consent judgement is quickly recorded in a suit earlier filed by 'Wa Bermuda.' Unfortunately, only 20 of the members accept settlement and the rest threaten to sue Kelly & SoWali for alleged breach of trust and 'corrupt dealing' by Kelly who apparently was responsible for drawing the trust deed of SME City Trust and also participated in the identification and evaluation of the beneficiaries of the trust. In the meanwhile, Kelly insists that a significant sum from the proceeds of the settlement sum be retained by the firm on the basis that SME City Trust had neglected to settle some fees for services rendered to the Trust. The nascent partnership is under serious strain as the discontented clients have already lodged a complaint with the Law Society. In addition, the dispute has attracted the attention of some mainstream dailies and the Law Society itself is very embarrassed by the negative publicity.

You are an ardent student of Professional Ethics and Practice and you have been requested to disaggregate and dissect the ethical issues that arise for presentation to your Firm. Please prepare a detailed write up specifying the redress and/ or liability of the respective parties.

(15 marks)

5. Consider the following hypothetical scenarios and give a brief reasoned opinion on the ethical and professional responsibility issues arising therefrom
 - (a) Sungura Mjanja is charged with the offense of stealing some Kshs.5,000,000 in cash. He has retained Wakili Shupavu & Co. Advocates to represent him. Wakili Shupavu & Co. Advocates have a client Mkristu Mwaminifu. Wakili Shupavu arranged a series of discussions with Sungura Mjanja to discuss the case. During one of the many discussion sessions in Wakili Shupavu's chambers, Mkristo Mwaminifu happened to be at the reception of Wakili Shupavu. He overheard Sungura Mjanja narrating a detailed account of how he (Sungura Mjanja) executed the theft. Mkristo Mwaminifu recorded the entire interview in his high end smart phone. He turned over the recording to the police who propose to use the recording as evidence in court in addition to calling Mkristo Mwaminifu as a witness. Wakili Shupavu protests against the use of the recording or the evidence of Mkristo Mwaminifu about the recorded discussion. **(3 marks)**
 - (b) Wakili Shupavu wrote a letter to his client Sungura Mjanja attaching a copy of Sungura's signed statement about the incident. By a strange twist of fate, the letter was addressed to the state counsel who is prosecuting the case. The state counsel is determined to use the copy of the statement as evidence against Sungura Mjanja and promptly gives Wakili Shupavu a notice to produce the original under section 68 of the Evidence Act. (Under section 68 the copy is admissible provided the notice to produce has been given). Though he agrees with the foregoing interpretation of section 68 Wakili Shupavu is sure he is still entitled to object to

the admissibility of the evidence on other grounds. He writes to the state counsel demanding an unconditional return of the signed statement and an assurance that the same will not be used against Sungura Mjanja. The State Counsel refuses to return the statement and insists he will use it in evidence in court. Wakili Shupavu considers the state counsel's conduct unbefitting of a member of the honourable profession of law. He commences disciplinary proceedings against the state counsel for professional misconduct. **(3 marks)**

(c) A former clerk of Wakili Shupavu former managed to remove a highly incriminating document from Sungura Mjanja's file which he turned over to the complainant in the case. The complainant turns over the document to the investigating officer who proposes to use the document as an exhibit in court. **(3 marks)**

(d) Sungura confided in Wakili Shupavu that he had hidden the proceeds of the crime in a secret bunker in his palatial tree cloistered villa in a leafy suburb in Nairobi but he proposes to move the proceeds to a safer location. The tape recording of this part of the conversation is hazy and the police are unable to identify the 'safer location.' Based on the information obtained from the recording the police demand that Wakili Shupavu disclose information that can be used to identify the 'safer location.' The police serve Wakili Shupavu with an appropriate notice under section 22 of the Police Act. Under section 22 the police are entitled to prefer charges against a person who deliberately withholds information that can help the police with the investigation of a crime. The police threaten to charge Wakili Shupavu under section 22 unless he discloses the information given to him by Sungura Mjanja about the 'safer location.' **(3 marks)**

(e) Sungura Mjanja is subsequently convicted of the offense he was charged with. He feels that Wakili Shupavu was incompetent in the conduct of the case. He also feels he was overcharged. After his release from jail he files a complaint against Wakili Shupavu for overcharging him and for incompetence. Wakili Shupavu proposes to use the information in Sungura Mjanja's file to defend himself against the allegations of overcharging and incompetence. He wants to use the information in the file to demonstrate that the conviction was well deserved. He produces the file during the disciplinary committee hearings. Sungura objects to the admissibility of the file on grounds of advocate client confidentiality. **(3 marks)**

6. Kipruto Wekesa was charged with the murder of one Njuguna Onyango. Okil Kamaloka has been nominated by the Registrar of the High Court to conduct a pauper brief for Kipruto. During an interview session Kipruto gives Okil Kamaloka his account of how Njuguna met his 'timely' death! He alleges, among other things that the deceased had violently attacked him with a Somali sword and that he (Kipruto) had acted in self-defence. He also alleged that he had given the Somali sword which the Njuguna had used to attack him to the arresting officer and the investigating officer and that the state counsel who was conducting the prosecution, says Kipruto, and they were deliberately withholding this vital evidence from the court. Kipruto also alleges that the investigating officer in the case was having an affair with his (Kipruto's) wife and that the prosecution was malicious in all respects. For good measure he also alleges that the trial magistrate had been seen with the complainant at the complainant's office in circumstances suggesting that the complainant may have been bribing the trial magistrate. Okil Kamaloka wants to take up the allegations against the investigating officer the state counsel and the trial

magistrate informally in chambers but Kipruto insists these are confidential communications which may only be used in court to cross examine the investigating officer during his and in support of a motion for both the trial magistrate and the state counsel to disqualify themselves from the case.

- (a) List the ethical and professional responsibility issues implicated in this hypothetical scenario noting to cite the applicable statutory provisions and case law. **(3 marks)**
- (b) Should Okil Kamaloka conduct the cross examination in the manner alleged and would you file the motions for disqualification? Give reasons. **(2 marks)**
- (c) Okil Kamaloka actually declined to file the motions to disqualify and to cross-examine the investigating officer as instructed. Consequently Kipruto was convicted. Subsequently evidence was found proving that Kipruto's allegations against the investigating officer, the state counsel and the trial magistrate were in fact well founded. The appellate court admitted the new evidence and overturned the conviction as a gross abuse of the process of court. Kipruto is aggrieved by the way Okil Kamaloka handled the case and decides to sue Okil Kamaloka for negligence and rendering inadequate legal services. He comes to you for advice on the prospects of his case. With the aid of local and even foreign case law, the provisions of any applicable statute or ethical and professional responsibility requirements, advice Kipruto of the prospects of his case. **(10 marks)**

COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

ATP 105: PROFESSIONAL ETHICS & PRACTICE

MONDAY 25TH JULY, 2011

DURATION: 3 HOURS

Instructions to Candidates

- (a) Answer Question **ONE** and any other **THREE** Questions
- (b) All questions carry **15 marks** each
- (c) Marks may be lost for illegibility

PLEASE TURN OVER

1. Kiumi retains Ole Kipin & Kamau as her Advocates regarding some protracted legal proceedings by beneficiaries in the matter of the Estate of her later father. Ole Kipin & Kamau Advocates demand legal fees of Kenya Shillings two million (Kshs.2,000,000/-) which Kiumi promptly pays, and a fees agreement is executed accordingly. The case drags on for two years and in a lengthy judgment, the High Court awards Kiumi a sizeable share of her father's estate and also awards her costs of the suit. Ole Kipin & Kamau Advocates promptly file a Party and Party Bill of Costs which is taxed at Kenya Shillings Three Million (Kshs.3,000,000/-). Ole Kipin & Kamau Advocates recover the costs from the defendants. About three (3) years later, a disgruntled former employee of Ole Kipin & Kamau Advocates informs Kiumi about the recovery of the costs by the law firm and even provides documentary proof in support. Upon Kiumi demanding payment of the said costs, Ole Kipin & Kamau Advocates decline to pay Kiumi the sum of costs recovered on the basis that Kiumi had not fully paid up the fees due and that there were some other outstanding fees relating to other legal services rendered by the firm to Kiumi about four years before the judgment in the matter of the estate of Kiumi's father's. Ole Kipin gets extremely agitated when Kiumi refuses to leave the law firm's reception and physically ejects her and gives instructions to the reception staff that Kiumi should not be allowed into the office again. Kiumi sends a demand letter to both partners of the law firm. Kamau, who ceased to be a partner shortly after Kiumi instructed the law firm in the matter of her father's estate, denies liability and pleads ignorance over the matter. Ole Kipin does not bother to respond to the demand letter or even to a subsequent letter sent by the Law Society of Kenya making inquiries over the matter.

i) **Identify and discuss the ethical issues in this narrative.**

ii) **Advise Kiumi on the procedures for lodging her complaint and the possible outcomes**
(15 marks)

2. A complaint has been made to the Law Society of Kenya by a Judge regarding the behaviour in Court of Advocate Mohammed. At issue is whether or not Mohammed's conduct, relating to the following events, amounts to professional misconduct:

(a) On 16 February 2010, the advocate appeared for the defendant in a civil case at the Milimani Courts:

(b) During his cross examination of the plaintiff the following exchange occurred between Mohammed and the Judge:

JUDGE: "Counsel, I must intervene at this point. I find your cross examination objectionable. I believe that you are suggesting fraud or serious misconduct on the part of the plaintiff. Not only is it not part of any pleading, it has nothing to do with any of the issues in this case."

Mohammed: "It is for my learned friend to object to my questions, not Your Lordship. I am entitled to ask anything I want in cross examination. Just let me get on with the case instead of your needless interjection."

JUDGE: “You will not speak to me in that manner. I can intervene when the need arises and that was the appropriate time. I find your comment offensive. You will apologize to the Court

Mohammed: “I will not. I am covered by advocates’ immunity, and I will continue because I believe it is in my client’s interest. You are just biased against my client.”

JUDGE: “If you believe so, make a formal application but do note that you are in contempt of this Court.”

The Judge requests both counsel to step outside the court room for 15 minutes to enable him discharge other advocates waiting to be heard.

Whilst outside the court room, Mohammed, in the hearing of a court clerk and Maina Advocate, yells at the Plaintiff’s counsel and swears that the days of corrupt judges and their accomplice advocates are over.

What ethical issues (if any) arise in this story and how should these be addressed?
(15 marks)

3. You are a newly admitted Advocate employed by a large firm.

The Managing Partner tells you that he thinks that you might have a fresh perspective on Profession Ethics and Conduct as you are the most recent graduate from the Kenya School of Law within the firm. He asks you to write short articles (no more than, say, 400 words each) giving, succinct day- to- day practitioner experiences, for the firm’s in-house magazine.

The Managing Partner has selected the following topics for you.

- i) What factor(s) determine whether an Advocate is fit/unfit to remain on the Roll?
- ii) Legal professional privilege – an Advocate’s tool.
- iii) The responsibility of Advocates for the professional conduct of their partners.

Proceed. **(15 marks)**

4. You are a solo practitioner specializing in the area of professional ethics and responsibility. Your office is in Nairobi, Kenya. Recently, you have been contacted by an attorney, Moses, who has an ethical problem. Upon graduation from law school in 2005, Moses took a job with the law firm of Ouma, Korir and Kamau (OKK) in Nairobi. The firm currently has 20 advocates. Approximately three months ago, Moses left the firm and took a new job with the law firm of Jerusha, Agatha and Sarah (JAS) in Mombasa. JAS employs over 30 advocates, and Moses has been assigned to the firm’s conveyancing department. For the past two years, OKK has been handling a personal injury case against Millennium Industries. The plaintiff in the action was involved in a road traffic accident and alleges that she suffered severe injuries as a result of the negligence of the driver of a motor vehicle owned by Millennium. JAS is defending Millennium in the lawsuit and has been involved in the case since it was originally filed.

When Moses was interviewed by JAS for his current position with the firm, he was asked whether he had worked in any manner or in any capacity whatsoever on the Millennium case. Moses truthfully answered No. His work for OKK was limited to conveyancing. Moses was then asked whether he had attended any staff meetings at OKK, formal or informal, at which time the Millennium case was discussed. Again, Moses answered No. Moses was hired and, up to recently, was doing well at JAS.

Approximately one week ago, JAS received a motion from OKK to disqualify JAS from the Millennium case. The basis of the motion is that Moses was working for OKK while the firm was handling the claim against Millennium. JAS are opposing the motion and have prepared an affidavit for Moses to sign. The affidavit states, in part, that: 1) while with OKK, Moses did not work on the Millennium Admiral case, 2) in addition, while working for OKK, Moses acquired no knowledge and/or confidential information relating to the Millennium case, and 3) the motion to disqualify, therefore, is frivolous.

Moses confides in you, however, that there is a problem. When Moses was at OKK, his good friend and former Law School classmate, Salim, was substantially involved in the Millennium litigation. Salim was assigned to the case by the firm. As friends and colleagues, Moses and Salim spent a great deal of time together outside of the office. In fact, when Moses and Salim both began working for the firm, the two shared an apartment. Unfortunately, Salim talked nonstop about the Millennium case. Moses knows all about the Millennium case, although his information has been obtained on a purely informal basis from his friend, Salim.

Moses has called Salim, and Salim is "pretty sure" that no one else knows about these conversations. Salim has confided in Moses that the motion to disqualify is just another tactical manoeuvre in the case on the part of OKK. Moses's plan is to sign the affidavit as drafted. Based upon the affidavit, he anticipates that the motion to disqualify JAS will be denied, and Salim and Moses will have no further communications about the case.

Moses tells you that he will not share any of the information that he has about the Millennium case with members of his current firm. Neither the plaintiff, therefore, nor the defendant will be harmed. And Moses will be able to keep his job.

Moses wants your opinion about all of this. How would you advise him? Based upon your advice, what do you think is a likely outcome of the motion to disqualify JAS

Illustrate your answer with decided cases from Kenya and other countries with comparable ethical standards.

(15 marks)

5. You have been approached by the Council of Legal Education to prepare a policy paper on the future of legal education in Kenya. Based on your knowledge of the current structure and history of the legal profession, what recommendations would you give the Council with regard to the content, prerequisites, structure, administration, management and regulation of legal education?

(15 marks)

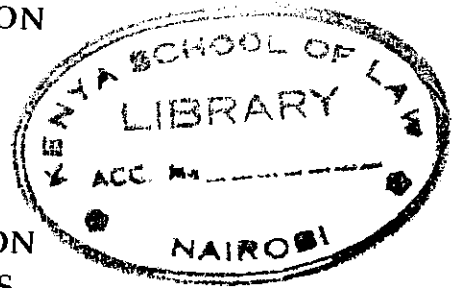
6. for the last ten years you have been acting for a client who is now running for the presidency of Kenya. Opinion polls leave no doubt that he is a clear favourite for the presidency. The elections are due in one month's time. You have served the client very well, save for a few instances where there have been what you agree to be unjustifiable delays in the prosecution of some of his matters. Recently, a serious disagreement arose because your client is not happy that you are a supporter of his rival in the presidential elections. You have made it clear that political affiliation is your constitutional right and it is obvious that it has never affected the quality of your services to the client

The client through his new lawyer wants all his files and any funds held by you from various debt collection matters and damage claims. Your accountant informs you that the client still owes you substantial fees in respect of many, but not all the files. You are also holding funds for the benefit of your client but the amount held is less than one third of the amount your accountant informs you is due and owing. Your client is shocked that he has run up such a huge bill and blames you for not always updating him on the accrued fees and disbursements. You are also a little surprised that you have not been efficient in collecting fees from this client but are relieved that you have earned such a tidy amount of money from professional services well rendered. You know that only by retaining the files and the funds can you ensure that your now hostile client will pay your fees without delay. You have outstanding rents salaries and other commitments to attend to and you are determined to use the most efficient and effective method of collecting your unpaid fees.

- a) Do you have to deliver up the files and the funds to the new lawyer?
- b) What options are available to the client who disputes your fees and who urgently needs some of the documents in your custody to prosecute an extremely urgent application to protect a property the value of which is very high?
- c) What options are available to your client in respect of the other files he needs to ensure the new lawyer prosecutes the same without delay?

(15 marks)

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PLEASE TURN OVER

1. Kwamboka, a recently admitted advocate of the High Court of Kenya, arrives at the offices of Mwelu & Company Advocates on her first day of work. She finds this voice mail from Mwelu, the supervising partner:

'Welcome to our firm Kwamboka. I am really sorry I could not be there this morning to show you around and brief you on the pending urgent matters. Daisy, my secretary, will explain to you how we carry out client interviews. At 10.00 a.m. you will interview some possible clients with respect to a proposed environmental pollution suit against Rose Farm Limited. They are worried about the costs of litigation, but assure them that they will not have to pay a coin if we take their case. We will bear all the costs, including medical examination fees. By the way, we will help pay their rent and school fees, if necessary. Do not turn them into clients yet because our finances are pretty low at present and there are far too many other briefs to deal with right now. Be friendly and supportive but do not seal the deal yet. That interview should take no more than one hour. You will next have to go and speak to more employees of Peruvian Ltd, who were forced to work overtime without pay. We already represent three of the employees but we need to get more of them. Take along the fees agreement (which sets the fee at 40% of the sum recovered) and instruction letter for the new clients to sign. Daisy will explain everything to you. This could be a huge case for us in terms of a precedent and not to mention the advocates' costs we are likely to earn. Be persuasive and persistent. There is also the Karnau -v- Obiero case. I finally convinced the client's mother to pay the hourly legal fees, but we need to get the mother to execute the fee agreement. Have her sign the form that Daisy will avail you in this regard. Finally, I need your urgent advice over the matter of the estate of Ondego (deceased). You will note that I am one of the executors and trustees of the Estate of the deceased. One of the beneficiaries is now challenging the appointment of our firm as lawyers for the estate of the deceased and demanding a refund of the fees of Kshs.500,000/- paid to our firm. The Law Society of Kenya has issued us a notice to show cause why disciplinary proceedings should not be commenced. I am particularly hurt by this matter as my late dear friend, Ondego, fully trusted me during the time he was alive. I will be back at about 6.00 p.m. and I will treat you to a 'welcome to the job'' at Cappucino's. Justice Manga will join us for coffee and it will be interesting to hear his advice with respect to the Ondego matter.'

Identify and analyze the ethical issues that arise from these instructions.

2. Chifundo Laile is as an Advocate of the High Court of Malawi and bosom friends with Fares Mugisha, a Ugandan Advocate. During the African Bar Association meeting in Harare the two lawyers got acquainted with Byron Obiero, a Kenyan Advocate of three years standing who has spent the last two years (since his admission) at the University of Cape Town completing his Masters degree. The three became good friends and agreed to take the necessary steps to set up a law firm in Nairobi.

(a) What processes (if any) do they need to go through before their dream can become a reality?
(4 marks)

Pending formalization of their partnership, it has been agreed that Obiero immediately sets up a law firm in Nairobi where he will list both Kalaile and Mugisha as Consultants, as they await

their fees and failing to unearth a cogent legal defence on his behalf. Senior Counsel Omar, after further reflection, excitedly advises that there is one possibility of temporarily improving Mali Mingi's bargaining stance. Mali Mingi shall allege deceptive conduct and fraud on the part of Mjengo. As part of the strategy, Mkimbizi shall lodge a comprehensive and substantive Request for Further and Better Particulars with the usual threat to Mjengo's lawyers that the defence shall move the court to strike out the claim if the request is not honoured. The interlocutory proceedings run for several months and the suit, which proves to be quite lengthy and protracted, is finally heard by Justice Kibao. In the meanwhile, Mkimbizi, who acted for Mjengo in a debt recovery suit against a different developer for an unrelated property, is holding a certificate of costs against Mjengo, and is determined to set off the amount, should the Court order that Mali Mingi pays Mjengo the sum claimed, or a part thereof.

- i. What ethical issues, if any, arise? (7 marks)
- ii. What orders should the Court issue? (4 marks)
- iii. You are a newly admitted advocate in the employ of Mkimbizi. What advice would you give Mkimbizi in the matter of the Certificate of Costs against Mjengo? (4 marks)

6. In 2007 Bitange Oparanya instructed Ndemo William to act for Oparanya's minor daughter in a claim relating to an accident in which she was injured in May 2006. Upon taking instructions and without Oparanya's consent, William negotiated, on a without prejudice basis, with the insured's Advocates to settle the claim at Kenya shillings 200,000. Some basic research would have enabled him discover that the seriousness of the injuries would merit an award way above this settlement. In any event, by January 2010 the claim had not been paid and the insurance company reneged, claiming the officer who had purported to negotiate the claim had no authority.

- (a) Oparanya wants to lodge a complaint and/or pursue proceedings against Ndemo and has approached you to advise him on the options available and the procedures thereof. Advise. (8 marks)
- (b) Oparanya has also requested you to commence a suit against the insurance company and its insured for damages on the claim. During your perusal of the file you note that the insured had at one point discussed this case with you though you never got to act for him. To make matters worse as soon as you file suit, the insurance company enters into a merger with one of your most important clients and they ask that you withdraw from acting for Oparanya's daughter.

Should you continue to act in this matter? Why?

(7 marks)

authority to fully practice in Kenya. They would in their capacity as Consultants market for legal work from their countrymen living in Nairobi and all fees emanating from such briefs would be shared equally by all three. Obiero confides in the Chair of the Law Society about this lucrative deal and the Chair determines that he will prevent the proposed arrangement from being implemented.

(b) What legal and ethical issues are disclosed in this arrangement? (8 marks)

(c) What options are available to the Chair to block Obiero's plans? (3 marks)

3. Kimani is an advocate of the High Court of Kenya and director and shareholder of some three (3) property investment companies. Kimani discloses to some of his clients that he is a director of these companies and should the clients lend the companies money, this would be invested and the clients shall earn huge profits. Kimani himself stands to gain substantially if the investments are successful. The companies' financial states, however, deteriorate and many clients lose their moneys in failed investments. The Law Society of Kenya (LSK), upon receipt of complaints from Kimani's clients, commences disciplinary proceedings for professional misconduct against Kimani. One of Kimani's clients, Ogola, is particularly angry that when he asked for an appointment to see Advocate Kimani over some legal matter, he was referred to a woman named Chebet who he now discovers was Kimani's clerk. Ogola has been advised by his new Counsel that the advice he received from Chebet was correct and sound in law but Ogola insists that he must be refunded the full fees paid for that advice.

i) Prepare detailed submissions on behalf of the LSK. (10 marks)

ii) Advise Ogola in the matter of refund of fees. (5 marks)

4. Akili Ndogo has been Mfumo's lawyer for many years. Mfumo, an enterprising trader, intends to purchase a property and requires that an unconditional and irrevocable undertaking for the payment of the purchase price be given by Ndogo's law firm. Ndogo, who manages the law firm's Head Office in Nairobi instructs Makena, their pupil who oversees all aspects of their Busia County office, to issue the undertaking and ignores Makena's protestations that they have no money from Mfumo in support of the undertaking. To avoid the sack, Makena issues the undertaking.

Even before this transaction is over, Mfumo comes to visit Busia and confides in Makena about the possibility of him being charged with drug trafficking. He narrates to Makena his involvement in the crime and even leaves some of the proceeds of the crime with Makena who deposits it in the law firm's only subsisting account. In the evening at her weekly fellowship, Makena shares Mfumo's confession with one of her pastors who immediately reports to the police. Makena is arrested and jointly charged with Mfumo for drug trafficking.

Discuss the various ethico-legal issues that arise in this scenario.

(15 marks)

5. Mjengo Limited (Mjengo) has constructed a shopping mall at Boma Annexe on behalf of a developer, Mali Mingi. Mali Mingi is determined to delay payment. Senior Counsel Omar who was retained as consultant by Mkimbizi, Advocate for Mali Mingi, advises Mali Mingi that his legal position is weak. Mali Mingi derides both counsel for receiving a huge deposit towards



EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

AUGUST/SEPTEMBER 2010

PROFESSIONAL ETHICS & PRACTICE

Instructions

- (a) Answer Question ONE and any other THREE QUESTIONS
 - (b) Question One is compulsory
 - (c) All questions carry 15 marks each
 - (d) Marks may be lost for illegibility
 - (e) Time allowed 3 hours
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1. Katibampya Ochieng was admitted into the partnership of Bill Brown Advocates on the 12th of January 2008. Before his admission into the partnership he had been employed as an in house Advocate at Monopoly Bank Ltd as the Company Secretary and dealt with all legal matters in the Bank. He only found out that the Bank did not pay for his practicing certificate for 2008 on the 3rd of February 2008 at which time he immediately made an application for the certificate, paid his dues and was issued a certificate. Between his admission as a partner and issuance of the certificate he had filed several pleadings and prepared a number of conveyancing documents. The validity of those pleadings and documents has been questioned.

Meanwhile, one of the cases that the firm has been instructed to handle on behalf of Monopoly Bank, which has a long term retainer with Bill Brown Advocates, relates to a claim against the Bank in respect of some conveyancing transaction that Ochieng had solely handled whilst employed by the Bank and in which he had been paid fees, which fees was naturally shared with the Bank. Several allegations against the propriety of the conduct of the Bank's legal office have been made by the plaintiff. Being familiar with the matter, it has been decided by the law firm that Ochieng leads the defence team, which Ochieng commences with great enthusiasm.

Discuss the professional and ethical issues that arise in this case.

(15 marks)

2. Mildred engages the services of Jason Kuria Advocate concerning various mortgage contracts entered into by her husband from whom she is now separated. Mildred was a guarantor to the said contracts and is worried that her immovable properties will be attached once the bank gets judgment in some impending suits against her and her husband. Advocate Kuria advises Mildred that it would be prudent to dispose off her properties well in advance to avoid attachment and a forced sale which could be at

undervalue. He further advises Mildred to give him the relevant titles so that he sells the land to enable her pay her creditors. Mr. Kuria also persuades Mildred to execute the instruments of sale and transfer without any monetary or valuable consideration which Mildred agrees to do on condition that the Advocate sells the plots and pays her creditors from the proceeds. Later on, Mildred is aghast to learn that Mr. Kuria did not sell her properties but instead paid her creditors with his own funds and had her properties registered in his name.

Discuss the professional and ethico-legal issues that arise.

(15 marks)

3. Referendum Kajuju is one of three partners in the law firm of Referendum Promulgation & Partners. Each of the partners has limited liability in the partnership. The law firm has a vibrant criminal and commercial law practice. One of their clients, Mr. Mnyonyaji Mkali has informed them that he managed to make some money selling drugs and sent it by Real Time Gross Settlement to the law firm's account. He needs advice on how to "clean" the money and to evade tax on it. Kajuju gives a lengthy opinion on the matter and proposes, amongst other things, that Mkali purchases assets with the funds. Kajuju, being a wily lawyer, remembers that he has a property that he has no use for and offers it to Mkali for double its value, without disclosing that he is the owner. He also charges Mkali a hefty "finders commission". Promulgation Wasike is so mad about these developments that he decides to report the matter to the police who then arrest Mkali and call Kajuju as a prosecution witness.

Discuss the professional, legal and ethical issues that arise in this matter.

(15 marks)

4. In need of legal services, Biko secured an appointment to meet with Silvio of Silyio & Temu Advocates. During the meeting, Biko divulged highly private information to Silvio, believing that Silvio would keep the matter confidential. Subsequently, Biko is shocked to learn that Silvio had shared the said information with his law partner, Temu and their common friend, a practising advocate by the name Silo. When confronted, Silvio retorted that Biko was not his firm's client and further that Silvio did not give an undertaking that he would not divulge the information. Silvio further stated that he merely shared the information with the two lawyers in order to assure himself that the advice he had given Biko was correct.

Discuss whether Silvio is in breach of any rules or principles of professional ethics and conduct.

(15 marks)

5. As incoming Chair of the Law Society of Kenya NoYes Mlamali has committed to making significant changes in LSK. The first order of business his Council carries out is to issue "authority to practice" certificates to several Ugandan Advocates who have been complaining that Kenya has been failing to allow them to practice in Kenya contrary to the spirit of the East African Community Treaty. The second order of business is to enter into a Memorandum of Understanding with the Association of Auctioneers and Court

Brokers allowing Advocates and Auctioneers to partner in debt collection matters subject only to Advocates being entitled to a higher percentage of all fees charged in work carried out jointly. Mlamali has also agreed with Mpita Kati , one of the contenders for the Presidency and who has championed LSK matters in parliament that the LSK will support Mpita Kati in the forthcoming elections and will release a tenth of its income to support his campaign. Most Council members are generally agreeable to this proposal but one of them is unhappy with the fast-changing terrain in the LSK. Upon challenging Mlamali, he is thrown out of the Council and the Chairman even refuses to issue the certificate supporting his application for renewal of his annual practising certificate.

(a) Discuss the professional and ethical legal issues that arise in this narrative.

(9 marks)

(b) What options are available to members of the LSK to counter the Chairman's actions?

(6 marks)

6. Your client of 20 years, Mr. Thuga who is a wealthy local farmer, requests you to prepare a will for him. Apart from bequeathing substantial legacies to his wife and five children, he expresses the wish that his nephew Mark, who has served as his personal assistant for nearly 15 years, takes his Karen mansion. Thuga Junior, a child born of his mistress is to receive a cash gift of Kshs. 20 million. Thuga also authorizes you to provide for yourself a cash gift of Kshs.10 million, in appreciation of your having saved his vast immovable properties from the auctioneer's hammer a couple of years ago. Mark and your secretary Anne shall witness the will. Mr. Thuga also informs you that with you as executor of his estate, he has no doubt that all shall be well should he succumb to the cancer from which he has ailed for the past five years. Sadly, Mr. Thuga passes on barely a month after the execution of his will. You are faced with hostile beneficiaries who have sworn to have Mr. Thuga's will declared invalid. They also lodge complaints against you and disciplinary proceedings are instituted.

(a) Should you have cause to worry?

(3 marks)

(b) What ethical issues if any, arise?

(4 marks)

(c) Assuming that the beneficiaries' action succeeded, what do you ought to have done in order to avoid the acts of professional misconduct and negligence complained of?

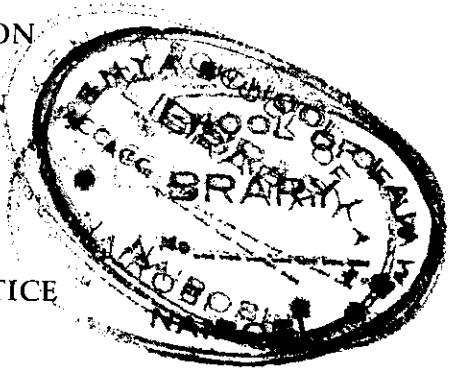
(8 marks)

COUNCIL OF LEGAL EDUCATION

EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

DECEMBER 2009

PROFESSIONAL ETHICS & PRACTICE



Instructions

- (a) Answer Question ONE and any other THREE QUESTIONS
 - (b) Question One is compulsory
 - (c) All questions carry 15 marks each
 - (d) Marks may be lost for illegibility
 - (e) Time allowed 3 hours
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1. This is a verbatim extract of the March 06, 2008 'Business Daily' account of the electioneering for the post of Chairman of the Law Society of Kenya (LSK) prior to the LSK Annual General Meeting of 7th March, 2008.

'After months of campaigning and waiting, the Law Society of Kenya (LSK) will tomorrow have a new chairperson--or a continuity. This year's elections are significant since the LSK Act has been amended and an elected chair will now be in office for two years-unlike previous years when a chair was elected for only one year.

Also, there are questions on the fairness of the poll. The contenders for the post include the current chairperson, Mr Okon'go O'Mogeni, the current vice-chairman Mr Justus Munyithya, and the only woman, Ms Roselyn Adede, a practicing advocate in Eldoret and council member.

"In Mombasa, about half of the about 350 lawyers did not get the ballot papers to vote this year. When this issue was raised with the secretariat, nothing was done," claims Munyithya.

When contacted by Business Daily on the issue, Betty Nyabuto, the LSK chief executive officer, referred us to O'Mogeni, who said the issue was not valid as any lawyer could pick a vote from the LSK offices if they did not have one.

"How can the LSK be at the forefront of criticizing the country's electoral process when its own electoral process is not at all transparent?" poses Munyithya. And those are not the only issues. The elections also come at a time when the country is gearing up for a coalition government and after bitter divisions rocked the body during the post-election crisis.

"It is the truth, lawyers are currently divided along tribal and political affiliations as much, if not more than the rest of Kenyans," says Mr Evans Monari, a council member who is defending his seat.

... Initially established by an Act of Parliament in 1949 to organize the annual general luncheon held every year, the LSK has evolved and is now involved in many aspects of the country's legal issues.

But its vibrancy and independence has been waning. While prominent lawyers such as Gibson Kamau Kuria, Justice GBM Kariuki, Nzamba Kitonga, Mutula Kilonzo and Paul Muite made their names as the LSK Chair, prominent lawyers in Kenya are complaining that in the last few years, lawyers ended up electing colourless chairmen who have not brought out the aims and visions of the Society.

One of the contestants, Adede is of the view that the problem can only be solved by changing the voting strategies, election rules, and putting stringent requirements for office of chair.

... "What makes the LSK either vibrant or dull is how it engages in issues both of importance generally to the public and to the society itself", Mr Ahmednassir, the former chair told the Business Daily.

... O'Mogeni is a practicing lawyer in Nairobi. Soft spoken and less abrasive, he concedes that the LSK chair is one of the 'hottest' posts he has ever held.

"I might not even finish my two year period if elected on March 8, the post just drains you." He says. Philosophical about attacks leveled against him, O'Mogeni states that being in leadership will bring all kinds of allegations and compliments that one should take in his stride.

"That is why we can criticize a president but still applaud his achievements. It is not personal and no one should see it as so", he says. Some members are also questioning statements made by LSK after the December polls.

On his statement that President Kibaki resigns, O' Mogeni says that was the best way to go as it put pressure on government to cede ground. "We were on record saying that the problem was political and needed a political solution, that has been vindicated by the agreement reached at the mediation talks," he says.

Welcoming Ahmednassir's criticism, O'Mogeni says: "Honestly, we did not take a partisan position, what we wanted was to put the heat on the Government to ensure that they agreed to talk. We were not dancing to the tune of ODM, but unfortunately in such circumstances, you cannot please everyone," he says.

Monari, who will be gunning for the chair when the term of the next chair expires, says one of the main issues the LSK needs to urgently change is the mode of electing council members. "The election process should be radically changed in a manner that will ensure that only experienced lawyers, who have an understanding of council issues are elected," he says.

Monari claims the LSK has a credibility crisis, especially on the international scene, because the recent past has not seen highly experienced and notable lawyers head the body.

"Actually, whenever there are international legal meetings, people do not give the LSK as much respect as they should, because the chair is not as well versed on the issues as his counterparts from other jurisdictions who have been practitioners of many years standing with wide international and national recognition," he says

“A good case in point is during the current political crisis in the country after the disputed election. Members of the Council requested the chair to convene a special general meeting to address the situation and chart the way forward, but the chair sat on the issue only to later release a statement that he purported to be the stand of the council. It was not and he should be honest about it,” says Munyithya.

But O’Mogeni refutes this: ‘Munyithya is not being honest. We briefed him on each and every position we were taking, but then again, as I have said, it is the right of everyone to hold their opinions and as a leader you have to take all criticism positively and try to learn from it, says Mogeni, “at the end of the day, lawyers will decide who is best amongst the three of us,” he says.

How the turbulent political times have changed LSK will become clear as it goes to the polls. But one thing is clear—LSK has not been spared the conflict brought by change, and the current elections have shown a society deeply divided’.

- i. Is there any substance in the concerns raised by the LSK members quoted in the Daily Business extract and should the issues raised concern us as members or prospective members of the LSK?*
- ii. In the context of the provisions of the Law Society of Kenya Act regarding the criteria and the process for electing council members and chairman of the Society, are the views of the persons quoted in this article justified?*
- iii. In your view, also taking into account the decided authorities on the point, is there any real concern that the LSK has either failed to execute its mandate or exceeded the same?*
- iv. In your view, does the account of the Business Daily capture the reality of some of the issues affecting the LSK? Discuss.*

(15 marks)

2. Nailanjo Waimbura was arrested whilst attempting to ferry narcotics out of Kenya. She immediately called Facebook Otieno, an accomplished criminal lawyer to defend her. Whilst she was giving instructions, Obako Okuyo a pupil in Otieno’s law firm overheard the confession of guilt by Nailanjo, and being a very moral person reported the confession to the police who want to use her as one of the witnesses in the trial. At some point during the taking of instructions, whilst Okuyo had gone to make some coffee, Nailanjo intimated to Otieno that she still had some more drugs stacked up in her flat, and she sought advise on the most efficient way of smuggling them out of Kenya. Otieno made several proposals on how that could be accomplished. Unknown to them, an Inspector of police, who as at law firm’s reception, overheard the conversation, arrested both Otieno and Nailanjo and had them charged for conspiracy to traffic in narcotics. In the absence of any Advocates in the firm, Okuyo appeared in court but only applied for bail for them. He has also been arrested and the police have offered to withdraw the charges against him if he will appear as a prosecution witness in the principal trial against Nailanjo.

You have been instructed to act for Okuyo, Otieno and Nailanjo. Please give an opinion to them, on the issues arising in relation to the cases.

(15 marks)

3. Rodney generally acts for Kale Trust ('Kale'), which owns 5,000 of the 20,000 shares of Mboga Ltd, ('Mboga') a private horticultural company. Mboga has recently been dogged by endless board squabbles resulting in successive financial losses. The 15,000 shares of Mboga are offered for sale. Kale, being a substantial shareholder is entitled to a first option to purchase the shares. Kale trustees decline to exercise the option to purchase and inform Rodney that whilst the price of Kshs 50,000/- per share offered is attractive, the Board fights are a definite 'turn off'. Rodney decides to purchase the shares himself through a newly floated company, Mpenzi Limited ('Mpenzi) where he holds majority shares. Mpenzi, being a majority shareholder provides a new Managing Director to Mboga and secures three seats in the six member board of directors. With more strict oversight and streamlining of Mboga's business, the Company begins to make profits and within three years of purchasing the Mboga shares, Mpenzi offers 50% of its shareholding in Mboga for sale and realizes huge profits. Kale, too, posts unprecedented returns on its investment in Mboga. A beneficiary of Kale stumbles on information that links Rodney to the ownership of substantial shares in Mpenzi and calls upon the Kale Trustees to lodge a claim against Rodney.

Identify and discuss the ethical issues that arise (if any). What would be the nature of the suit filed against Rodney and what in your view would be the probable outcome of the same?

(15 marks)

4. (a) Kauma Muesli practising in London, is both a Barrister of the London Grays Inn and an Advocate of the High Court of Uganda having been admitted to the Bar last year. During one of his regular visits to Kenya he got acquainted and fell in love with Mary Waamboi a Kenyan Advocate who was also admitted to the Bar last year. Mary has already opened a solo practice in Busia and Malaba. It transpired that Muesli has many clients in Kenya to whom he comes to offer legal advice and for whom he draws documents that are then endorsed as drawn by a Kenyan Advocate. His fees are shared with the endorsing Advocate. Mary graciously offered to be the new 'Kenyan connection' and this beneficial arrangement has been going on for some time. Muesli has recently been instructed to represent a Briton who has been charged with Child trafficking in Nairobi. The trial commences in a month's time. *What options are available for him to represent the Briton?*

(b) In the long term, Muesli wishes to join in partnership with Waamboi so that they can practice in Kenya and Uganda under the name "The Activists, Barristers".

Discuss the legal and ethical issues arising in this scenario and advise Muesli and Mary how they can achieve their dream of partnership.

(15 marks)

5. Steve is an advocate in Nairobi and Kiran is in charge of his paralegal staff. Steve and Kiran are trustees of the Kimani Trust. Peter contracts to purchase from Steve and Kiran a commercial building situated in Nairobi's Tom Mboya Street, the property of Kimani Trust. Throughout the transaction Steve acts as advocate for both the vendors (the trustees) and the purchaser (Peter). Steve does not disclose to Peter valuations previously obtained showing that the property was not worth the price Peter had agreed to pay. Peter knew that the vendors were trustees. In the course of the negotiations Peter offered and Kiran accepted a bribe and disclosed to Peter that the valuations for the property were much lower than the price that Peter had contracted to purchase the property for. Peter immediately files suit to rescind the contract claiming that the transaction was unconscionable and that he should immediately be released from his obligations under the contract.

Identify and discuss the ethical and practice issues that arise.

In your view, taking also into account relevant case law, what are the prospects of Peter's success in the suit filed?

(15 marks)

6. "An Advocate, by the sacred duty of his connection with his client, knows, in the discharge of that office, but one person in the world, that client and none other. To save that client by all expedient means-to protect that client at all hazards and costs to all others and among others to himself-is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other, nay, separating, even the duties of a patriot from those of an Advocate, he must reckless of the consequences, if his fate it should unhappily be, to involve his country in confusion for his client" Quoted from Lord Brougham's defence of Queen Caroline (Hansard new series, iii, Oct 3 1820) .

Discuss the accuracy and relevance of this statement in relation to the conflicting duties of an Advocate in the practice of law in Kenya today.

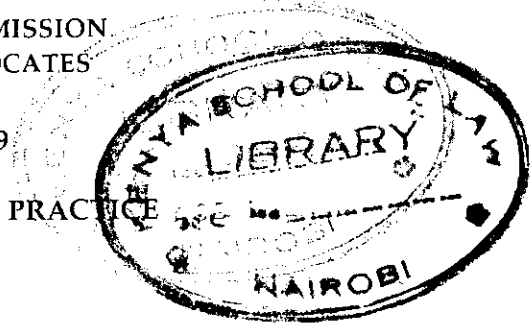
(15 marks)

COUNCIL OF LEGAL EDUCATION

EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

NOVEMBER 2009

PROFESSIONAL ETHICS & PRACTICE



Instructions

- (a) Answer Question ONE and any other THREE QUESTIONS
 - (b) Question One is compulsory
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 - (e) Time allowed 3 hours
-

1. Maina Ngenga became a lawyer through a correspondence course he completed whilst awaiting trial as leader of Mongeeki, a local militia group. On one of his long bail releases he managed to go through the Advocates Training Program and was eventually admitted as an Advocate a year ago. Upon his conviction, he was sentenced to five years in prison, a term he is now serving. Whilst in prison his practising certificate expired. He has however set up a lucrative prison "law firm" complete with pupils. He charges a standard fee of 1000 shillings for any case that he handles, which largely comprises drawing appeals and commercial contracts. He also uses the prison *blog* and their monthly newsletter to publicize his services.

Knowing the problems that may arise if documents are filed in his name, he has agreed with James Aggrey Mogeni to use Mogeni's law firm as drawer of documents. The fees arising from all matters filed through Mogeni's law firm are shared between Mogeni, Ngenga and the pupils, to maintain harmony in prison.

Discuss the ethical issues raised in this scenario. (15 marks)

2. Following your admission as an advocate of the High Court of Kenya on the 5th of October, 2009, you are elated at landing a limited partnership with a successful Nairobi law firm, Kibao & Company Advocates ('Kibao'). The week following your arrival, the senior partner, Mr. Alex Kibao ('Alex'), who has previously been unable to take time off, decides to attend the Commonwealth Lawyers' Conference in Hong Kong. 'The easiest way to learn the ropes', he jokingly tells you, 'is to plunge right into the deep end of things.' Three days after Alex's departure, you receive this email from him:

'... There is this busy brief we are handling for Jamii Ltd ('Jamii') against Bora Ltd ('Bora'). Please ask my secretary, Tudor, to get the file for you* The dispute relates to some grave environmental law breaches apparently committed by Discount Ltd, a former subsidiary of Jamii, which was acquired by Bora a while back. The matter caused a real stink for Jamii which was, only last year feted as the most profitable and ethical business in town. I think, though, that the matter could soon be settled out of court. I must tell you,

however, that I have found the applicable Environmental Management and Co-ordination Act (EMCA) regulations extremely technical and complex. But I guess you heard it said at law school that all you need do is think like a lawyer. So, just give it a crack. By the way, I was just browsing the 'Business Daily' online and the lead story is the acquisition of Bora by Daima Ltd (Daima) a few days ago. Now, Daima might be our client. I recall a couple of briefs from Daima over the years but, as I said earlier, the Jamii and Bora case is headed for settlement. Bora's lawyers called me a few days ago and proposed settlement at Kenya Shillings 50 Million. I told them that Jamii would not accept a sum less than 80 Million (actually Jamii is willing to accept Kshs 30 Million but you know you must extract the maximum prize!). Anyway, with Daima in the picture, I will go slow on Bora but keep some 'gentle' pressure on. Tudor will give you the draft of the ten-page Request for Particulars that I crafted for Bora a while back. Just bang it in! Now Justice Bilha the presiding judge is one great girl! You can imagine how the out of court settlement would have been set back had Justice Bilha not acceded to my nudging that she delays an important ruling. The Law Society of Kenya is seeking to lift some stay of execution orders that Bora's lawyer has enjoyed for 5 years since he was slapped with a suspension order by the Disciplinary Committee.

We are likely to get really busy on EMCA regulation cases. Our firm's consultant, Baraka from Tanzania, tells me that the University of Dar-es-Salaam's School of Law has a one week break and that he will be visiting our offices soon. Please consult Baraka with regard to the Jamii and Bora case.

You need not worry about the practicing certificate. I have had a word with the LSK CEO who is also attending the conference and he tells me that you will hear from him in a couple of days.'

What concerns of professional ethics and practice (if any) can you identify and how would you resolve the said concerns? (15 marks)

3. Mwamu Monari is a young lawyer and the current Chairman of the Law Society of Kenya. In his monthly communiqué to members, he has informed them that LSK has been admitted as a corporate member of the ruling party PNOD. Monari has already used LSK funds to sponsor a joint LSK / PNOD sensitization drive of their Memorandum of Understanding. One of the terms of the MOU is that for the sake of the public interest, all LSK members will now be required to disclose information relating to instructions given by clients who PNOD considers anti government. Knowing that there may be objection to his moves, he has 'sacked' members of Council opposed to him and has ensured that they are not allowed into Council meetings. Members of the LSK are incensed and wish to pursue litigation against the Chair and the Council.

- a. Discuss the various issues that the plaintiffs will rely on in their suit. (8 marks)

In the meantime, Evans Akide who was a member of the Council several years ago has decided to offer himself as a candidate for the Chairmanship in the forthcoming LSK elections. Part of his campaign platform is that he will ensure that Kenya reforms its practice rules to allow Multi Disciplinary practice.

- b. Discuss the issues that Monari's camp will articulate in their campaign against him. (7 marks)

4. Unlike my selfish colleagues, senior advocates at the bar, I will share with you some practical survival skills.

'The Legal Profession in the 21st Century' has become a recurrent theme at law conferences. What with the competitive legal services market that we all have to contend with? About 7 years ago, there were approximately 1,500 practising advocates in Kenya. Presently, the number stands at approximately 7,000 and competition for legal work is bruising. One needs to be very innovative to survive in this business. In fact, I have just been consulting with some learned friends in Arusha and apparently I could very easily set up a practice there. I am also in discussions with 'Chief Counsel', Legal Innovations Inc, an international non-governmental organization with impressive international networks. I get to pay Kshs 5,000/- per month to get placed on their panel which could lead to some business- mostly international adoptions, divorce and other family law cases. Another useful link is Bidii Auditors with whom I network frequently. We refer cases to each other. Bidii shall host a workshop soon. Participants will get free advice on how to weather the current economic crisis. I have been invited to make presentations on various aspects of family law. This will be an opportunity for me to contact prospective clients. Bidii have proposed, and I entirely agree with them, that attractive flyers be put out. My firm, 'Wakimbizi & Kondoo Advocates' shall feature prominently on the flyer. I shall, of course, mention this to Justice Kondoo (he was my partner before he was appointed judge, two years ago and you will find that it really helps to have good contacts on the bench) when we next meet at Elite Club's monthly board meeting. I keep telling Justice Kondoo that he should have tried his hands at politics. His blog is a busy site particularly after he wrote an extremely incisive piece titled *'Kenya's 2012 Political Tsunami: Voices from the Grave'*.

You must agree that my honourable networks are very valuable. Which reminds me, the Senior Counsel Regulations have now been published by the Attorney-General. I do not doubt that you shall nominate me for consideration or, am I too presumptuous?

Discus.

(15 marks)

5. You are a member of the Disciplinary Committee of the Law Society of Kenya (DC). At the hearing, the Applicant, the Law Society of Kenya (LSK), and an accused advocate, Ms Belle have agreed on the following facts:
- c. Belle was a sole practitioner with expertise in the criminal field;
 - d. Belle's client, Beau, had been charged with trafficking of narcotic drugs, the minimum sentence upon conviction being 20 years imprisonment without an option of a fine; Beau was in remand as he had been denied bail;
 - e. The State's case was substantially grounded upon the evidence of Mr. Snoop, a police informer;
 - f. Beau swore to Belle that he knew nothing about the alleged offence and that the charges were merely a witch hunt by Snoop who bore some old grudge against Beau from their high school days at Makindu School;

- g. Belle sought out Snoop at his home with a view to reviewing his statement to the police to make sure that he had not fabricated the allegations against Beau, but Snoop stuck with his story;
- h. Belle went to see Beau in remand and reported what had transpired when she visited Snoop at his home. Beau swore to Belle that he was not guilty of the offence charged and that Snoop was actuated by malice;
- i. Beau requested Belle to go and collect a parcel from Beau's brother, Noir, and deliver the parcel to Snoop and Beau added: 'After Snoop sees what is in the parcel he will change his mind, you'll see';
- j. Beau picked up the parcel from Noir, delivered it to Snoop and before Snoop could open it, Belle left;
- k. The next day police went to see Belle at her office. Snoop had reported the delivery of the box, the police had opened it and found 20 rolls of bhang, 100 grammes of heroin and Kenya shillings One Million and a note which read 'say nothing if you know what's good for you'. The only finger prints found all over were Belle's;
- l. Beau and Noir denied any knowledge of the parcel;
- m. Belle was charged with various offences including subverting or attempting to subvert the course of justice, interfering with witnesses, corrupting or attempting to corrupt witnesses, possession of narcotic drugs and having moneys which were the proceeds of crime;
- n. Despite her fervent protestations Belle was tried, convicted of the various charges and placed on five (5) years probation. The State has however filed an appeal against the sentence on the basis that Belle should in fact have been given a custodial sentence of at least twenty years in accordance with the provisions of the Narcotics Drugs and Psychotropic Substances Control, Chapter 245 of the Laws of Kenya;
- o. Beau retained accomplished criminal law practitioner Ombeta to act for him and was eventually acquitted of all charges.

LSK has been following the criminal case against Belle closely and even sent a counsel to hold a watching brief on its behalf. Thereafter, LSK commenced the current proceedings alleging that Belle was guilty of professional misconduct and that she had been (1) Convicted of a number of criminal offences (2) Was guilty of perjury and subornation of perjury (had attempted to bribe or induce a witness to perjure himself) (3) Had been in possession of narcotic drugs (4) Had in her possession moneys which were the proceeds of crime (4) Had brought the profession into disrepute and was, generally, in view of the circumstances of the case, guilty of gross professional misconduct. LSK argues that the gravity of the misconduct calls for a striking off the Roll of Advocates.

There are only two matters in dispute before the DC:

- Did Belle do more than just deliver the parcel to Noir- that is did she know what was in the parcel and did she deliver it for the purpose of attempting to undermine the State's case against her client?

- Whatever the answer to the first matter in dispute, whether Belle was guilty of professional misconduct or, as was submitted by Belle, was not guilty of any misconduct.

You have been charged with preparing a draft judgment for consideration by the other members of the panel. In your draft judgment you will refer to the rules of professional ethics and practice. You may also, if you wish, refer to any case law or statute law you may consider useful. (15 marks)

6. Mutula Kalua engaged an Advocate, Martha Kilonzo, to act for him in a personal injury claim. They agreed on a contingent fee arrangement. Unknown to Kalua, Kilonzo is the majority shareholder in Conners Limited, the insurance firm that had insured the tortfeasor. The matter proceeds very slowly, with Kilonzo failing to keep Kalua updated on progress in the matter despite numerous requests. Eventually the suit is time barred and Kilonzo releases the file back to Kalua indicating that 'he had a poor case anyway' and there was no need to throw good money after bad. To 'kill' the case, Kilonzo gets paid a commission of Kshs 500,000, which he naturally does not disclose to his client. Kalua writes to the LSK, where Kilonzo is a serving Council member. The LSK writes back telling him his complaint has no merit.

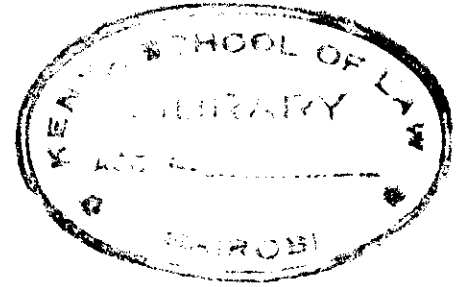
Discuss the elements of the complaint that Kalua has against Kilonzo and the avenues and processes (if any) that are available for the complaint against Kilonzo to be successfully pursued. (15 marks)

COUNCIL OF LEGAL EDUCATION

EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

NOVEMBER 2009

PROFESSIONAL ETHICS & PRACTICE



Instructions

- (a) Answer QUESTION ONE and ANY OTHER TWO QUESTIONS
- (b) QUESTION ONE is COMPULSORY and carries 20 marks
- (c) All other questions carry 15 marks each
- (d) Marks may be lost for illegibility
- (e) Two (2) Hours are allowed

-
1. The advocate-client relationship is considered an equity as a fiduciary one in which certain obligations of the special nature are imposed on the advocate.

Briefly outline these obligations in the following circumstances:

- (i) Advocate selling his property to his client
- (ii) Advocate purchasing a house from his client
- (iii) Advocate borrowing a sum of money from his client
- (iv) Advocate lending a sum of money to his client
- (v) Gifts from client to advocate
- (vi) Bequests/devises to advocate by client
- (vii) Advocate as client's agent in a sale
- (viii) Advocate swearing and filing affidavit(s) on behalf of his client
- (ix) Advocate as surety to court on behalf of client/accused

(20 marks)

2. John and Peter are young advocates recently admitted to the Bar. John was admitted in October, 2007 while Peter joined the profession in May 2008. In November, 2009, the two registered a law firm in which they are the sole partners.

The said law firm has filed several suits on behalf of its clients, with some of the pleadings being signed by John and others by Peter. At the same time, both John and Peter are on record separately in various criminal cases representing clients. The firm has also acted for several clients in conveyancing matters.

Discuss the legal issues arising from this narrative.

(15 marks)

3. (a) Discuss in detail the concept of retainer in the legal profession. (10 marks)

(b) A dispute has arisen between James, an Advocate, and his client, Mjomba, regarding the quantum of legal fees payable by Mjomba in respect of representation by James in criminal proceedings.

How would this dispute be dealt with under the law?

(15 marks)

4. Brown Matata, an advocate of the High Court of Kenya, has filed suit in the High Court challenging the requirement for compulsory membership of all advocates in the Law Society of Kenya (LSK). He argues *inter alia*, that the requirement is unconstitutional as it violates his freedom of association. He also asserts that practicing certificates for advocates are issued by the Registrar of the High Court and the LSK has no business getting involved in the process of application for the certificates.

You are the advocate acting for LSK in the proceedings. Set out your arguments in response to Matata's suit.

(15 marks)

5. "It seems to me practically impossible for [an advocate] to do his duty to each client properly when he tries to act for both vendor and purchaser." *Dankwets, J. in Goody v. Baring (1956) 2 All E.R.11*

(15 marks)

6. Write short but comprehensive notes on the following:

(a) Professional undertaking (5 marks)

(b) Advocates (Deposit Interest) Rules (5 marks)

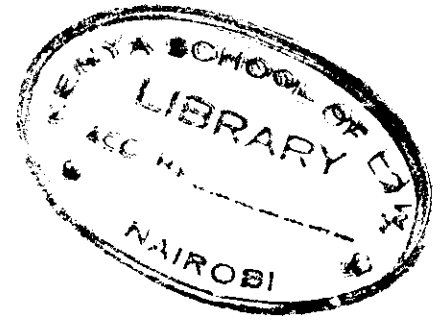
(c) Multi-disciplinary practice (5 marks)

COUNCIL OF LEGAL EDUCATION

EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

JULY, 2009

PROFESSIONAL ETHICS & PRACTICE



Instructions

- (a) Answer Question **ONE** and any other **THREE** QUESTIONS
 - (b) All questions carry **15 marks** each
 - (c) Marks may be lost for illegibility
 - (d) Time allowed **3 hours**
-

1. Gillian Makini and her adult son Prince Makini are your clients. Gillian informs you that Prince wishes to purchase a property. The Letter of Offer from Mkenya Bank Ltd requires a guarantee as additional security to a charge over the property. Gillian informs you that she will execute the requisite guarantee. Both Gillian and Prince have instructed you to act for them in the said transaction and you have accepted. The transaction is subsequently completed. Prince repays part of the loan but he, unfortunately, falls into arrears. Due to his inability to pay another creditor's debt, Prince is declared a bankrupt by the High court and Mkenya Bank Ltd files suit against Gillian for the balance of the loan. Gillian in turn joins you as a third party in the said proceedings and seeks indemnity on the basis that you were negligent in advising her with regard to the subject transaction.
- i) Should you have acted for Gillian and Prince?
 - ii) What ethical issues (if any) arise and how would you have resolved them?
 - iii) What is the likely outcome of the proceedings by Gillian against you?
 - iv) Are you likely to face any disciplinary charges?
 - v) Supposing Prince had in confidence expressed doubts that he would be able to service the loan. What advice (if any) would you have given?

(15 marks)

2. Jack Onyango has been an Advocate of the High Court of Kenya for seven years. After serving as a Senior Litigation Advocate in the firm of Kepan & Sampton Advocates, he has now set up his own law firm in partnership with Jill Kitheka, a young lawyer who was his pupil at Kepan & Sampton and was admitted to the Bar barely one year ago. During his tenure at Kepan & Sampton, he acted regularly for Axess Insurance Company and was aware of the company policy to settle all claims below Kshs 100,000. Armed with this knowledge he advertises in a local FM station for clients who may have personal injuries to call on his law firm for representation. Five of those who turn up relate to defendants who were insured by Axess. Three of them have already instructed other Advocates but wish to move their instructions to

Onyango without paying their Advocates, since their matters have not been completed anyway. Onyango immediately takes up all these matters.

Discuss the ethical issues raised by this scenario and the remedies that are available to the wronged parties (if any).

(15 marks)

3. On the 10th of January, 2008, your client Silvio instructs you to draw a will and pays for your services in advance. One of the beneficiaries to the estate is a son, Livio, aged 26 years. You are instructed to provide for a gift of Kshs 10 million for Livio. During his lifetime Silvio did not disclose to his wife, Anne and their three children, the existence of Livio. Silvio's larger family was equally unaware of Silvio's relationship to Livio. On the 1st of August, 2008 you are shocked to see Silvio's photograph in an obituaries page in the Daily Nation. It is then you realize that you completely forgot to draw Silvio's will as instructed.
- i) Discuss the possible consequences of your failure to draw Silvio's will.
 - ii) What steps (if any) should an advocate take firstly, to avoid a default such as the above, and secondly, to provide additional protection.

(15 marks)

4. Gitahi Mititi entered into a transaction for the sale of his bungalow to Roocy Kambona for the sum of Kshs 11,000,000. His Advocate Sangoma McMichelle delayed the transaction for so long that the buyer pulled out of the deal. Sangoma then offered to purchase the property, at a lower price. It was known to Sangoma, who acts for the Nairobi City Council, that the Council had planned to build a high class shopping centre on an adjacent property and was looking to buy properties in the neighborhood. Sangoma then sold the property to the NCC at the tidy sum of Kshs 23,000,000. In the latter transaction Sangoma acted for both the Vendor and the Purchaser and, without the knowledge of the Purchaser, provided that the Advocates fees for both the Vendor and Purchaser would be paid by the Purchaser.

Discuss the ethical issue raised by this situation and the remedies available to any aggrieved parties.

(15 marks)

5. The fifty (50) residents of Suswa Estate (Suswa residents) have a grievance against Redeemers Church. The latter has recently pitched a tent for the 'Teeniez Ministry' at an adjoining plot that has been leased to the church by one of the church members. Suswa residents are unable to bear the loud music that blares from the site from Friday night through to Sunday night. Three representatives of Suswa residents instruct you to file suit against the church in order to address the nuisance. Suswa residents contribute towards payment of your fees and the same is settled in advance. After you have filed the plaint, two of the representative plaintiffs inform you that the dispute with the church has now been settled and that the suit should be withdrawn. The third plaintiff representative, however, objects to the said withdrawal on the basis that the two representative plaintiffs have recently become members of Redeemers

Church and that they have no instructions to compromise the suit on behalf of the rest of the Suswa residents.

- i) Who is your client?
- ii) How would you resolve the conflict?
- iii) What advice should you give clients where you are acting for members of incorporated or unincorporated associations?

(15 marks)

6. In the course of drawing security documents in favour of Muungwana Bank, Mchezi Onalo forgot to include the name of his law firm as the drawer of the documents. Upon realizing his mistake, he recalled the documents and gave an unconditional and irrevocable professional undertaking to his clients that he would recall the registered documents from the Registry and correct the anomaly. Unfortunately for him the Registry has indicated that they cannot release such documents and Onalo has advised his clients accordingly and seeks to return their documents uncorrected. The Bank declares a dispute and instructs its house Counsel, a young lawyer of one and a half years standing, to act for them in the matter on the understanding that all fees paid to the Counsel would naturally be shared with the Banks employees in the Legal Department.

Discuss the ethical issues raised by this situation.

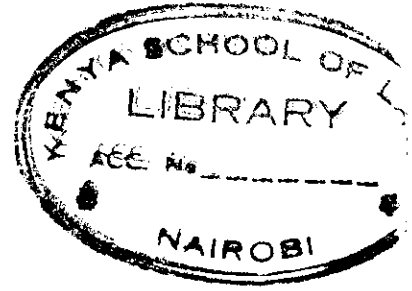
(15 marks)

COUNCIL OF LEGAL EDUCATION

EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES

JUNE 2009

PROFESSIONAL ETHICS & PRACTICE



Instructions

- (a) Answer **QUESTION ONE** and **ANY OTHER TWO QUESTIONS**
- (b) **QUESTION ONE** is **COMPULSORY** and carries 20 marks
- (c) All other questions carry **15 marks** each
- (d) Marks may be lost for illegibility
- (e) **Two (2) Hours** are allowed

-
1. (a) Medrine Omusaba was appointed a judge of the High court of Kenya in 2004. After serving for 3 years, and upon serious concerns being raised by the Law Society of Kenya about her unethical conduct, she retired and wanted to go back to legal practice. What steps will she need to take to lawfully practice and what avenues if any exist for the LSK to block her application?

(10 marks)

- (b) Kagai has agreed to enter into partnership with Joab Walter Mongare, an enterprising auctioneer who was admitted as an advocate one (1) year ago. What is exciting about the proposed partnership is that Mongare's law firm is actually offering both auctioneering and advocacy services with equal profit sharing partnership between the Auctioneers and the Advocates.

Discuss the legal and ethical issues raised by the proposed arrangement.

(10 marks)

2. Ngonya wa Gakonya is an advocate of many years standing with a lucrative conveyancing practice. As the conveyancing partner in the firm of Ngonya & Onyango Advocates he had received confidential information relating to Migingo Limited from the company. This information enabled him to draw security documents in respect of the Company's borrowings from Obama Bank Limited. Unfortunately, the mortgage documents drawn by the firm failed to indicate the drawer of the documents though it was clear from the content and form of the document that the law firm was somehow involved in the documentation.

Migingo Limited having failed in its obligations under the securities, the Bank has instructed Gakonya Otieno Advocates, where Ngonya is now the head of litigation to pursue the matter. Because of the magnitude of the matter, the latter law firm has agreed to charge fees below the remuneration order and also to be paid on a contingency basis.

Discuss the legal and ethical issues disclosed by these scenarios.

(15 marks)

3. Museveni Mlagai is a Ugandan Advocate of one year standing who has been operating a struggling solo practice in Kampala Uganda. Museveni has now decided to take advantage of the EAC spirit and has applied to the Law Society of Kenya to open a practice in Migingo Island, which is now accepted as being within Kenya's jurisdiction. He proposes, inter alia to open a petty offences clinic through which he will offer all Kenyan fishermen legal services at subsidized cost. He has produced brochures detailing the nature and costs of services he will offer.

Taking into account that the Uganda Advocates Act is similar to the Kenyan equivalent, discuss all the issues that this situation raises.

(15 marks)

4. Rasta Mkora was charged with theft on the morning of 3rd March 2008. On the same evening whilst having a drink at Wakilis pub, a facility frequented by lawyers, he had one drink too many. Without knowing that Kipruto M'irungu was an Advocate, Mkora requested M'irungu to 'clean' some of the stolen funds through M'irungu's Bank Account. He also gave M'irungu a detailed account of how he and his colleagues, who he introduced to M'irungu, had carried out the theft. Just then the police arrived and arrested the group at which time Mkora, learning that M'irungu was an Advocate, immediately instructed M'irungu to represent him in the theft case, promising to pay him with 'the funds they had discussed'. The police have demanded that M'irungu gives details of the confession by Mkora.

What rights does M'irungu have? Would your answer be different if Mkora had sought M'irungu's advice whilst knowing that he was a lawyer? What if Mkora had given details and sought advice on the defences available for an offence he and his friends intend to commit the next day?

(15 marks)

5. Write short notes on any three (3) of the following
- Professional undertakings
 - Termination of retainers
 - Retainers by minors
 - Multi Disciplinary practice
 - The Complaints Commission

(15 marks)

6. Kamunzyu Mwikya was admitted as an Advocate of the High Court Of Kenya one and a half years ago and after eight months of practice opened a law firm in his village of Nyalgunga. To take advantage of the coffee boom, he has called his firm "Coffee Action Barristers", a name he successfully registered with the Registrar of Business names. He has also incorporated a company Coffee Action Limited, which manages the administrative aspects of the law firm.

Due to the expansion of his business interests, he has opened a branch office in Kora which is operated by one of his gallant pupils. Indeed Mwikya has never had to visit the branch office since it was opened, as the pupil very competently handles all correspondence and even appears in court for simple matters. All complex matters are referred to admitted Advocates.

Discuss the ethical issues raised by this scenario.

(15 marks)

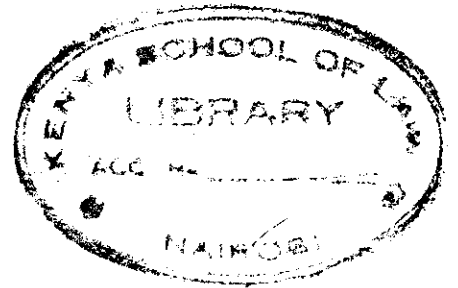
COUNCIL OF LEGAL EDUCATION

EXAMINATION FOR ADMISSION

TO THE ROLL OF ADVOCATES

DECEMBER, 2008

PROFESSIONAL ETHICS



Instructions

- (a) Answer Question ONE and any other THREE QUESTIONS
- (b) All questions carry 15 marks each
- (c) Marks may be lost for illegibility
- (d) Time allowed 3 hours

-
1. Whitney Obama is an accomplished para-legal in Meru, Kenya, having undergone an intensive basic law training by a local NGO. Even though he is not an Advocate, he has extensive expertise in matters legal, and his employer, M'Ntemera Advocate allows Obama to prepare basic pleadings and legal documents for local residents and to argue basic applications in the magistrates' courts. Being a student of equity and fairness, M'Ntemera shares his profits with Obama.

As an enterprising man, M'Ntemera has published and distributed a leaflet that explains the nature of services offered by his firm and the applicable charges, which are reasonably low and below the rates stipulated in the Advocates Remuneration Order. He justifies his charges on the basis of state of the local economy.

To expand his reach and to enable him be more effective, Obama has obtained an online law degree from an Australian University and now wishes to be admitted as an Advocate of the High Court of Kenya and Uganda.

Discuss the ethico-legal issues raised by the conduct of M'Ntemera and explain the process by which Obama can seek admission to the High Court of Kenya and Uganda.

(15 marks)

2. Munir & Company Advocates are acting for the purchaser in a transaction. Sergio & Company Advocates, advocates for the vendor, call for a professional undertaking from Munir & Company to facilitate the release of the documents of title. On the completion date, Sergio & Co call for the balance of the purchase price. No response is received from Munir & Company. Sergio & Company issue a completion notice which is also ignored. Sergio & Company sue Munir & Company to enforce the professional undertaking. Munir & Company advance the defence that it is not possible to determine the actual sum that the vendor is owed, as there is a dispute on the rate and amount of interest. Justice Mang'aa is presiding over the dispute. One week before the scheduled hearing of the case Munir, a partner in the firm of Munir & Company is informed by his clerk that he saw the judge

taking coffee at 'The Junction' with Sergio, a partner in Sergio & Company. The clerk also alleges that he saw the judge receiving an envelope from Sergio. During the hearing, counsel for Munir & Company, makes an application for the judge to disqualify himself on the basis that he has been compromised. The judge refuses to disqualify himself, gets very angry and issues an order for contempt against counsel for Munir & Company. The judge subsequently continues with the hearing of the suit and holds in favour of Sergio & Company.

Munir & Company withdraws instructions from its counsel citing incompetence, and now seeks your advice on the various issues arising from both the transaction and the case.

Prepare a comprehensive legal opinion discussing the legal issues arising from the above transactions.

(15 marks)

3. Kriegler O'waki is a partner in the law firm of Owaki & Co Advocates. In January, 2006, the firm admitted O'Kamau as a partner and the firm immediately changed its name to Jarndyce & Jarndyce Advocates in tribute to Charles Dickens, O'Kamau's favorite author. O'Kamau immediately commenced work and in the course of business filed a suit on behalf of Wizi Bank Limited for foreclosure against Mchunjo Limited's mortgaged property. In February, the firm learns that O'Kamau had not paid for his practicing certificate for that year and it hastily pays for the same and the certificate is issued before the end of February.

As soon as the matter against Mchunjo Limited comes up for hearing, it emerges that the mortgage in favour of Wizi Bank Limited, was perfected by an associate of O'Kamau, in the law firm where O'Kamau was previously a partner, but under O'Kamau's oversight.

Discuss the ethical issues raised by the above scenario. What legal issues may arise with respect to the role of O'Kamau and his new firm in the suit against Mchunjo Limited.

(15 marks)

4. Akinyi has just achieved her long life dream. Six months ago, she was admitted as an Advocate of the High Court of Kenya after arduous self-sponsored studies. She immediately invites another achiever Aukot to join her as a partner in the new firm which promises "to take Nairobi by storm." Aukot is equally enthusiastic and the firm 'Top Wizards & Associates' (TW) is immediately set up. TW engages the services of Dot.biz to design a website for the firm. The content of the website includes a picture gallery and a write up on the rise to stardom of the TW partners. There is also an invitation to prospective clients to enlist the firm's services on attractive terms. One such term is that once a client deposits court filing fees, TW's fees shall be recovered from the decretal sum as success in all litigation is virtually assured. In order to further give TW visibility, Akinyi seeks the assistance of her childhood friend who is a media personality in a leading TV Channel 'On Time'. Akinyi and Aukot appear in a popular TV show 'The Achievers', and both counsel regale their audience with tales of their prowess in advocacy. Akinyi also throws a challenge to potential contenders for the chairmanship of the Law Society of Kenya once the current Chairman's term expires. In her view, the Society needs a radical shake up. Two days following the TV appearance, TW receives a letter from the Secretary of the Law Society of Kenya seeking various explanations. TW does not bother to reply to the said letter.

Identify the issues which arise from TW's passion to succeed 'on time' and express your opinion on each.

(15 marks)

5. Kabuga is a lawyer who specializes in criminal law. In the course of representing Rop Kimkung in a charge of theft by servant, Rop confesses to the theft and also seeks Kabuga's opinion on the defences available to the charge of arson. Rop informs Kabuga that he intends to commit arson the following day so as to get rid of some of the evidence in the theft case. In the course of discussing the defences available for the theft case, Kabuga gives Rop a considered opinion on arson defences. Unknown to him, the conversation is overheard by a court clerk, who reports to the police leading to the arrest of Kabuga. The police want Kabuga to write a statement concerning the charge of theft and the intended arson. While arresting him they also find on his person a large bundle of genuine American Dollars, the source and purpose of which they insist Kabuga must explain.

(a) What ethical issues arise in this situation and what rights does Kabuga have in the circumstances?

(7 marks)

(b) Whilst he is still under arrest, Kabuga's partners resolve to pursue disciplinary proceedings against him for his conduct. Part of the evidence they intend to use is correspondence between the firm and another client that Kabuga represented where they feel he acted unethically.

Discuss the efficacy of the action proposed by the partners and the process they would use to pursue the disciplinary cause. What are the sanctions available to the Disciplinary Committee if it finds Kabuga guilty?

(8 marks)

6. The Kamaus instructed Zuma & Company Advocates to act as their Advocates on the purchase of a pub. During the entire period, the Kamaus consulted with Senior Partner Zuma. They then told Zuma at a meeting that they had decided not to proceed with the transaction. Later, during the very same meeting, Zuma told the Kamaus that the law firm had some interests in a hotel business and he invited them to buy into it. They agreed to do so and he drew up a partnership deed. The venture proved to be a disaster, and the Kamaus sued Zuma & Company Advocates for the colossal losses they had incurred. Mutiso, a partner with the law firm seeks to distance himself from the transaction. Zuma had not disclosed to him or, indeed, to any of the other partners about the transaction. In the recent past Zuma had virtually excluded his partners from the hotel business, and there is a suit by the rest of the partners seeking dissolution of that business. Onyango, another partner, also contests the case by the Kamaus on the basis that he is a new entrant in the firm of Zuma & Company Advocates. Kibet, another partner, wonders what the Kamaus' case has to do with him as he is a limited partner.

a) What issues arise from this scenario?

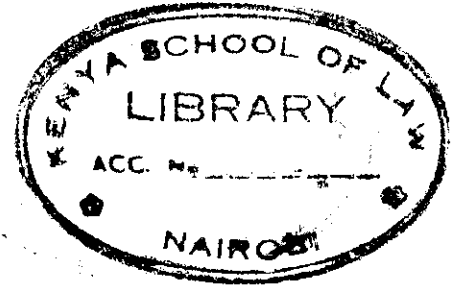
b) What do you think is the likely outcome of the litigation by the Kamaus?

15 marks)

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

NOVEMBER, 2008

PROFESSIONAL ETHICS & PRACTICE



Instructions

- (a) Answer **QUESTION 1** and **ANY OTHER TWO (2) QUESTIONS**
- (b) **QUESTION 1** is **COMPULSORY** and carries **20 marks**
- (c) All other questions carry **15 marks** each
- (d) Marks may be lost for illegibility
- (e) **Two (2) Hours** are allowed

1. Ali Baba was admitted as an Advocate of the High Court of Tanzania (whose Advocates Act is identical to the Kenyan Advocates Act) this year, on the 8th of April 2008. One of his clients is a company in Kenya whose Managing Director has been charged with fraud in Nairobi. Ali Baba wishes to represent the client in Nairobi.

- (a) What options exist for him in this regard and what processes will he need to undergo (if any) to represent his client in Nairobi?

10 marks

As he considers his options, he decides to open a law firm in Arusha, to enable him take advantage of the International Criminal Tribunal for Rwanda, which he understands may close shop within next year, 2009. Since he does not speak good French, he admits into partnership a French lawyer, Sarkozie who is also qualified as a doctor and who is seeking, but has not obtained, Tanzanian citizenship. Together they call their law firm, 'Ali Baba's French connections.' Both Sarkozie and Ali Baba agree with the hospital in which Sarkozie works that the hospital staff may notify all patients of the existence of the law firm and the services it offers. They have also agreed to pay a percentage of any damages obtained from a successful claim to the staffer who introduces the claimant. They have also agreed with claimants to enter into contingency fee arrangements.

- (b) Discuss the legal issues raised by the above scenario.

10 marks

2. In 2001, in order to finance the purchase of a hotel intended to be run as a family,

restaurant business, the second defendant, Amani, borrowed Kshs 100 million from Quick Credit Company Ltd on the security of a mortgage of her house. A further substantial sum was required to pay the balance of the purchase price and, on the basis that it could be raised by a loan from a Cooperative Society, Amani instructed her lawyer, Akili Mingi, to exchange

contracts for the purchase of the hotel. In the event, the Cooperative Society loan was not received and Amani was unable to obtain finance from any other source.

Akili Mingi's law firm had an existing unused finance facility with a bank and, on the day prior to the date fixed for completion, they offered Amani a bridging loan of Kshs.75 million secured by a first charge on the hotel which she accepted and the following day the purchase was completed.

Akili Mingi failed to disclose to Amani that his firm was making a hidden profit on the loan or that he had known that the Cooperative Society loan would not be forthcoming.

The restaurant business was unsuccessful, and in 2003, after Amani had defaulted on her mortgage, Quick Credit Company Ltd foreclosed on her house. At that time, the market value of the house was considerably less than the sum owing under the mortgage.

In early 2004, owing to non-payment by Amani, Akili Mingi's firm sought to exercise their statutory power of sale. Amani immediately filed a plaint against Akili Mingi's firm seeking various orders including injunctive reliefs, damages or equitable compensation for the value of the equity she had formerly held in the house which she lost to Quick Credit Ltd, and the return of various documents including a will, passport and certificates of title over different properties which she had placed with Akili Mingi's law firm for safe custody. Akili Mingi's law firm in turn raised various causes of defence including the right to possession of the hotel and to withhold Amani's documents on account of some unpaid fees.

- (a) In your view, what cause of action (if any) does Amani have and what arguments does she advance? Further, what is likely to be the defence of Akili Mingi's firm?
- (b) If you were the judge of the High Court who adjudicated over these claims, in whose favor would you rule and what would be the salient points of your judgment?

15 marks

3. Nailantei Okuna is a successful conveyancing lawyer. She has received instructions from

Wito Bank to pursue recovery proceedings against Mtu Mwema Co who had borrowed from Wito Bank on the security of several charges on Mtu Mwema's properties. Whilst perusing the charge documents, Nailantei realizes that she is the one who prepared the securities, while she was a partner in a different law firm. She also realizes that she has several matters in which she is acting against Wito Bank in unrelated matters. She also realizes that she witnessed the signatures of the security documents in February 2005, whilst she had paid for her practicing certificate in March of the same year.

- (a) What options are available to her in relation to the matter and which is the most ethical? Would your answer be different if her assistant is the one who dealt with all Wito Bank matters in the other lawfirm?
- (b) What are the implications of Nailantei's delay in securing a Practicing Certificate?

15 marks

4. Onyango is employed as an in-house counsel by Tana River Mining Company Ltd ("Tana").

Tana wishes to purchase some assets of a rival company, Magadi Mining Company Ltd ("Magadi") and seeks the advice of Onyango. Tana is particularly concerned about the environmental provisions of the contract and Onyango makes detailed recommendations to the satisfaction of Tana and the contract is subsequently concluded. The National Environment Management Authority (NEMA), within two weeks of the conclusion of the contract, informs both Tana and Magadi that a water catchment area adjacent to and that has been contaminated over several months by one of the assets under the concluded contract must be cleaned up. Tana and Magadi disagree over liability for the said clean up and Tana files a suit in which it seeks declaratory orders that the rival company is liable to comply with NEMA's orders. Magadi in its defence denies liability and formally seeks orders for the disclosure and production of all the recommendations that Onyango gave to Tana. Onyango in a sworn affidavit declines and pleads client legal privilege. You are the external lawyer for Tana and your client has asked you to give a detailed legal opinion. Would your advice be different if the recommendations to Tana were given by an internal lawyer?

15 marks

5. Over a drink at his local, Musikari Odinga is approached by a gentleman who, not knowing

Odinga is a lawyer, indicates to him that he suspects that he may be charged with theft by servant. The gentleman indicates to Odinga that he did indeed carry out the theft and even offers to share some of the loot with Odinga, if the latter would 'clean' it for him. As soon as Odinga mentions that he is a lawyer, the gentleman gets excited and asks Odinga to represent him if he is charged. Odinga then stops the gentleman from disclosing any further information and indicates that he cannot represent him. Just then the police arrive and arrest both the gentlemen and Odinga, who they request to write a statement detailing their conversation.

- (a) What are Odinga's rights and duties in the circumstances?
- (b) Unlike other professionals Advocates are immune to the tort of negligence and any action by a client in this regard can only be but a waste of resources. Discuss

15 marks

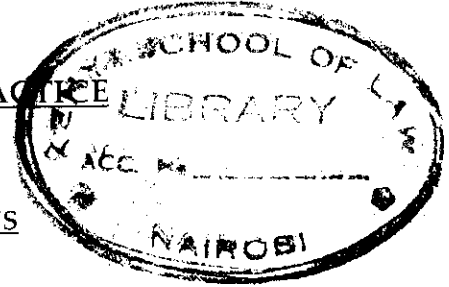
COUNCIL OF LEGAL EDUCATION

EXAMINATION FOR ADMISSION

TO THE ROLL OF ADVOCATES

JUNE, 2008

PROFESSIONAL ETHICS & PRACTICE



Instructions:

- (a) Answer QUESTION 1 and ANY OTHER TWO QUESTIONS
- (b) QUESTION ONE is COMPULSORY and carries 20 marks.
- (c) All other questions carry 15 marks each
- (d) Marks may be lost for illegibility
- (e) **Two (2) Hours** are allowed

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1. Mongo Beti has just been admitted as an Advocate of the High Court of Kenya. Having obtained a soft loan from his local Constituency Development Fund, he has opened a law firm where he is the sole proprietor. He has called the firm "Moongeke Support Barristers" and has produced a brochure detailing the services he offers and the fees he charges. With the business thriving, he has admitted two pupils who regularly interview clients and appear in court for mentions in his cases. In recognition of their valiant efforts, he shares the profits that he makes with them.

Ever the innovator, Beti regularly advertises his successes in the local daily and has offered to represent any suspects arrested on similar charges and to generally offer legal services at a fee which is 50% below the fees allowed in the remuneration order.

- (a) With the aid of case law on all or any of the issues, discuss the improprieties of Biko's actions this far.
- (b) How can the Law Society of Kenya pursue an action against him for the improprieties (if any)?

20 marks

2. Grand Coalition Byamugisha is a Ugandan Advocate of 15 years standing and an accomplished International Trade lawyer. Part of his work involves representing M'pesa Credit Limited, a Ugandan Company. In 1999, Byamugisha's law firm prepared securities in respect of borrowings by Robert Mugabe Masumbuko. This being a standard charge, the firm did not consider it necessary to insert the name of the law firm as the drawer of the document.

In 2004, Masumbuko defaulted in the loan and M'pesa instructed Byamugisha's firm to act in the debt collection matter. The bank required that the debt collection suit be filed and prosecuted in Kenya and Byamugisha has sought your advice on the process available to him so that he can act for the Company in Kenya. In the course of your discussions, it transpires that Byamugisha has

discussed the full details of his client's case with the Law Society of Kenya Secretary pursuant to inquiries by the Law Society of Kenya Disciplinary Committee.

- (a) Quoting case law on the point, discuss the ethical issues that this situation raises.
- (b) How would you advise Masumbuko to deal with the issue of acting for his client in Kenya?
(Please note that Ugandan law on ethics is similar to Kenyan law in every respect)

15 marks

3. (a) Section 4 of the Law Society of Kenya Act sets out the objects of the Law Society of Kenya. Discuss any three objects of the Law Society explaining how the Society has implemented or failed to implement these objects.

10 marks

- (b) Critique the Law Society of Kenya's involvement in the admission and annual certification of Advocates?

5 marks

4. Write short but comprehensive notes on the following

- (i) The Advocates Disciplinary Committee
- (ii) Breach of professional undertakings
- (iii) Touting
- (iv) Two types of retainers
- (v) Termination of a retainer

15 marks

5. Mwanamke Mkali has been charged with corruption under the Anti Corruption and Economic Crimes Act No.3 of 2003. You work with the Kenya Anti Corruption Commission and you are the prosecuting counsel in the case. At the first court appearance, the defence lawyer raises an objection that you have not taken out a practicing certificate.

- (a) What options are available to you in light of this objection?
- (b) Before the matter is concluded, you leave KACC and open up a criminal law practice. One of your first clients is Mwanamke Mkali. In the course of your discussions with her, she confesses that she carried out the acts she is charged with and you establish that there is no defence to her actions.
- (c) What ethical issues does this situation raise and what options are available to you in dealing with the matter?

15 marks

6. *"There is widespread anxiety within the legal profession that professionalism has lost most of its vitality and meaning for lawyers..."* Anthony T. Kronman

- (i) Discuss any three factors that attest to the practice of law being a Profession.
- (ii) To what extent does the practice of law in Kenya exhibit these factors?
- (iii) Discuss any measures that the legal profession in Kenya can take to uphold professionalism in the practice of law.

15 marks
