

**COUNCIL OF LEGAL EDUCATION.**



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

**ATP 100: CIVIL LITIGATION.**

**MONDAY 17<sup>TH</sup> JULY, 2017.**

**DURATION: 3 HOURS.**

**Instructions to Candidates**

- (a) This paper contains **Six (6) printed pages** including the cover page, with a total of **Six questions**.
- (b) Candidates **MUST** answer **FIVE** questions.
- (c) **Question ONE** is compulsory and carries **20 marks**.
- (d) **All other questions** carry **10 marks each**.
- (e) Answers **MUST** be supported by relevant case law and statutory provisions where required.

**PLEASE TURN OVER**

## QUESTION ONE

You are a newly admitted advocate who has been employed by the firm of Wakili and Company Advocates of Gorofa House, 3<sup>rd</sup> floor, Moi Avenue, P.O. Box 34031 - 00100 Nairobi. On 31<sup>st</sup> January, 2017, the Senior Partner in charge of litigation referred Esther Kanunka to you with a request that you take instructions from her.

Esther told you that on the 15<sup>th</sup> day of January 2015, her late husband Peter Kanunka was driving his motor vehicle registration number KCB 300V along the Kiambu-Nairobi Road. He was with their son John Kanunka who was seated on the front passenger seat. As Peter was approaching the Thika-Nairobi highway, Llyod Musonda, a resident of Nyeri County who was driving motor vehicle registration number KTF 324 from the opposite direction started overtaking the vehicles that were ahead of him without first ascertaining whether it was safe to do so.

As a result, the two vehicles collided head-on and both Peter and John sustained serious injuries. John sustained the following injuries: multiple soft tissue injuries, a fracture of the right upper arm, a fracture of the distal femur right thigh bone, fracture of the pelvis and a fracture of the distal right wrist. He was admitted at the Nairobi Hospital for three weeks and was discharged after his condition improved. Peter was pronounced dead on arrival at the hospital.

Esther gave you the following documents:

A death certificate, a police abstract, a Grant of Letters of Administration in her name, receipts for medical expenses in the sum of Kshs.2,785,459/-, a receipt for fees paid for a medical report in the sum of Kshs.5,000/-, a receipt for fees paid for a police abstract in the sum of Kshs.100/-, a pay-slip indicating that Peter used to earn a net monthly salary of Kshs.560,000/, receipts for burial expenses in the sum of Kshs.540,000/-, a medical report, a birth certificate for John indicating that he was born on 10<sup>th</sup> May, 2002, a judgement in a Kiambu Traffic case Number 331 of 2015 indicating that Llyod was convicted of the offence of causing death by dangerous driving and was sentenced to serve two (2) years imprisonment and a letter from her area Chief indicating that the deceased left John and herself as the only dependants surviving him.

Upon perusal of the documents you noticed that:

Llyod Musonda is the registered owner of the motor vehicle registration number KTF 324 and his Postal address is P.O. Box 341 - 10100 Nyeri. Esther's postal address is P.O. Box 415 - 00900 Kiambu. John will require further surgery to remove the metal fixations at a cost of Kshs.3,000,000/- and that Peter was aged 42 years old at the time of his death.

Esther told you that she depended on her husband for the provision of shelter, payment of school fees for their son and other expenses and that by his death, she has suffered loss and damage.

You have discussed the matter with the senior partner and agreed that you draw appropriate pleadings to be filed in court.

Draw the pleadings as agreed, excluding a list of witnesses, witness statements and a list of documents. (20 marks)

## QUESTION TWO

Tabitha Liwewe is the registered proprietor of all that parcel of land known as Kajiado/Kisaju/3489. A dispute arose between Tabitha and Oliver Muchanju over the ownership of the said parcel of land. Oliver claimed to have purchased the land in October 2007 pursuant to a sale agreement dated 12<sup>th</sup> October 2007.

On 8<sup>th</sup> January 2008, Oliver filed a claim before the Ngong Land Disputes Tribunal seeking an order that he is the owner of the said parcel and that Tabitha should be ordered to effect the transfer in his favour.

Upon being served with the claim and a notice that the dispute is fixed for hearing on 3<sup>rd</sup> March 2008, Tabitha wrote a letter to the Tribunal challenging its jurisdiction to hear and determine the issues in dispute. The said letter was copied to the chairman of the Tribunal. The matter was not heard on the said date. Tabitha wrote to the Tribunal and advised that she had changed her postal address and requested that all future correspondence should be forwarded to the new address. Tabitha never received any communication from the Tribunal for over one year and never bothered to find out if the matter was ever fixed for hearing.

On 11<sup>th</sup> October 2009, by sheer luck, her daughter Jane Liwewe happened to be at the Kajiado Senior Resident Magistrate's court when a ruling touching on the dispute was delivered. She immediately informed her mother what had transpired in court. This prompted Tabitha to find out how the dispute ended up in that court.

She went to court and perused the court file and found out that the dispute was heard in her absence on 15<sup>th</sup> May 2008 and an award was made on 25<sup>th</sup> June 2008 to the effect that Tabitha should immediately transfer the suit land to Oliver. She also found out that on 23<sup>rd</sup> September 2008, the court adopted the award as a judgement and a decree was drawn. Oliver then filed an application seeking to have the executive officer of the court to sign all the relevant documents including transfer forms to facilitate the transfer of the suit land. The application was allowed on 11<sup>th</sup> October 2009. Tabitha fears that unless the entire process is stopped Oliver will extract the order and proceed to transfer the land to himself.

Assume that Tabitha approached you on 15<sup>th</sup> October 2009 and gave you copies of the proceedings at the Tribunal and the Senior Resident Magistrate's Court and requested you to advise her on the steps she should take to protect her interest in the suit land.

Write a legal opinion on the nature and scope of remedies she should seek and the procedure of making an application for those remedies. (10 marks)

## QUESTION THREE

- (a) On 5<sup>th</sup> September 2015, Mathew obtained judgement against John to recover a sum of Kshs.15,575,000/- inclusive of costs. John did not appeal against the judgement. Mathew, through his advocates applied for execution and obtained warrants of attachment. The warrants were given to an auctioneer to execute but were returned after two months because the auctioneers could not trace any attachable goods. Mathew has received information that John is the registered proprietor of all that parcel

of land known as Kajjado/Kitengela/39587. The said land has an approximate market value of Kshs.21,000,000/-.

On 30<sup>th</sup> November 2016, Mathew came to your office and explained to you what had transpired. He is anxious and wants you to take over the matter from his former advocates so that you can apply to execute the decree.

Explain the procedure you will follow to execute the decree and recover the decretal sum. (5 marks)

- (b) Mohamed operates account number 001300421 with Akiba Bora Bank Limited at its Thika Branch. On 21<sup>st</sup> December 2016, Mohamed deposited cheque number 018983 of Kshs.9,988,075/- purportedly drawn in his favour by Kuwinda Limited. Akiba Bora Bank Limited presented the cheque for clearing and payment in its usual course of business. The cheque was paid and its proceeds were credited to Mohamed's account.

Meanwhile Ukweli Limited discovered that cheque number 018983 which had been deposited in its account by Kuwinda Limited had not been credited. Ukweli Limited made inquiries at its bank and was informed that cheque number 018983 in the sum of Kshs.9,988,075 had been credited to Mohamed's account at Akiba Bora Bank Limited at its Thika branch.

Kuwinda Limited has denied having issued any cheque to Mohamed since the company has no dealing with him. Both Mohamed and Kuwinda Limited are claiming to be entitled to the said sum of money which is now held in account number 001300421 at Akiba Bora Bank Limited.

Akiba Bora Bank Limited wants to release the said amount to its rightful owner but does not know how to go about it. The bank has approached you and wants to render a legal opinion on how it should resolve the matter.

Write a legal opinion describing the nature of the application the bank may make and the conditions which it must fulfil before a court can grant such an application.

(5 marks)

#### QUESTION FOUR

Haria Limited of P.O. Box 14921-00200 Nairobi is engaged in the business of production, marketing and sale of spices under the brand name "Simba Tata Bizari Halisi". It is also registered as proprietor of Trademark Number 69810 "Simba Tatu Limited", 70305, "Simba Tatu Bizari Halisi" and 71431 "Simba Tatu Bizari Halisi" (name and device). The company therefore enjoys exclusive use of the said trademarks in relation to the spices and printed matter in classes 45 and 60 of the Nice Classification of Goods and Services.

Haramu Limited of P.O. Box 30402 - 00100 Nairobi has infringed on Haria Limited's trademarks by engaging in the importation, packaging, supply, distribution and sale of spices in packs so similar to that of Haria Limited so as to confuse and deceive the public into thinking that Haramu Limited's spices are those of Haria Limited.

The spices are being distributed by Soba Limited of P.O. Box 11378 - 00100 Nairobi at its outlets in Nairobi, Nakuru, Kisumu, Meru and Mombasa at the expense of Haria Limited's goodwill thus causing Haria Limited loss, damage and decline in sales. Haramu Ltd is also infringing on Haria Limited's trademarks.

On 15<sup>th</sup> January 2017, John Williams, a director of Haria Limited instructed the firm of Carson and Associates of P.O. Box 40311-00100, Maziwa House, 4<sup>th</sup> floor Tom Mboya Street Nairobi to file a suit to protect the company's interests. The necessary pleadings were prepared and filed in Nairobi as Nairobi HCCC Number 35 of 2017. However, before summons to enter appearance were served, John approached you and sought your advice on how the company can mitigate the losses it is incurring and preserve the evidence it will require during the hearing.

- (a) Advise John on the nature of the application and the orders which the company may seek and the conditions which must be fulfilled before such orders are granted. (5 marks)
- (b) Draw an appropriate application to secure Haria Limited's interests. (5 marks)

#### QUESTION FIVE

- (a) On or about the 10<sup>th</sup> day of April 2016, Peter sold his motor vehicle registration number KAA 180N to John at a purchase price of Kshs.750,000/-. John took possession of the vehicle and gave Peter a post-dated cheque to be banked on 10<sup>th</sup> May 2016. On 9<sup>th</sup> May 2016, John wrote a letter to Peter and advised him to bank the cheque on 30<sup>th</sup> June 2016. Peter travelled to Uganda to attend to urgent work and did not come back to Kenya until 30<sup>th</sup> November 2016. He realized that he could not bank the cheque because it had become stale. John refused to replace the cheque nor pay the amount due.

Peter has now filed a suit at the Chief Magistrate's Court at Nairobi claiming a sum of Kshs.750,000/-. John had filed a defence denying owing Peter any money but has admitted having issued the cheque in question. Peter is desirous of obtaining judgement without going through a full trial and has requested you to advise him on the avenues available to him.

Write a legal opinion describing three options that are available to Peter. (5 marks)

- (b) William obtained judgement against your client Joseph in Nairobi HCCC No.501 of 2014 in which Joseph was ordered to transfer that parcel of land known as LR No.12570 to William. Joseph was dissatisfied with the said judgement and instructed you to file an appeal. You lodged a Notice of Appeal and applied for stay of execution of the decree but the superior court dismissed the application with costs.

Joseph wants to pursue his appeal but fears that if he transfers the property and his appeal succeeds he may not get it back. He wants you to advise him on how he can protect his interest in the property.

Prepare a concise legal opinion on the nature of application you will make to protect his interest and the conditions that must be fulfilled before such an application can be granted. (5 marks)

## QUESTION SIX

James Juma filed a suit for breach of contract against Hezekiah 10 years ago. The amount in dispute is Kshs.2,000,000. Hezekiah duly filed his defence and the other necessary pleadings. He listed 60 witnesses, with the witness statements amounting to approximately 600 pages. The documents listed by Hezekiah as exhibits are 200 but James Juma believes they are irrelevant to the case. To date only 10 witnesses have been heard.

- (a) Analyze these circumstances with a view to advising whether they achieve the overriding objective in Civil Litigation. (5 marks)
- (b) On the basis of the Constitution of Kenya, 2010, and the provisions of the Civil Procedure Act and the Rules, advise on the action that a court ought to take to arrest such a situation. (5 marks)

-----  
END