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COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES

ATP 100: CIVIL LITIGATION

MONDAY 28TH NOVEMBER, 2016

DURATION: 3 HOURS

Instructions to Candidates

- (a) This paper contains **Five 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 the proprietor of Akili & Co. Advocates. You have received urgent instructions from your client Mr. White, who states that he had entered into an agreement of sale with Ms Anne for the purchase of property described on the title document as Busara Block 50/350 Measuring 0.45 Ha (Hereinafter referred to as "the suit property") for Kshs.50,000,000.00. Ms Anne was the registered owner of the suit property.

The terms of payment as per the Agreement were that 10% of the purchase price was payable on the execution of the agreement and the balance was to be paid upon the successful transfer of the suit property to your client Mr. White.

In the documents availed to you, you have established that Mr. White has fully paid the purchase price to Ms Anne. Ms Anne has duly executed an acknowledgement note confirming receipt of the full purchase price. However, Ms Anne has been reluctant to sign the transfer documents in order to transfer the title of the suit property to Mr. White.

In the bundle of documents provided, you have also seen a letter from Sharp & Co. Advocates addressed to Mr. White apparently intending to cancel the sale. This is the extract of the letter:

Sharp & Co. Advocates

Date: 03/05/2015
Your Reference: ABX
Our Reference: XYZ

RE: CANCELLATION OF SALE OF LAND REFERENCE BUSARA BLOCK 50/350:
ANNE TO WHITE

We refer to the above matter.

We would like to bring to your attention that Ms Anne has decided to cancel the sale with effect from the date of service of this letter to yourselves.

The reason of the cancellation is that our client has secured a better deal, in fact, Mr. Pesa is ready and willing to pay three times the purchase price you had agreed. He has already executed the Agreement for sale with Ms Anne.

Do not worry, we shall refund you Kshs.50,000,000.00 together with a 10% p.a interest.

We should be grateful if you would kindly expedite because time is of essence.

Yours faithfully,

*Sharp & Co. Advocates
Senior Partner*

Mr. White does not want to lose the suit property because of its prime location. He contends that he has fully complied with the terms of the agreement and Ms Anne should complete the sale and transfer the suit property to him.

Mr. White has instructed you to file a suit seeking orders to compel Ms Anne to transfer the suit property to him.

In addition your client fears that before hearing and determination of the main suit, there is a high probability that Ms Anne may dispose off the suit property to a third party and hence defeat the end of justice.

As a learned Advocate, you have advised Mr. White that you can apply your vast knowledge in civil litigation to obtain the necessary orders so as to protect the interests of your client.

- (a) What are the orders that you are going to seek from the court? (5 marks)
(b) Draft the application you will file in court in order to seek these orders. (15 marks)

QUESTION TWO ✓

Mazingira Nadhibu, a Non-Governmental Organization based in Garissa County of the Republic of Kenya is concerned that the Garissa County Government has never developed a policy on management of solid waste around Garissa town. Recently there has been an upsurge in the quantity of polythene papers littered all over Garissa town. Further, the County Government recently resolved to relocate the sewerage system to a certain highly densely populated area on the outskirts of Garissa town. There has been no information in the media on calling for public involvement in any Environmental Impact Assessment (EIA) process, if at all such a process was ever undertaken. Mazingira Nadhibu's Garissa County Coordinator, Mr. Shah Bin Shah has written a letter to the National Environmental Management Authority (NEMA), a body corporate established under the Environmental Management Authority and Co-ordination Act seeking details on whether, and when an EIA licence was obtained by the County Government for the sewerage relocation project. NEMA has not responded to the letter for two (2) months now. Frustrated by this inaction on the part of NEMA and the County Government of Garissa, Mr. Shah instructs your law firm, Usafi Daima Advocates to give a legal opinion on the appropriate action that may be taken by the organization for purposes of enforcing the rights that have been denied, violated or thwarted.

In giving your opinion, discuss the issue of *locus standi* in this matter, the specific rights involved, the possible remedies that are available and the appropriate court for commencing this action. Reference to the relevant cases interpreting particular provisions of the law is encouraged. (10 marks)

QUESTION THREE ✓

Matthew sued Likoko Limited in a personal accident claim. The protracted civil trial took place before you, the Chief Magistrate, at Tenda Wema Law Courts. You recorded the following *viva voce* evidence from the witnesses:

Matthew was cycling his bicycle along Imani Road when the driver of KBU 324A, a Nissan Bus who was trying to overtake a stationary car collided with his bicycle violently throwing him off the road.

As a result of the accident Matthew sustained serious injuries, a fracture of both lower limbs, deep cut wounds on his forehead, bruises on the upper limbs and dislocation of his right hip joint.

The section of the road where the driver of the motor vehicle registration number KBU 324A was overtaking was a sharp bend with several enormous road signs reading "stick to your lane, do not overtake".

Matthew produced a search of the motor vehicle registration number KBU 324A from the Registrar or Motor Vehicles as plaintiff exhibit 1 which confirmed that Likoko Limited was the registered owner of the motor vehicle.

Matthew also called a medical doctor who produced the P3 Form and Medical Report as plaintiff's exhibit 2 and corroborated the plaintiff's testimony on the extent of the injuries sustained.

The last plaintiff's witness was the investigating officer who produced the OB Report and drawings of the scene of the accident. These were marked as plaintiff's exhibit 3. His testimony and exhibits confirmed on a balance of probabilities that motor vehicle registration number KBU 324A was overtaking on the wrong section of the road and its driver was solely to blame for causing the accident.

In its defence, Likoko Limited submitted that it was not the owner of the motor vehicle registration number KBU 324A since it had already sold it to Kuruka Safaris the previous month. Likoko Limited produced an Agreement for Sale entered between itself and Kuruka Safaris as defence exhibit I before the court.

Matthew submitted that an Agreement for Sale was not a valid document of ownership. Kuruka Safaris was not enjoined as a party to the suit.

In the suit papers, there are several receipts of treatment in the list of documents. They total to Kshs.1,000,000.00. The amount pleaded as special damages is Kshs.2,000,000.00

As a magistrate well-schooled in the essential contents of a judgment, you are tasked with the responsibility of drafting a well-reasoned judgment in this matter.

Proceed accordingly. (10 marks)

QUESTION FOUR

- X (a) Set out and explain five (5) factors that a taxing officer must take into account in taxation of costs. (5 marks)
- (b) Explain the procedure which a party who is dissatisfied with the decision of a taxing officer has to follow in challenging the said decision. (5 marks)

QUESTION FIVE ✓

Your client, Ruth had initially retained Luke & Co. Advocates to act for her in a protracted civil trial lasting for 15 years. The court pronounced itself on the judgment which was unfavourable to your client. Ruth was very discouraged and decided to take a 'rest from the corridors of justice'. After 14 years, she instructed her advocates to file a Notice of Motion application before the court which delivered the judgment seeking *inter alia*:

That the court be pleased on its own motion to recall, review or set aside its judgment delivered 14 years ago in High Court Civil Case No.23 of 1995.

In her supporting affidavit she depones that it is in the interest of justice for the court to hear and determine the application in her favour in order to avoid substantial miscarriage of justice.

After filing of the application, her Advocates Luke & Co. refuse to act for her citing perceived conflict of interest. Ruth then forwards the bulky file to you to take over the matter. However, before taking any step, she requests that you give a legal opinion on the critical issues of the matter.

Draft a well-reasoned legal opinion citing the grounds for review of a court's order and her chances of success in this application. (10 marks)

QUESTION SIX ✓

Sammy Fowler filed a suit at the Chief Magistrate's Court in Nairobi against Ndege Kubwa Ltd. The suit sought Kshs.2,000,000 in damages for breach of contract. The process server served the plaint upon Sarah Salim, a cleaner at Ndege Kubwa Ltd.'s premises. Sarah immediately threw the documents in the litter bin upon failing to establish the importance of the same. No appearance or defence was therefore filed in the matter. On 5.05.2016, auctioneers proclaimed the office furniture and fittings at Ndege Kubwa Ltd in purported execution of a decree issued in Nairobi Chief Magistrates Civil Case No.3 of 2016.

Tumbo Joto the Managing Director at Ndege Kubwa Ltd immediately contacts you at Haraka Wakili Advocates to proceed to court and protect the company's property from imminent disposal. You peruse the court file and discover that the process server had described Sarah Salim as the legal affairs officer at Ndege Kubwa Ltd.

Prepare an appropriate application together with the necessary accompanying documents to secure your client's interests. (10 marks)

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