

COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES

ATP 102: PROBATE AND ADMINISTRATION

FRIDAY 2ND DECEMBER, 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

Parents in common

Summarise

QUESTION ONE

Mr. and Mrs. Mbwa Mwitw were married at the Registrar of Marriages. They own their palatial home as joint tenants. Mr. Mbwa Mwitw owns two ten (10) acre farms half of which was acquired forty (40) years ago in Sokwe Mtu County, two (2) cars a Porsche Cayenne and a Range rover, he keeps one hundred (100) exotic birds and fifty (50) horses while Mrs. Mbwa Mwitw owns a rental property in her name alone that she inherited from her mother. The rental income is deposited into an investment account in her name.

The beneficiaries named on Mrs. Mbwa Mwitw's investment account are Pomboo and Paa who are the biological children of Mr. and Mrs. Mbwa Mwitw.

*3 dependent
Paa & Pomboo
responsibility*

In 1991 Mr. and Mrs. Mbwa Mwitw went to their advocate's chambers with instructions to prepare their will. Mr. Mbwa Mwitw stated that upon his death, his estate should be distributed to his wife Mrs. Mbwa Mwitw, if she survives him and if she fails to survive him then the will provides that his estate be distributed equally between their biological children. Mrs. Mbwa Mwitw's will contains reciprocal provisions to that of Mr. Mbwa Mwitw.

Mr. and Mrs. Mbwa Mwitw have been living and caring for an orphan Swala and he is not mentioned anywhere in their wills. The Advocate prepared the wills. Mr. and Mrs. Mbwa Mwitw reviewed and signed the wills at the Advocate's offices with the Advocate Court Clerk and Secretary signing the wills as witnesses.

Subsequent to execution of their wills Mr. and Mrs. Mbwa Mwitw were blessed with a daughter Farasi who was born in 1995. Mr. and Mrs. Mbwa Mwitw instructed their advocate to prepare new wills and they booked an appointment with their Advocate to execute their wills which would include and provide for Farasi as they had provided for Pomboo and Paa. However the Advocate was always held up in court and as time passed they forgot to update their wills to include Farasi.

loss of time

*Farasi
not mentioned
Present*

Two years ago, Mrs. Mbwa Mwitw comes across her will and believing that it is invalid for not providing for Farasi tears it in half and leaves it in the safe. She promises to visit her lawyer to make a new will including Farasi but has no intention of changing anything else in the will contents. She goes to the bank and updates records of her investment account and adds Farasi as beneficiary alongside her brothers Paa and Pomboo.

One month ago Mr. and Mrs. Mbwa Mwitw were driving home from work late in the evening when their car was swept away by floods after heavy downpour and they both died as a result of drowning. Prior to his death, Mr. Mbwa Mwitw had promised to give his daughter the Porsche Cayenne as a gift if she passed her Bar Exams which she has since passed.

*→ F. D. → later
→ F. D. → later
→ F. D. → later*

After the funerals a woman arrived at the home claiming that she was married to the deceased Mr. Mbwa Mwitw but divorced thirty (30) years ago and that in fact, the court had awarded her half (1/2) acre in one of the farms in Sokwe Mtu County belonging to Mr. Mbwa Mwitw where she lived. She therefore regarded herself as Mbwa Mwitw's widow.

→ former wife

Not long thereafter another woman visited the home with a two (2) year old boy who resembled Mr. Mbwa Mwitw. She introduced herself as Fisi a girlfriend to Mr. Mbwa Mwitw for five (5) years and she had sired a son Fisilet with Mr. Mbwa Mwitw. She therefore regarded herself as his

→ child of Mr.

*Parental
Paa & Pomboo
responsibility
to be passed*

*→ up to date
→ During the life time*

widow. Family members have now requested the children Pomboo, Paa and Farasi to approach you for legal advice on the following:

- a) Validity of the wills under the Law of Succession Act (Chapter 160, Laws of Kenya) (7 marks)
- b) The entitlements or otherwise of all persons named in the above narrative vis-à-vis the estate of the deceased's having regard to relevant Kenyan statutes and case law. (10 marks)
- c) The specific steps and legal processes to be taken to pursue the children's claims to their parent's estate. (3 marks)

Advise the children Pomboo, Paa and Farasi accordingly.

QUESTION TWO

By way of an application dated 16th February 2015 the applicant seeks orders for an interim injunction restraining the respondents from acting in any way whatsoever through alienating, encroaching or otherwise intermeddling with the property belonging to the deceased's estate.

In view of the above background facts and also against the words of the Hon. Justice W. Okwany in Moraa Gusemba v David Nyakoi Ongori [2015] e KLR that:

"Courts have in many instances grappled with the question of whether orders of injunction can be made in succession cases with the main question being whether the court is clothed with the powers to grant such orders."

Assume that you are acting for:

- (a) The applicant. (5 marks)
- (b) The respondent. (5 marks)

In each case discuss your case in light of the Judge's sentiments.

QUESTION THREE

Mr. Samawati, now deceased, had carried on a transport business known as Samawati & Brothers Transporters. After his death his wife Mrs. Samawati was appointed the Administrator of his estate and she continued to operate the deceased's business which remained a sole proprietorship in the name of the deceased.

Mrs. Samawati is a member of Rangi Mums which is a women's investment group "*chama*". During the group's meeting last weekend, Mjuaji, a member of Rangi Mums, informed Mrs. Samawati that she may be personally liable if she continued to carry on her late husband's business under the same name. However, the other chama ladies disagreed with Mjuaji and advised Mrs. Samawati to continue running the business in her late husband's name since the business belonged to a dead person.

Summary

* check a/c
* in function -> note
* appoint an admin

- pay all liabilities & manage assets
- take interest
- keep records
- register the
- beneficiaries & more where stipulated
- execution to the will

After the chama meeting Mrs. Samawati has not slept. She visits your chambers for legal advice.

a) Advise Mrs. Samawati accordingly and discuss whether she can be held personally liable for any adverse action/suit against Samawati & Brothers Transporters. (4 marks)

b) Discuss her powers and duties to the estate. (6 marks)

personal

QUESTION FOUR

Doreen is a member of the Women's Fellowship Programme (WFP) at your church. During the Sunday service the WFP invited you as a recently admitted advocate to speak to the ladies about the importance of writing wills.

Following your talk Doreen has visited you in chambers and would like you to draw up a will for her. The following is a summary of Doreen's background.

- away
- explain
- inform
- any
- benefits

Personal
info.

i.

Family status:

She is divorced. She was previously married to John Kiserian for 30 years, between 1985 and 2015. They had a few joint properties which were split after divorce.

ii.

Children:

She has three children namely:

- Issa Obiero aged 29. He is married with one child and lives in Siaya.
- Clarence Shambani aged 21, recently employed and lives with Doreen.
- John Samaki aged 10.

2 Beneficiaries

iii.

Other Relations:

- She has a boyfriend, Joel Mtamu whom she loves dearly.
- Her parents Teresa and Josiah Manderu are quite elderly and they also live with her.

Guardians

The only other family members whom she is in contact with are:

- Her elder brother Tom Turkana who works in Turkana.
- Her uncle Jairus Nanyuki, a policeman in Nairobi, and
- Her aunty Ruth Meru a nurse in Machakos.

make a list

iv.

Property:

- She has life savings of Kshs.450,000/- held in an account in Equity Bank.
- 10,000 shares
- A block of 20 apartments at Komarock which she bought after the matrimonial settlement.
- A life cover with Maisha Insurance Co. Ltd.
- 2 plots at Komarock.

1. estate
2. distribute for distribution

Distribution

Identify and draft any five (5) sample clauses of Doreen's will.

(10 marks)

QUESTION FIVE

Mr. Buluu a dedicated family man with seven (7) children dies without a will leaving behind vast acres of land. Mrs. Buluu comes to your law offices where you practice as an associate. You are allocated the file to deal accordingly.

Mrs. Buluu informs you that she has been living in Dubai away from Mr. Buluu because their relationship had deteriorated over the years since she could not get along with Mr. Buluu's children who are all adults and that she is the same age with Mr. Buluu's last born child. That she is not the biological mother of Mr. Buluu's seven (7) adult children since she married Mr. Buluu at a church wedding seven (7) years ago after the death of his first wife who was the mother of Mr. Buluu's children. Mr. Buluu's children had developed a cavalier and hostile attitude towards her as their step mother from the onset and they would verbally insult and abuse her forcing her to flee to Dubai three years ago for fear of harm.

Mrs. Buluu further explains that she did not attend the burial of Mr. Buluu since she was not able to process travel documents and visa on time. She has now learnt that her step children applied for a Grant of Letters of Administration claiming that they were the only children of Mr. Buluu whom they claimed was a widower. The Grant of letters of Administration was awarded to them and subsequently confirmed. The step children have been selling the vast acres of land and sharing the proceeds to her exclusion.

Mrs. Buluu needs legal assistance and advice on the following:

- Whether she is entitled to a share in the estate. (6 marks)
- The legal processes and steps necessary to pursue her claim. (4 marks)

QUESTION SIX

George Ndoto died of prostate cancer after battling with the disease for a long time. Since he was aware of his condition, George decided to write his will from his hospital bed. He made provision for his two wives and seven children. He also gave further instructions on the disposal of his body and creation of trusts for his minor children.

After his death it emerged that George had not willed away a block of residential flats located in Ridgeways along Kiambu Road. A search at the land registry indeed confirmed that the block of 20 flats was registered in the name of George Ndoto solely.

Following the discovery a family feud has erupted. Bibi Mkubwa, George's elder wife is of the view that she should get a larger portion of the estate since even under the will her husband had left her a large portion of property. Bibi Mdogo, the younger wife, feels that the property should be shared equally.

You are George Ndoto's lawyer and the two widows have approached you for advice over the matter.

Draft the relevant documentation for filing in court before distribution of the portion of the estate can begin. (10 marks)

END