

# COUNCIL OF LEGAL EDUCATION



## EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES

### **ATP 108: COMMERCIAL TRANSACTIONS**

MONDAY 23<sup>RD</sup> NOVEMBER, 2015

DURATION: 3 HOURS

#### Instructions to Candidates

- (a) Candidates **MUST** answer **FOUR** questions, at least one question from each of the **three sections (A,B,C)**
- (b) All questions carry 15 marks each.
- (c) Marks shall be lost for illegibility

PLEASE TURN OVER

## SECTION A

1. Nyakora Enterprises is a thriving general retail business formed by three close friends and former school mates some eight years ago. The three, Nyamele, Kola and Rarinde have seen the business grow into a multi-million shilling organization in a short period. Nyamele and Kola reckon that they can now undertake, in addition to the current business, hardware and electronics business. Rarinde does not agree with them and is ready to withdraw from the business and leave his friends to continue.

All three partners have approached you to advise them on the best way forward legally. Advise on:

- (a) The effect of Rarinde's departure from Nyakora Enterprises.
- (b) The most suitable business vehicle that the two remaining friends may form, having indicated that they no longer wish to use the partnership. Spell out the steps involved in forming the new association.

(15 marks)

2. Madhubuti Bank Limited is a multinational bank which has operated in Kenya for a long time. Recently the bank instructed you to act for it in the proposed acquisition of Suta Bank Limited, a smaller bank struggling to stay afloat in the face of stiff competition in the banking industry. Both banks have insurance and investments subsidiaries. The bank wishes you to prepare a detailed legal opinion to be used as a Board paper, with focus on the following areas:

- (a) The governing legal framework and key legal issues. (9 marks)
- (b) The chief issues to be covered in carrying out legal due diligence. (6 marks)

3. Alice Teja is a depositor in Malinjozi Bank and has just learned that the bank has been placed under statutory management by the Central Bank of Kenya. The bank is said to be insolvent. A while back it was reported in the press that the bank's directors, members of one family, had bought Malinjozi Plaza which also housed the bank's headquarters.

Ms Teja did not think much of these developments, simply consoling herself that her deposit, like thousands of such deposits by very important persons she knew could not really be in danger.

With reality dawning on her she has rushed to your office for help to recover her savings.

Advise Ms Teja.

(15 marks)

## SECTION B

4. Magunga and Ronda are partners in Roma Tailors, a tailoring business based at Kandito. A year ago Magunga approached Chiel Wiyoke, a wealthy businessman in the county, and borrowed Kshs.50,000/- as a short-term loan, payable within two months. He claimed that the money was needed to purchase bulk clothing material for making school uniforms for students of a local and well-known secondary school.

Magunga misappropriated money for use on his own affairs, without the knowledge of Ronda, only pleading "overwhelming obligations" when confronted by the latter.

The Managing Director of your client has been informed of this and has invited you to provide a written legal brief and in particular, seeks to know if the corporation should be in any way worried about this discovery.

Write a legal brief on the basis on the facts above.

(8 marks)

(b) Gabriel Ntagabo approached Nakasero Motors, reputable car dealers of the popular motograry model. He needs the car immediately for his work as a journalist but can only afford a payment arrangement that will allow him to complete payment of it after twelve months. Ms. Salema, the Sales Manager, readily agrees but explains that, in that case, the price will be marked up by 13 per cent and that their trade partners Messrs. Senti Advances Limited, for whom you act, will complete the rest of the transaction for him.

As expected Senti Advances Limited has passed the matter to you. Draw and attach a draft of the essential legal instrument, remembering to highlight the main clauses thereof.

(7 marks)

8. Mrs. Bimkora Mbune handed a cheque for Kshs.650,000/- drawn on Guda Bank with a request to open an account in her name, claiming that the drawer therein, Messrs Kamaloka & Company Advocates, had acted for her in a sale and transfer of a boutique kiosk she used to run. The bank obliged and went ahead to collect the proceeds which it placed in her new account.

Three days later, Mrs. Mbune withdrew the whole amount and cannot be traced now. It has turned out that her husband, Mr. Tapell Mbune, who worked as a cashier at Messrs Kamaloka & Company Advocates received the cheque drawn by the law firm's sole proprietor and signatory and proceeded to open and endorse the same cheque in favour of his wife.

The Advocates now demand that Guda Bank pays them the amount of the cheque among other demands.

Advise the bank.

(15 marks)

9. The Cabinet Secretary responsible for matters of finance recently established a Commission to review and consider a report on legislation concerning Commercial Papers in Kenya, and you have been appointed a member representing the Law Society of Kenya. The commission Chairman has seen your curriculum vitae which shows, in part, that you are well grounded in Commercial Law; and he has asked you to prepare a sub-chapter on "A Fresh Look at Negotiable Instruments in Kenya Today."

Specifically, you have been requested to give a background that included the form or elements of such instruments prescribed by statute and those, if any, evolved from trade and usage.

- (a) Name and discuss five (5) commonly used payment instruments in Kenya.

(8 marks)

- (b) In respect of the payment instruments in (a) above, suggest reforms that would make them more applicable to Kenya's modern commercial transactions.

(7 marks)

Chiel Wiyoke has sued Roma Tailors, prompting Ronda to come to you for legal advice. He lets you know that Magunga has been a lifelong friend and a brother-in-law to him, and also seeks to know if there are any circumstances under which a person in his position may ratify a contract he knew nothing about.

Advise Ronda.

(15 marks)

5. Nairobi Airlines Limited (NAL) ordered six Dreamliner aeroplanes in 2010 from Bolche Inc., with delivery to be at the Rabunche International Airport in Brazil.

Early last year NAL informed Bolche Inc. that due to worsening financial situation and reduction in business it no longer wished to take delivery of the aeroplanes. However it would wish to acquire only two much smaller aircrafts. Bolche Inc. did not reply to the communication from NAL.

Last week NAL received a notice from Bolche Inc. advising the former to take delivery of two of the dreamliners ordered at the agreed place of delivery, namely Rabunche International Airport. They have advised, indeed warned, that continued and extended storage/parking of the two aeroplanes will attract charges.

*Argued* NAL has asked you to prepare an urgent response to Bolche Inc. and wish you to highlight reasons for resistance to the notice of ~~non~~-delivery of the aircraft and possible remedies against the aircraft manufacturer.

(15 marks)

6. Dabalo Dhidho Auctioneers knocked down a used Lexus Saloon car to Yanya for the latter's bid of Kshs.1 million. It later emerged that the owner and seller of the car, Ms. Maga, had advised the auctioneers, in writing, of a minimum price of Kshs.1.5 million on the item. The Manager of the auctioneers firm, Mr. Dhidho acknowledges this, but he counters that, two earlier attempts to sell the same car, did not attract any offers close to Kshs.1 million.

Maga seeks to retrieve the car from Yanya. Discuss briefly the legal rights of the three parties.

(15 marks)

### SECTION C

7. (a) Mr. Mwangalifu borrowed a substantial sum of money from your client, Mashama Finance Corporation in December 2010 on the security of his farm equipment and produce. This was to help him undertake major upgrading and expansion of his farming business. Mr. Lifu had executed some standard documents in favour of your client which, to his knowledge were delivered to Sheria House for registration. Unfortunately, he lost his copies of these in a recent flood that affected his residence.

Upon visiting the relevant registry in Sheria House, Mr. Lifu is shocked to learn that virtually all such documents delivered from the Corporation and other financiers have not yet been endorsed by the relevant officer for over seven years and are simply stacked in some part of the office.