

COUNCIL OF LEGAL EDUCATION.



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

ATP 104: TRIAL ADVOCACY

TUESDAY 21ST MARCH, 2023.

DURATION: 3 HOURS.

Instructions to Candidates:

- (a) This paper contains **EIGHT (8)** printed pages including the cover page, with a total of **SIX (6)** questions.
- (b) A candidate **MUST** answer **FIVE (5)** 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

Mr. Mboje was employed by MPD Limited as a Group Financial Controller. The MPD Limited's Human Resources Manual (HRM) provides that senior employees, such as the Group Financial Controller, can only be employed under short-term contracts for a period of three (3) years. These short-term contracts are renewable on application and upon satisfactory performance. The HRM also provides that the employees subject to these contracts are not entitled to pension but to a one-off gratuity payment computed at the rate of one third of every year's salary for the years served.

Mr. Mboje has worked for MPD Limited under these short-term contracts since February 2012. Upon lapse of each contract, the same has been renewed given Mr. Mboje's exemplary performance. Mr. Mboje has received payment of gratuity upon the lapse of each short-term contract.

As the Group Financial Controller, Mr. Mboje does not have a seat in the MPD Board of Directors. However, on 10th January, 2021 the MPD Limited's Managing Director, Mr. Musone was away on official duties when the MPD Limited's Board of Directors had a sitting. Mr. Mboje attended the Board Meeting on behalf of Mr. Musone. One of the agenda that was coming up for consideration during that Board Meeting was the proposal by the Board's Human Resources Committee to extend a Voluntary Early Retirement Programme (VER) to the employees who are subject to the short term contracts. The proposed VER provides for very substantial pensions to be payable to whom it applies.

Considering that his employment contract was coming to an end and that he had reached the mandatory retirement age, Mr. Mboje canvassed and voted in favour of the VER. The resolution was adopted unanimously by the MPD Limited's Board. During the deliberations, Mr. Mboje did not disclose the fact that his employment contract was coming to an end or that he had reached the mandatory retirement age.

Subsequently, Mr. Mboje applied for VER as required by the new VER policy. The application was accepted in writing by Mr. Andambi, the MPD Limited's Human Resources Manager. Mr. Andambi informed Mr. Mboje that he could proceed on his terminal leave as he waited payment of the VER dues.

Two weeks after Mr. Mboje had proceeded on his terminal leave, a new Board of Directors of MPD Limited came into office. During its first sitting, the validity of the VER policy was discussed. It was noted that the VER policy went against the MPD Limited's HRM. Consequently, the Board resolved to recall and terminate the VER policy effective immediately.

Mr. Andambi thereafter wrote to Mr. Mboje informing him of the Board's decision. He directed Mr. Mboje to proceed to clear with all relevant departments within the

company after which he would be paid his gratuity as per his contract. Mr. Mboje proceeded to clear with the respective departments as directed and was subsequently paid his gratuity.

A year later, Mr. Mboje filed a suit against MPD Limited to enforce the VER. His contention is that MPD Limited made the VER available to all employees. Mr. Mboje says that he applied for the VER which application was accepted by MPD Limited. Consequently, he argues, MPD Limited should be held to its word.

- a) Assuming you represent MPD Limited, draft cross examination questions that you would put to Mr. Mboje. Exclude introductory questions. (10 marks)
- b) Identify the key planks of your closing arguments in favour of Mr. Mboje. (5 marks)
- c) Draft five (5) questions that you would put to Mr. Andambi during examination in chief. Assume that introductory questions have already been asked. (5 marks)

QUESTION TWO

Emma and Lisa are sisters and discover they are dating the same man, Tim. They are having an argument in their living room, each screaming in anger that she was dating Tim first and that the other should leave him alone. Emma shouts at Lisa, "I am tired of you trying to steal my boyfriends. I am going to end your thieving ways, once and for all." Emma advances towards Lisa, holding a mug of hot coffee. Lisa in anger and panic picks up a nearby glass vase and throws it at her sister. The glass hits Emma on the face and she falls on the ground.

Their mother, Hellen, having heard the shouting, rushed into the living room and on seeing Emma on the ground calls for help. The neighbor, Anthony, a medical Practitioner rushed to the scene, did a first aid on Emma. Emma suffered a deep cut on her upper lip. She receives medical attention and is discharged from the hospital three days later. Emma and Lisa do not see eye to eye. Emma has reported the incident and the police are on course with their investigations. She has also decided to sue her sister Lisa for the injuries suffered. Their mother has approached you as a seasoned Advocate and a Certified Professional Mediator with an intention of helping the parties deal with the issue.

- a) Discuss five (5) critical stages that you would apply as a mediator in the resolution of this dispute. (5 marks)
- b) Discuss the dangers of involving the mother in the mediation process. (5 marks)

QUESTION THREE

- A. Mr. Parkash died in November 2018, leaving behind a widow and two sons. The late was a co-director of Kaikai Farms Ltd with, Mr. Alumasi. Before his death, Mr. Parkash had in 2012 approached Mr. Ogado, the proprietor of Poei Farms Ltd to purchase a parcel of land title Number kikoi/Malindi/203, who had then taken exclusive possession of the parcel in 2013 and, together with his wife, had been carrying out agricultural activities in it. This had led to bad blood between Parkash and Alumasi. In fact, in 2018, Alumasi had gone to the Environment and Land Court and Filed a suit for severance of joint tenancy over the parcel of land so that he would be able to get a portion of it. The suit is still pending.

After his death, Mrs. Addah, the Late Parkash's widow, applied for grants of letters of administration to the estate of the deceased in the High Court at Kajiado in May 2019. Part of the property of the deceased she declared in the application for the grants was the parcel of land title Number kikoi/Malindi/203, whose title was still under the name of Poei Farms Ltd.

In the meantime, in June 2021, Mr. Alumasi sought to take possession of the parcel on the ground that it belongs to Kaikai Farms Ltd, to which he was now the sole surviving director. In response, Mrs. Addah made an application in the succession suit against Mr. Alumasi for intermeddling.

Mr. Alumasi comes to you seeking your legal services, and asks you to file an objection to the application. Highlight grounds of preliminary objections you will raise on behalf of your client. (5 Marks)

- B. Mr. Andrew is an Advocate of the High Court of Kenya practicing as such in the firm of Urgency LLP. As part of business development for the firm, Mr. Andrew reacted to an advertisement from Sapari Limited calling for interested law firms to apply to be prequalified in Sapari Limited's panel of advocates. Mr. Andrew oversaw the preparation and submission of the bid documents. This culminated in Urgency LLP being included in Sapari Limited's panel of advocates in the year 2021. Sapari Limited would on a need basis instruct any firm in the panel to represent it in disputes in court or arbitration.

Mr. Richard is a Partner at Urgency LLP. He has been representing Wakulima Limited in a suit against Sapari Limited since the year 2015. In the suit, Wakulima Limited seeks damages from Sapari Limited for breach of contract. In this suit, Sapari Limited is represented by Mr. Joseph.

When the suit by Wakulima Limited comes up for hearing, Mr. Joseph raises an objection to Mr. Richard appearing for Wakulima Limited citing conflict of interests.

Draft the skeleton arguments to be relied on by Mr. Richard in response to the objection noting to set out the rationale for such arguments. (5 marks)

QUESTION FOUR

Mr. Majani's son fell ill one Saturday at 11pm. At the time, Mr. Majani was meeting some of his friends at a local bar when he received a phone call from his wife informing him that he needs to rush back home to take his son to hospital. Mr. Majani got home in record time and picked both his son and wife. They drove out towards Matibabu Hospital using Mr. Majani's Subaru Legacy registration number KDD 444 T.

As Mr. Majani drove along Ngong Road, he realized that the traffic police had set out a road block to check for drunk drivers. One policeman, Cpl. Afandi, flagged down Mr. Majani's car. Mr. Majani remarked loudly, "Oh dear, how will I go through the alcoblow test"? Noticing the implications of this statement, Mrs. Majani got out of the car and spoke to Cpl. Afandi. "*Habari* Officer. We have a very sick child in the car who requires urgent medical attention. Please allow us through." Cpl. Afandi peeped into the car saw Master Titus Majani looking in distress, feverish. Though he could tell there was a scent of alcohol in the car, he allowed Mr. Majani to drive through without testing his breath.

Just before they got to the hospital, Titus begun convulsing. Mr. Majani looked back instinctively reacting to the noises he heard were coming from the back seat where Titus was seated. As he turned to look back, he did not notice that another car had joined Ngong Road from a feeder road. By the time he turned to look forward, he realized that he was too close to that vehicle and because of the speed at which he was driving, he had to swerve to avoid knocking the vehicle. Unbeknownst to Mr. Majani, just as he swerved to the left, another car, registration number KCK 555 D (owned by Mr. Majaliwa ya Mungu) had started overtaking his vehicle. He tried to swerve back but was not able to do so on time. Mr. Majani's vehicle knocked motor vehicle registration number KCK 555 D which in turn knocked motor vehicle registration number KDC 342 C, which Mr. Majani was avoiding to collide with in the first place.

As a result of the accident, Mr. Ukweli Kabisa, the owner and driver of motor vehicle registration number KDC 342 C, suffered fractures to his ribs and had soft tissue injuries on his neck. His vehicle was also damaged. Mr. Ukweli was admitted at Matibabu Hospital for three days. He was attended to by Dr. Uzima. Mr. Ukweli paid a bill of Kshs. 65,000 upon his discharge from hospital. Dr. Uzima advised him to take one month's bed rest to allow for full recovery and the removal of the neck brace.

Mr. Ukweli is not happy about Dr. Uzima's advise that he takes one month's bed rest due to the fact that he runs a hardware shop that requires his physical presence every day. Since he does not trust anyone else to run the hardware shop for him, bed rest would entail him closing his shop and thereby losing the revenue that comes from the shop. The revenue from the hardware shop ranges from Kshs. 15,000 on a bad day to Kshs. 50,000 on a good day. Though the doctor had recommended that Mr. Ukweli takes one month's bed rest, Mr. Ukweli actually took 15 days of bed rest after which he felt well enough to resume the operations of his hardware shop.

Mr. Ukweli also took his motor vehicle for repair at Rekebisha Garage Limited. He incurred a cost of Kshs. 45,000 to repair the damage to his car.

You are a recently admitted Advocate of the High Court of Kenya. Mr. Ukweli has approached you to pursue a claim on his behalf arising from this accident. Prepare a Case Analysis using this fact pattern. (10 marks)

QUESTION FIVE

Mr. Fred, Senior Counsel has been instructed by the firm of MLP LLP to lead them in a dispute before the Supreme Court. Mrs. Kizito, an Advocate of three years' standing in the firm of MLP LLP, is handling the matter in which Mr. Fred is the lead counsel. Mrs. Kizito's client, Mwawani Limited is the Respondent in the Petition before the Supreme Court. Kazana Limited is the Petitioner represented by Mr. Saliba. Mr. Saliba is an Advocate of 6 years' standing.

The Petition is coming up for hearing before a five-judge-bench of the Supreme Court. All parties are in Court except for Mr. Fred, SC who is attending to a phone call outside the Court. Mrs. Kizito has filled out the coram sheet indicating that she is being led by Mr. Fred, SC. Both parties are ready to proceed with the hearing.

When the matter is called out by the Court Clerk, Mrs. Kizito and Mr. Saliba look at each other unsure on who should address the Court.

- a) Advise Mrs. Kizito and Mr. Saliba on how they should proceed. (3 marks)

- b) After the hearing has progressed for three hours, the Court takes a health break of thirty minutes. Mrs. Kizito has asked Mr. Joel, an advocate of seven year's standing, to hold brief as she runs to attend to an urgent matter before the Chief Magistrates Court. Mrs. Kizito hopes to be back before the Supreme Court session resumes. On the other hand, Mr. Fred, SC has gone before the Court of Appeal next door to attend to a mention of a different matter. He also hopes to be back before the Supreme Court session resumes. Both Mrs. Kizito and Mr. Fred, SC are

not able to make it back to court on time when the Supreme Court judges resume the sitting.

Write a verbatim presentation that Mr. Joel should make noting to clearly indicate whose brief he holds and the representations. (3 marks)

- c) Assume that Mr. Joel is not able to address the Court as he is also held up in a different court. Mr. Joel asks you to hold brief and effect the instructions given by Mrs. Kizito to allow her conclude her appearance before the Chief Magistrate to return to Court. You are senior to Mr. Saliba, write out how you would address the Court. (4 marks)

QUESTION SIX

Armando, the owner of Eartone Consultants, a finance and investment firm in Nairobi, is sued by the government for Ksh 3 billion Ponzi scheme in a civil suit on securities fraud.

As soon as he is released on bond, he calls a press conference, and announces that although he has faith in the Kenyan judiciary, he knows there is pressure to ensure that he is liquidated and expresses fears that this would in the end be prejudicial to him. Thereafter, he retains Octavia as his advocate in the matter.

During the first appearance, Armando is ordered to turn over to the Central Bank about Kshs 150 million in gold bars, rare coins, and antiquities pending the determination of the suit. Unhappy with these orders, Octavia links the video of Armando's press conference to her twitter handle with the comment, "now the fight begins".

Although Octavia is aware of the vast assets owned by Armando, over which she has even had a discussion with the counsel representing the Central Bank, her former classmate at Law School, she is instructed to plead that her client does not have the assets to surrender to the court, and to try and buy him time to negotiate with the government functionaries to have the matter dismissed.

During the next appearance, Octavia makes an oral application to the court to adjourn the matter to allow her to appeal against the court's order that in her view were in violation of her clients "well settled rights, which the court was now being cowed by the government to turn a blind eye to", retorting that this, "it seemed was with much success".

The court is not happy and castigated the parties for their conducts throughout the proceedings. Against this backdrop:

- a) Discuss the duties Octavia owed to her client vis-à-vis his obligation to the administration of justice. (4 Marks)
- b) Explain the nature of contempt of court and their consequences arising from this scenario. (6 Marks)