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COUNCIL OF LEGAL EDUCATION

EXAMINATION FOR ADMISSION TO THE ROLL OF ADVOCATES

REGISTRATION NUMBER:

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VENUE: Co-operative University ☐

JKUAT ☐

ATP104: TRIAL ADVOCACY

Examination Series: April 2025

Date: 15th April 2025

Time: 09:00AM-12:00PM

Duration: 3 hours

Instructions to Candidates:

- Enter your registration number and tick the exam venue in the space provided.
- Answer **FIVE (5)** questions, including question **ONE** which is **COMPULSORY**.
- Question **ONE** contains **20 Marks**. All other questions carry **10 Marks** each.
- Attempt each question in the space provided. Additional space is provided at the back of the booklet.
- Answers **MUST** be supported by relevant statutory provisions and case law where required.
- Do not write your name in the booklet.
- Ensure your handwriting is **LEGIBLE**.

FOR EXAMINER'S USE ONLY

Question Number	Examiner		Internal Moderator		External Moderator		Quality Assurer	
	Mark	Initials	Mark	Initials	Mark	Initials	Mark	Initials
1.								
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QUESTION ONE

Tana International Sugar Company Limited (TISCOL), a sugar manufacturing company, entered into a sublease with the Cabinet Secretary for the Treasury (CST). The Sublease is dated 10th November 2007. Through the sublease, the CST leased to TISCOL 20,000 acres (being L.R. No. 26554) of land in Tana County for purposes of sugar cane farming, milling and associated activities.

TISCOL has claimed that the CST failed in its obligations under the sublease to grant vacant possession of the entire leased parcel of land. The land is at several locations occupied by squatters which has affected the implementation of the business plan. In the year 2009, some of the squatters obtained a conservatory order in *Petition No. 22 of 2009* restraining TISCOL from conducting any farming or other activities on the portion of land that they occupied pending the hearing and determination of the Petition. The conservatory orders remained in place for 7 years when TISCOL applied to have them set aside.

This, TISCOL says, has caused a failure of its business model leading to increased costs over and above what had been projected in the business model. TISCOL says that its financial model was predicated upon the availability of the entire parcel of land. The inability to access the entire parcel of land led to increased project costs, including additional loans and equity injections by its shareholders. As a consequence, TISCOL claims USD 200 million being the additional expenses incurred over and above what had been projected in the business model projections. TISCOL filed its suit in the High Court on 11th November 2021.

CST denies liability and has argued that TISCOL was granted vacant possession immediately after the sublease was signed. This, CST argues, explains why there is no correspondence from TISCOL in the first 3 years since 2007 complaining about squatters on the land. CST further argues that TISCOL has failed in its obligations under the sublease by failing to secure the land by fencing it to keep away squatters. CST has also alleged that TISCOL forfeited the sublease due to its failure to pay rents as and when they fell due. It was only after a demand for the rents was made that TISCOL settled the outstanding rents. CST also argues that it was not privy to the TISCOL business model to be made liable for any losses or increased costs incurred by TISCOL.

Relevant Lease Excerpts:

Clause 7a) "The Lessor shall ensure that the Lessee shall peaceably and quietly possess and enjoy the land without any interruption or disturbance from the Lessor or any person claiming under or in trust for the Lessor."

Clause 8a) "The Lessee shall, at its own expense, maintain and repair all fences, boundaries and other structures on the land to prevent unauthorized access or encroachment."

Clause 10a) "The Property is leased on an "As-is-Where-is" basis.

Excerpt from Mr. Tomlinson's Witness Statement

"The government assured us that the land would be free from squatters and that we would have full access to the 20,000 acres. I had conversations with the CST and he gave me that assurance on several occasions. In fact, even after we took possession of the land, we continued to have the conversation with CST to have the National Land Commission (NLC) allocate us alternative land. He assured me that he would direct the NLC to make the allocation of the land. It is on the basis of these repeated assurances that TISCOL feels that the CST has breached the terms of the sublease. We relied on the terms of the sublease as well as the discussions I held with CST to make further investments on the property with the hope that the land access issue would be resolved. Unfortunately, it was not resolved by the CST. I am aware that there is internal correspondence



QUESTION TWO

Keith Evans in the *Golden Rules of Advocacy* observes that: -

“In an Adversarial Judicial System, a trial process is not necessarily a search for the truth. The business that goes on in the trial process is to get the tribunal to arrive at an opinion favorable to your client. It is not a duel as such, but rather a carefully controlled presentation.”

- Outline five rules of trial advocacy that guide a trial advocate in court in an adversarial judicial system. (5 Marks)
- Explain the psychology of advocacy that a trial advocate may employ to guide a tribunal to arrive at an opinion favorable to their client. (5 marks)

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QUESTION THREE

Mr. Mazingira is an advocate of the High Court of Kenya and has established a legal practice firm in the city. In addition to his usual work as an advocate, he is very passionate about matters relating to the environment. In fact, his firm is engaged in several CSR activities in the country to curb adverse effects of climate change. He holds very strong opinions against those who fail to adhere to laws, rules and regulations on the environmental governance in the country. One afternoon he receives a client who states that he has been charged under the Environment Management and Coordination Act No. 8 of 1999 and that he wants Mr. Mazingira to defend him. In the course of taking these instructions, it becomes apparent that one of the key witnesses for the prosecution is Mr. Mazingira's long-lost brother, who 'went missing' 7 years ago.

Using this case as a background, discuss the application of the cab rank rule *vis a vis* the ethical duties of a lawyer. (10 marks)

[illegible]

QUESTION FOUR

Mr. Mansa is an eighteen-year (18) year old literature enthusiast and the Author of a book Titled 'unchain the boy child' the book is laden with radical messages of establishing a male dominated society. On the 4th of August, 2023 he was charged with the murder of two (2) women contrary to sections 203 and 204 of the Penal code before the Busia High Court. This was the first time that Mr. Mansa has been charged in court.

The prosecution presented before the court evidence linking Mr. Mansa to the death of the women such as telephone conversations, video footages, eye witness accounts photograph of Mr. Mansa Blood-stained apartment and DNA reports.

- As the prosecutor prepare the closing argument that you will deliver at the close of the trial. (6 marks)
- As a prosecutor what factors do you anticipate the defense may raise as mitigating factors in sentencing. (4 marks)

[illegible]

QUESTION FIVE

Kennedy & Mills Advocates (KMA) is a mid-sized law firm in Nairobi, known for handling high-profile corporate clients. The firm has a strong reputation in commercial litigation, corporate governance and real estate law. The firm is currently representing Milton Holdings Limited (MHL), a large real estate development company, in a complex dispute involving the acquisition of a 200-acre parcel of land in Karen, Nairobi. The firm's Managing Partner, Mr. Kennedy, has personally taken charge of the case.

MHL entered into an agreement with Greenfield Developers (GD), a rival real estate company, to purchase the 200-acre piece of land. The agreement stipulated that GD would transfer the land title to MHL upon completion of payment of the purchase price in three installments. MHL paid the first two installments but defaulted on the final payment due to liquidity issues caused by the collapse of a major project. GD, sensing an opportunity, initiated negotiations with SafariLand Limited, a third party, to sell the land at a higher price, claiming that MHL breached the contract by failing to pay the final installment.

MHL, through KMA filed a suit against GD seeking specific performance of the contract and to compel GD to transfer the land title in accordance with the original agreement. KMA drafted the pleadings and advised MHL on the merits of the case, focusing on the doctrine of substantial performance and arguing that MHL had almost fully performed its obligations under the contract. The case is set to be heard by Justice Winfred, a seasoned judge with a reputation for being strict on procedural compliance.

Unbeknownst to Mr. Kennedy, one of the junior associates of KMA, Ms. Fanaka previously worked at Michelle & Co Advocates (MCA), the law firm representing GD. During her tenure at MCA, Ms. Fanaka was involved in drafting the initial contract between GD and MHL and had access to confidential communication between GD and its counsel regarding the strategy if MHL defaulted. Ms. Fanaka has not disclosed her prior involvement at MCA on the GD brief to Mr. Kennedy. Ms. Fanaka assumed that since her involvement in the GD brief was minor and did not involve any direct communication or meetings with GD, she had no duty to disclose the same. However, during the pre-trial conference, GD's lead counsel, Mr. Orange, recognized Ms. Fanaka and immediately raised the issue of a potential conflict of interest with Justice Winfred,

Justice Winfred, concerned about the integrity of the proceedings, questioned Mr. Kennedy on whether he was aware of Ms. Fanaka's prior involvement with GD. Mr. Kennedy, taken by surprise, assured the court that he was not aware of any conflict but requested for time to investigate the matter. The court adjourned the proceedings, and Mr. Kennedy conducted an internal inquiry. He discovered that indeed Ms. Fanaka had worked on the case while at MCA and that she failed to disclose this involvement during her employment interview at KMA. Mr. Kennedy faces the dilemma of whether to remove Ms. Fanaka from the case given her special knowledge of the facts and the legal principles of the case. This has the potential of weakening their client's case.

During the hearing to determine whether KMA should be disqualified from representing MHL, Mr. Kennedy, in an attempt to defend his firm, made several interruptions while Mr. Orange was on his feet making submissions. He also had an exchange with the Judge arguing that the court had no authority to question his judgment on an internal firm matter. He repeatedly put it to the court that Ms. Fanaka was his assistant, that she had not given him any confidential information arising from her tenure at MCA for use in representing MHL. Noting that the court was not in agreement with his approach to the issue, Mr. Kennedy insisted that the court place on record his client's position on the matter emphasizing that his client had a right to the choice of legal representation



Ms. Maarifa, a Senior Counsel of over 36 years standing as an Advocate, has observed the proceedings with consternation. She noticed that the Judge became increasingly angry at the conduct of Mr. Kennedy. That as the exchange continued, both Justice Winfred and Mr. Kennedy raised their voices which shocked many advocates and members of the public who attended the court session. In her many years of practice, she had not seen anything like that.

a) While discussing the legal principles underpinning conflict of interest, discuss whether KMA and specifically Mr. Kennedy should continue representing MHL in the proceedings.

b) What steps should Mr. Kennedy take to address the potential conflict of interest and what are the possible consequences if the conflict of interest is not properly managed?

c) Assess Mr. Kennedy's behavior in court during the hearing of the disqualification motion.

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