

COUNCIL OF LEGAL EDUCATION.



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

ATP 102: PROBATE AND ADMINISTRATION.

FRIDAY 24TH NOVEMBER, 2017.

DURATION: 3 HOURS.

Instructions to Candidates:

- (a) This paper contains **Six 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

Rosa aged 44 years, recently died intestate following a road traffic accident. According to the police records, an Isuzu lorry veered off the road and hit her as she drove her Mercedes 'C' 200 Class on her side of the road. She died on the spot and her car was declared a write-off. The police blame the driver of the lorry and have since charged him with causing death by dangerous driving.

Rosa was a wealthy lady and owned a five bedroomed house in a low density, highly respectable suburb at Queens's Drive. She also owned twenty (20) acres of agricultural land in Happy Valley County, a Land Cruiser V8, two blocks of rental apartments in an upmarket suburb, a 50x100 plot along the Thika Superhighway in Kasarani and two PSV matatu mini-buses plying the Ummoinner route. She also owned and operated a posh restaurant under the name and style of Sallyrose Resort and Club which she managed on a daily basis. She had two (2) personal bank accounts in separate banks and two (2) business accounts in different banks, one in the name of Sallyrose Resort & Club exclusive to the restaurant and the other in the name of Rysa Tours & Homes which dealt with rental income plus proceeds from the matatus. The proceeds from the matatu business would be sent to her via Mpesa or in cash after which she would deposit in the account.

Rosa had two children, Ryan a boy aged thirteen (13) old years who had just received an admission letter to join Form One in a high class international school and Sally, a girl aged eight (8) years who was in Grade Three (3) in a prestigious international school. Rosa was a single mother and both children were from different fathers who never bothered about her or the children's welfare. However, she had a boyfriend, Tony, whom she lived with and who helped her in running her businesses. Though they may have wanted to formalize their union, she died before she could even introduce him to her family. She was buried at her parents' home. Apart from her children, Rosa was survived by her parents, mother aged sixty seven (67) years and father aged seventy (70) years, three (3) sisters and two (2) brothers. She used to provide for her parents and had built them a stone house in their rural area and would give them a monthly upkeep of Kshs.10,000 per month.

The parents of Rosa have made a decision to take charge of the deceased's affairs/estate and are faced with the following issues:

- (i) According to Ryan's admission letter, Kshs.580,000/- is required to be paid to the school for 1st term and he is supposed to be in school in three (3) weeks' time. Sally has just opened school and an amount of Kshs.280,000/- is required by the school as fees. From one of the bank statements that Rosa's mother came across in the deceased's house, one of Rosa's personal accounts has a balance of Kshs.2.3 million.
- (ii) The restaurant business is being mismanaged and the supervisor is not cooperative, the matatu crew have haphazardly been depositing business proceeds in the deceased's Mpesa account and also claim to give Tony the proceeds of the day whenever he approaches them for the same. The tenants claim to be depositing money in the same rental account.
- (iii) The parents of Rosa also wish to sue the owner and driver of the lorry that caused their daughter's death.

- (iv) Tony Rosa's boyfriend claims that the deceased had given him the 50x100 plot in Kasarani as a gift. He even brings along a friend whom he claims was a witness when the deceased allegedly told him "Darling you can have the Kasarani plot as a gift from me to you."

The parents of Rosa have sought your legal advice with a view to possible court action.

- (a) In light of the above narrative with regard to issues (i) to (iii), what immediate short-term measures would you advise the parents of the deceased to take in view of the urgency of the matter. In your answer, state the type of application(s) you would make, the required pleadings, plus the necessary supporting documents and the orders you would be seeking from court, if any. (9 marks)
- (b) What long-term measures in pursuit of administration and distribution of the estate of the deceased would you advise the parents to take according to the law? State the legal steps to be followed bearing in mind the interests of the minor children. (6 marks)
- (c) Discuss issue (iv) in accordance with the doctrine of "*Donatio mortis causa*". (5 marks)

QUESTION TWO

Mr. Mali, a widower had two sons Pele and Omali and one daughter, Dada. Pele lived in the city with his family while Omali lived with his family on his father's farm. Mr. Mali had a twelve (12) acre farm in the rural area and had built his house on part of the farm where he lived. His daughter Dada was in a cohabiting relationship with a man with whom she bore two children before parting ways with him and returning to her father's house. The man never came back for her and instead married another woman.

Dada lived with her father in his house together with her two children aged five (5) and nine (9) years. She took care of her father, helped him in the shamba and in return her father helped her pay school fees and other related expenses for her two children and provided for her financial needs.

Later, Mr. Mali fell ill and Dada took it upon herself to take care of him, nurse him and do all that was necessary to ensure he went through his illness with minimum suffering. After a long battle with the illness, Mr. Mali succumbed to it and died. He died intestate.

After his burial, his son Pele left the city with his family and came to set base at his father's house in the rural area. Pele and Omali thereafter began showing Dada signs that she was not welcome in her father's home and that she should go back to the father of her children. She was forced to leave and went to sell vegetables in the the nearest market while living in a one room house with her two children.

Pele and Omali later secretly applied for letters of administration of their father's estate without informing Dada thereby excluding her from the estate. Dada got wind of this from a girlfriend of Omali who lived in the market and had heard him talk of confirmation of grant. Dada approached her brothers but they dismissed her, claiming that according to tradition, she was not entitled to inherit.

Dada has no money to hire a lawyer but she has heard of an organization called “Wakili bila Malipo”. She approaches the organization and you are seized with the matter to advise and act accordingly.

- (a) What are her options, if any, in pursuing her rights to her father’s estate and what does she need to do to pursue her rights? Also state the type of pleadings she would be required to file in pursuit of her rights. (5 marks)
- (b) In light of the narrative, interrogate/discuss the rights of women to inherit vis-à-vis the applicable laws. (5 marks)

QUESTION THREE

In *Elizabeth K. Ndolo vs George M. Ndolo* (Court of Appeal No.128 of 1995) the court *inter alia* held that:

“In section 5 [of the Law of Succession Act], every adult has an unfettered testamentary freedom to dispose his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled, the freedom to dispose off property given by section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his/her lifetime.”

In light of the above quote, consider the following:

- (a) A man dies testate leaving a written will. In the said will he does not provide for his son whom he sired out of wedlock. He recognized this son since birth, took care of him, educated him and had even introduced him to his family.

The son has come to you for legal advice on whether he has a claim. Discuss his entitlements or otherwise using the relevant statutory provisions and case law. (6 marks)

- (b) A lady who claims to be a wife of a deceased person wants to lay a claim for provision in a pending succession case. However, she has no marriage certificate and she is not known by the family of the deceased. No traditional marriage ceremony has ever been performed. She did not have any children with the deceased. A friend of the deceased says she was only a girlfriend who accompanied the deceased to the local pubs and other ceremonial occasions.

Evaluate her case and advise her whether she has a claim or not. (4 marks)

QUESTION FOUR

When Suleiman was diagnosed with a terminal illness and was informed by his doctors that he had only a few months to live, he decided to write a will and visited his lawyers for this purpose. He had two wives and six (6) daughters. The first wife Aisha had five (5) daughters who were

all above 18 years and three were married while the second wife Yasmin had one daughter aged five (5) years.

In his will, Suleiman bequeathed his estate to his two wives and children. He named his sister Mwanahamisi as executor of the will and further stated that Mwanahamisi would hold the share of his daughter aged five (5) years in trust for her until she attained the age of eighteen (18) years. The only property Mr. Suleiman owned was a prime commercial building in the city which was used as a godown.

In the will he states that his property should be distributed in accordance with Sharia (Islamic) law and that all parties were Muslims. Much later, the second wife Yasmin though a Muslim refuses to submit to the jurisdiction of the Kadhi's court. This is because she is aware that under Sharia law she will get an equal share as the first wife and that also all daughters will get an equal share irrespective of age. Yasmin believes that because her daughter is a minor she should get a bigger share as she still needs substantial upkeep.

(a) The deceased's sister, Mwanahamsi visits your offices with a copy of the will. What initial legal steps should she take in administering the estate? Advise her on the applicable applications she should make. (4 marks)

(b) Article 170 of the Constitution of Kenya 2010 provides:

"The jurisdiction of the Kadhi's Court shall be limited to the determination of the questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's Court."

- (i) Discuss Yasmin's case in relation to the above Article vis-à-vis applicable succession laws. (4 marks)
- (ii) Would your answer be different if Yasmin was a Christian? Explain. (2 marks)

QUESTION FIVE

In *Re Harrison* (1885) 30 Ch. 390, the court observed that "Where a will is executed in solemn form, it is to be assumed that the maker did not intend a solemn force and that he did not intend to die intestate when he had in fact gone through due process of making a will".

In light of the above, consider the following:

Madam P makes a will with a provision that: "I direct my executors to pass my interest in the land known as L.R. 2/101/10/40 measuring 10.5 acres to my five children of marriage..."

After the demise of Madam P, the executor later discovers that L.R. 2/101/10/40 does not exist and in fact the one that exists and measures 10.5 acres is L.R.2/40/10.

(a) Advise the executor. (5 marks)

(b) Using relevant laws including case law, discuss at least two (2) rules applied in the construction of wills. (5 marks)

QUESTION SIX

Before Mr. Wamugunda died, he called two close relatives and gave instructions on the disposal of his land. He was quite elderly and probably had a premonition of his imminent death. The relatives caused a document to be written in pursuit of the deceased's wishes. It was written in vernacular and translated in English as follows:

"I Wamugunda s/o Magara has given to Grace d/o Wamugunda two (2) acres of land near the river on the eastern side. On the western side, I have given to John s/o Wamugunda and on the higher side near the road, I have given to Roy s/o Wamugunda. That is how I have shared."

Mr. Wamugunda died two weeks later and his wishes were read out at his funeral.

(a) Is there a valid will? Discuss using relevant statutory provisions and case law. (7 marks)

(b) Assuming there was a previous written will executed and signed by Wamugunda and two witnesses, would it stand revoked by the subsequent wishes above. Explain. (3 marks)

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