

QUESTION 2

As an arbitrator in a complex arbitration, indicate the various measures which you would suggest for discussion at the preliminary meeting with a view of saving time and reducing costs in the arbitral process. (15 marks).

QUESTION 3

Write explanatory notes on the following

- (a) Conciliation (5 marks).
- (b) Interest-based problem solving (5 marks).
- (c) Adjudication (5 marks).

QUESTION 4

The County Governments of Nyeri and Muranga are in conflict over the use of the waters of the River Gura, a trans-county natural resource. The former has an interest in the hydro-electric power potential of the river to supply power to county's tea factory so as to reduce their production costs. The latter is concerned that the damming of the river upstream by the Nyeri County Government to produce hydro-electric power will result in water shortage downstream with adverse effects on the livelihoods of its residents. The Council of Governors has advised the two county governments to amicably settle the conflict on the use of the river for their mutual benefit.

You are a lawyer acting for the County Government of Nyeri in the dispute. Giving reasons for your answer, discuss the negotiation strategies you would employ in an attempt to resolve the conflict. (15 marks).

QUESTION 5

Article 159 of the Constitution of Kenya (2010), vests judicial authority in the courts and tribunals that it establishes, and enjoins those courts and tribunals when exercising judicial authority to give effect to the right of all persons to access justice as among other things, the principle of alternative dispute resolution. Discuss how the (15 marks).

QUESTION 1

Kamau Patel is a businessman who runs a multi-billion shilling real estate development company in Eldoret. He is also an ardent golfer and a member of Eldoret Club. He has established wide networks on the golf course and at the club which have resulted in major business contracts for his real estate business. Additionally, his company is prominently displayed in many advertisements for events at the Club. The proceeds from these adverts are usually transferred to a subsidiary of his holding company. His holding company at the same time funds several golfing events at the Club. His accounting records are however disorganised and not all of his dealings have been properly documented. Over the last two years, the tax authorities have been carrying out an audit of his business income. Mr. Patel blames the Tax authorities for extreme sluggishness in the process and the Tax Authorities in turn insist that he does not provide sufficient information on time and has failed in his obligation to provide them with the necessary information. A further escalation of the dispute between Mr. Patel and the tax authorities is anticipated and a decision to be made on the basis of information sought is not forthcoming. It is clear however that the final report of the audit will result in a huge additional assessment of the taxes being demanded from Mr. Patel.

Mr. Patel has engaged an advocate with instructions that the advocate convinces the tax authorities to conclude the audit and through a settlement agreement reach an amicable solution with them. Initially, the negotiations were harmonious with the tax authorities being cooperative during the discussions, but after some internal consultations, they have reverted to their initial assessment of taxes due, which Mr. Patel disputes. The consequence of this turn of events is that Mr. Patel's advocate has also reverted to their initial position that the monies from the golfing activities are business costs and therefore not taxable income. Communication between Mr. Patel and the Tax Authorities has been by among other things, email. By error, one of the employees of the Tax Authorities sent an email intended for a colleague, touching on the matters in dispute, to Mr. Patel's advocate. Upon realisation of the error, the tax authorities take the position that the earlier negotiations between them and Mr. Patel can be resumed with a view to reaching a substantive solution. After a follow-up meeting, Mr. Patel's advocate records the basic assumptions for a settlement agreement in writing with a request for mediation if the parties fail to reach an agreement. The advocate has received a reply from the tax authorities stating that the negotiations are being suspended and that the final audit report will be concluded as soon as possible. The advocate has disagreed with this course of action and considers the suspension of negotiations as being in bad faith and therefore a justification for a complaint under the relevant tax laws.

The advocate has now reported the case for mediation with the tax authorities regional mediation coordinator. The Tax Authorities have addressed the mediation request and referred the matter to you for mediation. Explain in detail how you would conduct the mediation exercise.

(25 marks).

that mediation is the best approach to use to help them solve their issues since it will preserve and perhaps improve the existing relationship. They opt to hire a mediator to help them resolve their issues, but can't decide on which type of mediation to hire for them. With a view to helping them decide:

Explain what evaluative and facilitative mediation is and whether they can be used to solve this dispute.

- (a) Explain how transformative mediation differs from facilitative and evaluative mediation (10 marks)
- (b) Explain the shortcomings with in this approach (transformative mediation). (5 marks)

QUESTION FOUR

Write analytical notes on the following:

- (a) The Scott Avery Clause. (5 marks)
- (b) The Role of the Ombudsman's office in Kenya. (5 marks)
- (c) The Ethical Issues in Mediation. (5 marks)

QUESTION FIVE

JUSTIN employs PEDRO as his personal assistant. A clause in the employment contract provides as follows:

that any dispute between Employee and Employer arise at any time

QUESTION 1

Kamau Patel is a businessman who runs a multi-billion shilling real estate development company in Eldoret. He is also an ardent golfer and a member of Eldoret Club. He has established wide networks on the golf course and at the club which have resulted in major business contracts for his real estate business. Additionally, his company is prominently displayed in many advertisements for events at the Club. The proceeds from these adverts are usually transferred to a subsidiary of his holding company. His holding company at the same time funds several golfing events at the Club. His accounting records are however disorganised and not all of his dealings have been properly documented. Over the last two years, the tax authorities have been carrying out an audit of his business income. Mr. Patel blames the Tax authorities for extreme sluggishness in the process and the Tax Authorities in turn insist that he does not provide sufficient information on time and has failed in his obligation to provide them with the necessary information. A further escalation of the dispute between Mr. Patel and the tax authorities is anticipated and a decision to be made on the basis of information sought is not forthcoming. It is clear however that the final report of the audit will result in a huge additional assessment of the taxes being demanded from Mr. Patel.

Mr. Patel has engaged an advocate with instructions that the advocate convinces the tax authorities to conclude the audit and through a settlement agreement reach an amicable solution with them. Initially, the negotiations were harmonious with the tax authorities being cooperative during the discussions, but after some internal consultations, they have reverted to their initial assessment of taxes due, which Mr. Patel disputes. The consequence of this turn of events is that Mr. Patel's advocate has also reverted to their initial position that the monies from the golfing activities are business costs and therefore not taxable income. Communication between Mr. Patel and the Tax Authorities has been by among other things, email. By error, one of the employees of the Tax Authorities sent an email intended for a colleague, touching on the matters in dispute, to Mr. Patel's advocate. Upon realisation of the error, the tax authorities take the position that the earlier negotiations between them and Mr. Patel can be resumed with a view to reaching a substantive solution. After a follow-up meeting, Mr. Patel's advocate records the basic assumptions for a settlement agreement in writing with a request for mediation if the parties fail to reach an agreement. The advocate has received a reply from the tax authorities stating that the negotiations are being suspended and that the final audit report will be concluded as soon as possible. The advocate has disagreed with this course of action and considers the suspension of negotiations as being in bad faith and therefore a justification for a complaint under the relevant tax laws.

QUESTION 2

As an arbitrator in a complex arbitration, indicate the various measures which you would suggest for discussion at the preliminary meeting with a view of saving time and reducing costs in the arbitral process. (15 marks).

QUESTION 3

Write explanatory notes on the following

- (a) Conciliation (5 marks).
- (b) Interest-based problem solving (5 marks).
- (c) Adjudication (5 marks).

QUESTION 4

The County Governments of Nyeri and Muranga are in conflict over the use of the waters of the River Gura, a trans-county natural resource. The former has an interest in the hydro-electric power potential of the river to supply power to county's tea factory so as to reduce their production costs. The latter is concerned that the damming of the river upstream by the Nyeri County Government to produce hydro-electric power will result in water shortage downstream with adverse effects on the livelihoods of its residents. The Council of Governors has advised the two county governments to amicably settle the conflict on the use of the river for their mutual benefit.

You are a lawyer acting for the County Government of Nyeri in the dispute. Giving reasons for your answer, discuss the negotiation strategies you would employ in an attempt to resolve the conflict. (15 marks).

QUESTION 5

Article 159 of the Constitution of Kenya (2010), vests judicial authority in the courts and tribunals that it establishes, and enjoins those courts and tribunals when exercising judicial authority, to among other things, the principle of alternative dispute resolution. Discuss how the courts have applied this principle to give effect to the right of all persons to access justice as provided for by article 48 of the Constitution. (15 marks).

QUESTION 6

Discuss any five essential components of an award, indicating the role each plays in such awards. (15 Marks).

per month for a 3 bed-roomed maisonette. In January 2017, EF relocated to Kampala without renewing the tenancy agreement but AB continued in occupation as a tenant and dutifully paid rent into EF's account at Barclays Bank Eldoret.

In August 2018, by way of a short text message on phone EF purported to increase the rent to Kshs. 90,000 per month. AB continued to pay the Kshs. 70,000 every month and is still in occupation. EF has threatened to evict AB from the house and claims rent arrears of Kshs. Kshs. 100,000. He has also drawn up a new tenancy agreement for AB to execute at a monthly rental of Kshs. 90,000. AB will have none of this saying the increment is unreasonable. After some initial prodding EF has opened up to negotiation of a new tenancy agreement.

Case 2

*reduce a criminy
ensure children have
a close & continuing
relationship with both
parents*

Mjuaji and Mwerevu had been married under the African Christian marriage and Divorce Act in 2013. In 2018 their marriage was dissolved by the court on the basis of Mjuaji's cruelty towards his wife, Mwerevu. They have 2 children aged 5 and 2 years respectively. Mwerevu was at all material time a housewife taking care of the children while Mjuaji is a businessman with vast interests in real estate and is worth about Kshs. 100 million. Mwerevu filed suit for division of matrimonial property which Mjuaji contests. They are also embroiled in a tussle over the custody of the children. The court has directed that they try settle the matter out of court.

Case 3

XYZ a wealthy businessman in Eldoret died intestate leaving behind 2 widows and an estate worth Kshs. 2 billion. This includes 3 large farms and 4 commercial buildings. The first widow has 4 children and the second has 2. They have failed to agree on how to amicably share the estate between the two houses.

Instructions

Each group shall break itself up into 3 groups to tackle each case. Those three groups will further break into two groups representing either party.

Prepare presentations on how negotiations to resolve the various disputes will be carried out. The presentations will be done by means of role plays. The strategies used by each group and the negotiated settlements will be reduced into writing and submitted to me on 18 February 2019.

AW Munene

He had hoped that by working with JUSTIN, he would learn the ropes of his new profession. Instead, he now buys newspapers, picks the children from school and a host of other tasks which he considers menial. He resigns in a huff and is told he is not entitled to any benefits.

- (a) Advise him on whether he can file suit in court to claim any benefits which are due to him. (5 marks)
- (b) Advise him on the considerations the court will make in the event that JUSTIN files an application for stay if he files suit. (10 marks)

QUESTION SIX

Explain the main principles underlying the Kenyan Arbitration Act.

[15 marks].

this dispute.

...ative mediation is and whether they can be used to solve

- (a) Explain how transformative mediation differs from facilitative and evaluative mediation (10 marks)
- (b) Explain the shortcomings with in this approach (transformative mediation). (5 marks)

QUESTION FOUR

Write analytical notes on the following:

- (a) The Scott Avery Clause. (5 marks)
- (b) The Role of the Ombudsman's office in Kenya. (5 marks)
- (c) The Ethical Issues in Mediation. (5 marks)

QUESTION FIVE

JUSTIN employs PEDRO as his personal assistant. A clause in the employment contract provides as follows:

In the event that any dispute between Employee and Employer arise at any time out of any aspect of the employment relationship, including, but not limited to, the hiring, performance or termination of employment, Employee and Employer will confer in good faith to resolve promptly such dispute. In the event that Employer and Employee are unable to resolve their dispute, and should either desire to pursue a claim against the other party, both Employer and Employee agree to have the dispute resolved by final and binding Arbitration.

After 2 years of working for JUSTIN, PEDRO is fed up. His main complaint is that JUSTIN sends him on personal errands which in his opinion are outside the scope of his work.

FLB 304: ALTERNATIVE DISPUTE RESOLUTION

NEGOTIATION PRACTICUM (Issued 28 January 2019)

Case 1

AB has been a tenant of EF in a residential property in Elgon View Estate for since 2015. The first 2 years were governed by a written tenancy agreement. The rent amount is Kshs. 70,000 per month for a 3 bed-roomed maisonette. In January 2017, EF relocated to Kampala without renewing the tenancy agreement but AB continued in occupation as a tenant and dutifully paid rent into EF's account at Barclays Bank Eldoret.

In August 2018, by way of a short text message on phone EF purported to increase the rent to Kshs. 90,000 per month. AB continued to pay the Kshs. 70,000 every month and is still in occupation. EF has threatened to evict AB from the house and claims rent arrears of Kshs. Kshs. 100,000. He has also drawn up a new tenancy agreement for AB to execute at a monthly rental of Kshs. 90,000. AB will have none of this saying the increment is unreasonable. After some initial prodding EF has opened up to negotiation of a new tenancy agreement.

Case 2

*→ reduce acrimony
→ ensure children have
a close & continuing
relationship with both
parents*

Mjuaji and Mwerevu had been married under the African Christian marriage and Divorce Act in 2013. In 2018 their marriage was dissolved by the court on the basis of Mjuaji's cruelty towards his wife, Mwerevu. They have 2 children aged 5 and 2 years respectively. Mwerevu was at all material time a housewife taking care of the children while Mjuaji is a businessman with vast interests in real estate and is worth about Kshs. 100 million. Mwerevu filed suit for division of matrimonial property which Mjuaji contests. They are also embroiled in a tussle over the custody of the children. The court has directed that they try settle the matter out of court.

Case 3

XYZ a wealthy businessman in Eldoret died intestate leaving behind 2 widows and an estate worth Kshs. 2 billion. This includes 3 large farms and 4 commercial buildings. The first widow has 4 children and the second has 2. They have failed to agree on how to amicably share the estate between the two houses.



MOI UNIVERSITY

OFFICE OF THE DEPUTY VICE CHANCELLOR
(ACADEMICS, RESEARCH & EXTENSION)

UNIVERSITY EXAMINATIONS 2019/2020 ACADEMIC YEAR THIRD YEAR FIRST SEMESTER EXAMINATION FOR THE DEGREE OF BACHELOR OF LAWS

COURSE CODE:

FLB 304

COURSE TITLE:

ALTERNATIVE DISPUTE RESOLUTION

DATE: 18TH DECEMBER, 2019 **TIME:** 9.00 A.M. – 12.00 NOON

INSTRUCTION TO CANDIDATES

- Answer Question ONE (1) and Any THREE (3) Others
- Illustrate your Answers with relevant decided cases and statutory provisions

THIS PAPER CONSISTS OF (3) PRINTED PAGES

PLEASE TURN OVER

Question 1

Mjazi and Mawereke had been married under the African Christian marriage and Divorce Act 1955. In 2014 their marriage was dissolved by the court on the basis of Mjazi's cruelty towards his wife Mawereke. They have 2 children aged 7 and 2 years respectively. Mawereke was a full-time nurse and a housewife taking care of the children while Mjazi is a businessman with two interests in real estate and is worth about Kshs. 100 million. Mawereke filed suit for division of matrimonial property which Mjazi contested. They are also embroiled in a dispute over the custody of the children. The court has directed that they try settle the matter through mediation.

Explain in detail how you would conduct the mediation exercise.

(25 marks).

Question 2

Describe the essential elements of a valid arbitration award.

(15 marks).

Question 3

Write brief explanatory notes on the following alternative dispute resolution concepts:

(a) Conciliation

(5 marks)

(b) Adjudication

(5 marks)

(c) Facilitation

(5 marks).

Question 4

AB has been a tenant of EF in a residential property in Elgon View Estate for since 2015. The last 2 years were governed by a written tenancy agreement. The rent amount is Kshs. 70,000 per month for a 2 bed-roomed apartment. In January 2017, EF relocated to Kampala without renewing the tenancy agreement but AB continued in occupation as a tenant and actually paid rent into EF's account at Barclays Bank Eldoret.

In August 2018, by way of a short text message on phone EF purported to increase the rent to Kshs. 90,000 per month. AB continued to pay the Kshs. 70,000 every month and is still in occupation. EF has threatened to evict AB from the house and claims rent arrears of Kshs. 100,000. He has also drawn up a new tenancy agreement for AB to execute at a monthly rental of Kshs. 90,000. AB will have none of this saying the increment is unreasonable. After some initial prodding EF has opened up to negotiation of a new tenancy agreement.

With the aid of concrete justification, outline the negotiation strategies you would employ on behalf of AB to secure a favourable tenancy.

(15 marks).

QUESTION 1

Read the following excerpt and use it to answer the following questions –

"Pambo and Pendo are two business men. They are in the oil business. Pambo has many petrol stations throughout East Africa. Pendo has numerous tankers transporting oil products throughout the region. They decide to enter into a contract where Pendo's tankers would be the sole suppliers for Pambo's petrol stations. They have come to you to help them with the contract. Further they realize that it's important that they have a mechanism of resolving any dispute that would result from their contractual relationship. They are divided between arbitration or mediation."

- a) Given the finality of arbitration awards, you have advised them to adopt arbitration. They have accepted your advice and have mandated you to come up with the contract. Draft the arbitration agreement.

15 Marks

- b) They are also keen to understand the mediation option. Particularly, they would wish to understand the mediation process. Prepare a write up for them on the mediation process.

10 Marks

QUESTION 2

"Where members of an organization have chosen, by virtue of their very membership, to settle their disputes through arbitration, I see absolutely no reason why the courts should interfere in that process. It is not in the public interest...The courts should encourage as far as possible settlement of disputes outside of the court process...This court will certainly encourage the use of alternate dispute resolution where it is appropriate to do so."

Visram J in *ALFRED WEKESA SAMBU & 4 Others v MOHAMMED HATIMY & 12 Others* [2007] eKLR

In spite of this statement, the Arbitration Act 1995 provides for the possibility for pre-arbitration intervention. How may this happen and what are the conditions for such intervention?

15 Marks

QUESTION 3

Compare and contrast mediation and negotiation as methods of alternative dispute resolution.

15 Marks



MOI UNIVERSITY

OFFICE OF THE DEPUTY VICE CHANCELLOR
(ACADEMICS, RESEARCH & EXTENSION)

UNIVERSITY EXAMINATIONS 2020/2021 ACADEMIC YEAR THIRD YEAR FIRST SEMESTER EXAMINATION

FOR THE DEGREE OF BACHELOR OF LAWS

COURSE CODE: FLB 304

COURSE TITLE: ALTERNATIVE DISPUTE RESOLUTION

DATE: 23RD AUGUST, 2021 **TIME:** 9.00 A.M. – 12.00 NOON.

INSTRUCTION TO CANDIDATES

- ANSWER QUESTION ONE (1) AND ANY THREE (3) OTHERS.
- ILLUSTRATE YOUR ANSWER WITH RELEVANT DECIDED CASES AND STATUTORY PROVISIONS.

THIS PAPER CONSISTS OF (3) PRINTED PAGES

PLEASE TURN OVER

FLB 304 ALTERNATIVE DISPUTE RESOLUTION

QUESTION 4

"What justice could we expect from the corridors of justice when only those who can hire the best lawyers, better still buy the judge have their way in court?" Anonymous disgruntled Kenyan commenting on the recent developments in the judiciary. He concluded by stating that any day he would choose Alternative Dispute Resolution Mechanism over Litigation. What reasons could he advance in support of this position?

15 Marks.

QUESTION 5

Traditional dispute resolution mechanisms play an important role in resolving conflicts in Kenya. Explain the traditional disputes resolution process in the area marriage and family in your community. How do they differ from the judicial process?

15 Marks

QUESTION 6

"The court has come up with numerous measures to promote Article 159 of the Constitution of Kenya 2010. Revision of Order 46 of the Civil Procedure Rules is one of those measures." Anonymous

Discuss the quote illustrating the extent to which alternative dispute resolution measures have been implemented under the Constitution of Kenya 2010.

15 Marks

S

provisions

FLB 304

Question 5

Evaluate the role of alternative dispute resolution mechanisms in enhancing access to justice in Kenya. (15 marks).

Question 6

Discuss the rationale and value of court annexed mediation in dispute resolution in Kenya (15 marks).