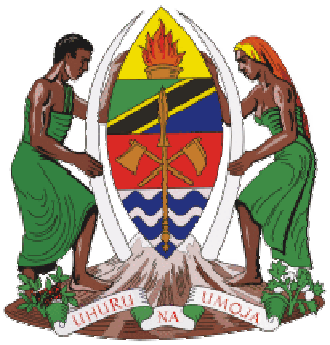
THE UNITED REPUBLIC OF TANZANIA



THE JUDICIARY

The High Court of Tanzania

[Commercial Division]

THE COMMERCIAL DIVISION: WHAT IT IS, HOW IT FUNCTIONS AND HOW YOU CAN USE IT

Contents

THE COMMERCIAL DIVISION: WHAT IT IS, HOW IT FUNCTIONS, AND HOW YOU CAN USE IT

1. The Commercial Division in Historical Context

The Commercial Division commonly known as the Commercial Court (***Com Court***) was established as a Division of the High Court of Tanzania. The establishment of the Commercial Division was a great step in the reform process of the legal and judicial sector. It became operational on the 15th of September, 1999 and commenced its business in rented premises at Upanga Maweni Street. Later it moved into its own premises on the 27th and 28th of January, 2000, in a building which was refurbished through financial assistance from DANIDA. The Division building was officially inaugurated on the 11th May, 2001 by his Excellency President Benjamin William Mkapa, the 3rd Phase Government President of the United Republic of Tanzania.

The Division is located at the corner of Kivukoni Front and Luthuli Street in Dar es Salaam City. It has sub-registries in Arusha City and Mwanza City. Plans are underway to open more sub-registries in other High Court Zonal Centers, one in Mbeya and another in Dodoma with some plans also earmarked for another sub-registry in Tanga.

Since its inception, three Judges have managed the Division at any given time. The first Judge-in-Charge was His Lordship Justice Dr. S.J. Bwana. The other founder judges were Hon. Mr. Justice Nsekela and Hon. Mr. Justice Kalegeya. Upon Hon. Mr. Justice Nsekela being appointed Justice of Court of Appeal of Tanzania, Hon. Lady Justice N.P. Kimaro was appointed to replace him and later she too was appointed Justice of Court of Appeal.

His Lordship Justice Kalegeya, currently with the Court of Appeal, was transferred from the Division to the High Court Dar es Salaam Main Registry as a judge and was later appointed Judge-in-Charge of the Dar es Salaam Zone of the High Court before finally also being appointed Justice of Court of Appeal.

Following the transfer of the first Judge-in-Charge of the Division, His Lordship Justice Luanda currently in the Court of Appeal took over the captainship of the Division. Other judges were Hon. Justice S.A. Massati and Lady Justice Sauda Mjasiri, all of whom were later transferred, Hon. Justice Luanda and Madam Justice Mjasiri being appointed Justices of Court of Appeal and His Lordship Justice S.A. Massati becoming the Principle Judge before ultimately also finding his way to the Court of Appeal.

Currently the Judge-in-Charge is Hon. Judge Robert Vincent Makaramba who took over from Lady Justice K. K. Oriyo who was elevated to the Court of Appeal. The other judges are Hon. Judge A. R. Mruma and Hon. Justice A. E. Bukuku.

The Division has had the services of Dr. John Luhangisa, the current Registrar of the East Africa Court of Justice, as its first Registrar, followed by Mrs. Teemba and later on the late Mrs. E.G. Mbise, both of whom were later appointed judges of the High Court. The current Registrar of the Division is Hon. John R. Kahyoza, who is assisted by Deputy Registrars, Hon. Mrs. Katarina Revocati at the main registry, Hon. Ms. Angela. E. M. Teye at the Arusha sub–registry and Hon. Ms. Eugenia.G. Rujwahuka at the Mwanza sub-registry. In the history of the Division, the first Deputy Registrar was Mrs. Teemba who as pointed out was later appointed a judge of the High Court. Hon. Justice A. Mruma who is now a judge in the Division once also served as Deputy Registrar in the Division.

2. Establishment of the Commercial Division

2.1 How was the Division established?

The Commercial Division was established under Rule 5A of the High Court Registries Rules, 1984 [GN.23/1984] as amended by the High Court Registries (amendment)Rules, 1999 [GN.141/1999] which was later repealed and replaced by the High Court Registries Rules,2005 [GN. 96/2005.

Rule 5A of GN No.96/2005 provided that "***there shall be a Commercial Division of the High Court within the Registry at Dar es Salaam and at any other Registry or sub registry as may be determined by the Chief Justice in which proceedings concerning Commercial case may be instituted."***

2.2 Why was the Commercial Division Established?

The Commercial Division was established as a "specialized court" to cater specifically for the business community by resolving commercial disputes expeditiously, efficiently and effectively. The establishment of the Division was necessitated by the prevailing economic situation ushered in by liberalization and privatization policies of the Government of the day, which aimed at strengthening the private sector by encouraging investors, both local and foreign thus contributing to alleviating poverty.

The need for a specialized court to resolve commercial disputes that were to emerge in the wake of expanded business and commercial activities particularly was also a pushing factor for the establishment of the Commercial Division.

2.2 Who supported the Establishment of the Division?

In its initial stages, the Division enjoyed the great support from the Bank of Tanzania and DANIDA. The Government of Tanzania provided the requisite support through allocation of human personnel and finances through recurrent budget.

The assistance of the Danish Government through its development agency, DANIDA, came in the form of funding for refurbishing the headquarters of the Division and construction of its sub-registry office in Arusha but also for building the capacity of the court's personnel staff through training and attachment in other commercial courts from other jurisdictions. DANIDA also provided the Division with modern working equipment and training for the users.

The Bank of Tanzania (BOT) has offered support to the Division which supplemented the support from DANIDA and the government. DANIDA refurbished the Division's temporary premises, procured transport for staff and contributed to build capacity of staff of the Division.

2.3 How does the Division function?

2.3.1 The Division's Strategic Plan

The Division has developed and adopted its own Strategic Plan (SP), which clearly states its Vision, Mission and Core Values, as well as its objectives, Performance indicators and means of evaluation.

The current Strategic Plan, which is for 2010/2011 to 2014/2015 is a review of the previous one which was 2006/2007 to 2010/2011. It addresses the unfinished business of the Division in the previous one. The current SP implements the strategic priorities of the High Court and responds to major strategic issues implied by the evolving external and internal environments of the Division.

2.3.2 The Vision, Mission and Core Values

The vision of the Division for the Tanzanian society is:

"Timely, Quality and Accessible Justice in Commercial Cases for All."

In line with the Vision, the Mission of the Division is:

"To provide just, quality, efficient, effective and speedy disposal of commercial cases through modern systems and practices."

The institutional vision or rather, the conceptual image of the Division's success by the end of the five years of the Plan is:

"To be become a dynamic, technology-oriented and professionally competent commercial Division - able to handle specialized commercial cases."

2.3.3 Core Values

The handling of commercial cases by the Division is continuously to be underlined by the following set of core values:

(i) Equality (before the law)
(ii) Impartiality
(iii) Independence of decision-making
(iv) Competence and professionalism
(v) Integrity
(vi) Accessibility
(vii) Timeliness
(viii) Certainty and predictability of decisions

In order to achieve the Vision of "***Timely Quality and Accessible Justice in Commercial Cases for all***" the Division has strived to create conducive environment for efficient and effective delivery of supportive Division services. The Division sets its targets, which are carried out by a team of committed members of staff using relatively modern court technological systems.

2.4 How is the Division organized?

The Division which is among the three divisions of High Court of Tanzania has its headquarters in Dar es Salaam, and operates two sub-registries, one at Arusha and another at Mwanza. Currently, the Division operates on full-time basis and carries out its day-to-day activities from its headquarters in Dar es Salaam. Its three judges take turn in going on a one-week session in each of its two sub-registries located up country, since there are no resident judges there. An organogram is attached to this Manual showing the Division's organizational structure.

Each sub registry has a deputy registrar, who carries out the function of admitting cases and administering both its financial and human resources. Advanced plans are already underway to open two more sub-registries one at Mbeya in Southern Highlands of Tanzania and another at Dodoma in Central Tanzania.

2.5 Who manages and runs the Division?

Currently the Division has three judges, a Registrar, three-deputy registrars, one at the headquarters and one at each of the sub registry, and 72 support staff of different caliber. The authorized establishment for judges is four, but given shortage of judges nationwide, the number of judges at the Court has remained three from its inception.

The Division is managed by a judge-in-charge, a registrar and deputy registrar. The Registrar is the accounting and chief executive officer of the Division.

The Division has permanent committees, which assist in its operations. The Division may sometimes form ad hoc committees as it deems fit.

(a) The Management Committee

The Management Committee is an in-house management team comprised of all the three judges, the registrars, the chief accountant, the chief internal auditor, the human recourses officer and the senior registry officer.

The basic duty of the Management Committee is to advice "the management" on in-house management issues. The Management team is comprised of the judge-in-charge and the two registrars, who handle day-to-day operations of the Division.

(b) The Commercial Division User's Committee

The Commercial Court User's Committee was established under ***Government Notice No 141 of 1999*** as amended by ***Rule 5B of Government Notice No. 96 of 2005,*** to advise the management of the Division on matters of court practice. It also selects assessors who sit on commercial cases.

The Committee is comprised of all three judges of the Division, the Registrar and Deputy Registrar who serve as its secretary; two advocates nominated by the National Bar Association (the Tanganyika Law Society); two State Attorneys nominated by the Attorney General; and five persons nominated from the business community, who come from lawfully established business organizations representing the business community.

The Commercial Court Users' committee acts as a watchdog. It feeds the management with views and feelings of "the outside world" about the Division. The Committee sometimes informs its members of what is going on in the Division.

(c) Staff General Meeting

The Staff General Meeting is a meeting convened once in every month for all members of staff of the Division to update them on management decisions and to receive feedback from them.

(d) The Workers' Council

The Workers' Council is composed of representatives of employees, trade union leaders and the management. The Division has its Workers Council meeting and participates in the Workers' Council for the entire Judiciary of Tanzania, which brings together workers' representatives from the whole Judiciary. It is a body, which makes it possible for employees to take part in the administration of their organization or institution and it is a creature of law.

3 How does the Division Operate and Perform its duties

3.1 What is the Jurisdiction of the Division?

The High Court of Tanzania (Commercial Division inclusive) is a creature of statute. Neither the parties, nor the court can grant itself jurisdiction where it lacks one or by the consent of the parties [Refer ***Commercial Case No. 65 of 2006, Kenya Commercial Bank (T) Ltd v. Deata Ltd & Others,*** a ruling delivered by Hon. Massati, J. on 16 March 2007].

A Court's jurisdiction is determined either by the statute that creates it or by limitations contained in the relevant law. Article 108(1) of the Constitution of the United Republic of Tanzania of 1977 (as amended from time to time) recognizes the existence of the High Court of the United Republic (the High Court of Tanzania as commonly referred to, which was established in 1920 by the Tanganyika Order-in-Council. The Commercial Division of the High Court of Tanzania has both original and appellate jurisdiction as provided under ***Rule 5A (2) of the High Court Registries Rules [Government Notice No. 427/2005].***

(a) Governing Rules of Practice and Procedure

The Commercial Division being a division of the High Court of Tanzania is governed by the laws governing the High Court of Tanzania with very few exceptions.

The **Civil Procedure Code Act, [Cap.33 R.E 2002] (C.P.C.)** regulates the functioning of civil courts, which include subordinate courts of Resident and District Magistrates' Courts and the High Court. The CPC lays down the rules in which a civil court including the Commercial Division is to function, which may be summed up as follows:

- Procedure of filing a civil case which include a commercial case.
- Powers of court to pass various orders.
- Court fees and stamp involved in filing of case (in this regard the Commercial Division has its own rules setting the amount of fess payable when filing a commercial case.
- Rights of the parties to a case, namely, plaintiff and defendant
- Jurisdiction and parameters within which the civil courts should function (in this respect the Rules provide for the jurisdiction of the Commercial Division over cases of commercial significance.
- Specific rules for proceedings of a case.
- Right of Appeals, review or reference.

(b) Original Jurisdiction of the Division

In terms of Rule 2 of the High Court Registries Amendment Rules 1984 Government Notice No.141/1999 as amended by Government Notice No.96 of 2005, initially the Division had only original jurisdiction over cases of commercial significance.

(c) Appellate Jurisdiction of the Division

In 2005 by virtue of Rule 5A(2) of Government Notice No.427/2005, the Division was also allowed to hear appeals from subordinate courts of Resident and District Magistrates' Courts in decisions on cases of commercial significance decided by those courts.

By virtue of GN.96/2005 the term "Appeal" includes Revision, Review, Reference, case stated and point of law reserved, thus the Division has vested with powers to make review and revision over cases adjudicated by subordinate courts.

(d) Review

The law allows any person who is aggrieved by any decision or order from which an appeal is allowed but no appeal has been made to apply for review of the order or decision made by a magistrate who passed the judgment [Order XLII Rule 1(a) of CPC].

Review may also be applied for in circumstances where the party has no right to appeal so that a court can reverse its decision [Order XLII Rule 1(b) of CPC]. According to Order XLII Rule 1(1) (2) &(3) of CPC the applicant for review has to show that he or she discovered new or important matters or evidence.

The judge to whom the application is made is free to alter his or her decision as he or she deems fit. [Refer to **Misc Civil Cause No. 1 of 2008, G.K. Hotels And Resorts (Pty) v. Board of Trustees of the Local Authorities Provident Fund** delivered on 20th February 2009 by Hon. Werema,J(as he then was) and **Commercial Case No. 107 Of 2003 ,Chrome Company Limited v. Kilosa District Council**, a ruling by Hon.Bwana,J(as he then was). on 29th March 2005].

(e) Supervision and Revision Powers of the Division

The Division is vested with general powers of supervision and revision over all Districts Courts and Courts of Resident Magistrates in the exercise of their appellate jurisdiction on matters originating from primary courts as well as in exercising their original jurisdiction **(Refer section 43(2) of the Magistrates' Courts Act, Cap.11 R.E.2002)**. Where in exercise of such power the Division may either call to inspect the record of any proceedings, direct any District Court to call for and inspect the records of any proceedings in a primary court, or it can itself revise any such proceedings.

Under the Magistrate Courts Act if in any proceedings of a civil nature where it appears that there has been an error material to the merits of the case involving injustices, the Division may revise the proceedings and make such decision as it sees fit.

(f) Lack of Exclusive Jurisdiction and "forum shopping"

Finally, it should be pointed out that this Division has no exclusive mandatory jurisdiction to hear and determine commercial dispute. Order IV Rule 4 of the Civil Procedure Code, 1966 (as amended) provides that, "***it shall not be mandatory for a commercial case to be instituted in the Commercial division of the High Court.***"

A litigant in a commercial case therefore has an option of instituting a commercial case either in the Ordinary Registry of the High Court, in the Commercial Division or in the subordinate Courts. Order IV Rule 3 of the Civil Procedure Code, provides that:

> "***No suit shall be instituted in the Commercial Division of the High Court concerning a commercial matter which is pending before another court or tribunal of competent jurisdiction or which falls within the competency of a lower court.***"

Section 13 of the Civil Procedure Code should be read together with Section 43(2) of the Magistrate Courts Act, Cap 11 R.E 2002 on determining the pecuniary limitation of the subordinate Courts over commercial cases.

Section 13 of the Civil Procedure Code provides that:

> *"Every suit shall be instituted in the court of the lowest grade competent to try it and, for the purposes of this section, a court of a Resident Magistrate and a District Court shall be deemed to be courts of the same grade."*

Again the law allows filing of commercial cases not only at its headquarters but also at any High Court centre (zone). If a commercial case is filed at the ordinary High Court centre it can be transferred to the Commercial Division.

3.2 What is a case of commercial significance?

According to the Rules establishing the Commercial Division, a commercial case is a civil case involving a matter considered to be of commercial significance, which may include but is not limited to the following type of cases:-

i. *Formation of a business or commercial organization;*
ii. *Governance of a business or commercial organization;*
iii. *Contractual relationship of a business or commercial organization with other bodies or person outside it;*
iv. *Liability of a commercial or business organization or official arising out of its commercial or business activities;*
v. *Liabilities of a commercial or business person arising out of that person commercial or business activities;*
vi. *Retracting or payment of commercial debts by or to business or commercial organization or person;*
vii. *The enforcement of commercial arbitration award;*
viii. *Enforcement of awards of a regional court or tribunal of competent jurisdiction made in accordance with a Treaty or Mutual Assistance arrangement; to which the United Republic is a signatory and which forms part of the law of the United Republic;*
ix. *Admiralty proceedings; and*
x. *Arbitration proceedings.*

The above list is nonetheless exhaustive. A presiding judge has discretion to determine whether or not a case is of commercial significance (***Refer Commercial case no.44 of 2007, Kibo Hotel Kilimanjaro Versus Presidential Parastatal Sector Reform Commission and Impala Hotel Limited (At DSM).***

In the wake of amendments to the Land Laws in 2010, the jurisdiction of the Division over commercial mortgages has now been restored having initially been wrested from the Division and placed in the Land Division of the High Court by the **Mortgages Financing (Special Provisions) Act, 2008**, [Act No.17 of 2008], which the President signed into law on 6th December 2008.

The Act No.17 of 2008 also amended Rule 3 of Order XXXV of the Civil Procedure Act [Cap.33 R.E. 2002] to allow summary procedure in suits arising out of mortgages, where the mortgagor demonstrate that: (i) the loan or the portion of the loan claimed is indeed discharged; or (i) the loan was actually not taken.

3.3 What is the pecuniary limitation of the Division?

The jurisdiction of civil courts can be classified as (a) pecuniary/monetary and (b) territorial/area wise. Pecuniary jurisdiction divides the courts on a vertical basis. Territorial jurisdiction divides the courts on a horizontal basis. The Commercial Division of the High Court of Tanzania has territorial jurisdiction.

The pecuniary jurisdiction of courts in Tanzania Mainland in suits amounting to Tshs.100,000,000/= for movable property and Tshs.150,000,000/= for immovable property lie before the District and Resident Magistrates' Courts. Suits over and above the value mentioned herein above lie before the High Court.

The pecuniary jurisdiction of the Commercial Division on cases of commercial significance is lower than that in the Land Division and the General Registry of the High Court. In terms of section 40 (2) (a & b) of the Magistrates Courts Act, Cap 11 R.E 2002 as amended by the Written Laws (Misc. Amendment) Act No.25/2002 and Written Laws Act No.4/2004, the pecuniary jurisdiction of the Commercial Division is Tshs.30, 000,000/= for movable property and Tshs.50, 000,000/= for immovable property respectively.

If the value of the subject matter is lower than the amount specified in section 40 (2)(a & b) of the Magistrates Courts Act as amended by Act 4 of 2004, then a party should file his matter in District or Resident Magistrate Court. [Refer to Section 13 and Order IV Rule 3 of the Civil Procedure Code, Cap.33 R.E 2002, ***Commercial Case No.18 of 2003 Akiba Commercial Bank Ltd v. The Network of Technical publications in Africa & 4 Others at Dar es Salaam (unreported), Commercial Case No. 35 of 2003 The Courtyard Dar Es Salaam v. The Managing Director Tanzania Postal Bank at Dar es Salaam (unreported).***]

3.4 How much fees you have to pay to launch a commercial case?

The Commercial Division has its own unique fee structure, which is governed by Government Notice No.428/2005, which amended Government Notice No. 275/1999. The fee structure is based on the following scales which are used for determining the filing fees:

(a) For every subject matter or amount claimed whose value is up to Tshs.200,000,000/- (two hundred million shillings 3% of that value shall be payable as court fees;

(b) Where the value or amount claimed exceeds Tshs.200,000,000/=, then 1% of that excess shall be payable in addition to the 3% payable under item (a) above.

There has been some uneasiness with the fee structure among potential litigants and development partners, who are not in favour of the fee structure. The issue is whether the fee structure as it presently stands is ideal or not. This requires some study so as to be able to come out with the most satisfactory answer to the issue.

The founder Judge in-Charge of the Division used to call the fee structure a "safety valve" which is meant to control the number of cases filed at the Division lest it becomes indaunted with case and finally clogged up. [Refer to Hon. Justice Dr. J. S. Bwana (JA) in his Paper titled "***Evolution and Development of the Commercial Court Division of the High Court of Tanzania."*** The logic behind the present court fees structure was twofold: First, to "filter" out non serious disputes from coming to the Division and second, to enable the Division to meet its own running costs through the retention scheme. Court fees therefore were the only sure source of income to support such activities.

Plans are underway already by the Division to review the fee structure. However, reports from other sister courts in the region where such safety valve does not exist show that they have been burgeoned with pending cases and are already thinking of imposing a restrictive fee structure.

The unsatisfactory nature of the fee structure has had some legal pundits in the country, thinking hard about the possibility of creating a small claims court, which idea the Government seems to have bought through its Roadmap. The discussion for the establishment of such court means to cater largely for small and medium size enterprises.

3.5 How much fine you pay for unreasonable adjournment of a case?

The Division fee structure has another unique aspect. It introduces fine for unreasonable adjournment of cases. Fine for adjournment, is payable to the Division and in

most cases it is awarded together with costs to the party affected by the adjournment. The fine is currently Tshs.20,000/= [See Part 4 of the Schedule to the Commercial Court (Fees) Rules of 1999 [GN.275/1999]. On filing application for adjournment or for leave to file a pleading or other document out of time including the fee for the order thereon].

3.6 How can you access the Court?

In this section we shall be able to see how a person can launch a commercial case at the Commercial Division. Like for the other courts, this involves preparation and initiation. The processes/ stages involved to get your case into the Division are as follows:

(a) Preparatory stage

This stage involves making a determination whether your case is a civil case of commercial significance using the criteria stipulated in paragraph 3.2 above on what is a case of commercial significance.

(b) Preparing important documents for your case

The documents you will need to file in the Division in most cases are not that different from those which you file in any other court concerning a civil matter. This however, depends on the type of a case you wish to bring to the Division. A case at the Division is initiated by filing a plaint. At this stage, this will involve the preparation of the Plaint or a document containing statement and particulars of the claim in a narrative fashion without giving evidence.

(c) Initiating your case by filing it at the Division

After preparing your documents you can initiate your case by filing a plaint/or the document for its registration in Division records. At the Division the following departments/sections are important in the process of registering the case.

i) The Civil Registry

The first section to take your document to is the Civil section. At this section, your document/the plaint will be evaluated to assess the fees you are supposed to pay for admission

and registration of your case. This are called the filing fees. The Commercial court fees are provided for under the schedule to the Commercial Court(Fees)Rules, 1999 G.N no. 275 of 1999 read together with Commercial Court (Fees) (Amendment) Rules,2005 G.N no. 428 of 2005.

ii) The Cash Office

After your documents have been assessed you will be required to go to the cash office of the Accounts department for making the necessary payments. At the Cash Office you will be issued with two types of receipts, a light green coloured receipt for the Division's record. This will be attached to your document for purpose of proof of payment of the necessary fees required by the law. The second receipt is a yellow one, which is for your own record.

After paying the necessary fees, you then will take the receipts back to the Civil Registry where the clerk will file your case ready for the next move. At this stage, you will have accomplished a great part of the process in initiating your case.

(i) The Judge-in-Charge

From the Civil section, your file will be placed before the Judge in Charge for assignment to a judge. After the case has been assigned to a judge, the judge will make some necessary orders in relation to the nature of the document/case file. In most cases, if it is a freshly filed case, then, the judge will make orders requiring the parties to appear for mention of that case and for further orders.

(j) The Registrar

From the Judge, the respective Bench Clerk for the Judge will take the file to the Registrar for the issuing and signing the summons. The summons will then be placed at the registry office. You can collect the summons and copy of your plaint/chamber application for serving the other party.

d) How are you going to get information of what and when is the next action concerning your case such as when is it scheduled for?

There are two basic ways of obtaining information about the progress or next step of your case depending on the stage/type of your case. If it is a freshly filed case against you, either the plaintiff or the Court officer known as Process Server will deliver to you a summons detailing the next action, for example such as when the case is coming for mention, first hearing or judgment and/or ruling as the case may be. However, if the case is in progress, you can obtain information on the progress of the case either by visiting the Division's website or you can request the information through the mobile application system.

Once you have accessed the Division website (www.comcourt.org.tz), do the following:

(i) On the display window will click on the "cause list" menu item. The menu will display our three registries of Dar es Salaam, Arusha and Mwanza.

(ii) Then click on the particular registry where you filed your case. Next, a box will be displayed.

(iii) Once you have clicked in the box, a calendar for that specific month will be displayed. Select the dates since you made last appearance for your case until about a month (if you are not so sure of the exact date your case is coming up).

(iv) Click on the word "search. A cause list will be displayed for the dates that you have indicated in your "search." If you do not see your case listed, repeat the exercise by changing the dates and months until you get your own case and its action it is listed for.

3.7 Court-Annexed Mediation in Commercial Cases

3.7.1 The first scheduling and settlement conference

In terms of Order VIIIA Rule 3 (1) of CPC in every case assigned to a specific judge or magistrate, a first scheduling and settlement conference attended by the parties or their recognized agents or advocates is held and presided over by the judge or magistrate within twenty-one days after conclusion of the pleadings for the purpose of ascertaining the speed track of the case, resolving the case through negotiation, mediation, arbitration or such other procedures not involving a trial.

3.7.2 Determination of Case Speed Track

In terms of Order VIIIA Rule 3(2) of CPC appropriate speed track for a case is to be determined by the presiding judge or magistrate, after consultation with the parties or their recognized agents or advocates, and thereby make a scheduling order, setting out the dates or time for future events or steps in the case, including preliminary applications, affidavits, counter affidavits and notices, and the use of procedures for alternative disputes resolution.

3.7.3 Application of ADR Procedures in Commercial Cases

The general principle under Order VIIIA Rule 3(2A) of the CPC is that no alternative dispute resolution procedure is required in the Commercial Division of the High Court, where prior attempts to settle the commercial case have been undertaken under a practice or mechanism established by law or approved by the Chief Justice by notice published in the Gazette. However, in every commercial case as is the case with all other civil cases, mediation is compulsory.

3.8 The Role of Advocates in trial of Commercial Cases

For a civil justice system to function and meet the challenges facing it, it is essential that those who man (the bench) and assist (the bar) must be sensitive to court delays and other problems facing the civil justice system in the forefront in suggesting improvements [Hon. Judge B.D. Chipeta (rtd) in his paper titled "**The importance of Civil Justice: Basic Principles that Should be Met By A Civil System.**"]

(a) The Role of Advocates as Officers of Court

Advocates are officers of the court. In the adversarial systems like our advocates play an important role in the administration of justice. Advocates contribute positive or negative to the court's performance. Cooperation between advocates and the Division will enhance the latter's performance.

The Mission of the Division is to provide just, efficient, effective and speedy disposal of commercial cases through modern systems and practices. Advocates therefore have a duty as officers of court to assist the Division to realize its mission and achieve its vision.

There are a number of areas the Division would serious require attention of all advocates appearing to the Division.

(b) The Role of Advocates in Case Flow Management

The term Case Flow Management connotes supervision or management of the time and events involved in the movement of a case through the court system from the point of initiation

to disposal, regardless of what type of disposal while encouraging cooperation of the parties in the process.

Case management or as sometimes referred to as judicial case management is one of the ways of solving the problem of case backlog in trial courts. The idea was simply for the judiciary to abandon its traditional passivity role as an umpire referee and become more actively involved in pre-trial conferences with the parties where attempts would be made to settle the case and ensure parties comply with the time and schedule.

The Division cannot discharge its function of managing cases without the advocates playing its part. Advocates appearing to the Division are strongly urged to refrain from the following unbecoming behavior which in any way largely contributes to the problem of cases delays:

i. **Consent adjournment of cases,**
ii. **Unnecessary interlocutory application,**
iii. **Unnecessary adjournment,**
iv. **Failure to abide to schedules as regards filing of submissions**
v. **Lack of preparedness,**
vi. **Not being Punctual to courts,**
vii. **Holding briefs without proper instructions and**
viii. **Failure of advocates to enter appearance due sickness without complying with the Hon. Principle Judge's circular and the civil Procedure code cap 33 (R.E)2002**

Note: Order XVII Rule 1 (2) of the CPC provides that where the suit has been adjourned at the request of the plaintiff or by consent of both parties, such a suit shall be placed last in the list of pending cases. Provided that- (a)..(b)…(c)…(d) *Where the illness of and advocate or his inability to conduct the case for any reason, other than being engaged in another court, is put forward as a ground of adjournment, the court shall not grant adjournment unless it is satisfied that the party applying for adjournment could not have engaged another advocate.*

(c) Oral submissions accompanied by soft copies

The current rules of procedures do not allow filing of pleadings and submissions electronically. However, since most of the judges at the Division compose their own judgments electronically using personal computers and/or laptops, which has greatly contributed in expediting court processes, they would have benefitted more if hard copies of submissions when lodged with the court were accompanied with soft copies. This would assist the judges to desist from having to re-typing the Counsel submissions when composing ruling/judgment instead of just copying and pasting some of the relevant parts of the submissions.

3.9 The Role of Assessors in trial of a Commercial Case

The general principle in the conduct of trial in the Commercial Division as per Order XVIII Rule1A of the Civil Procedure Code, is that the trial of all cases, unless decided otherwise by parties should be by the aid of assessors.

Not less than two assessors are to sit in a trial in the Commercial Division. The assessors who are persons g***enerally knowledgeable of the field concerning the suit***", are selected from the list submitted to the Commercial Division by the Commercial Court Users' Committee.

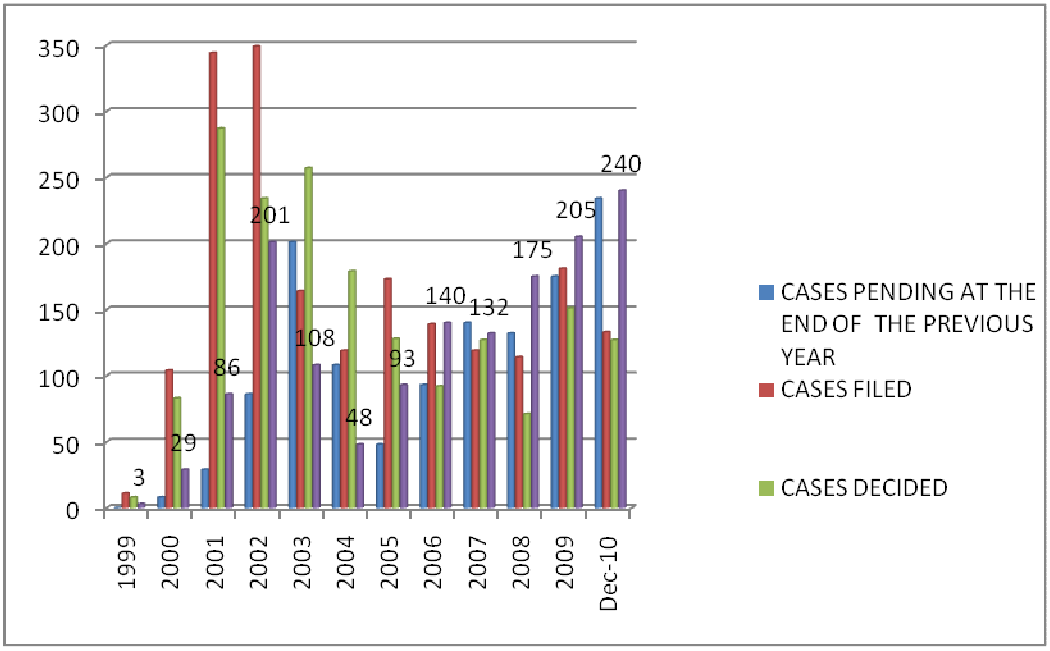
The decision whether a trial needs the aid of assessors is in the hands of the parties. However, in reaching a decision, although the law requires a judge to take the opinion of the assessors into account, the judge is not bound by the opinion, provided the judge gives reasons for disagreeing with it.

4.0 Assessment of the Division's Performance

4.1 A Summary of Ten Years

The Court's performance has been relatively good and has met the expectations of the stakeholders as evidenced by the following data, which speaks for itself:

SUMMARY OF PERFORMANCE FROM SEP. 1999 – 2010



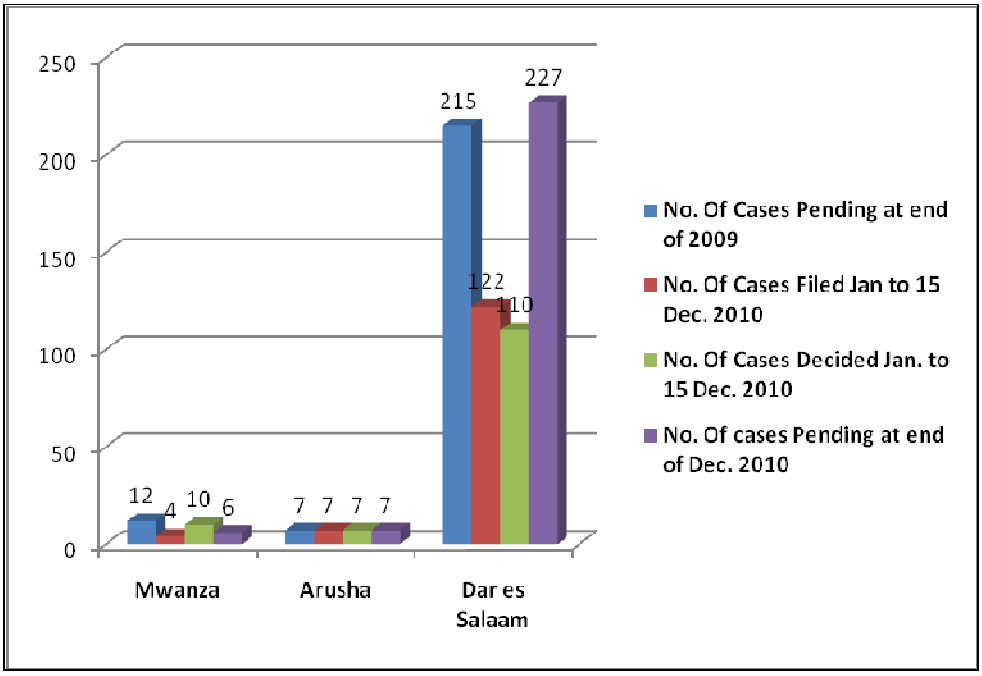
Average time a case takes from filing to determination:

S/N	Year	Months
1	1999	2
2	2000	3.5
3	2001	2.86
4	2002	5.05
5	2003	8.42
6	2004	13.26
7	2005	9.81
8	2006	7.47
9	2007	14.02
10	2008	13.54
11	2009	10.59
12	2010	389 days (13 months average)

A total number of **1977 case by 2010** have been filed in this Division, out of which **1729** case have been disposed of, which makes **89 %** of the total number of cases filed. Out of all cases disposed of, about 10% were settled through mediation.

The World Bank Doing Business 2010 Report is another substantiation of good performance of the Commercial Division since basing on the assessment of the Commercial Division, in that Report the country has been ranked 31st position out of 131 economies around the world in 2008/09 reforms in the area of enforcing contracts, which shows that the Commercial Division has even contributed in the creation of good image for the country worldwide.

SUMMARY OF WORK LOAD AND DISPOSAL FOR THE YEAR 2010



There are several factors which have contributed to the success story of the Division in expeditious disposal of cases, which include but are not limited to the following:

(a) Proactive attitude

Due to the fact that there are no elaborate rules of procedures to ease speedy disposal at the Division, to speed up commercial cases depends very much on the mindset and initiatives of its stake holders. Whoever files a case with the Division comes with a determination to speed up the process. The Division staff is inclined to cope with the spirit of the litigants to dispose off the matter within a short time. Judges play proactive role to ensure that unserious litigants are under control. All these create a united or common vision and goal to the result of the matter. With the same goal among the stakeholders, achievement of purpose is made easier.

(b) Use of Mediation

Determination of cases through mediation has been another technique to speed up disposal of cases. At least 20% of the cases filed are being settled by a way of mediation. This is regardless of the fact that not all the stakeholders are in favour of mediation, but judges exercise their proactive role to encourage the process.

4.2 Recommendations of the Court User's Committee on performance improvement

The establishment, composition of the commercial court User's committee has been explained herein above. The committee held its meeting in September 2010 and made the following recommendations, which the bench and the bar are bound to observe.

i. *Faini au Gharama(costs of adjournment) zinazotolewa kwa kuahirishwa mashauri bila sababu zilipwe kabla ya tarehe inayofuata ya kusikilizwa shauri husika.*

ii. *Waheshimiwa majaji wakatae sababu za mawakili wa serikali kuahirisha mashauri kwa sababu ya kupewa jalada ndani ya muda mfupi. Ilielezwa kuwa kwa kawaida majalada yanagawiwa mapema na kama kuna dharura wakili aliyepewa shauri anatakiwa kusoma maelekezo kwenye jadala na kuendelea na shauri husika.*

iii. *Wadaiwa au wakili atakayepata udhuru atoe taarifa kwa upande mwingine na kwa Mahakama ili kuepusha usumbufu na gharama kwa upande wapili.*

iv. *Kamati ilipendekeza mashauri yapangiwe muda wa kuanza. Kila shauri lionyeshwe muda wa kuanza. Kama kuna mhusika atachelewa muda aliopangiwa atoe taarifa kwa mahakama na kwa upande mwingine ili shauri lisubiri baadaye au itakavyoonekena inafaa.*

v. *Kamati ilipendekeza mashauri yasipangiwe tarehe ya kutajwa baadala yake yapangwe kwa ajili ya tukio fulani au hatua fulani inayofahamika (cases should not be fixed for mention but for a particular action or for necessary orders).*

vi. *Wadaiwa au mawakili wao wapewe taarifa za kutokuwepo kwa Waheshimiwa majaji na mashauri yao yapangiwe tarehe nyingine na wahusika kujulishwa. Wadaiwa na Mawakili ambao tarehe walizopangiwa zitakuwa na majukumu tayari, watakuwa na jukumu la kuitaarifu mahakama.*

4.3 Capacity Building

The Division is committed to build the capacity of its staff at all levels through training and study tours. The Division has a training programme which has taken on board the training needs of its staff. The Division's biggest challenge however, is securing funding to implement the training programme. The Division normally sets funds for training in its

annual recurrent budget but that amount is not sufficient, and therefore sometimes it has to rely on support from development partners and other sources.

The Division intends to be a user-friendly court, and this can be achieved through training to change staff's attitude particularly in customer care.

5.0 How are the Court's Decrees executed?

5.1 The Role of Court Brokers in the Execution Process

Court decrees are executed by court brokers. Court brokers are officers of the court. They are appointed under the Judicature and Application of Laws Act (Cap.453 R.E. 2002] and the rules made thereunder. The rules are called **Court Broker and Process Servers (Appointment, Remuneration and Discipline) Government Notice No. 315/97**.

5.2 Disciplinary Procedures for Court Brokers

Court Brokers are appointed and disciplined by the Disciplinary Committee. The chairperson of the disciplinary committee is the Chief Justice or his representative. The Executing Officers who are Taxing Masters (Registrars) determine the costs of executing decrees.

The general performance of a court broker is reviewed by the Registrar or Magistrate once every year. As a disciplinary procedure, where there are any disciplinary actions being taken or to be taken against the court broker, the registrar or magistrate, may, with the approval of the Chief Justice, suspend the appointment of such broker.

The disciplinary proceedings once instituted are regulated by the rules of natural justice which includes the right to be heard and the rules against bias. Upon conclusion of the proceedings, where the broker is found guilty, the Appointment and Disciplinary committee is empowered under the said rules to revoke the appointment or impose lesser penalties including reprimand.

Currently there are complaints from the public and commercial Division users on the general conduct of the brokers especially on execution. Some violate the rules which requires them to issue a fourteen days notice to a judgment debtor against whom a decree is sought out be executed. Others have been complained of misappropriating the client's funds after the sale of the subject matter of execution.

In case you want to engage the services of a court broker you should know that Court Brokers are not legal persons. The Certificate of Appointment of a court broker is issued to an individual person. It is therefore better to demand to see the certificate of appointment to verify

whether the person seeking to offer brokerage services is legally appointed by the Division and thereby avoiding being a victim to unscrupulous persons mascarading as Court Brokers.

6.0 The Use of ICT in the Administration of Commercial Justice

According to its mission, the Division aims at providing just, quality, efficient, effective and speedy disposal of commercial cases through modern systems and practices. The Division embraces technology as it is shown by its mission.

The use of ICT is considered one of the key elements to significantly improve the administration of justice. Some examples spurring judicial administration around the world to rethink their current functions and activities include:

Availability of web services
Possibility of consulting on-line legislation and case-law
The Use of electronic filing
The Electronic exchange of legal documents

New possibilities are emerging for integration and automation of Division procedures and practices in addition to use of the Internet, can offer the chance to open the judiciary to the public, providing both general and specific information on its activities, thereby also increase legitimacy.

6.1 ICT Road Map for the Judiciary

The Division oblivious of the central role ICT can play in the administration of commercial justice, in September, 2007, organized and held a Conference in Arusha, Tanzania on "***The Role of Information, Communication and Technology in the Administration of Commercial Justice." The Conference was attended by*** all judges from Tanzania, 18 judges from other African countries and 6 judges from outside Africa and at its conclusion one among its many recommendations was to put in place an ***Information, Communication and Technology*** **(ICT)** ***Road Map*** for the Judiciary of Tanzania. In the aftermath of the Conference, the Judiciary of Tanzania engaged a consultant who developed the ICT Road, which has already been adopted by the Judiciary and it is now being implemented.

It is the Divisions' expectation that the ICT Road Map for the Judiciary of Tanzania will revolutionize and change the way the Judiciary in general and the Division in particular operates in the administration of justice.

6.2 The Digital Recording System for court proceedings

In 2004, the Division introduced court recording systems, which effectively started in 2005 with analog recording systems and later in 2006, it moved to digital mobile recording system. The Division now has in place a Digital Computer Aided Recording and Transcription System, which allows evidence in trials to be recorded and transcribed, thus relieving Judges of the tediousness of recording evidence by long hand. The Division has introduced naturally spoken dragon software. The evidence in a trial in a commercial case is recorded by special computers and then transcribed into text. This has enhanced the efficiency of the judges, by relieving them of the tedious job of recording evidence manually by long hand. The digital recording system is a delayed transcription in the sense that the transcribed proceedings are available some three up to seven days from the day of the recording depending on their length and the speed of the transcribers currently only five of them are on site.

There are plans however, to upgrade the digital recording system by procuring a new system and engaging and training Real Time stenographers. This will take time, as discussions are still underway with the potential financial supporters.

The Division has also procured and installed on the Judges' and Registrars' lap top computers a software going by the name, Dragon Naturally Speaking, which assist in dictation while writing judgments and/or ruling and issuing orders. The software automatically transcribes the oral dictation into editable text which can then be printed out and signed by the judge. The software however, is still on a trial bases. Not all judges in the Division have been trained on its use, which among other things involves the judge training his/her computers to recognize his/her accent/voice before it can record it.

6.3 The Division's Website

The Division has developed its own dynamic website. The website has the following address: <www.comcourt.go.tz.> The website provides access to cause list, case and status. There is no longer any need for an advocate or a litigant to come to Division for a cause list. It also provides information on Display Boards and online discussion.

The Display Boards which are located at the Division's main entrance and in the advocates' lobby provide information on what is going on in Division at the particular moment

in time. Parties can also tell what has happened to their cases on that day by visiting the website. However, there are also rules which are applied to the Division and some other useful information which has been posted on the website, which is updated frequently.

Apart from using the above address, the website can be accessed from the Judiciary of Tanzania website, <www.judiciary.go.tz.> Parties and advocates may down load cause list from the website for their use. The Division has long stopped from producing hard copies of cause list.

6.4 The Division's e-Library

The Division recognizes the importance of research in discharging the work of judicial officers. It has contracted a consultant to develop an electronic library. The consultant has accomplished his work and the e-library is available at the Division's website. Judges will be able to use the library materials from their home place. This will enhance judges' efficiency.

6.5 Mobile Application System

The mobile application system enables you to access information about your case simply by using your mobile phone handset, all benefits of modern technology. The Division's Development Partners through their financial support made the implementation of this system possible.

Since 2010, the Commercial Division of the High Court has introduced a mobile phone application system, which allows parties and their advocates to get information on the status of their cases using mobile phone. Currently three mobile telephone companies offer this service to the Division, which are: ***Vodacom, Tigo and Airtel.***

The system works by submitting a text message through your mobile phone by using the following procedure:

(i) On your mobile handset, open a message page.

(ii) Then text "Kesi" or "case" and

(iii) Leave a space and write a case number (eg. 11/2011)

(iv) Send it to 15564

(v) You will then get full information on the dates, time, hour, place (chamber) for your case.

The systems allows confirmation of information by repeating the above exercise, but this time the word "parties" or "Wahusika" is used instead of the word "case" "Kesi" or "Shauri".

You will get Day, Date, Parties and advocates involved.

7.0 Budgeting

7.1 Allocation of Government Funds

The Division has its own vote (Vote 64) since 2002. It prepares its own budget. Its financial independence has not saved it from the normal shortage of funds. The budget allocated to the Division is not enough to cover all the targeted activities. The Division enjoys support from development partners to supplement its budget allocation.

8.0 Challenges Facing the Division

8.1 Internal Challenges

- *Shortage of transcribers and stenographers- hence untimely transcription of all audio records*
- *Lack of rules governing recording of proceedings.*
- *Insufficient budget for ICT and lack of Rules for maintenance and disposal of ICT equipment.*
- *Growing backlog of cases.*
- *Shortage of Judges national wide which affects the number of judges at the Commercial Division.*
- *Rigidity of existing rules of procedure and Cumbersome and expensive execution proceedings.*
- *Insufficient funds allocated to the Division to implement the existing programmes.*

8.2 External Challenges

- *The continued use of the CPC in the procedure for the trial of commercial cases hampers the spirit of expeditious disposal of such cases, and hence calling for special rules of practice and procedures specifically tailored for use in the Commercial Division of the High Court of Tanzania.*
- *The Sub-registries have no resident judges. As such the practice of Judges conducting a one-week session, every month at each Sub registries, reduces the work force at the*

headquarters. The estimated number of judges for the Division is four, but the number has always remained three from its inception.

- *The unsatisfactory nature of the court fees structure which stakeholders complain that it is on the high side thus locking out potential litigants from the Commercial division of the High Court.*
- *The unsatisfactory nature of the Rules for the appointment, disciplinary and remuneration for Court Brokers.*
- *The recent amendment of the Civil Procedure Code empowering Registrars to deliver ruling and judgments and signing court decrees has been scuttled away and thus still wanting and yearning for further amendment.*
- *Lack of funds to implement a training programme for the Commercial Division Staff.*

9.0 Future Prospects and the Way Forward

9.1 Enhancing Access to Commercial Justice:

(i) *Opening more registries, one at Mbeya and another at Dodoma*

(ii) *Reviewing Commercial Rules of Procedure to put in place a set of new procedural rules specifically for the Commercial Division by June 2011*

(iii) *Staff Capacity Development through training by way of study tours and exchange programmes*

(iv) *Enhancing Case Disposal and reducing time taken from filing to disposal from 16 months to 12.*

(v) *Developing a Client's Service Charter providing time within which important steps will be taken*

(vi) *Maintaining integrity, transparency and accountability*

(vii) *Increasing HIV/AIDS Awareness and providing care and support to staff members living with HIV/AIDS*

(viii) *Using ICT in Administration of Commercial Justice*

(ix) *Improving and Extending to its sub-registries the use of Computer Aided Recording and Transcription System*

(x) *Updating the Division's Website to provide more and necessary information and to make it more interactive*

(xi) *To benefit from the Court Case Management System being developed by the Judiciary for all courts and all types of cases and maintain the current case management system while awaiting for the new one to be developed and rolled over.*

(xii) *Maintaining and Enhancing the Mobile Application System to enable advocates and parties get updated information on their case status through mobile phones at a token fee deposited by agreement to cater for the short message system (sms) service.*

(xiii) *Procuring Electronic Books and Maintaining Site for posting important Judgments.*

(xiv) *Strengthening the application of Alternative Dispute Resolution (A.D. R) Mechanisms by imparting skills both to the Bench and the Bar.*

(xv) *Consolidating and Strengthening cooperation and exchange programs with sister courts in the region and outside.*

10 Conclusion

The Division's Performance is fairly satisfactory. However, the need to strive to maintain and improve standards and quality of our work for better performance cannot be overemphasized. The Division values the support and contribution of its various stakeholders in improving its performance and undertakes to continue improving its relationship with them.

12. REFERENCES:

STATUTES

Civil Procedure Code Act, Cap. 33 R.E 2002.

Judicature and Application of Laws Act, Cap. 453 R.E. 2002

Magistrates Court Act, Cap 11 R.E 2002.

Mortgages Financing (Special Provisions) Act No. 17 of 2008

The Constitution of the United Republic of Tanzania of 1977 as amended from time to time

Written Laws (Misc. Amendment) Act No. 25 of 2002

Written Laws Act No.4 of 2004

RULES

High Court Registries (Amendment) Rules, 2005 [GN.427 of 2005]

High Court Registries (Amendment) Rules,1999 [G.N.141/1999]

High Court Registries Rules, 2005 [G.N.96/2005]

The Commercial Court (Fees) (Amendment) Rules, 2005 [G.N. 428 of 2005]

The Commercial Court (Fees) Rules, 1999 [G.N. 275 of 1999]

The Court Broker and Process Servers (Appointment, Remuneration and Discipline) Rules, 1997 [G.N. 315/1997.]

The Court Broker and Process Servers (Appointment, Remuneration and Discipline) Rules, 1997 [G.N. 764/1997.]

CASES

Akiba Commercial Bank Ltd v. The Network of Technical Publications In Africa & 4 Others Commercial Case No. 18 of 2003 (Unreported) at Dar es Salaam.

Chrome Company Limited v. Kilosa District Council, Commercial Case No. 107 of 2003, (Unreported) at Dare s salaam.

G.K. Hotels And Resorts (Pty) v. Board of Trustees of The Local Authorities Provident Fund, Misc Civil Cause No. 1 of 2008, (Unreported) at Dare s salaam.

Kenya Commercial Bank (T) Ltd v. Deata Ltd & 6 Others, Commercial Case No. 65 of 2006, (Unreported), at Dar es Salaam.

Kibo Hotel Kilimanjaro v. Presidential Parastatal Sector Reform Commission and Impala Hotel Limited, Commercial Case No. 44 of 2007 (Unreported), at Dare s Salaam.

The Courtyard Dar es Salaam v. The Managing Director Tanzania Postal Bank, Commercial Case No. 35 of 2003, (Unreported) at Dar es Salaam

PAPERS

B.D.CHIPETA "**The importance of Civil Justice: Basic Principles that should be met By A Civil System"**

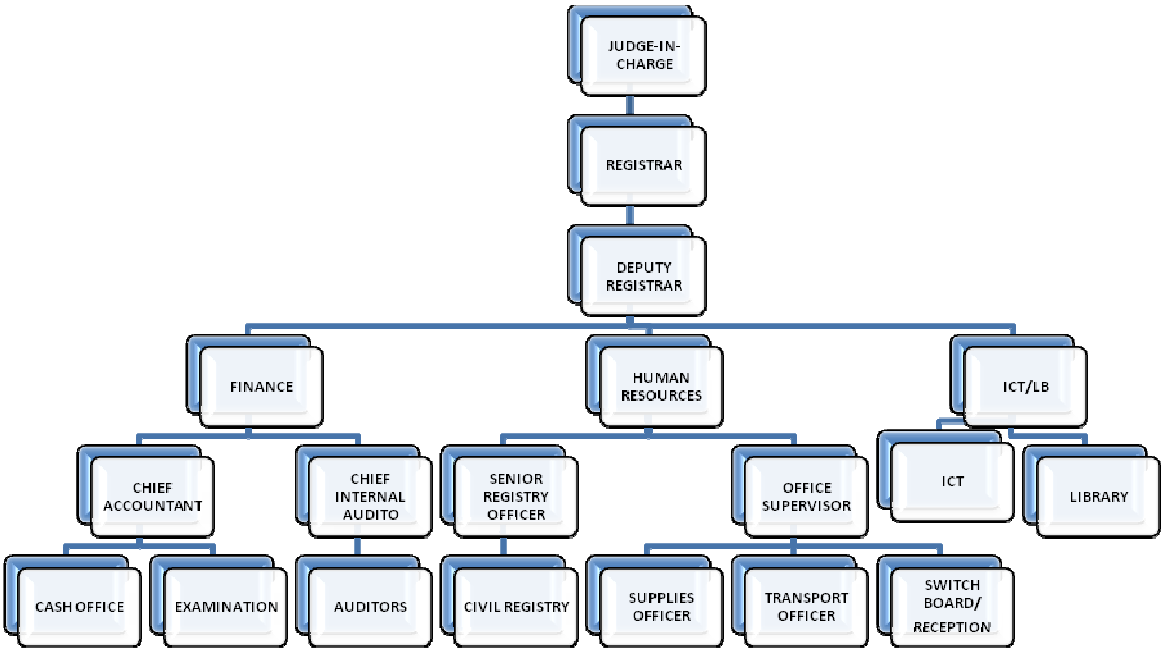
Bwana, S.J. ***"Evolution and Development of the Commercial Division of the High Court of Tanzania:"*** A paper presented at the 2nd Round Table Discussion marking the 10th Anniversary of the Commercial Court of Tanzania, 1999 – 2009.

Bwana, S.J. "***The Role of Court in Supporting Financial Sector Reforms in Tanzania***" (A paper presented at the Public Lecture of the Tanzania Bankers Association 20 April, 2006)

Makaramba, R. V. "***Commercial Disputes Resolution in Tanzania: Challenges and Prospects***" A paper presented at the 2nd Round Table Discussion marking the 10th Anniversary of the Commercial Court of Tanzania, 1999 – 2009.

11. ANNEXTURES

11.1 THE ORGANISATIONAL STRUCTURE OF THE COMMERCIAL DIVISION



GOVERNMENT NOTICE No. 764 published on 28/11/97

THE JUDICATURE AND APPLICATION OF LAWS ORDINANCE

(CAP. 453)

RULES OF COURT

Made under section 4

THE COURT BROKERS AND PROCESS SERVERS (APPOINTMENTS. REMUNERATION AND DISCIPLINE) (AMENDMENT) RULES. 1997

1. These Rules may be cited as the Court Brokers and Process servers (Appointments, Remuneration and Discipline)(Amendment) Rules, 1997 and shall be read as one with the Court Brokers and Process Servers (Appointments, Remuneration and Discipline) Rules, 1997, in these Rules, referred to as "the principal Rules". G.N. No. 315 of 1997

2. The principal Rules and these Rules shall both be deemed to have come into operation on the 1st day of December, 1997.

3. The principal Rules are hereby amended in rule 11 by adding after sub-rule (4) the following new sub-rule:

"5 Where a court broker dies or is suspended or his licence is revoked or not renewed, any property attached by him before that occurrence may be transferred by the court to another court broker on such terms as the court may deem fit.".

4. The Second Schedule to the principal Rules is hereby deleted and replaced by the following Second Schedule.

"SECOND SCHEDULE

PART I

ATTACHMENT

Item No.	*Fees*
1. For attaching or taking possession of movable property and keeping possession of the same for 30 days or part thereof, when the estimated value of the property(in accordance with the executing officer's inventory furnished under rule 6)—	
(a) does not exceed shs. 200,000/-	5% but not exceeding shs. 10,000/-
(b) exceeds shs. 200,000/- but does not exceed shs. 2,000,000/-	shs. 10,000/- plus 2% of the amount in excess of shs. 200,000/-

SCHEDULE—*(contd.)*

G.N. No. 764 *(contd.)*

(c) exceeds shs. 2,000,000/- but does not exceed shs. 50,000,000/-	shs. 30,000/- plus 1% of the amount in excess of shs. 2,000,000/-
(d) exceeds shs. 50,000,000/-	shs. 100,000/- plus 0.5% of the amount in excess of shs. 50,000,000/-.

Provided that where it is considered necessary to hold the property for longer period, the executing officer shall, in addition to the fee calculated on the basis of the above schedule, be reimbursed for the additional costs/expenses which in the opinion of the Registrar or Magistrate, are properly incurred.

2. For attaching immovable property where the amount of the decree in execution of which the property is attached—

(a) does not exceed shs. 200,000/-	5% but not exceeding shs. 10,000/-
(b) exceeds shs. 200,000/- but does not exceed shs. 2,000,000/-	shs. 10,000/- plus 2% of the amount in excess of shs. 200,000/-
(c) exceeds shs. 2,000,000 but does not exceed shs. 50,000,000/-	shs. 30,000/- plus 1% of the amount in excess of shs. 2,000,000/-
(d) exceeds shs. 50,000,000/-	shs. 100,000/- plus 0.5% of the amount in excess of shs. 50,000,000/-.

3. For attending to, attaching or taking possession of movable property, where no property is found after diligent inquiries, the executing officer shall be paid 1% of the decretal amount and be reimbursed for actual expenses incurred in the exercise.

PART II

SALE

4. For selling movable property where the amount realised—

(a) does not exceed shs. 200,000/-	5% but not exceeding shs. 10,000/-
(b) exceeds shs. 200,000/- but does not exceed shs. 2,000,000/-	shs. 10,000/- plus 2% of the amount in excess of shs. 200,000/-
(c) exceeds shs. 2,000,000 but does not exceed shs. 50,000,000/-	shs. 30,000/- plus 1% of the amount in excess of shs. 2,000,000/-
(d) exceeds shs. 50,000,000/-	shs. 100,000/- plus 0.5% of the amount in excess of shs. 50,000,000/-.

5. For selling immovable property, where the amount realised—

(a) does not exceed shs. 200,000/-	5% but not exceed shs 10,000/-
(b) exceeds shs. 200,000/- but does not exceed shs. 2,000,00/-	shs. 10,000/- plus 2% of the amount in excess of shs. 200,000/-

SCHEDULE—*(contd.)*

Item No.	*Fees*
(c) exceeds shs. 2,000,000/- but does not exceed shs 50,000,000/-	shs. 30,000/- plus 1% of the amount in excess of shs 2,000,000/-
(d) exceeds shs. 50,000,000/-	shs. 100,000/- plus 0.5% of the amount in excess of shs. 50,000,000/-.

6. Where an order of sale has been made but the executing officer is informed by the Registrar or Magistrate that the attachment is deemed to have been withdrawn or has ceased or that the order for the sale has been set aside or the sale has been postponed by the Court or the property was for any other reason unsold or where the decretal amount and costs (including the costs of the sale) are tendered to the executing officer or proof is given to his satisfaction that such amount and costs have been paid into the court— G.N. No. 247 of 1997

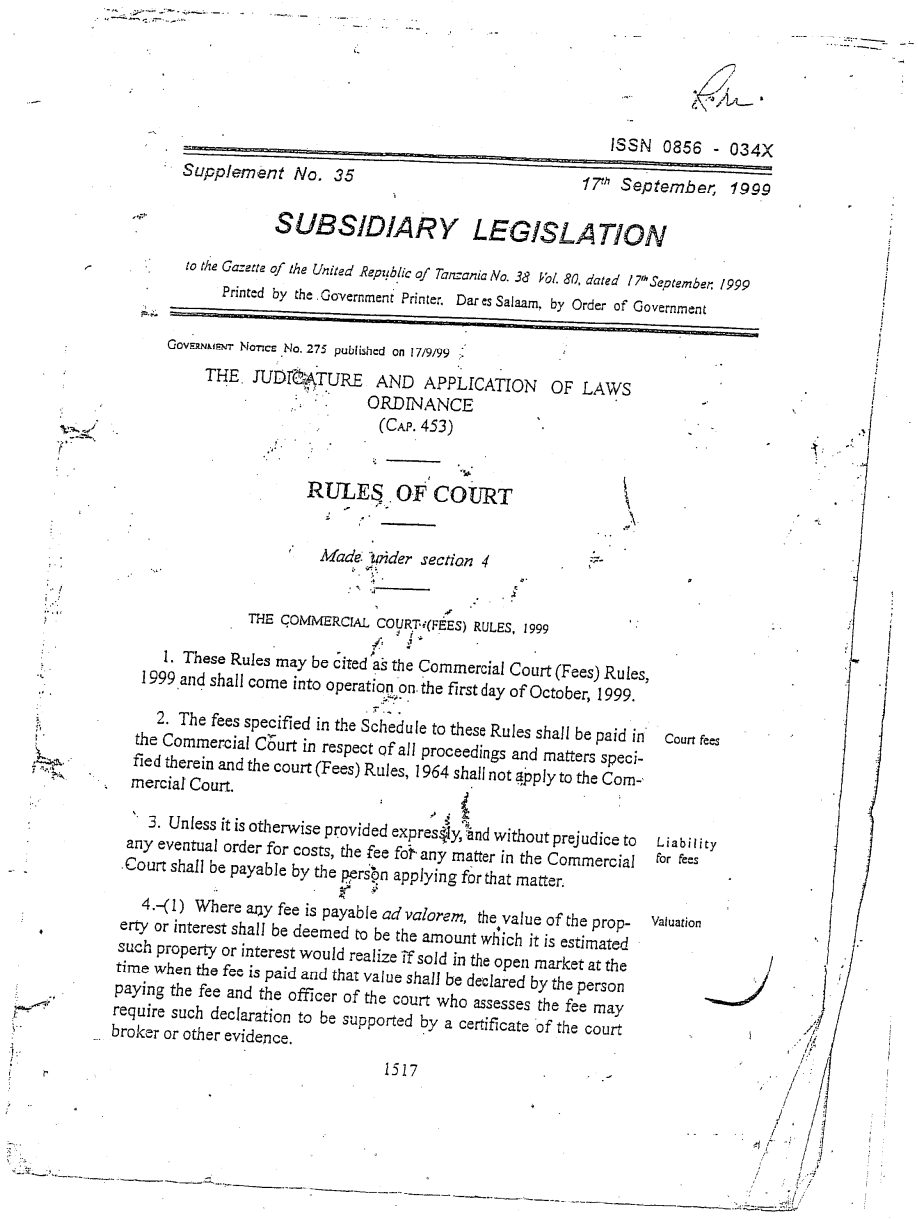
(a) before commencement of sale	NIL
(b) after commencement of sale where estimated value of property ordered to be sold—	
(i) does not exceed shs 200,000/-	5% but not exceeding shs. 10,000/-
(ii) exceeds shs. 200,000/- but does not exceed shs. 2,000,000/-	shs. 10,000/- plus 2% of the amount in excess of shs. 200,000/-
(iii) exceeds shs. 2,000,000/- but does not exceed shs. 50,000,000/-	shs. 30,000/- plus 1% of the amount in excess of shs. 2,000,000/-
(iv) exceeds shs. 50,000,000/-	shs. 100,000/- plus 0.5% of the amount in excess of shs. 50,000,000/-.

5. The Attachment and Sale (Brokers and Fees) Rules, 1997, are hereby revoked.

Dar es Salaam,
27th November, 1997

F. L. NYALALI,
Chief Justice

Price Shs. 515/-



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SUBSIDIARY LEGISLATION

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GOVERNMENT NOTICE No. 275 published on 17/9/99

THE JUDICATURE AND APPLICATION OF LAWS ORDINANCE
(CAP. 453)

RULES OF COURT

Made under section 4

THE COMMERCIAL COURT (FEES) RULES, 1999

1. These Rules may be cited as the Commercial Court (Fees) Rules, 1999 and shall come into operation on the first day of October, 1999.

Court fees

2. The fees specified in the Schedule to these Rules shall be paid in the Commercial Court in respect of all proceedings and matters specified therein and the court (Fees) Rules, 1964 shall not apply to the Commercial Court.

Liability for fees

3. Unless it is otherwise provided expressly, and without prejudice to any eventual order for costs, the fee for any matter in the Commercial Court shall be payable by the person applying for that matter.

Valuation

4.-(1) Where any fee is payable *ad valorem*, the value of the property or interest shall be deemed to be the amount which it is estimated such property or interest would realize if sold in the open market at the time when the fee is paid and that value shall be declared by the person paying the fee and the officer of the court who assesses the fee may require such declaration to be supported by a certificate of the court broker or other evidence.

1517

(2) In assessing the value of any land, the land shall be deemed to include all buildings, erection, works, tree and perennial crops thereon except where the person bringing the proceedings expressly declares that such buildings, erection, works, trees or pernnial crops are excluded from the proceeding but not annual crops unless such annual crops are part of the subject matter of the proceedings.

Assessment of fees

5. Where a person paying a fee under these Rules is dissatisfied with the assessment of the fee by the officer of the court, such officer shall refer the matter to the Registrar of the court and the Registrar shall assess the fee and give his reasons in writing.

Reference

6.–(1) Where a fee has been assessed under rule 5, any party to the proceeding aggrieved by that assessment may refer his objection to the Court of Appeal.

(2) A reference under this rule shall be by way of chamber summons supported by an affidavit giving grounds of the objection.

(3) Any reference referred to in this section may be made at any time not later than thirty days after the date of the determination of the proceedings.

(4) The Court of Appeal may defer consideration of any objection referred to it under this rule pending the determination of the proceedings or the hearing of the appeal if any.

Refund of fees

7.–(1) If any appeal is withdrawn or abates within one year of the date on which it was filed, one-half of the fee paid for filing the shall be refunded on application in writing made by the person who paid it.

(2) Where the Court of Appeal in exercise of its appellate or revisional jurisdiction has ordered the rehearing *de novo* of any proceedings, it may, in its discretion, order the refund of all or any appeal fees to the person who paid the same.

(3) Where the court makes an order for the refund of any fee wholly or in part, it shall record its reasons for so doing.

Government proceedings

8.–(1) No fee shall be payable by the Republic or the Government in respect of proceedings instituted by or against the Republic or the Government but a judgement in favor of the Republic or the Government for

costs shall, unless the court directs otherwise, include the amount of the fees which would have been payable if the proceedings had been instituted by or against a private person.

Exemption

9. Where by any convention, agreement or treaty entered into by the Republic with any other country it is provided that no fee shall be required to be paid in respect of any proceedings, the fees specified in the Schedule to these Rules shall not be payable in respect of those proceedings.

SCHEDULE

1. On filing a plaint, counter claim or set off—

(a) forty cents shall be payable for every twelve shillings of the value of the subject matter or of the amount claimed in a suit or counter claim or set off.

(b) Where the claim is for damage but no specific amount is claimed .....Shs. 100,000/=.

(c) Where the claim is for injuction or declaration (other than declaration of title to property) or other order which cannot be valued in terms of money.....Shs. 100,000/=.

(d) Where the claim is made by a landlord for recovery of possession from a tenant, for each Shs. 2,000/= or part thereof of the gross annual rent of the property...Shs. 15,000/=.

Provided that where the claim is by landlord but so that the fee shall not exceed Shs. 30,000/= for recovery of rent and possession, the aggregate fee payable under this paragraph (as of this item and under this paragraph) shall not exceed Shs. 80,000/=.

2. On making an interlocutory application whether written or oral, including the fee for an affidavit in support and for the order thereon.....Shs. 15,000/=.

3. For applying for the issue of a chamber summons, application not otherwise provided for and including the fees for filling an affidavit in support and for the order there on ..... Shs. 20,000/=.

4. On filing application for adjournment or for leave to file a pleading or other document out of time including the fee for the order thereon.....Shs. 20,000/=.

5. On filing an application for an order of mandamus or certiorari or an injunction (other than a temporary injunction).....Shs. 10,000/=.

6. Filing and deposit of other documents and on filing an account, including the fee for filing the report thereon, (if any) .....Shs. 15,000/=.

7. On filing a bill of costs for taxation.....Shs. 20,000/=.

8. On filing any document not otherwise provided for Shs. 15,000/=.

SCHEDULE—(contd.)

9. On depositing any document not otherwise provided for Shs.....15,000/=

10. For the issue of warrant of attachment, eviction order, prohibitory order or other process in execution of a decree or order of the court..... Shs. 20,000/=.

11. For the service of any document, in addition to all necessary expenses where the service is to be effected outside the limits of the city, municipality or township in which the court issuing the document is situated..... Shs. 20,000/=.

12. For the service of document at the request of a person outside the court jurisdiction.....Shs. 30,000/=.

13. For the issue of every notice, summons or warrant not otherwise provided for.....Shs. 15,000/=.

14. For taking the evidence of a witness before hearing of the suit.....Shs. 15,000/=.

Evidence:

15. For taking evidence on Commission and in addition for every hour or part thereof after the list.....Shs. 15,000/=

16. On tendering an exhibit.....Shs. 15,000/=.

Issue and Transfer of Decrees:

17. For the issue of a decree or order otherwise provided for.....Shs. 15,000/=.

18. For the transfer of a decree outside Tanzania including the fees for application for an order, certificate of non-satisfaction and communication.....Shs. 30,000/=.

Administration of Oaths, etc, and Attestation of Signatures:

19. For attesting a signature.....Shs. 15,000/=.

Attendance and communications:

20. For the attendance of an officer of the court to view, in addition to all necessary expenses, unless the court otherwise orders.....Shs. 15,000/=.

21. All necessary expenses, unless the court orders otherwise.....Shs. 20,000/=.

22. For the attendance of an officer of the court at a sale.....Shs. 20,000/=.

23. For the attendance of an officer of the court to administer an oath or affirmation or to take an affidavit or receive a declaration elsewhere than at the office of the court, in addition to the fee prescribed under item 22 and all necessary expenses.....Shs. 20,000/=.

24. For Communication with a tribunal within Tanzania (except where the communication in respect of services of document issued by the court).....Shs. 15,000/=.

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SCHEDULE—*(contd.)*

25. For Communication with a tribunal outside Tanzania..... Shs. 30,000/=.

Recording, certifying, Copying, Translating and Producing for Inspection:

26. For recording the particulars of a plaint, application or other pleading .Shs. 10,000/=.

27. For recording the particulars of an affidavit or declaration.....Shs. 10,000/=.

28. For translation of any document—

(a) for the first 100 words or part thereof.....Shs. 10,000/=.
(b) for each subsequent 100 words or part thereof Shs. 5,000/=.

29. For certifying as a correct the translation of any document (where or not such copy has been made by an officer of the court—

(a) for the first 100 words or part thereof.....Shs. 5,000/=.
(b) for each subsequent 100 words or part thereof.....Shs. 2,000/=.

30. For certifying as correct a copy of any document (whether or not such copy has been made by an officer of the court)

(a) For the first 100 words or part thereof.....Shs. 5,000/=.
(b) For each subsequent 100 words or part thereof..... Shs. 2,000/=.

31. For certifying a signature on Seal.....Shs. 15,000/=.

32. For the issue of a certificate of non-satisfaction of decree.....Shs. 15,000/=.

33. For the issue of certificate not otherwise provided or..... Shs. 15,000/=.

34. For producing for inspection of the record of any case or any document in the custody of the court.....Shs. 20,000/=.

35. On payment of money or deposit of anything into court as security on deposit or otherwise (except by way of deposit for witnesses) or assessors expenses or court fees or for the subsistence of judgement debtor or is made by an officer of the Court in the courses of the administration of a deceased's estate, 15 percentum of the amount paid into court or the value of the thing but so that the fee shall not be less than Shs. 100 nor more than Shs. 5,000/=.

36. For the taking or passing of an account by an officer of the court and in addition for every sitting of three hours or past three hours or part thereof after the first three hours....Shs. 15,000/=.

37. On application for review of the judgement.....Shs. 30,000/=.

38. On application for reference or revision including the fees for filing an affidavit in support.....Shs. 30,000/=.

39. On lodging the appeal—

(a) against the final decree where the decree is for a sum certain or for property and the amount awards or the value of the property—

G. N. No. 275 (contd.)

SCHEDULE—*(contd.)*

(i) does not exceed Shs. 2,000/=.....Shs. 20,000/=.
(ii) exceeds Shs. 2,000/= for the first 2,000/= and for each subsequent Shs. 2,000/= or part thereof Shs. 50/= but so that the fees shall not exceed Shs. 40,000/=
(iii) Where the decree cannot be valued in terms of money.....Shs. 20,000/=.

Provided that where a fee is payable under paragraph (i) above the fee under this item shall be reduced to Shs. 4,000/= and aggregate fees shall not exceed Shs. 20,000/=.

(a) against any other order.....Shs. 20,000/=.

40. On filing security..... Shs. 15,000/=.

41. On application for leave to appeal out of time including an affidavit in support and the order thereof.....Shs. 20,000/=.

42. On every application made to the Court of Appeal in its appellate or revisional jurisdiction, not otherwise provided for, including the fee for the affidavit in support and order thereon.....Shs. 15,000/=.

43. For the issue of a decree on appeal or an order in revision.....Shs. 15,000/=.

Dar es Salaam,
10th September, 1999

F. L. NYALALI,
Chief Justice

GOVERNMENT NOTICE No. 276 published on 17/9/99

RADIOACTIVE WASTE MANAGEMENT FOR THE PROTECTION OF HUMAN HEALTH AND ENVIRONMENT REGULATIONS, 1999

ARRANGEMENT OF REGULATIONS

PART I

PRELIMINARY

Regulations *Title*

3B In the Commercial Division of the High Court the judge shall, in the judgement, take into account the opinion of the assessors but shall not be bound by it, provided that the judge shall give reasons for disagreeing with such opinion".

Dar es Salaam,
11th June, 1999.

F. L. NYALALI,
Chief Justice

I CONSENT

HARITH B. MWAPACHU.
Minister for Justice and Constitutional Affairs

Dar es Salaam,
18th June, 1999

GOVERNMENT NOTICE No. 141 published on 18/6/99

THE JUDICATURE AND APPLICATION OF LAWS ORDINANCE
(CAP. 453)

RULES OF COURT

Under section 4

THE HIGH COURT REGISTRIES (AMENDMENT) RULES, 1999

GN. 23 of 1984

1. These Rules may be cited as the High Court Registries (Amendment) Rules, 1999 and shall be read together with the High Court Registries Rules, 1984 referred to as the "Principal Rules".

Amendment of Rule 2

2. Rule 2 of the Principal Rule is amended-

(a) by inserting immediately after the definition of the term "the Court" the following definitions-

"Commercial Case" means a Civil case involving a matter considered to be of commercial significance, including but not limited to:

(i) the formation of a business or Commercial Organization;

(ii) the governance of a business or commercial organization;

(iii) the contractual relationship of a business or commercial organization with other bodies or persons outside it;

(iv) the liability of a commercial or business organization or its officials arising out of its commercial or business activities;

(v) the liabilities of a commercial or business person arising out of that person' commercial or business activities;

(vi) the restructing or payment of commercial debts by or to business or commercial organization or person;

(vii) the winding up or bankruptcy of a commercial or business organization or person;

(viii) the enforcement of commercial arbitration award;

(ix) the enforcement of awards of a regional court or tribunal of competent jurisdiction made in

(x) accordance with a Treaty or Mutual Assistance arrangement to which the United Republic is a signatory and which forms part of the law of the United Republic;

(xi) admiralty proceedings; and

(xii) arbitration proceedings;

"Commercial Division" means a Commercial division of the High Court established under Rule 5A";

(b) by deleting the definition of the word "Registrar" and substituting for it the following new definition-

"Registrar" means the Registrar of the High Court, a Deputy Registrar, District Registrar, Acting District Registrar and Registrar of Commercial Division"

3. The principal Rules are amended by adding immediately after rule 5 the following Rules- Addition of Rule 5A

"5A There shall be a Commercial Division of the High Court within the Registry at Dar es Salaam and at any other registry or sub-registry as may be determined by the Chief Justice, in which proceedings concerning commercial cases may be instituted".

5B There shall be a Commercial Court Users Committee Consisting of the Judges of the Commercial Division of the High Court, two advocates nominated by the Tanganyika Law Society, two State Attorneys nominated by the Attorney General and five persons nominated by lawfully established organizations representing the commercial community.

5C It shall be the responsibility of the Commercial Court Users' Committee to advise the Commercial Division of the High Court on matters of court practice and to submit a list of persons knowledgeable in commercial matters to serve as assessors.

5D Assessors shall be remunerated or compensated for service rendered in a manner determined by the Chief Justice and notified in the Gazette upon recommendation of the Commercial Court Users' Committee".

Amendment of Rule 7

4. Rule 7 of the Principal Rules is amended by adding at the end of the sub-rule-

"Provided that where orginal proceedings in a commerial case are institute in a District or Sub-registry, such proceedings shall as soon as practicable be transferred to the Commercial Division before further steps are taken in the proceedings, except where all parties agree to have the Commercial case determined by the High Court at such District or Sub-registry of the High Court".

Dar es Salaam,
11TH June, 1999

F. L. NYALALI,
Chief Justice

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SUBSIDIARY LEGISLATION

to the Gazette of the United Republic of Tanzania, No. 15 Vol. 86 dated 15th April, 2005

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GOVERNMENT NOTICE NO. 96 published on 15/4/2005

JUDICATURE AND APPLICATION OF LAWS ORDINANCE
(CAP.. 453)

RULES OF COURT

Made under section 4

THE HIGH COURT REGISTRIES, RULES, 2003

1. These Rules may be cited as the High Court Registries Rules, 2005. Citation

2. In these Rules, unless the context otherwise requires:- Inter-pretation

"Appeal" includes revision, review, reference, case stated and point of law reserved;

"appellate proceedings" means all proceedings relating to appeals to the High Court from subordinate courts and to all applications to the High Court for review or revision of proceedings in subordinate courts;

"the Court" means the High Court;

"Commercial Case" means a Civil case involving a matter considered to be of commercial significance, including but not limited to:

(i) the formation of a business or commercial organization;
(ii) the governances of a business or commercial organization;
(iii) the contractual relationship of a business or commercial organization with other bodies or person outside it;
(iv) the liability of a commercial or business organization or official arising out of its commercial or business activities;
(v) the liabilities of a commercial or business person arising out of that person commercial or business activities;
(vi) the restructing or payment of commercial debts by or to business or commercial organization or person;

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G.N. No. 96 (contd.)

(viii) the enforcement of commercial arbitration award;
(ix) the enforcement of awards of a regional court or tribunal of competent jurisdiction made in;
(x) accordance with a Treaty or Mutual Assistance arrangement; to which the United Republic is a signatory and which forms part of the law of the United Republic
(xi) admiralty proceedings; and
(xii) arbitation proceedings.

"Commercial Division" means a Commercial Division of the High Court established under Rule 5A;

Act No. 13 of 1984

"economic crimes" means cases tried under the Economic and Organized Crime Control Act, 1984;

"Land Division" means a Land Division of the High Court established under Rule 5E;
"original proceedings" means all proceedings in the Court not being appellate proceedings;
"Registrar" means the Registrar of the High Court, a Deputy Registrar, District Registrar, Acting District Registrar, Registrar of Commercial Division and the Registrar of the Land Division; and
"Registry" includes a District Registry.

Establishment of Registries

3. There shall be two Registries of the High Court, one for the High Court when it is exercising its ordinary jurisdiction and the other when the High Court is exercising economic crimes jurisdiction.

Register

4. There shall be kept and maintained at every High Court Registry two separate registers one for economic crimes and the other for ordinary cases.

District Registry

5. In addition to the Registry at Dar es Salaam there shall be a District Registry at such places and for such areas as are set in the schedule to these Rules or as may hereafter be set out under the provisions of rule 6.

Establishment for the Commercial Division

5A. There shall be a Commercial Division of the High Court within the Registry at Dar es Salaam and at any other registry or sub-registry as may be determined by the Chief Justice, in which proceedings concerning commercial cases may be instituted.

Establishment of the Commercial Court Users Committee

5B. There shall be a Commercial Court Users Committee consisting of the Judges of the Commercial Division of the High Court, two advocates nominated by the Tanganyika Law Society, two State Attorneys nominated by the Attorney General and five persons nominated by lawfully established organizations representing the commercial community.

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G.N. No. 96 (contd.)

Com-mercial Court Assessors

5C. It shall be the responsibility of the Commercial Court Users' Committee to advise the Commercial Division of the High Court on matters of court practice and to submit a list of persons knowledgeable in commercial matters to serve as assessors.

Remunera-tions of Assessors

5D. Assessors shall be remunerated or compensated for service rendered in a manner determined by the Chief Justice and notified in the *Gazette* upon recommendation of the Commercial Court Users; Committee.

Establish-ment of the Land Division

5E. There shall be a land division of the High Court within the Registry at Dar es Salaam and at any other registry or sub-registry as may be determined by the Chief Justice in which, subject to the provision of any relevant law, appellant proceedings or original proceedings concerning land may be instituted.

Land Court Assessors

5F. The Land Division of the High Court shall be properly constituted when presided ever by a Judge sitting with two assessors.

Opinion of Assessors

5G. In reaching decisions of the court in the Land Division of the High Court, the judge shall take into account the opinion of the assessors but shall not be bound by it, save that the judge shall in the judgement give reasons for differing with such opinion.

Amend-ment of the Schedule

6. The Schedule to these Rules may be altered or amended by notice given by the Chief Justice in the *Gazette*.

Original Pro-ceedings

7.—(1) Original proceedings in the Court may be instituted either in the Registry at Dar es Salaam or in the District Registry (if any) for the area in which the cause of action arose or where the defendant resides.

(2) Appellate proceedings in the Court shall be instituted in the District Registry for the area in which is situated the court from the judgement or order of which the appeal is preferred or where is no District Registry for such area, in the Registry at Dar es Salaam.

Provided that the Registrar may allow a party to file in the Registry at Dar es Salaam a memorandum or petition or appeal an application for review or revision, or an application for reference which should be filed in a District Registry if he is satisfied that it is more convenient for the party or his advocate to file the same there:

G.N. No. 96 (contd.)

And provided further that where such memorandum or petition of appeal application for review or revision, or application for reference is filed in the Registry at Dar es Salaam the Registrar shall forthwith transmit the same to the appropriate District Registry and such namorandum or petition of appeal, application for review or application of reference shall be deemed to have been filed in the District Registry on the date when the same was filed in the Registry at Dar es Salaam.

(3) All documents filed subsequently to the institution of any proceedings in the Court shall, subject as hereinafter provided, be filed at the place where the proceedings were instituted or are deemed to have been instituted.

(4) The Court may at any time on application or of its own motion transfer any proceedings from one Registry to another and any proceedings transferred, and all documents shall be filed accordingly.

Provided that where original proceedings in a commercial case are instituted in a District or Sub-registry, such proceedings shall as soon as practicable be transferred to the Commercial Division before further steps are taken in the proceedings, except where all parties agree to have the commercial case determined by the High Court at such District or Sub-registry of the High Court.

Economic Crimes' Matter

8.—(1) When any cause or matter on economic crimes has been entered in the appropriate Registry, it shall be entitled—

"IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA"

"IN THE REGISTRY/DISTRICT REGISTRY AT .....

ECONOMIC/ORGANIZED CRIMES CRIMINAL CASE NO. .....

OF ....."

(2) When any cause or matter, whether original or appellate, has been enterred in a District Pegistry, it shall be entered—

"IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA"

"IN THE DISTRICT REGISTRY AT ....."

Criminal Appeal, Civil Appeal, Civil Case, Miscellaneous Civil Cause, Bankruptcy Case, Matrimonial Cause as the cause may be.

Date of the Judgement given or extracted

9. All summonses, warrants, orders, decrees, notices and mandatory processes whatsoever of the court may be signed by any judge or by a Registrar and shall be sealed with the Seal of the Court. Every order of the court shall be dated as the date on which the Judgement was given order made and shall in addition show the date on which the order was extracted.

G.N. No. 96 (contd.)

10. All formal and preliminary steps and all interlocutory applications in proceedings entered at a District Registry shall be taken or made either before a judge of the District Registrar.

Interlocutory applications

11.—(1) Any person aggrieved by any decision of a Registrar made or purported to be made under these Rules may, within fifteen days by notice in writing require that the matter to referred to a judge for his decision and the judge for his decision and the judge may make such order thereon as the justice of the case may require.

Decision of a Registrar

(2) For the purpose of computing the said period of fifteen days, the provisions of the Law of Limitation Act, 1971 as to the exclusion of the time shall apply.

Acts No. 10 of 1971

12. The High Court Registries Rules 1985 are hereby revoked.

Revocation of G.N. No. 23 of 1985

SCHEDULE

(Under Rule 5)

No.	*Place of District Registry*	*Areas*
1.	Dar es Salaam	Dar es Salaam, Coast Region and Morogoro
2.	Arusha	Arusha
3.	Dodoma	Dodoma and Singida
4.	Kagera	Bukoba
5.	Kilimanjaro	Moshi
6.	Mbeya	Mbeya and Iringa
7.	Mtwara	Mtwara and Lindi
8.	Mwanza	Mwanza and Mara
9.	Sumbawanga	Rukwa
10.	Songea	Ruvuma
11.	Tabora	Tabora, Kigoma and Shinyanga
12.	Tanga	Tanga

Dar es Salaam,
14th April, 2005

BARNABAS A. SAMATTA,
Chief Justice

GOVERNMENT NOTICE No. 427 published on 23/12/2005

THE JUDICATURE AND APPLICATION OF LAWS ACT

(CAP. 358)

RULES OF COURT

Made under section 4

THE HIGH COURT REGISTRIES (AMENDMENT) RULES, 2005

Citation G.N. No. 96 of 2005

1. These Rules may be cited as the High Court Registries (Amendment) Rules, 2005 and shall be read together with the High Court Registries, Rules 2005 referred to as the "Principal Rules".

Amendment of Rule 5A

2. The Principal Rules are amended in rule 5A—

(a) by redesignating the contents of rule 5A as sub rule (1); and

(b) by adding immediately after sub-rule (1) as redesignated the following:

"(2) The Commercial Division of High Court shall have both original and appellate jurisdiction over cases of a commercial significance".

Dar es Salaam,
29th November, 2005

B. A. SAMATTA,
Chief Justice

GOVERNMENT NOTICE No. 428 published on 23/12/2005

THE JUDICATURE AND APPLICATION OF LAWS ACT

(CAP. 358)

RULES OF COURT

Made under section 4

THE COMMERCIAL COURT (FEES) (AMENDMENT) RULES, 2005

Citation G.N. No. 275 of 1999

1. These Rules may be cited as the Commercial Court (Fees) (Amendment) Rules, 2005 and shall be read as one with the Commercial Court (Fees) Rules, 1999 referred to as the "Principal Rules".

Amendment of the Schedule

2. The Principal Rules are amended in paragraph 1 of the Schedule Schedule by deleting items (a), (b), (c) and (d) and substituting for them the following new items-

"(a) for every subject matter or amount claimed whose value is up to Tanzanian shillings two hundred million (200,000,000), three per centum (3%) of the said value shall be payable as court fees;

(b) where the value or amount claimed exceeds two hundred million shillings (200,000,000/=), then one per centum (1 %) of that excess shall be payable in addition to the three per centum (3%) payable under item (a)."

Dar es Salaam,
29th November, 2005

B. A. SAMATTA,
Chief Justice

11.7 AKIBA COMMERCIAL BANK LTD Vs. THE NETWORK OF TECHNICAL PUBLICATIONS IN AFRICA & 4 OTHERS COMMERCIAL CASE NO. 18 OF 2003 (UNREPORTED) AT DAR ES SALAAM.

The plaintiff, AKIBA COMMERCIAL BANK LTD, is suing the NETWORK OF TECHNICAL PUBLICATIONS IN AFRICA, Ms Elieshi Lema, Mr. Thomas Kamugisha, Mr. Martin Van Lanuveld and Hon. Ndibalema Tegambwage for the recovery of T.shs 14,492,842.24 being a loan and overdraft facilities extended to the first defendant. The second to fifth defendants are Directors of the first defendant and they guaranteed the loan.

It is only the third defendant who filed a Written Statement of Defence. He has raised three points of preliminary objection –

(a) That the suit is not maintenable as it is not properly before the court because it has been filed against wrong parties to wit: the guarantors instead of filing against the borrower. It should therefore be struck out with costs.

(b) The suit has been filed in a wrong court i.e. in violation of Act No.25 of 2002. It should therefore be rejected with costs.

(c) There is no evidence that the mortgage was registered. The mortgage is therefore void.

The Learned Advocates appearing in this case; that is Mr. Swai for the plaintiff and Mr. Mjindo for the third defendant, advanced written arguments.

The argument by Mr. Mjindo in respect of the first point of objection is that, the third defendant being only a guarantor, should be the last person to be sued. Mr. Mjindo seeks justification for this argument on what was taken by the plaintiff as security for the loan. First there was Bank guarantee (100%) from ABN-AMRO proposed by HIVOS. Second, was personal guarantees from all Directors/Trustees and the third was chattel mortgage or debunture on all assets of the company. Mr. Mjindo is of a view that the plaintiff should first sue the borrower or else go for the chattel mortgage or debenture of the company. Steps against the third defendant should be a last resort.

The response by Mr. Swai is that the third defendant has been properly joined into the suit because he has admitted being a guarantor to the loan which was advanced to the first defendant. He also said that the third defendant is aware that the first defendant has defaulted

repayment, despite several demands. Mr. Swai observed that since the principal is in default, the guarantor has been properly joined.

It must be pointed out that this point of preliminary objection is misconceived. Order II rule 3(1) allows joinder of several causes of action against defendants jointly. The first defendant borrowed. The loan was secured by personal guarantee of the 3rd defendant. The loan has not been repayed. The plaintiff is entitled to sue the borrower and the guarantor. The first point of preliminary objection is dismissed.

The second point of objection is on the jurisdiction of this court after enactment of Act No.25 of 2002. Act No. 25 of 2002 amended the Magistrates Courts Act 1984 raising the pecuniary jurisdiction of the District Courts and Courts of Resident Magistrate to T. shs 100 million for movable property and T.shs 150 million for immovable property. Mr. Mjindo's argument on this matter is that, since the pecuniary value of the subject matter of this suit is below T.shs100 million, the suit ought to have been filed in the District Court. Section 13 of the Civil Procedure Code, 1966 was cited to augument his submission

The reply by Mr. Swai is that the amendments made by Act No.25 of 2002 do not affect the jurisdiction of this court because the High Court has unlimited jurisdiction in Civil and Criminal matters and that the amendments are only concerned with Magistrates and do not affect the High Court.

In **HAJI UKWAJU t/a WAJENZI ENTERPRISES VS NATIONAL MICRO FINANCE BANK & JOSEPH MUSIBA** Commercial Case No.27 of 2003 (Unreported), my Brother Judge, Dr. Bwana pointed out the negative effects experienced from Act No.25 of 2002. I respect his views and will add that Act No.25 of 2002 defeats the purpose of the establishment of the Commercial Division of the High Court in as far as expediency in finalization of cases is concerned.

However, I am in total agreement with Mr. Mjindo that Act No.25 of 2002 ousts the jurisdiction of this court. the Civil Procedure Code 1966 regulates the procedure for the Civil process system in both the High Court and the Courts of Resident Magistrate and the District Courts. Section 13 of the Civil Procedure Code, 1966 requires any civil matter to be instituted in the lowest court competent to try the matter. The pecuniary value of the subject matter involved in this case is shs 14,492,842.24. Act No.25 of 2002 has raised the pecuniary jurisdiction of the Courts of Resident Magistrate and District Court to T.shs 100 million. This

means that Court of Resident Magistrate and the District Courts are the Courts of lowest grade competent to try the matter.

The argument raised by Mr. Swai that the amendment were meant to affect only the subordinate courts (Magistrates Courts) and leave the High Court can not be valid. If the law is let to operate that way, there will be a total confusion. We need stability. The option of where to start can not be left on the parties. There must be a control. Act No.25 of 2002 provides such a control. The negative effects found in Act No.25 of 2002 have to be corrected by the relevant authority which is responsible for that duty. Otherwise the interpretation which comes out of it is that with the raising of the pecuniary jurisdiction of the District Court to T.shs 100 million, it is only matters whose value is above T.shs 100 million which should come before the High Court. Any matter involving pecuniary value below T.shs 100 million has to be filed in the District Court until such time the law is amended again to provide otherwise.

With what has been said, I join my Brother Judge Kalegeya in the case of **The Courtyard Dar-es-Salaam vs The Managing Director Tanzania Postal Bank,** Commercial Case No. 35 of 2003 (unreported) and uphold the preliminary objection.

Mr. Mjindo abandoned the third point of preliminary objection after realising that it was a matter of evidence.

The preliminary objection on the issue of jurisdiction of this court having been upheld, the suit is struck out with costs.

N.P.KIMARO
JUDGE
6/06/2003

11.8 THE COURTYARD DAR ES SALAAM VS. THE MANAGING DIRECTOR TANZANIA POSTAL BANK, COMMERCIAL CASE NO. 35 OF 2003, AT DAR ES SALAAM (UNREPORTED) A RULING DELIVERED BY HON. KALEGEYA, J.

This ruling is in respect of just one issue – whether this court can transfer a case over which it has no jurisdiction. The Plaintiff represented by Mr. Boas, Advocate, urges and answers the said issue positively, while the Defendant represented by Mr. Hamis, Advocate, maintains the contrary.

Both Counsel are agreed that following the amendment made to the Magistrates Courts Act, No. 2 of 1984 (vide Act No. 25/2002), which amendment raised the pecuniary jurisdiction of District and Resident Magistrates' Courts to shs.100 million for movable property and shs.150 million for immovable property, a suit whose subject matter is valued at shs.22,151,164/= cannot be tried before the High Court. Thus, the preliminary objection raised by the Defendant that *"the suit is unmaintainable as it is filed in disregard to the provisions of sections 13 and 14 of the Civil Procedure Code"* was not contested. From that point however the counsel part company regarding what step should this court take.

The Plaintiff insists,

"1.4 In the circumstances it is clear that, the suit ought to have been filed in a subordinate court rather than the Commercial Division of the High Court.

2.1 Since the proceedings are before the High Court that has unlimited jurisdiction, it may make remedial orders transferring the case to the Resident Magistrates Court of Kisutu (a subordinate Court having jurisdiction in the matter).

2.2 This may be done under the following provisions of the law.

- *Order VII rule 10 (1) of the Civil Procedure Code 1966 which provides that:*

  "The plaint shall at any stage of the suit be returned to be presented to the court in which the suit should have been instituted."

- *Section 21 of the Civil Procedure Code 1966 which provides that:*

  "On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage:

(a) Transfer any suit or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same.

(b) The powers of transfer and withdrawal of suit conferred by this section and section 20 shall be in addition to and not in substitution for the powers contained in Part V of the Magistrate Courts Act 1963."

3.0 An order transferring the suit to a subordinate court for trial and disposal is more desirable in the circumstances of this case bearing in mind that the plaintiff has incurred a substantial amount being filing fees and that, the amendment in question was quite sudden thereby taking many suitors by surprise,"

while the Defendant charges,

"4.0 …consequences of lack of jurisdiction is not to transfer the case but to struck (?) it out with costs. The position was clearly spelt out by the Court of Appeal of Tanzania in ***John Sangawe vs Rau River Village Council (Omar, Ramadhan and Mnzavas, JJA) [1992] TLR at page 91.*** *Their Lordships held;*

> *"We are satisfied that this following decision of this court in Civil Appeal No. 25 of 1989 is relevant in this case. It reads thus; we held that the High Court has no original jurisdiction in the matters mentioned above and cannot therefore order such proceedings to commence in itself. Our conclusion on this point is supported by the view expressed by this court in the case of Frank M. Marealle Vs Paul Kyauka Njau [1982] TLR P. 32. We think the rationale or policy behind the provisions of Section 63 (1) which deprive the High Court of original jurisdiction in these and involve the community at the gross roots level, that the matters are better dealt with first by court which are closer to the people than the High Court."*

4.1 …we implore your Honourable Court to go along with the above decision of the Court of Appeal and hold that this court has no jurisdiction and thus the case be struck out with costs."

Now, although the Counsel for the Plaintiff avoids direct statement on this, the obvious is that what he concedes to, tantamounts to saying that this court has no jurisdiction, which view I also hold. Apart from amendments vide Act 25 /2002, section 13 of The Civil Procedure Code provides,

"Every suit shall be instituted in the Court of the lowest grade competent to try it…",

while GN 140 of 1999 amended O. IV, Rule 1 by adding sub-rule 3 which states:-

*"(3)" **No suit shall be instituted in the Commercial Division of the High Court concerning a Commercial matter** which is pending before another court or tribunal of competent jurisdiction or **which falls within the competency of a lower court."** (emphasis mine)*

Defining the term "jurisdiction", the **Blacks Law Dictionary, 6th Edition, page 852** has the following to say:

"A term of comprehensive import embracing every kind of judicial action……

It is the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties……

Jurisdiction defines the powers of courts to inquire into facts, apply the law, make decisions, and declare judgment……

The legal right by which judges exercise their authority……

It exists when court has cognizance of class of cases involved, proper parties are present, and point to be decided is within powers of court. ……

Power and authority of a court to hear and determine a juridical proceeding; and power to render particular judgment in question. ……The right and power of a court to adjudicate concerning the subject matter in a given case…"

In my considered view therefore, this court cannot inquire into facts, apply the law and give judgment in the matter. Clearly it has no jurisdiction. This is so notwithstanding Article 107 A of The Constitution of The United Republic of Tanzania which enjoins courts, in civil matters, to give decisions on the basis of justice and without undue regard to technicalities. Article 108 (2) thereof provides that the High Court has unlimited jurisdiction where there is no other law expressly providing for the trial of a matter before any other court. In part it runs:

> *"If this Constitution or any other law does* ***not expressly*** *provide that any specified matter shall first be heard by a court specified for that purpose, then the High Court shall have jurisdiction to hear every matter of such type. Similarly the High Court shall have jurisdiction to deal with any matter which, according to legal traditions obtaining in Tanzania, is ordinarily dealt with by High Court…"*

Thus, O. VII, Rule 10 (1) and S. 21 CPC do not apply here in view of S. 13 CPC and O. IV, Rule 1 (3) CPC read together with S. 40 of The Magistrates Courts Acts, 1984 as amended by Act 25/2002.

I should hurriedly add that regarding the effect of the amendments of Act 25 of 2002 I have already held in another matter **(Commercial Case No.16 of 2003, The Jubilee Insurance Company of Tanzania Ltd Vs DHL Tanzania Ltd, in a ruling dated 11.4.2003)** in which the principal sum claimed was shs 50,067,680/=, that this court has jurisdiction in claims whose value is above shs.100 million. And also I am aware of a conflicting decision by my brother, Bwana Ji/c, in **Commercial case No.27 of 2003 Haji A. Ukwaju t/a Wajenzi Enterprises vs The National Micro Finance Bank and Joseph Musiba,** in which the sum claimed being shs 27,402,081/=, it was held that this court has jurisdiction [ruling delivered on 13.5.2003]. Further, I am mindful of the fact that judges of the same court should seldomly give conflicting decisions [**(CAT) Misc. Civil Application No. 17 of 1994, J.S. Mutungi vs University if Dar-es-Salaam and 2 others (DSM Registry) followed by this Court in Commercial Case No. 260 of 2001, Tanzania Breweries Company Ltd vs Tanzania Revenue Authority and cc No.24 of 2000, Kiganga and Associates Gold Mining versus Universal Gold N.L.].** Having taken into consideration all the said factors, my considered view of the position of the law is that this court has jurisdiction only in matters whose value is above shs 100 million.

Having so concluded, can the same court have power to make an order transferring the case to the lower court? My answer is in the negative. It cannot have power over a subject which was not supposed to be before it in the first place. It cannot pass an order for its continuity. Its power is limited and simply ends at an order striking it out. I do sympathise with Plaintiff for the fees already paid but the maximum we can do is just to lament.

For reasons discussed above, the preliminary objection is upheld. The suit is struck out with costs.

L.B. KALEGEYA
JUDGE

5/6/2003

11.9 KIBO HOTEL KILIMANJARO Vs. PRESIDENTIAL PARASTATAL SECTOR REFORM COMMISSION and IMPALA HOTEL LIMITED, COMMERCIAL CASE NO. 44 OF 2007 (UNREPORTED), A RULING DELIVERED AT DARE S SALAAM BY HON. MASATI, J

MS MAIRA & CO. ADVOCATES, have filed a suit in this court on behalf of the Plaintiff, who seeks for the following orders: -

(1) Declaration that the Settlement Deed between the 1st Defendant and the 2nd Defendant is unlawful, null and void ab initio.

(2) Declaration that the Plaintiff is the rightful owner of the Assets of Moshi Hotel.

(3) Costs of the suit.

(4) Any other or further orders or relief that this Honourable Court may deem fit and just to grant.

The Defendants instructed Mr. Fungamtama and Ms. Professional Centre, learned Counsel to draw their Written Statements of Defence. In each of the separate statements of defence, the Defendants have raised preliminary objections against the suit, on which I am now going to decide.

For the 1st Defendant, it was contended that:-

(i) The Honourable Court lacks the requisite jurisdiction to entertain and determine the suit since it is a matter concerning land.

(ii) The plaint is bad in law as it offends the mandatory provisions of O. VI rule 14 of the Civil Procedure Code, read together with s. 53 (2) of the Interpretation of Laws Act.

For the Second Defendant, it was contended that: -

(a) The Plaintiff's suit being a dispute over the ownership of right to land owned by Moshi Hotel Limited, hence a land matter, this Honourable Court lacks jurisdiction to entertain this suit.

(b) The plaint does not contain a statement of the value of the subject matters, thus it offends the mandatory provisions of O. VII rule 1 (1) of the Civil Procedure Code.

(c) The Plaintiff's suit is res judicata.

However, at the hearing of the objections, Mr. Kamara, learned Counsel who appeared for the 2nd Defendant, abandoned the third objection (c) and argued the rest.

Mr. Fungamtama, learned Counsel, submitted that since there is a claim for a declaration that the Plaintiff is the rightful owner of Moshi Hotel, and so long as the Plaintiff relies on the Sale of Assets Agreement, and the Purchased Right of Occupancy CT No. 056021/52, and since this is a matter touching on land, in terms of s. 3 (1) of the Land Disputes Act read together with s. 53 (2) of the Interpretation of Laws Act, and s. 167 (i) of the Land Act, this division of the High Court has no jurisdiction to adjudicate on the matter.

On the second preliminary objection, Mr. Fungamtama, submitted that, although the plaint was signed by the Plaintiff, since the law requires also the advocate to sign, and since in this case Mr. Maira did not sign in the body of the plaint, the plaint violated O. VI rule 14 of the Civil Procedure Code. It ought therefore to be struck out with costs.

On the other hand, Mr. Kamara, learned Counsel for the Second Defendant, concurred with the submission of his colleague on the first objection but added weight to it by referring to the court, the decision of this court in Commercial Case No. 5/2005 of **ANSELIMO MINJA VS SUPA FOOD CORPORATION LTD** (unreported).

On the second objection, the learned Counsel submitted that by not putting in the plaint, a statement of the value of the subject matter, the plaint violated the provisions of O. VII rule (1) (i) of the Civil Procedure Code, 1966 which is couched in mandatory terms. The learned Counsel referred to the case of **ASSANAND & SONS (U) LIMITED VS E.A. RECORDERS LTD** [1959] EA 360 for inspiration. Interpreting a similar provision of the Ugandan Civil Procedure Code, the defunct East African Court of Appeal held that the provision was

mandatory. So, with this, Mr. Kamara prayed for the dismissal or striking out of the suit with costs.

On the other hand, Mr. Maira, learned Counsel for the Plaintiff, expressed his opinion as follows: -

First, the jurisdiction of the High Court, notwithstanding the formation in various divisions, is unlimited. For this, he referred to Article 107 A of the constitution of the United Republic of Tanzania, and s. 2 (2) of the Judicature and Application of Laws Act. He also referred to a decision of this court in Commercial Case No. 43/2006 **WORLD WIDE TRADING CO. LTD VS PSRC AND BUNDA OIL CO. LTD** (unreported) in which he had also raised a similar objection but was dismissed. Although, argued the learned Counsel, the decision was not binding on me, it should be followed, if just for the sake of consistency.

Secondly, what is also in issue is the legality and propriety of arbitration proceedings, in which this court is vested with jurisdiction.

On the rest of the objections Mr. Maira submitted that the plaint was clearly compliant with the provisions of O. VI rule 14 and O. VII rule 1 (1) of the Civil Procedure Code.

In the alternative, the learned Counsel suggested to the court that, should it find that this is not the proper forum, it could direct transfer of the suit to the proper forum. As for the defects in the plaint, if any, the court should be pleased to order an amendment.

It is with those arguments that Mr. Maira prayed for the dismissal of the preliminary objections with costs.

The gist of the rebuttal submissions by the learned Counsel for the defence, was that, it was not true that the jurisdiction of the High Court was unlimited, but rather **subject to other written laws**. They submitted that this was the proper interpretation of Article 108 (1) of the Constitution and s. 2 (3) of the Judicature and Application of Laws Act. And such written laws include s. 167 (1) (b) of the Land Act. Another example was the amendment to the Magistrates Courts Act. They said that in **WORLDWIDE** case, the claim was for declaration

against the second tender, and not declaration on land ownership. So the facts in the two cases were different.

On the suggestion that this court could order amendments to the plaint the learned Counsel relied on the decision in another case of this court in **DAVID MGWASA VS SUPA FOOD** Commercial Case No. 6/2005 (unreported) and submitted that no amendment could be allowed once a preliminary objection was raised.

So the learned Counsel reiterated that prayer the suit be struck out or dismissed as the court may be pleased, with costs.

I think, the objection on the question of the jurisdiction of the High Court is on firm grounds. The concept that this court has unlimited jurisdiction in all civil and criminal matters is long gone with the wind with the recent decision of the Court of Appeal of Tanzania in **TANZANIA – CHINA FRIENDSHIP TEXTILE CO. LTD VS. OUR LADY OF THE USAMBARA SISTERS** in Civil Appeal No. 84 of 2002 (unreported). After considering the provisions of Article 108 (1) of the Constitution of the United Republic of Tanzania, s. 2 (1) of the Judicature and Application of Laws Act, 56 & 13 of the Civil Procedure Code Act 1966 and s. 40 of the Magistrates Courts Act, the Court of Appeal concluded on p. 16 of the judgment: -

> *"It is clear to us that under this Article (i.e. 108 (1) of jurisdiction of the High Court is also subject to some other laws."*

With the above decision in mind, I first go to s. 7 of the Civil Procedure Code Act. It provides: -

> *"7 (1) The courts shall (subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."*

There is no dispute that, at least in part, the Plaintiff's claim here is for a declaration that: -

> *"…the Plaintiff is rightful owner of the Assets of Moshi Hotels."*

It is also noted that the Plaintiff relies on the Sale of Assets Agreement, Annexure KHK 1 in which reference is made to a Purchased Right of Occupancy as that comprising in Title No. 056021/52. On all the above, I understand that Mr. Maira had no dispute in terms of s. 3 (1) of the Land Disputes Act (Cap 216). All that the learned Counsel was emphatic on, was that this court also had concurrent jurisdiction with other divisions of the High Court, in all the matters. As demonstrated above, on the authority of the **TANZANIA – CHINA FRIENDSHIP** case (op cit) and s. 7 (1) of the Civil Procedure Code Act, Mr. Maira's argument is clearly untenable. Even in a case where a statute had robbed the courts of their jurisdiction and transferred them to tribunals, the Court of Appeal of Tanzania, in **ATTORNEY GENERAL VS LOHAY AKONAY AND JOSEPH LOHAY** [1995] TLR. 80, at p. 96 had this to say: -

> *"Clearly this section is unconstitutional only to the extent that it purports to exclude access to the courts. The offending parts may, however, be severe so that the remainder ….This would leave the door open for an aggrieved party to seek remedy in the courts,* ***although such courts would not normally entertain a matter for which a special forum has been established, unless the aggrieved party can satisfy the court that no appropriate remedy is available in the special forum."***

In the present case, s. 167 (1) of the Land Act and s. 3 (1) of the land Dispute Act, vests **exclusive jurisdiction** on land disputes in the land courts set up under these statutes. Even if therefore, I were to uphold Mr. Maira's submission that this division had concurrent jurisdiction, I would still be restrained not to entertain it in the first in stance because, not only a special forum (which by law Mr. Maira's own admission, are divisions of this same court) have already been set up, but also the Plaintiff has not, either in his pleadings or in his submission in court satisfied the court that no appropriate remedy is available in the land courts. Besides by the wording of s. 7 of the Civil Procedure Code, the cognizance of land disputes by this division of the High Court is expressly **barred** by s. 167 (1) of the Land Act.

As I held in **DAVID MGWASSA VS SUPA FOOD CORPORATION LIMITED,** Commercial Case No. 6 of 2005, and **ANSELIMO MINJA VS SUPA FOOD CORPORATION LIMITED** (Commercial Case No. 5 of 2005, since the Land Division of the High Court, has exclusive jurisdiction in land disputes; and since the present dispute involves a matter touching on land ownership, and therefore by definition, a land dispute, this court has no jurisdiction to

determine the matter, whatever commercial significance it might have. The issue in the **DUNIA WORLDWIDE** case was not land ownership but the legality of the second tender. It is therefore distinguishable from the present one.

From the above analysis, it means that the first preliminary objection is upheld: I will proceed to find that this court has no jurisdiction to try the suit.

In view of my holding above, there is no need for me to decide on the other points of preliminary objections raised by the Defendants.

In consequence, the suit is not properly before this court. It is accordingly struck out with costs. It is so ordered.

SGD

S.A. MASSATI

JUDGE

31/7/2007

11.10 KENYA COMMERCIAL BANK (T) LTD VS. DEATA LTD & 6 OTHERS, COMMERCIAL CASE NO. 65 OF 2006, (UNREPORTED), A RULING DELIVERED BY HON. MASSATI, J.

The Present suit was filed on 21st September, 2006. On 16/10/2006 Mr. Galeba, learned Counsel for the Plaintiff informed the court that the Defendants had been served on 26/9/2006 and 6/10/2006. So I ordered that the Defendants file their written statements of defence by 27/10/2006 and reply (if any) by 7/11/2007. The first pretrial conference was fixed for 9/11/2006. On that day the Registrar adjourned it to 29/11/2006.

When the court convened on 29/11/2006 Mr. Galeba, learned Counsel for the Plaintiff informed the court that while M/s Maira & Co Advocates had filed a joint written statement of defence, raising therein some preliminary objections, the 6th Defendant had filed a separate written statement of defence and a separate notice of preliminary objection. I allowed the 6th Defendant to go his separate way, and set 1/12/2006 as the date for proceeding with the preliminary objections raised by both M/s Maira & Company Advocates and the 6th Defendant, whose statement of defence had been drawn and filed by Mr. Outa, learned Counsel.

On 1/12/2006 the Defendants (except the 6th) did not appear, neither did their Counsel, (except Mr. Outa for the 6th Defendant whose brief was held by Mr. Mbwambo). So I ordered the parties to argue the preliminary objections by way of written submissions, the latest whereof, was to be filed by 18/1/2007. I was to deliver a ruling thereon on 9/2/2007. However, on 30/1/2007 M/s Maira & Company filed an application for extension of time within which to file their written submissions. But this did not deter me from delivering my ruling on the 6th Defendant's preliminary objection. On 9/2/2007, I ruled that the preliminary objection having been filed outside the written statement of Defence, was incompetent and so I struck it out with costs. On 21/2/2007 the 6th Defendant filed an application to amend his written statement of defence. The Plaintiff was allowed to respond to both the application for extension of time, and for amendment. Hearing for both applications was set for 15/3/2007. All the parties were to be notified.

On 15/3/2007 Mr. Galeba and Mr. Outa appeared in court ready for hearing of the application. Mr. Maira for the other Defendants did not appear. Mr. Galeba showed me a letter dated 5/3/2007 which they wrote to notify M/s Maira & Co. Advocates. Next to the

addressee, an official stamp of Maira & Co. Advocates was fixed to show that the letter was received by their office on the same day – 5/3/2007. In a written submission on the Defendants' joint written statement of defence, Mr. Galeba had also attached a letter addressed to M/s Maira & Co Advocates dated 4/12/2006 also notifying them of my orders dated 1/12/2006 which appeared to have been received by the said chambers on 8/12/2006. In my ruling of 9/2/2007 I reserved my ruling on Ms. Maira's preliminary objection because they had already filed an application for extension of time. That application was to be heard on 15/3/2007. Mr. Maira did not appear. On account of this Mr. Galeba has prayed that the application for extension of time be dismissed for want of prosecution.

In considering whether or not to dismiss the application, I must first be satisfied whether M/s Maira & Co. were served. In reaching at such decision I will take into account the available records. First, is the letter from the Plaintiff's Counsel dated 4/12/2006 addressed to the learned Counsel for the Defendants, on which I reserved my comments pending the hearing of the application. Then there is the letter of 5/3/2007. I have compared the two letters and the signatures appearing therein embossed on Maira & Co's official stamp. Exercising my powers under s. 75 (1) of the Evidence Act, I am satisfied that both letters bear the same signature and the same official stamp. This is further confirmed by the affidavit of service of one MICHAEL SIZYA which is attached to the counter affidavit of ZEPHRINE GALEBA. Secondly, paragraph 4 of the affidavit of MOSES MAIRA acknowledges receipt of the letter of 4/12/2006 although he alleges he received it on 14/12/2006. I believe that they received the letter in question but I do not believe that they received it on 14/12/2006 as alleged. I do so, because the letter which they said they received on 14/12/2006 (which according to their official practice ought to have been endorsed with the official stamp on which the date of receipt is indicated) was not produced for the inspection of the court. Secondly, there is no reply to refute the contents of the counter affidavit of Mr. Galeba. So, I would like to believe that M/s Maira & Co Advocates did receive the letter on 4/12/2006 as well as that of 5/3/2007. But what is more, it is clear that having filed their application for extension of time the learned Counsel did not exhibit any diligence in following up their application. This smacks of either negligence or outright indifference to the interests of their clients. So even without the presence of the learned Counsel there is sufficient material on record to enable the court, decide the application on merit. And I hereby do proceed to find that on merits the application is lacking. For non appearance I am satisfied that the learned

Counsel are not serious in prosecuting their clients' case. For these reasons, I agree with Mr. Galeba, that the application for extension of time does not deserve to remain on board. It is accordingly dismissed with costs.

After dismissing the application for extension of time, what is the fate of the preliminary objections raised by the learned Counsel? I would state the position of the law to be this. Where a party does not raise or fails to prosecute a point of law that would be in his favour if it succeeded he should deemed to have waived it, but such waiver cannot be presumed in matters of jurisdiction. This follows from the principle that neither the parties, nor the court can grant itself jurisdiction where it lacks one or by the consent of the parties. Whether or not, it is raised by any of the parties, the court reserves the power to consider any matters pertaining to its jurisdiction at any time before judgment. It is therefore with those reservations that I would dismiss the application for extension of time.

Coming to the application for amendment filed by Mr. Outa learned Counsel for the 6th Defendant, it was briefly submitted that the intended application was intended to introduce a point of law. Relying on **GEORGE SHAMBWE VS ATTORNEY GENERAL AND ANOTHER** [1996] TLR 334 Mr. Outa submitted that as a matter of principle, amendments should be freely allowed before hearing if no prejudice is caused to the other party. He submitted that the court was not functus officio since in its ruling of 9/2/2007 the objection was not struck out on merit. So he prayed that the application be allowed.

Mr. Galeba, learned Counsel for the Respondent, put up a four point resistance to the application. First, for amendments to be allowed, the point must be one in controversy between the parties. Whether or not the plaint was filed by a person or a firm of advocates is not such a controversy necessary for this court to determine because the real question in controversy is the unpaid loan advanced by the Plaintiff to the first Defendant of which the 6th Defendant guaranteed. Secondly, having struck out the preliminary objection in its ruling of 9/2/2007, this court is now functus officio to sit and determine the said matter again. Thirdly in so long as the amendment seeks to implead a matter of which it had prior knowledge, it is not proper because amendments should only be allowed to allow parties to bring up matters which have only subsequently come to their knowledge. Fourthly amendments should not seek to introduce a new substantial course of action or defence.

The learned Counsel also sought to distinguish the facts in **SHAMBWE'S** case and pleaded that this was intended to delay the case and therefore an abuse of the court process. He urged the court to dismiss the application with costs.

In his reply, Mr. Outa, learned Counsel referred me to s. 58 of the Evidence Act on matters which the court could take judicial notice of, and that it was the duty of the court to first address itself on matters of law whether or not raised by the parties, and to resolve them first. On this court being functus officio, the learned Counsel submitted that as the objection was not decided on merit the court was not functus officio. Besides, the Plaintiff would no be prejudiced as he has already reaped his costs in that previous application. The learned Counsel further submitted that the application for amendment was being made before the hearing of the case as in **SHAMBWE'S** case, and it is not true that hearing of the interlocutory matters was a hearing on merit. So he reiterated his prayers for this court to allow the application.

Mr. Galeba, learned Counsel, has raised two important preliminary points of law which I have to determine first. First, he has submitted that since in my ruling of 9/2/2007, I struck out the preliminary objection, therefore the court is functus officio. Mr. Outa thinks not, because that ruling did not dispose of the matter on merit.

In my view, Mr. Galeba's argument may be attractive but incorrect. In my considered opinion not every decision that a court makes renders the court functus officio. On the contrary, it has been held that where the court merely strikes out a matter before it because it is incompetent the party can always rectify the error and refile it. If there is need for any authority, I would refer to the decision of **RAMADHNAI J.A. in PITA KEMPAP LTD VS MOHAMED I A ABDULLHUSSEIN (CAT)** Civil Application No. 128 of 2004 and 69/2005 (Unreported). On p. 5 of the ruling, the learned Appellate Justice made the following pertinent observation:

> *"When a court strikes out a matter that does not mean that the matter has been refused. All that the court says is that for some reasons the matter is incompetent and so, there is nothing before the court for adjudication. So, the proper course of action is to rectify the error and go back to the same court…"*

In the present case, in my ruling of 9/2/2007 I struck out the preliminary objection because *"the Notice of Preliminary Objection filed by the 6th Defendant is not properly before the court"*. This is the error which made the preliminary objection incompetent. What the Defendant has done is to try to rectify that error and on the principle in **PITA KEMPAP LTD'S** case, this court can still adjudicate the matter. It is not therefore functus officio. I will accordingly reject Mr. Galeba's argument on that limb.

The second point of law raised and argued by the parties is, at which point in time in the proceedings can an application for amendment be made? It was argued by Mr. Galeba and countered by Mr. Outa that an application for amendment cannot be made after the hearing had began, and according to Mr. Galeba, hearing includes hearing of preliminary objections.

I think the law as expounded by the Court of Appeal in Tanzania in **GEORGE SHAMBWE'S** case (supra) and in the spirit of O. VI rule 17 of the Civil Procedure Code Act, 1966, is that amendments sought before the hearing should be freely allowed, if they can be made without injustice to the other side. The Court of Appeal in that case followed the principle enumerated in the leading case of **EASTERN BAKERY VS CASTELINO** [1958] EA. 461.

As to when the hearing of a case begins, again, I think, Mr. Outa is right that hearing does not mean hearing of preliminary objections but it is when the parties begin to receive evidence. In **MULLA CODE OF CIVIL PROCEDURE ACT** Vol. 1 [1965] at p. 796, the authors considered the meaning of the words *"called on for hearing"* in O. IX rule 8 of the Civil Procedure Code of India which is in pari material with the Civil Procedure Code 1966 of Tanzania.

> *"The word "hearing" (is used to) mean a hearing in which the judge takes evidence or arguments on questions arising for adjudication on the rights of the parties in the suit, and not in which interlocutory matters are to be disposed of."*

Although the commentary relates to the provisions of O. IX rule 8 of the Civil Procedure Code 1966, I think it is equally applicable, wherever that word appears in the Civil Procedure Code 1966; especially so, as the word *"hearing"* itself does not appear in rule 17 of O. VI of the

Civil Procedure Code 1966. It was just used in case law. Therefore with due respect to Mr. Galeba, I do not think that he is right in thinking that the hearing of preliminary objections was hearing of the suit. And in any case this does not derogate from the general principle that amendments may be allowed at any stage even as late as at an appellate stage where no further evidence would be required (See **JUPITER GENERAL INSURANCE CO LTD VS RAJABALI HASHAM AND SONS** [1960] E.A. 592. So for all the above reasons, I would hold that the application for amendment is properly before the court. I will now turn to consider its merits.

On the merits of the application, Mr. Galeba has advanced two substantial objections. First, the amendment sought would not throw any light to the court as to the real substantial question between the parties because whether it is a person or a firm that drafted the plaint had nothing to do with the controversy between the Plaintiff and the 6th Defendant. Secondly the amendment seeks to introduce a new defence which is against one of the rules of amendments.

I would begin with the rule against introducing new causes of action or defences in amendments. The position of the law on this aspect is certainly not a smooth sail. In **AFRICAN OVERSEAS TRADING CO VS ACHARYA** [1963] EA. 468 an application for leave to amend a plaint was refused so far as it would introduce a new cause of action; and it was refused where a Plaintiff sought to add a new cause of action in consistent with his pleadings and evidence **PATEL VS JOSHI** [1952] 19 EA CA. 42. On the other hand, a proposed amendment was allowed to introduce an alternative defence notwithstanding inconsistency with the original pleading. **BRITISH INDIA GENERAL INSURANCE CO LTD VS G M. PARMA & CO** [1966] E.A. 172. These apparently inconsistent decisions show no more than judicial discretion at work. Apart from the broad principles that amendments may be made to allow parties to determine the real question in controversy, the decision whether or not to allow an application for amendment remains largely at the discretion of the court to be exercised within the peculiar circumstances of each case.

In the present case, I do not think that it is right to argue that the intended amendment was intended to introduce a new defence. Even if it was not properly first introduced in court it is naïve of the learned Counsel to think that the court would believe that the Plaintiff would be taken by surprise by the intended amendment. I will also accordingly reject that argument.

The last argument is whether the amendment would introduce something distanced from the real question in controversy between the parties as argued by Mr. Galeba.

I have looked at the learned Counsel's affidavit in support of the application for amendment. According to paragraph 6, the purpose of the amendment is to allow the defendant tell the court that the plaint was drawn by a firm of advocates and not a person, and this was contrary to s. 44 of the Advocates Act.

Mr. Galeba, learned Counsel was very forceful while presenting this argument but I did not get the requisite response from Mr. Outa.

The recommended practice is that the proposed amended pleading should have been attached to the application for amendment, and the purpose is to enable the court properly assess whether the amendment is necessary, before leave is granted. The Defendant did not do so in the present case. The court has been denied of that advantage.

The general rule is that all amendments which are necessary should be liberally allowed at any stage of the proceedings. But there are a number of in roads to that rule. These include: -

(a) No amendment should be allowed which amounts to or relates to defeating a legal right accruing to the opposite party on account of lapse of time.

(b) The court can reject the prayer for amendment if the same is not bona fide.

(c) Amendment of pleadings should not become a matter of hide and seek between the parties or an attempt to outwit the opponent.

(d) An amendment which is not necessary should not be allowed.

(e) An amendment to the written statement of defence would be allowed if it elaborates the defence.

(f) *Courts would not allow amendments where the proposed amendments are irrelevant, unnecessary and not based on any bona fides.*

(See **SARKAR ON CODE OF CIVIL PROCEDURE** 10th ed. Vol. 1 pp. 929 – 935.

Based on the above principles, and the circumstances of this case, and without deciding on the falsity or truth of the intended amendment I have come to the firm view that from the pleadings of the parties already in court the intended amendment is neither bona fide nor necessary and is intended to turn the suit into a matter of hide and seek and an attempt to outwit the opponent. It does not seek to elaborate the defence at all.

In the circumstances I would agree with Mr. Galeba that the proposed amendment is not necessary for the purposes of determining the real question in controversy between the parties to the proceedings. I would therefore accordingly reject the application. Costs shall be costs in the suit.

Order accordingly.

S.A. MASSATI

JUDGE

16/3/2007

11.11 CHROME COMPANY LIMITED VS. KILOSA DISTRICT COUNCIL, COMMERCIAL CASE NO. 107 OF 2003, A RULING DELIVERED AT DARE S SALAAM BY HON. DR. BWANA, J.

On 20 January 2005, the Applicant filed a Memorandum of Review of the judgment made by this court (Bwana, J) on3rd December 2004 on account of mistake or error apparent on the face of the record or for sufficient reason. The alleged error apparent is however, and to the best of my examination of the record, not shown as would be required under the provisions of Order XL II R.1,2 and 3 of the Civil Procedure Code. Instead, the Applicant states the following:-

> **" It is proposed to ask this court for an order to review**
> **the judgment and order dated 3 December 2004 to the extent that the court may be pleased to award interest on the Principal sum of sh.411,467,375/50 computed at the rate of 20% stipulated in clause 43.1 of the contract."**

The above quoted statement, with due respect, does not amount to a correction of an error or mistake. Nor does it point out an apparent mistake or error on the face of the record or any sufficient reason. In its simple meaning, the prayer sought, if granted, would amount to awarding additional rewards to the applicant, rewards that were not awarded in the 3rd December 2004 judgment. That prayer had been considered then by this court but for reasons stated in that judgment, it decided to award shs.41,819,898/75 plus a 7% interest calculated from the date of the judgment until full payment. The applicant was also awarded costs. This court is functus officio to entertain this application at this stage. Therefore I concur with the Respondent's objection on this point as filed.

The above argument is sufficient to dispose of the Application. However, in the interest of justice, I will go further and examine some of the issues raised in the preliminary objection as filed by the Respondent in respect of this Application.

I start with the issue of jurisdiction. It is on record at this court that the Applicant has preferred an appeal against the decision of this court dated 3 December 2004. It is not controverted that a Notice of appeal to the Court of Appeal of Tanzania has already been lodged. In such a situation then this court ceases to have jurisdiction. Section 78 of the CPC is clear on this. It states:

" s.78.

Subject as aforesaid, any person considering himself aggrieved –

(a) by decree or order from which an appeal is allowed by this code but from which no appeal has been preferred; or

(b) …….

may apply for a review of judgment to the court which passed the decree or made the order and the court may make such order thereon as it thinks fit.." (emphasis mine)

Therefore if an appeal is preferred, then no such review can be entertained by the trial court. There is no dearth of authorities on this subject. In Aero Helicopter (T) Ltd vs F. N. Jansen (1990) TLR 142, 145, the Court of Appeal of Tanzania (per Kisanga J.A) stated:

"……once appeal proceedings to this court have commenced..the ***High Court could not properly apply section 95 of the Code for the simple reason that the proceedings are no longer in that court****…."(emphasis mine*).

Proceedings do commence in the Court of Appeal, it is my view, by filing a Notice of Appeal to that court. When that happens – as it has in the instant case – then all proceedings are shifted from the High Court to the Court of Appeal. Therefore the Applicant cannot have both – this Application for Review and the pending appeal in the Court of Appeal. Therefore this court has no jurisdiction to entertain this Memorandum of Review while the Notice of Appeal is pending.

That is not all. There is the time factor as well. Under item 3 of Part III of the First Schedule to the Law of Limitation Act No. 10 of 1971, an application for review of a decree, judgment or order, must be filed within thirty days from the date of said judgment, decree or order. That is not the case in the instant case. Computing the dates from the date of judgment (3 December 2004) up to the date of filing of the Memorandum of Review (20 January 2005) the statutory period of thirty days has lapsed. No reason has been given for the delay. No leave was sought and obtained

for extension of time. All this renders this Application incompetent, as it is time barred.

Therefore all the above points considered, I do dismiss the Memorandum of Review filed by the Applicant. It is dismissed with costs awarded to the Respondent.

Dr. S. J. Bwana
JUDGE
29/3/2005

11.12 G.K. HOTELS AND RESORTS (PTY) VS. BOARD OF TRUSTEES OF THE LOCAL AUTHORITIES PROVIDENT FUND, MISC CIVIL CAUSE NO. 1 OF 2008,(UNREPORTED) A RULING DELIVERED AT DARE S SALAAM BY HON. WEREMA, J.

The Petitioner was a tenant in the premises known as Millennium Towers located at Plots 13; 14; and 15 Block D situate at Kijitonyama area along the New Bagamoyo Road, in Dar es Salaam. The respondent is the landlord. Their relationship was regulated by a Lease Agreement which was entered into on 22nd day of May 2003. It was essentially a Tenant/ Landlord relationship. This contractual relationship became acrimonious and is almost torn asunder except for what remains of it in law as I will show in the course of this ruling. The Petitioner was 'locked out' of the premises on 2nd November 2007.

The petitioner pleads that the respondent's cause of action was unlawful and that the respondent has breached its obligations under the lease. He also pleads that this is a dispute which falls under the ambit of Article 41.2 and 42.3 of the Lease Agreement. The clause signifies intention of parties to the Lease Agreement to submit dispute or difference arising between them as to interpretation and construction of the Lease Agreement or rights, duties or obligations, to arbitration if such a dispute or difference is not settled amicably. Imploring the clause on arbitration, the petitioner served the respondent with a letter notifying him of his intention to proceed to arbitration. He proposed that Honourable Mr. Justice Lameck Mfalila, a retired justice of appeal, be nominated an arbitrator.

The respondent refused to have the matter arbitrated on the ground that the petitioner had abrogated the agreement to arbitrate disputes under the Lease Agreement. It should be noted here that the respondent has not expressed any objection to the proposed arbitrator. Having expressed no objection to the proposal, I assume he would not mind, should I find it fit to grant the Petition, the appointment of the proposed arbitrator.

Be as it may, the petitioner resists the averment that the agreement has been abrogated and has petitioned this court under Sections 4 and 8 (1)(a) and 8(2) and Paragraph 1 of the First Schedule of the Arbitration Act [CAP 15 R.E 2002] and Rules 5 and 6 of the Arbitration Rules pleading that since the Petitioner and the Respondent have failed to agree on the appointment of an arbitrator this court be pleased to intervene by appointing Honourable Mr. Justice Lameck Mfalila or any other fit and proper person or persons to act as arbitrator or as arbitrators.

The basis for the respondent's assertion of abrogation of arbitration clause is stated in the pleadings to be the Petitioner's filing of a suit in the Land Registry of the High Court instead of initiating arbitration process. The citation of this case is given as Land Case No. 35 of 2007. The respondent's are therefore saying that anything that the Petitioner did after institution of his suit including seeking arbitration, was a nullity having been instituted after the petitioner had abrogated the arbitration clause of the Lease Agreement.

A doctrine of estoppel is pleaded in paragraph 11 to of the answer to the petition. The respondent are also pleading that the Lease Agreement had already terminated by the time this notice of arbitration was issued and according to them, there is no basis for a reference to arbitration after the events.

The most trying challenge to the petition as far as I am concerned is centred on a point of preliminary objections on points of Law. It is to the effect that this Court has no jurisdiction to entertain the petition and that the proper court would have been the Land Division of the High Court. Associated with this hurdle, is another application by Respondents who, by way of Chamber Summons supported by an affidavit, have prayed for an order that the Petitioner

furnish security in the form of irrevocable Bank Guarantee in the sum equivalent to the value of the subject matter. The figure sum of US $ 1,222,996.98 is stated. The Chamber Summons is purportedly made under Section 95 of the Civil Procedure Act, [CAP 33 R.E. 2002].

These are two substantive issues which I am called to determine. They are not plutonic and are going to tax my mind. The first one on jurisdiction will take precedence as it should always. If I determine that I have no jurisdiction, the other will fall. But if I hold that I have jurisdiction, the journey or flight I will take will be long before landing. My vessel is both road and airworthy, ready to take me into new fields.

First, I wish to address and dispose off the jurisdiction issue. According to GN No.427/2005, the High Court Registries Rules were amended. A new Rule 5A (2) conferred to the Commercial Division of the High Court both original and appellate jurisdiction over cases of a commercial significance. This term "commercial significance" is not defined. My understanding is that it has a literal meaning and therefore subject to literal interpretation. However, the term "Commercial Case" is defined in GN 96/ 2005 to mean;

"A civil case involving a matter considered to be of Commercial significance, including but not limited to:

(i) the formation of a business or commercial organization;

(ii) the governances of a business or commercial organization;

(iii) the contractual relationship of a business or commercial organization with other bodies or person outside it;

(iv) the liability of a commercial or business organization or official arising out of its commercial or business activities;

(v) the liabilities of a commercial or business person arising out of that person commercial or business activities;

(vi) the restructuring or payment of commercial debts by or to business or commercial organization or person;

(vii) the enforcement of commercial arbitral award;

(viii) the enforcement of awards of a regional court or tribunal of competent jurisdiction made in accordance with a Treaty of Mutual Assistance Agreement to which the United Republic is a signatory and which forms part of law of the United Republic;

(ix) admiralty proceedings; and

(x) arbitration proceedings.

I do not think the categories of cases with commercial significance are closed. In this case, the court is being asked to facilitate access by the parties to arbitration on the basis of an agreement to arbitrate by them as evidenced by the Lease Agreement. It is a fact that the parties here agreed to settle their disputes through arbitration. The fact that the agreement to arbitrate is arising from a Lease Agreement which is under a landed property does not, by that fact alone, exclude the jurisdiction of this Court to entertain the petition. The Commercial Division has jurisdiction to entertain a petition of this kind even though it arises from a Lease Agreement.

I think, as I understand it, this is not an invitation of me to determine a matter on breach of a covenant under the Lease to pay rent or unlawful eviction under section 110(1) of the Land Act,1999 Act No.4/1999. Rather, it is a petition to operationalize an agreed agreement by the parties to settle their dispute or difference through such an agreement.

Those disputes could be, and are actually centred on a land property issue. I am partly guided by a decision of this Court, Kalegeya J, as he then was, in the case of NATIONAL BANK OF COMMERCE LTD VS UNIVERSAL ELECTRONICS & HARDWARE LTD and 2 others, Com Case No. 198/2002(unreported). The Presiding judge held in this case that the action did not centre on land and that the issue of realization of a debenture or mortgage was just ancillary to the action. His Lordship was construing section 167(1) of the Land Act which vests exclusive jurisdiction to certain courts to hear and determine all matters of disputes, actions and proceedings concerning land. The Commercial Court is not among those courts.

I am satisfied that even here the agreement to include an agreement to arbitrate in the main Lease Agreement is a matter of commercial significance. Hostility to arbitration could have adverse effect on the economy if courts in this country do not support parties and arbitral tribunals to enforce their choice to arbitrate their disputes. Investors and commercial actors may shun investing here. Pro active support of arbitration by courts on the other hand may attract others to make Dar es Salaam seat of choice of arbitration, being sure that courts here will enforce agreements to arbitrate. If that is achieved, the economy of this country may benefit significantly. But this cannot be my sole consideration. There is a more fundamental consideration.

The arbitration clause in a contract of any kind is separable from the Agreement in which such a clause is in. Thus, a Lease Agreement which contains Clause 41 constitutes two separate contracts. The main or primary contract concerns the obligations and rights of the parties under the Lease. The secondary or collateral contract contains the obligation to resolve any disputes arising from the Lease obligations by arbitration. This is of commercial significance. It is this secondary or collateral contract that is the concern of this court. This

concept may not be understood. The debate rekindles my memorable tenure at the American University in Washington, District of Columbia studying International Arbitration for my Masters Degree in international Financial Law and Development Economics. Some of the things I have said, and I will say here, are the effect of that scholarly work. I am also guided by a decision of Lord Diplock in BREMER VULKAN SCHIFFBAU AND MASCHINENFABRIK V SOUTH INDIA SHIPPING CORPORATION LTD [1981] A.C 909,982. I am not bound by this decision but I am persuaded by it. It is a decision I adopted and used to propound the same theory in my thesis.

Further and for clarity, this secondary or collateral contract may never be operationalized. However, if it does, it forms the basis for the appointment of an arbitral tribunal, which will then determine the rights and obligations of the parties under the main or primary contract. This being a petition to invoke arbitration proceedings, I am satisfied that this Court has jurisdiction to hear and determine it.

Having determined that this Court has jurisdiction to determine the petition is not conclusive of my flight, I have another decision to make and that is whether I should assume this jurisdiction. I am not bound to assume jurisdiction because this Court does not have exclusive jurisdiction on commercial cases. Secondly, I may decline jurisdiction on the basis of procedural law if there is a pending matter in another court relating to the Lease Agreement. Civil Procedure Act was amended through GN 140/99 and Order IV as amended now stands as Rule 3. It reads:

> *"No suit shall be instituted in the Commercial Division of the High Court concerning a commercial matter which is pending before another court or Tribunal of competent jurisdiction or which falls within the competency of a lower court."*

Through the pleadings before me, it has been strongly represented by the respondents that the Petitioner had instituted a suit against them in the Land Division of the High Court and that case is Land Case No. 35 of 2007. If this case is pending then the appropriate measure would have been for either party to ask the court to stay the proceedings and allow parties to invoke arbitration under Clause 41 of the Lease Agreement. But, the same pleadings also indicate that the case was struck out on 31st August, 2007. I am also informed, through the pleadings again, that the case was between the respondents and agents of the petitioner.

My research in the registry of the Land Division, I landed on the case referred to here. The parties in that case were African Sky Millennium Towers Ltd versus Local Authority Provident Fund. At least for sure, the Petitioner was not a party to those proceedings. That being the case, the strong presentation by the respondent on this point is rather extravagant.

I find and hold that Order IV r. (3) is inapplicable and cannot bar this application. The jurisdiction of this court on this matter is not therefore barred by the procedural requirement of the law.

There was another matter raised. It is that the Lease Agreement as averred in paragraph 13 of the answer to the petition, had already terminated and that on that basis there was no need for a reference to arbitration. This point is vexed again in the affidavit of Yustus Thomas Mulokozi at paragraph 4 in the strongest terms. Unfortunately, Dr Wilbert Kapinga, Learned Advocate from the firm of Mkono and Company, Advocates is silent on this important point. It is important because if it is true that the Lease Agreement had terminated with all clauses, then the Petition cannot stand. The loss must lie where it is.

I think it being a legal issue of significant implications; Counsel ought to have addressed it. I think since it is raised in the pleadings, I would not be shooting 'overhead' or below the 'belt' if I can address it. No one will be prejudiced. Unfortunately, even from the Respondent's point of view it is raised as a statement but never expounded. I am not therefore privileged to have intellectually stimulating arguments on this point from either side. I had to research on the point on my own. I am glad I discovered my student's notes in my archives.

The question that ought to be addressed is the effect of termination of a Lease Agreement on an arbitration clause. Does the arbitration clause terminate with the main agreement?

I have already held that an arbitration clause is independent and separate from the Lease Agreement. This should be underlined. This Court is not bound by decisions from other jurisdictions of the Commonwealth or common law except as provided by the Reception Clause. The decision of US second circuit Court in PRIMA PAINT CORPORATION V CONKLIN MANUFACTURING CO. 18 L. Ed. 2d. 1276 also reported in **[1967] 338 US 395,** is persuasive when it held that:

> *"Arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are imbedded; the concept is sometimes referred to as a question of 'severability'."*

I am also indebted to eminent writers on the subject of arbitration. Alan Redfern and Martin Hunter, authors of *INTERNATIONAL COMMERCIAL ARBITRATION, 2nd (1991)* Sweet & Maxwell, one of the leading textbook on the subject, at page 174-75 states:

"The arbitration clause may have this separate existence not only when the contract has come to an end by performance (that is to say, when it has been executed) but also when it has come to an end prematurely, as a result of a supervening event such as force majeure or illegality. It is important in practice that an arbitration clause should be capable of this separate existence as it is the base on which the arbitration is founded. The agreement to arbitrate is contained in the arbitration clause; without such an agreement there can be no valid arbitration."

An arbitration clause, from this scholarly point of view, is survived by a terminated agreement. In this case, if a Lease Agreement has been terminated, the arbitration clause has not. It is still valid. This should also be underlined. Critical thinking may show any person justification for this position. It does make a lot of legal sense because most claims, true to the learned authors above, are brought to arbitration following termination of a Contract. It would cause a lot of injustices if for some reason the arbitration clause was held to have been terminated. This is the occasion and time when it is needed most.

Let us resort to the wisdom of our elders in law to cement the point. As way back in history as in 1942, Lord MacMillan in HEYMAN V DARWINS LTD [1942] A.C 375, 374 stated this:

"*if, for example, one party claims that there has been a total breach of contract by the other this does not abrogate the contract, though it may relieve the injured party of the duty of further fulfilling the obligations which he has by the contract undertaken to the repudiating party. The Contract is not put out of its existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives*

for determining the mode of their settlement. The purposes of the contract have failed, but arbitration clause is not one of the purposes of the contract." (underlining mine).

The autonomy of the arbitration clause in contracts is a lifeline of and in commercial transactions. I do respect the position canvassed by Counsel for the Respondents but I respectfully, disagree with him. It would frustrate the purpose of arbitration clause if a party, as in this case, could claim that an arbitration agreement has ceased to exist as soon as the primary contract, in this case, the Lease Agreement, has come to an end by performance or some intervening event. There are also international customary norms to support this view.

The principle of separability of arbitration clause with the main Agreement is established. This is a very important feature of modern arbitration as laid down in Article 21.2 of United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. This clause gives arbitrators power to determine their jurisdiction, validity of arbitration clause and validity or invalidity of the main agreement. They may declare the Agreement invalid but without affecting the validity of arbitration clause. The negotiators of the Rules, according to **Trauvax pre'paratories,** referred to the case of PRIMA PAINT CORPORATION cited above as an example of the acceptance of this principle and concluded that this concept may be considered to conform to the underlying intention of the parties. They also made reference to Article 18 of the Uniform Law annexed to the 1966 European Convention Providing a Uniform Law on arbitration [the Strasbourg Uniform Law]. The Contracting Parties, including the United Republic of Tanzania, agreed that arbitration clause should survive termination. The International Chamber of Commerce Rules contain a similar provision in Article 8(3) as is the London Court of International Arbitration in its Article 14(1). In the UNCITRAL RULES this undertaking appears in Article 21.2 which reads:

"The arbitral tribunal shall have the power to determine the existence or validity of the contract of which an arbitration clause forms part. For the purpose of article 21, an arbitration clause which forms part of the contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

The doctrine is therefore not alien in law. It is an international norm both in international customary law and in international law. The clause came into play in the US-Iran Claims Tribunal which adopted the UNCITRAL Rules of Arbitration. The concepts must be read into our Arbitration Act. On the basis of all of these points, even if the Lease Agreement has been terminated, clause 41 survives termination and a party who want to have recourse to arbitration to safeguard any of his rights, may do so. I have to underscore what I have already stated. Whether the arbitrator has jurisdiction or not is a matter to be determine by the arbitrator and this court will defer on that issue for a moment.

Before concluding on this point, I think it is also appropriate to decide on an application by way of Chamber Summons by the Respondents in the Petition, praying for an Order that the Petitioner furnish security in the form of irrevocable Bank Guarantee in the sum of equivalent to the value of the subject matter, namely USD 1,222,996.98. This application was purportedly brought under section 95 of the Civil Procedure Act, [CAP 33 R.E.2002]. The basis of this application is, in my view, that which is stated in paragraph 9. Respondent avers that unless such application for security is made at this stage, they will have no opportunity to make it before the arbitrator because the law does not empower the arbitrator to make such orders. Unfortunately, Mr. Joseph Thadayo, learned Advocate who compiled the written

submissions did not expound on this issue as to whether as a matter of law an arbitral tribunal has no jurisdiction to order for security of costs. His statement that an arbitrator has no jurisdiction came too soon and is not supported by concrete analysis expected of an advocate. Dr. Wilbert Kapinga, the learned Advocate seems to have timidly avoided it.

I am not aware of such prohibition in the law that arbitrators cannot order security of costs. I understand that they will unlikely do so but that is different from saying they have no jurisdiction to do so. Such legal prohibition, if it exists, must be out of touch of new trends in modern arbitration and must be archaic. That would be a matter of domestic policy and the trust given to arbitrators internally. But in consideration that the Fourth Schedule of Arbitration Act, is the Vienna Convention of 1923 which is no longer in application, having been replaced by the New York Convention of 1958 the problem being raised by the respondent may not be of much substance. Tanzania acceded to the Convention but no efforts were or have been made to replace the 4th schedule with the updated Convention. The Convention aim at facilitating enforcement of international commercial arbitral awards by Contracting Parties as an international obligation. All in all, a new law on arbitration is required to replace our archaic legislation. This is not to say that our law do support the idealistic view of lack of jurisdiction on arbitrators to order for security of costs.

Court intervention in order to facilitate arbitration is a matter of municipal law. I think it is truthful to say that courts are interested in the effectiveness of arbitral proceedings and will likely intervene to ensure this effectiveness. To this extent, therefore, there are three categories of intervention. The court may intervene to award interim measures of protection or conservatory measures to safeguard the subject of arbitration; courts have supportive role; and supervisory role. I doubt it, if a court can issue orders for one party to provide security.

This is an interesting point to canvass into. A guiding legal principle is probably required. I am afraid I cannot do so before I determine a point of preliminary objection in respect of the competence of the application.

Dr. Kapinga challenges the application for being made under a wrong section of the law. The Respondents, fortunately agree with the Petitioner's Counsel but retort again that the application is taken *ex debito justitiae.* Can this court indulge itself on the relief based on this maxim? The way I have understood this maxim upon my reading of REX V RICHMOND CONFIRMING AUTHORITY [1921] 1K.B 248 which is a leading authority on the maxim, I do not agree that it is applicable here or that the court can invoke it as a cornerstone of substantial and simple justice. This seems to apply in prerogative reliefs. For it to apply here, the respondent must show that they have a particular grievance of theirs beyond some convenience suffered by them in common with the rest of the public. It therefore appears to me to be a fit plea for prerogative relief rather than a substantive case as this one. It about exercise of jurisdiction excessively or exercise of jurisdiction wrongly. I have read the pleadings and I am satisfied that this is an order that cannot be given under Section 95 of the Civil Procedure Act, which both parties agree is not a panacea for all shortcomings of the procedural law. No other law has been cited as an enabling law for the exercise of the powers sought and I decline to do what I have been required to do in equity or common law. I am not properly moved under the law and I think, even if I had been properly moved, I think I would have yielded this to an arbitrator under principles of Arbitration Law and practice. I am confident, without deciding, that arbitrators are competent to decide on this issue. In my soft landing I must decide as hereunder.

The Petition is granted. This Court, acting under section 8(1) and 8(2) and paragraph 1 of the First Schedule of the Arbitration Act [CAP 15 R.E 2002] and Rules 5 and 6 of the

Arbitration Rules, do appoint Honourable Mr. Justice Lameck Mfalila as an arbitrator in the matter between the parties hereto. Should the Respondent object to the appointment, they should notify the Court within five (5) days from this Ruling. Such a notification shall be accompanied by an alternative proposed person for consideration of the court.

In the event that this Petition is successful the Petitioner will have costs of this Petition here.

F. M. Werema,

JUDGE