CURBING DELAYS IN COMMERCIAL DISPUTE RESOLUTION

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"Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have been married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why… . Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out … but Jarndyce and Jarndyce still drags it dreary length before the Court, perennially hopeless."
- Charles Dickens (Bleak House)

Attorney James: I wish Dickens was wrong!
Judge Smith: Life of law defies simplicity!
Attorney Aaron: As long as the rules of procedure remain as they are, delays are part of our legal system, am afraid!
Judge Carl: What about enacting procedural rules geared at circumventing delays?
Attorney Jimmy: I agree that may be the solution. But will that not be at the cost of justice?
Attorney Paul: But justice is not ideal?
Judge Craig: Jimmy, law has a purpose, anyway, justice equally!

From the life of Judge Aaron

Delays in determination of the suits is one of the serious issues in the administration of civil justice which threatens the fabric of the legal system itself. The society believes that lawyers are to blame for the delay. I agree! Jonathan Swift depicts such sentiments in the following sarcastic description:

"In pleading, they (lawyers) studiously avoid entering into the merits of the cause; but are loud, violent and tedious in dwelling upon all circumstances which are not to the purpose…they never desire to know what claim or title my adversary hath to my cow, but whether the said cow were red or black; her horns long or short; whether the field I graze her in be round or square; whether she were milked at home or abroad; what diseases she is subject to; and the like; after which they consult the precedents, adjourn the cause from time to time, and in ten, twenty or thirty years come to an issue.

It is likewise to be observed that this society has a peculiar cant and jargon of their own, that no other mortal can understand, and wherein all their laws are written; which they take special care to multiply; whereby they have wholly confounded the very essence of truth and falsehood; of right and wrong; so that it will take thirty years to decide whether the field, left by my ancestors for six generations belong to me or to a stranger three hundred miles off"
-Jonathan Swift, (Gulliver's Travels)

In this discussion I have chosen to talk with you on the internal system of the procedural laws, which I believe, is to a large extent a real cause of delays not only in the commercial cases but also in civil cases generally. Apart from the internal system of the procedural laws, I also argue that there is wanting of proper training on the part of the advocates about the interests of their clients and how to achieve such interests through the legal system.

Last week I learned from the speech of the official opposition in the Parliament that the High Court Commercial Division of Tanzania has a backlog of 285 cases. I must state that if that data is not contested then this court deserves our clapping. When compared to other courts you find out that that record stands out in the crowd. I will compare that to the New York Commercial Division, the best according to the world rankings on commercial disputes resolution. On 26th February 2012 a task force on commercial litigation in state courts convened by Chief Judge Jonathan Lippman was formed to look for solutions to delays and overcrowded dockets that plague the Commercial Division in an

effort to keep business cases from fleeing to other venues. The picture in the Manhattan Commercial Division looks like this:

Manhattan Commercial Division Cases				
	2011	2010	2009	2008
Disposed	1,402	1,873	1,614	1,367
Pending	2,573	2,238	2,267	2,145

SOURCE: Office of Court Administration

If that is the case in New York, with all the training, facilities and better working conditions generally, then I can say confidently that our court is doing the best; it can in the circumstances it finds itself! Perhaps with better facilities, working conditions and training might have done even much better.

WHAT ARE THE REAL CAUSES OF THE COMMERCIAL DISPUTES?

As I have already alluded to earlier on the major cause of all civil cases is the internal system of the procedural laws which are at the heart of the civil justice. The rules of the code of civil procedure, evidence, limitation and others of the same ilk, naturally lead to delays of settlement of disputes. The best that the court can do is to know how to utilize them for the better expeditious of the resolution. Let me illustrate the point by use of Civil Procedure Code: today on the 20th day of July 2012 party A files a suit in the Commercial Court against party B. Party A expeditiously after filing the suit, on the same day serves the Plaint to Party B. Party he has a liberty to file the Written Statement of Defence within 21 days (see Order VIII, rule 1(2) of the Civil Procedure Code [Cap 33 R.E. 2002]

Hardly will a summons be issued to appear before the judge before the lapse of 21 days. Let us assume that the file is assigned to a presiding judge on the same day when the suit is filed and summons calling parties to appear before the judge is issued on the same day. Let us further assume that Party B, files the defence within 21 days and that the summons asks the parties to appear before the judge on the 22 day from the date filing the suit.

If the defendant files a defence in response to the summons to file a defence the plaintiff has a right to file reply thereto within 7 days from the date of service of the defence to him (see Order VIII Rule 13 of Cap 33). That takes us to 28 days from the date of filing of the suit.

On filing of the Reply to the Written Statement of Defence the pleadings by virtue of Rule 15 of Order VIII of Cap 33 are complete and case should be fixed for Hearing. This provision, however, seems to have been repealed technically by virtue of Order VIIIA, B& C, of the CPC. I will revert to it later.

What happens next after the pleadings are in, is a date not for hearing but for mention to see if pleadings are complete or there are preliminary objections. Let us assume that there are no objections, the matter should proceed for hearing.

Order VIII, Rule 15 is bypassed in favour of Order VIIIA. Here we encounter Rule 3(1) of Order VIIIA. It requires that a first scheduling and settlement conference should be held within 21 days from the date of the conclusion of the pleadings. This takes us to 49 days from the date of filing the suit. This is the most ideal situation. Rule 7 of Order VIIIA, allows holding more than one pre-trial conference. If that happens we have more days added to our calendar. Let us ignore that possibility and assume that on the first day of mediation, it is recorded to have failed and the file seconded for final pretrial conference by virtue of Order VIIIB, Rule 3(1) of Cap 33. Rule 3(3) of Order VIIIB, provides that the final pretrial conference must be held within 30 days for speed truck one cases, 40 days for speed truck 2 cases and 60 days for speed truck three cases. Speed truck one are cases expected to be determined within 10 months from the date of commencement cases, speed truck two, 12 months and speed truck three 14 months (see Order VIIIA, Rule 3 of Cap 33). That takes us to 79, 89 or 109 days from the date of instituting the suit!

At this juncture the case is ready for trial. That is the best of the best. The most ideal condition! I am not sure if that has ever

happened! If there is an extension of time to serve summons or file the defence, the days can go ballistic! That is what is happening.

Framing of issues will be the next step to be carried before hearing. On the first day of hearing of the suit, a party is at liberty to present new documents (see Order XIII, Rule 1(1) of the Code of the Civil Procedure. That can cause an adjournment to be sought to enable the other party to examine them carefully. That is how delays come about in our civil system.

HOW DO THE RULES PLAY OUT?

The Code of the Civil Procedure has an internal coherent system. If that system is maintained, we can go afar distance in curbing delays in the court. If not we are likely to cultivate delays. Here I examine the rules and the inconsistencies in the system, which I believe, contribute to the delays and how that can be curbed.

RULE 15 OF ORDER VIII OF THE CIVIL PROCEDURE CODE

This rule requires that on filing of the reply to the written statement of defence, or if there is no reply, the pleading are deemed to be complete and the suit should be fixed for the hearing date. I contend that this rule was intended to send a signal to litigants to be careful in preparations of pleadings. The message here is that there is no room for dilly-dallying after instituting the case. The court is for serious business for serious people.

Rule 17 of Order VI of the Cap 33, however, carries the potential to compromise this rule. It allows amendments at any stage of the pleadings. I contend that with alert judge in full control of the case, Rule 17 need not be a problem. The judge in control of the proceedings knows which amendments to allow and which not to allow. He knows which amendments are intended to real resolve the dispute and which are dilly-dallying techniques. The same applies for Rule 4 of Order VIIIA of Cap 33.

Rule 15 of Order VIII, however, seems to be repealed indirectly, by virtue of Order VIIIA and VIIIB, which have introduced first pretrial conference and final pretrial conference.

I contend that for purposes of commercial cases there is an alternative of removing Orders VIIIA, B & C. Amend Order VIIIA, Rule 2A to the effect that commercial cases shall not be instituted before attempting mediation or mediation-arbitration out of the court. This will reduce the 30, 40 or 60 days consumed by pre and final trial conferences, or double that number if the conference is held twice, as required under Rule 7 of Order VIIIA of Cap 33.

But if you make a condition that a commercial case shall not be instituted unless mediation has already been attempted out of the court, what if a party wants a temporary order? I argue that there should be room to allow a party to seek a temporary order without the need to file the suit first. That will require amending Order XXXVII, for example on temporary injunctive orders. To avoid abuse of the new rule, the rule should stipulate a time within which that order lapses. The time of the order should be the time within which parties should mediate. If they fail to settle the matter then each party is at liberty to file the suit.

ORDER VIIIA, B & C OF THE CODE OF CIVIL PROCEDURE

There is no doubt that the introduction of these provisions was intended to speed up the hearing of cases. It was hoped that many cases would be settled before trial, thereby reducing triable cases to a large extent. Today most advocates believe that these provisions have not tackled the problem. They have exacerbated the problem. I agree.

In my considered view, the problem is not the rules but the incompetence of the bar on the application and advantages of these rules, and want of control and aptitude on the part of bench in utilizing these rules. I will end with plea for the training of the bench and the bar as crucial for the curbing of the delays not only

in commercial disputes but also in the entire civil litigation in our country, as long as Order VIIIA, B & C remain part of the CPC.

Let me first tackle the incompetence of the advocates. The Advocates Act requires that advocates refrain from taking instructions before they are paid. If they are paid first, it follows that they have an incentive to have the case determined as soon as possible, so that they have an opportunity to grab another.

On the same footing commercial lawyers are aware that reputation of their clients is something to be protected. Cases sometimes tarnish such reputation. Having a system, which cannot do that, would be in the best interests of the client. Mediation offers them the secret they cannot find when the matter go on trial. Mediation offers them the speedy they cannot find anywhere even by use of arbitration. Mediation guarantees and warrants them their dignity. There is no losing face! Not all is lost, even if there is a loss! What effective remedy are you seeking other than that?

Business oriented persons do not prefer to have commercial disputes in their records. They would prefer to have clean sheet and not liability likely from legal disputes. Thus, they prefer expeditious determination of their disputes. Cases, which go on trial under the adversary system takes long to resolve. Mediation is a truncated means of resolving disputes when compared to trial. Businesspersons therefore would naturally prefer mediation to trial.

If that is well known to the advocate, how and under what circumstances should a commercial case not be resolved through mediation? Why? Why should I go for the worst results under trial, whereas there is a real opportunity of getting bad or worse results under mediation? But certainly not the worst results under trial? My prediction is that most of us do not know the best interests of our clients, we do not know how properly to advise them, and rarely do we know how best to meet our clients needs. In most cases we do not conduct case analysis before preparing pleadings and before undergoing mediation. We attempt mediation without

through knowledge of our case. We only do so when the case is fixed for hearing. Too late!

It simply doesn't make sense. A thoroughly prepared case from the very beginning will give a clear indication which way it will go on trial. Let me take an example of a contract case. The Plaintiff needs to establish four elements: the existence of the contract, the terms of the contract, breach of the terms of the contract, the damages and/or loss sustained. He must have facts which show that there was a contract, the terms of that contract were so and so; so and so terms of the contract were breached and as a result the plaintiff has suffered so and so. That is not enough. The Plaintiff should be able to establish from beginning the evidence available to him and the evidence he needs to obtain. If you cannot have them before mediation you cannot expect to have them established on the trial.

From that analysis you know which side the case will go. If that be the case, why should one insist to go on trial whereas there is a chance of salvaging something? What is the basis of your refusal to settle the case?

The bench has its own share. As mediators, judges have a duty to know the case very well just as advocates before mediation. Who is a good mediator? They have good listening skills, compassion, energy, imagination, fairness, empathy, tenacity, open-mindedness, level-headedness. To be fair, however, one needs to thoroughly understand the case. Without understanding the case, thoroughly then you can only be fair if you are King Solomon. A Mediator who real understands the case thoroughly goes a long way to bridging the gap between the parties. He easily helps each to see the holes of his case thereby giving them hard time to rethink their positions.

Mediators, in this case judges who have read all the pleading have an opportunity of understanding the case and therefore on a better position to advise both parties properly. They have a chance to help the parties see the weaknesses of their cases. In that way

mediation is effective. But how can we credibly expect a judge to read a file if on a single day he has 20 files? He simply cannot manage!

ORDER XIII, RULE 1(1)

This rule gives litigants the right to present documents in their possession, which haven't been filed in court. This rule has the potential of delaying the determination of the suit. Take this example. On the day when the suit is fixed for Hearing, the other party presents new documents, which might change the direction of the case altogether. In one commercial case, which I defended, I was confronted with documents, with 1205 pages in total filed and presented to the court on the date fixed for Hearing. I had no option but to seek for an adjournment, which was not resisted by the opposite party or the judge. This disrupted the schedule to three months later.

In another case, it was my turn. I presented two documents on the hearing date. But these documents fundamentally had the impact of changing the issues as framed. The opposite counsel sought adjournment, which was granted. He forgot to seek rephrasing the issues, as these documents were changing the nature of my case. He only discovered during Final Submission. That was too late for him! Delay occasioned; and justice perhaps not well served.

I contend that this rule ought to be amended. It real carries the potential to delay the expeditious determination of cases. I recommend that the rule be part of Order VIIIA, B & C of the CPC, or introduce a new rule which takes care of discovery, interrogatories, facts in dispute and non disputed facts, along the line of Rule 10(2) of the Labour Court Rules, 2007. That rule real enhances the expeditious disposal of cases. It stipulates as follows:

10(2) – During a pre-trial conference, the parties shall first attempt to reach an amicable settlement by any means available to the parties, including mediation on the –

(a) facts that are common cause;

(b) facts that are in dispute;

(c) the issues that the court is required to decide upon;

(d) the precise relief claimed;
(e) discover, exchange of documents and the preparation of a paginated bundle of documentation in a chronological order;
(f) the manner in which documentary evidence is to be dealt with, including any agreement on the status of documents and whether these documents or parts of documents will be admissible as evidence of what they purport to be;
(g) whether evidence in respect of an affidavit will be admitted with or without the right of any party to file counter affidavit, reply to it or to cross-examine the deponent, with leave of the court;
(h) the necessity for any on-the-spot inspection;
(i) securing the presence of any witness at the court;
(j) the resolution of any preliminary objection;
(k) the exchange of witness statements;
(l) expert evidence;
(m) any other means by which the proceedings may be shortened;
(n) an estimate of the time required for the hearing

With all these matters determined on day for first pretrial conference, you stand a chance to cut half the time spent in adducing evidence. There is so much time wasted on objections in adducing the evidence.

Counsels time and again will object to leading questions, admissibility of documents, which frequently forces the court to make rulings. This happens because at the commencement of the hearing of the case, parties are not in agreement, which documents are agreed, which facts are common and therefore non-disputed. If you are agreed on common facts the opposite party can easily lead his witness, thereby shortening the long route taken when you are forced not to lead your witness. The same applies to admissibility of documents. You need to lay the foundation for the document to be admitted. If, however, that is agreed so much time is saved. If facts are agreed in advance you do not need call witnesses, by virtue of section 60 of the Evidence Act, [Cap 6 R.E. 2002]

It is my considered view that these are the matters, which are required to be determined during the pretrial conference and the

final pretrial conference. What happens, however, is something different. I propose that a similar rule to section 192 of the Criminal Procedure Act, which requires the parties to conduct a Preliminary Hearing, in which the above matters are agreed and recorded, can go well in curbing delays in the Commercial Court. It is a matter of re-working Order VIIIA, B & C of the CPC.

OPENING AND CLOSING SPEECHES

We are used to closing speech, dubbed as final submission. Rarely do we use the opening statement or opening speech. Order XVIII, Rule 2 of the CPC provides for this procedure. My experience informs me that there are no clear rules guiding final submissions. Why does the court prefer written submission to oral? Who begins filing? Or are the parties required to file the submission at the same time?

Filing final submissions is another cause of delay. I have observed that advocates ask the court to grant them time to reply to submissions. This can take 7 or 14 or 21 days after the conclusion of the trial.

It is my considered opinion that it is time for the Commercial Court to bar written final submissions and demand that parties make final submissions on the same day or the next day after concluding trial. This shortens the time. Second, I have also observed that written final submissions in most cases get into so much details of authorities citation to support particular legal positions. My advocacy skills training made me aware that the purpose of final submission is interpretation of the evidence not principles of law or legal positions. It is this poor practice whereby a court is faced with a 50pages submission, for something which could have been explained in 5pages only. You burden the judge unnecessarily!

Rarely is the Opening Statement used in Tanzania. I believe that there is so much value in employing this procedure. In some cases, chances are that the court has not yet read the pleadings well. Opening statement is a roadmap. It is a helpful guideline as to

what the case is all about, what to expect from the witnesses and what not to expect from them. It helps the judge to easily understand what to expect and therefore can control the proceedings for he knows what facts to shut out and which facts to allow during examination of witnesses. I would highly recommend for this procedure.

CONTINUATION OF CASES

I make the case that the commercial court needs to hear cases on a continuous basis until when the case ends. The current situation is that cases are dodged with interruptions time after time. Would it not make things better to fix hearing of the case for five or ten days consecutively?

Hearing the case continuously instills much responsibility to the advocates and the judge. Yet, it has one important advantage. It speeds up the trial and it keep intact the memory of the court and the party themselves. The interruptions gives the judge hard time because every time he adjourns the case, he knows next time he will be forced to re-read the file. The same thing applies to advocates.

What about the dangers of failing to secure all witnesses at the same time? Yes, some can be sick others on travel. But that applies equally even when the case is not heard continuously.

RELEVANCY OF FACTS

There is so much adduced in evidence, which has no evidential value. There is so much time wasted in adducing facts, which have no, value whatsoever in determining the real issue in dispute. My experience informs me that non-adherence to section 7-18 of the Evidence Act has occasioned much delay in the disposal of cases. Prosecuting counsels have misconstrued section 111 of the Evidence Act to the effect that they must adduce anything to prove their cases, while defending counsels have misconstrued section 155 which entitles them to shake the credibility of the witness to the effect that the sky is the limit under cross examination! Nonsense! To my disappointment courts have

remained spectators. No. I believe the courts need to play an intervening role.

This takes me back to the pre and final trial conferences, framing of the issues and opening statements. These processes are intended to guide the court and parties to which facts are contested. The facts contested are those, which are facts in issue and no others. According to section 7 of the Evidence Act, those are the only facts, which are relevant, and therefore a subject of proof under section 111 of the same statute. Not other facts! The sky is the limit in cross-examination is sheer nonsense!

My experience informs me that so much time is wasted during the hearing because counsels get embroiled in adducing so many facts, which have nothing to do with proof of the issues before the court. It is my opinion that in this context a judge of the commercial court is fully entitled to get involved when he sees an aimless cross examination which has no value but an embarrassment to the witness, which only consumes the time of the court to the detriment of the court and other litigants.

ADMISSIBILITY OF DOCUMENTS

You have to lay the foundation for the acceptance of the document. A witness must be proven to be competent to tender the document. The witness must be proven to have knowledge of the document before tendering it. So much time is consumed to establish that. This is the reason why in am advocating for a rule like Rule 10 of the Labour Court Rules.

Every practicing advocate will agree that a trial, which involves documents like commercial cases, so much time, is needed to get those documents admitted. There is a need to get a truncated procedure for the admission of the documents. In other countries like US, they get around that by way of pretrial where parties do agree which documents have no disputes, and those which have a dispute a judge is asked to make a ruling whether to be admitted or not. That is done well before trial.

It is my argument that such a procedure can be carried during the pretrial conference, so that on the commencement of the hearing of the case all those issues have been determined. That in itself can cut half of the time spent in adducing the evidence.

ELECTRONIC EVIDENCE

There is no doubt that the level of e-commerce is increasing on the daily basis. It is natural therefore to expect many of the commercial disputes to rely on electronic evidence. Their means of resolution therefore must also adopt electronic means. Our procedural laws seem to be lagging behind. To this day in this country there is no enactment on electronic evidence. I am aware of the Written Laws (Miscellaneous Amendments) Act, 2007, Act No.2 of 2007, which amended section 76 and 78 of the Evidence Act, in respect of the banker's books. The amendments have made it legal the admissibility of electronic evidence in respect of banker's books only. Of recent section 3 of the same statute has been amended to allow teleconference or video conference as means of giving oral evidence (see the Written Laws (Miscellaneous Amendments) Act, 20011, Act No. 3 of 2011.

I argue that time has come for judges to take practical steps in addressing this issue which the legislature has decided to *ignore*. I am using the word *"ignore"* to express my frustration. The Parliament in 2007 through Act No. 2 amended section 40 of the Evidence Act, to allow electronic evidence in criminal cases. In 2011 through Act No. 3 the Evidence Act was amended to take care of videoconference and teleconference. If the Parliament is aware and knows the need of these why not e-evidence in commercial disputes where e-documents is the medium of the transaction?

Let me make my case for the judges of the commercial court to intervene in this area of the law. There is a huge territory to be traveled from admissibility of the document to proof of the content of that document. It is not the law that whatever is admitted is proved. Whether the judge will accept electronic evidence as proving a fact in issue has nothing to do with the

admissibility of that electronic evidence. The proof or what weight should a judge assign to a particular document has nothing to do with admissibility of the document at issue. Proof of the content of what the document purports to say of what weight should a judge lay on a document is a question of the total analysis by drawing inferences from what is admitted and what is disputed to see where the resultant effect is. By failing to admit electronic evidence, the court is actively taking part in occasioning miscarriage of justice. Why? Failure to consider them narrows the scope of analysis of the evidence. If that is agreed there need not be reason why should e-mail or any other electronic stored information not be admitted? In fact the definition of a document under the Evidence Act, is wide enough to capture electronic evidence.

It is for that reason I am very pleased by the decision of court in Commercial Case No.10/2008 ***Lazarus Mirisho Mafie & M/s Shidolya Tours & Safaris versus Odilo Gasper Kilenga***, in which the court laid down rules to guide the court in determining the admissibility of electronically stored information. I only hope that this decision will not be set aside by the superior court.

Yet, this problem can be ameliorated if the preliminary hearings are properly conducted. Where a preliminary hearing is properly conducted and all documents not in dispute identified, while those in dispute a judge being is called to determine whether they should be admitted or not, can help a lot in circumventing this lacunae.

SERVICE OF SUMMONS

According to Rules 16-19 of Order V of the Civil Procedure Code, an officer of the court known as the serving officer serves court summons. There has been a practice of parties serving summons rather than the serving officer. Due to the requirement of Rule 18 of Order V of the CPC that the serving officer must return the original summons with an endorsement as to how he effected the service, the party who served the summons is on the losing side if the opponent does not appear in court. Another cause for delay!

I argue that there is wisdom on the part of the court to relax the consequences of Order V, Rule 18. Why? Even though on the institution of the suit, the Plaintiff pays fees for service, the truth is that the court does not have sufficient number of the serving officers. Alternatively, there is room to make a case for an amendment so that there is a clear rule to the effect that parties have a primary obligation to serve their opponents. There is a need for a guidance of the court on this issue.

CITING WRONG PROVISION OF THE LAW

It is now a well-established position of the judge made law, that citing a wrong provision of the law is fatal. It renders the application incompetent. Some decision have even gone even further to state that citing a wrong provision of the law divests the court the jurisdiction to hear and determine the application. The consequence of citing a wrong provision of the law is to strike off the application. What next? The next step is to re-file the application afresh.

It is my considered view that this position does not do any good the civil justice system. The only achievement of this position is delay of determination of cases, more work to the judges and staff of the court and loss of taxpayers money and time waste by the court which could have served other litigants.

Striking the application does not determine the matter. It simply adds more work to the court, save fees paid for refilling. I am not advocating for the court's hands off style of managing proceedings. No. Parties must abide by the rules. However, the consequences of failure to abide by the rules should be measured. If I fail to cite a proper provision of the law, the court can condemn me to paying costs but allow me to make amendments there and on so that the case proceeds. If the amendments do occasion injustice to the other party the court is entitled to deny me the amendment, but it can be done without occasioning injustice to the party, I do not find any merit in denying the amendment in favour of striking out the application.

It is my considered opinion for purposes of commercial court; this rule ought to be relaxed. I am aware that this will require an intervention of the Chief Justice to amend the relevant rule.

May these memorable words of Lord Bowen's in ***Cropper vs. Smith [1884] 26 Ch. D. 700, 710*** inspire us into that direction:

> *"It is a well established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights... . I know no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for deciding matters in controversy"*

AMENDMENTS AND PRELIMINARY OBJECTIONS

It is well-established rule that you cannot seek an amendment of a pleading after the other party has raised an objection to the document. Your fate! Wait for the court to strike out such a pleading. What next then? File the pleading afresh. Isn't this a clear manifestation of lawyer creating rules which clearly causes delays? Why not should the court allow the offending party to amendments there and on, and then condemn him to paying costs?

I contend that such judge made rules with the best intentions to instill the sense of diligence and seriousness on the part of the advocates, do more harm to the civil justice system than the intended results. It time that such rules are given a second look.

TIME FRAME

The civil procedural law and the law of limitation provides for time framework for doing various things. If you cannot do within the time provided you are forced to first seek an extension of time before doing what you need to do. What is the end result? More delay.

Why not should the offending party do both at the same time? More still, why not seek an extension of time even if he had

already doe that which at the end he will do if the extension of time is allowed? You do you will be met with an objection that you gave powers unto yourself to do things without imprimatur of the court. Alas!

These rules appear simple but have huge implications for purpose of expeditious determination of suits. They make the court extremely busy, by forcing the court to do the same thing twice or thrice. Why? Let us reflect!

EXECUTION

A friend tells me it is very simple to prosecute the case but extremely difficult to execute the decree. Many share his sentiments. Executing a decree has many roadblocks. A share fair of cowboys in the legal fraternity; court brokers and auctioneers! Sometimes it is due to sheer complexity of the law and the many loopholes for stay of execution of the decree.

My experience informs me that it is these applications which jam our courts and make the judges less effective. The more the number of applications in the court the less effective judges become in dealing with the suit because of the sheer burden placed on their shoulders. He has less time to deal with the rest of other matter.

I am of the opinion that the well-established rule that an appeal is not a ground for stay of execution has not served us well. Why? If I have rule stipulating that appeal acts as a stay I have relived courts with the burden of several applications. I know the rule is subject of abuse by losers who simply put up an appeal to frustrate the decree holder. There must be a rule to discourage that. Increase the costs of appeal and make it clear that where the court finds that the appeal has no merit the costs will be enhanced. In that way I believe you relieve the court from the applications so that the judges concentrates on other pressing matters.

CONTROL OF PROCEEDINGS BY JUDGES

The Civil Procedure Code grants so much discretion in the hands of the judges for obvious reasons. So many things affect the way proceedings are conducted and therefore a need for flexibility. It is reasonable and fair that the judge be granted discretionary powers to enable him to control the proceedings. The judge has powers to allow adjournments, amendments, temporary orders and many others.

I argue that as a means of curbing delays judges ought to give a hard look adjournments sought, amendments of pleadings and late filing of documents, which aid in delaying the determination of the suit. The judge is absolutely entitled to demand an explanation from the advocate why the prayer is sought at that time, and the advocate is expected to assign concrete reasons why that is the case.

There are endless questions during cross-examination of witnesses which to a large extend derail the speedy determination of the suit. The judge has a role in putting matters course.

CONCLUSION

My argument in this discussion is anchored on the assumption that the bench and the bar has the competence to deliver and having enough number to do the job. It is also assumed that there are sufficient facilities to do the job. If these assumptions are challenged the scope of the causes of delays will be increased.

I have tried to show that apart from other factors, the rules of procedure to a large extent make a difference in curbing delays. If they are designed to curb the delay, they can make a difference. I have shown that most of our procedural rules, are not designed and curbing delays but their effect when applied is to encourage delays.