

**CHAPTER 33**  
**THE CIVIL PROCEDURE CODE**

[PRINCIPAL LEGISLATION]

**ARRANGEMENT OF SECTIONS**

Section

Title

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*Rule*

- 1A. Citation.

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**(a) Joinder of Parties**

- 1. Who may be joined as plaintiffs.

2. Power of court to order separate trials.
3. Who may be joined as defendants.
4. Court may give judgment for or against one or more of joint parties.
5. Defendant need not be interested.
6. Joinder of parties liable on same contract.
7. When plaintiff in doubt, from whom redress is to be sought.
8. One person may sue or defend on behalf of all in same interest.
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19. Judgment against third party in default.
20. Costs.
21. Provisions of the Code and Law of Limitation to apply to third party proceedings.
22. A third party may present a third party notice.
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**ORDER II: FRAME OF SUIT**

1. Frame of suit.
2. Suit to include the whole claim, relinquishment of part of claim, and omission to sue for one of several reliefs.
- 2A. [Omitted.]
3. Joinder of causes of action.
4. Only certain claims to be joined for recovery of immovable property.
5. Claims by or against executor, administrator or heir.
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#### **ORDER IV: INSTITUTION OF SUITS**

1. Suit to be commenced by plaintiff.
2. Register of suits.
3. Instituted suits to be assigned within four days.

#### **ORDER V: ISSUE AND SERVICE OF SUMMONS**

##### ***Issue of Summons***

1. Summons.
2. Summons to be signed and sealed.
3. Copy of plaintiff.
4. Further directions in summons to appear.
5. Appearance of defendant.
6. Fixing day for appearance.
7. Personal appearance of the parties.
8. No party to be ordered to appear in person unless resident within certain limits.

##### ***Service of Summons***

9. Delivery or transmission of summons for service.
10. Mode of service.
11. Service on several defendants.
12. Service to be on defendant in person when practicable or on his agent.
13. Service on agent by whom defendant carries on business.
14. Service on agent in charge in suits for immovable property.
15. Where service may be made on any adult member of defendant's family.
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17. Procedure when defendant cannot be found.
18. Endorsement of time and manner of service.
19. Examination of serving officer.
20. Substituted service.
21. Service by post.
22. Service of summons where defendant resides within jurisdiction of another court.
23. Duty of court to which summons is sent.
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25. Service on officers of the Government and local government authorities.
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27. Duty of person to whom summons is delivered or sent for service.
28. Service where defendant resides in a neighbouring country.
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31. Service by the plaintiff or his agent.
32. Service through the courts of other countries.
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6. Condition precedent.
7. Departure.
8. Denial of contract.
9. Effect of document to be stated.
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11. Notice.
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14. Pleading to be signed.
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4. When plaintiff sues as representative.
5. Defendant's interest and liability to be shown.
6. Ground of exemption from limitation law.
7. Relief to be specifically stated.
8. Relief founded on separate grounds.
9. List of documents.
10. Return of plaint and procedure on returning plaint.
11. Rejection of plaint.
12. Procedure on rejecting plaint.
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#### ***Documents Relied on in Plaint***

14. Production of document on which plaintiff sues.  
List of other documents.
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17. Production of shop book and original entry to be marked and returned.
18. Inadmissibility of document not produced when plaint filed.

#### **ORDER VIII: WRITTEN STATEMENT, SET-OFF AND COUNTERCLAIM**

1. Written statement of defence.
2. New facts must be specially pleaded.
3. Denial to be specific.

4. Evasive denial.
5. Specific denial.
6. Particulars of set-off to be given in written statement and effect of set-off.
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8. New ground of defence.
9. Counterclaim.
10. Counterclaim against plaintiff and third party.
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12. Court may order separate trial of counterclaim.
13. Subsequent pleadings.
14. Failure to present written statement of defence.
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#### **ORDER VIIIA: FIRST PRE-TRIAL SETTLEMENT AND SCHEDULING CONFERENCE**

1. Application.
2. Exemption from application of certain rules.
3. Scheduling and settlement to be held within twenty-one days.  
Speed track of cases.
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1. Parties to appear on day fixed in summons or on day fixed for hearing.
2. Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs.
3. Where neither party appears suit to be dismissed.
4. Plaintiff may bring fresh suit or court may restore suit.
5. Dismissal of suit where plaintiff, after summons returned unserved, fails for three month to apply for fresh summons.
6. Procedure when only plaintiff appears.
7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.
8. Procedure where defendant only appears.
9. Decree against plaintiff by default bars fresh suit.

10. Procedure in case of non-attendance of one or more of several plaintiffs.
11. Procedure in case of non-attendance of one or more of several defendants.
12. Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person.

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14. No decree or judgment to be set aside without notice to opposite party.

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1. Discovery by interrogatories.
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4. Interrogatories relating to corporations.
5. Objections to interrogatories by answer.
6. Setting aside and striking out interrogatories.
7. Filing of affidavit in answer.
8. No exception to be taken.
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10. Application for discovery of documents.
11. Affidavit of documents.
12. Production of documents.
13. Inspection of documents referred to in pleadings or affidavits.
14. Time for inspection when notice given.
15. Order for inspection.
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19. Using answers to interrogatories at trial.
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2. Notice to admit documents.
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2. Effect of non-production of documents.
3. Rejection of irrelevant or inadmissible documents.
4. Endorsements on documents admitted in evidence.
5. Endorsements on copies of admitted entries in books, accounts and records.
6. Endorsements on documents rejected as inadmissible in evidence.
7. Recording of admitted documents and return of rejected documents.
8. Court may order any document to be impounded.
9. Return of admitted documents.
10. Court may send for papers from its own records or from other courts.
11. Provisions as to documents also applicable to material objects.

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2. Issues of law and of fact.
3. Materials from which issues may be framed.
4. Court may examine witnesses or documents before framing issues.
5. Power to amend, and strike out, issues.
6. Questions of fact or law may by agreement be stated in form of issues.
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3. Parties at issue.
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### **ORDER XVI: SUMMONING AND ATTENDANCE OF WITNESSES**

1. Summons to attend, to give evidence or produce documents.
2. Expenses of witnesses.
3. Tender of expenses to witnesses.
4. Procedure where insufficient sum paid in and expenses of witnesses detained more than one day.
5. Time, place and purpose of attendance to be specified in summons.
6. Summons to produce document.
7. Power to require persons present in court to give evidence or produce document.
8. Summons, how served.
9. Time for serving summons.
10. Procedure where witness fails to comply with summons.
11. If witness appears attachment may be withdrawn.
12. Procedure if witness fails to appear.

13. Mode of attachment.
14. Court may of its own accord summon as witnesses strangers to suit.
15. Duty of persons summoned to give evidence or produce document.
16. Obligation of person summoned to attend hearing.
17. Application of rules 10 to 13.
18. Procedure where witness apprehended cannot give evidence or produce document.
19. No witness to be ordered to attend in person unless resident within certain limits.
20. Consequence of refusal of party to give evidence when called on by court.
21. Rules as to witnesses to apply to parties summoned.

#### **ORDER XVII: ADJOURNMENTS**

1. Court may grant time and adjourn hearing and costs of adjournment.
2. Procedure if parties fail to appear on day fixed.
3. Court may proceed notwithstanding either party failing to produce evidence, etc.
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5. Suit may be struck out if no step taken for three years.

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1. Right to begin.
- 1A. Assessors.
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2. Statement and production of evidence.
3. Evidence where there are several issues.
4. Witnesses to be examined in open court.
5. How evidence shall be taken.
6. Any particular question and answer may be taken down.
7. Questions objected to and allowed by court.
8. Remarks on demeanour of witnesses.
9. Power to direct shorthand record.
10. Power to deal with evidence taken before another judge or magistrate.
11. Power to examine witness immediately.
12. Court may recall and examine witness.
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3. Judgment to be signed.
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- 3B. Opinion of assessors.

4. Contents of judgments.
5. Court to state its decision on each issue.
6. Contents of decree.
7. Date of decree.
8. Procedure where judge or magistrate has vacated office before signing decree.
9. Decree for recovery of immovable property.
10. Decree for delivery of movable property.
11. Decree may direct payment by instalments.
12. Decree for possession and mesne profits.
13. Decree in administration suit.
14. Decree in pre-emption suit.
15. Decree in suit for dissolution of partnership.
16. Decree in suit for account between principal and agent.
17. Special directions as to accounts.
18. Decree in suit for partition of property or separate possession of a share therein.
19. Decree when set-off allowed and appeal from decree relating to set-off.
20. Certified copies of judgment and decree to be furnished.

#### ***Interest***

21. Interest on judgment debts.

### **ORDER XXI: EXECUTION OF DECREES AND ORDERS**

#### ***Payment under Decree***

1. Modes of paying money under decree.
2. Payment out of court to decree-holder.
- 2A. Satisfaction of orders against the Government.

#### ***Courts Executing Decrees***

3. Lands situate in more than one jurisdiction.
4. Mode of transfer.
5. Procedure where court desires that its own decree shall be executed by another court.
6. Court receiving copies of decree, etc., to file same without proof.
7. Execution of decree or order by court to which it is sent.
8. Execution by High Court of decree transferred by other court.

#### ***Application for Execution***

9. Application for execution.
10. Oral and written applications.
11. Application for attachment of movable property not in judgment debtor's possession.
12. Application for attachment of immovable property to contain certain particulars.
13. Application for execution by joint decree-holder.
14. Application for execution by transferee of decree.
15. Procedure on receiving application for execution of decree.
16. Execution in case of cross-decrees.

- 17. Execution in case of cross-claims under same decree.
- 18. Cross-decrees and cross-claims in mortgage suits.
- 18A. Continuous order for attachment in certain cases.
- 19. Simultaneous execution.

#### ***Notice before Execution***

- 20. Notice to show cause against execution in certain cases.
- 21. Procedure after issue of notice.

#### ***Process for Execution***

- 22. Process for execution.
- 23. Endorsement on process.

#### ***Stay of Execution***

- 24. When court may stay execution and power to require security from or impose conditions upon judgment debtor.
- 25. Liability of judgment debtor discharged.
- 26. Order of court which passed decree or of appellate court to be binding upon court applied to.
- 27. Stay of execution pending suit between decree-holder and judgment debtor.

#### ***Mode of Execution***

- 28. Decree for payment of money.
- 29. Decree for specific movable property.
- 30. Decree for specific performance, for restitution of conjugal rights, or for an injunction.
- 31. Execution of decrees for restitution of conjugal rights.
- 32. Decree for execution of document or endorsement of negotiable instrument.
- 33. Decree for delivery of immovable property.
- 34. Decree for delivery of immovable property when in occupancy of tenant.

#### ***Arrest and Detention in Prison***

- 35. Discretionary power to permit judgment debtor to show cause against detention in prison.
- 36. Warrant for arrest to direct judgment debtor to be brought up.
- 37. Request for arrest by telegram.
- 38. Subsistence allowance.
- 39. Proceedings on appearance of judgment debtor in obedience to notice or after arrest.

#### ***Attachment of Property***

- 40. Examination of judgment debtor as to his property.
- 41. Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined.
- 42. Attachment of movable property, other than agricultural produce, in possession of

- judgment debtor.
43. Attachment of agricultural produce.
  44. Provisions as to agricultural produce under attachment.
  45. Attachment of debt, share and other property not in possession of judgment debtor.
  46. Attachment of share in movables.
  47. Attachment of salary.
  48. Attachment of partnership property.
  49. Execution of decree against firm.
  50. Attachment of negotiable instruments.
  51. Attachment of property in custody of court or public officer.
  52. Attachment of decrees.
  53. Attachment of immovable property.
  54. Removal of attachment after satisfaction of decree.
  55. Order for payment of coin or currency notes to party entitled under decree.
  56. Determination of attachment.

#### ***Investigation of Claims and Objections***

57. Investigation of claims to, and objections to attachment of, attached property and postponement of sale.
58. Evidence to be adduced by claimant.
59. Release of property from attachment.
60. Disallowance of claim to property attached.
61. Continuance of attachment subject to claim of incumbrancer.
62. Saving of suits to establish right to attached property.

#### ***Sale Generally***

63. Power to order property attached to be sold and proceeds to be paid to person entitled.
64. Sales, by whom conducted and how made.
65. Proclamation of sales by public auction.
66. Mode of making proclamation.
67. Time of sale.
68. Adjournment or stoppage of sale.
69. Defaulting purchaser answerable for loss on re-sale.
70. Decree-holder not to bid for or buy property without permission.
71. Restriction on bidding or purchase by officer.

#### ***Sale of Movable Property***

72. Sale of agricultural produce.
73. Special provisions relating to growing crops.
74. Negotiable instruments and shares in corporations.
75. Sale by public auction.
76. Irregularity not to vitiate sale, but any person injured may sue.
77. Delivery of movable property, debts and shares.
78. Transfer of negotiable instruments and shares.
79. Vesting order in case of other property.

### ***Sale of Immovable Property***

80. What courts may order sales.
81. Postponement of sale to enable judgment debtor to raise amount of decree.
82. Deposit by purchaser and re-sale on default.
83. Time for payment in full of purchase money.
84. Procedure in default of payment.
85. Notification on re-sale.
86. Bid of co-sharer to have preference.
87. Application to set aside sale on deposit.
88. Application to set aside sale on ground of irregularity or fraud.
89. Application by purchaser to set aside sale on ground of judgment debtor having no saleable interest.
90. Sale, when to become absolute or be set aside.
91. Return of purchase money in certain cases.
92. Certificate to purchaser.
93. Delivery of property in occupancy of judgment debtor.
94. Delivery of property in occupancy of tenant.

### ***Resistance to Delivery of Possession to Decree-Holder or Purchaser***

95. Resistance or obstruction to possession of immovable property.
96. Resistance or obstruction by judgment debtor.
97. Resistance or obstruction by *bona fide* claimant.
98. Dispossession by decree-holder or purchaser.
99. *Bona fide* claimant to be restored to possession.
100. Rules not applicable to transferee *pendente lite*.
101. Orders conclusive subject to regular suit.

### **ORDER XXII: DEATH, MARRIAGE AND INSOLVENCY OF PARTIES**

1. No abatement by party's death if right to sue survives.
2. Procedure where one of several plaintiffs or defendants dies and right to sue survives.
3. Procedure in case of death of one of several plaintiffs or of sole plaintiff.
4. Procedure in case of death of one of several defendants or of sole defendant.
5. Determination of question as to legal representative.
6. No abatement by reason of death after hearing.
7. Suit not abated by marriage of female party.
8. When plaintiff's insolvency bars suit and procedure where assignee fails to continue suit or give security.
9. Effect of abatement or dismissal.
10. Procedure in case of assignment before final order in suit.
11. Application of Order to appeals.
12. Application or Order to proceedings in execution of decree or order.

### **ORDER XXIII: WITHDRAWAL AND ADJUSTMENT OF SUITS**

1. Withdrawal of suit or abandonment of part of claim.
2. Limitation law not affected by fresh suit.

3. Compromise of suit.
4. Proceedings in execution of decrees not affected.

#### **ORDER XXIV: PAYMENT INTO COURT**

1. Deposit by defendant of amount in satisfaction of claim.
2. Notice of deposit.
3. Interest on deposit not allowed to plaintiff after notice.
4. Procedure where plaintiff accepts deposit as satisfaction in full or in part.

#### **ORDER XXV: SECURITY FOR COSTS**

1. When security for costs may be required from plaintiff.
2. Effect of failure to furnish security.

#### **ORDER XXVI: COMMISSIONS**

##### ***Commissions to Examine Witnesses***

1. Cases in which court may issue commission to examine witness.
2. Order for commission.
3. Where witness resides within court's jurisdiction.
4. Persons for whose examination court may issue commission.
5. Commission or request to examine witness not within Tanzania.
6. Court to examine witness pursuant to commission.
7. Return of commission with depositions of witnesses.
8. When depositions may be read in evidence.

##### ***Commissions for Local Investigations***

9. Commissions to make local investigation.
10. Procedure of commissioner and evidential status of report and deposition in suit.

##### ***Commissions to Examine Accounts***

11. Commission to examine or adjust accounts.
12. Court to give commissioner necessary instructions; and evidential status of proceedings and report.

##### ***Commissions to Make Partitions***

13. Commission to make partition of immovable property.
14. Procedure of commissioner.

##### ***General Provisions***

15. Expenses of commission to be paid into court.
16. Powers of commissioners.
17. Attendance and examination of witnesses before commissioner.
18. Parties to appear before commissioner.

#### **ORDER XXVII: SUITS BY OR AGAINST MILITARY PERSONNEL**

1. Officers or soldiers who cannot obtain leave may authorise any person to sue or defend for them.
2. Person so authorised may act personally or appoint advocate.
3. Service on person authorised, or on his advocate, to be good service.

#### **ORDER XXVIII: SUITS BY OR AGAINST CORPORATIONS**

1. Subscription and verification of pleading.
2. Service on corporation.
3. Power to require personal attendance of officer of corporation.

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- 1A. Citation and application.

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## **SCHEDULES**

### **CHAPTER 33 THE CIVIL PROCEDURE CODE**

**An Act to provide for the procedure and related matters in civil proceedings.**

[1st January, 1967]  
[G.N. No. 410 of 1966]

Acts Nos.  
49 of 1966  
11 of 1976  
G.Ns. Nos.  
375 of 1966

363 of 1968  
376 of 1968  
79 of 1970  
228 of 1971  
23 of 1984  
509 of 1991  
422 of 1994  
140 of 1999

## **PART IA PRELIMINARY PROVISIONS (ss 1-6)**

### **1. Short title**

This Act may be cited as the Civil Procedure Code.

### **2. Application 1(1)**

Subject to the express provisions of any written law, the provisions of this Code shall apply to all proceedings in the High Court of the United Republic, courts of resident magistrates and district courts.

### **3. Interpretation**

In this Code, unless the context requires otherwise—

**"advocate"** has the meaning ascribed to it in the Advocates Act \*(2);

**"court"**, except in the expression "foreign court", means the High Court of the United Republic, a court of a resident magistrate or a district court presided over by a civil magistrate and references to a district court are references to a district court presided over by a civil magistrate;

**"decree"** means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final and it shall be deemed to include the rejection of a plaint and the determination of any question within section 38 or section 89, but shall not include—

- (a) an adjudication from which an appeal lies as an appeal from an order; or
- (b) any order of dismissal for default.

*Explanation:* A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;

**"decree-holder"** means any person in whose favour a decree has been passed or an order capable of execution has been made;

**"foreign court"** means a court situated beyond the limits of Tanzania which has no authority in Tanzania;

**"foreign judgment"** means the judgment of a foreign court;

**"High Court"** means the High Court of the United Republic;

**"judgment"** means the statement given by a judge or a magistrate of the grounds for a decree or order;

**"judgment debtor"** means any person against whom a decree has been passed or an order capable of execution has been made;

**"legal representative"** means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sue or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued;

**"mesne profits"** of property means those profits which the person in wrongful possession of such property actually received or might, with ordinary diligence, have received therefrom together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession;

**"movable property"** includes growing crops;

**"order"** means the formal expression of any decision of a civil court which is not a decree;

**"rules"** means the rules contained in the First and Second Schedules or made under sections 29, 45 or 82;

**"share in a corporation"** shall be deemed to include stock, debenture stock, debentures, or bonds; and

**"signed"**, save in the case of a judgment or decree, includes stamped.

#### **4. Subordination of courts**

For the purposes of this Code, every court of a resident magistrate and every district court is subordinate to the High Court, and every district court is subordinate to the court of the resident magistrate within the area of whose jurisdiction it is situate.

#### **5. Saving of procedure prescribed in other laws**

In the absence of any specific provision to the contrary, nothing in this Code shall be

deemed to limit or otherwise affect any special form of procedure prescribed by or under any other law for the time being in force.

## **6. Pecuniary jurisdiction**

Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any court jurisdiction over suits the amount or value of the subject matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction.

# **PART I**

## **JURISDICTION OF COURTS AND RES JUDICATA (ss 7-30)**

## **7. Jurisdiction of courts**

(1) Subject to this Act the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

(2) No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and a court may make binding declarations of right whether or not any consequential relief is or could be claimed.

## **8. Stay of suit**

No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in Tanzania having jurisdiction to grant the relief claimed.

*Explanation:* The pendency of a suit in a foreign court does not preclude the courts in Tanzania from trying a suit founded on the same cause of action.

## **9. Res judicata**

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

*Explanation I:* The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

*Explanation II:* For the purposes of this section, the competence of a court shall be determined irrespective of any provisions as to a right of appeal from the decision of such court.

*Explanation III:* The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

*Explanation IV:* Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

*Explanation V:* Any relief claimed in the plaint which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

*Explanation VI:* Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

## **10. Bar to further suit**

Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any court to which this Code applies.

## **11. When foreign judgment not conclusive**

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—

- (a) where it has not been pronounced by a court of competent jurisdiction;
- (b) where it has not been given on the merits of the case;
- (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of Tanzania in cases in which such law is applicable;
- (d) where the proceedings in which the judgment was obtained are opposed to natural justice;
- (e) where it has been obtained by fraud;
- (f) where it sustains a claim founded on a breach of any law in force in Tanzania.

## **12. Presumption as to foreign judgment**

The court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced

by proving want of jurisdiction.

### ***Place of Suing (ss 13-21)***

#### **13. Court in which suits may be instituted**

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.

#### **14. Suits to be instituted where subject matter situate**

Subject to the pecuniary or other limitations prescribed by any law, suits—

- (a) for the recovery of immovable property with or without rent or profits;
- (b) for the partition of immovable property;
- (c) for foreclosure, sale or redemption in the case of a mortgage of or a charge upon immovable property;
- (d) for the determination of any other right to, or interest in, immovable property;
- (e) for compensation for a wrong to immovable property; or
- (f) for the recovery of movable property actually under distraint or attachment,

shall be instituted in the court within the local limits of whose jurisdiction the property is situate:

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business or personally works for gain.

*Explanation:* In this section "property" means property situated in Tanzania.

#### **15. Suits for immovable property situate within jurisdiction of different courts**

Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different courts, the suit may be instituted in any court within the local limits of whose jurisdiction any portion of the property is situate if, in respect of the value of the subject matter of the suit, the entire claim is cognizable by such court.

#### **16. Place of institution of suit where local limits of jurisdiction of courts are uncertain**

- (1) Where it is alleged to be uncertain within the local limits of the jurisdiction of which of two

or more courts any immovable property is situate, any one of those courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction:

Provided that the suit is one with respect to which the court is competent as regards the nature and value of the suit to exercise jurisdiction.

(2) Where a statement has not been recorded under subsection (1), and an objection is taken before an appellate or revisional court that a decree or order in a suit relating to such property was made by a court not having jurisdiction where the property is situate, the appellate or revisional court shall not allow the objection unless in its opinion there was, at the time of the institution of the suit, no reasonable ground for uncertainty as to the court having jurisdiction with respect thereto and there has been a consequent failure of justice.

#### **17. Suits of compensation for wrongs to person or movables**

Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of the said courts.

#### **18. Other suits to be instituted where defendant resides or cause of action arises**

Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—

- (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain;
- (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the court is given or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
- (c) the cause of action, wholly or part, arises.

*Explanation I:* Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect any cause of action arising at the place where he has such temporary residence.

*Explanation II:* A corporation shall be deemed to carry on business at its sole or principal office in Tanzania, or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

## **19. Objections to jurisdiction**

No objection as to the place of suing shall be allowed by any appellate or revisional court unless such objection was taken in the court of first instance at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

## **20. Power to transfer suits which may be instituted in more than one court**

Where a suit may be instituted in any one of two or more district courts within the area of the jurisdiction of a court of a resident magistrate, and is instituted in one of such courts, not being the court of the resident magistrate—

- (a) if before any evidence has been taken all the parties to the suit consent to the suit being transferred to the court of such resident magistrate, the court in which the suit has been instituted shall record the fact of such consent and shall transmit the record to such resident magistrate who shall in due course try the suit;
- (b) on the application to such resident magistrate of a party to the suit and after notice to the parties and after consideration of objections (if any) of any party such resident magistrate may, at any stage before any evidence has been taken in the suit, transfer the suit for trial by himself; or
- (c) of his own motion, such resident magistrate may, at any stage before evidence has been taken in the suit, transfer the suit for trial by himself:

Provided that the exercise of the powers conferred by paragraph (b) or (c) hereof shall be subject to such limitations or conditions, if any, as the Chief Justice shall impose by rules of court and provided further that this section shall not affect the powers of the High Court under section 21.

## **21. General power of transfer and withdrawal**

(1) 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; or
- (b) withdraw any suit or other proceeding pending in any court subordinate to it, and—
  - (i) try or dispose of the same;
  - (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under subsection (1), the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either re-try it or proceed from the point at which it was transferred or withdrawn.

(3) The powers of transfer and withdrawal of suits 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 Magistrates' Courts Act \*(3).

### ***Institution of Suits (s 22)***

#### **22. Institution of suits**

Every suit shall be instituted by the presentation of a plaint or in such other manner as any be prescribed.

### ***Summons and Discovery (ss 23-27)***

#### **23. Summons to defendant**

Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in the manner prescribed.

#### **24. Service of summons where defendant resides outside jurisdiction of court**

(1) A summons may be sent for service to another court in Tanzania within the local limits of whose jurisdiction the defendant may be believed to be residing.

(2) The court to which such summons is sent shall, upon receipt thereof, proceed as if it has been issued by such court and shall then return the summons to the court of issue together with the record (if any) of its proceedings with regard thereto.

#### **25. Power to order discovery and the like**

Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on application of any party—

- (a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;
- (b) issue summonses to person whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid; or

- (c) order any fact to be proved by affidavit.

## **26. Summons to witness**

The provisions of sections 23 and 24 shall apply to summonses to give evidence or to produce documents or other material objects.

## **27. Penalty for default**

The court may compel the attendance of any person to whom a summons has been issued under section 25 and for that purpose may—

- (a) issue a warrant for his arrest;
- (b) attach and sell his property;
- (c) impose a fine upon him not exceeding one thousand shillings; or
- (d) order him to furnish security for his appearance and in default commit him as a civil prisoner.

### ***Judgment and Decree (s 28)***

## **28. Judgment and decree**

The court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow.

### ***Interest (s 29)***

## **29. Interest on judgment debts**

The Chief Justice may make rules prescribing the rate of interest which shall be carried by judgment debts and, without prejudice to the power of the court to order interest to be paid upon to date of judgment at such rates as it may deem reasonable, every judgment debt shall carry interest at the rate prescribed from the date of the delivery of the judgment until the same shall be satisfied.

### ***Costs (s 30)***

## **30. Costs**

(1) Subject to such conditions and limitations as may be prescribed and to the provisions of any law from the time being in force, the costs of, and incidental to, all suits shall be in the discretion of the court and the court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no

bar to the exercise of such powers.

(2) Where the court directs that any costs shall not follow the event, the court shall state its reasons in writing.

(3) The court may give interest on costs at any rate not exceeding seven percent per annum and such interest shall be added to the costs and shall be recoverable as such.

## **PART II EXECUTION (ss 31-55)**

### ***General (ss 31-32)***

#### **31. Application to orders**

The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders.

#### **32. Definition of "court which passed a decree"**

The expression "court which passed a decree" or words to that effect shall, in relation to the execution of decrees, unless there is any thing repugnant in the subject or context, be deemed to include—

- (a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the court of first instance; and
- (b) where the court of first instance has ceased to exist or to have jurisdiction to execute it, the court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

### ***Courts by which Decrees may be Executed (ss 33-37)***

#### **33. Courts by which decrees may be executed**

A decree may be executed either by the court which passed it or by the court to which it is sent for execution.

#### **34. Transfer of decree**

(1) The court which passed a decree may, on the application of the decree-holder, send it for execution to another court—

- (a) if the person against whom the decree is passed actually and voluntarily resides or carries on business or personally works for gain, within the local limits of the jurisdiction of such other court;

- (b) if such person has no property within the local limits of the jurisdiction of the court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other court;
- (c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the court which passed it; or
- (d) if the court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other court.

(2) The court which passed a decree may of its own motion send it for execution to any subordinate court of competent jurisdiction.

### **35. Result of execution proceedings to be certified**

The court to which a decree is sent for execution shall certify to the court which passed it the fact of such execution or, where the former court fails to execute the same, the circumstances attending such failure.

### **36. Powers of court in executing transferred decree**

The court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself; and all persons disobeying or obstructing the execution of the decree shall be punishable by such court in the same manner as if it had passed the decree and its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

### **37. Precepts**

(1) Upon the application of the decree-holder the court which passed the decree may, whenever it thinks fit, issue a precept to any other court which would be competent to execute such decree to attach any property belonging to the judgment debtor and specified in the precept.

(2) The court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree:

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the court which passed the decree or unless, before the determination of such attachment, the decree has been transferred to the court by which the attachment has been made and the decree-holder has applied for an order for the sale of such property.

### ***Questions to be determined by Court Executing Decree (s 38)***

### **38. Questions to be determined by the court executing decree**

(1) All questions arising between the parties to the suit in which the decree was passed, or their representative, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding any may, if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

### ***Limit of Time for Execution (s 39)***

#### **39. Execution barred in certain cases**

(1) Where an application to execute a decree, not being a decree granting an injunction, has been made no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from—

- (a) the date of the decree sought to be executed; or
- (b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.

(2) Nothing in this section shall be deemed—

- (a) to preclude the court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years where the judgment debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application; or
- (b) to limit or otherwise affect the operation of article 183 of the First Schedule to the Indian Limitation Act, as applied to Tanzania.

### ***Transferee and Legal Representatives (ss 40-41)***

#### **40. Transferee**

Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment debtor might have enforced against the original decree-holder.

#### **41. Legal representative**

(1) Where a judgment debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal

representative of the deceased.

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and for the purpose of ascertaining such liability, the court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

### ***Procedure in Execution (ss 42-43)***

#### **42. Powers of court to enforce execution**

Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree—

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale or by sale without attachment of any property;
- (c) by arrest and detention in prison;
- (d) by appointing a receiver; or
- (e) in such other manner as the nature of the relief granted may require.

#### **43. Enforcement of decree against legal representative**

(1) Where a decree is passed against a party as the legal representative of a deceased person and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

(2) Where no such property remains in the possession of the judgment debtor and he fails to satisfy the court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment debtor to the extent of the property in respect of which he has failed so to satisfy the court in the same manner as if the decree had been against him personally.

### ***Arrest and Detention (ss 44-47)***

#### **44. Arrest and detention**

(1) A judgment debtor may be arrested in execution of a decree at any hour and on any day and shall, as soon as practicable, be brought before the court, and the court may order his detention:

Provided that, for the purposes of making an arrest under this section—

- (a) no dwelling-house shall be entered after sunset and before sunrise;
- (b) no outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment debtor and he refuses or in any way prevents access thereto, but when the officer authorised to make the arrest has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe the judgment debtor is to be found; or
- (c) if the room is in the actual occupancy of a woman who is not the judgment debtor and who, according to her religion or local custom, does not appear in public, the officer authorised to make the arrest shall give notice to her that she is at liberty to withdraw and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest:

And provided further that where the decree in execution of which a judgment debtor is arrested is a decree for the payment of money, and the judgment debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

(2) Where a judgment debtor is arrested in execution of a decree for the payment of money and brought before the court, the court shall inform him that he may apply to be declared an insolvent, and that he will be discharged if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.

(3) Where a judgment debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the court, that he will within one month so apply and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the court shall release him from arrest and, if he fails so to apply and to appear, the court may either direct the security to be realised or commit him as a civil prisoner in execution of the decree.

#### **45. Subsistence allowance**

The Chief Justice may make rules prescribing scales of monthly allowances payable for the subsistence of judgment-debtors.

#### **46. Detention and release**

- (1) Every person detained as a civil prisoner in execution of a decree shall be so detained—
  - (a) where the decree is for the payment of a sum of money exceeding one hundred shillings, for a period of six months; and
  - (b) in any other case, for a period of six weeks:

Provided that he shall be released from such detention before the expiration of the said

period of six months or six weeks, as the case may be—

- (i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the prison;
- (ii) on the decree against him being otherwise fully satisfied;
- (iii) on the request of the person on whose application he has been so detained; or
- (iv) on the omission by the person on whose application he has been so detained to pay subsistence allowance:

Provided further that he shall not be released from such detention under clause (ii) or clause (iii) without the order of the court.

(2) A judgment debtor released from detention under this section shall not, merely by reason of his release, be discharged from his debt.

(3) Where a judgment debtor has been released from detention under this section before the expiration of the period of six months or six weeks, as the case may be, for which he was ordered to be detained, and the decree against him has not been fully satisfied he shall, if he was released on the request of the person on whose application he was detained but not otherwise, be liable to be re-arrested under the decree in execution of which he was detained.

(4) A judgment debtor who has been re-arrested under the provisions of subsection (3) of this section shall be detained as a civil prisoner for the remainder of the period of six months or six weeks, as the case may be, for which he would have been detained under the provisions of subsection (1) of this section if he had not been released from such detention under the proviso to that subsection:

Provided that he shall be released from such detention before the expiration of the remainder of the said period of six months or six weeks, as the case may be, in any of the circumstances specified in the first proviso to subsection (1) of this section.

#### **47. Release on grounds of illness**

(1) At any time after a warrant for the arrest of a judgment debtor has been issued, the court may cancel it on the ground of his serious illness.

(2) Where a judgment debtor has been arrested, the court may release him if in its opinion he is not in a fit state of health to be detained as a civil prisoner.

(3) Where a judgment debtor has been committed as a civil prisoner, he may be released—

- (a) by the officer in charge of the prison in which he is confined, on the ground of the existence of any infectious or contagious disease; or
- (b) by the committing court, or any court to which that court is subordinate, on the ground

of his suffering from any serious illness.

(4) A judgment debtor released under this section may be re-arrested but the period of his detention as a civil prisoner shall not in the aggregate exceed that prescribed by section 46.

### ***Attachment (ss 48-51)***

#### **48. Property liable to attachment and sale in execution of decree**

(1) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, banknotes, cheque, bills of exchange, promissory notes, Government securities, bonds or other securities for money debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, movable or immovable, belonging to the judgment debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment debtor or by another person in trust for him or on his behalf:

Provided that the following shall not be liable to such attachment or sale, namely—

- (a) the necessary wearing-apparel, cooking vessels, beds and bedding of the judgment debtor, his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman;
- (b) tools of artisans, and, where the judgment debtor is an agriculturist, his implements of husbandry and such cattle and seed-grain as may, in the opinion of the court, be necessary to enable him to earn his livelihood as such;
- (c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him;
- (d) any land used for agricultural purposes by a village, an Ujamaa Village, a co-operative society, or an individual whose livelihood is wholly dependent upon the use of such land;
- (e) any residential house or building, or part of a house or building occupied by the judgment debtor, his wife and dependant children for residential purposes;
- (f) books of account;
- (g) a mere right to sue for damages;
- (h) the salary of an employee to the extent of—
  - (i) the whole of the salary where it does not exceed one hundred and fifty shillings monthly;
  - (ii) one hundred and fifty shillings monthly where the salary exceeds one hundred and

fifty shillings and does not exceed two hundred and fifty shillings and does not exceed two hundred and twenty-five shillings monthly; or

- (iii) two-thirds of the salary in any other case;
- (i) the expense allowances of any employees;
- (j) an expectancy of succession by survivorship or other merely contingent or possible right or interest;
- (k) a right to future maintenance; or
- (l) any other property declared by any written law not be liable to attachment.

*Explanation:* The particulars mentioned in classes (f) and (g) are exempt from attachment whether before or after they are actually payable.

(2) Subject to the provisions of any written law, nothing in this section shall be deemed to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment) from attachment or sale in execution of decrees for rent of any such house, building, site or land.

(3) For the purposes of this section—

"expense allowance" means any sum paid to an employee by an employer which is a *bona fide* payment to meet an expense incurred or to be incurred by the employee wholly and exclusively in or for the purposes of the performance of the duties of his office or employment or in discharging functions authorised by the employer; and

"salary" includes any sum of money granted to an employee by an employer other than an expense allowance.

#### **49. Seizure of property in dwelling house**

(1) No person executing any process under this Code directing or authorising seizure of movable property shall enter any dwelling-house after sunset and before sunrise.

(2) No outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment debtor and he refuses or in any way prevents access thereto, but when the person executing any such process had duly gained access to any dwelling-house he may break open the door of any room in which he has reason to believe any such property to be.

(3) Where a room in a dwelling-house is in the actual occupancy of a woman who, according to her religion or local custom, does not appear in public, the person executing the process shall give notice to such woman that she is at liberty to withdraw; and, after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing, he may enter such

room for the purpose of seizing the property, using at the same time every precaution consistent with these provisions, to prevent its clandestine removal.

#### **50. Property attached in execution of decrees of several courts**

(1) Where property not in the custody of any court is under attachment in execution of decrees of more courts than one, the court which shall receive or realise such property and shall determine any claim thereto and any objection to the attachment thereof shall be the court of the highest grade, or, where there is no difference in grade between such courts, the court under whose decree the property was first attached.

(2) Nothing in this section shall be deemed to invalidate any proceeding taken by a court executing one of such decrees.

#### **51. Private alienation of property after attachment to be void**

Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment.

*Explanation:* For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

#### ***Sale (ss 52-53)***

#### **52. Purchaser's title**

Where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.

#### **53. Suit against purchaser not maintainable on ground of purchase being on behalf of plaintiff**

(1) No suit shall be maintained against any person claiming title under a purchase certified by the court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or behalf of someone through whom the plaintiff claims.

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third persons against the real owner.

#### ***Distribution of Assets (s 54)***

#### **54. Proceeds of execution sale to be rateably distributed among decree-holders**

(1) Where assets are held by a court and more persons than one have, before the receipt of such assets, made application to the court for the execution of decrees for the payment of money passed against the same judgment debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realisation, shall be rateably distributed among all such persons:

Provided that—

- (a) where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale;
- (b) where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the court may with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold;
- (c) where any immovable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—
  - (i) in defraying the expenses of the sale;
  - (ii) in discharging the amount due under the decree;
  - (iii) in discharging the interest and principal moneys due on subsequent incumbrance (if any); and,
  - (iv) rateably among the holders of decrees for the payment of money against the judgment debtor who have, prior to the sale of the property, applied to the court which passed the decree ordering such sale for execution of such decrees and have not obtained satisfaction thereof.

(2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

(3) Nothing in this section affects any right of the Government.

#### ***Resistance to Execution (s 55)***

#### **55. Resistance to execution**

Where the court is satisfied that the holder of a decree for the possession of immovable property or that the purchaser of immovable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment debtor or some

person on his behalf and that such resistance or obstruction was without any just cause, the court may, at the instance of the decree-holder or purchaser, order the judgment debtor or such other person to be detained as a civil prisoner for a term which may extend to thirty days and may further direct that the decree-holder or purchaser be put into possession of the property.

### **PART III INCIDENTAL PROCEEDINGS (ss 56-59)**

#### ***Commissions (ss 56-59)***

#### **56. Power of court to issue commissions**

Subject to such conditions and limitations as may be prescribed, the court may issue a commission—

- (a) to examine any person;
- (b) to make a local investigation;
- (c) to examine or adjust accounts; or
- (d) to make a partition.

#### **57. Commission to another court**

(1) A commission for the examination of any person may be issued to any court (other than the High Court) in Tanzania having jurisdiction in the place in which the person to be examined resides.

(2) Every court receiving a commission for the examination of any person under subsection (1) shall examine him or cause him to be examined pursuant thereto, and the commission, when it has been duly executed, shall be returned together with the evidence taken under it to the court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order.

#### **58. Letter of request**

In lieu of issuing a commission, the court may issue a letter request to examine a witness residing at any place outside Tanzania.

#### **59. Commissions issued by foreign courts**

The provisions as to the execution and return of commissions for the examination of witnesses shall apply to commissions issued by foreign courts for the examination of persons residing in Tanzania.

### **PART IV**

## **SUITS IN PARTICULAR CASES (ss 60-63)**

### ***Suits against Public Officers (s 60)***

#### **60. Exemption from arrest and personal appearance of public officers**

In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity—

- (a) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree; and
- (b) where the court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person.

### ***Suits by Aliens and Foreign States (ss 61-62)***

#### **61. When aliens may sue**

(1) Alien enemies residing in Tanzania with the permission of the Government and alien friends, may sue in the courts of Tanzania.

(2) No alien enemy residing in Tanzania without such permission, or residing in a foreign country, shall sue in any of such courts.

#### **62. When foreign State may sue**

(1) A foreign State which has been recognised by the Government of Tanzania may sue in any court of Tanzania if the object of the suit is to enforce a private right vested in the head of such State or in any officer of such State in his public capacity.

(2) Every court shall take judicial notice of the fact that a foreign State has or has not been recognised by the Government of Tanzania.

### ***Interpleader (s 63)***

#### **63. Where interpleader suit may instituted**

Where two or more persons claim adversely to one another the same debt, sum of money or other property, movable or immovable, from another person who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and of obtaining indemnity for himself:

Provided that where any suit is pending in which the rights of parties can properly be decided, no such suit of interpleader shall be instituted.

**PART V**  
**SPECIAL PROCEEDINGS (ss 64-67)**

***Arbitration (s 64)***

**64. Arbitration**

Save in so far as is otherwise provided by the Arbitration Act \*(4) or by any other law for the time being in force, all references to arbitration, whether by an order in a suit or otherwise, and all proceedings thereunder shall be governed by the provisions contained in the Second Schedule.

***Special Case (s 65)***

**65. Power to state case for opinion of court**

Where any person agrees in writing to state a case for the opinion of the court, then the court shall try and determine the same in the manner prescribed.

***Suits relating to Public Matters (ss 66-67)***

**66. Public nuisance**

(1) In the case of a public nuisance, the Attorney-General or two or more persons having obtained the consent in writing of the Attorney-General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

**67. Public charities**

In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the court is deemed necessary for the administration of any such trust, the Attorney-General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Attorney-General, may institute a suit, whether contentious or not, in the High Court to obtain a decree—

- (a) removing any trustee;
- (b) appointing a new trustee;
- (c) vesting any property in a trustee;
- (d) directing accounts and inquiries;

- (e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;
- (f) authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged;
- (g) settling a scheme; or
- (h) granting such further or other relief as the nature of the case may require.

**PART VI**  
**SUPPLEMENTAL PROCEEDINGS (ss 68-69)**

**68. Supplemental proceedings**

In order to prevent the ends of justice from being defeated the court may, subject to any rules in that behalf—

- (a) issue a warrant to arrest the defendant and bring him before the court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him as a civil prisoner;
- (b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property;
- (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof as a civil prisoner and order that his property be attached and sold;
- (d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property; or
- (e) make such other interlocutory orders as may appear to the court to be just and convenient.

**69. Compensation for obtaining arrest, attachment or injunction on insufficient grounds**

(1) Where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted under section 68—

- (a) it appears to the court that such attachment or injunction was applied for on insufficient grounds; or
- (b) the suit of the plaintiff fails and it appears to the court that there was no reasonable or probable ground for instituting the same,

the defendant may apply to the court and the court may, upon such application, award against the plaintiff by its order such amount, not exceeding two thousand shillings, as it deems a

reasonable compensation to the defendant for the expense or injury cause to him.

(2) An order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction.

## **PART VII APPEALS (ss 70-76)**

### ***Appeals from Decrees (ss 70-73)***

#### **70. Appeal from original decree**

(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed by a court of a resident magistrate or a district court exercising original jurisdiction.

(2) An appeal may lie from an original decree passed *ex parte*.

(3) No appeal shall lie from a decree passed by the court with the consent of the parties.

#### **71. Appeal from final decree where no appeal from preliminary decree**

Where any party aggrieved by a preliminary decree does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

#### **72. Decision where appeal heard by two or more judges**

(1) Where an appeal is heard by a Bench of two or more judges, the appeal shall be decided in accordance with the opinion of such judges or of the majority (if any) of such judges.

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed:

Provided that where the bench hearing the appeal is composed of two judges and the judges composing the bench differ in opinion on a point of law, they may state the point of law upon which they differ, and the appeal shall then be heard upon that point only by one or more of the other judges, and such point shall be decided according to the opinion of the majority (if any) of the judges who have heard the appeal including those who first heard it.

#### **73. No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction**

No decree shall be reversed or substantially varied, nor shall any case be remanded, on appeal, on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit not affecting the merits of the case or the jurisdiction of the court.

## ***Appeals from Orders (ss 74-75)***

### **74. Orders from which appeals lie**

An appeal shall lie to the High Court from the following orders of the courts of resident magistrates and district courts and, save as otherwise expressly provided in this Code or by any law for the time being in force, from no other orders—

- (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;
- (b) an order on an award stated in the form of a special case;
- (c) an order modifying or correcting an award;
- (d) an order filing or refusing to file an agreement to refer to arbitration;
- (e) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
- (f) an order filing or refusing to file an award in an arbitration without the intervention of the court;
- (g) an order under section 69;
- (h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention as a civil prisoner of any person except where such arrest or detention is in execution of a decree; or
- (i) any order made under rules from which an appeal is expressly allowed by rules.

### **75. Other orders**

Save as otherwise expressly provided, no appeal shall lie from any order made by a court; but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal.

## ***General Provisions relating to Appeals (s 76)***

### **76. Powers of the High Court on appeal**

(1) Subject to such conditions and limitations as may be prescribed, the High Court in the exercise of its appellate jurisdiction shall have power—

- (a) to determine a case finally;
- (b) to remit a case for re-trial;

- (c) to frame issues and refer them for trial; or
- (d) to take additional evidence or to require such evidence to be taken.

(2) Subject any conditions and limitations prescribed under subsection (1), the High Court shall have the same powers and shall perform, as nearly as may be, the same duties as are conferred and imposed by this Code on courts of original jurisdiction in respect of suits instituted therein.

## **PART VIII**

### **REFERENCE, REVIEW AND REVISION (ss 77-79)**

#### **77. Reference to High Court**

Subject to such conditions and limitations as may be prescribed, any court may state a case and refer the same for the opinion of the High Court and the High Court may make such order thereon as thinks fit.

#### **78. Review**

Subject to any conditions and limitations prescribed under section 77, 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) by a decree or order from which no appeal is allowed by this Code,

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.

#### **79. Revision**

(1) The High Court may call for the record of any case which has been decided by any court subordinate to it and in which no appeal lies thereto, and if such subordinate court appears—

- (a) to have exercised jurisdiction not vested in it by law; or
- (b) to have failed to exercise jurisdiction so vested; or
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit.

(2) Nothing in this section shall be construed as limiting the High Court's power to exercise revisional jurisdiction under the Magistrates' Courts Act \*(5) .

## **PART IX**

## **RULES (ss 80-82)**

### **80. Application of rules in First and Second Schedules**

Subject to this Act, the Rules set out in the First and Second Schedules shall apply to the matters provided for in this Code.

### **81. Powers of Chief Justice to make rules**

The Chief Justice may, with the consent of the Minister responsible for legal affairs, amend the First and Second Schedules.

### **82. Matters for which rules may provide**

(1) Rules made in accordance with the provisions of this Part may provide for any matter relating to the procedure of civil courts.

(2) In particular, and without prejudice to the generality of the powers conferred by subsection (1), and in addition to the powers conferred by sections 29 and 45, such rules may provide for all or any of the following matters, namely—

- (a) the service of summonses, notices and other process by post or in any other manner either generally or in any specified areas, and the proof of such service;
- (b) the maintenance and custody, while under attachment, of livestock and other movable property, the fees payable for such maintenance and custody, the sale of such livestock and property and the proceeds of such sale;
- (c) procedure in suits by way of counterclaim, and the valuation of such suits for the purposes of jurisdiction;
- (d) procedure in garnishee and charging orders either in addition to, or in substitution for, the attachment and sale of debts;
- (e) summary procedure—
  - (i) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising on a contract, express or implied, or on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only; or on a trust; or
  - (ii) in suits for the recovery of immovable property, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant;

- (f) procedure by way of originating summons;
- (g) consolidation of suits, appeals and other proceedings;
- (h) delegation to any Registrar, Deputy Registrar or District Registrar or other official of the court of any judicial, quasi-judicial, and non-judicial duties; and
- (i) all forms, registers, books, entries and accounts which may be necessary or desirable for the transaction of the business of courts.

**PART X**  
**MISCELLANEOUS PROVISIONS (ss 83-97)**

**83. Courts to respect privacy of women enjoined by religion or custom**

(1) Women who, according to their religion or local custom, do not appear in public shall, when appearing or required to appear in court pursuant to any process issued by the court, be accorded such facilities for maintaining their privacy as may be reasonable and practicable.

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process.

**84. Arrest other than in execution of decree**

The provisions of sections 44, 45 and 47 shall apply, so far as may be, to all persons arrested under this Code.

**85. Exemption from arrest under civil process**

(1) No judge, magistrate or other judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from, his court.

(2) Where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their advocates and recognised agents, and their witnesses, acting in obedience to a summons, shall be exempt from arrest under civil process other than process issued by such tribunal for contempt of court while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal.

(3) Nothing in subsection (2) shall enable a judgment debtor to claim exemption from arrest under an order for immediate execution or where such judgment debtor attends to show cause why he should not be committed to prison in execution of a decree.

**86. Procedure where person to be arrested or property to be attached is outside jurisdiction**

(1) Where an application is made that any person shall be arrested or that any property shall

be attached under any provision of this Code, not relating to the execution of decrees, and such person resides or such property is situate outside the local limits of the jurisdiction of the court to which the application is made the court may, in its discretion, issue a warrant of arrest or make an order of attachment and send to the court within the local limits of whose jurisdiction such person resides or such property is situate a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment or a notice that security for the payment of such amount has been given.

(2) The court receiving such copy and amount or notice shall cause the arrest or attachment to be made by its own officers and shall inform the court which issued or made such warrant or order of the arrest or attachment.

(3) The court making an arrest under this section shall send the person arrested to the court by which the warrant of arrest was issued, unless he shows cause to the satisfaction of the former court why he should not be sent to the latter court, or unless he furnishes sufficient security for his appearance before the latter court or for satisfying any decree that may be passed against him by that court, in either of which cases the court making the arrest shall release him.

#### **87. Assessors in causes of salvage, etc.**

(1) In any admiralty cause of salvage, towage or collision, the High Court may, if it thinks fit, and shall upon request of either party to such cause, summon to its assistance, in such manner as it may direct or as may be prescribed, two competent assessors, and such assessors shall attend and assist accordingly.

(2) Every assessor shall receive such fees for his attendance to be paid by such of the parties as the High Court may direct or as may be prescribed.

#### **88. Orders and notices to be in writing**

All orders and notices served on, or given to, any person under the provisions of this Code shall be in writing.

#### **89. Application for restitution**

(1) Where and in so far as a decree is varied or reversed, the court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which

could be obtained by application under subsection (1).

#### **90. Enforcement of liability of surety**

Where any person has become liable as surety—

- (a) for the performance of any decree or any part thereof;
- (b) for the restitution of any property taken in execution of a decree; or
- (c) for the payment of any money or for the fulfilment of any condition imposed on any person, under an order of the court in any suit or in any proceeding consequent thereon,

the decree or order may be executed against him to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 38, provided that such notices as the court in each case thinks sufficient has been given to the surety.

#### **91. Proceedings by or against representatives**

Save as otherwise provided by this Code or by any written law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

#### **92. Consent or agreement by persons under disability**

In all suits to which any person under disability is a party, any consent or agreement as to any proceeding shall, if given or made with the express leave of the court by the next friend or guardian for the suit, have the same force and effect as if such person were under no disability and had given such consent or made such agreement.

#### **93. Enlargement of time**

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Code, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

#### **94. Transfer of business**

Save as otherwise provided, where the business of any court is transferred to any other court, the court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the court from which the business was so transferred.

## **95. Saving of inherent powers of court**

Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

## **96. Amendments of judgments, decrees or orders**

Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission may, at any time, be corrected by the court either of its own motion or on the application of any of the parties.

## **97. General power to amend**

The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

## **PART XI REPEAL AND TRANSITIONAL PROVISIONS (ss 98-101)**

### **98.-100. Omitted**

[Omitted.]

### **101. Forms**

(1) Subject to any prescribed forms, the Chief Justice may approve for use forms for applications, proceedings, processes, notices, orders, decrees, precepts, memoranda, bonds, commissions, letters of request or other documents required to be prepared, executed, filed, issued or otherwise used in connection with proceedings under this Code.

(2) Where any form is prescribed or approved for use by the Chief Justice it shall be followed in all such cases to which it applies with such variations as the circumstances of the case require.

(3) All forms heretofore in use in connection with proceedings under the Indian Code of Civil Procedure, 1908, as in force in Tanzania shall, where applicable and subject to such variations as may be necessary, be deemed to be forms approved by the Chief Justice for use in connection with proceedings under this Code until replaced by forms prescribed or approved by the Chief Justice under subsection (1).

## **FIRST SCHEDULE THE CIVIL PROCEDURE RULES**

(Section 80)

## **1A. Citation**

These Rules may be cited as the Civil Procedure Rules.

### **ORDER I PARTIES TO SUITS**

#### **(a) Joinder of Parties**

##### **1. Who may be joined as plaintiffs**

All persons may join in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative where, if such persons brought separate suits, any common question of law or fact would arise.

##### **2. Power of court to order separate trials**

Where it appears to the court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the court may put the plaintiffs to their election or order separate trials or make such other order as may be expedient.

##### **3. Who may be joined as defendants**

All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative where, if separate suits were brought against such persons, any common question of law or fact would arise.

##### **4. Court may give judgment for or against one or more of joint parties**

Judgment may be given—

- (a) for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to; or
- (b) against such one or more of the defendants as may be found to be liable, according to their respective liabilities

##### **5. Defendant need not be interested**

It shall not be necessary that every defendant shall be interested as to all the reliefs claimed in any suit against him.

##### **6. Joinder of parties liable on same contract**

The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes.

#### **7. When plaintiff in doubt, from whom redress is to be sought**

Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.

#### **8. One person may sue or defend on behalf of all in same interest**

(1) Where there are numerous person having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested; but the court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit.

#### **9. Misjoinder and non-joinder of parties**

No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it.

#### **10. Suit in name of wrong plaintiff**

(1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff the court may, at any stage of the suit, if satisfied that the suit has been so instituted through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the court thinks just.

(2) The court may, at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) No person shall be added as a plaintiff using without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) Where a defendant is added the plaintiff shall, unless the court otherwise directs, be

amended in such manner as may be necessary; and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendant.

(5) Subject to the provisions of section 22 of the Law of Limitation Act \*(6) , the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

#### **11. Conduct of suit**

The court may give the conduct of the suit to such person as it deems proper.

#### **12. Appearance of one of several plaintiffs or defendants for others**

(1) Where there are more plaintiffs than one, any one or more of them may be authorised by any other of them to appear, plead or act for such other in any proceeding; and in like manner, where there are more defendants than one, any one or more of them may be authorised by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in court.

#### **13. Objections as to non-joinder or misjoinder**

All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all case where issues are settled, at or before such settlement unless the ground of objection has subsequently arisen; and any such objection not so taken shall be deemed to have been waived.

#### **(b) Third Party Procedure**

#### **14. Leave to file third party notice**

(1) Where in any suit a defendant claims against any person not a party to the suit (hereinafter referred to as "the third party")–

- (a) any contribution or indemnity; or
- (b) any relief or remedy relating to or connected with the subject matter of the suit and substantially the same as a relief or remedy claimed by the plaintiff,

the defendant may apply to the court for leave to present to the court a third party notice.

(2) An application under subrule (1) shall, unless the court otherwise directs, be made *ex parte* and be supported by an affidavit stating–

- (a) the nature of the claim made by the plaintiff in the suit;

- (b) the stage which proceedings in the suit have reached;
- (c) the nature of the claim made by the applicant against the third party and its relation to the plaintiff's claim against the applicant; and
- (d) the name and address of the third party.

(3) Where, upon an application made under subrule (1), the court is satisfied that the defendant's claim against the third party is in respect of a matter referred to in paragraph (a) or (b) of that subrule and that, having regard to all the circumstances of the case, it is reasonable and proper to grant leave to the defendant to present a third party notice, the court shall, upon such terms and conditions as it may think just, make an order granting the defendant leave to present a third party notice.

(4) An order granting leave to present a third party notice shall contain directions as to the period within which such notice may be presented and as to such other matters as the court may think just.

#### **15. Contents of notice**

Every third party notice shall state—

- (a) the nature of the plaintiff's case against the defendant;
- (b) the nature of the defendant's claim against the third party;
- (c) the reliefs claimed by the defendant against the third party;
- (d) the period within which the third party may present his defence; and
- (e) the consequences of the failure by the third party to present his defence within such a period.

#### **16. Service of notice on third party and other parties to the suit**

(1) The court shall cause to be served a copy of a third party notice presented to it on the third party in accordance with rules relating to service of summons.

(2) A copy of the third party notice shall also be served on each of the other parties to the suit in accordance with the provisions of rule 2 of Order VI as if such notice were a pleading other than a plaint.

#### **17. Defence by third party**

Where a third party notice has been served on the third party, the third party shall, if he wishes to dispute the plaintiff's claim in the suit against the defendant presenting the third party notice or his own liability to the defendant, within twenty-one days of the service of the third party notice upon him or such longer period as the court may have directed or as the court may,

on the application of the third party, direct, present to the court a written statement of his defence.

## **18. Directions**

(1) Where a third party has presented a written statement of defence the court shall on the application of the defendant presenting the third party notice or on the application of the third party or, where the third party has disputed the plaintiff's claim against the defendant, on the application of the plaintiff, or on its own motion, fix a date for the giving of directions and may on such date, if satisfied that there is a proper question to be tried as to the liability of the third party in respect of the claim made against him by the defendant, order the question of such liability to be tried in such manner, at or after the trial of the suit, as the court may direct or, if the court is not so satisfied, pass such decree or make such order as the nature of the case may require.

(2) The court shall cause a notice of the date of giving directions to be served on the defendant presenting the third party notice and on the third party and on such other parties to the suit as the court may direct, in accordance with the rules relating to service of summons.

## **19. Judgment against third party in default**

(1) Where a third party makes default in presenting his written statement of defence within the time allowed under rule 17 or having presented a written statement of defence, makes default in appearing on the date fixed for the giving of directions—

- (a) if the defendant presenting the third party notice suffers judgment by default, such defendant may at any time after satisfaction of that judgment or, with leave of the court, before satisfaction thereof, apply *ex parte* for judgment against the third party in respect of any contribution, indemnity or relief claimed in the notice and the court may, on such application and on *ex parte* proof by the defendant of his claim against the third party, enter such judgment against the third party as the nature of the suit may require;
- (b) if the defendant presenting the third party notice suffers judgment after trial of the suit against him, the court may at or after the trial of the suit enter such judgment for the defendant against the third party as the nature of the suit and the claim made in the third party notice may require:

Provided that execution of any decree passed consequent upon judgment being entered in accordance with this paragraph shall not be issued without leave of the court until after satisfaction by such defendant of the decree passed against him; or

- (c) if judgment by consent is entered against the defendant in favour of the plaintiff the court may, on application of the defendant and on *ex parte* proof by him of his claim against the third party, enter such judgment in favour of the defendant against the third

party as the nature of the suit may require:

Provided that execution of any decree passed against the third party consequent upon judgment being entered against him in accordance with this paragraph shall not be issued without leave of the court, until after satisfaction by such defendant of the decree passed against him; or

- (d) if the third party is the Attorney-General, the court shall, on the application for directions of the defendant presenting the third party notice, fix a date of which notice shall be given to the Attorney-General and on which the court may make any order, upon such terms as it may direct as to costs or otherwise, which it could make under the provisions of rule 18 or may enter such judgment against the third party as the nature of the suit may require.

(2) The court may at any time set aside or vary a judgment entered against a third party pursuant to the provisions of subrule (1) on such terms as it may think just.

## **20. Costs**

The court may decide all questions of costs between a third party and other parties to the suit, and may make such orders as to costs as it may think just.

## **21. Provisions of the Code and Law of Limitation to apply to third party proceedings**

Subject to the provisions of rules 14, 15, 16, 17, 18 and 19, the provisions of this Code and the provisions of the Law of Limitation Act \*(7) in relation to a third party notice and to proceedings begun thereby shall apply as if—

- (a) the third party notice were a summons to defend;
- (b) the defendant presenting the notice were a plaintiff and the third party were a defendant;
- (c) the date fixed for the giving of directions were a date fixed for the hearing of a suit; and
- (d) judgment entered against the third party in accordance with the provisions of rule 19 were an *ex parte* judgment entered against a defendant in a suit.

## **22. A third party may present a third party notice**

A third party served with a third party notice shall have the same right to present a third party notice against some other party not a party to the suit as if he were a defendant in that suit.

## **23. Co-defendant as a third party**

Where in any suit a defendant claims against another defendant in the same suit (hereinafter referred to as "the co-defendant")—

- (a) any contribution or indemnity;
- (b) any relief or remedy relating to or connected with any subject matter of the suit and substantially the same as a relief or remedy claimed by the plaintiff against the defendant,

such defendant may present a third party notice against the co-defendant in the same manner and subject to the same conditions as if the co-defendant were a third party and the same procedure shall be adopted for the determination of the claims made against the co-defendant as if the co-defendant were a third party.

## **ORDER II FRAME OF SUIT**

### **1. Frame of suit**

Every suit shall, as far as practicable, be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

### **2. Suit to include the whole claim, relinquishment of part of claim and omission to sue for one of several reliefs**

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court.

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterward sue for any relief so omitted.

*Explanation:* For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

### **2A. Omitted**

[Omitted.]

### **3. Joinder of causes of action**

(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same

defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

#### **4. Only certain claims to be joined for recovery of immovable property**

No cause of action shall, unless with the leave of the court, be joined with a suit for the recovery of immovable property, except—

- (a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;
- (b) claims for damages for breach of any contract under which the property or any part thereof is held; or
- (c) claims in which the relief sought is based on the same cause of action:

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property.

#### **5. Claims by or against executor, administrator or heir**

No claim by or against an executor, administrator or heir, as such shall be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir, or such as he was entitled to, or liable for, jointly with the deceased person whom he represents.

#### **6. Power of court to order separate trials**

Where it appears to the court that any causes of action joined in one suit cannot be conveniently tried or disposed of together, the court may order separate trials or make such other order as may be expedient.

#### **7. Objections as to misjoinder of causes of action**

All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and in all case where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

### **ORDER III RECOGNISED AGENTS AND ADVOCATES**

#### **1. Appearances, etc., may be in person, by recognised agent or by advocate**

Any appearance, application or act in or to any court, required or authorised by law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person or by his recognised agent or by an advocate duly appointed to act on his behalf or, where the Attorney-General is a party, by a public officer duly authorised by him in that behalf:

Provided that any such appearance shall, if the court so directs, be made by the party in person.

## **2. Recognised agents**

The recognised agents of parties by whom such appearances, applications and acts may be made or done are—

- (a) persons holding powers-of-attorney, authorising them to make appearances or applications and to do such acts on behalf of such parties;
- (b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorised to make and do such appearances, applications and acts.

### **2A. Certification by the Council for Legal Education**

Notwithstanding the provisions of rules 1 and 2, no advocate shall appear before a commercial court unless he is certified by the council for legal education as being knowledgeable in commercial law and practice, or has obtained permission from the Judge in charge of the Commercial Court to appear in respect of a specific case.

## **3. Service of process on recognised agent**

(1) Processes served on the recognised agent of a party shall be as effectual as if the same had been served on the party in person, unless the court otherwise directs.

(2) The provisions for the service of process on a party to a suit shall apply to the service of process on his recognised agent.

## **4. Advocate to produce written authority when required**

The court may require any advocate claiming to act on behalf of any party who has not appeared in person or by his recognised agent to produce, within such time as may be reasonable, a written authority signed by such party or his recognised agent authorising the advocate to act on behalf of such party.

## **5. Service of process on advocate**

Any process served on the advocate of any party or left at the office or ordinary residence of such advocate, and whether the same is for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the advocate represents and, unless the court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person.

## **6. Agent to accept service and appointment to be in writing and to be filed in court**

(1) Besides the recognised agents described in rule 2 any person residing within the jurisdiction of the court may be appointed an agent to accept service of process.

(2) Such appointment may be special or general and shall be made by an instrument in writing signed by the principal, and such instrument or, if the appointment is general, a certified copy thereof shall be filed in court.

## **ORDER IV INSTITUTION OF SUITS**

### **1. Suit to be commenced by plaintiff**

(1) Every suit shall be instituted by presenting a plaint to the court or such officer as it appoints in that behalf and, where the suit is instituted against the Government, delivering a copy of the plaint to the Attorney-General.

(2) Every plaint shall comply with the rules contained in Order VI and VIII, so far as they are applicable.

(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.

(4) It shall not be mandatory for a commercial case to be instituted in the Commercial Division of the High Court.

(5) Notwithstanding the provisions of Rule 10 of the High Court Registries Rules \*(8), and without prejudice to the exception under subrule (1) of Rule 7 of the High Court Registries Rules, all preliminary steps in the Commercial Division, including the decision as to whether or not the suit concerns a commercial case shall be determined by a judge and such suit shall not come up for mention except for the judge to make a rescheduling order in respect of the case.

### **2. Register of suits**

The court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits; and such entries shall be numbered in every year according to the order in which the plaints are presented.

### **3. Instituted suits to be assigned within four days**

A Judge or Magistrate in Charge of the Court shall within four days after the institution of a suit cause it to be assigned to a specific Judge or magistrate.

## **ORDER V ISSUE AND SERVICE OF SUMMONS**

### ***Issue of Summons***

#### **1. Summons**

When a suit has been duly instituted a summons may be issued to the defendant at the time when the suit is assigned to a specific judge or magistrate pursuant to the provisions of rule 3 of Order IV–

- (a) to appear and answer the claim on a day to be specified therein (hereinafter referred to as a summons to appear); or
- (b) if the suit is instituted in a court other than the High Court and the court so determines, to file, in accordance with subrule (2) of rule 1 of Order VIII, a written statement of defence to the claim (hereinafter referred to as a summons to file a defence):

Provided that no summons shall be issued under this rule when the defendant has appeared at the presentation of the plaint, has proved his identity to the satisfaction of the court and has admitted the plaintiff's claim:

Provided also that no summons shall be issued under this rule to the Attorney-General–

- (i) except on the application of the plaintiff made not less the fourteen days after the suit has been duly instituted; and
- (ii) unless the court is satisfied that a request made by the Attorney-General for a further and better statement of the nature of the claim, or for further and better particulars of any matter stated in the plaint, has been complied with or that no such request has been made.

#### **2. Summons to be signed and sealed**

Every summons shall be signed by the Judge or Magistrate or such officer as may be appointed by the Chief Justice in that behalf and shall be sealed with the seal of the court.

#### **3. Copy of plaint**

Every summons shall be accompanied by a copy of the plaint and copies of other documents as may be prescribed by the Chief Justice for the information of the defendant regarding the future conduct of the suit.

#### **4. Further directions in summons to appear**

A summons to appear issued by a court other than the High Court shall direct that the defendant shall produce on the day fixed for his appearance—

- (a) all documents in his possession or power upon which he intends to rely in supporting his case; and
- (b) all witnesses upon whose evidence he intends to rely in support of his case.

#### **5. Appearance of defendant**

Save where the court requires the personal appearance of the defendant, a defendant in respect of whom a summons to appear is issued may appear—

- (a) in person;
- (b) by an advocate duly instructed and able to answer all material questions relating to the suit; or
- (c) by an advocate accompanied by some person able to answer all such question;
- (d) where the Attorney-General is the defendant, by a public officer duly authorised by him in that behalf.

#### **6. Fixing day for appearance**

The day for the appearance of the defendant shall be fixed with reference to the current business of the court, the place of residence of the defendant and the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day.

#### **7 Personal appearance of the parties**

(1) Where the court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person in court on the day therein specified.

(2) Where the court sees reason to require the personal appearance of the plaintiff on the same day, it shall make an order for such appearance.

(3) The power of court to require the personal appearance of a party shall not be effected by the issue of a summons to file a defence, but where in any such case the court sees fit to require such personal appearance, it may issue a separate summons to that effect.

#### **8. No party to be ordered to appear in person unless resident within certain limits**

No party shall be ordered to appear in person unless he resides—

- (a) within the local limits of the court's ordinary jurisdiction; or
- (b) without such limits but at a place less than fifty miles or, where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the court is situate, less than two hundred miles distance from the court-house.

### ***Service of Summons***

#### **9. Delivery or transmission of summons for the service**

(1) Where the defendant resides within the jurisdiction of the court in which the suit is instituted or has an agent resident within that jurisdiction who is empowered to accept service of the summons, the summons shall, unless the court otherwise directs, be delivered or sent to the proper officer to be served by him or one of his subordinates.

(2) The proper officer may be an officer of a court other than that in which the suit is instituted and, where he is such an officer, the summons may be sent to him by post or in such other manner as the court may direct.

#### **10. Mode of service**

Service of summons shall be made within twenty-one days after it has been received by delivering or tendering a copy thereof signed by the judge, magistrate or such officer as the Chief Justice may appoint in this behalf and sealed with the seal of the Court.

#### **11. Service on several defendants**

Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant.

#### **12. Service to be on defendant in person when practicable or on his agent**

Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient.

#### **13. Service on agent by whom defendant carries on business**

(1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the court from which the summons is issued, service on any manager or agent who, at the time of service personally carries on such business or work for such person within such limits, shall be deemed good service.

(2) For the purpose of this rule the master of a ship shall be deemed to be the agent of the owner or charterer.

#### **14. Service on agent in charge in suits for immovable property**

Where in a suit to obtain relief respecting, or compensation for wrong to, immovable property, service cannot be made on the defendant in person, and the defendant has no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property.

#### **15 Where service may be made on any adult member of defendant's family**

Where in any suit the defendant is absent from his residence at the time when the service of the summons is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of the summons on his behalf, service may be made on any adult member of the family who is of sound mind, whether male or female, who, is residing with him.

*Explanation:* A servant is not a member of the family within the meaning of this rule.

#### **16. Person served to sign acknowledgement**

Where the serving officer delivers or tenders a copy of the summons to the defendant personally or to an agent or other person on his behalf, he shall require the person to whom the copy is so delivered or tendered to sign an acknowledgement of service endorsed on the original summons:

Provided that where the defendant, his agent or such other person refuses to sign the acknowledgement the serving officer shall leave a copy thereof with him and return the original to the court together with an affidavit stating that the person upon whom he served the summons refused to sign the acknowledgement, that he left a copy of the summons with such person and the name and address of the person (if any) by whom the person on whom the summons was served was identified.

#### **17. Procedure when defendant cannot be found**

Where the serving officer, after using all due and reasonable diligence, cannot find the defendant and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall within fourteen days of affixing such copy then return the original to the court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

#### **18. Endorsement of time and manner of service**

The serving officer shall, within fourteen days of service in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or

to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.

#### **19. Examination of serving officer**

Where a summons is returned under rule 17 the court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

#### **20. Substituted service**

(1) Where the court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that, for any other reason, the summons cannot be served in the ordinary way, the court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain or in such other manner as the court thinks fit.

(2) Service substituted by order of the court shall be as effectual as if it had been made on the defendant personally.

(3) Where service is substituted by order of the court, the court shall fix such time for the appearance of the defendant as the case may require.

#### **21. Service by post**

(1) Where the court is satisfied that to require a summons to be served on a defendant in the ordinary manner or by substituted service may cause undue delay and that the summons may more conveniently be served by post, the court may order that the summons be served by post.

(2) Where a summons has been sent to a defendant by post and the court is satisfied that under the provisions of rule 30 the service may be deemed to have been duly effected, the summons shall be deemed to have been served on the defendant as effectively as if it had been served on him personally.

(3) Where service is by post the court shall fix such time for appearance of the defendant as the case may require.

#### **22. Service of summons where defendant resides within jurisdiction of another court**

(1) The original and a copy of a summons may be sent by the court by which it is issued either by one of its officers or by post to any court (not being the High Court) having jurisdiction

in the place where the defendant resides.

(2) Where the defendant resides within the jurisdiction of the High Court of Zanzibar the original and a copy of the summons may be sent by the court by which it is issued either by one of its officers or by post to the High Court of Zanzibar or to any court subordinate thereto within whose jurisdiction the defendant resides for service on the defendant.

### **23. Duty of court to which summons is sent**

The court to which the original and a copy of a summons are sent under rule 22 shall, upon receipt thereof, proceed as if the summons had been issued by such court and shall then within fourteen days of completing such proceeding return the summons to the court of issue, together with the record (if any) of its proceedings with regard thereto.

### **24. Service on defendant in prison**

Where the defendant is confined in a prison, the original and a copy of the summons shall be delivered or sent to the officer in charge of the prison for service on the defendant.

### **25. Service on officers of the Government and local government authorities**

Where the defendant is an officer of the government or of a local government authority the court may, if it appears to it that the summons may be most conveniently so served, send the original and a copy of the summons for service on the defendant to the head of the office in which he is employed.

### **26. Service on members of the armed forces**

When the defendant is a member of the armed forces of the Republic, the court shall send the original and a copy of the summons for service on the defendant to his commanding officer.

### **27. Duty of person to whom summons is delivered or sent for service**

(1) Where the original and a copy of a summons are delivered or sent to any person for service under rule 24, rule 25 or rule 26, such person shall be bound to serve the summons, if possible and within fourteen days after service to return it under his signature, with a written acknowledgement of the defendant or, if there is no such acknowledgement, with a certificate of service, and such signature or certificate shall be deemed to be evidence of service.

(2) Where from any cause service is impossible, the summons shall be returned to the court with a full statement of such cause and of the steps taken to procure service, and such statement shall be deemed to be evidence of non-service.

### **28. Service where defendant resides in a neighbouring country**

Where the defendant is believed to reside in Kenya, Uganda, Malawi or Zambia and has no

known agent in Tanzania empowered to accept service, the summons may be served—

- (a) where the plaintiff has furnished the postal address of the defendant, by post;
- (b) in any other case, through the courts of the country in which the defendant is believed to reside; or
- (c) by leave of the court, by the plaintiff or his agent.

### **29. Service where defendant resides outside Tanzania**

Where the defendant is believed to reside outside Tanzania, elsewhere than in Kenya, Uganda, Malawi or Zambia and has no known agent in Tanzania empowered to accept service, the court may, on the application of the plaintiff, order that service of the summons be effected—

- (a) by posts;
- (b) by the plaintiff or his agent; or
- (c) through the courts of the country in which the defendant is believed to reside.

### **30. Service by post, when effective**

Service by post may be deemed to have been duly effected if—

- (a) the summons is returned by the defendant endorsed with an acknowledgement of receipt;
- (b) a letter or other document is received from the defendant acknowledging or indicating that he received the summons; or
- (c) evidence is produced that a postal packet was received by the defendant, supported by a certificate of an officer of the court that the postal packet contained the summons.

### **31. Service by the plaintiff or his agent**

Service by the plaintiff or his agent may be deemed to have been duly effected if an affidavit is filed by the person who effected the service—

- (a) that he personally served the summons on the defendant;
- (b) that the defendant was personally known to him or was identified to him by a person named in the affidavit; and
- (c) exhibiting the summons or a copy thereof endorsed by the defendant with an acknowledgement of service or giving the reasons why no such acknowledgement could be obtained.

### **32. Service through the courts of other counties**

Service through the courts of the country in which the defendant is believed to reside may be deemed to have been duly effected if the summons is returned by any such court with an endorsement that it has been served.

### **33. Procedure for procuring service through courts of other countries**

(1) Where the court of a resident magistrate or a district court has ordered the service of a summons to be effected through the courts of any country, other than Kenya, Uganda, Malawi or Zambia, in which the defendant is believed to reside, it shall remit to the Registrar of the High Court at Dar es Salaam, and where the High Court has so ordered, the Registrar shall issue, a summons, together with two copies thereof and two copies of a translation thereof in the language of the country in which the summons is to be served, if that language is other than English, and the Registrar shall thereupon send those documents together with a certificate as to the sum of money deposited or secured to cover the expenses of service, to the Principal Secretary to the Ministry for the time being responsible for legal affairs—

- (a) Where leave has been given for service to be effect in a country with which a convention has been made by the United Republic concerning the service of civil processes, for transmission to the representative of the United Republic in that country or as the convention may otherwise provide; or
- (b) for transmission to the Government of the country in which leave has been given for service to be effected, with a letter of request that service be effected through the courts of that country.

(2) Where the defendant is believed to reside in Kenya, Uganda, Malawi or Zambia the court which issued the summons may send the original and a copy thereof for service direct to any court having civil jurisdiction in the place where the defendant is believed to reside.

(3) A summons shall not be sent for service through the courts of any other country unless there has been deposited with the court or secured a sum sufficient in the opinion of the court to cover the expenses of service.

## **ORDER VI PLEADING GENERALLY**

### **1. Pleading**

"Pleading" means a plaint or a written statement of defence (including a written statement of defence filed by a third party) and such other subsequent pleadings as may be presented in accordance with rule 13 of Order VIII.

### **2. Service of pleading on parties to the suit**

(1) Where any pleading is presented to the court the party presenting the pleading shall–

- (a) in the case of plaint, present to the court such additional number of copies of the plaint as there may be defendants to enable the court to serve a copy of the plaint on each of the defendants; and
- (b) in the case of any other pleading–
  - (i) prior to the presentation of the pleading, serve or cause to be served on each of the other parties to the suit a copy of such pleading; or
  - (ii) at the time of such presentation present to the court such additional number of copies of the pleading as there may be other parties to the suit who have not been served with them in accordance with provisions of subparagraph (i), and the court shall cause to be served on each of such parties a copy of such pleading.

(2) A party to a suit shall be deemed to have been served with a copy of a pleading under the provisions of subparagraph (b) of subrule (1) where such copy is served on the person who has entered appearance on behalf of such party or on his advocate.

### **3. Pleading to state material facts and not evidence**

Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively; and dates, sums and numbers may be expressed in figures.

### **4. Particulars to be given where necessary**

In all case in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence and in all other case in which particulars may be necessary to substantiate any allegation, such particulars (with dates and items if necessary) shall be stated in the pleading.

### **5. Further and better statements or particulars**

A further and better statement of the nature of the claim or defence or further and better particulars of any matter stated in any pleading may in all cases be ordered, upon such terms, as to costs and otherwise as may be just.

### **6. Condition precedent**

Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; subject thereto, an averment of the performance or occurrence of all conditions

precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading.

#### **7. Departure**

No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

#### **8. Denial of contract**

Where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract.

#### **9. Effect of document to be stated**

Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

#### **10. Malice, knowledge, etc.**

Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

#### **11. Notice**

Wherever it is material to allege notice to any person of any fact, matter of thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, are material.

#### **12. Implied contract or relation**

Wherever any contract or any relation between any person is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversation or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstance, he may state the same in the alternative.

#### **13. Presumption of law**

Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied (e.g. consideration from a bill of exchange where the plaintiff sues only

on the bill, and not for the consideration as a substantive ground of claim).

#### **14. Pleading to be signed**

Every pleading shall be signed by the party and his advocate (if any); provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorised by him to sign the same or to sue or defend on his behalf.

#### **15. Verification of pleadings**

(1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case.

(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verified upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

#### **16. Striking out pleading**

The court may, at any stage of the proceedings, order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit.

#### **17. Amendment of pleading**

The court may at any stage of the proceedings allow either party to alter or amend his pleading in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

#### **18. Failure to amend after order**

If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the court.

### **ORDER VII PLAINT**

## **1. Particulars to be contained in plaint**

The plaint shall contain the following particulars–

- (a) the name of the court in which the suit is brought;
- (b) the name, description and place of residence of the plaintiff;
- (c) the name, description and place of residence of the defendant, so far as they can be ascertained;
- (d) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;
- (e) the facts constituting the cause of action and when it arose;
- (f) the facts showing that the court has jurisdiction;
- (g) the relief which the plaintiff claims;
- (h) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and
- (i) a statement of the value of the subject matter of the suit for the purposes of jurisdiction and of court fees, so far as the case admits.

## **2. In money suits, precise amount of money to be stated**

Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed:

Provided that where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaint shall state approximately the amount sued for.

## **3. Where the subject matter of the suit is immovable property, identification required**

Where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it and, in case such property can be identified by a title number under the Land Registration Act \*(9) , the plaint shall specify such title number.

## **4. When plaintiff sues as representative**

Where the plaintiff sues in a representative character the plaint shall show not only that he has an actual existing interest in the subject matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it.

## **5. Defendant's interest and liability to be shown**

The plaint shall show that the defendant is or claims to be interested in the subject matter, and that he is liable to be called upon to answer the plaintiff's demand.

#### **6. Ground of exemption from limitation law**

Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed.

#### **7. Relief to be specifically stated**

Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the court may think just to the same extent as if it had been asked for; and this rule shall apply to any relief claimed by the defendant in his written statement.

#### **8. Relief founded on separate grounds**

Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly.

#### **9. List of documents**

(1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it.

(2) The clerk of court shall sign such list if, on examination, he finds it to be correct.

#### **10. Return of plaint and procedure on returning plaint**

(1) 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.

(2) On returning a plaint the judge or magistrate, shall endorse thereon the date of its presentation and return, the name of the party presenting it and a brief statement of the reasons for returning it.

#### **11. Rejection of plaint**

The plaint shall be rejected in the following cases—

- (a) where it does not disclose a cause of action;
- (b) where the relief claimed is undervalued and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so;
- (c) where the suit appears from the statement in the plaint to be barred by any law:

Provided that where a plaintiff does not disclose a cause of action or where the suit appears from the statement in plaintiff to be barred by any law and the court is satisfied that if the plaintiff is permitted to amend the plaintiff, the plaintiff will disclose a cause of action or, as the case may be, the suit will cease to appear from the plaintiff to be barred by any law, the court may allow the plaintiff to amend the plaintiff subject to such conditions as to costs or otherwise as the court may deem fit to impose.

## **12. Procedure on rejecting plaintiff**

Where a plaintiff is rejected the judge or magistrate shall record an order to that effect with the reasons for such order.

## **13. Where rejection of plaintiff does not preclude presentation of fresh plaintiff**

The rejection of the plaintiff on any of the grounds set out in rule 11 shall not of its own force preclude the plaintiff from presenting a fresh plaintiff in respect of the same cause of action.

### ***Documents Relied on in Plaintiff***

## **14. Production of document on which plaintiff sues**

(1) Where a plaintiff sues upon a document in his possession or power, he shall produce it in court when the plaintiff is presented and shall at the same time deliver the document or a copy thereof to be filed with the plaintiff.

### ***List of other documents***

(2) Where the plaintiff relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaintiff.

## **15. Statement in case of documents not in plaintiff's possession or power**

Where any such document is not in the possession or power of the plaintiff, he shall, if possible state in whose possession or power it is.

## **16. Suits on lost negotiable instruments**

Where the suit is founded upon a negotiable instrument and it is proved that the instrument is lost and an indemnity is given by the plaintiff, to the satisfaction of the court, against the claims of any other person upon such instrument, the court may pass such decree as it would have passed if the plaintiff had produced the instrument in court when the plaintiff was presented, and had at the same time delivered a copy of the instrument to be filed with the plaintiff.

## **17. Production of shop book and original entry to be marked and returned**

(1) Save in so far as is otherwise provided by the Evidence Act \*(10), where the document

on which the plaintiff sues is an entry in a shop book or other account in his possession or power, the plaintiff shall produce the book or account at the time of filing the plaint, together with a copy of the entry on which he relies.

(2) The court or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification; and, after examining and comparing the copy with the original shall, if it is found correct, certify it to be so and return the book to the plaintiff and cause the copy to be filed.

### **18. Inadmissibility of document not produced when plaint filed**

(1) A document which ought to be produced in court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the court, be received in evidence on his behalf at the hearing of the suit.

(2) Nothing in this rule applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory.

## **ORDER VIII WRITTEN STATEMENT, SET-OFF AND COUNTERCLAIM**

### **1. Written statement of defence**

(1) Where a summons to appear has been issued, the defendant may, and if so required by the Court shall, within seven days before the first hearing, present a written statement of his defence.

(2) Where a summons to file a defence has been issued and the defendant wishes to defend the suit, he shall, within twenty-one days of the date of service of the summons upon him present to the court a written statement of his defence:

Provided that the Court may, within twenty-one days of expiration of the prescribed period, grant an extension of time for presentation of the written statement of defence on application by the defendant.

### **2. New facts must be specially pleaded**

The defendant must raise by his pleading all matters which show the suit not be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.

### **3. Denial to be specific**

It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

#### **4. Evasive denial**

Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

#### **5. Specific denial**

Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:

Provided that the court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

#### **6. Particulars of set-off to be given in written statement and effect of set-off**

(1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, within period of twenty-one days of being served with the summons present a written statement containing the particulars of the debt sought to be set-off:

Provided that a written statement shall not contain particulars of—

- (a) any debt, where the suit is brought for the recovery of taxes, duties or penalties;
- (b) a debt arising out of a right or claim to repayment in respect of any taxes, duties or penalties.

(2) The written statement shall have the same effect as a plaint in a cross-suit so as to enable the court to pronounce a final judgment in respect of both the original claim and the set-off; but this shall not affect the lien, upon the amount decreed, of any advocate in respect of the costs payable to him under the decree.

(3) The rule relating to a written statement by a defendant shall apply to a written statement in answer to a claim of set-off.

## **7. Defence of set-off founded on separate grounds**

Where the defendant relies upon several distinct grounds of defence or set-off founded upon separate and distinct facts, they shall be stated as far as may be, separately and distinctly.

## **8. New ground of defence**

Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off may be raised by the defendant or plaintiff, as the case may be, in his written statement.

## **9. Counterclaim**

(1) Where in any suit the defendant alleges that he has any claim or is entitled to any relief or remedy against the plaintiff in respect of a cause of action accruing to the defendant before the presentation of a written statement of his defence the defendant may, in his written statement of defence, state particulars of the claim made or relief or remedy sought by him:

Provided that a written statement of defence shall not state—

- (a) any particulars of claim where the suit is brought for the recovery of taxes, duties or penalties;
- (b) particulars of any claim to repayment in respect of any taxes, duties or penalties.

(2) Where a counterclaim is set-up in a written statement of defence, the counterclaim shall be treated as a cross-suit and the written statement shall have the same effect as a plaint in a cross-suit, and the provisions of Order VII shall apply *mutatis mutandis* to such written statement as if it were a plaint.

## **10. Counterclaim against plaintiff and third party**

(1) Where a defendant, by a written statement, sets up any counterclaim which raises questions between himself and the plaintiff along with another person (whether or not a party to the suit), he may join that person as a party against whom the counterclaim is made.

(2) Where a defendant joins a person as party against whom a counterclaim is made he shall add to the title of the written statement of defence a further title similar to the title in a plaint setting forth the name of such person and a copy of such written statement of defence together with a notice requiring such person, should he wish to defend the defendant's counterclaim, to file his written reply in answer to the claim within the period specified in rule 11 shall be served on him as if such notice were summons and such counterclaim were a plaint.

## **11. Reply to counterclaim**

(1) Where a defendant sets up a counterclaim, the plaintiff and the person (if any) who is joined as a party against whom the counterclaim is made, shall each, if he wishes to dispute the

counterclaim, present to the court a written reply containing a statement of his defence in answer to the counterclaim within twenty-one days from the date of the service upon him of the counterclaim.

(2) The rules relating to a written statement of defence by a defendant shall apply to a reply by the plaintiff or a person joined as a party against whom a counterclaim is made.

## **12. Court may order separate trial of counterclaim**

Where a defendant has set up a counterclaim the court may, if it is of the opinion that the subject matter of the counterclaim ought for any reason to be disposed of by a separate suit, order the counterclaim to be struck out or order it to be tried separately or make such other order as may be expedient.

## **13. Subsequent pleadings**

No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off or counterclaim shall be presented except by the leave of the court and upon such terms as the court thinks fit, but the court may at a pre-trial conference require a written statement or additional written statement from any of the parties and fix a time for presenting the same:

Provided that where a defendant has presented a written statement of defence in accordance with a summons to file a defence the plaintiff may, without obtaining leave of the court, present a reply to the written statement of defence within seven days after the written statement of defence or, where there are two or more defendants, the last of the written statements of defence, shall have been served upon him in accordance with the provisions of rule 2 of Order VI.

## **14. Failure to present written statement of defence**

(1) Where any party has been required to present a written statement under subrule (1) of rule 1 or a reply under rule 11 of this order and fails to present the same within the time fixed by the court, the court shall pronounce judgment against him or make such order in relation to the suit or counterclaim, as the case may be, as it thinks fit.

(2) In any case in which a defendant who is required under subrule (2) of rule 1 to present his written statement of defence fails to do so within the period specified in the summons or, where such period has been extended in accordance with the proviso to that subrule, within the period of such extension, the court may—

- (a) where the claim is for a liquidated sum not exceeding one thousand shillings, upon proof by affidavit or oral evidence of service of the summons, enter judgment in favour of the plaintiff without requiring him to prove his claim;
- (b) in any other case, fix a day for *ex parte* proof and may pronounce judgment in favour

of the plaintiff upon such proof of his claim.

(3) Notwithstanding anything in this rule, where the Attorney-General is required to present a written statement of defence or a reply and fails to present the same within the time fixed by the court or within the period specified in the summons or, where the period has been extended by the court, within the period of such extension, the plaintiff or the defendant, as the case may be, may apply in writing for leave to adduce *ex parte* proof of his claim or counterclaim and the court shall thereupon fix a day for the hearing of the application and shall direct that notice of the application and of such day be given to the Attorney-General.

(4) Where the Attorney-General appears at the hearing of an application under subrule (3) hereof and assigns good cause for the non-presentation of the written statement of defence or the reply, the court shall, upon such terms as it may direct as to costs or otherwise, extend or further extend the period within which the written statement of defence or reply shall be presented and in any other case the court may pronounce judgment upon *ex parte* proof of the claim or may make such order in relation to the suit or counterclaim, as the case may be, as it thinks fit.

#### **15. When all pleadings presented**

As soon as the written statement of defence or, if there are more defendants than one, the last written statement of defence, and the reply (if any) thereto, or the last reply if there are more plaintiffs than one, or other pleadings have been presented, the case shall be deemed to be ready for hearing and a day shall be fixed by the court accordingly unless the provisions of Orders IX and X apply to the case.

### **ORDER VIII A FIRST PRE-TRIAL SETTLEMENT AND SCHEDULING CONFERENCE**

#### **1. Application**

The rules provided under this order shall not apply to the following—

- (a) a suit in which summons to appear is issued to the defendant under paragraph (a) of rule 1 under Order V and no written statement of defence is filed pursuant to the provisions of subrule (1) of rule 1 under Order VIII; or
- (b) a suit in a non-contentions matter.

#### **2. Exemption from application of certain rules**

The Chief Justice may by Notice published in the *Gazette*, exempt any part of the High Court or any subordinate court from the application of any rule or rules under this Order either in respect of all cases or a particular class of cases for a specified period of time.

#### **3. Scheduling and settlement to be held within twenty-one days**

(1) In every case assigned to a specific judge or magistrate, a first scheduling and settlement conference attended by the parties or their recognised agents or advocates shall be held and presided over by such judge or magistrate within a period of 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.

(2) In ascertaining the speed track of the case, the presiding judge or magistrate, shall after consultation with the parties or their recognised agents or advocates, determine the appropriate speed track for such a case and 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.

(2A) No alternative dispute resolution procedure shall be 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*.

### ***Speed track of cases***

(3) The appropriate speed track of a cases shall be determined as follows—

- (a) Speed Track One shall be reserved for cases considered by the judge or magistrate to be fast cases, capable of being or are required in the interests of justice to be concluded fast within a period not exceeding ten months from commencement of the case;
- (b) Speed Track Two shall be reserved for cases considered by the judge or magistrate to be normal cases capable of being or are required in the interests of justice to be concluded within a period not exceeding twelve months from commencement of the case;
- (c) Speed Track Three shall be reserved for cases considered by the judge or magistrate to be complex cases capable of being or are required in the interests of justice to be concluded within a period not exceeding fourteen months;
- (d) Speed Track Four shall be reserved for cases considered by the judge or magistrate to be special cases which fall in none of the three abovementioned categories but which nonetheless need to be concluded within a period not exceeding twenty-four months.

#### **4. Prohibition of further amendment to an order**

Where a scheduling conference order is made, no departure from or amendment of such order shall be allowed unless the court is satisfied that such departure or amendment is necessary in the interests of justice and the party in favour of whom such departure or amendment is made shall bear the costs of such departure or amendment, unless the court

directs otherwise.

## **5. Orders against defaulting party**

Where a party to a case or the party's recognised agent or advocate fails without good cause to comply with a scheduling order, or to appear at a conference held under subrule (1) of rule 3 or is substantially unprepared to participate in such conference, the Court shall make such orders against the defaulting or unprepared party, agent or advocate as it deems fit, including an order for costs, unless there are exceptional circumstances for not making such orders.

## **6. Prohibition of adjournment of conference**

No conference held under subrule (1) of rule 3 shall be adjourned except for reasons beyond the control of the parties or the court.

## **7. Sessions of pre-trial conference**

The court may hold more than one sessions of the pre-trial conference for purposes of dealing with all matters required to be dealt with in any case at such a conference.

# **ORDER VIII B FINAL PRE-TRIAL SETTLEMENT AND SCHEDULING CONFERENCE**

## **1. Application**

The rules provided under this Order shall not apply to—

- (a) a suit in which summons to appear is issued to the defendant under paragraph (a) or rule 1 Order V, and no written statement of defence is filed pursuant to subrule (1) of rule 1 Order VIII;
- (b) a suit in a non-contentious matter.

## **2. Exemption from application of any rule under this order**

The Chief Justice may, by Notice published in the *Gazette*, exempt any part of the High Court or any subordinate court from the application of any rule or rules under this order either in respect of all cases or a particular class of cases for a specified period of time.

## **3. Final pre-trial conference**

(1) Where, after full compliance with the directions made under subrule (2) of rule 3 of Order VIIIA, the case remains unresolved, a final pre-trial settlement and scheduling conference shall be held, presided over by the judge or magistrate assigned to try the case for the purpose of giving the parties a last chance to reach an amicable settlement of the case and for enabling the Court to schedule the future events and steps which are bound or likely to arise in the conduct of the case, including the date or dates of trial.

(2) In making a final pre-trial conference order, the court shall be guided by the Speed Track to which the specific case is allocated.

(3) The final pre-trial settlement and scheduling conference shall be held within a period not exceeding thirty days, forty days or sixty days from the time of full compliance with the first pre-trial conference order in respect of cases allocated to Speed Track One, Two or Three respectively.

(4) Where an amicable settlement of the case is not reached pursuant to the provisions of subrule (1) of this rule, the judge or magistrate presiding at such conference, shall, after consultation with the parties or their recognised agents or advocates, make a final pre-trial conference order therein framing the issues according to provisions of Order XVII of this Code, and fixing the trial date or dates and generally providing for matters necessary for the expeditious trial of the case according to the relevant Speed Track.

## **ORDER VIII C**

### **ARBITRATION, NEGOTIATIONS AND MEDIATION PROCEDURE**

#### **1. Directions to be made by the Chief Justice**

Where negotiation or mediation or other similar alternative procedure for resolving the matters in dispute between the parties is directed by the court under a scheduling order made under subrule (2) of rule 3 of Order VIIIA or under subrule (1) or rule 3 of Order VIIIB, such negotiation, mediation or similar alternative procedure, other than arbitration, shall be conducted in accordance with directions issued by the Chief Justice.

#### **2. Procedure on arbitration**

Any matter in dispute referred to arbitration under a court order shall be dealt with as provided for under the Second Schedule to this Code.

## **ORDER IX**

### **APPEARANCE OF PARTIES AND CONSEQUENCES OF NON-APPEARANCE**

#### **1. Parties to appear on day fixed in summons or on day fixed for hearing**

When a summons to appear has been issued on the day fixed in the summons for the defendant to appear or where a summons to file defence has been issued and a day for the hearing is fixed in accordance with the provisions of rule 15 of Order VIII, on the day so fixed for hearing, the parties shall be in attendance at the court-house in person or by their respective recognised agents or advocate, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the court.

#### **2. Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs**

Where on such day as aforesaid it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, the court may make an order that the suit be dismissed:

Provided that no such order shall be made although the summons has not been served upon the defendant, if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent.

### **3. Where neither party appears suit to be dismissed**

Where neither party appears when the suit is called on for hearing the court may make an order that the suit be dismissed.

### **4. Plaintiff may bring fresh suit or court may restore suit**

Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply for an order to set the dismissal aside, and if he satisfies the court that there was sufficient cause for his not paying the court-fee and postal charges (if any) required within the time fixed before the issue of the summons, or for his non-appearance, as the case may be, the court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

### **5. Dismissal of suit where plaintiff after summons returned unserved, fails for three months to apply for fresh summons**

(1) Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails for a period of twenty-one days from the date of the return made to the court by the officer ordinarily certifying to the court returns made by the serving officers, to apply for the issue of a fresh summons the court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the court that—

- (a) he has failed after using his best endeavours to discover the residence of the defendant who has not been served; or
- (b) such defendant is avoiding service of process; or
- (c) there is any other sufficient cause for extending the time, in which case the court may extend the time for making such application for such period as it thinks fit.

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

### **6. Procedure when only plaintiff appears**

(1) Where the plaintiff appears and the defendant does not appear when the suit is called for hearing then—

- (i) if the defendant is the Attorney-General and it is proved that the summons was duly served, the plaintiff may apply for leave to proceed *ex parte* and the court shall thereupon fix a day for the hearing of the application and shall direct that notice of the application and of such day be given to the Attorney-General;
- (ii) where the Attorney-General appears at the hearing of an application under this paragraph and assigns good cause for his previous non-appearance, he may, upon such terms as the court may direct as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for hearing the suit;
- (iii) if it is not proved that the summons was duly served, the court shall direct a second summons to be issued and served on the defendant; or
- (iv) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the court shall postpone the hearing of the suit to a future day to be fixed by the court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the court shall order the plaintiff to pay the costs occasioned by the postponement.

#### **7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance**

Where the court has adjourned the hearing of the suit *ex parte* and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the court may direct as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

#### **8. Procedure where defendant only appears**

Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the court shall make an order that the suit be dismissed unless the defendant admits the claim, or part thereof, in which case the court shall pass a decree against the defendant upon such admission and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

#### **9. Decree against plaintiff by default bars fresh suit**

(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action, but he may apply for an order to set the dismissal aside and, if he satisfies the court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit and shall appoint a

day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

#### **10. Procedure in case of non-attendance of one or more of several plaintiffs**

Where there are more plaintiffs than one, and one or more of them appear and the others do not appear the court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared or make such order as it thinks fit.

#### **11. Procedure in case of non-attendance of one or more of several defendants**

Where there are more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed and the court shall, at the time or pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear:

Provided that if the Attorney-General is a defendant who does not appear, the provisions of paragraph (ii) of subrule (1) of rule 6 shall apply to such non-appearance.

#### **12. Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person**

Where a plaintiff or defendant who has been ordered to appear in person does not appear in person or who is without sufficient cause to the satisfaction of the court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively, who do not appear.

### ***Setting Aside Decrees Ex Parte***

#### **13. Setting aside decree or judgment *ex parte* against defendant**

(1) In any case in which a decree is passed *ex parte* against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.

(2) Where judgment has been entered by a court pursuant to paragraph (ii) of subrule (1) of rule 6 of this Order or subrule (2) of rule 14 of Order VIII it shall be lawful for the court, upon application being made by an aggrieved party within twenty-one days from the date of the judgment, to set aside or vary such judgment upon such terms as may be considered by the

court to be just:

Provided that where a decree has been issued prior to such application being made, the provisions of the Law of Limitation Act \*(11) shall apply.

#### **14. No decree or judgment to be set aside without notice to opposite party**

No decree or judgment shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party or the persons who has entered appearance on behalf of such party.

### **ORDER X EXAMINATION OF PARTIES BY THE COURT**

#### **1. Ascertainment whether allegations in pleadings are admitted or denied**

At the first hearing of the suit the court shall ascertain from each party or his advocate whether he admits or denies such allegations of facts as are made in the plaint or written statement (if any) of the apposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made and the court shall record such admissions and denials.

#### **2. Oral examination of party or companion of party**

At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in court, or any person able to answer any material questions relating to the suit by whom such party or his advocate is accompanied, may be examined orally by the court; and the court may, if it thinks fit, put in the course of such examination questions suggested by either party.

#### **3. Substance of examination to be written**

The substance of the examination shall be reduced to writing by the judge or magistrate and shall form part of the record.

#### **4. Consequence of refusal or inability of advocate to answer**

(1) Where the advocate of any party who appears by an advocate or any such person accompanying an advocate as is referred to in rule 2 refuses or is unable to answer any material question relating to the suit which the court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.

(2) If such party fails without lawful excuse to appear in person on the day so appointed, the court may pronounce judgment against him or make such order in relation to the suit as it thinks

fit.

## **ORDER XI DISCOVERY AND INSPECTION**

### **1. Discovery by interrogatories**

In any suit the plaintiff or defendant, by leave of the court, may deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer:

Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose:

Provided also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

### **2. Particular interrogatories to be submitted**

On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the court and in deciding upon such application, the court shall take into account any offer which may be made by the party sought to be interrogated to deliver particulars, or to make admission, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the court shall consider necessary either for disposing fairly of the suit or for saving costs.

### **3. Costs of interrogatories**

In adjusting the costs of the suit inquiry shall, at the instance of any party, be made into the propriety of exhibiting such interrogatories; and if it is the opinion of the taxing officer or of the court, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the cost occasioned by the said interrogatories and the answer thereto shall be paid in any event by the party in fault.

### **4. Interrogatories relating to corporations**

Where any party to a suit is a corporation or a body of persons, whether incorporated or not, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation or body, and an order may be made accordingly.

### **5. Objections to interrogatories by answer**

Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant

or not exhibited *bona fide* for the purpose of the suit, or that the matters inquired into are not sufficiently material at that stage, or on any other grounds, may be taken in the affidavit in answer.

## **6. Setting aside and striking out interrogatories**

Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories.

## **7. Filing of affidavit in answer**

Interrogatories shall be answered by affidavit to be filed within ten days or within such other time as the court may allow.

## **8. No exception to be taken**

No exception shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the court.

## **9. Order to answer or answer further**

Where any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the court for an order requiring him to answer, or to answer further, as the case may be and an order may be made requiring him to answer or answer further, either by affidavit or by *viva voce* examination, as the court may direct:

Provided that no order shall be made requiring a person to answer or answer further where any enactment or rule of law authorises or requires the refusal to answer any question on the ground that the answering of the question would be injurious to the public interest.

## **10. Application for discovery of documents**

Any party may, without filing any affidavit, apply to the court for an order directing any other party to any suit to make discovery on oath of documents which are or have been in his possession or power, relating to any matter in question therein and on the hearing of such application the court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at the stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit:

Provided that discovery shall not be ordered when and so far as the court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs:

Provided also that discovery shall not be ordered where there is produced to the court a certificate under the hand of a Minister that, in his opinion, discovery, either generally or in relation to a certain document or a certain class of documents, would be injurious to the public

interest.

#### **11. Affidavit of documents**

The affidavit to be made by a party against whom such order as is mentioned in rule 10 has been made, shall specify which (if any) of the documents therein mentioned he objects to produce.

#### **12. Production of documents**

It shall be lawful for the court, at any time during the pendency of any suit to order the production, by any party thereto upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the court shall think right; and the court may deal with such documents when produced, in such manner as shall appear just:

Provided that production shall not be ordered of a document where any enactment or rule of law authorises or requires the withholding of the document on the ground that the disclosure of the document would be injurious to the public interest.

#### **13. Inspection of documents referred to in pleadings or affidavits**

Every party to a suit shall be entitled at any time to give notice to any other party in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice or his advocate, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the court that such document relates only to his own title, he being a defendant to the suit or that he had some other cause or excuse which the court shall deem sufficient for not complying with such notice, in which case the court may allow the same to be put in evidence on such terms as to costs and otherwise as the court shall think fit.

#### **14. Time for inspection when notice given**

The party to whom such notice is given shall, within ten days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his advocate, or in the case of banker's books or other books of account or books in constant use for the purpose of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground.

#### **15. Order for inspection**

(1) Where the party served with notice under rule 14 omits to give such notice of a time for inspection or objects to give inspection or offers inspection elsewhere than at the office of his advocate the court may, on the application of the party desiring it, make an order for inspection

in such place and in such manner as it may think fit:

Provided that the order shall not be made when and so far as the court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

(2) Any application to inspect documents, except such as are referred to in the pleadings, particulars or affidavits of the party against whom the application is made or disclosed in his affidavits of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them and that they are in the possession or power of the other party. The court shall not make such order for inspection of such documents when and so far as the court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

(3) Notwithstanding anything contained in this rule, an order for inspection of documents shall not be made where there is produced to the court a certificate under the hand of a Minister that in his opinion, inspection would be injurious to the public interest.

## **16. Verified copies**

(1) Where inspection of any business books is applied for, the court may, if it thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations:

Provided that, notwithstanding that such copy has been supplied, the court may order inspection of the book from which the copy was made.

(2) Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the court to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

(3) The court may, on the application of any party to a suit at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party, other than the Attorney-General to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been in his possession or power; and, if not then in his possession when he parted with the same and what has become thereof.

(4) An application made under subrule (3) shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or power the document or documents specified in the application and that they relate to the matters in question in the suit or to some of them.

## **17. Premature discovery**

Where the party from whom discovery of any kind or inspection is sought objects to the same or any part thereof the court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined, first, and reserve the question as to the discovery or inspection.

#### **18. Non-compliance with order for discovery**

Where any party fails to comply with any order to answer interrogatories or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the court for an order to that effect and an order may be made accordingly.

#### **19. Using answers to interrogatories at trial**

Any party may, at the trial of a suit, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer:

Provided that in such case the court may look at the whole of the answers and, if it shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, it may direct them to be put in.

#### **20. Application of Order to minors**

This Order shall apply to minor plaintiffs and defendants, and to the next friends and guardians for the suit of persons under disability.

### **ORDER XII ADMISSIONS**

#### **1. Notice of admission of case**

Any party to a suit may give notice, by his pleading or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.

#### **2. Notice to admit documents**

Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit after such notice, the costs of proving any such documents shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the court otherwise directs and no costs of proving any document shall be allowed unless such notice is given except where the omission to give the notice is, in the

opinion of the court, a saving of expense.

### **3. Notice to admit facts**

Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing, call on any other party to admit, for the purposes of the suit only, any specific fact or facts mentioned in such notice; and in case of refusal or neglect to admit the same within six days after service for such notice, or within such further time as may be allowed by the court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the court otherwise directs:

Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice:

Provided also that the court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

### **4. Judgment on admissions**

Any party may at any stage of a suit, where admissions of fact have been made either on the pleading, or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for determination of any other question between the parties; and the court may upon such application made such order, or give such judgment, as the court may think just.

### **5. Affidavit of signature**

An affidavit of the advocate or his clerk, of the due signature of any admission made in pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admission, if evidence thereof is required.

### **6. Evidence of notice to produce documents**

An affidavit of the advocate or his clerk, of the service of any notice to produce and of the time when it was served, with a copy of the notice to produce, shall in all case be sufficient evidence of the service of the notice and of the time when it was served.

### **7 Costs**

If a notice under rule 6 is a notice to admit or produce specified documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice.

## **ORDER XIII PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS**

## **1. Documentary evidence to be produced at first hearing**

(1) The parties or their advocates shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely and which has not already been filed in court, and all documents which the court has ordered to be produced.

(2) The court shall receive the document so produced provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

## **2. Effect of non-production of documents**

No documentary evidence in the possession or power of any party which should have been, but has not been, produced in accordance with the requirements of rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the court for the non-production thereof; and the court receiving any such evidence shall record the reasons for so doing.

## **3. Rejection of irrelevant or inadmissible documents**

The court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

## **4. Endorsements on documents admitted in evidence**

(1) Subject to the provisions of the subrule (2), there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely—

- (a) the number and title of the suit;
- (b) the name of the person producing the document;
- (c) the date on which it was produced; and
- (d) a statement of its having been so admitted;

and the endorsement shall be signed or initialled by the judge or magistrate.

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under rule 5, the particular aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the judge or magistrate.

## **5. Endorsements on copies of admitted entries in books, accounts and records**

(1) Save in so far as is otherwise provided by the Evidence Act \*(12), where a document admitted in evidence in the suit is an entry in a letter-book or a shop-book or other account in current use, the party on whose behalf the book or account is produced may furnish a copy of

the entry.

(2) Where such a document is an entry in a public record produced from a public office or by a public officer, or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the court may require a copy of the entry to be furnished—

- (a) where the record, book or account is produced on behalf of a party, then by that party; or
- (b) where the record, book or account is produced in obedience to an order of the court acting of its own motion, then by either or any party.

(3) Where a copy of an entry is furnished under the provisions of this rule, the court shall, after causing the copy to be examined, compared and certified in manner mentioned in rule 17 of Order VII, mark the entry and cause the book, account or record in which it occurs to be returned to the person producing it.

#### **6. Endorsements on documents rejected as inadmissible in evidence**

Where a document relied on as evidence by either party is considered by the court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (a), (b) and (c) of subrule (1) of rule 4 together with a statement of its having been rejected, and the endorsement shall be signed or initialled by the Judge or magistrate.

#### **7. Recording of admitted documents and return of rejected documents**

(1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit.

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them.

#### **8. Court may order any document to be impounded**

Notwithstanding anything contained in rule 5 or rule 7 of this Order or in rule 17 of Order VII, the court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the court for such period and subject to such conditions as the court thinks fit.

#### **9. Return of admitted documents**

(1) Any person whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the document is impounded under rule 8, be entitled to receive back the same—

- (a) where the suit is one in which an appeal is not allowed, when the suit has been

disposed of; or

- (b) where the suit is one in which an appeal is allowed, when the court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or, if an appeal has been preferred, when the appeal has been disposed of:

Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the original and undertakes to produce the original if required to do so:

Provided also that no document shall be returned which, by force of the decree, has become wholly void or useless.

(2) On the return of a document admitted in evidence, a receipt shall be given by the person receiving it.

#### **10. Court may send for papers from its own records or from other courts**

(1) The court may of its own motion, and may in its discretion upon the application of any of the parties to a suit, send for, either from its own records or from any other court, the record of any other suit or proceeding, and inspect the same.

(2) Every application made under this rule shall (unless the court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice.

(3) Nothing contained in this rule shall be deemed to enable the court to use in evidence any document which under the law of evidence would be inadmissible in the suit.

#### **11. Provisions as to documents also applicable to material objects**

The provisions herein contained as to documents shall, as far as may be, apply to all other material objects producible as evidence.

### **ORDER XIV SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES OF LAW OR ON ISSUES AGREED UPON**

#### **1. Framing of issues**

(1) Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other.

(2) Material propositions are those propositions of law or fact which plaintiff must allege in

order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds—

- (a) issues of fact; and
- (b) issues of law.

(5) At the first hearing of the suit the court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material proposition of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

## **2. Issues of law and of fact**

Where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

## **3. Materials from which issues may be framed**

The court may frame the issues from all or any of the following materials—

- (a) allegations made on oath by the parties, or by any person present on their behalf, or made by the advocates of such parties;
- (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit;
- (c) the contents of documents produced by either party.

## **4. Court may examine witnesses or documents before framing issues**

Where the court is of opinion that the issues cannot be correctly framed without the examination of some person not before the court or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is, by summons or other process.

## **5. Power to amend, and strike out, issues**

(1) The court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit; and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

## **6 Questions of fact or law may by agreement be stated in form of issues**

Where the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon finding of the court in the affirmative or the negative of such issue—

- (a) a sum of money specified in the agreement or to be ascertained by the court, or in such manner as the court may direct, shall be paid by one of the parties to the other of them, or that one of them shall be declared entitled to some right or subject to some liability specified in the agreement;
- (b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them; or as that other may direct; or
- (c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute.

## **7. Court, if satisfied that agreement was executed in good faith, may pronounce judgment**

Where the court is satisfied, after making such inquiry as it deems proper—

- (a) that the agreement was duly executed by the parties;
- (b) that they have a substantial interest in the decision of such question as aforesaid; and
- (c) that the same is fit to be tried and decided,

it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by court and shall, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement; and, upon the judgment so pronounced, a decree shall follow.

## **ORDER XV DISPOSAL OF THE SUIT AT FIRST HEARING**

### **1. Parties not at issue**

Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the court may at once pronounce judgment.

## **2. One of several defendants not at issue**

Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants.

## **3. Parties at issue**

(1) Where the parties are at issue on some question of law or of fact, and issues have been framed by the court as hereinbefore provided, if the court is satisfied that no further argument or evidence than the parties at once adduce is required upon such issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the court may proceed to determine such issues and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly.

(2) Where the finding is not sufficient for the decision, the court shall postpone the further hearing of the suit and shall fix a day for the production of such further evidence or for such further argument as the case requires.

## **4. Failure to produce evidence**

Where a summons to appear has been issued by a court other than the High Court and either party fails without sufficient cause to produce the evidence on which he relies, the court may at once pronounce judgment, or may, if it thinks fit, after framing and recording issues, adjourn the suit for the production of such evidence as may be necessary for its decision upon such issues.

# **ORDER XVI SUMMONING AND ATTENDANCE OF WITNESSES**

## **1. Summons to attend, to give evidence or produce documents**

At any time after the suit is instituted, the parties may obtain, on application to the court, or to such officer as it appoints in this behalf, summonses to whose attendance is required either to give persons evidence or to produce documents.

## **2. Expenses of witnesses**

(1) The party applying for a summons shall, before the summons is granted and within a period to be fixed, pay into court such sum of money as appears to the court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the court in which he is required to attend, and for one day's attendance.

(2) In determining the amount payable under this rule the court may, in the case of any

person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.

(3) Where the court is subordinate to the High Court regard shall be had, in fixing the scale of such expenses, to any rules made in that behalf.

### **3. Tender of expenses to witnesses**

The sum so paid into court shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

### **4. Procedure where insufficient sum paid in and expenses of witnesses detained more than one day**

(1) Where it appears to the court or to such officer as it appoints in this behalf that the sum paid into court is not sufficient to cover such expenses or reasonable remuneration, the court may direct such further sum to be paid to the person summoned as appears to be necessary on that account and, in case of default in payment, may order such sum to be levied by attachment and sale of the movable property of the party obtaining the summons; or the court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person.

(2) Where it is necessary to detain the person summoned for a longer period than one day the court may, from time to time, order the party at whose instance he was summoned to pay into court such sum as is sufficient to defray the expenses of his detention for such further period and, in default of such deposit being made, may order such sum to be levied by attachment and sale of the movable property of such party; or the court may discharge the person summoned without requiring him to give evidence or may both order such levy and discharge such person.

### **5. Time, place and purpose of attendance to be specified in summons**

Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend and also whether his attendance is required for the purpose of giving evidence or to produce a document or for both purposes; and any particular document which the person summoned is called on to produce shall be described in the summons with reasonable accuracy.

### **6. Summons to produce document**

Any person may be summoned to produce a document without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same.

## **7. Power to require persons present in court to give evidence or produce document**

Any person present in court may be required by the court to give evidence or to produce any document then and there in his possession or power.

Provided that the court shall not require a person to produce a document where any enactment or rule of law authorises or requires the withholding of the document on the ground that the production of the document would be injurious to the public interest.

## **8. Summons, how served**

Every summons under this Order shall be served as nearly as may be in the same manner as a summons to a defendant and the rules in Order V as to proof of service shall apply in the case of all summonses served under this rule.

## **9. Time for serving summons**

Service shall in all cases be made in sufficient time before the time specified in the summons for the attendance of the person summoned, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required.

## **10. Procedure where witness fails to comply with summons**

(1) Where a person to whom a summons has been issued either to attend to give evidence or to produce a document fails to attend or to produce the document in compliance with such summons, the court shall, if the certificate of the serving officer has not been verified by affidavit, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another court, regarding the service or non-service of the summons.

(2) Where the court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the court may in its discretion, issue a warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under rule 12.

## **11. If witness appears attachment may be withdrawn**

Where, at any time after the attachment of his property, such person appears and satisfies the court—

- (a) that he did not, without lawful excuse, fail to comply with the summons or intentionally avoid service; and
- (b) where he has failed to attend at the time and place named in a proclamation issued under the rule 10, that he had no notice of such proclamation in time to attend,

the court shall direct that the property be released from attachment, and shall make such order as to the costs of the attachment as it thinks fit.

## **12. Procedure if witness fails to appear**

The court may, where such person does not appear, or appears but fails so to satisfy the court, impose upon him, such fine not exceeding one thousand shillings as it thinks fit, having regard to his condition in life and all the circumstance of the case, and may order his property, or any part thereof, to be attached and sold or, if already attached under rule 10, to be sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine if any:

Provided that if the person whose attendance is required pays into court the costs and fine aforesaid, the court shall order the property to be released from attachment.

## **13. Mode of attachment**

The provisions with regard to the attachment and sale of property in the execution of a decree shall, so far as they are applicable, be deemed to apply to any attachment and sale under this Order as if the person whose property is so attached were a judgment debtor.

## **14. Court may of its own accord summon as witnesses strangers to suit**

Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the court at any time thinks it necessary to examine any person other than a party to the suit and not called as a witness by a party to the suit the court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

## **15. Duty of persons summoned to give evidence or produce document**

Whoever is summoned to appear and give evidence in a suit shall attend at the time and place named in the summons for that purpose and whoever is summoned to produce a document shall either attend to produce it, or cause it, to be produced at such time and place.

## **16. Obligation of person summoned to attend hearing**

(1) A person summoned and attending shall, unless the court otherwise directs, attend at each hearing until the suit has been disposed of.

(2) On the application of either party and the payment through the court of all necessary expenses (if any), the court may require any person so summoned and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and, in default of his furnishing such security, may order him to be detained as a civil prisoner.

#### **17. Application of rules 10 to 13**

The provisions of rules 10 to 13 shall, so far as they are applicable, be deemed to apply to any person who having attended in compliance with a summons, departs without lawful excuse, in contravention of rule 16.

#### **18. Procedure where witness apprehended cannot give evidence or produce document**

Where any person arrested under a warrant is brought before the court in custody and cannot, owing to the absence of the parties or any of them, give the evidence or produce the document which he has been summoned to give or produce, the court may require him to give reasonable bail or other security for his appearance at such time and place as it thinks fit and, on such bail or security being given, may release him, and, in default of his giving such bail or security, may order him to be detained as a civil prisoner.

#### **19. No witness to be ordered to attend in person unless resident within certain limits**

No one shall be ordered to attend in person to give evidence unless he resides—

- (a) within the local limits of the court's ordinary original jurisdiction; or
- (b) without such limits but at a place less than fifty miles or, where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the court is situate, less than two hundred miles distance from the court-house.

#### **20. Consequence of refusal of party to give evidence when called on by court**

Where any party to a suit present in court refuses, without lawful excuse, when required by the court, to give evidence or to produce any document then and there in his possession or power, the court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

#### **21. Rules as to witnesses to apply to parties summoned**

Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable.

### **ORDER XVII ADJOURNMENTS**

## **1. Court may grant time and adjourn hearing and costs of adjournment**

(1) At any stage of the suit the court may, if sufficient cause is shown, grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.

(2) In every case under subrule (1), the court shall fix a day for the further hearing of the suit and may make such order as it thinks fit with respect to the costs occasioned by the adjournment:

Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded.

## **2. Procedure if parties fail to appear on day fixed**

Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

## **3. Court may proceed notwithstanding either party failing to produce evidence, etc.**

Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith.

## **4. Procedure where no application is made on suit adjourned generally**

Where the hearing of a suit has been adjourned generally, the court may, if no application is made within twelve months of the last adjournment, give notice to the parties to show cause why the suit should not be dismissed and, if cause is not shown to the satisfaction of the court, the case shall be dismissed.

## **5. Suit may be struck out if no step taken for three years**

In any case, not otherwise provided for in which no application is made or step taken for a period of three years by either party with a view to proceeding with the suit, the court may without notice order the suit to be struck out for want of prosecution, and after such an order has been made shall give notice of the order on the court notice board, but in such case the plaintiff may, subject to the law of limitation, bring a fresh suit.

# **ORDER XVIII HEARING OF SUIT AND EXAMINATION OF WITNESSES**

## **1. Right to begin**

The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

#### **1A. Assessors**

Except where both parties agree otherwise, the trial of a suit in the Commercial Division of the High Court shall be with the aid of assessors who shall not be less than two and generally knowledgeable of the field concerning the suit, and shall be selected from a list submitted to the Commercial Divisions by the Commercial Court Users' Committee.

#### **1B. Absence of assessors**

Where in the course of the trial one or more of the assessors is absent, the court may proceed and conclude the trial with the remaining assessor or assessors as the case may be.

### **2. Statement and production of evidence**

(1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case and produce his evidence (if any) and may then address the court generally on the whole case.

(3) The party beginning may then reply generally on the whole case.

### **3. Evidence where there are several issues**

Where there are several issues the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and in the latter case, the party beginning may produce evidence and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

### **4. Witnesses to be examined in open court**

The evidence of the witnesses in attendance shall be taken orally in open court in the presence and under the personal direction and superintendence of the judge or magistrate.

### **5. How evidence shall be taken**

The evidence of each witness shall be taken down in writing, in the language of the court, by or in the presence and under the personal direction and superintendence of the judge or magistrate, not ordinarily in the form of question and answer, but in that of a narrative and the

judge or magistrate shall sign the same.

#### **6. Any particular question and answer may be taken down**

The court may, of its own motion or on the application of any party or his advocate, take down any particular question and answer or any objection to any question, if there appears to be any special reason for so doing.

#### **7. Questions objected to and allowed by court**

Where any question put to a witness is objected to by a party or his advocate, and the court allows the same to be put, the judge or magistrate shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the court thereon.

#### **8. Remarks on demeanour of witnesses**

The court may record such remarks as it thinks material respecting the demeanour of any witness while under examination.

#### **9. Power to direct shorthand record**

(1) Notwithstanding anything in the foregoing rules of this Order, the judge or magistrate may direct a court stenographer to make a shorthand record of the whole of, or any part of, or the substance of, the evidence of any witness or other proceedings.

(2) A shorthand record made under the provisions of subrule (1) shall, as soon as practicable thereafter, be transcribed and typewritten by the same or any other court stenographer who shall certify the resultant typewritten transcript to be correct and complete and thereupon it shall form part of the record.

(3) In this rule "court stenographer" means any person appointed by the Chief Justice to be a court stenographer.

#### **10. Power to deal with evidence taken before another judge or magistrate**

(1) Where a judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.

(2) The provisions of subrule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 21.

#### **11. Power to examine witness immediately**

(1) Where a witness is about to leave the jurisdiction of the court or other sufficient cause is shown to the satisfaction of the court why his evidence should be taken immediately the court may, upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness.

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the court thinks sufficient, of the day fixed for the examination, shall be given to the parties.

## **12. Court may recall and examine witness**

The court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the court thinks fit.

## **13. Power of court to inspect**

The court may at any stage of a suit inspect any property or thing concerning which any question may arise.

# **ORDER XIX AFFIDAVITS**

## **1. Power to order any point to be proved by affidavit**

A court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:

Provided that where it appears to the court that either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

## **2. Power to order attendance of deponent for cross-examination**

(1) Upon an application evidence may be given by affidavit but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.

(2) Such attendance shall be in court unless the deponent is exempted from personal appearance in court or the court otherwise directs.

## **3. Matters to which affidavits shall be confined**

(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted:

Provided that the grounds thereof are stated.

(2) The costs of every affidavit which unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents shall (unless the court otherwise directs) be paid by the party filing the same.

## **ORDER XX JUDGMENT AND DECREE**

### **1. Judgment, when pronounced**

The court, after the case has been heard, shall pronounce judgment in open court, either at once or on some future day, of which due notice shall be given to the parties or their advocates.

### **2. Power to pronounce judgment written by judge's or magistrate's predecessor**

A Judge or magistrate may pronounce a judgment written but not pronounced by his predecessor.

### **3. Judgment to be signed**

The judgment shall be written by, or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall be dated and signed by such presiding judge or magistrate as of the date on which it is pronounced in open court and, when once signed, shall not afterwards be altered or added to, save as provided by section 96 or on review.

### **3A. Judgment in the Commercial Division of the High Court**

In the Commercial Division of the High Court the court shall, after the case has been heard, sum up the evidence for each side and then require each assessor to state his or her opinion orally as to the case generally and to any specific question of fact, and thereafter the judge shall pronounce judgment in open court, either at once or on some future day, of which due notice shall be given to the parties or their advocates.

### **3B. Opinion of assessors**

In the Commercial Division of the High Court the judge shall, in the judgment, 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.

### **4. Contents of judgments**

A judgment shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision.

### **5. Court to state its decision on each issue**

In suits in which issues have been framed, the court shall state its finding or decision, with

the reason therefor, upon each separate issue unless the finding upon any one or more of the issues is sufficient for the decision of the suit.

## **6. Contents of decree**

(1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties and particulars of the claim and shall specify clearly the relief granted or other determination of the suit.

(2) The decree shall also state the amount of costs incurred in the suit and by whom or out of what property and in what proportions such costs are to be paid.

(3) The court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter.

## **7. Date of decree**

The decree shall bear the date of the day on which the judgment was pronounced and, when the Judge or magistrate has satisfied himself that the decree has been drawn up in accordance with the judgment he shall sign the decree.

## **8. Procedure where judge or magistrate has vacated office before signing decree**

Where a judge or magistrate has vacated office after pronouncing judgment but without signing the decree, a decree drawn up in accordance with such judgment may be signed by his successor.

## **9. Decree for recovery of immovable property**

Where the subject matter of the suit is immovable property, the decree shall contain a description of such property sufficient to identify the same, and where such property can be identified by a title number under the Land Registration Act \*(13), the decree shall specify such title number.

## **10. Decree for delivery of movable property**

Where the suit is for movable property, and the decree is for the delivery of such property, the decree shall also state the amount of money to be paid as an alternative if delivery cannot be had.

## **11. Decree may direct payment by instalments**

(1) Where and in so far as a decree is for the payment of money the court may, for any sufficient reason, at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalment, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

(2) After the passing of any such decree the court may, on the application of the judgment debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment debtor, of the taking of security from him, or otherwise, as it thinks fit.

## **12. Decree for possession and mesne profits**

(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree—

- (a) for the possession of the property or declaring an entitlement as against the Government to possession of the property;
- (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
- (c) directing an inquiry as to rent or mesne profits from the institution of the suit until—
  - (i) the delivery of possession to the decree-holder;
  - (ii) the relinquishment of possession by the judgment debtor with notice to the decree-holder through the court; or
  - (iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under clause (b) or clause (c) a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.

## **13. Decree in administration suit**

(1) Where a suit is for an account of any property and for its due administration under the decree of the court, the court shall, before passing the final decree, pass a preliminary decree ordering such accounts and inquiries to be taken and made, and giving such other directions as it thinks fit.

(2) In the administration by the court of the property of any deceased person, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being within the local limits of the courts in which the administration suit is pending with respect to the estates of persons adjudged or declared insolvent; and all person, who in any such case would be entitled to be paid out of such property may come in under the preliminary decree and make such claims against the same as they may respectively be entitled to by virtue of this Code.

#### **14. Decree in pre-emption suit**

(1) Where the court decrees a claim to pre-emption in respect of a particular sale of property and the purchase money has not been paid into court, the decree shall–

- (a) specify a day on or before which the purchase money shall be so paid; and
- (b) direct that on payment into court of such purchase money, together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause (a), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase money and the costs (if any) are not so paid, the suit shall be dismissed with costs.

(2) Where the court has adjudicated upon rival claims to pre-emption, the decree shall direct–

- (a) if and in so far as the claims decreed are equal in degree, that the claim of each pre-emptor complying with the provisions of subrule (1) shall take effect in respect of a proportionate share of the property including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect; and
- (b) if and so far as the claims decreed are different in degree, that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions.

#### **15. Decree in suit for dissolution of partnership**

Where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the court, before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved and directing such accounts to be taken and other acts to be done as it thinks fit.

#### **16. Decree in suit for account between principal and agent**

In a suit for an account of pecuniary transactions between a principal and an agent and in any other suit not hereinbefore provided for where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken, the court shall, before passing its final decree, pass a preliminary decree directing such accounts to be taken as it thinks fit.

#### **17. Special directions as to accounts**

The court may, either by the decree directing an account to be taken or by any subsequent order, give special directions with regard to the mode in which the account is to be taken or

vouched and in particular may direct that in taking the account the books of account, in which the accounts in question have been kept, shall be taken as *prima facie* evidence of the truth of the matters therein contained with liberty to the parties interested to take such objection thereto as they may be advised.

#### **18. Decree in suit for partition of property or separate possession of a share therein**

Where the court passes a decree for the partition of property or for the separate possession of a share therein the court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

#### **19. Decree when set-off allowed and appeal from decree relating to set-off**

(1) Where the defendant has been allowed a set-off against a claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party.

(2) Any decree passed in a suit in which a set-off is claimed shall be subject to the same provisions in respect of appeal to which it would have been subject if no set-off had been claimed.

(3) The provisions of this rule shall apply whether the set-off is admissible under rule 6 of Order VIII or otherwise.

#### **20. Certified copies of judgment and decree to be furnished**

Certified copies of the judgment and decree shall be furnished to the parties on application to the court and at their expense.

### ***Interest***

#### **21. Interest on judgment debts**

(1) The rate of interest on every judgment debt from the date of delivery of the judgment until satisfaction shall be seven *per centum* per annum or such other rate, not exceeding twelve *per centum* per annum, as the parties may expressly agree in writing before or after the delivery of the judgment or as may be adjudged by consent:

Provided that in the case of a judgment debt subsisting on the first day of July, 1964, the provision of this rule shall apply thereto as if there were substituted for the words "delivery of judgment" the words "on the first day of July, 1964".

(2) For the purposes of this rule—

"judgment" in suits relating to mortgages of immovable property means the final decree; and

"judgment debt" means–

- (a) the principal sum;
- (b) any interest adjudged on such principal sum for any period prior to the institution of the suit; and
- (c) any interest adjudged on such principal sum for the period between the institution of the suit and the delivery of the judgment.

## **ORDER XXI EXECUTION OF DECREES AND ORDERS**

### ***Payment under Decree***

#### **1. Modes of paying money under decree**

(1) All money payable under a decree shall be paid as follows, namely–

- (a) into the court whose duty it is to execute the decree;
- (b) out of court to the decree-holder; or
- (c) otherwise as the court which made the decree directs.

(2) Where any payment is made under paragraph (a) of subrule (1), notice of such payment shall be given to the decree-holder.

#### **2. Payment out of court to decree-holder**

(1) Where any money payable under a decree of any kind is paid out of court or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the court whose duty it is to execute the decree and the court shall record the same accordingly.

(2) The judgment debtor also may inform the court of such payment or adjustment and apply to the court to issue a notice to the decree-holder to show cause, on a day to be fixed by the court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the court shall record the same accordingly.

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognised by any court executing the decree.

#### **2A. Satisfaction of orders against the Government**

Where a decree contains any order in favour of any person against the Government or against an officer of the Government as such, the provisions of section 15 of the Government

Proceedings Act, shall apply in relation to satisfaction of the order, in lieu of the provisions of rules 3 to 110 of this Order.

### ***Courts Executing Decrees***

#### **3. Lands situate in more than one jurisdiction**

Where immovable property forms one estate or tenure situate within local limits of the jurisdiction of two or more courts, any one of such courts may attach and sell the entire estate or tenure.

#### **4. Mode of transfer**

The court of a resident magistrate may send a decree for execution directly to any other court (other than the High Court) within the local limits of its jurisdiction; in any other case, a decree to be executed outside the local limits of the jurisdiction of the court which passed it shall be sent to the court of the resident magistrate within the local limits of whose jurisdiction the decree is to be executed.

#### **5. Procedure where court desires that its own decree shall be executed by another court**

The court sending a decree for execution shall send—

- (a) a copy of the decree;
- (b) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the court by which it was passed or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied; and
- (c) a copy of any order for the execution of the decree; or, if no such order has been made, a certificate to that effect.

#### **6. Court receiving copies of decree, etc., to file same without proof**

The court to which a decree is so sent shall cause such copies and certificates to be filed, without any further proof of the decree or order for execution, or of the copies thereof, unless the court, for any special reasons to be recorded under the hand of the judge or magistrate, requires such proof.

#### **7. Execution of decree or order by court to which it is sent**

Where such copies are so filed, the decree or order may, if the court to which it is sent is the court of a resident magistrate, be executed by such court or be transferred for execution to any subordinate court of competent jurisdiction.

## **8. Execution by High Court of decree transferred by other court**

Where the court to which the decree is sent for execution is the High Court, the decree shall be executed by such Court in the same manner as if it had been passed by such Court in the exercise of its ordinary original civil jurisdiction.

### ***Application for Execution***

## **9. Application for execution**

When the holder of a decree desires to execute it, he shall apply to the court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions herein before contained to another court then to such court or to the proper officer thereof.

## **10. Oral and written applications**

(1) Where a decree is for the payment of money the court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment debtor, prior to the preparation of a warrant if he is within the precincts of the court.

(1A) Where an order has been made for payment of money under the Law of Marriage Act \*(14), the court may, on an oral application of the person in whose favour such order is made, order the enforcement of the order by the arrest of the judgment debtor or by the attachment of the judgment debtor's salary.

(2) Save as otherwise provided by subrule (1) or subrule (1A), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely—

- (a) the number of the suit;
- (b) the names of the parties;
- (c) the date of the decree;
- (d) whether any appeal has been preferred from the decree;
- (e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree;
- (f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results;
- (g) the amount with interest (if any) due upon the decree or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date

of the decree sought to be executed;

- (h) the amount of the costs (if any) awarded;
- (i) the name of the person against whom execution of the decree is sought; and
- (j) the mode in which the assistance of the court is required, whether—
  - (i) by the delivery of any property specifically decreed;
  - (ii) by the attachment and sale, or by the sale without attachment, of any property;
  - (iii) by the arrest and detention in prison of any person;
  - (iv) by the appointment of a receiver; or
  - (v) otherwise, as the nature of the relief granted may require.

(3) The court to which an application is made under subrule (2) may require the applicant to produce a certified copy of the decree.

#### **11. Application for attachment of movable property not in judgment debtor's possession**

Where an application is made for the attachment of any movable property belonging to a judgment debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same.

#### **12. Application for attachment of immovable property to contain certain particulars**

(1) Where an application is made for the attachment of any immovable property belonging to a judgment debtor, it shall contain at the foot—

- (a) a description of such property sufficient to identify the same and, in case such property can be identified by a title number under the Land Registration Act, such title number; and
- (b) a specification of the judgment debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same.

(2) Where an application is made for the attachment of any land of which an estate has been registered under the Land Registration Act \*(15), the court may require the applicant to produce an official search issued under section 97(2) of that Act relating to that land.

#### **13. Application for execution by joint decree-holder**

- (1) Where a decree has been passed jointly in favour of more persons than one, any one or

more of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased.

(2) Where the court sees sufficient cause for allowing the decree to be executed on an application made under this rule, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application.

#### **14. Application for execution by transferee of decree**

Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree, is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the court which passed it, and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder:

Provided that, where the decree or such interest as aforesaid has been transferred by assignment, notice of such application shall be given to the transferor and the judgment debtor, and the decree shall not be executed until the court has heard their objections (if any) to its execution:

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others.

#### **15. Procedure on receiving application for execution of decree**

(1) On receiving an application for the execution of a decree as provided by rule 10, subrule (2), the court shall ascertain whether such of the requirements or rules 10 to 12 as may be applicable to the case have been complied with; and, if they have not been complied with, the court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it.

(2) Where an application is amended under the provisions of subrule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.

(3) Every amendment made under this rule shall be signed or initialled by the judge or magistrate.

(4) When the application is admitted, the court shall enter in the proper register a note of the application and the date on which it was made and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application:

Provided that in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree.

## **16. Execution in case of cross-decrees**

(1) Where applications are made to a court for the execution of cross-decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such court, then—

- (a) if the two sums are equal, satisfaction shall be entered upon both decrees; and
- (b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum.

(2) This rule shall be deemed to apply where either party is an assignee of one of the decrees and as well in respect of judgment debts due by the original assignor as in respect of judgment debts due by the assignee himself.

(3) This rule shall not be deemed to apply unless—

- (a) the decree-holder in one of the suits in which the decrees have been made is the judgment debtor in the other and each party fills the same character in both suit; and
- (b) the sums due under the decrees are definite.

(4) The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons.

## **17. Execution in case of cross-claims under same decree**

Where application is made to a court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then—

- (a) if the two sums are equal, satisfaction for both shall be entered upon the decree; and
- (b) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree.

## **18. Cross-decrees and cross-claims in mortgage suits**

The provisions contained in rules 16 and 17 shall apply to decrees for sale in enforcement of a mortgage or charge.

### **18A. Continuous order for attachment in certain cases**

Where any order is made for periodic payments to any person under the provisions of the law of Marriage Act \*(16) or any written law replacing that Act, it shall be lawful for the court to

which an application is made for the enforcement of such order by attachment of the salary of the person against whom such order is made to direct that the order for the attachment of the salary shall continue in force and apply to any future salary or salaries of such person until such time as—

- (a) the court giving such direction revokes the same; or
- (b) the order for periodic payments is set aside or ceases to have effect for any reason whatsoever.

## **19. Simultaneous execution**

The court may, in its discretion, refuse execution at the same time against the person and property of the judgment debtor.

### ***Notice before Execution***

## **20. Notice to show cause against execution in certain cases**

- (1) Where an application for execution is made—
  - (a) more than one year after the date of the decree; or
  - (b) against the legal representative of a party to the decree,

the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause on a date to be fixed why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him.

(2) Nothing in subrule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

## **21. Procedure after issue of notice**

(1) Where the person to whom notice is issued under rule 20 does not appear or does not show cause to the satisfaction of the court why the decree should not be executed, the court shall order the decree to be executed.

(2) Where such person offers any objection to the execution of the decree, the court shall consider such objection and make such order as it thinks fit.

### ***Process for Execution***

#### **22. Process for execution**

(1) When the preliminary measures (if any) required by the foregoing rules have been taken, the court shall, unless it sees cause to the contrary, issue its process for the execution of the decree.

(2) Every such process shall bear the date of the day on which it is issued and shall be signed by the judge or magistrate or such officer as the court may appoint in this behalf and shall be sealed with the seal of the court and delivered to the proper officer to be executed.

(3) In every such process a day shall be specified on or before which it shall be executed.

#### **23. Endorsement on process**

(1) The officer entrusted with the execution of the process shall endorse thereon the day on, and the manner in, which it was executed, and, if the latest day specified in the process for the return thereof has been exceeded, the reason of the delay, or, if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the court.

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the court shall examine him touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result.

### ***Stay of Execution***

#### **24. When court may stay execution and power to require security from or impose conditions upon judgment debtor**

(1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment debtor to apply to the court by which the decree was passed or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution or for any other order relating to the decree or execution which might have been made by such court of first instance or appellate court if execution had been issued thereby, or if application for execution had been made thereto.

(2) Where the property or person of the judgment debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application.

(3) Before making an order to stay execution or for the restitution of property or the

discharge of the judgment debtor, the court may require such security from, or impose such conditions upon, the judgment debtor as it thinks fit.

#### **25. Liability of judgment debtor discharged**

No order of restitution or discharge under rule 24 shall prevent the property or person of a judgment debtor from being retaken in execution of the decree sent for execution.

#### **26. Order of court which passed decree or of appellate court to be binding upon court applied to**

Any order of the court by which the decree was passed, or of such court of appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the court to which the decree was sent for execution.

#### **27. Stay of execution pending suit between decree-holder and judgment debtor**

Where a suit is pending in any court against the holder of a decree of such court, on the part of the person against whom the decree was passed the court may, on such terms as to security or otherwise as it thinks fit, stay execution of the decree until the pending suit has been decided.

### ***Mode of Execution***

#### **28. Decree for payment of money**

Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention as a civil prisoner of the judgment debtor or by the attachment and sale of his property, or by both.

#### **29. Decree for specific movable property**

(1) Where the decree is for any specific movable, or for any share in a specific movable, it may be executed by the seizure, if practicable, of the movable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the detention as a civil prisoner of the judgment debtor or by the attachment of his property, or by both.

(2) Where any attachment under subrule (1) has remained in force for six months, if the judgment debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold and out of the proceeds the court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of movable property, such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment debtor on his application.

(3) Where the judgment debtor has obeyed the decree and paid all costs of executing the

same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or if made, has been refused, the attachment shall cease.

### **30. Decree for specific performance, for restitution of conjugal rights, or for an injunction**

(1) Where the party against whom a decree for the specific performance of a contract, or, subject to rule 31, for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may, save as otherwise provided by any law for the time being in force, be enforced by his detention as a civil prisoner, or by the attachment of his property or by both.

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the court, by the detention as civil prisoners of the directors or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under subrule (1) or subrule (2) has remained in force for one year, if the judgment debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment debtor on his application.

(4) Where the judgment debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of the one year from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the court, at the cost of the judgment debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the court may direct and may be recovered as if they were included in the decree.

### **31. Execution of decrees for restitution of conjugal rights**

(1) A decree for the restitution of conjugal rights shall not be enforced by detention as a civil prisoner.

(2) Where the decree holder is the wife, the court may, save as may otherwise be provided in any law for the time being in force, enforce the decree by making an order that in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment debtor shall make to the decree-holder such periodical payments as may be just, and, if it thinks fit, require that the judgment debtor shall, to its satisfaction, secure to the decree-holder

such periodical payments.

(3) The court may from time to time vary or modify any order made under subrule (2) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same, either wholly or in part as it may think just.

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money.

### **32. Decree for execution of document or endorsement of negotiable instrument**

(1) Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the court.

(2) The court shall thereupon cause the draft to be served on the judgment debtor together with a notice requiring his objections (if any) to be made within such time as the court fixes in this behalf.

(3) Where the judgment debtor objects to the draft, his objections shall be stated in writing within such time, and the court shall make such order approving or altering the draft, as it may think fit.

(4) The decree-holder shall deliver to the court a copy of the draft with such alterations (if any) as the court may have directed and the judge or magistrate or such officer as may be appointed in this behalf shall execute the document so delivered.

(5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely—

"C.D., Judge/or magistrate of the Court of ..... (or the case may be),  
for A.B., in a suit by E.F. against A.B."

and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same.

(6) The document or negotiable instrument so executed or endorsed shall thereupon be delivered to the decree-holder.

### **33. Decree for delivery of immovable property**

(1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged or to such person as he may appoint to

receive delivery on his behalf and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming the substance of the decree by such means as are used locally to make public pronouncements.

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the court, through its officers, may after giving reasonable warning and facility to any woman not appearing in public according to her religion or local custom to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.

#### **34. Decree for delivery of immovable property when in occupancy of tenant**

Where a decree is for the delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property and proclaiming to the occupant the substance of the decree by such means as are used locally to make public pronouncements.

### ***Arrest and Detention in Prison***

#### **35. Discretionary power to permit judgment debtor to show cause against detention in prison**

(1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention as a civil prisoner of a judgment debtor who is liable to be arrested in pursuance of the application, the court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the court on a day to be specified in the notice and show cause why he should not be committed to prison.

(2) Where appearance is not made in obedience to the notice, the court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment debtor.

#### **36. Warrant for arrest to direct judgment debtor to be brought up**

Every warrant for the arrest of a judgment debtor shall direct the officer entrusted with its execution to bring him before the court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid.

#### **37. Request for arrest by telegram**

(1) A court which has issued a warrant for the arrest of a judgment debtor may, by telegram, request any district court within the area of whose jurisdiction the judgment debtor is believed to

be, to arrest him and cause him to be taken under escort to the court which issued the warrant.

(2) A telegram sent under the provisions of subrule (1) shall state—

- (a) the number and title of the case;
- (b) the full name of the judgment debtor and the place where he is believed to be;
- (c) the amount of money upon payment of which the judgment debtor may be released;
- (d) that the person applying for arrest has given security for the expenses and the transport of the judgment debtor and his escort to the court which issued the warrant; and
- (e) the date when the warrant of arrest was issued.

(3) On receipt of a telegram sent in accordance with the provisions of this rule, the court to which it is addressed shall issue a provisional warrant in accordance with the particulars contained in the telegram and shall cause the same to be executed.

### **38. Subsistence allowance**

(1) No judgment debtor shall be arrested in execution of a decree unless and until the decree-holder pays into court such sum as the judge or magistrate thinks sufficient for the subsistence of the judgment debtor from the time of his arrest until he can be brought before the court.

(2) Where a judgment debtor is committed to prison in execution of a decree, the court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under section 45 or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

(3) The monthly allowance fixed by the court shall be supplied by the party on whose application the judgment debtor has been arrested by monthly payments in advance before the first day of each month.

(4) The first payment shall be made to the proper officer of the court for such portion of the current month as remains unexpired before the judgment debtor is committed to civil prison, and the subsequent payments (if any) shall be made to the officer in charge of the prison.

(5) Sums disbursed by the decree-holder for the subsistence of the judgment debtor in prison shall be deemed to be costs in the suit:

Provided that the judgment debtor shall not be detained in prison or arrested on account of any sum so disbursed.

### **39. Proceedings on appearance of judgment debtor in obedience to notice or after**

## **arrest**

(1) Where a judgment debtor appears before the court in obedience to a notice issued under rule 35, or is brought before the court after being arrested in execution of a decree for the payment of money and it appears to the court that the judgment debtor is unable from poverty or other sufficient cause to pay the amount of the decree or, if that amount is payable by instalment, the amount of any instalment thereof, the court may, upon such terms (if any) as it thinks fit, make an order disallowing the application for his arrest and detention, or directing his release, as the case may be.

(2) Before making an order under subrule (1), the court may take into consideration any allegation of the decree-holder touching any of the following matters, namely—

- (a) the decree being for a sum for which the judgment debtor was bound in any fiduciary capacity to account;
- (b) the transfer, concealment or removal by the judgment debtor of any part of his property after the date of the institution of the suit in which the decree was passed, or the commission by him after that date of any other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree-holder in the execution of the decree;
- (c) any undue preference given by the judgment debtor to any of his other creditors;
- (d) refusal or neglect on the part of the judgment debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it;
- (e) the likelihood of the judgment debtor absconding or leaving the jurisdiction of the court with the object or effect of obstructing or delaying the decree-holder in the execution of the decree.

(3) While any of the matters mentioned in subrule (2) are being considered, the court may, in its discretion, order the judgment debtor to be detained as a civil prisoner or leave him in the custody of an officer of the court, or release him on his furnishing security, to the satisfaction of the court, for his appearance when required by the court.

(4) A judgment debtor released under this rule may be re-arrested.

(5) Where the court does not make an order under subrule (1), it shall cause the judgment debtor to be arrested if he has not already been arrested and, subject to the other provisions of this Code, commit him to prison.

## ***Attachment of Property***

### **40. Examination of judgment debtor as to his property**

Where a decree is for the payment of money the decree-holder may apply to the court for an order that—

- (a) the judgment debtor;
- (b) in the case of a corporation, any officer thereof; or
- (c) any other person,

be orally examined as to whether any or what debts are owing to the judgment debtor and whether the judgment debtor has any and what other property or means of satisfying the decree; and the court may make an order for the attendance and examination of such judgment debtor, or officer or other person, and for the production of any books or documents.

#### **41. Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined**

Where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment debtor may, before the amount due from him has been ascertained, be attached as in the case of an ordinary decree for the payment of money.

#### **42. Attachment of movable property, other than agricultural produce, in possession of judgment debtor**

Where the property to be attached is movable property, other than agricultural produce, in the possession of the judgment debtor, the attachment shall be made by actual seizure and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof:

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

#### **43. Attachment of agricultural produce**

Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment—

- (a) where such produce is a growing crop, on the land on which such crop has grown; or
- (b) where such produce has been cut or gathered, on the place in which it is deposited,

and another copy on the outer door or some other conspicuous part of the house in which the judgment debtor ordinarily resides or, with the leave of the court, on the outer door or on some other conspicuous part of the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain; and the produce shall thereupon be deemed to have passed into the possession of the

court.

#### **44. Provisions as to agricultural produce under attachment**

(1) Where agricultural produce is attached, the court shall make such arrangements for the custody thereof as it may deem sufficient and, for the purposes of enabling the court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered.

(2) Subject to such conditions as may be imposed by the court in this behalf either in the order of attachment or in any subsequent order, the judgment debtor may tend, cut, gather and store the produce and do any other act necessary for maturing or preserving it; and if the judgment debtor fails to do all or any of such acts the decree-holder may, with the permission of the court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree-holder shall be recoverable from the judgment debtor as if they were included in, or formed part of, the decree.

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re-attachment merely because it has been severed from the soil.

(4) Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the court may suspend the execution of the order for such time as it thinks fit, and may, in its discretion, make a further order prohibiting the removal of the crop pending the execution of the order of attachment.

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered.

#### **44. Attachment of debt, share and other property not in possession of judgment debtor**

(1) In the case of—

- (a) a debt not secured by a negotiable instrument;
- (b) a share in the capital of a corporation;
- (c) other movable property not in the possession of the judgment debtor, except property deposited in, or in the custody of, any court,

the attachment shall be made by a written order prohibiting—

- (i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the court;
- (ii) in the case of the share, the person in whose name the share may be standing from

transferring the same or receiving any dividend thereon;

- (iii) in the case of the other movable property except as aforesaid, the person in possession of the same from giving it over to the judgment debtor.

(2) A copy of such order shall be fixed on some conspicuous part of the court-house, and another copy shall be sent in the case of the debts, to the debtor, in the case of the share, to the proper officer of the corporation, and, in the case of the other movable property (except as aforesaid), to the person in possession of the same.

(3) A debtor prohibited under item (i) of subrule (1) may pay the amount of his debt into court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

#### **46. Attachment of share in movables**

Where the property to be attached consists of the share or interest of the judgment debtor in movable property belonging to him and another as co-owner, the attachment shall be made by a notice to the judgment debtor prohibiting him from transferring the share or interest or charging it in any way.

#### **47. Attachment of salary**

(1) Where the property to be attached is the salary of an employee, the court may order that the amount shall be withheld from such salary either in one payment or by monthly instalments as the court may direct; and, upon notice of the order to the employer of the said employee, or in the case of a Government servant, to the paying authority, the employer or the paying authority or other person whose duty it is to disburse such salary, as the case may be, shall withhold and remit to the court the amount due under the said order, or the monthly instalments, as the case may be.

(2) An order attaching the salary of an employee may be made by the court whether the employee or the employer or the paying authority or other person, as the case may be, is or is not within the local limits of the court's jurisdiction.

(3) Where the attachable proportion of such salary is already being withheld and remitted to a court in pursuance of a previous and unsatisfied order of attachment, the employer or, in the case of a Government servant, the paying authority shall forthwith return the subsequent order to the court issuing it with a full statement of all the particulars of the existing attachment.

- (4) For the purposes of this rule—

"paying authority" means the Assistant Paymaster-General or such other officer as may be appointed as paying authority for any Government servant or any particular class of Government servant;

"employee" includes a Government servant;

"employer" includes the Government.

#### **48. Attachment of partnership property**

(1) Save as otherwise provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.

(2) The court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree, and may, by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other order as might have been directed or made if a charge had been made in favour of the decree-holder by such partner, or as the circumstances of the case may require.

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same.

(4) Every application for an order under subrule (2) shall be served on the judgment debtor and on his partners or such of them as are within Tanzania.

(5) Every application made by any partner of the judgment debtor under subrule (3) shall be served on the decree-holder and on the judgment debtor, and on such of the other partners as do not join in the application and as are within Tanzania.

(6) Service under subrule (4) or subrule (5) shall be deemed to be service on all the partners, and all orders made on such applications shall be similarly served.

#### **49. Execution of decree against firm**

(1) Where a decree has been passed against a firm, execution may be granted—

- (a) against any property of the partnership;
- (b) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXIX, or who has admitted on the pleading that he is, or who has been adjudged to be, a partner;
- (c) against any person who has been individually served as a partner with a summons and has failed to appear:

Provided that nothing in this subrule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract Act, 1872 as formerly applied to Tanzania and

saved by section 228 of the Law of Contract Act \*(17).

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in subrule (1), paragraphs (b) and (c), as being a partner in the firm, he may apply to the court which passed the decree for leave, and where the liability is not disputed, such court may grant such leave, or where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

(3) Where the liability of any person has been tried and determined under subrule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(4) Save as against any property of the partnership a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer.

#### **50. Attachment of negotiable instruments**

Where property is a negotiable instrument not deposited in a court, nor in the custody of a public officer, the attachment shall be made by actual seizure and the instrument shall be brought into court and held subject to further orders of the court.

#### **51. Attachment of property in custody of court or public officer**

Where the property to be attached is in the custody of any court or public officer, the attachment shall be made by a notice to such court or officer, requesting that such property and any interest or dividend becoming payable thereon may be held subject to the further orders of the court from which the notice is issued:

Provided that, where such property is in the custody of a court, any question of title or priority arising between the decree-holder and any other person, not being the judgment debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such court.

#### **52. Attachment of decrees**

(1) Where the property to be attached is a decree, either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made—

- (a) if the decree was passed by the same court, then by order of such court; or
- (b) if the decree sought to be attached was passed by another court, then by the issue to such other court of a notice by the court which passed the decree sought to be executed, requesting such other court to stay the execution of its decree unless and until—

- (i) the court which passed the decree sought to be executed cancels the notice; or
- (ii) the holder of the decree sought to be executed or his judgment debtor applies to the court receiving such notice to execute its own decree.

(2) Where a court makes an order under paragraph (a) of subrule (1), or receives an application under item (ii) of paragraph (b) of the said subrule, it shall, on the application of the creditor who has attached the decree or his judgment debtor, proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed.

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in subrule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in subrule (1), the attachment shall be made by a notice by the court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way; and, where such decree has been passed by any other court, also by sending to such other court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the court from which it was sent.

(5) The holder of a decree attached under this rule shall give the court executing the decree such information and aid as may reasonably be required.

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree, the court making an order of attachment under this rule shall give notice of such order to the judgment debtor bound by the decree attached; and no payment or adjustment of the attached decree made by the judgment debtor in contravention of such order after receipt of notice thereof, either through the court or otherwise, shall be recognised by any court so long as the attachment remains in force.

### **53. Attachment of immovable property**

(1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

(2) The order shall be proclaimed at some place on or adjacent to such property by such means as are used locally to make public pronouncements and a copy of the order shall be fixed on a conspicuous part of the property and then upon a conspicuous part of the court-house.

### **54. Removal of attachment after satisfaction of decree**

Where—

- (a) the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into court;
- (b) satisfaction of the decree is otherwise made through the court or certified to the court;  
or
- (c) the decree is set aside or reversed,

the attachment shall be deemed to be withdrawn, and, in the case of immovable property, the withdrawal shall, if the judgment debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by rule 53.

#### **55. Order for payment of coin or currency notes to party entitled under decree**

Where the property attached is current coin or currency notes the court may, at any time during the continuance of the attachment, direct that such coin or notes or a part thereof sufficient to satisfy the decree be paid over to the party entitled under the decree to receive the same.

#### **56. Determination of attachment**

Where any property has been attached in execution of a decree, but by reason of the decree-holder's default the court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date and upon the dismissal of such application the attachment shall cease.

### ***Investigation of Claims and Objections***

#### **57. Investigation of claims to, and objections to attachment of, attached property and postponement of sale**

(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector and in all other respects, as if he was a party to the suit:

Provided that no such investigation shall be made where the court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the court ordering the sale may postpone it pending the investigation of the claim or objection.

#### **58. Evidence to be adduced by claimant**

The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.

#### **59. Release of property from attachment**

Where upon the said investigation the court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment.

#### **60. Disallowance of claim to property attached**

Where the court is satisfied that the property was at the time it was attached, in the possession of the judgment debtor as his own property and not on account of any other person, or was in the possession of some other person in trust from him, or in the occupancy of a tenant or other person paying rent to him, the court shall disallow the claim.

#### **61. Continuance of attachment subject to claim of incumbrancer**

Where the court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge.

#### **62. Saving of suits to establish right to attached property**

Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.

### ***Sale Generally***

#### **63. Power to order property attached to be sold and proceeds to be paid to person entitled**

Any court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

#### **64. Sales, by whom conducted and how made**

Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the court or by such other person as the court may appoint in this behalf, and shall be

made by public auction in the manner prescribed.

#### **65. Proclamation of sales by public auction**

(1) Where any property is ordered to be sold by public auction in execution of a decree, the court shall cause a proclamation of the intended sale to be made in the language of such court.

(2) The proclamation shall be drawn up after notice to the decree-holder and the judgment debtor and shall state the time and place of sale, and specify as fairly and accurately as possible—

- (a) the property to be sold;
- (b) the rent (if any) payable in respect of the property;
- (c) any incumbrance to which the property is liable;
- (d) the amount for the recovery of which the sale is ordered;
- (e) every other thing which the court considers material for a purchaser to know in order to judge the nature and value of the property.

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by subrule (2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto.

#### **66. Mode of making proclamation**

(1) Every proclamation shall be made and published, as nearly as may be, in the manner prescribed by rule 53, subrule (2).

(2) Where the court so directs, such proclamation shall also be published in the *Gazette* or in a local newspaper, or in both, and the costs of such publication shall be deemed to be costs of the sale.

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot, unless property notice of the sale cannot, in the opinion of the court, otherwise be given.

#### **67. Time of sale**

Save in the case of property of the kind described in the proviso to rule 44, no sale hereunder shall, without the consent in writing of the judgment debtor, take place until after the expiration of at least thirty days in the case of immovable property, and of at least fifteen days in the case of movable property, calculated from the date on which the copy of the proclamation has been affixed on the court-house of the judge or magistrate ordering the sale.

#### **68. Adjournment or stoppage of sale**

(1) The court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reason for such adjournment:

Provided that, where the sale is made in, or within the precincts of, the court-house, no such adjournment shall be made without the leave of the court.

(2) Where a sale is adjourned under subrule (1) for a longer period than seven days, a fresh proclamation under rule 66 shall be made, unless the judgment debtor consents to waive it.

(3) Every sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are rendered to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the court which ordered the sale.

#### **69. Defaulting purchaser answerable for loss on re-sale**

Any deficiency of price which may happen on a re-sale by reason of the purchaser's default, and all expenses attending such re-sale, shall be certified to the court by the officer or other person holding the sale and shall, at the instance of either the decree-holder or the judgment debtor, be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money.

#### **70. Decree-holder not to bid for or buy property without permission**

(1) No holder of a decree in execution of which property is sold shall, without the express permission of the court, bid for or purchase the property.

(2) Where a decree-holder purchases with such permission, the purchase money and the amount due on the decree may, subject to the provisions of section 54, be set off against one another, and the court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

(3) Where a decree-holder purchases, by himself or through another person, without such permission, the court may, if it thinks fit, on the application of the judgment debtor or any other person whose interests are affected by the sale, by order set aside the sale; and the costs of such application and order, and any deficiency of price which may happen on the re-sale and all expenses attending it, shall be paid by the decree-holder.

## **71. Restriction on bidding or purchase by officer**

No officer or other person having any duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold.

### ***Sale of Movable Property***

## **72. Sale of agricultural produce**

(1) Where the property to be sold is agricultural produce, the sale shall, save as otherwise provided by any law for the time being in force, be held—

- (a) if such produce is a growing crop, on or near the land on which such crop has grown;  
or
- (b) if such produce has been cut or gathered, at or near the place in which it is deposited:

Provided that the court may direct the sale to be held at the nearest place of public resort, if it is of opinion that the produce is thereby likely to sell to greater advantage.

(2) Where, on the produce being put up for sale—

- (a) a fair price, in the estimation of the person holding the sale, is not offered for it; and
- (b) the owner of the produce or a person authorised to act in his behalf applies to have the sale postponed till the next day or, if a market is held at the place of sale, the next market-day,

the sale shall be postponed accordingly and shall be then completed, whatever price may be offered for the produce.

## **73. Special provisions relating to growing crops**

(1) Where the property to be sold is a growing crop and the crop from its nature admits of being stored but has not yet been stored, the day of the sale shall be so fixed as to admit of its being made ready for storing before the arrival of such day, and the sale shall not be held until the crop has been cut or gathered and is ready for storing.

(2) Where the crop from its nature does not admit of being stored, it may be sold before it is cut and gathered and the purchaser shall be entitled to enter on the land and to do all that is necessary for the purpose of tending and cutting or gathering it.

## **74. Negotiable instruments and shares in corporations**

Where the property to be sold is a negotiable instrument or a share in a corporation the court may, instead of directing the sale to be made by public auction, authorise the sale of such instrument or share through a broker.

## **75. Sale by public auction**

(1) Where movable property is sold by public auction the price of each lot shall be paid at the time of sale or as soon after as the officer or other person holding the sale directs, and in default of payment the property shall forthwith be re-sold.

(2) On payment of the purchase money, the officer or other person holding the sale shall grant a receipt for the same and the sale shall become absolute.

(3) Where the movable property to be sold is a share in goods belonging to the judgment debtor and a co-owner, and two or more persons, of whom one is such co-owner, respectively, bid the same sum for such property or for any lot, the bidding shall be deemed to be the bidding of the co-owner.

## **76. Irregularity not to vitiate sale, but any person injured may sue**

No irregularity in publishing or conducting the sale of movable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery.

## **77. Delivery of movable property, debts and shares**

(1) Where the property sold is movable property of which actual seizure has been made, it shall be delivered to the purchaser.

(2) Where the property sold is movable property in the possession of some person other than the judgment debtor, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser.

(3) Where the property sold is a debt not secured by a negotiable instrument or is a share in a corporation, the delivery thereof shall be made by a written order of the court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the manager, secretary or other proper officer of the corporation from permitting any such transfer or making any such payment to any person except the purchaser.

## **78. Transfer of negotiable instruments and shares**

(1) Where the execution of a document or the endorsement of the party in whose name a negotiable instrument or a share in a corporation is standing is required to transfer such negotiable instrument or share, the judge or magistrate or such officer as he may appoint in this

behalf may execute such document or make such endorsement as may be necessary, and such execution or endorsement shall have the same effect as an execution or endorsement by the party.

(2) The execution of a document or the endorsement of a negotiable instrument may be in the following form, namely:

A.B. by C.D., Judge/or magistrate of the court of ..... (or as the case may be), in a suit by E.F. against A.B."

(3) Until the transfer of such negotiable instrument or share the court may, by order, appoint some person to receive any interest or dividend due thereon and to sign a receipt for the same; and any receipt so signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself.

#### **79. Vesting order in case of other property**

In the case of any movable property not hereinbefore provided for, the court may make an order vesting such property in the purchaser or as he may direct; and such property shall vest accordingly.

### ***Sale of Immovable Property***

#### **80. What courts may order sales**

Sales of immovable property in execution of decrees may be ordered by any court.

#### **81. Postponement of sale to enable judgment debtor to raise amount of decree**

(1) Where an order for the sale of immovable property has been made, if the judgment debtor can satisfy the court that there is reason to believe that the amount of the decree may be raised by the mortgage or lease or private sale of such property, or some part thereof, or of any other immovable property of the judgment debtor, the court may, on his application, postpone the sale of the property comprised in the order for sale on such terms and for such period as it thinks proper, to enable him to raise the amount.

(2) In such case the court shall grant a certificate to the judgment debtor authorising him within a period to be mentioned therein, and notwithstanding anything contained in section 51, to make the proposed mortgage, lease or sale:

Provided that all moneys payable under such mortgage, lease or sale shall be paid not to the judgment debtor, but, save in so far as a decree-holder is entitled to set off such money under the provisions of rule 70, into court:

Provided also that no mortgage, lease or sale under this rule shall become absolute until it has been confirmed by the court.

(3) Nothing in this rule shall be deemed to apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage of, or charge on, such property.

## **82. Deposit by purchaser and re-sale on default**

(1) On every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five *per centum* on the amount of his purchase money to the officer or other person conducting the sale and, in default of such deposit, the property shall forthwith be re-sold.

(2) Where the decree-holder is the purchaser and is entitled to set-off the purchase money under rule 70, the court may dispense with the requirements of this rule.

## **83. Time for payment in full of purchase money**

The full amount of purchase money payable shall be paid by the purchaser into court before the court closes on the fifteenth day from the sale of the property:

Provided that, in calculating the amount to be so paid into court, the purchaser shall have the advantage of any set-off to which he may be entitled under rule 70.

## **84. Procedure in default of payment**

In default of payment within the period mentioned in rule 83, the deposit may, if the court thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold.

## **85. Notification on re-sale**

Every re-sale of immovable property, in default of payment of the purchase money within the period allowed for such payment, shall be made after the issue of a fresh proclamation in the manner and for the period hereinbefore prescribed for the sale.

## **86. Bid of co-sharer to have preference**

Where the property sold is a share of undivided immovable property and two or more persons, of whom one is a co-sharer, respectively bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co-sharer.

## **87. Application to set aside sale on deposit**

(1) Where immovable property has been sold in execution of a decree any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in court—

- (a) for payment to the purchaser, a sum equal to five percent of the purchase money; and

- (b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under rule 88 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.

#### **88. Application to set aside sale on ground of irregularity or fraud**

(1) Where any immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in rateable distribution of assets, or whose interests are affected by the sale, may apply to the court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it:

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

#### **89. Application by purchaser to set aside sale on ground of judgment debtor having no saleable interest**

The purchaser at any such sale in execution of a decree may apply to the court to set aside the sale, on the ground that the judgment debtor has no saleable interest in the property sold.

#### **90. Sale, when to become absolute or be set aside**

(1) Where no application is made under rule 87, rule 88 or rule 89, or where such application is made and disallowed, the court shall make an order confirming the sale and thereupon the sale shall become absolute:

Provided that where it is provided by any law that a disposition of property in the execution of a decree or order shall not have effect or be operative without the approval or consent of some person or authority other than the court, the court shall not confirm such disposition under this rule unless such approval or consent has first been granted.

(2) Where such application is made and allowed, and where, in the case of an application under rule 87, the deposit required by that rule is made within thirty days from the date of sale, the court shall make an order setting aside the sale:

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

(3) No suit to set aside an order made under this rule shall be brought by any person against

whom such order is made.

#### **91. Return of purchase money in certain cases**

Where a sale of immovable property is set aside under rule 90, the purchaser shall be entitled to an order for repayment of his purchase money, with or without interest as the court may direct, against any person to whom it has been paid.

#### **92. Certificate to purchaser**

Where a sale of immovable property has become absolute, the court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser and the certificate shall bear the date and the day on which the sale became absolute.

#### **93. Delivery of property in occupancy of judgment debtor**

Where the immovable property sold is in the occupancy of the judgment debtor or of some person on his behalf or of some person claiming under a title created by the judgment debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 92, the court shall, on the application of the purchaser, order delivery to be made by putting such purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property and, if need be, by removing any person who refuses to vacate the same.

#### **94. Delivery of property in occupancy of tenant**

Where the property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under rule 94, the court shall, on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by such means as are used locally to make public pronouncements that the interest of the judgment debtor has been transferred to the purchaser.

#### ***Resistance to Delivery of Possession to Decree-Holder or Purchaser***

#### **95. Resistance or obstruction to possession of immovable property**

(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the court complaining of such resistance or obstruction.

(2) The court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

#### **96. Resistance or obstruction by judgment debtor**

Where the court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment debtor or by some other person at his instigation, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the court may also, at the instance of the applicant, order the judgment debtor, or any person acting at his instigation, to be detained as a civil prisoner for a term which may extend to thirty days.

#### **97. Resistance or obstruction by *bona fide* claimant**

Where the court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment debtor, the court shall make an order dismissing the application.

#### **98. Dispossession by decree-holder or purchaser**

(1) Where any person other than the judgment debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the court complaining of such dispossession.

(2) The court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

#### **99. *Bona fide* claimant to be restored to possession**

Where the court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment debtor, it shall direct that the applicant be put into possession of the property.

#### **100. Rules not applicable to transferee *pendente lite***

Nothing in rules 97 and 98 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

#### **101. Orders conclusive subject to regular suit**

Any party not being a judgment debtor against whom an order is made under rule 98, rule 99 or rule 100 may institute a suit to establish the right which he claims to the present possession of the property; but subject to the result of such suit (if any), the order shall be conclusive.

### **ORDER XXII**

## **DEATH, MARRIAGE AND INSOLVENCY OF PARTIES**

### **1. No abatement by party's death if right to sue survives**

The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

### **2. Procedure where one of several plaintiffs or defendants dies and right to sue survives**

Where there are more plaintiffs or defendants than one and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

### **3. Procedure in case of death of one of several plaintiffs or of sole plaintiff**

(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

### **4. Procedure in case of death of one of several defendants or of sole defendant**

(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under subrule (1), the suit shall abate as against the deceased defendant.

### **5. Determination of question as to legal representative**

Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the court.

## **6. No abatement by reason of death after hearing**

Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place.

## **7. Suit not abated by marriage of female party**

(1) The marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and, where the decree is against a female defendant, it may be executed against her alone.

(2) Where the husband is by law liable for the debts of his wife, the decree may, with the permission of the court, be executed against the husband also; and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject matter of the decree.

## **8. When plaintiff's insolvency bars suit and procedure where assignee fails to continue suit or give security**

(1) The insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his creditors, shall not cause the suit to abate unless such assignee or receiver declines to continue the suit or (unless for any special reason the court otherwise directs) to give security for the costs thereof within such time as the court may direct.

(2) Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate.

## **9. Effect of abatement or dismissal**

(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of section 5 of the Law of Limitation Act \*(18) shall apply to applications under subrule (2).

## **10. Procedure in case of assignment before final order in suit**

(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of subrule (1).

## **11. Application of Order to appeals**

In the application of this Order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal.

## **12. Application of Order to proceedings in execution of decree or order**

Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order.

### **ORDER XXIII WITHDRAWAL AND ADJUSTMENT OF SUITS**

#### **1. Withdrawal of suit or abandonment of part of claim**

(1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

(2) Where the court is satisfied—

- (a) that a suit must fail by reason of some formal defect; or
- (b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in subrule (2), he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

(4) Nothing in this rule shall be deemed to authorise the court to permit one of several plaintiffs to withdraw without the consent of the others.

#### **2. Limitation law not affected by fresh suit**

In any fresh suit instituted on permission granted under rule 1, the plaintiff shall be bound by

the law of limitation in the same manner as if the first suit had not been instituted.

### **3. Compromise of suit**

Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit.

### **4. Proceedings in execution of decrees not affected**

Nothing in this Order shall apply to any proceedings in execution of a decree or order.

## **ORDER XXIV PAYMENT INTO COURT**

### **1. Deposit by defendant of amount in satisfaction of claim**

The defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in court such sum of money as he considers a satisfaction in full of the claim.

### **2. Notice of deposit**

Notice of the deposit shall be given through the court by the defendant to the plaintiff, and the amount of the deposit shall (unless the court otherwise directs) be paid to the plaintiff on his application.

### **3. Interest on deposit not allowed to plaintiff after notice**

No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full satisfaction of the claim or falls short thereof.

### **4. Procedure where plaintiff accepts deposit as satisfaction in full or in part**

(1) Where the plaintiff accepts such amount as satisfaction in part only of his claim, he may prosecute his suit for the balance; and, if the court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff shall pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim.

(2) Where the plaintiff accepts such amount as satisfaction in full of his claim, he shall present to the court a statement to that effect and such statement shall be filed and the court shall pronounce judgment accordingly; and, in directing by whom the costs of each party are to be paid, the court shall consider which of the parties is most to blame for the litigation.

**ORDER XXV  
SECURITY FOR COSTS**

**1. When security for costs may be required from plaintiff**

(1) Where, at any stage of a suit, it appears to the court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are residing out of Tanzania, and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immovable property within Tanzania other than the property in suit, the court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

(2) Whoever leaves Tanzania under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of Tanzania within the meaning of subrule (1).

**2. Effect of failure to furnish security**

(1) In the event of such security not being furnished within the time fixed, the court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside and, if it is proved to the satisfaction of the court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit and shall appoint a day for proceeding with the suit.

(3) The dismissal shall not be set aside unless notice of such application has been served on the defendant.

**ORDER XXVI  
COMMISSIONS**

***Commissions to Examine Witnesses***

**1. Cases in which court may issue commission to examine witness**

Any court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the court or who is, from sickness or infirmity, unable to attend it.

**2. Order for commission**

An order for the issue of a commission for the examination of a witness may be made by the court either of its own motion or on the application, supported by affidavit or otherwise, of any

party to the suit or of the witness to be examined.

### **3. Where witness resides within court's jurisdiction**

A commission for the examination of a person who resides within the local limits of the jurisdiction of the court issuing the same may be issued to any person whom the court thinks fit to execute it.

### **4. Persons for whose examination court may issue commission**

(1) Any court may in any suit issue a commission for the examination of—

- (a) any person resident beyond the local limits of its jurisdiction;
- (b) any person who is about to leave such limits before the date on which he is required to be examined in court; or
- (c) any civil or military officer of the Government who cannot, in the opinion of the court, attend without detriment to the public service.

(2) Such commission may be issued to any court, other than the High Court, within the local limits of whose jurisdiction such person resides, or to any advocate or other person whom the court issuing the commission may appoint.

(3) The court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate court.

### **5. Commission or request to examine witness not within Tanzania**

Where any court to which application is made for the issue of a commission for the examination of a person residing at any place not within Tanzania is satisfied that the evidence of such person is necessary, the court may issue such commission or a letter of request.

### **6. Court to examine witness pursuant to commission**

Every court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto.

### **7. Return of commission with depositions of witnesses**

Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the return thereto and the evidence taken under it shall (subject to the provisions of rule 8) form part of the record of the suit.

### **8. When depositions may be read in evidence**

Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered unless—

- (a) the person who gave the evidence is beyond the jurisdiction of the court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in court, or is a civil or military officer of the Government who cannot, in the opinion of the court, attend without detriment to the public service; or
- (b) the court in its discretion dispenses with the proof of any of the circumstances mentioned in paragraph (a), and authorises the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

### ***Commissions for Local Investigations***

#### **9. Commissions to make local investigation**

In any suit in which the court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or of ascertaining the market value of any property or the amount of any mesne profits or damages or annual net profits, the court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the court.

#### **10. Procedure of commissioner and evidential status of report and deposition in suit**

(1) The commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to court.

(2) The report of the commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the court or, with the permission of the court, any of the parties to the suit, may examine the commissioner personally in open court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) Where the court is for any reason dissatisfied with the proceedings of the commissioner, it may direct such further inquiry to be made as it shall think fit.

### ***Commissions to Examine Accounts***

#### **11. Commissions to examine or adjust accounts**

In any suit in which an examination or adjustment of accounts is necessary, the court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

## **12. Court to give commissioner necessary instructions; and evidential status of proceedings and report**

(1) The court shall furnish the commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

(2) The proceedings and report (if any) of the commissioner shall be evidence in the suit, but where the court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit.

### ***Commissions to Make Partitions***

## **13. Commission to make partition of immovable property**

Where a preliminary decree for partition has been passed, the court may issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

## **14. Procedure of commissioner**

(1) The commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued and shall allot such shares to the parties and may, if authorised thereto by the said order, award sums to be paid for the purpose of equalising the value of the shares.

(2) The commissioner shall then prepare and sign a report or the commissioner (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds and such report or reports shall be annexed to the commission and transmitted to the court; and the court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.

### ***General Provisions***

## **15. Expenses of commission to be paid into court**

Before issuing any commission under this Order, the court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into court by the party at whose instance or for whose benefit the commission is issued.

## **16. Powers of commissioners**

Any commissioner appointed under this Order may, unless otherwise directed by the order of appointment—

- (a) examine the parties themselves and any witness whom they or any of them may produce and any other person whom the commissioner thinks proper to call upon to give evidence in the matter referred to him;
- (b) call for and examine documents and other things relevant to the subject of inquiry;
- (c) at any reasonable time enter upon or into any land or building mentioned in the order.

## **17. Attendance and examination of witnesses before commissioner**

(1) The provisions of this Code relating to the summoning, attendance and examination of witnesses, shall apply to persons required to give evidence or to produce documents under this order whether the commission in execution of which they are so required has been issued by a court situate within, or by a court situate beyond, the limits of Tanzania, and for the purposes of this rule the commissioner shall be deemed to be a civil court.

(2) A commissioner may apply to any court (other than the High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness and such court may, in its discretion, issue such process as it considers reasonable and proper.

## **18. Parties to appear before commissioner**

(1) Where a commission is issued under this Order, the court shall direct that the parties to the suit shall appear before the commissioner in person or by their agents or advocates.

(2) Where all or any of the parties do not so appear, the commissioner may proceed in their absence.

## **ORDER XXVII SUITS BY OR AGAINST MILITARY PERSONNEL**

### **1. Officers or soldiers who cannot obtain leave may authorise any person to sue or defend for them**

(1) Where any officer or soldier actually serving the Government in a military capacity is a party to a suit, and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, he may authorise any person to sue or defend in his stead.

(2) The authority shall be in writing and shall be signed by the officer or soldier in the presence of—

- (a) his commanding officer, or the next subordinate officer, if the party is himself the commanding officer; or
- (b) where the officer or soldier is serving in military staff employment, the head or other superior officer of the officer in which he is employed, such commanding or other officer shall countersign the authority, which shall be filed in court.

(3) When so filed, the countersignature shall be sufficient proof that the authority was duly executed and that the officer or soldier by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person.

*Explanation:* In this Order the expression "commanding officer" means the officer in actual command for the time being of any regiment, corps, detachment or depot to which the officer or soldier belongs.

## **2. Person so authorised may act personally or appoint advocate**

Any person authorised by an officer or soldier to prosecute or defend a suit in his stead may prosecute or defend it in person in the same manner as the officer or soldier could do if present; or he may appoint an advocate to prosecute or defend the suit on behalf of such officer or soldier.

## **3 Service on person authorised, or on his advocate, to be good service**

Processes served upon any person authorised by an officer or soldier under rule 1 or upon any advocate appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person.

# **ORDER XXVIII SUITS BY OR AGAINST CORPORATIONS**

## **1. Subscription and verification of pleading**

In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

## **2. Service on corporation**

Subject to any written law regulating service of process, where the suit is against a corporation, the summons may be served—

- (a) on the secretary, or on any director, or other principal officer of the corporation; or
- (b) by leaving it or sending it by post addressed to the corporation at the registered office or, if there is no registered office, then at the place where the corporation carries on

business.

### **3. Power to require personal attendance of officer of corporation**

The court may, at any stage of the suit, require the personal appearance of the secretary or of any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit.

## **ORDER XXIX SUITS BY OR AGAINST FIRMS AND PERSONS CARRYING ON BUSINESS IN NAMES OTHER THAN THEIR OWN**

### **1. Suing of partners in name of firm**

(1) Any two or more persons claiming or being liable as partners and carrying on business in Tanzania may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the court for a statement of the names and addresses of the person who were, at the time of the accruing of the cause of action partners in such firm, to be furnished and verified in such manner as the court may direct.

(2) Where persons sue or are sued as partners in the name of their firm under subrule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons.

### **2. Disclosure of partners' names**

(1) Where a suit is instituted by partners in the name of their firm, the plaintiffs or their advocate shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.

(2) Where the plaintiffs or their advocate fail to comply with any demand made under subrule (1), all proceeding in the suit may, upon an application for that purpose, be stayed upon such terms as the court may direct.

(3) Where the names of the partners are declared in the manner referred to in subrule (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint:

Provided that all the proceedings shall nevertheless continue in the name of the firm.

### **3. Service**

Where persons are sued as partners in the name of their firm, the summons shall be served

either–

- (a) upon any one or more of the partners; or
- (b) at the principal place at which the partnership business is carried on, upon any person having, at the time of service, the control or management of the partnership business there,

as the court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without Tanzania:

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within Tanzania whom it is sought to make liable.

#### **4. Right of suit on death of partner**

(1) Notwithstanding anything contained in section 45 of the Law of Contract Act \*(19), where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in subrule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have–

- (a) to apply to be made a party to the suit; or
- (b) to enforce any claim against the survivor or survivors.

#### **5. Notice, in what capacity served**

Where a summons is issued to a firm and is served in the manner provided by rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters and, in default of such notice, the person served shall be deemed to be served as a partner.

#### **6. Appearance of partners**

Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

#### **7. No appearance except by partners**

Where a summons is served in the manner provided by rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary

unless he is a partner of the firm sued.

#### **8. Appearance under protest**

Any person served with summons as a partner under rule 3 may appear under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in default of appearance where no partner has appeared.

#### **9. Suits between co-partners**

This Order shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners in common; but no execution shall be issued in such suits except by leave of the court, and, on an application for leave to issue such execution, all such accounts and inquiries may be directed to be taken and made and directions given as may be just.

#### **10. Suit against person carrying on business in name other than his own**

Any person carrying on business in a name or style other than his own name, may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules under this Order shall apply.

### **ORDER XXX**

#### **SUITS BY OR AGAINST TRUSTEES, EXECUTORS AND ADMINISTRATORS**

##### **1. Representation of beneficiaries in suits concerning property vested in trustees, etc.**

In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit, but the court may, if it thinks fit, order them or any of them to be made parties.

##### **2. Joinder of trustees, executors and administrators**

Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them:

Provided that the executors who have not proved their testator's will, and trustees, executors and administrators outside Tanzania, need not be made parties.

### **ORDER XXXI**

#### **SUITS BY OR AGAINST MINORS AND PERSONS OF UNSOUND MIND**

##### **1. Minor to sue by next friend**

Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.

## **2. Where suit is instituted without next friend, plaint to be taken off the file**

(1) Where a suit is instituted by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file with costs to be paid by the advocate or other person by whom it was presented.

(2) Notice of such application shall be given to such person and the court, after hearing his objections (if any), may make such order in the matter as it thinks fit.

## **3. Guardian for the suit to be appointed by court for minor defendant**

(1) Where the defendant is a minor, the court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) The application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

(4) No order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf or, where there is no such guardian, upon notice to the father or other natural guardian of the minor or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this subrule.

(5) A person appointed under this rule to be a guardian for a suit shall, unless his appointment is terminated by retirement, removal or death, continue as such for the purposes of all the proceedings arising out of the suit including proceedings in execution of a decree.

## **4. Who may act as next friend or be appointed guardian for suit**

(1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit, provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared by a competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be.

(3) No person shall without his consent be appointed guardian for the suit.

(4) Where there is no other person fit and willing to act as guardian for the suit, the court may appoint any of its officers to be such guardian and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require.

## **5. Representation of minor by next friend or guardian for the suit**

(1) Every application to the court on behalf of a minor, other than an application under rule 10, subrule (2), shall be made by his next friend or by his guardian for the suit.

(2) Every order made in a suit or on any application before the court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged and, where the advocate of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such advocate.

## **6. Receipt by next friend or guardian for the suit of property under decree for minor**

(1) A next friend or guardian for the suit shall not, without the leave of the court, receive any money or other movable property on behalf of a minor either—

- (a) by way of compromise before decree or order; or
- (b) under a decree or order in favour of the minor.

(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor or, having been so appointed or declared, is under any disability known to the court to receive the money or other movable property, the court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application.

## **7. Agreement or compromise by next friend or guardian for the suit**

(1) No next friend or guardian for the suit shall, without the leave of the court expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

(2) Any such agreement or compromise entered into without the leave of the court so recorded shall be voidable against all parties other than the minor.

## **8. Retirement of next friend**

(1) Unless otherwise ordered by the court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already incurred.

(2) The application for the appointment of a new next friend shall be supported by an affidavit showing the fitness of the person proposed, and also that he has no interest adverse to that of the minor.

## **9. Removal of next friend**

(1) Where the interest of the next friend of a minor is adverse to that of the minor or where he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him, or where he does not do his duty, or during the pendency of the suit, ceases to reside within Tanzania or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal; and the court, if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly and make such other order as to costs as it thinks fit.

(2) Where the next friend is not a guardian appointed or declared by an authority competent in this behalf and an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend, the court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor, and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit.

## **10. Stay of proceedings on removal, etc., of next friend**

(1) On the retirement, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place.

(2) Where the advocate of such minor omits, within a reasonable time, to take steps to get a new next friend appointed, any person interested in the minor or in the matter in issue may apply to the court for the appointment of one, and the court may appoint such person as it thinks fit.

## **11. Retirement, removal or death of guardian for the suit**

(1) Where the guardian for the suit desires to retire or does not do his duty, or for any other sufficient cause, the court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit.

(2) Where the guardian for the suit retires, dies or is removed by the court during the pendency of the suit, the court shall appoint a new guardian in his place.

## **12. Course to be followed by minor plaintiff or applicant on attaining majority**

(1) A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending

shall, on attaining majority, elect where he will proceed with the or applicant suit or application.

(2) Where he elects to proceed with the suit or application, he shall apply for an order discharging the next friend and for leave to proceed in his own name.

(3) The title of the suit or application shall in such case be corrected so as to read henceforth thus—

"A.B., late a minor, by C.D., his next friend, but now having attained majority".

(4) Where he elects to abandon the suit or application he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend.

(5) Any application under this rule may be made *ex parte*; but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend.

### **13. Where minor co-plaintiff attaining majority desires to repudiate suit**

(1) Where a minor co-plaintiff on attaining majority desires to repudiate the suit, he shall apply to have his name struck out as co-plaintiff; and the court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit.

(2) Notice of the application shall be served on the friend, on any co-plaintiff and on the defendant.

(3) The costs of all parties of such application and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the court directs.

(4) Where the applicant is a necessary party to the suit the court may direct him to be made a defendant.

### **14. Unreasonable or improper suit**

(1) A minor on attaining majority may, if a sole plaintiff, apply that a suit instituted in his name by his next friend be dismissed on the ground that it was unreasonable or improper.

(2) Notice of the application shall be served on all the parties concerned; and the court, upon being satisfied of such unreasonableness or impropriety, may grant the application and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit, or make such other order as it thinks fit.

### **15. Application of rules to persons of unsound mind**

The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind and to person who though not so adjudged are found

by the court on inquiry, by reason or unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.

**ORDER XXXII**  
**SUITS RELATING TO MORTGAGES OF IMMOVABLE PROPERTY**

**1. Parties to suits for foreclosure, sale and redemption**

Subject to the provisions of this Code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage:

Provided that—

- (a) a puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit; and
- (b) a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage.

**2. Preliminary decree in foreclosure suit**

In a suit for foreclosure, if the plaintiff succeeds, the court shall pass a decree (referred to in this Code as "preliminary decree")—

- (a) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to; or
- (b) declaring the amount so due at the date of such decree; and
- (c) directing—
  - (i) that if the defendant pays into court the amount so due on a day within six months from the date of declaring in court the amount so due, to be fixed by the court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession the property; and
  - (ii) that, if such payment is not made on or before the day to be fixed by the court, the defendant shall, on the passing of a final decree, be debarred from all right to redeem the property.

**3. Final decree in foreclosure suit, power to enlarge time and discharge of debt**

(1) Where, on or before the day fixed, the defendant pays into court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the court shall pass a decree—

- (a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up; and
- (b) and if so required, ordering him to retransfer the mortgage property as directed in the said decree; and
- (c) if necessary, ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the court shall, on application made in that behalf by the plaintiff, pass a decree that the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgage property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property:

Provided that the court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for such payment.

(3) On the passing of a decree under subrule (2) the debt secured by the mortgage shall be deemed to be discharged.

#### **4. Preliminary decree in suit for sale and power to decree sale in foreclosure suit**

(1) In a suit for sale, if the plaintiff succeeds, the court shall pass a decree (referred to in this Code as "preliminary decree") to the effect mentioned in paragraphs (a), (b) and (c) of rule 2 and also directing that in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof shall, upon the passing of a final decree, be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into court and applied in payment of what is declared due to the plaintiff as aforesaid, together with subsequent interest and subsequent costs, and that the balance (if any) be paid to the defendant or other persons entitled to receive the same.

(2) In a suit for foreclosure, if the plaintiff succeeds, the court may, at the instance of the plaintiff or of any person interested either in the mortgage-money or in the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit including the deposit in court of a reasonable sum fixed by the court, to meet the expenses of sale and to secure the performance of the terms.

#### **5. Final decree in suit for sale**

(1) Where, on or before the day fixed, the defendant pays into court the amount declared due as aforesaid together with such subsequent costs as are mentioned in rule 10, the court shall pass a decree—

- (a) ordering the plaintiff to deliver up the documents which under the terms of the

preliminary decree he is bound to deliver up; and

- (b) if so required ordering him to retransfer the mortgaged property as directed in the said decree;
- (c) if necessary ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the court shall, on application may in that behalf by the plaintiff, pass a decree that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with as mentioned in rule 4.

## **6. Recovery of balance due on mortgage**

Where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the court may pass a decree for such amount.

## **7. Preliminary decree in redemption suit**

In a suit for redemption, if the plaintiff succeeds, the court shall pass a decree (referred to in this Code as "preliminary decree")–

- (a) ordering that an account be taken of what will be due to the defendant for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to; or
- (b) declaring the amount so due at the date of such decree; and
- (c) directing–
  - (i) that if the plaintiff pays into court the amount so due on a day within six months from the date of declaring in court the amount so due, to be fixed by the court, the defendant shall deliver up to the plaintiff, or to such persons as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff in possession of the property; and
  - (ii) that, if such payment is not made on or before the day to be fixed by the court, the plaintiff shall, on the passing of a final decree, be debarred from all right to redeem or that the mortgaged property be sold.

## **8. Final decree in redemption suit and power to enlarge time**

(1) Where, on or before the day fixed, the plaintiff pays into court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the court shall

pass a decree—

- (a) ordering the defendant to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up; and
- (b) if so required, ordering him to retransfer the mortgaged property as directed in the said decree; and
- (c) if necessary ordering him to put the plaintiff in possession of the property.

(2) Where such payment is not so made, the court shall, on application made in that behalf by the defendant, pass a decree that the plaintiff and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the plaintiff to put the defendant in possession of the property.

(3) On the passing of a decree under subrule (2) the debt secured by the mortgage shall be deemed to be discharged.

(4) Where such payment is not so made, the court shall, on application made in that behalf by the defendant, pass a decree that the mortgaged property or a sufficient part thereof be sold and that the proceeds for the sale (after defraying thereout the expenses of the sale) be paid into court and applied in payment of what is found due to the defendant, and that the balance (if any) be paid to the plaintiff or other persons entitled to receive the same.

(5) The court may, upon good cause shown and upon such terms (if any) as it thinks fit from time to time postpone the day fixed for payment.

## **9. Decree where nothing is found due or where mortgagee has been overpaid**

Notwithstanding anything hereinbefore contained, if it appears, upon taking the account referred to in rule 7, that, nothing is due to the defendant or that he has been overpaid, the court shall pass a decree directing the defendant, if so required, to retransfer the property and to pay the plaintiff the amount which may be found due to him; and the plaintiff shall, if necessary, be put in possession of the mortgaged property.

## **10. Costs of mortgagee subsequent to decree**

In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure or sale or redemption, the court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure or sale or redemption up to the time of actual payment.

## **11. Right of mesne mortgagee to redeem and foreclose**

Where property is mortgaged for successive debts to successive mortgagees, any mesne mortgagee may institute a suit to redeem the interests of the prior mortgagees and to foreclose

the rights of those that are posterior to himself and of the mortgagor.

## **12. Sale of property subject to prior mortgage**

Where any property the sale of which is directed under this Order is subject to a prior mortgage, the court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

## **13. Application of proceeds**

- (1) The proceeds shall be brought into court and applied in the following order of priority:
  - (a) in the payment of all expenses incidental to the sale or expenses properly incurred in any attempted sale;
  - (b) in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith;
  - (c) in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made;
  - (d) in payment of the principal money due on account of that mortgage; and
  - (e) the residue (if any) shall be paid to the person proving himself to be interested in the property sold or, if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

(2) Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by section 63 of the Land Registration Act \*(20).

## **14. Suit for possession**

In a suit for delivery of possession of a mortgaged property (where such possession is sought otherwise than by foreclosure) to the mortgagee by the mortgagor or by any other person in or alleged to be in possession of the property the court may, if it is satisfied that the plaintiff has a right to such possession, pass a decree, subject to such conditions as it may think just, directing the defendant to deliver possession of such property to the plaintiff.

## **15. Interpretation**

References in this Order to retransferring mortgaged property shall, in relation to land registered under the Land Registration Act \*(21), be construed as meaning discharging the mortgage.

## **16. Mortgages by deposit of title deeds and charges**

All the provisions contained in this Order which apply to a mortgage shall, so far as may be, apply to mortgages and liens by deposit of title deeds and to statutory charges.

## **ORDER XXXIII INTERPLEADER**

### **1. Complaint in interpleader suits**

In every suit of interpleader the plaintiff shall, in addition to other statements necessary for complaints, state—

- (a) that the plaintiff claims no interest in the subject matter in dispute other than for charges or costs;
- (b) the claims made by the defendants severally; and
- (c) that there is no collusion between the plaintiff and any of the defendants.

### **2. Payment of thing claimed into court**

Where the thing claimed is capable of being paid into court, or placed in the custody of the court, the plaintiff may be required to so pay or place it before he can be entitled to any order in the suit.

### **3. Procedure where defendant is suing plaintiff**

Where any of the defendants in an interpleader suit is actually suing the plaintiff in respect of the subject matter of such suit, the court in which the suit against the plaintiff is pending shall, on being informed by the court in which the interpleader suit has been instituted stay the proceedings as against him; and his costs in the suit so stayed may be provided for in such suit; but if, and in so far as, they are provided for in that suit, they may be added to his costs incurred in the interpleader suit.

### **4. Procedure at first hearing**

- (1) At the first hearing the court may—
  - (a) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit; or
  - (b) if it thinks that justice or convenience so requires, retain all parties until the final disposal of the suit.
- (2) Where the court finds that the admissions of the parties or other evidence enable it to do so, it may adjudicate the title to the thing claimed.
- (3) Where the admission of the parties do not enable the court so to adjudicate, it may

direct–

- (a) that an issue or issues between the parties be framed and tried; and
- (b) that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff,

and shall proceed to try the suit in the ordinary manner.

## **5. Agents and tenants may not institute interpleader suits**

Nothing in this Order shall be deemed to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords.

## **6. Charge for plaintiff's costs**

Where the suit is properly instituted the court may provide for the costs of the original plaintiff by giving him a charge on the thing claimed or in some other effectual way.

### **ORDER XXXIV SPECIAL CASE**

## **1. Power to state case for court's opinion**

(1) Parties claiming to be interested in the decision of any question of fact or law may enter into an agreement in writing stating such question in the form of a case for the opinion of the court and providing that, upon the finding of the court with respect to such question–

- (a) a sum of money fixed by the parties or to be determined by the court shall be paid by one of the parties to the other of them;
- (b) some property, movable or immovable, specified in the agreement, shall be delivered by one of the parties to the other of them; or
- (c) one or more of the parties shall do, or refrain from doing some other particular act specified in the agreement.

(2) Every case stated under this rule shall be divided into consecutively numbered paragraphs and shall concisely state such facts and specify such documents as may be necessary to enable the court to decide the question raised thereby.

## **2. Where value of subject matter must be stated**

Where the agreement is for the delivery of any property, or for the doing, or the refraining from doing, any particular act, the estimated value of the property to be delivered, or to which the act specified has reference, shall be stated in the agreement.

### **3. Agreement to be filed and registered as suit**

(1) The agreement, if framed in accordance with the rules hereinbefore contained, may be filed in the court which would have jurisdiction to entertain a suit the amount or value of the subject matter of which is the same as the amount or value of the subject matter of the agreement.

(2) The agreement, when so filed, shall be numbered and registered as a suit between one or more of the parties claiming to be interested as plaintiff or plaintiffs, and the other or the others of them as defendant or defendants and notice shall be given to all parties to the agreement other than the party or parties by whom it was presented.

### **4. Parties to be subject to court's jurisdiction**

Where the agreement has been filed, the parties to it shall be subject to the jurisdiction of the court and shall be bound by the statement contained therein.

### **5. Hearing and disposal of case**

(1) The case shall be set down for hearing as a suit instituted in the ordinary manner, and the provisions of this Code shall apply to such suit so far as the same are applicable.

(2) Where the court is satisfied, after examination of the parties, or after taking such evidence as it thinks fit—

- (a) that the agreement was duly executed by them;
- (b) that they have a *bona fide* interest in the question stated therein; and
- (c) that the case is fit to be decided,

it shall proceed to pronounce judgment thereon in the same way as in an ordinary suit; and upon the judgment so pronounced a decree shall follow.

## **ORDER XXXV SUMMARY PROCEDURE**

### **1. Application of Order**

This Order shall, where the plaintiff desires to proceed in accordance with the Order, apply to—

- (a) suits upon bills of exchange (including cheques) or promissory notes;
- (b) suits for the recovery of income tax; and
- (c) suits arising out of mortgages, whether legal or equitable, for—

- (i) payment of monies secured by mortgage;
  - (ii) sale;
  - (iii) foreclosure;
  - (iv) delivery of possession of the mortgaged property (where such possession is sought otherwise than by foreclosure) to the mortgagee by the mortgagor or by any other person in or alleged to be in possession of the mortgaged property;
  - (v) redemption; or
  - (vi) retransfer or discharge; and
- (d) suits by the Tanzania Electric Supply Company Limited for the recovery of meter rents, charges for the supply of electricity and other charges (including any tax) connected with or incidental to the supply of electricity to any consumer;
  - (e) suits for the recovery of rent, interest or other debts due to the Republic, the Government or any local government authority;
  - (f) suits for the recovery of possession of any immovable property including any building or other premises where the right of the person seeking to recover such possession is not restricted by the provisions of the Rent Restriction Act \*(22), and suit for the recovery of rent, mesne profits or damages for unlawful occupation in respect of such immovable property, building or premises; and
  - (g) suits for the recovery of possession of any immovable property from a lessee under a financial lease agreement where under a financial lease agreement where under such agreement the lessee has no right of ownership over the property leased to him.

## **2. Institution of summary suits**

(1) Suits to which this Order applies shall be instituted by presenting a plaint in the usual form but endorsed "Order XXXV: Summary Procedure" and the summons shall inform the defendant that unless he obtains leave from the court to defend the suit, a decision may be given against him and shall also inform him of the manner in which application may be made for leave to defend.

(2) In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from the judge or magistrate as hereinafter provided so to appear and defend; and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled—

- (a) where the suit is a suit, referred to in paragraph (a), (b) or (d) of rule 1 or a suit for the recovery of money under a mortgage and no other relief in respect of such mortgage is

claimed, to a decree for any sum not exceeding the sum mentioned in the summons, together with interest at the rate specified (if any) and such sum for costs as may be prescribed, unless the plaintiff claims more than such fixed sum, in which case the costs shall be ascertained in the ordinary way, and such decree may be executed forthwith;

- (b) where the suit arises out of a mortgage and is for foreclosure, sale, delivery of possession, redemption or retransfer, to a decree in accordance with the provisions of Order XXXII and other provisions of this Code and such decree may, unless it is a preliminary decree, be executed forthwith;
- (c) where the suit is for the recovery of possession of any immovable property, building or premises or for payment of rent, mesne profits or damages for unlawful occupation of such immovable property, building or premises, to a decree for possession and for payment of rent, mesne profits or damages as claimed.

### **3. Defendant showing defence on merits to have leave to appear**

(1) The court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which—

- (a) disclose such facts as would make it incumbent on the holder to prove consideration, where the suit is on a bill of exchange or promissory note; or
- (b) disclose such facts as the court may deem sufficient to support the application.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into court, giving security, framing and recording issues or otherwise as the court thinks fit.

### **4. Power to set aside decree**

After decree the court may, under special circumstance, set aside the decree and, if necessary, stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the court so to do, and on such terms as the court thinks fit.

### **5. Power to order bill, etc., to be deposited with officer of court**

In any proceeding under this Order the court may order the bill or note on which the suit is founded to be forthwith deposited with an officer of the court and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof.

### **6. Recovery of cost of noting non-acceptance of dishonoured bill or note**

The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under this Order for the

recovery of the amount of such bill or note.

## **7. Procedure in suits**

Save as provided by this Order, the procedure in suits under this order shall be the same as the procedure in suits instituted in the ordinary manner.

### **ORDER XXXVI ARREST AND ATTACHMENT BEFORE JUDGMENT**

#### ***Arrest before Judgment***

#### **1. Where defendant may be called upon to furnish security for appearance**

Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) of section 14, the court is satisfied, by affidavit or otherwise—

- (a) that the defendant, with intent to delay the plaintiff, or to avoid any process of the court or to obstruct or delay the execution of any decree that may be passed against him—
  - (i) has absconded or left the local limits of the jurisdiction of the court; or
  - (ii) is about to abscond or leave the local limits of the jurisdiction of the court; or
  - (iii) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or
- (b) that the defendant is about to leave Tanzania under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance:

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court.

#### **2. Request for arrest by telegram**

(1) A court which has issued a warrant of arrest under rule 1 of this Order may, by telegram, request any district court within the area of whose jurisdiction the defendant is believed to be, to arrest him and cause him to be taken under escort to the court which issued the warrant.

(2) A telegram sent under the provisions of subrule (1) shall state—

- (a) the number and title of the case;

- (b) the full name of the defendant and the place where he is believed to be;
- (c) the amount of money upon payment of which the defendant may be released;
- (d) that the person applying for arrest has given security for the expenses of and the transport of the defendant and his escort to the court which issued the warrant; and
- (e) the date when the warrant of arrest was issued.

(3) On receipt of a telegram sent in accordance with the provisions of this rule, the court to which it is addressed shall issue a provisional warrant in accordance with the particulars contained in the telegram and shall cause the same to be executed.

### **3. Security**

(1) Where the defendant fails to show such cause under rule 1 the court shall order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to rule 1.

(2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

### **4. Procedure on application by surety to be discharged**

(1) A surety for the appearance of a defendant may at any time apply to the court in which he became such surety to be discharged from his obligation.

(2) On such application being made, the court shall summon the defendant to appear or, if it thinks fit, may issue a warrant for his arrest in the first instance.

(3) On the appearance of the defendant in pursuance of the summons or warrant, or on his voluntary surrender, the court shall direct the surety to be discharged from his obligation and shall call upon the defendant to find fresh security.

### **5. Procedure where defendant fails to furnish security or find fresh security**

Where the defendant fails to comply with any order under rule 3 or rule 4, the court may commit him as a civil prisoner until the decision of the suit or, where a decree is passed against the defendant, until the decree has been satisfied:

Provided that no person shall be detained in prison under this rule in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject matter of the suit does not exceed one hundred and fifty shillings:

Provided also that no person shall be detained in prison under this rule after he has complied

with such order.

### ***Attachment before Judgment***

#### **6. Where defendant may be called upon to furnish security for production of property**

(1) Where, at any stage of a suit, the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him—

- (a) is about to dispose of the whole or any part of his property; or
- (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

#### **7. Attachment where cause not shown or security not furnished**

(1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the court, the court may order that the property specified or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

(2) Where the defendant shows such cause or furnishes the required security and the property specified or any portion of it has been attached, the court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

#### **8. Mode of making attachment**

Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of the property in execution of a decree.

#### **9. Investigation of claim to property attached before judgment**

Where any claim is preferred to property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for the payment of money.

#### **10. Removal of attachment when security furnished or suit dismissed**

Where an order is made for attachment before judgment, the court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed.

#### **11. Attachment before judgment not to affect rights of strangers nor bar decree-holder from applying for sale**

Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

#### **12. Property attached before judgment not to be re-attached in execution of decree**

Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for re-attachment of the property.

#### **13. Agricultural produce not attachable before judgment**

Nothing in this Order shall be deemed to authorise the plaintiff to apply for the attachment of any agricultural produce in the possession of an agriculturist, or to empower the court to order the attachment or production of such produce.

### **ORDER XXXVII TEMPORARY INJUNCTIONS, DECLARATORY ORDERS AND INTERLOCUTORY ORDERS**

#### ***Temporary Injunctions***

#### **1. Cases in which temporary injunction may be granted or declaratory order made**

Where in any suit it is proved by affidavit or otherwise—

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit or suffering loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree; or
- (b) that the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors,

the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the property as the court thinks fit, until the disposal of the suit or until further orders:

Provided that an order granting a temporary injunction shall not be made against the

Government, but the court may in lieu thereof make an order declaratory of the rights of the parties.

## **2. Injunction to restrain repetition or continuance of breach**

(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right:

Provided that no application shall be made for a temporary injunction where the defendant is the Attorney-General but, in such case, the plaintiff may apply to the court for an order declaratory of the rights of the parties.

(2) In case of disobedience or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained as a civil prisoner for a term not exceeding six months, unless in the meantime the court directs his release.

(3) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

## **3. Procedure where no application is made on suit adjourned generally**

In addition to such terms as the keeping of an account and giving security, the court may be order grant injunction under rule 1 or rule 2 and such order shall be in force for a period specified by the court, but not exceeding six months:

Provided that the court granting the injunction may, from time to time extend such period for a further period which in the aggregate shall not exceed one year, upon being satisfied, on the application of the holder of such court injunction that the applicant has diligently been taking steps to settle the matter complained of and such extension sought is in the interest of justice, necessary or desirable; and

## **4. Before granting injunction court to direct notice to opposite party**

The court shall in all cases, before granting an injunction, direct notice of application for the same to be given to the opposite party, except where it appears that the giving of such notice would cause undue delay and that the object of granting the injunction, would thereby be defeated.

## **5. Order for injunction or declaratory order may be discharged, varied or set aside**

Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.

## **6. Injunction to corporation binding on its officers**

An injunction directed to a corporation is binding not only on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain.

### ***Interlocutory Orders***

## **7. Power to order interim sale**

The court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any movable property, being the subject matter of such suit or attached before judgment in such suit, which is subject to speedy and natural decay or which for any other just and sufficient cause it may be desirable to have sold at once.

## **8. Detention, preservation, inspection, etc., of subject matter of suit**

- (1) The court may, on the application of any party to a suit, and on such terms as it thinks fit—
  - (a) make an order for the detention, preservation or inspection of any property which is the subject matter of such suit, or as to which any question may arise therein;
  - (b) for all or any of the purposes aforesaid authorise any person to enter upon or into any land or building in the possession of any other party to such suit; and
  - (c) for all or any of the purposes aforesaid authorise any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

(2) The provisions as to execution of process shall apply, *mutatis mutandis*, to persons authorised to enter under this rule.

## **9. Application for orders to be after notice**

(1) An application by the plaintiff for an order under rule 6 or rule 7 may be made after notice to the defendant at any time after institution of the suit.

(2) An application by the defendant for a like order may be made after notice to the plaintiff at any time after appearance.

## **10. Deposits of money, etc., in court**

Where the subject matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the court may order the same to be deposited in court

or delivered to such last-named party, with or without security subject to the further direction of the court.

## **ORDER XXXVIII APPOINTMENT OF RECEIVERS**

### **1. Appointment of receivers**

(1) Where it appears to the court to be just and convenient, the court may, by order, do any of the following—

- (a) appoint a receiver of any property, whether before or after decree;
- (b) remove any person from the possession or custody of the property;
- (c) commit the property to the possession, custody or management of the receiver;
- (d) confer upon the receiver all such powers, as to bringing and defending suits and for the realisation, management, protection, preservation and improvement of the property, the collection of the rent and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the court thinks fit.

(2) Nothing in this rule shall authorise the court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

### **2. Remuneration of receiver**

The court may by general or special order fix the amount to be paid as remuneration for the services of the receiver.

### **3. Duties of receiver**

Every receiver so appointed shall—

- (a) furnish such security (if any ) as the court thinks fit, duly to account for what he shall receive in respect of the property;
- (b) submit his accounts at such periods and in such form as the court directs;
- (c) pay the amount due from him as the court directs; and
- (d) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

### **4. Enforcement of receiver's duties**

Where a receiver—

- (a) fails to submit his accounts at such periods and in such form as the court directs;
- (b) fails to pay the amount due from him as the court directs; or
- (c) occasions loss to the property by his wilful default or gross negligence,

the court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver.

## **ORDER XXXIX APPEALS FROM ORIGINAL DECREES**

### **1. Form of appeal, contents of memorandum and attachments**

(1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his advocate and presented to the High Court (hereinafter in this Order referred to as "the Court") or to such officer as it appoints in this behalf and the memorandum shall be accompanied by a copy of the decree appealed from and (unless the Court dispenses therewith) of the judgment on which it is founded.

(2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively.

### **2. Grounds which may be taken on appeal**

The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

### **3. Rejection or amendment of memorandum**

(1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.

(2) Where the Court rejects any memorandum it shall record the reasons for such rejection.

(3) Where a memorandum of appeal is amended, the judge, or such officer as he appoints in this behalf, shall sign or initial the amendment.

### **4. One of several plaintiffs or defendants may obtain reversal of whole decree where**

### **it proceeds on ground common to all**

Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

### ***Stay of Proceedings and of Execution***

#### **5. Stay by Appellate Court or by court which passed the decree**

(1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree but the Court may, for sufficient cause, order the stay of execution of such decree.

(2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the court which passed the decree may, on sufficient cause shown, order the execution to be stayed.

(3) No order for stay of execution shall be made under subrule (1) or subrule (2) unless the High Court or the court making it is satisfied—

- (a) that substantial loss may result to the party applying for stay of execution unless the order is made;
- (b) that the application has been made without unreasonable delay; and
- (c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) Notwithstanding anything contained in subrule (3), the court may make an *ex parte* order for stay of execution pending the hearing of the application.

#### **6. Security in case of order for execution of decree appealed from**

(1) Where an order is made for the execution of a decree from which an appeal is pending, the court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the court or the Court may, for like cause, direct the court which passed the decree to take such security.

(2) Where an order has been made for the sale of immovable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment debtor to the court which made the order, be stayed on such terms as to giving

security or otherwise as the court thinks fit until the appeal is disposed of.

#### **7. No security to be required from the Government or a public officer in certain cases**

No such security as is mentioned in rules 5 and 6 shall be required from the Government or, where the Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity.

#### **8. Exercise of powers in appeal from order made in execution of decree**

The powers conferred by rules 5 and 6 shall be exercisable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree.

#### ***Procedure on Admission of Appeal***

#### **9. Registration of memorandum of appeal and register of appeals**

Where a memorandum of appeal is admitted, the Court or the proper officer of the Court shall endorse thereon the date of presentation and shall register the appeal in a book, to be known as the Register of Appeal, and kept for the purpose.

#### **10. Appellate Court may require appellant to furnish security for costs**

(1) The Court may in its direction, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both:

Provided that the Court shall demand such security in all cases in which the appellant is residing out of Tanzania, and is not possessed of any sufficient immovable property within Tanzania other than the property (if any) to which the appeal relates.

(2) Where such security is not furnished within such time as the Court orders, the Court shall reject the appeal.

#### **11. Power to dismiss appeal without sending notice to lower court**

(1) The Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his advocate and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the court from whose decree the appeal is preferred and without serving notice on the respondent or his advocate.

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing the Court may make an order that the appeal be dismissed.

(3) The dismissal of an appeal under this rule shall be notified to the court from whose decree the appeal is preferred.

## **12. Day for hearing appeal**

(1) Unless the Court dismisses the appeal under rule 11, it shall fix a day for hearing the appeal.

(2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day.

## **13. High Court to give notice to court whose decree appealed from; and other requirements**

(1) Where the appeal is not dismissed under rule 11, the Court shall send notice of the appeal to the court from whose decree the appeal is preferred.

(2) The court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the Court.

(3) Either party may apply in writing to the court from whose decree the appeal is preferred, specifying any of the papers in such court of which he requires copies to be made and copies of such papers shall be made at the expense of, and given to, the applicant.

## **14. Publication and service of notice of day for hearing of appeal**

(1) Notice of the day fixed under rule 12 shall be fixed in the Court, and a like notice shall be sent by the Court to the court from whose decree the appeal is preferred, and shall be served on the respondent or on his advocate acting for him in the Court in the manner provided for the service on a defendant of a summons; and all the provisions applicable to summons and to proceedings with reference to the service thereof shall apply to the service of such notice.

(2) Instead of sending the notice to the court from whose decree the appeal is preferred, the Court may itself cause the notice to be served on the respondent or his advocate; and the provisions of subrule (1) shall apply to such service.

## **15. Contents of notice**

The notice to the respondent shall declare that if he does not appear in the Court on the day so affixed, the appeal will be heard *ex parte*.

### ***Procedure on Hearing***

## **16. Right to begin**

(1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal.

(2) The Court shall then, if it does not dismiss the appeal at once, hear the respondent

against the appeal, and in such case the appellant shall be entitled to reply.

**17. Dismissal of appeal for appellant's default and hearing of appeal *ex parte***

(1) Where on the day fixed or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(2) Where the appellant appears and the respondent does not appear, the appeal shall be heard *ex parte*.

**18. Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs**

Where on the day fixed, or on any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of serving the notice, the Court may make an order that the appeal be dismissed:

Provided that no such order shall be made although the notice has not been served upon the respondent, if on any such day the respondent appears when the appeal is called on for hearing.

**19. Re-admission of appeal dismissed for default**

Where an appeal is dismissed under subrule (2), of rule 11 or rule 17 or rule 18, the appellant may apply to the Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

**20. Power to adjourn hearing and direct persons appearing interested to be made respondents**

Where it appears to the Court at the hearing that any person who was a party to the suit in the court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent.

**21. Re-hearing on application of respondent against whom *ex parte* decree made**

Where an appeal is heard *ex parte* and judgment is pronounced against the respondent, he may apply to the Court to re-hear the appeal; and, if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him.

## **22. Upon hearing, respondent may object to decree as if he had preferred separate appeal**

(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Court within one month from the date of service on him or his advocate of notice of the day fixed for hearing the appeal, or within such further time as the Court may see fit to allow.

(2) The cross-objection shall be in the form of a memorandum and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(3) Unless the respondent files with the objection a written acknowledgement from the party who may be affected by such objection or his advocate, of having received a copy thereof, the Court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his advocate at the expense of the respondent.

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

## **23. Remand of case by High Court**

Where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Court may, if it thinks fit, by order remand the case and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

## **24. Where evidence on record sufficient, High Court may determine case finally**

Where the evidence upon the record is sufficient to enable the Court to pronounce judgment, the Court may, after re-settling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Court proceeds.

## **25. Where High Court may frame issues and refer them for trial to court whose decree appealed from**

Where the court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Court essential to the right

decision of the suit upon the merits, the Court may, if necessary, frame issues and refer the same for trial to the court from whose decree the appeal is preferred, and in such case shall direct such court to take the additional evidence required; and such court shall proceed to try such issues and shall return the evidence to the Court together with its findings thereon and the reasons therefor.

## **26. Findings and evidence to be put on record, objections to finding and determination of appeal**

(1) The evidence and findings shall form part of the record in the suit; and either party may, within a time to be fixed by the Court, present a memorandum of objections to any finding.

(2) After the expiration of the period so fixed for presenting such memorandum the Court shall proceed to determine the appeal.

## **27. Production of additional evidence in High Court**

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Court, but if—

- (a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
- (b) the Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Court may allow such evidence or document to be produced, or the witness to be examined.

(2) Wherever additional evidence is allowed to be produced by the Court, the Court shall record the reason for its admission.

## **28. Mode of taking additional evidence**

Wherever additional evidence is allowed to be produced, the Court may either take such evidence or direct the court from whose decree the appeal is preferred, or any other subordinate court, to take such evidence and to send it, when taken, to the court.

## **29. Points to be defined and recorded**

Where additional evidence is directed or allowed to be taken, the Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified.

### ***Judgment in Appeal***

## **30. Judgment, when and where pronounced**

The Court, after hearing the parties or their advocates and referring to any part of the

proceedings to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day of which notice shall be given to the parties or their advocates.

### **31. Contents, date and signature of judgment**

The judgment of the Court shall be in writing and shall state—

- (a) the points for determination;
- (b) the decision thereon;
- (c) the reasons for the decisions; and
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled,

and shall at the time that it is pronounced be signed and dated by the judge or by the judges concurring therein.

### **32. What judgment may direct**

The judgment may be for confirming, varying or reversing the decree from which the appeal is preferred or, if the parties to the appeal agree as to the form which the decree in appeal shall take or as to the order to be made in appeal, the Court may pass a decree or make an order accordingly.

### **33. Power of High Court**

The Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

### **34. Dissent to be recorded**

Where the appeal is heard by more judges than one, any judge dissenting from the judgment of the Court shall state in writing the decision or order which he thinks should be passed on the appeal, and may state his reasons for the same.

## ***Decree in Appeal***

### **35. Date and contents of decree**

(1) The decree of the Court shall bear the date of the day on which the judgment was pronounced.

(2) The decree shall, contain the number of the appeal, the names and descriptions of the appellant and respondent and a clear specification of the relief granted or other adjudication made.

(3) The decree shall also state the amount of costs incurred in the appeal, and by whom, or out of what property, and in what proportion such costs and the costs in the suit are to be paid.

(4) The decree shall be signed and dated by the judge or judges who passed it:

Provided that where there are more Judges than one and there is a difference of opinion among them, it shall not be necessary for any judge dissenting from the judgment of the Court to sign the decree.

### **36. Copies of judgment and decree to be furnished to parties**

Certified copies of the judgment and decree in appeal shall be furnished to the parties on application to the Court and at their expense.

### **37. Certified copy of decree to be sent to court whose decree appealed from**

A copy of the judgment and of the decree, certified by the Court or such officer as it appoints in this behalf, shall be sent to the court which passed the decree appealed from and shall be filed with the original proceedings in the suit, and an entry of the judgment of the Court shall be made in the register of civil suits.

## **ORDER XL APPEALS FROM ORDERS**

### **1. Appeals from orders**

An appeal shall lie from the following orders under the provisions of section 74, namely—

- (a) an order under rule 10 of Order VII returning a plaint to be presented to the proper court;
- (b) an order under rule 14 of Order VIII pronouncing judgment against a party;
- (c) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;
- (d) an order under rule 13 of Order IX rejection an application (in a case open to appeal) for an order to set aside a decree or judgment passed *ex parte*;
- (e) an order under rule 4 or Order X pronouncing judgment against a party;
- (f) an order under rule 18 of Order XI;

- (g) an order under rule 10 of Order XVI for the attachment of property;
- (h) an order under rule 20 of Order XVI pronouncing judgment against a party;
- (i) an order under rule 34 of Order XXI on an objection to the draft of a document or of an endorsement;
- (j) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale;
- (k) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit;
- (l) an order under rule 10 of Order XXII giving or refusing to give leave;
- (m) an order under rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction;
- (n) an order under rule 2 of Order XXV rejecting an application for an order to set aside the dismissal of a suit;
- (o) an order under rule 3 or rule 8 of Order XXXII refusing to extend the time for the payment of mortgage-money;
- (p) orders in interpleader-suits under rule 3, rule 4 or rule 6 of Order XXXIII;
- (q) an order under rule 3, rule 4 or rule 7 of Order XXXVI;
- (r) an order under rule 1, rule 2, rule 4 or rule 9 of Order XXXVII;
- (s) an order under rule 1 or rule 4 of Order XXXVIII;
- (t) an order of refusal under rule 19 of Order XXXIX to re-admit, or under rule 21 of Order XXXIX to re-hear, an appeal;
- (u) an order under rule 23 of Order XXXIX remanding a case, where an appeal would lie from the decree of the High Court;
- (v) an order under rule 4 of Order XLII granting an application for review.

## **2. Procedure**

The rules of Order XXXIX shall apply, so far as may be, to appeals from orders.

### **ORDER XLI REFERENCE**

#### **1. Reference of question to High Court**

Where, before or on the hearing of a suit in which the decree is not subject to appeal or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained and refer such statement with its own opinion on the point for the decision of the High Court.

## **2. Court may pass decree contingent upon decision of High Court**

The court may either stay the proceedings or proceed in the case notwithstanding such reference, and may pass a decree or make an order contingent upon the decision of the High Court on the point referred; but no decree or order shall be executed in any case in which such reference is made until the receipt of a copy of the judgment of the High Court upon the reference.

## **3. Judgment of High Court to be transmitted, and case disposed of accordingly**

The High Court, after hearing the parties if they appear and desire to be heard, shall decide the point so referred and shall transmit a copy of its judgment under the signature of the Registrar to the court by which the reference was made and such court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court.

## **4. Costs of reference to High Court**

The costs (if any) consequent on a reference for the decision of the High Court shall be costs in the case.

## **5. Power to alter, etc., decree of court making reference**

Where a case is referred to the High Court under rule 1, the High Court may return the case for amendment and may alter, cancel or set aside any decree or order which the court making the reference has passed or made in the case out of which the reference arose and make such order as it thinks fit.

## **6. Power to refer to High Court questions as to jurisdiction**

(1) Where at any time before judgment a court in which a suit has been instituted doubts whether the suit is cognizable by that court or is not so cognizable, it may submit the record to the High Court with a statement of its reasons for the doubts as to the nature of the suit.

(2) On receiving the record and statement, the High Court may order the court either to proceed with the suit or to return the plaint for presentation to such other court as it may in its order declare to be competent to take cognizance of the suit.

**ORDER XLII  
REVIEW**

## **1. Application for review of judgment**

(1) Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

## **2. To whom application for review may be made**

An application for review of a decree or order of a court, other than the High Court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1 or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the magistrate who passed the decree or made the order sought to be reviewed; but any such application may, if the magistrate who passed the decree or made the order has ordered notice to issue under paragraph (b) of the proviso to subrule (2) of rule 4.

## **3. Form of applications for review**

The provisions as to the form of preferring appeal shall apply, *mutatis mutandis*, to applications for review.

## **4. Application, where rejected or granted**

(1) Where it appears to the court that there is not sufficient ground for a review, it shall reject the application.

(2) Where the court is of opinion that the application for review should be granted it shall grant the same:

Provided that—

- (a) no such application shall be granted without previous notice to the opposite party, to

enable him to appear and be heard in support of the decree or order, a review of which is applied for; and

- (b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation.

#### **5. Application for review in court consisting of two or more judges**

(1) Where the judge or judges, or any one of the judges, who passed the decree or made the order, a review of which is applied for, continues or continue attached to the court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such judge or judges or any of them shall hear the application, and no other judge or judges of the court shall hear the same.

(2) For the purposes of this rule and rule 6, "judge" includes a magistrate.

#### **6. Decision where application heard by more than one judge**

(1) Where the application for a review is heard by more than one judge and the Court is equally divided, the application shall be rejected.

(2) Where there is a majority, the decision shall be according to the opinion of the majority.

#### **7. Order of rejection not appealable and objections to order granting application**

(1) An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to on the ground that the application was—

- (a) in contravention of the provisions of rule 2;
- (b) in contravention of the provisions of rule 4;
- (c) after the expiration of the period of limitation prescribed therefor and without sufficient cause,

and such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit.

(2) Where the application has been rejected in consequence of the failure of the applicant to appear, he may apply for an order to have the rejected application restored to the file and where it is proved to the satisfaction of the court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit and shall appoint a day for hearing the same.

(3) No order shall be made under subrule (2) unless notice of the application has been served on the opposite party.

#### **8. Registration of application granted, and order for re-hearing**

When an application for review is granted, a note thereof shall be made in the register and the court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.

#### **9. Bar of certain applications**

No application to review an order made on an application for a review or a decree or order passed or made on a review shall be entertained.

### **ORDER XLIII MISCELLANEOUS PROVISIONS**

#### **1. Powers of Registrars**

Subject to any general or special direction of the Chief Justice, the following powers may be exercised by the Registrar or any Deputy or District Registrar of the High Court in any proceeding before the High Court—

- (a) to appoint and extend the time for filing the written statement of defence, to give leave to file a reply thereto and to appoint and extend the time for filing such reply under Order VIII, rule 1, 11, and 13;
- (b) to order that a suit be dismissed under Order IX, rules 2, 3 and 5;
- (c) to make an order or give judgment on admissions under order XII, rule 4;
- (d) to sign decrees under Order XX, rule 7;
- (e) to admit, reject or allow the amendment of an application for execution of a decree under Order XXI, rule 15;
- (f) to issue notice under Order XXI, rule 20;
- (g) to order that a decree be executed under Order XXI, rule 21;
- (h) to issue process for execution of a decree under Order XXI, rule 22;
- (i) to stay execution, restore property, discharge judgment-debtors and require and take security under Order XXI, rule 24;
- (j) if there is no judge at the place of registry, to issue a notice to show cause and to issue a warrant of arrest under Order XXI, rule 35;

- (k) if there is no judge at the place of registry, to order attendance, examination and production under Order XXI, rule 40; and
- (l) to order that an agreement, compromise or satisfaction be recorded under Order XXIII, rule 3.

## **2. Applications to be by chamber summons supported by affidavit**

Every application to the Court made under this Code shall, unless otherwise provided, be made by a chamber summons supported by affidavit:

Provided that the Court may where it considers fit to do so, entertain an application made orally or, where all the parties to a suit consent to the order applied for being made, by a memorandum in writing signed by all the parties or their advocates, or in such other mode as may be appropriate having regard to all the circumstances under which the application is made.

## **3. Process to be served at expense of party issuing and costs of service**

(1) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the court otherwise directs.

(2) The court fee chargeable for such service shall be paid within a time to be fixed before the process is issued.

## **4. Orders and notices, how served**

All orders, notices and other documents required by this Code to be given to or served on any person shall be served in the manner provided for the service of summons.

## **5. Directions of High Court may be notified by telegram**

(1) The Registrar of the High Court may by telegram, notify any officer of the court of any order made by the High Court and direct him to take such steps as may be necessary to give effect to the order.

(2) A telegram sent under the provisions of subrule (1) shall state—

- (a) the number and title of the proceeding;
- (b) the substance of the order; and
- (c) the action required to be taken.

(3) On receipt of a telegram sent in accordance with the provisions of this rule the officer to whom it is addressed shall act in accordance with the directions given to him.

## **SECOND SCHEDULE**

## **THE CIVIL PROCEDURE (ARBITRATION) RULES**

(Section 80)

### **1A. Citation and application**

(1) These Rules may be cited as the Civil Procedure (Arbitration) Rules \*(23).

(2) In addition to their application to any other proceedings, these Rules shall also apply to proceedings to which the Government Proceedings Act applies.

## **ARBITRATION**

### **ARBITRATION IN SUITS**

#### **1. Order of reference to arbitration**

(1) Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration they may, at any time before judgment is pronounced, apply to the court for an order of reference.

(2) Every such application shall be in writing and shall state the matter sought to be referred.

#### **2. Appointment of arbitrator**

The arbitrator shall be appointed in such manner as may be agreed upon between the parties.

#### **3. Order of reference**

(1) The court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order.

(2) Where a matter is referred to arbitration the court shall not, save in the manner and to the extent provided in these Rules, deal with such matter in the same suit.

#### **4. Where reference is to two or more arbitrators, order to provide for difference of opinion**

(1) Where the reference is to two or more arbitrators, provisions shall be made in the order for a difference of opinion among the arbitrators—

- (a) by the appointment of an umpire;
- (b) by declaring that if the majority of the arbitrators agree, the decision of the majority shall prevail;

- (c) by empowering the arbitrators to appoint an umpire; or
- (d) otherwise as may be agreed between the parties or, if they cannot agree, as the court may determine.

(2) Where an umpire is appointed, the court shall fix such time as it thinks reasonable for the making of his award in case he is required to act.

#### **5. Power of court to appoint arbitrator in certain cases**

(1) In any of the following cases, namely—

- (a) where the parties cannot agree within a reasonable time with respect to the appointment of an arbitrator, or the person appointed refuses to accept the office of arbitrator, or
- (b) where an arbitrator or umpire—
  - (i) dies;
  - (ii) refuses or neglects to act or becomes incapable of acting; or
  - (iii) leaves Tanzania in circumstances showing that he will probably not return at an early date; or
- (c) where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so,

any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator or umpire.

(2) If, within seven clear days after such notice has been served or such further time as the court may in each case allow, no arbitrator or no umpire is appointed, as the case may be, the court may, on application by the party who gave the notice and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire or make an order superseding the arbitration, and in such case shall proceed with the suit.

#### **6. Powers of arbitrator or umpire appointed under rule 4 or 5**

Every arbitrator or umpire appointed under rule 4 or rule 5 shall have the like powers as if his name had been inserted in the order of reference.

#### **7. Summoning witnesses and default**

(1) The court shall issue the same processes to the parties and witnesses whom the arbitrator or umpire desires to examine, as the court may issue in suits tried before it.

(2) Persons not attending in accordance with such process, or making any other default, or

refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties and punishments, by order of the court on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the court.

#### **8. Extension of time for making award**

Where the arbitrators or the umpire cannot complete the award within the period specified in the order, the court may, if it thinks fit, either allow further time, and from time to time, either before or after the expiration of the period fixed for the making of the award, enlarge such period or may make an order superseding the arbitration, and in such case shall proceed with the suit.

#### **9. Where umpire may arbitrate in lieu of arbitrators**

Where an umpire has been appointed, he may enter on the reference in the place of the arbitrators—

- (a) if they have allowed the appointed time to expire without making an award; or
- (b) if they have delivered to the court or to the umpire a notice in writing stating that they cannot agree.

#### **10. Award to be signed and filed**

Where an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in court, together with any depositions and documents which have been taken and proved before them; and notice of the filing shall be given to the parties.

#### **11. Statement of special case by arbitrators or umpire**

Upon any reference by an order of the court, the arbitrator or umpire may, with the leave of the court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the court, and the court shall deliver its opinion thereon, and shall order such opinion to be added to and to form part of the award.

#### **12. Power to modify or correct award**

The court may, by order, modify or correct an award—

- (a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred;
- (b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or
- (c) where the award contains a clerical mistake or an error arising from an accidental slip

or omission.

### **13. Order as to costs of arbitration**

The court may also make such order as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

### **14. Where award or matter referred to arbitration may be remitted**

The court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrator or umpire, upon such terms as it thinks fit—

- (a) where the award has left undetermined any of the matters referred to arbitration; where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred;
- (b) where the award is so indefinite as to be incapable of execution; or
- (c) where an objection to the legality of the award is apparent upon the face of it.

### **15. Grounds for setting aside award**

(1) An award remitted under rule 14 becomes void on failure of the arbitrator or umpire to reconsider it; but no award shall be set aside except on one of the following grounds, namely—

- (a) corruption or misconduct of the arbitrator or umpire;
- (b) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed or of wilfully misleading or deceiving the arbitrator or umpire;
- (c) the award having been made after the issue of an order by the court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the court or being otherwise invalid.

(2) Where an award becomes void or is set aside under subrule (1) the court shall make an order superseding the arbitration and in such case shall proceed with the suit.

### **16. Judgment to be according to award**

(1) Where the court sees no cause to remit the award or any of the matters referred to arbitration for re-consideration in the manner aforesaid, and no application has been made to set aside the award or the court has refused such application, the court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.

## **ORDER OF REFERENCE ON AGREEMENTS TO REFER TO ARBITRATION**

### **17. Application to file in court agreement to refer to arbitration**

(1) Where any persons agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement or any of them may apply to any court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant if the application has been presented by all the parties or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the court shall direct notice thereof to be given to all the parties to the agreement, other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

(4) Where no sufficient cause is shown, the court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement or, if there is no such provision and the parties cannot agree, the court may appoint an arbitrator.

### **18. Stay of suit where there is an agreement to refer to arbitration**

Where any party to any agreement to refer to arbitration, or any person claiming under him, institutes any suit against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred, any party to such suit may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to the court to stay the suit; and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit.

### **19. Provisions applicable to proceedings under rule 17**

The provisions of rules 17 and 18, so far as they are consistent with any agreement filed under rule 17, shall be applicable to all proceedings under the order of reference made by the court under that rule and to the award and to the decree following thereon.

## **ARBITRATION WITHOUT THE INTERVENTION OF A COURT**

### **20. Filing award in matter referred to arbitration without intervention of court**

(1) Where any matter has been referred to arbitration without the intervention of a court, and an award has been made thereon, any person interested in the award may apply to any court

having jurisdiction over the subject matter of the award that the award be filed in court.

(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

(3) The court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause within a time specified, why the award should not be filed.

## **21. Filing and enforcement of such award**

(1) Where the court is satisfied that the matter has been referred to arbitration and that an award has been made thereon and where no ground such as is mentioned or referred to in rule 14 or rule 15 is proved, the court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.

## **Endnotes**

### **1 (Popup - Popup)**

*Note:* The rules of procedure for primary courts are set out in the Magistrates' Courts (Civil Procedure in Primary Courts) Rules - Cap. 11 S.L.

### **2 (Popup - Popup)**

Cap. 341

### **3 (Popup - Popup)**

Cap. 11

### **4 (Popup - Popup)**

Cap. 15

### **5 (Popup - Popup)**

Cap. 11

### **6 (Popup - Popup)**

Cap. 89

### **7 (Popup - Popup)**

Cap. 89

### **8 (Popup - Popup)**

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### **9 (Popup - Popup)**

Cap. 334

### **10 (Popup - Popup)**

Cap. 6

### **11 (Popup - Popup)**

Cap. 89

### **12 (Popup - Popup)**

Cap. 6

**13 (Popup - Popup)**

Cap. 334

**14 (Popup - Popup)**

Cap. 29

**15 (Popup - Popup)**

Cap. 334

**16 (Popup - Popup)**

Cap. 29

**17 (Popup - Popup)**

Cap. 345

**18 (Popup - Popup)**

Cap. 89

**19 (Popup - Popup)**

Cap. 345

**20 (Popup - Popup)**

Cap. 334

**21 (Popup - Popup)**

Cap. 334

**22 (Popup - Popup)**

Cap. 339

**23 (Popup - Popup)**

Cap. 33