

THE UNITED REPUBLIC OF TANZANIA



JUDICIARY HIGH COURT OF TANZANIA (Commercial Division)

THIRD ROUND TABLE DISCUSSION

THEME: “CONTRACT ENFORCEMENT THROUGH JUDICIAL SYSTEM IN TANZANIA”

VENUE: Dar es Salaam International Conference Centre, PPF. Tower
5th Floor-DAR ES SALAAM TANZANIA,

1.0 .INTRODUCTION

This is a report on the third round table discussions held at the Dar es salaam International Conference Center(DICC) on the 2nd March, 2011.The main theme of the discussion was "Contract Enforcement through Judicial systems in Tanzania. This discussion and the previous ones are among the long term strategic plan contents of the Commercial court division, under the support of the BEST programme to bring together the stake holders and discuss on the various matters of commercial interests aiming at improving performance of the Court and access to commercial justice in Tanzania.

This report features the general proceedings of the discussions including the introductory remarks, summaries of the papers presented, plenary discussions and summing up remarks, and finally the recommendations by the discussants.

2.0. THE PROCEEDINGS:

2.1. COMMENCEMENT AND INTRODUCTORY REMARKS.

INTRODUCTORY REMARKS:

The Hon. Registrar started by informing the members on the arrival of the Hon. Chief Justice of Tanzania. Also, alerting the members on the amendments of Mr. Kibodya's paper. Also he hinted on the programme that it is still tentative and made some comments on the proceedings generally as to how it will run. Further that the president of TLS is

expected to be in the discussion, though for the moment the immediate past president who is present will hold his brief.

ARRIVAL OF THE CJ

All members per protocol rose up. The Registrar proceeded with the introduction of the judges and registrars present.

He introduced the round table and the intention of the discussion that the commercial court needed its stake holders to discuss its progress, chart out the challenges and some solutions to them. Then he welcomed the judge in charge Justice Makaramba to welcome the CJ.

THE J/IN CHARGE

He started by observing the protocol, and then thanked the members for their attendance and the BEST programme for continued support for running the programme. Then he thanked the neighbors who are present and the other judges in charge. Also in the list were the registrars of the commercial court in Arusha, Mwanza. Then he welcomed the CJ.

THE CJ.

He started by welcoming the participants and introduced the purpose of the commercial court division-

Key issues:

-point how case management can be controlled, unnecessary court appearance, identifying delaying tactics in the enforcement of contracts,

On dispute resolution-mediation process introduced in 1994- 24% was settled via adr-though not popular to the parties-expects suggestions on how best arbitral awards can be enforced

AFTER THE SPEECH

The Registrar invited the participants to proceed to the group photo.

PRESENTATIONS:

Paper I: **Contract enforcement through judicial system : A Case for Exclusive Jurisdiction of the Commercial Court in determining commercial disputes.**

By: Mr. Felix Kibodya: (Immediate past president Tanganyika Law Society).

CHAIRPERSON: Hon. Dr. Fauzi Twaib-Judge:

PLENARY DISCUSSION.

1ST Discussant: Mr. Bede Lyimo:

He started by acknowledging the CJ's remarks-that it sounded like music. He then added focusing on the concept behind the com court, the objectives and response of other judicial system. The data provided by the CJ on the performance of the comcourt are not based on analysis of the real performance of the judiciary in Tanzania. He says that we can not reach timely justice for looking at the comcourt only. The elements of raising other ties of the judiciary

1. The rules-must be good
2. The infrastructure-software,
3. People themselves.

How can the other system be raised to the same level as the comcourt.

1. Rules: there had to be reforming civil system-from 2005, the law reform says it must start anew- but there is a conflict of interest- hence loses the chances of developing-the civil justice review project.
2. People:-judicial officers are not delivering-there are issues of ethics, capacity- e.t.c. there is inefficiencies.
3. The system/infrastructure: case management, recording, but procurement people are dragging it. Case flow management is also in place.
4. There fore there is need of addressing these challenges so that the judiciary can perform.

2nd Discussant: Mr. Mlaki-Consultant: at the BEST INVESTMENT CLIMATE

He hinted on the issue of specialization and especially on commercial matters-that most of judges, magistrates and advocates are not best suited to resolve commercial disputes. He says it might not be possible of having people specialized quickly as per ICF views.

Also on ADR-he says that it should not only be left to be handled by judges only so as to speed up the case.

3rd Justice Kaijage:

He pointed out that the com div has comparatively highly motivated staff. But there are more filing of the com cases at the main registry than at the com court. And more clients prefer filing them at other registries of the HC. He then posed a question of what may be the probable causes of such trend.

RESPONSE BY KIBODYA:

Probable cause of litigants avoiding commercial court

1. It is slightly cheaper (other registries)
2. The intended outcome—the advocates may be focused on delaying the case in mentions—frustrating outcomes—and abusing the process
3. Specialization—there may be complex commercial transactions and the advocates may not be specialized in that area of practice and decide to go to the High court main registry.
4. There should also be training intervention to the judges and other role players including advocates, prosecutors etc.
- 5.

There should be a team of members on looking at how the reforms can be taken forward rather than going back.

Also on delaying tactics—and there are also the issue of fees.

In Regard to ADR: the views of the position paper- to have an ADR system which is not court annexed and mediators who are not judges e.g. retired judges, practicing advocates, and from other fields.

The chairperson thanked the discussants for their useful comments and the registrar welcomed the members to the tea.

2ND PRESENTATION: *Resolving Law Suits faster and more affordably: The case for Small Claims Court for Tanzania Mainland*".

Presenter: *Hon. Justice R. V. Makaramba -Judge in Charge High Court of Tanzania commercial Division.*

Session chair person: *Dr. Gerald Ndika:*

Dr. Ndika started by saying that it was an honor for him to chair a session of whose the speaker is his former legal method teacher.

PRENALLY DISCUSSION

1st Discussant:

Mr. Mohamed Khalfan(Commercaill court use committee)..... The presentations are timely because:

-there are people fearing to go to the court on fear of time and the consequences if they lose

2nd: Mr. Bede Lyimo: He applauded the research by Makaramba. He said that the idea of small claim court is to operate in the environment where about 90% are in informal business sector. He also said there are informal mechanisms of settling disputes e.g the ten cell leader resolving family issues. But in course of designing the dispute settlement, it came idea. And in September 2002 at Arusha conference a presentation was made by the Zambia justice. In Tanzania, the question is how to proceed. He said that there is a need of having the small claims disputes. Then the issue is how efficient is the ten cell leader-where he said that, the increase of urbanization- i.e. in TZ 30% are in urban, also there is a process of formalization. Therefore for the interest of young generation it is time for the small claim idea.

Also technically, some other technical people may refute the idea. But

There is a need of drawing experience by doing contextual comparison, that whether we can adopt what is done in South Africa. The way to go forward is by involving young lawyers to do MORE Researches ON IT TO SEE ON HOW the CONCEPT of small claims courts can be established and made a reality in Tanzania.

The system causes delay in resolving the problems. He posed a challenge of how they can be established.

2nd : Mr. Felix Kibodya:

He said that, the small claims courts tribunal agenda has been on cards for a long time. There is need of acting. There is a need of a diagnostic study on the judiciary. That the need is emanating from inefficiency and parallel jurisdiction of the existing system.

Two: that on land division, there should also be a small claims courts and they should be supervised by the judiciary rather than being left alone, they can be demi-god.

As of them being lawyer less- this could do away with a right to legal representation. He said also there is a need of acting.

3rd :Mr. Mlaki

He posed a challenge as to whether the small claims court will reduce the number of cases lying and piling up in other courts, and whether the proceedings in those courts will be expeditious/timely, and will all small claims go these courts or whether the plaintiff will be allowed to forum shop.

HADIJA Simba:

She agreed with what is being proposed. Because 90 % are informal sector.

There should be a fee for the cases

The long process time consuming be done away with.

The idea should be speeded up.

The Registrar Com Court division-Hon.Kahyoza,J:

He pointed out the Mercantile court of the England and compared it with small claims courts. That it can be taken as a case study.

Also he proposes introducing the speed track of small claims matters on special basis by the magistrates. For instance in Rwanda, he said that they have the commercial court at magistrates' courts. He pointed out what differentiates a court that it is rules-

Therefore there should be rules and procedures for commercial court to act differently from other courts.

Dr. Ndika was of the view that in Tanzania, small claims courts are more or less of primary courts in terms of pecuniary jurisdiction, rules of procedure and evidence, and hence, establishment of the scc must be broadened. Thus establishment will lead to having dual streams-i.e the district courts (ordinary stream) and the small claims courts and then posed a challenge of what will be the interplay.

Justice Makaramba was of the view that there should be stop thinking as adversarial lawyers. It is not a business for lawyers. He referred to South Africa that it is court sui generis, different from the ordinary courts but tracing its origin form traditional ways of settling disputes. Thus they need to be formalized. He supported the idea of a diagnostic study to advise the government. He said that the other idea is to reduce the costs of running these courts. For instance in India in the public interests litigation a court is moved by a letter which explains the problems without necessary plaints.

4TH PRESENTATION: *Enforcement of foreign Judgment and Arbitral Awards in Tanzania*”

Presenter: Hon. (Judge) *F. M. Werema – Attorney General.*

Session Chair: Hon. Dr. Luhangisa

PLENARY DISCUSSION

1st Discussant: Mr. Mohamed Khalfan:

He applauded the presentation. He commented on the recognition and enforcement of foreign arbitral award, that Tanganyika in 1958 under colonial power was a signatory to the UN CONVENTION ON RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARD. Because British ratified it on behalf of its territories. However the convention was formerly

ratified in 1965: are the provisions of the Tz arbitration in harmony with that convention- and if not what is the fate of these agreements with the international or foreign parties which says the agreements mention the arbitration act of 2002. Under these circumstances will the agreements be prejudiced, can an award be challenged as being not valid? Also referring to public policy- the convention says that the contestant of the validity to the award can have one ground that recognizing that award would be contrary to the public policy.

2nd Discussants: Hon. Nyerere J.

She pointed out her disappointments on the ratification of laws which are not beneficial to Tanzania.

3rd Discussant: Mr. Felix Kibodya:

He commented on the investment disputes settlement part of the presentation-and asked as to how far has we fared in the settlement of those disputes

4th : Dr.Luhangisa

Commented on frustrations of people on the inadequacy of the laws on enforcement of the arbitral awards- what are the progress to update the laws. Also on gazetted countries where foreign judgment can be enforced- what about the east African countries like Rwanda and Burundi which are not listed-

5th : Mr. Mlaki: He had a question on the feelings of the general public, and how is the knowledge of the public on foreign judgments and what should be done to make the public accept those awards:

RESPONSE:

He said that the new convention does not apply to arbitral award obtained in Tanzania but those outside Tanzania. As to the fate of the agreement

governed by Tz Law, he argued that they will be governed by Tz law because international norms are applicable in Tz, and that arbitration agreement can be challenged if it is on matters which are not arbitrable, per the public policy-which he compared it to unruly horse- that it is always upon the judge to determine what is public policy.

-He said also that judges fails to use international conventions because they are not ratified. He said also that as a judge, facing a problem which may be solved by an international law he could be go for it, for example the ICCPR. This is because; those laws not ratified are sources of laws in Tanzania though in a low hierarchy. Nevertheless, he said that there are efforts to ratify some of the international laws though some need reservations such as the abortion convention.

-With ICST he said that Tz is faring well.

-On the backwardness if the law he said that it is not his creation but acknowledged that he is part of it.

As of the east African countries he said that the law is the extension of foreign judgment acts which enables enforcement as judgments made in Tanzania.

-As of public feeling-he referred it as "mhemuko" but said that ultimate goal is the rule of law which must prevail. He said however that the judge should be left alone to make judgment on his own. He further said that the determinant of public policy is not the people of Tanzania but the judge.

RECOMMENDATIONS/RESOLUTIONS

1. The High Court registry regulations should be re-enacted to suit the current situation.
2. There should be specialization of practice by the judges.
3. There is a need of a diagnostic study to identify the need for, and the modality of establishing the small claims courts.
4. Alternatively there should be speed tracking of small claims matters on special basis by the magistrates' courts.
5. The idea of a small claims court whose principles greatly underpin the introduction of a small claims stream as envisaged by the Government is that lawyers or advocates should not appear in the small claims stream.
6. The Government should be committed to facilitate access to commercial justice particularly by allocating adequate budget and resources.
7. There is a need for user friendly non-technical rules of practice and procedure for the small claims stream. In a court case, everyone involved must receive the key documents they need. "Serving" documents must be done at each step in the case. Service of claims by an alternative to personal service, by registered mail or courier with verification (by Post or the courier company) that the document was received, rather than by service to last-

known address by regular letter mail. There is need for serious consideration as to the extent these should apply to small claims stream.

- It is proposed that the Rules should provide for filing a claim and enforcing a judgment in particular Small Claims Stream and about where a person should file his or her claim or take steps to enforce a judgment.
- It is also proposed that there should be rules about the small claims stream location where a claim should be started. The Rules should take into account the following matters:
 - *where the problem occurred (the location of the cause of action);*
 - *where the defendant lives or carries on business; or*
 - *the small claims stream location nearest to where the defendant lives or carries on business.*
- There is need also to consider the time the dispute take place in a small claims court. There may be a time limit on how long one can wait before making a claim, which is set out in the Law of Limitation Act.
- The rules should also provide for enforcement of award or judgment.
- The Government should constitute a Judicial Commission of Inquiry under the chairmanship of a judge to enquire into and advise the government on the desirability or otherwise of establishing a Small Claims Stream.

Annex 1. List of presenters, topics and session chairperson.

PRESENTERS:

SN	NAME	TOPIC	SESSION CHAIRPERSON
1	Mr. Felix Kibodya	<i>Contract Enforcement through Judicial System in Tanzania: A Case for Exclusive Jurisdiction of the High Court Commercial Division</i>	<i>Hon. Dr. F. Twaib, Judge of the High Court of Tanzania</i>
2	JUSTICE Robert	<i>Resolving Law Suits Faster</i>	<i>Dr G. Ndika Ag. Principal - Law School</i>

	V.Makaramba	<i>and More Affordably : The case for Small Claims Court for Tanzania Mainland</i>	
3	MR.Frederick Werema	<i>Enforcement of foreign Judgment and Arbitral Awards in Tanzania</i>	<i>Dr. John E. Ruhangisa-Registrar East African Court of Justice - Session Chair</i>
4	<i>Dr. Mapunda</i>	<i>Role of Bar and the Bench in Enforcement of Contracts</i>	<i>Hon. Dr. F. Twaib, Judge of the High Court of Tanzania</i>