

THE ROLE OF ICT IN THE ADMINISTRATION OF COMMERCIAL JUSTICE

A Commercial Litigant's Perspective of Tanzanian Commercial Justice System

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1.0 Overview:

All businesses however strong or good are prone to the risk of succumbing to disputes. Commercial disputes partake of varying forms such as non-performance of contractual terms, breach of contract or conflicting interpretation of a term of a contract. To a business person, the overriding considerations or drivers in dispute resolution mechanism are efficiency (time factor), affordability (cost), reliability (predictability and precedent) and above all, preservation of business relationship between two parties that has been established overtime.

As a person representing commercial litigants, this workshop is more than timely. Banks have, on a number of occasions, raised their concern over the problems they face when they are involved in litigation. For example, the one bank I am currently engaged has about 300 court cases pending in different courts. Before

joining this bank, I worked for another commercial bank. There, I left a portfolio of 350 cases. All these cases involve significant amounts of depositors' money.

In order for the distinguished audience to have a feel of the magnitude of the problems that bankers (commercial litigants) face due to the lack of IT in the court processes, I will try to give vivid examples. In May 2006, I presented a Paper at a World Bank organized workshop on legal impediments affecting businesses in Tanzania. I seized the opportunity to inform the public that whilst formal statistics were not available, an estimated sum of **Tzs. 100bln/=** was stuck-up in the court system. This is a huge amount for a country like Tanzania and which, among others, has driven the cost of credit to the roof. Moreover, the stuck up funds have the effect of crowding out credit to a number of businesses. As a result, currently only 4% of Tanzanians have access to formal credit.

The problem of delays in concluding cases filed before our courts is further aggravated by the court's inclination to decide cases on the basis of strict compliance with rules of procedure instead of substantive justice. In one case, the highest court of the land reversed a high court decision on the ground of non-existence of a formal contract. Unfortunately, the highest court did not consider the fact that during the trial by the court of first instance, there was no dispute that the appellant was granted a loan by the respondent bank and which no single cent was paid. As a result of

the reliance on technicalities, the respondent bank not only suffered loss from non-recovery of about Tzs 650m/= but was condemned to costs in the sum of Tzs 80m/= (including its own legal costs and filing fees).

In simple terms, the court's decision referred to above (and there are many) effectively increases the cost of credit to the economy, which in turn, has increased, in the same proportion, the cost of doing business. On this score, we have all heard complaints that banks do not lend although they boast of being awash with money. The typical example cited is the "unwarranted" disparity between deposit (about 3%) and lending (about 17%) rates. What is not cited is the legal risk premium attached to the credit.

The outcry mentioned above, prompted the World Bank to commission a study on court cases affecting banks with a view to coming up with empirical data, establishing the causal factors and to recommend remedial measures. The study has already started.

2.0 Commercial Justice: shortcomings and pitfalls:

As aptly demonstrated by Hon. Massati, J. commercial justice in Tanzania is administered through the court hierarchy. However, the commercial division of the High Court plays a fundamental role. The question to be asked is, who are the commercial litigants? To answer this question, we need to have a clear understanding of the profile of Tanzania entrepreneurs. In broad

terms, there are three categories of entrepreneurs namely, small and medium scale (SMEs), Micro and large corporate entities.

SMEs:

The SME is the fastest growing sector. It is interesting to note that this category has evolved from informality where it was operating extra-judicially and has graduated thereby entering the formal sector. The SME currently employ more than 40% of the nation's labour force and contributes about 25% of the GDP. In short, the SME is becoming the engine of economic growth in Tanzania. As such, we cannot pretend to ignore it. Unfortunately, the SME Policy that was promulgated by the Government in year 2000 did not sufficiently dwell on gaps in dispute resolution mechanism involving the SME sector.

Micro Entreprises:

On the other hand, micro businesses also have a role to play in the economy. However, due to a number of impediments including the cost of accessing commercial justice, the sector operates underground i.e., informally. Support for micro businesses is not properly coordinated due to the lack of information system. The main players are non-governmental organizations (mostly donor funded projects) and a number of micro finance institutions (MFIs)

Corporate bodies:

Evolution of corporate Tanzania is the outcome of the Government's economic liberalization policy, which resulted into

FDI inflows in the country. (Tanzania is rated No. 3 recipient of FDI in Sub-Saharan Africa excluding South Africa) The profile of medium and large size corporate entities in Tanzania is characterized by privatized public entities, subsidiary companies of foreign owned corporations and a handful success story of local companies owned by Tanzanians. These are the main taxpayers. This sector demands a very efficient commercial dispute resolution mechanism.

The three categories represent the commercial litigants in Tanzania. Now, having identified them, the next issue is, what are the problems commercial litigants face as regards dispute resolution? The following are the most significant ones:

- Unfriendly and complex procedure (e.g., the Civil Procedure Code, 1966 and the Tanzania Court of Appeal Rules 1979),
- Inherently adversarial platform where winner gets all and winning by all means philosophy reigns,
- Inadequate and poorly equipped courts,
- Lack of specialized skills both in the bench and the bar as a result, refuge is sought to strict compliance with antiquated procedural rules at the expense of substantive justice,
- Weak alternative dispute resolution avenues/mechanism,
- Lack of effective legal framework to regulate certain aspects thereby tempting the bench to fill-in the gaps through precedent,

- Lack or limited use of IT in court processes thereby causing delays, abuse and poor information flow.

3.0 Commercial litigants and ICT:

Let me use the bankers' perception and experience of commercial justice as it relates to ICT. As expected, sectoral reforms in Tanzania started with bank in 1991. As a result, the banking sector in Tanzania is fairly advanced compared to other sectors in embracing ICT in its processes. The banking law and regulations promulgated in the 1990s were very strict in that the Bank of Tanzania - the regulator - would not grant approval to a bank to open a branch if the same cannot operate on IT platform.

To-date, almost 95% of banking transactions, communication and documents are processed electronically. Nonetheless, even with the benefit of being trendsetter in the communication super highway, banks are obliged to maintain day-to-day relationship with crucial stakeholders such as court registries, land and companies registries, advocates, etc. Unfortunately, the bank's IT platform cannot interface with those of its stakeholders simply because the latter are yet to move in tandem with the urge to embrace ICT. As a result, the "digital divide" has become the root cause of bankers' frustration.

4.0 Commercial litigation without IT is costly:

Banks have identified legal risks as one among those impeding on their performance. Apart from risk of suffering loss, banks are now struggling to cope with managing the drastic increase in legal fees paid to external counsel. Accordingly, a number of banks are implementing legal risk control framework policy. However, implementation of the said the policy is dependent upon effective communication system.

IT failure or failure to use IT in the court processes and its users has direct impact to businesses. The following are the typical costs that affects banks' (commercial litigants) bottom line:

- Loss arising from loosing cases (especially failure to recover loans),
- Delay in concluding cases resulting into loss of value in the claim (time value of money factor). Often, decretal sums are subject to court rate as opposed to commercial rate,
- Legal costs (instructions and court fees, expenses incurred by counsel, court broker etc.),
- Cost incurred by dedicating human resources to attend to court cases and in managing legal risks. Hence, the upsurge trend of in-house legal counsel staffing levels,
- Cost related to over-reliance on paperwork. Banks are forced to keep "mirror' files of all court cases. Implying that, there are three sets at any given time (one for the court, another for external counsel and the third kept by the bank).

All IT related issues (together with other shortcomings identified herein above) impact directly in the cost of doing business in Tanzania in so far as enforcement of contractual obligations is concerned. It is imperative therefore that reforms of the commercial justice system are immediately implemented.

5.0 Possible improvement areas:

Reforming commercial justice delivery system requires taking action in different fronts, at times contemporaneously. As regards IT, a commercial litigant such as banks (and are time sensitive) would like to see reforms in the following areas:

- Statutes and decisions of courts of record be made available on-line. In the case of judgments and rulings as soon as they are pronounced,
- Process servers should embrace IT. For instance, summons, cause lists, filing of documents should be done via electronic media,
- Use of ICT in the conduct of legal proceedings thereby reducing delays since documents can be "filed" by clicking the send button,
- Efficiency in terms of time management – there should be no need for the blessed "mentions with view to fixing the hearing date" and unscheduled adjournments.

Under these circumstances, our courts should be redesigned to accommodate ICT. For instance, we should see less and less of proceedings being heard in chambers, judges overwhelmed by

(huge) hard materials (pending files); judges struggling using longhand to reduce in English evidence testified by a witness who is also struggling in Kiswahili; judges deciding *par incurium* because past decisions by superior courts or by own brethren are not accessible. Like the unruly horse, justice becomes elusive if not illusion.

If the suggested reforms are pursued, they are bound to change both commercial litigants' mindset and perception that judges and magistrates are isolated from the rest in the on going economic transformation of the country and that, a court is the place where parties go to deal a blow to the hard earned business relationship.

It is truism that currently, commercial litigants feel that inefficiency in the court system is hidden behind the façade of procedural technicalities (such as the CPC and the Court of Appeal rules), which tend to mystify the entire legal process wherein only the judge and the advocate are perceived as the true officers of the court. The litigants are reduced to hapless spectators whose role is to wait for the results, which results they cannot predict due to lack of transparency in the entire legal process. Yet, the parties are the ones affected by the outcome of the case.

6.0 Use of IT by Advocates:

In my other capacity as Hon. Treasurer of the Tanganyika Law Society (TLS) and Deputy Treasurer of the East African Society (EALS), I cannot avoid mentioning the bar. Private legal practice in

Tanzania Mainland is the least developed in East Africa although the University of Dar Es Salaam was the first institution to produce law graduates in the region. Currently, the Roll of Advocates is about to clock the 1,000 number. Even with this meager achievement, only a handful, probably 500 are in active practice (catering for 38 million people!). It is not the objective of this paper to dwell on the causal factors behind this.

Private legal practice in Tanzania is characterized by existence of solo or single practitioners and small firms. There are no more than ten of what I would call medium size law firms (there is no firm with more than 10 partners). There is however a positive trend of a couple of law firms merging and a few some seeking association with international legal firms. The implication of the current practice is that, the small law firms lack appropriate skills. More important, they cannot afford the use of ICT to the desired levels.

It has to be said and with a loud voice that; use of ICT by the judiciary will be a wasteful venture if the bar is left behind. The medium size law firms referred to earlier enjoy cutting edge over the solo practitioners as they can access on-line documents, precedents, and information on recent trends in specific areas of legal practice. In short, their partners are able to move in tandem with what is happening elsewhere in the world. Moreover, through ICT, the bar needs to interface with the bench. The expected output is efficiency and timely delivery of commercial justice.

7.0 Conclusion:

My conclusion is that ICT is the lifeblood of business and support institutions including the government. Courts as crucial business support institution cannot afford to be left behind. It is unfortunate that the legal sector reforms came a little bit late in the reform process in Tanzania. This notwithstanding, we have to complete the circle and the circle cannot be completed without implementing the recommendations suggested herein. And in order to succeed in the crusade, continuous training is a vital tool.

It can be done lets play our part!

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