THE UNITED REPUBLIC OF TANZANIA
THE LAW REFORM COMMISSION OF TANZANIA

REPORT NO. 1 OF 1986
ON
DELAYS IN THE DISPOSAL OF CIVIL SUITS

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PRESENTED TO THE MINISTER FOR JUSTICE
ATTORNEY-GENERAL AT DAR ES SALAAM IN
FEBRUARY, 1986

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The Law Reform Commission of Tanzania was established by the Law Reform Act, 1980 and began functioning on 21st October, 1983.

The Commissioners are:

Hon. Mr. Justice Hamisi A. Msumi - Chairman

Mr. Augustine Saidi - Former Chief Justice Tanzania, Commissioner

Mr. Pius Msekwa - Principal Secretary,Prime Minister=s Office

Prof. J.L. Kanywanywi - Professor of Law, University of Dar es Salaam

Mr. Felician B.Mahatane - Private advocate

Mr. Mohamed Ismail - Private advocate

Mrs. Eusebia N. Munuo - Principal Resident Magistrate

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The Honourable Mr. Justice D. Z. Lubuva, M.P.
Minister for Justice and Attorney General
DAR ES SALAAM

Dear Minister,

REPORT ON DELAYS IN THE DISPOSAL OF CIVIL SUITS

Pursuant to section 8(1) of the Law Reform Commission of Tanzania Act, 1980 the

Commission, acting on one of your references, made a study of the subject of delays in the disposal of civil suits with a view to finding out the major causes of these delays and to advise on:

(a) changes which could be made in the lawsof procedure so as to hasten the process and determination of civil cases and;

(b) structural and statutory alterations which could be made the machinery established for the implementation of court decisions in civil cases.

The need to review this aspect of the administration of justice became apparent when delays in the disposal of civil suits became a major source of consistent public outcry and concern.

In March, 1985 the Commission issued Discussion Paper No. 1 entitled Delays in the Disposal of Civil Suits in which we reviewed the present law on civil procedure, explored the major causes of delays and suggested possible solutions of the problem. Copies of the Discussion Paper and we invited the public at large to make its views known in writing to the Commission. Many correspondents, including Judges, practising lawyers and general members of the public responded very encouragingly to both the Discussion Paper and the Questionnaire appended to it. (The questionnaire may be found in the APPENDIX to this report).

In compiling this report the Commission used survey research and literature search methods but due to time constraints we could not conduct group discussion. Despite these limitations we believe that the views we have expressed in this report reflect the views of the greatest possible number of the people of Tanzania on the issue in question as we are required to do by the provisions of section 10 of the Act establishing the Commission.

Having completed the study of this increasingly important area of the law we have the honour to submit herewith our Report on Delays in the Disposal of Civil Suits.

Yours faithfully,

(Signed)
Hamisi Amiri Msumi, Chairman;

(Signed)
Augustine Saidi, Commissioner;

(Signed)
Pius Msekwa, Commissioner;

(Signed)
Josephat L. Kanywanyi, Commissioner;

(Signed)
Felician B. Mahatane, Commissioner;

(Signed)
Mohamed Ismail, Commissioner;

(Signed)
Eusebia N. Munuo (Mrs.), Commissioner

I. INTRODUCTION:

DELAYED JUSTICE:

It is a matter of consensus that the interest of all involved in the administration of justice is that justice should be speedy, cheap and fair. Delayed justice causes numerous social and economic disruptions, and, therefore, the measure of a good legal system is the length of time it takes to conclude litigation. It is now an established fact that the legal system of Tanzania at times fails to deal with civil litigation with the necessary despatch. According to one research, the rate of clearing cases between 1974 and 1980 in the Resident Magistrate=s Court at Dar es Salaam was between 95% and 70%. The lowest percentage of pending cases was about $2^{1/2}$% in 1974, the percentage rose steadily to between 22% and 30% in the subsequent years up to 1979. According to research carried out the average time of the pendancy of cases was between two and seven years. Similar observations are also made in respect of the High Court. The percentage of cases pending in the High Court was 19% in 1977, and it rose steadily to 73% in 1980. the picture is similarly black in respect of other High Court centres in the country.

This low rate of clearance has caused a lot of inconvenience to the litigants. For example, the Plaintiff in Mayala Gweso v. Haji S.A. Karim /t/a Karim Transport, Civil Case No. 218 of 1979 Dar es Salaam High Court (unreported) wrote a letter to the Registrar of the High Court complaining that his case (which had so far taken three years) had dragged on for a long time. He informed the Registrar that as a result he had

experienced several hardships, among them being:

(i) Failure to continue with his business due to the act that the amount which was the subject matter of the suit was his capital, and delaying a decision in the dispute automatically made him out of business;

(ii) As a result of his inability to continue with his business, his family life was disrupted because of the economic hardship it was going through, and there was a possibility that his family would break up;

(iii) All these problems had had the effect of his developing stomach ulcers and he on certain occasions became neurotic.

These complaints cannot be dismissed as groundless. The fact is that delays in the conclusion of civil cases cause a lot of hardship to the parties involved. The paradox is that the parties would have come to court as a step of last resort only to find that the court cannot help them with expected expedition. Some litigants have eventually been forced to settle for less out of court than to endure the time and trouble involved in litigating.

In the above cited case, the plaintiff was forced to travel frequently from Maswa to Dar es Salaam only to be told that his case had been adjourned for another tie. This experience is not unique to this part, especially when considering the fact that a lot of litigants have to travel long distances to the court. This implies that on top of not being sure that the ultimate decision of the court is going to be in his favour, the litigant would be forced to spend even the little money he has - sometimes more than he is claiming - so as to try to enforce his rights.

From the research conducted in the High Court at Dar es Salaam, a larger proportion of cases of first instance filed in the High Court took between twelve months and twenty one months to be concluded. A relatively large proportion took more than twenty four months. Those which took less than twelve months were mostly cases which were brought under summary procedure. This means that where a case has to go to a full trial, the possibility of its being concluded in less than twelve months is slim. Those which were not brought under summary procedure but concluded within twelve months wee mainly decided ex parte as a result of the defendant not appearing or not filing a Written Statement of defence as ordered by the Court. thus, the major problem is in respect of cases of first instance which have to go through hearing. The next section will look at the possible reasons why these cases drag on for a long time.

II. REASONS FOR DELAYS

According to the research carried out there are a number of reasons why there are delays in the conclusion of civil cases in the courts in Tanzania. There is no doubt in our minds that most delays are caused by unnecessary adjournments. Unfortunately, a perusal of the court files revealed only a limited number of reasons because only a few judges actually record the reasons why they grant adjournments. Here below we examine some of the most common reasons for delays in the disposal of civil suits:-

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(i) Pre-Trial Adjournments:

Research revealed that in most cases, once a suit has been filed, a summons issues within a very reasonable time - between one and four weeks. However, there were a number of occasions in which the summons was returned unserved. The Affidavits of the process servers indicated that the summons could not be served because the Defendant could not be found at the address which was given by the Plaintiff. Accordingly, no blame can be attached to the court because it is generally known that it is the duty of the Plaintiff to supply the Court with the proper address of the defendant for purposes of service.

However, sometimes the summons has been returned unserved because the defendant actively avoided service. In these instances, the Court exhibited a lot of patience and did not award an ex parte decision immediately, but set the case for mention before the registrar at a future date, while ordering a fresh summons to be issued against the defendant. Although the interest of the court in such instances is to decide the case on merits, it is submitted that there are times when this may occasion some injustice because normally it is these types of defendants who have shown initial reluctance who exhibit tendencies of dilatoriness. Some affidavits of service indicated that the summons was not served because the defendant had moved and his address was not known. This may explain the reason why substitute service under Order V Rule 20 is very common in both the High Court and the Subordinate Courts. From the case files perused, the impression gained was that publication of the summons in the press is a very efficacious substitute for personal service. However, it leads to delays because normally when the defendant appears in response to such a summons he applies for a copy of the plaint and he is given directions to file a Written Statement of Defence. Also, in some cases especially when the defendant is in the remote rural areas, there is a possibility that the summons will not reach him because of the unavailability of newspapers in such areas.

Every where the summons has properly been served, there are times when there are delays. There is a common practice in both High Court and the Subordinate Courts to set cases for mention at a future date. This is stated to be for purposes of setting the date for hearing of the suit, or so as to enable the defendant to file a Written Statement of Defence. There have been cases in which the Courts have exercised their discretion to grant extensions of time to file Written Statements of Defence unduly liberally and this practice has acted to penalise the Plaintiffs. This tendency was noticed especially when the Defendant was represented by advocate. As a result, some Plaintiffs have remained with the impression that their advocates have colluded with the advocates for the Defendants to make sure that there is a delay. In Mayala case cited earlier, the plaintiff genuinely believed that his advocate had colluded with the advocate for the opposite party so that the hearing of the case could be put off for as long a time as possible, and at a certain point he wanted to withdraw his instructions from his advocate. When such an impression is created to a party, it does not do any good to the proper administration of justice however wrong that impression is.

There are times when some advocates have been very concerned with

the delays experienced. For example, in the above cited case, the advocate for the Plaintiff eventually, opposing an application for a further adjournment, submitted as follows:

> AThis case has been put off unreasonably often times. The Plaintiff has come from Maswa and there are three witnesses available this morning. This is a 1979 case, and the Plaintiff with his witnesses have been coming up to Dar es Salaam since 1980. I submit that his case be heard early next week. Otherwise I will have to withdraw from the case because I am no longer having the confidence of the client who has indicated a complaint that I do conspire with the other advocate ... for the defendant to delay the case unjustly.@

In a rather very unsympathetic and callous way, the advocate for the opposite party submitted that the concern showed by the Plaintiff=s advocate was not to be taken seriously. He submitted as follows:

> AThe submission by my learned friend is a threat to the court. If he wishes to withdraw he can do so. Because the case was set for adjournment the Defendant has not come from Arusha. The Plaintiff has to blame himself for the delay caused in this case because the fixing of hearing dates casually has been done now. The case is adjourned often times because it does not get fixed in the proper way of doing things. It has happened that this case gets squeezed up into pre-arranged schedules therefore causing confusion.@

One wonders whether the duty to fix hearing dates is on the Plaintiff or on the Court. It is true that in fixing the dates the court is expected to take the convenience of the parties and its own convenience into consideration, but allowing further adjournments because a party casually accepted a date which proved to be inconvenient is taking the adversarial system too far.

There are other instances in the pre-trial stage in which cases are delayed because the parties do not know what step to take next. This happens especially when the parties conducted their own cases. For example, in Albert Msala V. Edgari Muhezi, Civil Case No. 117 of 1969 Dar es Salaam High Court (unreported) the case had to be adjourned several times because the Defendant had not filed a Written Statement of Defence. Before the Court extended the time to file the Written Statement of Defence for the final time, it informed the Defendant extensively on what he was procedurally required to do. However, even after this step had been taken by the court, the Defendant failed to file the Written Statement of Defence as required by law. On the contrary, on the day set for the next appearance, the Defendant submitted an oral admission. The Court advised him that this was not what he was required to do, and following the law, the court treated him as if he had not submitted a Defence. However, the Court found it easy to act this way in this case because the Defendant had admitted the Plaintiff=s claim. One wonders how the Court would have acted if the Defendant had denied the claim by the Plaintiff.

There appears also to be delays which are occasioned by the general administration of the court. There are instances which the case cannot proceed

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because although both parties are present the case does not appear in the cause list for the week in question. This is taken up by certain advocates who for one reason or the other are not prepared to proceed with the case. Research has made us conclude that when a case appears in the Court Diaries but do not in the cause list, there is every likelihood that one advocate would want to have the case adjourned. Under normal circumstances most of the adjournments are with the consent of the parties or their advocates. This implies that whoever was in court on the day of the last adjournment took not of the date when the case would come up again, and presumably the advoctes keep diaries. Thus, the fact that a case is not included in the cause list should not be a reason for adjourning it.

(ii) Pressure of Work on the Court:

There are some instances in which cases have been adjourned because of pressure of work on the part of the court. Sometimes, the court would be involved in the hearing of another case which was adjourned the previous day, while at other times the presiding Judge will be busy writing judgements in cases which he has already heard. There are several instances in which the Judge or another Judge or the Registrar came to court simply to adjourn cases on the ground that the Presiding Judge had other engagements. All Judges and Magistrates hear both Civil and Criminal cases. Most of their time is spent on hearing Criminal cases. This does not do a lot of justice to the parties in Civil litigation.

(iii)Adjournments granted during Trial:

The point which has been raised in respect of Judges= and Magistrates= pressure of work holds as much water in the trial proceedings as it does in pre-trial proceedings. However, the most common reason why cases are adjourned at this stage can be summarised into three: advocates= parties= and witnesses= causes.

(a) Advocates:

There is a common practice in cases which are conducted by advocates for the court to grant adjournments on very flimsily grounds. Normally, the advocate would apply for an adjournment because he was busy in another court or he was tired, etc. The following are selected submissions by some advocates to show the reasons why they applied for adjournments:

1. I am leaving tomorrow for Korogwe for the high Court Sessions. I won=t be back until 14th September, 1982 ... From 15th September, 1982 to 22nd September, 1982 I will be engaged at the Permanent Labour Tribunal continuously in the case of one Chris Mwalongo. The earliest date convenient for me is 23rd September, 1982. Even then I shall be forced to ask for an adjournment. I twice consented to the Plaintiff=s suggested date and I do not see why he should not do the same for me ...

2. I am applying for an adjournment in this case and my grounds are two:

(1) I came back last night from Tunduma and taking into consideration my age - my whole body is paining and tired.

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(2) I have also been instructed to defend the other defendants ... after case was adjourned last time. Since no Written Statements of Defence ... have yet been filed I submit that the Written Statements be filed so that the case can be tried as a whole instead of trying it piecemeal.

3. It is a long time since the matter was dealt with. I request adjournment for today.

It is worth noting that although the advocate for the opposite party objected, he gave no grounds for his objection and the court granted an adjournment. However, it is clear that when an advocate comes to court he is expected to have taken notes of what had transpired in previous hearings. Thus, requesting a copy of the proceedings so that he may be able to proceed cannot under any circumstances be taken as a good ground for adjourning a case. It appears that the advocate in the above instance did not have enough time to prepare his case and he was using the application for a copy of the proceedings so that he could delay the actual hearing of the case, and unfortunately the court has proved to be too willing to abide by the wishes of such advocates.

4. I have been informed that the advocate for the Plaintiff is on safari and it is said that he left on the 26th October. He was then aware of today=s hearing but nevertheless did not bother to inform us of his safari ... I would, however, not like to prejudice the Plaintiff=s interests because of his advocate=s fault and I would accept an adjournment ...

5. I seek an adjournment because I have just come back from Mbeya last night, and have not seen my client. If the matter is to be mentioned ... on 26th May, 1983 we can record a settlement.

6. ... this is very old case and my client has been travelling from Shinyanga and I understand that your Lordship has been assigned a case for the whole week. I pray that a fresh hearing date be fixed here in court ..

All these and other reasons which have not been quoted here reveal the fact that advocates attempt to use the provisions relating to adjournments to suit their business dictates which in turn contribute to delays.

Hand in hand with these tendencies, there is also a tendency by the court to grant adjournments on request when the advocates sign Aconsent letter@. The court does not appear to exercise its discretion judiciously in granting such adjournments as should have been expected. It appears that once such letters are filed, the advocates believe, and the court acquiesces in this belief, that is their automatic right to get the adjournment.

It appears that the question of adjournments is decided by the advocates in their Chambers, and they expect the court simply to endorse their agreement. This is despite the fact that both the High Court and the Court of Appeal have commented on this practice as being unacceptable in law. For example, the High Court has stated as follows:

...a >consent letter= filed by the advocates for the parties can be no more than an

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application for an adjournment of a case. Each >consent letter= has to be considered on its merits. It cannot affect the principle adumbrated in the Civil Procedure Code that an adjournment can only be granted for sufficient cause. It would be wrong for advocates to assume that once a >consent letter= is filed, they are at liberty to advise the parties and their witnesses not to attend on the date fixed for the hearing of the case ...

(As per Onyiuke J. in Kulthum Kara vs. Y. Omari H.C. Civ.C. No. 119 of 1973 (Dsm)(unreported)). This position was stated in stronger terms by Mustafa J.A. in the Court of Appeal for East Africa. That the business of the courts should not be subject to Athe business vegaries@ of the advocates and their parties. However, it appears that the Courts in Tanzania have chosen to ignore such precedents and they decide cases on their own facts. Accordingly, most of the Aconsent letters@ filed are accepted by the Court as having the automatic effect of adjourning the case. Possibly the courts find it easier to grant adjournments in such situations because Judges and Magistrates are normally under serious pressure of work and therefore they take adjournments by consent as a way of postponing this pressure. However, although this could be a temporary solution to the problem of pressure of work, it is a very costly solution and it is only for the short term. The parties suffer a lot in terms of time lost and costs. Research has revealed that in most cases the advocates are not mindful of the costs which their clients suffer as a result of the frequent adjournments. A clear example is afforded by this dialogue in court:

AAdvocate for the defendant;

Mr. Magongo handled the case and he is out of Dar es Salaam. I request hearing to be adjourned.

Advocate for the Plaintiff;

My client has come from Tukuyu. I consent provided his costs are paid, Shs.300/-.

Advocate for the Defendant;

We agree to pay Shs.300/-.@

This callousness is aggravated by the fact that most advocates take up more cases than they can handle at the same time. In such a case, there is a tendency of the advocates seeking adjournments in cases which they consider to be of less importance than others, or in which the court has not expressed serious disquiet as to the way they have been dragging on. There are several occasions on which the advocates have sought adjournments on the ground that they were engaged in other courts. The following is a typical ground for application for adjournment by advocates:

A... I am holding Mr. Kesaria=s brief and he is today very busy in another court. I ask for an adjournment@.

It is curious to note that the advocate was holding a brief for another advocate who was simultaneously acting for both Plaintiff and the Defendant. As to why the Court did not notice this is a matter of conjecture.

Suffice it to state that this practice of seeking adjournments on the ground that the advocate is engaged in another court has already been frowned upon by the Court of Appeal. Despite a very clear ruling on this, however, the normal practice of the courts has been to grant such applications very liberally.

Coupled with this, is a practice which is normally found in interlocutory applications. When there is such an application on behalf of one party, the advocate of the opposite party will normally apply for leave to file a counter-affidavit. In most cases, the counter affidavit proves to be of no useful purpose, thus creating an impression that the leave be obtained, and the consequent extensions of the leave (which is very common) is used by the advocate only as a way of delaying the proceedings.

(b) Absence of Parties to the Suit:

This is one of the most common reasons why the courts grant adjournments. The courts have been very lenient with parties who do not turn up in court for one reason or the other. On some occasions, the reason which has been advanced for the absence of the party is illness. In fact, it is very common that a court will grant an adjournment on this ground. This is notwithstanding the fact that Order III of the Code allows the advocate to appear by himself. Indeed, there is no reason why the court should not proceed with the hearing of the case when the party is absent but represented by advocate. The only guess is that such a reason has been used either by the court or by the advocates to try to reduce the pressure of work for that day. Where the party is a major witness and has not been examined, an adjournment on the ground of his absence can be understood. However, when the adjournment is sought only for the purposes of securing his presence in court as a silent participant, it entails unnecessary delays. Examples of the use of this ground to grant adjournments abound in the case files which have been perused. For instance, in Caltex Oil (T) Ltd. v Felix Benjumlaki and 3 others, DSM HC Civil Case No. 207 of 1979 the advocate gave the following submission:

> AI have received a telegram from Mbeya informing me that the Defendant is involved in a motor car accident. And I also found a letter in my office giving me the same information ... and is now receiving treatment in Mbeya.
>
> Under the circumstances, I would apply for another hearing date.....@

A similar submission was given in Mayala Gweso v. Haji S.A. Karim t/a Karim Transport, H.C. Civil Case No. 218 of 1979 (DSM) unreported. On 2nd December, 1982 Advocate for the Defendant submitted that the client was very sick and the Plaintiff was not in court and therefore the hearing should be adjourned. However, both advocates were in court and nothing would have prevented them from proceeding. Despite of this, an adjournment was granted.

(c) Absence of Witness:

This is another very common ground for granting adjournment. The witness can be absent either because the witness summons has not been served or because the witness has considered other activities more important than appearing as a witness in court and accordingly disobeyed the summons. The non-service of the summons is caused by the parties not supplying correct addresses for service and therefore the parties are the ones to blame. In such an instance the court would not have anything to do other than granting an adjournment and ordering reservice of the summons. However, when the witness simply disobeys the summons, certainly the court has powers to make sure that its summons is obeyed. The following is an example of the arguments advanced in favour of an application for adjournment on the ground that the

crucial witness is absent:

> AThe plant engineer of the Defendant Company is the only person conversant with the facts of this case and on whom we are intending to rely. He has resigned from the Firm and gone back to India. ... the other person on whom we are intending to rely who is also conversant with the case is the supervisor. He is not in Dar es Salaam today. We are informed that he is handling a plant at IDM Mzumbe and is coming back on the 25th of July, 1981.@

Although the court reject the application for adjournment at that stage, it did not comment on the issue of the witnesses who were absent. In fact, it seems that the court would have granted an adjournment on that ground alone, but for the fact that the Plaintiff had eye witnesses present in court and he was prepared to proceed with the case. The court stated that the witnesses should be examined and that if the Plaintiff closed his case before the Defendant=s witnesses were available then an adjournment would be granted.

III. PROPOSED REFORMS

From the above discussion, we are convinced that the problem of delays is substantially caused by the too many adjournments which are granted by the courts in any one particular case. It will therefore be a worthless exercise condemning the law of Civil Procedure as being the major cause for the delays as some people have tried to do. There is an opinion which is very current which holds that delays are caused by the Atechnical nature@ of the Civil Procedure Code. However, practically all our correspondents opined that there is nothing substantially wrong with the substantive part of the Code. Little can be done to it which will make sure that Civil Proceedings are expedited.

However, a lot can be done in respect of the rules of Practice as found under the First Schedule to the Code. Hereunder we make suggestions as to how the Rules should be changed to make sure that Civil trials are expedited.

(i) Adjournments:

It has been seen that the provisions under Order XVII of the Code have been abused on a number of occasions, and this has been the single major factor which has caused many delays in court proceedings. There is, therefore, need to tighten up the provisions relating to adjournments. It should be brought to the notice of the court parties and their advocates that pressure of work should not be a ground for granting adjournments. Also, it should be brought to the notice of all concerned that the absence of parties when their advocates are present in court should not be a ground for granting an adjournment. Moreover, when a suit has, by necessity, to be adjourned then it should be adjourned to another date for hearing or further hearing, as the case may be, and not for Amention@ as, indeed, the word Amention@ does not appear anywhere in the Code. The discretion of the court in granting adjournments should be guided by specific Statutory provisions. For this purpose, it is suggested that the 1976 Indian amendment to he rule in pari material which is found under the Indian Civil Procedure code 1908 should be adopted. Thus, the proviso to Order XVII Rule 1(2) should adopt the Indian provision which reads as follows:

> AProvided that:
>
> a) When the hearing of the suit has been commenced, it shall be continued from day-to-day until all the witnesses in attendance have

been examined, unless the court finds that, for the exceptional reasons to be recorded by it, the adjournment of the hearing beyond the following day is necessary,

b) No adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of the party,

c) The fact that the Advocate of the party is engaged in another court, shall not be a ground for adjournment,

d) Where the illness of an Advocate or his inability to conduct the case for any reason, other than his being engaged in another court, is put forward as a ground for adjournment, the court shall not grant the adjournment unless it is satisfied that the party applying for adjournment could not have engaged another Advocate in time,

e) Where a witness is present in court but a party or his advocate is not present or the party or his Advocate, though present in court, is not ready to examine the witness, the court may, if it thinks fit, record the statement of the witness and pass such Orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be, by the party or his Advocate not present or not ready as aforesaid. Under Order XVII Rules 4 and 5 where the hearing of a suit has been adjourned generally and no application is made within 12 months and 3 years, respectively, of the last adjournment the court may dismiss the case if no cause is shown to its satisfaction.@

These provisions, if well used, could reduce delays but it is suggested that the time factor under both rules should be no more than twelve months.

(ii) Pre-Trial Conferences:

It was apparent from the research that there are many instances in which the court grants adjournments very readily if the application is supported by the ground that the parties are seeking to settle the matter out of court. In most cases, however, the parties come back to court again and say that they have failed to secure such a settlement. This practice delays the process of justice substantially. It is submitted that although settlement out of court is something which should be encouraged, it should be used only where there is a genuine chance of securing such a settlement. There is a possibility of advocates and parties who want to abuse the process of granting adjournments to use it when they are not ready to proceed with the trial. Hence, it is suggested that a procedure be instituted in which those cases which can potentially be settled out of court are screened from the beginning so as to minimise the possibility of adjournments on this ground.

In America, this procedure is secure by the existence of what has come to be known as APre-Trial Conferences@ in which the Judge and the parties or Counsel for the parties meet in Chambers before the actual trial begins to survey areas of possible agreement. This procedure is found under the United States Rules of Procedure (Title 28 App. V.S. code 1970 Ed. Vol. VII) and it reads as

follows:

> APRE-TRIAL PROCEDURE: FORMULATING ISSUES
> Rule 16
> In any action, the court may, in its discretion, direct the Attorneys for the parties to appear before it for a conference to consider:
>
> (1) The simplification of the issues;
>
> (2) The necessity or desirability or amendments to the pleadings;
>
> (3) The possibility of obtaining admissions of facts and documents which will avoid unnecessary roof;
>
> (4) The limitation of the numbers of expert witnesses;
>
> (5) The advisability of a preliminary reference of issues to a Master for findings to be used as evidence when the trial is to be by jury;
>
> (6) Such other matters as may aid in the disposition of the action.
>
> The court shall make an Order which recited the action taken at the Conference, the amendments allowed to he pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by the admissions or agreements of Counsel; and such Order when entered controls the subsequent course of action, unless modified at the trial to prevent manifest injustice. The court may in its discretion establish a pre-trial calendar ...@

These provisions appear in a very scattered form in the Tanzania Code of Civil Procedure. In fact, all the procedures relating to Interrogatories (Order XI), Discovery and Inspection (Order XI) are geared at achieving the same results. However, it is doubtful whether these procedures are actually used in the process of civil litigation in Tanzania. In America, the procedure quoted above has been credited with promoting a lot of settlements out of court. It is said that the number of cases which find their way to actual trial is but a very small proportion of those which were originally filed. relying on the Tanzania provisions cited above to achieve the same result will not be possible because the procedure is under direct control of the advocates and their parties, and very few of them actually invoke these provisions. The court only comes in, for example, when interrogatories have been exhibited and the opposite party refused to answer them, or when Discovery is sought and the opposite party refused to answer them, or when Discovery is sought and the opposite party is not willing to give it. There is therefore need to make the court more involved in the pre-trial procedures, with the view to promoting settlement of as many disputes out of court as is possible. It is suggested that the American provision be incorporated in Order XIV either in whole or in part. It should be specifically provided that at the first hearing the court has the duty

to survey the possibility of the parties reaching a settlement. It should be stated that if at the first hearing the court fails to make the parties reach a settlement, then an Order should be made that the case should go on to a full hearing. The possibility of settling the matter out of court should be explored at the time when issues are being framed.

(iii) Service of Summons:

It has been seen from the foregone that the failure to serve the summons upon the Defendant has a major impact on the progress of the suit. Order V. Rule 15 enacts that where the defendant cannot be found and has no agent authorised to accept service of the summons on his behalf, service may be made on any adult member of the family of the Defendant who is residing with him provided that such a person is male.

It is apparent from Order V. Rule 12 that service should as far as it is practicable be made on the defendant in person. This has the advantage of ensuring that service has actually been effected, hence the court may proceed ex parte if the summons is disobeyed without attracting the excuse of lack of due service. There is therefore a need to make it further clear that service upon another person who is not the Defendant in the suit should be made only where there is clear reason to believe that there is no possibility of getting the Defendant in person.

Further, at the level of our political development and our belief in the equality of all persons irrespective of sex, the provision that the service of a summons under Order V Rule 15 should be made on an adult male member of the Defendant=s family is outdated. Hence, we propose that the new 1976 Indian provision should be adopted. The provision reads as follows:

> AWhere 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, whether male or female, who is residing with him.@

(iv) Representative Suits:

At the moment, representative suits can take two forms:
Public interest suits in which a Plaintiff sues to enforce a Public right, and those envisaged under Order I Rule 8(1). The first type of suits is not very common in Tanzania. We are therefore, concerned with the latter.

Under the present law, where there are numerous persons having the same interest in one suit, one or more of those 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. This provision is in pari materia with the Indian provision in Act V of 1908. Since the enactment of the Tanzania Civil Procedure Code 1966, the Indian Act has been amended in the following way:

> AOrder I Rule 8(1)(b): The Court may direct that one or more of such persons may sue or be sued, may defend such a suit, on behalf of, or for the benefit of, all persons so interested.@

This amendment is significant since whereas previously the court did not have the power to limit the number of litigants where there was common interest, now the court has such powers. It is psychologically satisfying for a person to pursue his own rights. However, when many people are involved and have common interest, the court is potentially exposed to the possibility of hearing massive similar evidence and submissions. To save the time of the court, the Indian amendment should be adopted so that the court can have power, when the litigants are bent on prosecuting their own rights, to compel them to limit their numbers.

The Indian provision also empowers the court to substitute the person appointed to prosecute the suit on behalf of the other parties if he does not proceed with due diligence. Such a provision should also be adopted.

(v) Specialization of the Courts:

From the above it can be seen that some of the adjournments are caused by Judges= and Magistrates= pressure of work. This pressure of work has been attributed by some of our correspondents to the fact that there is no specialization in our courts.

The Chief Justice, Hon. Mr. F. L. Nyalali and Mr. Justice R. H. Kisanga of the Court of Appeal are both of the view that specialization is desirable. Mr. Justice A. Bahati of the High Court has expressed his reservation in the following words:

> AI do not believe that our level of development in the country is suitable for such specialization. Our Judges and Magistrates need practical experience in both Criminal and civil branches of the law to ensure that they are capable of dealing with both branches of the law.@ Mr. Justice A. Bahati further suggests that one alternative is Ato have Judges and Magistrates dealing with both branches of the law for a minimum of say five years after which they would specialize in only one branch of the law@.

Mr. W.N.B. Kapaya, Senior resident Magistrate, on the other hand, had this to say on the subject of specialization:

> AI beg to differ with you on this matter. I believe that at this stage of our development we do not have enough personnel (magistrates and judges) to effect the specialisation that has been proposed. And I believed it will be uneconomic to train people to deal with just one aspect of the law@.

After considering the matter very carefully we have come to the conclusion that specialization of the courts into criminal and civil divisions should not be effected at the moment. When it is opportune to carry out such specilization the necessary administrative arrangements will be charted out and recommended to the appropriate authorities by the Commission.

(vi) Execution of Decrees:

In 1973 the High Court by its circular letter Ref. No. JY/C.40/4/152 dated 11th July, 1973 directed that all execution be done by Regional/Area Commissioner=s office.

In some areas this circular seems to have been ignored but there are some quarters in the administration who demand that all execution process be carried out

through their offices. It has happened that some District Commissioners or Regional Commissioners who have been issued with a warrant of attachment, instead of attaching the property as directed convene a committee meeting to discuss the propriety of the order. This type of debate inevitably delays the course of justice apart from it being an interference with the judicial process.

It is, therefore, suggested that the process of executing a decree should be brought back into the province of the courts.

(vii) Government Suits:

It has proved difficult to get the necessary statistics from the Attorney-General=s Chambers, Dar es Salaam but it would appear that there is not much litigation in the courts involving the Government in this country. Before a suit can be instituted against the government under the government Proceedings Act, 1967 there must be obtained the written consent of the Minister of Justice. This requirement is a potential obstacle to the speedy disposal of civil suits against the Government because the Minister for Justice, before he decides to give or not to give his consent, will refer the matter in issue to the Ministry concerned. From research carried out it would appear that the dilatoriness of certain Ministries in responding to correspondence from the Minister of Justice is a major cause of delay in obtaining consent. Otherwise, where consent has been obtained and a suit has actually been instituted against the Government, there are no inherent reasons why a Government suit should take longer than other suits to be disposed of.

Mr. Justice K.S.K. Lugakingira of the High Court has mentioned the case of Paul Atoll Vs Theresia Andrea and the Attorney general H.C. Civil Case No. 9 of 1978 (Mz) unreported as a classic example to testify to the view that the requirement of the Minister=s consent may be a major source of delay in the disposal of Government suits. In the said case it took three years for the Minister=s consent to be given after being sought, even then, not without the intervention of the Permanent Commission of Enquiry. Subsequently the plaintiff obtained an ex-parte judgement because the Attorney-General could not file a written statement of defence in time. It was the wide publicity given to this judgement by the local press which helped to alert the Attorney-General=s Chambers. One of the difficulties expressed in this case was that the Attorney-General=s representative in Mwanza had sent his file to the Headquarters in Dar es Salaam from where he had been endeavouring without success to receive instructions. Apparently all suits involving the government are handled exclusively by the Attorney General=s Chambers, Dar es Salaam.

We are putting forward two suggestions in connection with the Minister=s consent. One, is that the Civil Section in the Attorney-General=s Chambers be decentralized so that Senior State Attorneys at AZonal Chambers@ be given the mandate subject to pecuniary or other restrictions, to give consent on behalf of the Minister. Secondly, that after a specific period of time has passed without getting the Minister=s response or consent after it is sought a plaintiff should be allowed to go ahead in court with
the institution of the suit against Government.

IV. SUMMARY OF MAJOR RECOMMENDATIONS

RECOMMENDATIONS ON ADJOURNMENTS

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1. We recommend that the Chief Justice should issue directives to all concerned that once the hearing of a suit has been commenced adjournments should be the institution of the suit against Government.discouraged.

2. We recommend that the Chief Justice should issue directives stipulating that an advocate=s or party=s pressure of work or the absence of parties when their advocates are present should not be grounds for granting adjournments.

3. We recommend that Order XVII Rules 4 and 5 of the Criminal Procedure Code, 1966 should be amended so that where the hearing of suit has been adjourned generally and no step is taken by the parties for a period of six months the case shall be dismissed.

4. We recommend that a provision be made in the civil Procedure Code whereby those cases which can potentially be settled out of court are screened from the beginning when issues are being framed by the Registrar or trial magistrate. In this connection Rule 16 of the United States Rules of Procedure (page 17 of this report) may, mutatis mutandis, be adopted.

RECOMMENDATION ON SERVICE OF SUMMONS

5. We recommend that Order V Rule 15 of the Civil Procedure Code, 1966 be amended so that service of summons may also be effected on any adult member of the family, whether male or female.

RECOMMENDATION OF REPRESENTATIVE SUITS

6. We recommend that Order I Rule 8 be amended so that the court should have the power to limit the number of litigants where there are numerous persons having the same interest in one suit.

RECOMMENDATIONS ON GOVERNMENT SUITS

7. We recommend that if the Minister for Justice does not, within six months, respond to an application to sue the Government then the plaintiff should proceed with the suit against Government Proceedings Act, 1967 should be amended accordingly.

8. We recommend that the Minister=s power to give or refuse consent, should be delegated, subject to pecuniary and other restrictions, to State Attorneys in-charge of Regions/Zones where the cause of action arose.

RECOMMENDATION ON EXECUTION OF DECREES

9. We recommend that the process of executing decrees should be brought back into the hands of the court and that the High Court circular letter (Ref. No. JY/C.40/4/152 of 11th July, 1973) be amended accordingly.