CIVIL PROCEDURE IN TANZANIA

The law relating to civil procedure in Tanzania is based on the Indian Civil Procedure Code, 1908. In Zanzibar, Civil Procedure is governed by the Civil Procedure Decree which was enacted in 1917 and which is based on the Indian Act of 1908. In Tanganyika until 1960 the Indian Act of 1908 was applied by virtue of the Indian Acts (Application) Ordinance enacted in 1920. In 1966 the Civil Procedure Code was enacted by the Parliament of the United Republic and came into operation on the 1st January 1967. The Code is based on the Indian Act of 1908 with various modifications. The substantial law relating to civil procedure is embodied in the body of the Act while the procedure rules are in the Schedule. The substantial law deals with such matters as jurisdiction of courts, *res judicata,* summons and discovery, execution of decrees, appointment of commissions, right of appeals and powers of the courts.

Courts which exercise original civil jurisdiction in Tanganyika are primary courts, district courts, courts of a Resident Magistrate, and the High Court. Primary courts have unlimited jurisdiction in all civil proceedings arising out of customary law. In such proceedings the pecuniary jurisdiction of the primary court is unlimited. The territorial jurisdiction of a primary court is confined to the district for which the court is established. Every district has a primary court and in certain districts there are two or more primary courts exercising concurrent jurisdiction.

With regard to non-customary law matters the civil jurisdiction of a primary court is very limited. It has civil jurisdiction in respect of debts due to the Government or a local government authority where the claim does not exceed two thousand shillings. A primary court has also civil jurisdiction to entertain a suit for the recovery of any civil debt arising out of contract if the value of the subject matter of the suit does not exceed one thousand shillings. The Civil Procedure Code, 1966, does not extend to primary courts and the procedure in civil proceedings before primary courts is governed by rules made under the Magistrates Courts Act of 1963.

Civil proceedings in district courts, courts of Resident Magistrates and the High Court are governed by the Civil Procedure Code, 1966. A district court does not *per se* have civil jurisdiction. It has civil jurisdiction only when it is presided over by a civil magistrate. A magistrate may be designated to be a civil magistrate by the Chief Justice. Every Resident Magistrate is a civil magistrate and therefore, every court of a Resident Magistrate has jurisdiction to try proceedings of a civil nature. The maximum pecuniary jurisdiction of a district court is twenty thousand shillings. The pecuniary jurisdiction of

a court of a Resident Magistrate is twenty thousand shillings. When the Chief Justice appoints a District Magistrate to be a civil magistrate he may limit his pecuniary jurisdiction to any amount less than twenty thousand shillings. The territorial jurisdiction of a district court extends to the whole district for which the court is established. The territorial jurisdiction of a court of Resident Magistrate is prescribed by the order establishing the court of a Resident Magistrate. Normally a court of a Resident Magistrate is established for every region. In certain cases a court of a Resident Magistrate may have every region. In certain cases a court of a Resident magistrate may have jurisdiction over an area larger than a region or over two or more regions. Thus, a district court has concurrent territorial jurisdiction with the court of a Resident Magistrate established for the region within, which the district lies. For example, "X" consists of districts A B and C, the court of a Resident Magistrate will have concurrent jurisdiction with the district courts A, B and C. A suit that can be filed in the district court A, B or C may also be filed in the court of the Resident Magistrate.

Section 13 of the Code provides that every suit shall be instituted in the court of the lowest grade, but for the purposes of that section a court of a Resident Magistrate and a district court shall be deemed to be courts of the same grade. The consequence of this section is that a suit, the value of the subject matter of which is less than twenty thousand shillings, cannot be commenced in the High Court and must be commenced either in a district court or the court of a Resident Magistrate. The pecuniary jurisdiction of the High Court is unlimited and its territorial jurisdiction extends to the whole of the mainland of Tanzania.

Suits relating to immovable property must be instituted in the court having jurisdiction over the area within which the property is situated. In this connection it should be remembered that a suit for recovery of rent is not a suit relating to immovable property but is a suit for recovery of a sum of money due under a tenancy or a lease. Where a suit is instituted for compensation for a wrong to immovable property the suit made by magistrate in the court having jurisdiction over the area where the property is situated and the court having jurisdiction over the area where the defendant relies or carries on business or personally immovable property is situated partly within the defendant and the court and partly within the jurisdiction of another court a suit may be instituted in either court. With regard to a suit for any other claim proceedings may be instituted:

a) In the court within the jurisdiction of which the defendant or any of the defendants reside, carries on business or works for gain;

b) In the court within the jurisdiction of which the cause of action wholly or partly arises.

Every suit is instituted by presentation of a plaint by the plaintiff. The plaint must contain the particulars of the plaintiff, the particulars of the defendant, and the particulars of the cause of action and the particulars of the relief sought. A plaint must also state facts showing that the court in which the suit is instituted has jurisdiction to try the suit. Upon presentation of the plaint the court will issue a summons to the defendant.

There are two types of summons. There is a summons which requires the defendant to appear and answer the claim on a day to be specified in the summons, and there is a summons which requires the defendant to file his written statement of defence within the time specified in the summons. The latter type of summons may be issued only by a court other than the High Court. If the defendant fails to file a written statement of defence within the time specified in the summons the Plaintiff will be entitled to apply for judgment against the defendant. Where a summons to appear has been served on the defendant and the defendant appears, he may be allowed to file a written statement of defence within such time as the court may decide.

In certain cases the plaintiff may apply for a summons for summary proceedings, where a summons for summary proceedings is issued the defendant is not entitled to defend his suit save with the leave of the court. He must first file an application for leave to defend and the court will grant him an application for leave to defend only if the court is satisfied that he has a *prima facie* defence. Such a summons may be issued only where the suit is based upon a bill of exchange or is for the recovery of income tax, or of a debt due to the Government, to a local government authority or to certain parastatal organizations. A summary suit may also be instituted for claims arising out of mortgages whether legal or equitable.

The summons in every case must be served on the defendant personally. In certain cases the plaintiff may apply for the summons to be served by substituted service and the court will make an order prescribing the manner in which the summons may be served. Normally, substituted service is affected by publication of the summons in a newspaper. A copy of every summons is posted on the notice board of the court in

which the suit has been instituted, and in the case of a substituted service a copy must also be affixed on the property where the defendant normally resides or is last known to have resided. Where a summons to appear has been issued and the defendant fails to appear on the date and time specified in the summons, the court may enter judgment against him if it is satisfied that the summons has been served. The defendant may apply to set aside the judgment and enter *ex parte* if he satisfies the court that he was prevented from appearing by a sufficient cause.

Where a defendant files his written statement of defence the plaintiff may, with the leave of the court, file a reply. The plaintiff must file a reply if the defendant, in his written statement of defence, has raised a counter-plaint or a set-off, because every counter-plaint or set-off deemed to be a plaint and the basic rule is that where any statement or claim alleged in the plaint is not specifically denied in a written statement of defence, the statement or claim shall be deemed to have been admitted.

When all the pleadings have been filed the court fixes a date for the hearing of the suit and the suit is heard in the normal way. The Plaintiff adduces his evidence and the defendant then adduces his evidence and the court then decides the issues. Before the hearing commences the court determines the issues involved in the suit, as disclosed in the pleadings, and the parties are bound by the issues and they can only produce evidence which relates to the issues. Each witness called by a party to a suit may be cross-examined by the other party. The taking of evidence is governed by the Evidence Act, 1967, which is also based on the Indian Evidence Act.

After the court has heard the evidence it gives its judgment. The judgment must decide each issue and give reasons for the decision. From the judgment the court extracts a decree which sets out the reliefs awarded by the court. The party in whose favour the decree is given is called the decree holder and the other party is called the judgment debtor. The decree holder may apply for execution of his decree. A decree may be executed either by attachment of the judgment debtor or by attachment of his property. Where an application is made for the execution of the decree by attachment of the judgment debtor, the court may issue a warrant for the arrest of the judgment debtor who is then produced before the court. The court may examine him as to his means and may either order him to pay the decretal amount immediately or by installments.

If the judgment debtor fails to comply with the order of the court he may be committed to a civil prison. The maximum period for which a judgment debtor may be committed to a civil prison is six months.

Where the decree holder has applied for execution by way of attachment of the judgment debtor's property, the property is first attached by the court and after a certain period the court may order the property to be sold by public auction. Attachment is effected in the case of movable property by seizure by court bailiff, and in the case of immovable property by the court issuing a notice of attachment which is served on the judgment debtor and also posted on the immovable property. Certain properties may not be attached. These include personal clothing, cooking vessels, beds and bedding, tools of artisans and agricultural tools, houses and buildings occupied by the judgment debtor where the judgment debtor is a farmer, and books of account. Rights in future may also not be attached. Where the property attached is money of salary then so much of the property as is sufficient to satisfy the decree holder's claim is delivered to the decree holder. In the case of any other property, it is sold and the proceeds of sale are applied in satisfying the decree. The balance in every case is paid to the judgment debtor. With regard to salary, only one-third of the judgment debtor's salary may be attached. Where a judgment debtor's salary has been attached under two or more decrees even then only one-third of his salary is liable to attachment and that one-third is then divided *pro rata* between the decree holders. Where several decrees have been passed against a judgment debtor and in each case the same property has been attached, the proceeds of the sale of the property are divided *pro rata* between the decree holders. Where attachment of a property does not result in sufficient funds being available to satisfy the judgment debt the decree holder may resort to another mode of execution for the recovery of the balance remaining due. Where there is any dispute in connection with the property attached the dispute will be determined by the court issuing the attachment and in the court.

The Civil Procedure Code also provides for the doctrine of *res judicata*. No court is empowered to 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 part or between parties under whom they or any of them claim, litigating in the same title, in a court competent to try such subsequent suit in the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. Thus, the following conditions must exist before the doctrine of *res judicata* can be invoked:

1. The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit. A matter may be directly and substantially in issue in the former suit

either actually or constructively. A matter is said to have been constructively in issue in the former suit. Thus, if A sues B for a debt and B defends the suit on the ground that the debt is not due, and loses the suit, he cannot subsequently claim a refund of the decretal amount which he has paid to A on the ground that the debt was not recoverable because at the time when he incurred the debt he was a minor. The issue of minority is one which might and ought to have been raised in the former suit.

2. The former suit must have been a suit between the same parties or between parties of whom they or any of them claim. Thus, if A sues B for the recovery of a debt and loses, his personal representative upon his death cannot sue B for the same debt because, although in the subsequent suit the parties are not the same, the personal representative of A is a party who claims under A.
3. The parties must have litigated under the same title in the former suit. If A sues B as personal representative of X in respect of a subject matter, he can subsequently sue B in respect of the same subject matter in his own personal capacity.
4. The court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which the subsequent issue is raised.
5. The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit. This condition does not apply in respect of matter constructively in issue.

A court may appoint a commission to examine a witness or to enquire into local custom or to effect partition of immovable property. The Commissioner must submit his report to the court and may in certain cases be examined by the parties to the suit.

Every decree and certain orders may be appealed against. Where a suit has been tried by a district court or a court of a Resident Magistrate the appeal lies to the High Court. Where a suit has been tried by the High Court the Appeal lies to the Court of Appeal of Tanzania. The court hearing the appeal may decide the appeal after hearing the arguments of the parties or may remand the case for re-trial or for taking further evidence to the court which tried the suit, or may itself take further evidence before deciding the appeal. Where an appeal has been made to the High Court a further appeal may lie in certain cases to the Court of Appeal of Tanzania.

The Civil Procedure Code, 1966 also contains exhaustive provision regulating counter-claim, set-off and third party procedure. These rules are based on the Indian Code but

follow, with a few variations, the rules applicable in the United Kingdom.

NOTES ON CIVIL PROCEDURE

HISTORICAL BACKGROUND

The law relating in civil procedure in Tanzania is based on the Indian Civil Procedure Code, 1908. In Zanzibar, civil procedure is governed by the Civil Procedure Decree which was enacted in 1917; it is also based on the Indian Civil Procedure Code, 1908. In Tanzania mainland until 1966 the Indian Act of 1908 was applied by virtue of the Indian Acts (Application) Ordinance ended in 1920. In 1966 the Parliament passed the Civil Procedure Code which repealed the Indian Code of Civil Procedure, 1908. The Tanzania (mainland) Civil Procedure Code of 1966 came into operation on 1st of January, 1967. Basically the structure of the Tanzania (Mainland) Civil Procedure Code is that of the Indian Code with minor modification.

ANATOMY OF THE CODE

The Civil Procedure Code is divided into two parts:

1. The main Act (Code) which is the substantial law, and
2. The schedules to the Act – which are two. One schedule contains orders and rules while the other schedule contains rules on arbitration (replica of Arbitration Ordinance). As far as the C.P.C. is concerned, **the schedule is deemed as part of the code,** contrary to the general rule that a schedule is not part of the legislation. **In case of conflict between sections in the main code and rules in the schedule, the sections will override the rules.** The case which illustrates the rule of schedule and the Act is the Indian case of **SAMBHOG V. SUNDER** (1946) I. L. R. BOMB. 756 That:

   "Whereas the body of the Code creates the jurisdiction of the code, the rules indicate the mode in which the jurisdiction is to be exercised."

   The rules can be changed in two ways:

   1. By Parliament
   2. Under section 80 of the code.

      S. 80 provides that the schedules to the Act should be regarded as the body of the Act until they are altered.

      S. 81 empower the Chief Justice to alter, add, or delete the rules after consultation with the Minister for Justice.

CONSTRUCTION OF THE CIVIL PROCEDURE CODE

The general rule is that procedural rules are hand maidens in the administration of

justice. They are made to facilitate the dispensation of substantial justice, therefore **a strict construction of CPC is discouraged.** All rules should be given a liberal interpretation. Thus rules of procedure do not give parties any rights, they only provide for the mode of settling disputes.

Cases: SOUTH BRITISH INSURANCE LTD. vs. MOHAMED TAIBJE (1973)

E.A. 210 at page 214.

In the above case the judge said, "In deciding appeals a fair court endeavors not to allow technicalities to cause a failure of justice but rather locks to the substance of the matter."Rules should not harass the parties.

Case: KARIMJEE PROPERTIES LTD. V. KHAKI CAMERA PRIX (1970)

BCD 235.

In this case the defendant was seeking to throw out a plaint which He claimed it did not disclose the cause of action. The court rejected the prayer.

INCORRECT PROCEDURE

If incorrect procedure is followed, the consequences are less harmful than when incorrect law is followed. The question should be whether the incorrect procedure has caused a substantial amount of injustice.

Case: NANJI PRABHUDAS V. STANDARD BANK (1968) E.A. 670 AT PAGE 693.

NEW ENACTMENTS AFFECTING PROCEDURE

If there is a pending dispute in court and the procedure is affected by a new enactment, the court has to follow the new procedure.

Case: Benfros Motors v. Patel (1967) HCD 432

However according to the case of **MJIGE V. HARBOURS CORPORATION** procedural enactments are retrospective only to matters already completed.

ORGANISATION OF CIVIL COURTS

1. **Special Constitution Court**

   Section 128 of the Constitution of the United Republic of Tanzania provides that the constitutional court is not a standing court but an ad hoc court which is established only when the need arises.

   Section 125, and 126 of the above constitution explain that **the special constitutional court exercises its jurisdiction like an arbitration tribunal.** Although it is a court of record **it does not give decision on basis of winner gets all.**

   The two governments choose judges the number of which is subject to negotiation, these judges are the ones who will constitute the special

constitutional court. S. 128(4) of the Constitution empowers the parliament to enact rules to be followed by this court. In the absence of any rules the said court will formulate its own rules. In case of disagreement the decision is to be made by the government of the United Republic.

2. **The Court of Appeal.**

It is established by section 117 of the Constitution, below it we have the High Court of Tanzania. This latter court is set up by section 108 of the Constitution. S. 117 does not provide for the jurisdiction of the Court of Appeal. "Jurisdiction is to be providing for the jurisdiction of the Court of Appeal. "Jurisdiction is to be provided by other written law." By this it had in mind the Judicature and Application of Laws Ordinance (JALO).

3. **The High Court:**

S. 3 of the Judicature and Application of Laws Ordinance provides for High Court's jurisdiction. Section 2 of the JALO provides that procedure in civil matters is to be governed by the Civil Procedure Code, 1966 (as amended/replaced from day to day. In the absence of any procedure, **common law, equity** and **other laws of England** which were in force **before the 20th July, 1922** will apply.

4. **The District and Resident Magistrates Courts:**

Below the High Court there are District Courts and Resident Magistrates Courts. The district courts are established under section 4 of the Magistrates Courts Act No. 2 of 1984. While the Resident Magistrates Courts are established under S. 5 of the Act.

Procedure:

Section 42 of the Magistrates Court Act 2/84 provides that the two above courts should follow the provisions of the Civil Procedure Code, 1966 (as amended from day to day) **in so far as they are applicable.** The words, in so far as they are applicable means that the court can depart from those provisions if it deems fit. This is not the case with the High Court where the judicature and Application of Laws Ordinance provides that the High Court "shall follow" the provisions of the Civil Procedure Code."

5. **Primary Courts.**

Below the district courts and resident magistrate's court there are Primary Courts. Primary Courts have **unlimited jurisdiction on customary and Islamic matters.**

The Primary Court Civil Procedure is different from the Civil Procedure Code. Primary Courts apply the 4th and 5th Schedules to the magistrates Courts Act 2/84 in trying civil cases. They also apply the Primary Court Civil Procedure Manual made by the Minister responsible.

ELEMENTS OF CIVIL LITIGATION

1. There should be **opposite parties** who are in contest as a result of a dispute, that is to say, there must be two rights which are clashing; one asserting a right and the other denying it.
2. The aggrieved party asserts a right by presenting a demand. A dispute is established by a **demand letter** (in Tanzania) and a letter (or notice) before action (in England).

   The purposes of demand letter are:-

   - To establish at a very early stage the **points** in which the parties are at issue.
   - It serves as **evidence** that the **plaintiff invoked the help of the court** as a means of a **last resort.**
   - It also serves to **remind forgetful debtors** who are potential defendants that the debts they owe are due.

   Different laws require demand letters to be served before a plaint is drawn. Before writing a demand letter **one can not proceed to draw a plaint.** For example – where a tenant over stays after a notice to quit has expired, the land lord can not bring an action for double value – **unless he has written a demand letter for repossession.**

   By implication a demand letter is necessary in Tanzania in respect of any action although it is not specifically so provided in the CPC. This view is fortified by the Advocates Remuneration and Taxation of Costs (Amendments) Rules, 1924 G. N. 193/24.

   Rule 61 of the said rules provides that a plaintiff can not file a plaint before he has written a demand letter.

   Rule 61: *"If the plaintiff in any action has not given the defendant notice of his intention to sue, and the defendant prays the amount claimed or found due at or before the first hearing, no advocate's costs will be allowed except on a special order of the judge."* This rule has been interpreted by three cases.

1. **AMRADHA CONSTRUCTOR CO. vs. SULTAN STREET AGIP SERVICE STATION (1967) HCD 321 – (1968) E.A. 85.**
2. **karimjee & others VS. Commissioner General of income tax (1972) hcd 61,** and
3. **ABDUL AZIZ VELJI RATANSI vs. SHARI SINGH (1968) HCD 453.**

The rule applies only in those cases where advocates are employed.

SUMMARY:

It is necessary to have a letter of demand and because such a letter will show that the suit has been brought to court **bona fide** and the **plaintiff has been compelled to do so.**

A court will rarely award costs against a defendant who did not receive a letter of demand. Letter of demand is also important as it serves as a **reminder.**

There are specific things which must be included/contained in a demand letter:-

1. Name and address of prospective plaintiff or his advocate.
2. It should state very clearly the claim which the prospective Plaintiff has against the prospective Defendant.
3. It should make a demand that the prospective Defendant should make good the claim at a specified time after which the prospective Plaintiff will be free to file a suit against the prospective Defendant. There is no limitation as to time but the practice is that it should not **be less than one calendar month.**

The following are usually the words used in a demand letter.

"I am instructed by Mr. x of …… to demand from you the sum of shs. …… which is due to him from you under the contract of ……. Between you and the said x.

Take notice that if the said amount is not paid to me by the …… day of …….. 19…. I am instructed to institute a suit for the recovery of the said amount against you and the costs will be at your risk.

Yours sincerely,

KAPELE & ADVOCATES

LIMITED

JURISDICTION

The term **"Jurisdiction"** is used as an expression in a variety of senses. It may mean an **authority** conferred by statute or some other instrument or a court or

tribunal or a person **to determine, after inquiry** into a case of the kind described into the statute or that other instrument regarding that authority submitted to the court or tribunal or that person **for the purpose of making a decision.** Or it may mean an authority which the court has been vested to decide matters litigated before it.

Territorial:

This factor limits the jurisdiction of the court within **areas of their establishments.** Primary and district courts exercise their jurisdiction within the districts in which they are established. The court of the Resident Magistrate has jurisdiction within the region or area prescribed by the Chief Justice. Finally the High Court and Court of Appeal have jurisdiction all over Tanzania mainland and for the latter it exercises jurisdiction over Zanzibar as well.

S. 13 of the CPC provides that **a suit shall be instituted** in the court of the lowest grade competent to try it. The purpose of this section is to avoid over crowding of suits in higher courts, not that the higher courts, strictly speaking have no jurisdiction. **The rule is of procedure** and not of jurisdiction.

Under s. 14 of the CPC. Suits relating to immovable property and in suits for compensation for a wrong done within local limits of the jurisdiction of one court and the Defendant resides or carries his business …… within the local limits of jurisdiction of another court, the Plaintiff will have to institute the suit in the local limits of the court of which that property is situated (in case of immovable property).

In case of wrong done ……. the Plaintiff will have to institute the case in the court under which the cause of action arose.

In case of compensation for wrong done the plaintiff may institute the suit either where the **cause of action arose** ***OR*** where the **Defendant resides or personally works for gain.** Thus by this way the above two instances have limited the scope s. 13 of the CPC.

Pecuniary:

There is a maximum **monetary value** of the subject matter of the dispute which

gives the courts their jurisdiction. This provision is found in the Magistrates Court Act, 1984 which fixes pecuniary jurisdiction of Resident Magistrates Courts and District Courts.

The pecuniary limit of the District court for recovery of immovable property is Shs. 300,000/= and for recovery of movable property the pecuniary limit is Shs. 200,000/= - s. 40(2)(a) and (b) of MCA 1984.

Section 40(1)(b) of the above Act provide that the District Courts have jurisdiction on civil matters though not tried by civil magistrates provided that there is specific written law which confers jurisdiction on them e.g. the Workmen's Compensation Ordinance.

Statutory (subject matter) jurisdiction:

Sometimes a **statute** may exclude jurisdiction of certain courts and vest jurisdiction on specific grade of courts. For example cases arising out of housing rents are tried by Magistrates Courts or Workmen's Compensation Ordinance are exclusively to be filed in district courts. What is important is that statutes casting the jurisdiction of civil courts must be very strictly construed so as to avoid placing cases in administrative tribunals.

Personal to Oneself:

A person may be appointed as a **district magistrate but not a Civil Magistrate because not all district magistrates** are **Civil** Magistrates. District Civil Magistrates are **appointed by the Chief Justice,** thus the appointments and the jurisdiction which are conferred on them are personal to themselves.

WHEN SHOULD THE QUESTION OF JURISDICTION BE DETERMINED

Any objection to jurisdiction **must be raised at the earliest possible opportunity.**

Objection as to the place of suing will not be entertained by any appellate or revisional court unless it was taken in the court of first instance and at the earliest possible opportunity – see s. 19 of the CPC.

The test as to whether a tribunal has jurisdiction or not **is WHETHER the court, commission, or tribunal has power to entertain the Inquiry and make decision or determination.**

Once the court has power to entertain the inquiry, it is free to determine it wrongly in fact or in law, hence the appellate system. The decision or determination that follows does not determine jurisdiction be it wrong or correct in law or in fact.

Parties can not by consent confer jurisdiction to a court which prima facie has no jurisdiction.

Cases: MARIAMBHAI RAJABALI vs. P. CURTIES (1968) HCD. 120, in this case it was held that, Parties can not confer jurisdiction on a primary court merely by appearing before it."

It was also held in the case of **BATHOLOMEW RICHARD DE SOUZA vs. C. DE COSTA AND J. J. PEREIRA (1934) 16 KLR 48 that,** ***"Parties by advocates cannot by agreement or other manner enlarge a court's jurisdiction. When a limited court takes upon itself to exercise jurisdiction it does not possess, its decision amounts to nothing."***

EXPRESSED OR IMPLIED BAR OF JURISDICTION

Expressed:

Proceedings can be barred when the statute in expressed or unequivocal terms bars a matter from a court of law e.g. s. 28(1) of the **SECURITY OF EMPLOYMENT ACT No. 62 of 1964.** It bars courts from trying cases of summarily dismissing employees from work.

Such cases are tried either by conciliatory Boards or by the permanent Labour Tribunal.

Cases:

KITUNDA SISAL ESTATE vs. SHINGO MSHUTI & OTHERS (1970) HCD 242.

- **MAPUNDA vs. THE MANAGER E**. A. A. (1970) HCD. 24

When a statute has a finality clause, ousting clause, or exclusion clause, we say there is an expressed bar.

Implied:

A matter is impliedly barred from courts if a statute creates a **new offence** or **new right** and prescribes a **particular penalty** in respect of **the offence** or a **special relief** or **remedy** in respect of the **right** together with a **special procedure** to be followed **before the penalty can be imposed** or the **relief or remedy can be granted.**

Example: THE TAZARA ACT NO. 23/75, 1st Schedule Article xtx.

Although there may be expressed or implied bar for the court, the presumption is that the given court has **jurisdiction.** The courts have traditionally viewed customer clauses with hostility. Biron J. applied the court's hostility to customer clauses in **MTENGA vs. UDSM (1971) HCD. 247.**

PLACE OF SUING

S. 13 of the CPC provides that every suit shall be instituted in the court of the lowest

grade competent to try it. The first question is therefore which court has the jurisdiction. According to case law, s. 13 is a rule of procedure and is not a rule of jurisdiction. In other words s. 13 does not give a **court jurisdiction which it does not have,** and conversely it **does not deprive a court of jurisdiction which it already has.** It simply states where the suit should be instituted.

WHERE TO FILE WHAT (ss. 14, 15 and 16 of CPC)

If the dispute relates to immovable property s. 14 of the CPC. Demands that it should be filed in the court of the **lowest grade which has territorial jurisdiction in the area in which the property is situated.** Such disputes commonly relate to recovery or possession of land, rent, mortgages etc.

Where the property is situated in **two territorial jurisdictions,** then the suit can be filed in **either of the courts.** In respect of any other claims, the suit be filed in the court of the lowest grade competent to try it – either where the cause of action arose or where the Defendant habitually resides or works for gain.

These provisions are subject to powers conferred to the Resident Magistrate. The R. M. has powers to order transfer of a suit if it is filed in a place where there is no **concurrent jurisdiction.**

NB: The limiting factors are only applicable to courts subordinating to the High Court.

TRANSFER OF CASES

Under the Magistrates Courts Act, 1984, transfer of suits can be done in three different ways.

Under S. 47:

a) A **Primary Court** can transfer a suit, **in its own motion,** to the District Court, Court of Resident Magistrate or to another primary court which has jurisdiction.

b) The **Resident Magistrates Court** can order transfer of a case from a primary court to district court, or to the Resident Magistrate Court, or to another primary court.

c) **The High Court** can order transfer of a suit from Primary Court to District Court, or to RM' s Court or to the High Court itself for trial.

CIRCUMSTANCES WHICH NECESSITATE TRANSFER OF CASES

1. Circumstances of the case make it desirable to make a transfer.

2. Reasonable cause to believe that there will be a **failure of justice** if proceedings is held in that particular court.

3. Where the proceedings seek to establish a remedy or to enforce a customary right or it is the benefit of the estate of the deceased person and the High Court is convinced that the **customary law is not applicable or is not prevalent.**

4. Transfer will be secured where there is a **question of law** at issue between the parties.

In all these circumstances transfer can be secured by either **the court's own motion** or at **the instance of either of the parties.**

Section 20 and 21 of the CPC which are about transfer of cases are complimentary to provisions of Part V of the Magistrates Courts Act and not in substitution thereof. Those powers must be exercised in **conjunction** and not in **derogation** of **provisions** of **Part V of the Magistrates Courts Act.**

Transfer of cases under the CPC, can not be ordered by the court in a case which it does not have jurisdiction. The first question the court should ask itself before ordering a transfer is whether it has jurisdiction to try the case.

When a party wants a transfer of proceedings to be made, he has to **apply by way of a Chamber Summons.** A chamber summons has got three qualities.

1. It serves as a **mode of application to the court.**

2. It serves as a **notice to the other party** that a **second application has been made.**

3. Since it is signed and sealed by the court, **It is a court process summons** to **the adverse party** for the **purposes of hearing his objections.** Thus a notice of transfer of proceedings must be served to the other party so that he can be heard if he has objections. It **is a judicial act.**

Likewise if the court wishes to withdraw a suit which has been instituted in a court subordinate to it, it must give **notice to the subordinate court.** Moreover if the court decides to order the transfer on **its own motion** it must **give notice.**

There are two stages at which transfer can be made:

- As per section 20 of the CPC, a transfer can be **made before evidence is taken** (first hearing).

- If transfer is made under section 21 (on order of the High Court) it can be made **at any stage of the proceedings but before judgment.**

- **When transfer is made under Part V of the MCA, it can be made** at any stage but before judgement.

It is in the **interest of justice** that litigation should come to an end as quickly as possible. On the other hand transfer under section 21 of the CPC does not imply a **fresh hearing.**

CONCURRENT AND EXCLUSIVE JURISDICTION

1) **CONCURRENT:**

When more than one court of **different grades** has **the same original jurisdiction** in respect of the same proceedings, each court is said to have concurrent jurisdiction. For example under the MCA. 1984 S. 18 (1) (a) (i) primary courts have unlimited original jurisdiction on matters arising out of Islamic and customary law.

Under section 35 of the MCA of 1963 which has been repealed and replaced by section 40 of the MCA. 1984, District Courts have limited original jurisdiction on any proceedings save where it is expressly or exclusively conferred on some other court.

From the above it can be said that Primary Courts and District Courts have concurrent jurisdiction on matters arising out of Islamic and customary law as the primary court's jurisdiction is not exclusive and the district court's jurisdiction is limited.

Cases:

- FRANCIS MWIJAGE vs. BONIFACE KABALENEZA (1968) HCD. 341
- KULTHUM ALLY KARA vs. YASSIN ORTHMAN (1968) HCD 340.

Section 63(1) of the MCA 1984 define "concurrent jurisdiction are in s. 75(2) and s. 76 of the Law of Marriage Act No. 5 of 1971.

2. **EXCLUSIVE JURISDICTION:**

Where jurisdiction in respect of some matters is conferred to one court only. The court is said to have exclusive jurisdiction on that matter and no other court can preside over that matter.

Cases:

- ABIFALAH vs. RUDNEP ZAMIBA LTD. (1971) HCD 165
- MOSWAYA vs. MSOWOYA – (1971) HCD 87.

In Abifalah's case the EACA held that under the Workmen's Compensation Ordinance Cap. 263 jurisdictions is exclusively conferred upon the District Court.

Other instances where the court has exclusive jurisdiction are to be found in the following legislations:

- Admiralty Cap. 453.
- Adoption Cap. 335
- Advocates Ordinance Cap. 341
- Bankruptcy Ordinance Cap. 24
- Companies Ordinance Cap. 212
- Election Petition Act No. 25 of 1970 etc.

Under the entire above legislations jurisdiction is exclusively conferred on the High Court.

PRELIMINARY OBJECTIONS WHICH MAY ARISE WHEN FILING A SUIT

(1) RES JUDICATA:

Section 9 of the CPC. Provides that no court shall try a suit whose subject matter is **substantially** and **directly** the same as the subject matter which was tried in another suit.

The doctrine of res judicata bars litigation on a point which has been a subject of litigation in a previous suit.

There are two limitations to the doctrine:

(a) Judgment of courts of **competent jurisdiction.** The doctrine provides that a judgment of a court of a concurrent jurisdiction upon a point is as a plea, bar or as evidence conclusive between the same parties upon the same matter directly in question in

another court. In other words, once a matter has been decided by a court of competent jurisdiction it can not be a subject of litigation to another court of competent jurisdiction:

2. **Exclusive jurisdiction:** A judgment of a court of exclusive jurisdiction directly upon a point is conclusive upon the same matter between the same parties coming incidentally in question in another court for a different purpose.

Simply Stated: The doctrine of **res judicata is a doctrine which enacts the doctrine of estoppel in civil proceedings.** Once a court of competent jurisdiction conclusively decides a matter neither of the parties can question the matters when brought in another court if the proceedings are **between the same** parties or **parties claiming directly under them.**

Rationale Behind the Rules: The rationale is that it is in the **interest of justice** that litigation should come to a **speedy and** that certain rules must be derived to prevent litigation from dragging on indefinitely i.e. it is a matter of public concern that law suits be met protracted interest reimblicable ut sit finish litium)

Civil litigation goes to the root of production process. Usually the subject matter of litigation (of economic value) is held idle till when the issue has been determined. Thus it becomes imperative that issues be tried speedily so that the parties to the suit can set engage in production.

The doctrine is also concerned with **credibility of the courts**. That there should not be a possibility of reopening a case which has been already decided. The other court can come to a different conclusion on the same evidence, thus exposing the first court to ridicule.

Thirdly, the doctrine is intended **to prevent harassment of the parties by each other.** If there were a possibility for a judgment debtor to open fresh proceedings, there would be a lot of inconvenience.

In Summary: The doctrine of res judicata is based on a need to give **finality to judicial decisions.** It is a principle which demands that a party should not be **vexed twice** on the **same point** or matter. **As a principle, it applies both to past and future litigations.**

REQUIREMENTS FOR RES-JUDICATA

Under 9 of the CPC, there are four major requirements for the doctrine to apply. The first requirement is that **the matter which is directly and substantially in issue in the present case must also have been directly and substantially in issue in a former case.** This requirement was elaborated in the case of **KARSAN vs. BROCHA (1953) 20 EACA 74.**

According to this case the matter in issue does not mean any matter in issue on a suit but has a **reference to the entire subject matter as controversy.** It is not enough that one or some issues are in common. The subject matter in the subsequent suit must be covered by the previous suit not vice versa, e.g. proceedings under the Affiliation Ordinance.

The second major requirement in this doctrine is that the previous suit must have been **finally and conclusively determined.** There is a comment in the case of **HUMPHRIES vs. HUMPHRIES (1910) 2 KB. 53.** According to this case the question of whether there has been a final and conclusive determination of a previous suit is a question of evidence. It must be on record (in judgment). The case of **MARGIN SON vs. BLACKBURN BOROUGH COUNCIL (1939) 2 kb 426** at page 437 stretched the rule in **HUMPHRIES'S** case even further that **res judicata is a broader rule of evidence.**

Another requirement is that the former suit and the subsequent suit must be shown **between the same parties or** parties **claiming under the same title,** or must be **between parties who have a right under the title of the**

original parties. In other words it is not necessary that the parties before the court in the subsequent suit are the same parties in the former suit.

For example:
X sues Y; Y subsequently dies. In this case X has the right to sue A the administrator of Y's estate. Thus the doctrine of res judicata is related to the **title** and not to persons themselves.

Lastly it is necessary to show that the previous suit was **determined by a court of competent jurisdiction.**

HOW TO DECIDE WHETHER THE MATTER WAS SUBSTANTIALLY AND DIRECTLY THE SAME

Explanation III under s. 9 of the CPC.

A matter is **directly and** substantially the same if it was **alleged by one party and denied by the other.** Three things must be taken into consideration:

1. The court must look into the **pleadings of the former** suit to make a comparison.

2. The court must also look into the **issues framed in the previous suit.**

3. **Lastly the court must look into the** decision of the previous suit.

"Former suit" in s. 9 refers to suit which has already been decided and not the time of institution of the suit. The last clause of s. 9 says that the issue has been subsequently raised, heard and finally decided by the court. This refers to a **decision on merit.** Thus where a suit which has two issues, one of them technical and the other one on merit and if the decision is made on technical ground, then it is not a decision on merit – e.g. bar of a suit due to time limitation. Such a technical decision can not

operate as res judicata.

The rationale is that **a decision on merit is a decision reached by the court after hearing the evidence of the parties,** whereas in technical grounds the parties are not allowed to **prevent their evidence.**

Case: KEREHAND vs. JANMOHAMED (1919 6y 2we45– 1921) EAPLR 69. It was held in this case that matters which have been decided on a preliminary point of limitation can not operate as res judicata.

"The broad rule appears to be that the plaintiff can not bring a second action unless he has in the first action an opportunity of being heard on merit when the case had been dismissed on a preliminary point. The question is whether the plaintiff has had an opportunity of being heard on merit. This case qualified the case of **AKBER MERALI ALIBHAI vs. FIDAHUSSEIN & CO. LTD. AND OTHERS (1969) HCD.** 270 in which the issue was whether a previous decision on the same issue or on **issues which could have been** raised but **had not been raised could operate as res judicata.**

Ref. Explanation of section 9 of the CPC. Says, **"Any matter which or ought to have been made." The duty of the Plaintiff is to bring forward the whole claim. If he does not claim all the reliefs in one suit he may be barred by the doctrine of res judicata.**

Case: ZUHURA D/O YUSUF vs. JUMA SAID (1969) HCD 193.

In this case a certain amount of cattle was claimed by the Plaintiff, but she forgot that there was a smaller amount of cattle which she could claim hence the institution of a fresh suit.

Held: Res judicata.

In **AKBER MERALI** (above) the view was that the parties to civil litigation

must claim all the reliefs which they are entitled to under one litigation in one suit. They are not permitted to open the same subject of litigation in respect of matters which have already been brought as part of the subject of contest but were not pleaded due to negligence, forgetfulness etc.

The test for res judicata is whether the cause of action in the previous suit was the same or embraces **the cause of action in the subsequent suit** in which case it does not matter whether the decision on the previous suit was erroneous or not.

DISMISSALS OF SUIT WHICH OPERATE AS PER JUDICATA

1. Dismissal in default of appearance by the plaintiff.

   Where the Plaintiff files a suit but on the day of hearing he does not appear in court, the suit can be dismissed by the court under O. IX. This kind of dismissal operates as res judicata. The law equates such dismissal to a decision on merits. The rationale is that if you institute a suit the presumption is that you have a right. So **failure to appear in court convinces the court that you have convinced yourself that you have no right.**

Case: MUSA V. KAPORO (1957) E.A. 189.

"A judge who dismisses the Plaintiff's suit in default of the Plaintiff's appearance can be said to have heard and determined the matter in dispute for the purpose of constituting res judicata" Thus a dismissal in default of Plaintiff's appearance is deemed to be a decision on merits for the purpose of section 9.

2. If a suit is dismissed for lack of prosecution (i.e. Plaintiff's failure to produce evidence.

Case: **SALEM H. SAIDI vs. FAUD HUMEIDAN** (1960) E.A. 92.

Dismissal of a claim on account of the Plaintiff's default to produce evidence to substantiate his case, has the same effects as a dismissal founded upon evidence and the subject matter of such a claim will be res judicata. Since the decision is deemed to be a decision on merits this is a logical conclusion. **If the Plaintiff has no evidence to offer, then the Defendant has no case to answer.** When the court dismisses such a suit, in essence it says that the Plaintiff has brought an action on grounds which he can not support.

Under s. 9 of the CPC. In order for a previous suit to act as res judicata to subsequent suit, **the previous suit must have been finally and conclusively been determined by the court** merits i.e. on the basis of evaluation of the evidence.

However **there are insurances where the parties may not be heard but the suit may operate as res judicata i.e. they are deemed to have been decided on merits (ref. the above two instances (1) and (2).**

WHETHER JUDGEMENT BY CONSENT CAN OPERATE AS RES JUDICATA

Where parties agree out of court to settle the dispute amicably and register their decision/consent in court i.e. if the suit had already been filed and reach such decision, the doctrine of res judicata does not apply. **A judgment by consent does not involve a hearing.** The court only registers it hence adopts it is not a decision. **It is not a decision on merits and as such it can not operate as res judicata.** Therefore if the Defendant does not appear in court, judgment may be entered against him ex parte. These are called decrees in default of appearance. Where there is an ex parte judgment the law implies a decision on the merits although it did not hear the Defendant. The Plaintiffs in most cases would have been allowed to present their evidence ex parte (where there is no cross-examination).

Such decisions act as res judicata the rationale being that the Defendant should not be allowed to disturb the peace of the proceedings. He has the duty to submit himself to the jurisdiction of the court whenever a suit is filed against him.

CRIMINAL PROCEDURES AND RES JUDICATA

Offences like assault are committed against a person and the court usually awards compensation to the Complaint. **This can not operate as res judicata where the complainant decides to file a civil suit because the matter decided in a criminal trial is whether the accused is guilty which is different from the matter to be decided in a civil court as:**

1. Issues are different.
2. The trial is also different
3. The parties are also different – The complainant is only a principal witness.

Cases:

- ABDULLAH RAMADHAN V. ASINATE KINUNWE (1969) HCD 24
- MEGHI V. ODHIAMBO (1951) 24 ALR. 84

These cases discuss the operation of res judicata in criminal cases. Moreover the case of COSMAS V. FAUSTIN (1971) HCD. 349 also rule that a criminal case based on the same facts can not bar a subsequent civil case based on the same facts.

The Effect of the Decision of A Civil Court That the Law Does not Give any Remedy:

Case law has held that where the court decides that there is no remedy in law, that decision is a decision on merit of the case. This was illustrated in the case

of **KOTAK LTD. vs. VALLABDAS KOOVERJI (1968) HCD 386**where it was held that "A Court's decision that the law provides no remedy is equivalent to a decision on the merits of the case and **thus the doctrine of res judicata applies.**

The situation is different where the decision is on the merits of the case and the Plaintiff wants to file another suit based on the same facts claiming **another right** using **another law. The general rule is that the Plaintiff must claim in one suit all the remedies which arise from one cause of action.** However the law does not require the Plaintiff to sue for all causes of action arising out of one transaction. **There is a rule to split causes of action, but there is no rule to split remedies.**

In land lord/tenant suit for rent due and for eviction. The law is against splitting relief which arise out of the same cause of action. However there are instances **where the plaintiff has two rights** e.g. right to rent and right to vacant possession. **There are two causes of actions based on the same facts.** The rule against splitting relief is based on public policy that Defendants must at one point in time free themselves from harassments by Plaintiffs.

Case: NDUKE vs. MATHAYO (1970) HCD 96.

Held: The doctrine of res judicata does not apply where the suit is based on a different right and also based on different principles of law.

PARTIES (FOR THE PURPOSE OF RES JUDICATA)

As we observed earlier, the identity of parties is a question of law. It is not necessary that the parties should be identical in both suits. Thus in a previously instituted suit the Plaintiff can be suing in his personal capacity, he will not be barred from suing in the same cause of action in a representative capacity. The doctrine of res judicata will only apply if He again sues in his personal capacity in the second suit because they will be the same parties.

Cases: FAKI vs. THE ADMINISTRATOR GENERAL OF ZANZIBAR (1957) E.A. 191.

According to this case **the expression "same title" under s. 9 of the CPC means**

"same capacity." Thus if in a previous suit a person was suing in a personal capacity and in a subsequent suit he sues in a representative capacity, he can not be said to have sued under the same title in both suits.

SUMMARY OF THE DOCTRINE OF RES JUDICATA

1. Res judicata involves a mixed question of law and fact because the record of the previous suit must be looked to determine whether the two suits are in fact based on the same cause of action and whether the parties are the same. It becomes the question of law when the application of the doctrine comes into question.

2. The absence of the pleadings on the point of res judicata is fatal to the plea that is **res judicata must be pleaded deictically.**

3. The onus of proving or establishing the ingredients of res judicata is on the Defendant. The mere filing of a written statement of defence is not enough for the purpose of enforcement of the doctrine. He must adduce evidence to show that actually the cause has already been decided.

4. Because it is upon the Defendant to raise the plea of the res judicata he can also waive his right to object. Thus if the Defendant waives his right to object on the ground of res judicata he can also waive his right to object. Thus if the Defendant waives his right to object on the ground of res judicata **he can not raise it on appeal.** **Res judicata applies only in the court of first instance.**

5. As the doctrine of res judicata is a doctrine of which is mandatory in the court, it can not be taken to go into the jurisdiction of the court and therefore an objection based on res judicata can be raised at any time in the course of the proceedings.

    - Res judicata can not operate where the proceedings in the previous suit were a nullity.

Case: ABDALLAH E. KUNEITY V. ABRIYA (1970) HCD. 263.

2. **THE RULE OF STAY OF SUITS (RES SUBJUDICE)**

"Res subjudice" means something which is still pending in court. **Res subjudice bars litigation in two suits simultaneously**. In res subjudice both matters must be pending in court. Section 8 of the CPC. Provides that no court should proceed with a matter which is in issue in a previously instituted suit.

FOUR ELEMENTS OF RES SUB JUDICE

1. There should be **two suits** filed either in the same court or in different courts with concurrent jurisdiction and one of the suits must have been earlier in point of time.

2. The matter in issue in the two suits must be the same. It must be possible to identify the cause of action as being the same. In res subjudice **the controlling factor is whether you are going to apply the same evidence in the two suits.**

3. The two suits must be **between the same parties** or parties claiming under the **same title.**

4. **The previously instituted suit should be pending** in the same court or in another court of competent jurisdiction.

Under s. 8 of the CPC stay of suit is mandatory when the court is convinced that another suit was previously instituted in the same court or in another court with competent jurisdiction. Under this section, it is the suit which was filed later in point of time which is going to be stayed. This section (i.e. s.8) does not go to the jurisdiction of the court but even though the application for a stay of proceedings can be brought at any time in the course of the proceedings.

EFFECTS OF STAYING OF SUIT

An order of staying a suit will have an effect of making the parties **unable to proceed with the suit until the other suit is determined.** The court also becomes unable to proceed with the suit which it had been hearing.

When the previously instituted suit is determined, the subsequently instituted suit becomes barred by res judicata. Thus res subjudice is a step towards res judicata.

Although the court is not allowed to proceed with the subsequent suit/proceedings, it is allowed to entertain interlocutory proceedings.

Interlocutory proceedings are proceedings which are meant to direct parties on matters which arise in the course of proceedings. Normally they end up with orders and not decrees.

Interlocutory proceedings are intended to regulate proceedings. They confer no rights. **For example:** although a suit may be stayed, a party may obtain an order for temporary injunction.

Although the suit may have been stay.

Also a party may apply and be granted an order of attachment (of property) before the court adjudicates the matter.

Thus when a suit is res subjudice, **section 8 merely prevents the continued hearing of the subsequently instituted suit but it does not prevent interlocutory orders in respect of matters relating to the suit.** S. 10. This section bars litigation in matters which are barred by any rule or law that bars such matters from being adjudicated upon. Best example is the law of limitation. Further examples are:

- Where a Plaintiff omits to sue in respect of part of a claim. 0.11 r. 2, or

- Where suit has abated O. XXII r. 9 or

- Where a Plaintiff withdraws from a suit with leave of the court. O. XXIII R. 1.

JUDGMENTS OF FOREIGN COURTS. S. 11 & 12.

Definition of the term foreign judgment is provided under section 3 of the CPC. **As far as foreign courts are concerned, res subjudice does not apply. Res judicata applies in certain circumstances.**

S. 11 provides that a foreign court's judgment is conclusive between the same parties or partner claiming under them.

Six Exceptions as Regards to Foreign Judgments:

1. A foreign judgment will not be conclusive if it was pronounced by a court which is not of competent jurisdiction. Competence contemplated here is an interior sense and not merely by law of a foreign state in which the court functions. Therefore whether the court has jurisdiction within S. 11, the question has to be determined according to international law. This determination is the function of the courts in the country where the decree is sought to be enforced. Therefore a foreign judgment may be impeached on the ground that the court acted without jurisdiction.

2. A foreign judgment will also not be conclusive if it did not give the merits of the case i.e. if it is not based on consideration of evidence brought before the trial court.

3. It will not be conclusive where on the face of it was based on an incorrect interpretation of international law or it was based on a refusal to

recognize the law of Tanzania.

4. A judgment of a foreign court which was obtained in proceedings conducted against natural justice is.

   NB: The rule does not refer to the justice of the decision but to the procedure followed in the trial.

5. If it was obtained by fraud. Any judgment obtained by fraud is a nullity.

6. If it sustains a claim which is against the law in force in Tanzania. Where a foreign judgment is founded on a breach of Tanzania law, it will not be enforced in this country even though the defect is not apparent on the face of the proceedings.

   However if the court holds that the foreign judgment is conclusive (i.e. it is not within the above six rules) then such a decision will operate as res judicata.

   Where a suit is instituted in this country on a foreign judgment, effect will be given to it though the court had no jurisdiction over the Defendant if the latter appears and defends the suit brought against him without objecting the jurisdiction at the earliest stage. He shall then be deemed to have submitted to the court's jurisdiction.

   S. 12 of the CPC presumes foreign judgment to be conclusive unless the contrary is proved. That is to say, according to this section, upon the production of any document purporting to be a certified copy of a foreign judgment the court shall, unless the contrary appears on the face of the record, presume that such judgment was pronounced by a court of competent jurisdiction. This is a rebuttable and not an irrebutable presumption. It may be displaced by proof of want of jurisdiction.

   Case: FRANCIS ZAVIER OMOSINGOIT vs. SECRETARY GENERAL, E.A.

COMMUNITY (1962) TLR. 155.

SUMMARY OF THE ABOVE NOTES

STEP	**GOVERNING PROVISIONS**
1. Once a dispute exists demand letter to the Defendant.	Advocates Remuneration and Taxation of Costs? Rules r. 61.
2. Jurisdiction of Courts	s. 7 of CPC. Ss. 40, 41 of MCA, 1984 and S. 2 of JALO Cap. 453.
3. Place of suing	
4. Res subjudice	Section 13 of the CPC.
5. Res judicata	S. 8 of CPC) whether

6. Whether suit is barred by any law e.g. limitation.	there is) foreign judgment S. 9 of CPC) Ss. 11 and 12 of CPC Section 10 of the CPC

ORDER I – PARTIES TO THE SUIT

A. JOINDER OF PARTIES

Who can be a Plaintiff: The general principle is that a Plaintiff should be the **person who is directly under him.** The right referred to is not a moral right but a legal right – a right in law.

- A Defendant, on the other hand is a person against whom a right in law is claimed.
- There are two categories of parties:
    1. Necessary parties, and
    2. Proper parties.

NECESSARY PARTY

A necessary party is that party whose presence in court is necessary for the purpose of issuing an effective decree. In other words, **all those persons without whose presence in courts record an effective judgment can not be delivered are the necessary parties.** To decide whether a party is a necessary party in civil litigation, the question should be **whether an effective decree can be issued in his absence.** When it is pointed out in court that the suit is bad for a joining the necessary parties, under 0.VI r. 7 the court will give permission to amend the plaint so as to include the necessary party. If after giving the chance so as to include the necessary party the Plaintiff fails to do so **the court can dismiss the suit.** Time limit should be observed to amend the plaint and lodge the fresh plaint within time limit allowed by law.

PROPER PARTY

A **proper party may or may not be interested in the relief sought,** e.g. A and B are in dispute of property which is in the possession of C. C can in his own motion or in court will include him as a proper party although he is not interested in the relief or in the suit. This is done in order to reach a proper decision. Thus we can say that a proper party is the one **whose presence is not necessary for the court to issue an effective decree, but whose presence is important.**

- Whereas the presence of a necessary party is indispensable, the presence of a proper party is dispensable.

Example: A suit for ejectment.
Land-lord vs. Tenant
- sub tenant.

In our above example, if the land lord wants vacant possession of the premises, he has to sue the tenant but not the sub-tenant as there is a contract between them although he can be joined in the pleadings.

- Against a necessary party there must be a **right to some relief in respect of the matter involved in the proceedings.** It **must not be possible to pass an effective decree in the absence of such party.** The test for determining the effectiveness of the decree is whether it **can be executed without the presence of the party in question as regards the property sought to be decreed in favour of the plaintiff.**

JOINDER PF PARTIES

The basic principles to joinder of parties are found in 0.1 R. 1 and 3. Rule 1 relates to

joinder of Plaintiffs.

Who can join as Plaintiffs: All those who are jointly interested in the relief should join as co-Plaintiffs. All co-promisors in the contract must joint together. **If one of the Plaintiffs does not join as a co-Plaintiff, he should be joined as a co-Defendant. Why?**

1. You can not implead anyone as a Plaintiff without his consent but you can do so as a co-Defendant.

2. The co-Plaintiff is a necessary party; the suit can be rejected if a co-Plaintiff refuses to be imp leaded as a co-Plaintiff.

Example:

A. B. C. are co-Promisors in a contract for building a house for a third party. If the third party fails to pay them the agreed payment, A. B. C. can sue him. If C is not suing as a Plaintiff the decree is defective because C is a necessary party. The court will insist that A and B should implead C in the suit.

O. 1 r. 3 relates to joinder of defendants. **You can join parties as Plaintiffs or Defendants where there is some common questions of law or fact between the parties, Secondly, where other rights to reliefs are in respect of or arise out of the same transaction.**

There will be a common question of law or fact where if two suits were instituted the same evidence will be required.

Case: ABDULLAH & MOHAMED vs. THE OFFICIAL RECEIVER (1954) 21 EACA 85 which adopted the decision in the case of **HORWOOD vs. STATESMAN PUBLISHING CO. LTD. (1929) 141 LRT. 54.**

According to **HORWOOD'S** case deciding whether there is a common question of fact or law is a matter of fact. "You must look at the language of the rules and **construe literally** and where there are common questions of law and fact involved in different causes of actions you should **include all parties** in one action subject to the direction of the court.

If thus inclusion is embarrassing to strike out one or some of the parties it is impossible to lay down any rule as to how discretion of the court is to be exercised. Broadly speaking where claims by one against different parties involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matter be disposed of at the same time, the court will allow the joinder of Plaintiffs or Defendants subject to its discretion as to how the action should be tried. **The test is whether the evidence will be the same.**

The policy behind the rule allowing joinder of parties is the **evidence of multiplicity of suits.** That as far as possible…

Where suits can be tried simultaneously, it will be in the interest of the parties that they be tried in one action – in the spirit of litigation should come to a **speedy end.** However **the rule relating to joinder of parties is a discretionary one,** and not mandatory. Therefore the Plaintiff can decide to sue different Defendants on the same cause of action in different suits. The court can not compel him to make a joinder although it retains the discretion of ordering a consolidation of the suits.

Where the Plaintiff joins the Defendants in one suit arising out of the same cause of action, the court has discretion to order how the suit is going to be conducted.

But where the court decides to hear the suit as one, then at the conclusion of the hearing the court may enter judgment in favour of one or all the Plaintiffs jointly or severally or it may enter judgment for the Defendants jointly or severally.

WHAT ABOUT IF PLAINTIFF IS NOT SURE WHOM TO SUE

0.1 R. 7 provides that he may implead all the persons whom he thinks he could sue as Defendants. It is upon the court to rule out as to who should be the Defendants. There is a danger in this, in that if the Plaintiff sues Defendants indiscriminately he will be liable in costs for those Defendants ultimately found to be not liable. Such costs may be awarded in two ways;

1. The Plaintiff may be ordered to pay the Defendants costs including costs of the

unsuccessful Defendants. There will be a **set-off** from costs by those found liable. This is called a **Bullock order.** It originates from the case of **BULLOCK V. LONDON GENERAL OMNIBUS CO. (1907) KB. 264.**

The Bullock order is an order by which the court orders a Plaintiff to pay costs to the successful Defendant and set-off the costs which are due to the Plaintiff from the Defendants who are found liable.

The effect of Bullock order is that the Plaintiff ends up "a net looser" in tenant of costs.

2. Alternatively the court may use what has come to be known as the Sanderson order which has its origin in the case of **SANDERSON vs. BLYTH THEATRE CO. (1903) 2 KB. 533.** In this order the procedure is that the unsuccessful Plaintiff will be ordered to pay costs directly to the successful Defendant. In practice the above two orders are referred to as **'bullock.'**

SUMMARY

JOINDER OF PARTIES:

1. All persons jointly entitled to a right must be joined as Plaintiffs. However some practical considerations could militate against such a joinder. For example if by joining the Plaintiffs it will be too cumbersome to try the suit as one, the court is under the impression that Defendants will be embarrassed by being sued by several Plaintiffs simultaneously, the court may order separate trials.

"Embarrassment" here means inability to answer various claims in one trial. The court may also order separate trials if it is of the opinion that trying the suit as one will result in long delays.

2. All persons jointly liable must be sued in one action as Defendants. However, again, practical considerations discussed above, the Plaintiff can also militate against joinder of Defendants.

3. Joinder of portion in the alternative is allowed under 0.1 r. 7 but the Plaintiff faces the risk of being penalized in costs. Thus although 0.1 r. 7 allows joinder of Defendants in the alternative, in practice r. 7 should rarely be used because it will invite the use of **"Bullock orders"** against Plaintiffs.

The general law to joinder of parties was stated in the case of **STROUD vs. LAWSON (1898) 2 hcd 44.** According to this case two conditions must be met when deciding whether to join parties or not:

1. There should be joint interest in the subject matter of the suit.
2. There should be the same Defendant(s).

There are some East African cases which have discussed the above principles i.e. **BARCLAYS BANK vs. PATEL (1959) E.A. 214.** In this case, there were two guarantors. One guarantor guaranteed one of the third parties, and the remaining guarantor, guaranteed the other. The question arose whether the two independent guarantors could be jointly sued. It was held that there was a misjoinder of the parties as two contracts of guarantees were independent.

The other case is of **YOHANA KAHERE vs. LUNJO ESTATES LTD. (1958) E.A. 319** in which there were two different contracts of tenancy. Notice to quit the premises was issued to all the tenants. The tenants instituted a joint suit against the land lord in one action. A question as to misjoinder of Plaintiffs was raised. It should be noted that these people were not joint tenants. So in this there could be a common question of though there was a common question of different principles of law. Hence the joinder of Plaintiffs in this case offended r. 1 of 0.1 of the CPC. If the two cases are taken together it will be seen that the principle enunciated in them have been summarized in the case of **PIONEER INVESTMENT vs. ARMACMEL (1964) E.A. 703.**

According to this case a common question of law affecting both Defendants could join both Defendants in one action. 0.1 r. 3 will prevail over 0.11 r. 3 that is: - If a Plaintiff has properly joined the Defendants there is likelihood of misjoining the case of action.

EFFECT OF MISJOINDER OF PARTIES

The above has been covered under 0.1 r. 9.

A misjoinder of parties is not fatal to the proceedings. In other words no suit can be dismissed on the ground of misjoinder or non-joinder of parties only. The rule of joinder of parties is a non-joinder of parties only. The rule of joinder of parties is a rule of procedure and should be applied liberally.

Under 0.1 r. 9 the court can proceed to determine the real questions between the parties who are before it and such determination shall not operate as res judicata against the parties who are not before the court. However where the rights to relief do not arise out of the same court of action the misjoinder of parties is fatal. That is to say parties can be joined where they are claiming under the same cause of action.

The rule relating to joinder of parties must be taken together with joinder of causes of action.

A misjoinder of causes of motion may result into the misjoinder of parties and that will result into an incurable state of affairs i.e. the suit has to be withdrawn.

PROCEDURE WHERE THERE IS MISJOINDER OF PARTIES

The Plaintiff may be given leave to withdraw the suit and file another suit against the Defendants independently (HANDLEY vs. PATEL'S case refers).

Another alternative is for the court to order a stay of proceedings. Where there is such an order it means that the suit remains sub judice and the Plaintiff can not

take any further action. The only alternative is for him to withdraw the suit. This approach was applied in the case of OIMANA KAHERE'S case above.

Although the Plaintiff can withdraw and file a fresh suit there is a danger of being barred by limitation since in essence be is deemed to have filed it when it has been properly filed.

0.1 r. 9 should be read together with 0.1 r. 13. R. 13 prescribe when one can raise objections as to misjoinder or non-joinder of parties. According to this rule an objection as to misjoinder or non-joinder should be taken at the earliest opportunity possible and not any rate not after the day of the first hearing. There is an exception. The exception is when the situation giving rise to the misjoinder or non-joinder has occurred after the first hearing i.e. where there is a transfer of liabilities to a third party. In any event, objections as to misjoinder or non-joinder can not be raised on appeal.

Order 1 Rule 10: This rule relates to substitution of parties. It can take place in two ways. One, under sub rule 1 and the other sub rule 2.

Under sub rule 1:

The court is given power where the suit has been instituted by a wrong plaintiff, or where there is a doubt if the suit has power. Thus the court must be satisfied that the suit was instituted by a wrong Plaintiff under a human mistake.

Secondly it must be satisfied that the order for substitution or addition of Plaintiff is necessary for the determination of real matter before it. As the misjoinder non joinder of parties goes to the root of the dispensation of justice, the court can order substitution or addition at any stage of trial before judgment.

Under sub rule 2:

Under r. 10 (2) the court may either on its own action (suo motto) or under Application of any of the parties, order the removal of an improperly joined party

at any stage before judgment. Likewise, it can order the party who is not before the court to be added. Under such order the court has discretion as to terms under which such order can be issued. Thus where the order can be issued. Thus where the order has been necessitated by the negligence of the Plaintiff, the court may order that such parties be added or struck out at the expense of the Plaintiff. Substitution or addition of parties entails a lot of expenses e.g. amendments of plaints, calling new Defendants, fresh evidence etc.

NEXT FRIENDS

A party can not be added as a next friend unless he consents.

Case: HASSANALI SOMJI Vs. KISHEN SINGH (1944) 21(1) KLR. 29.

The nature of mistake which results into a wrong Plaintiff suing should be a mistake of law or fact. The amendment or substitution according to this case can be made even on appeal.

The case of LOCHBARD BOJKING (K) LTD. vs. SHAH BAICHAND BHAGWAJI (1960) N. A. 969 deals with 0.1 r. 10 (2) i.e. substitution of parties must be supported by the written consent of the proposed new party. This case related to substitution of Plaintiff (by analogy it will also apply to the Defendants.)

The written consent by the proposed new party fact operates as a demand letter. You can not compel a party to enforce his rights hence the necessity of consent by the proposed new party.

The case of LOMBAR MNXING goes a step further by simplifying the case of SOMJI in respect of a mistake or law. According to this case, a mistake does not cease to be honest merely because it is negligent. The question is whether the negligent mistake was honestly made (or there were some ulterior motives for the mistake.).

PARRY vs. CUSSEN (1962) E. A. 515. This case deals with the circumstances

under which application to remove a party from the proceedings can be granted (under 0.1 r. 10). According to this case the court can not grant application unless the case will remain intact after such removal. The suit should remain intact in that the cause of action should remain the same, only the title should change.

The second principle in this case is that the provisions of r. 10 0.1 can not be used to remove all the parties. It should not be used to secure a whole sale substitution of the parties.

The court can not award an order of adding a party (Defendant) in a suit relating to tort without the consent of the Plaintiff. In other words you can not compel the Plaintiff to sue a Defendant he had chosen to exclude without his (Plaintiff's) consent **FERNANDES vs. KARA ABIEN & SONS (1961) E.A. 693.** That in a suit of tort a Defendant can not be added even if willing if the Plaintiff opposes.

REPRESENTATIVE SUITS (01 R. 8)

(1) Public interest litigation
(2) Group action.

The two concepts have been developed as a result of the intricate nature of our society. The state has been interfering too much with private interests resulting frequent head on collision of their interests.

Public interest litigation is litigation related to private individuals suing the state to enforce their public rights. In respect of such matters of public interest (0.1 r. 8) one can sue by the leave of the court on behalf of the others who are claiming the same rights. This is called a group action.

How to draft a representative suit. 0.1 r. 6

Where there are many people with the same interest one of them can sue the Defendant on behalf of others. Clubs, large associations are examples. However

in order to sue in a representative capacity there must be permission from the court. This fact must be mentioned in the body of the plaint. In suits for recovery of money no one can sue in the representative capacity. Representative suits can be brought in case of declaration of rights and injunctions. The above can be better understood if one reads the case on WILFRED d/o KADYELA vs. MAZONGE DAUD (1976) HET 24. In the above case the Defendant who was a head teacher was sued in the representative capacity.

SONKO AND OTHERS vs. HALIMA & ANOTHER (1971) E.A. 443.

The two Plaintiffs sued the Defendants and purported to sue on behalf of 21 infants without having obtained a representative order. The plaint alleged that the fraud on which the claim was based had been discovered within the limitation period and that the second Defendant was a party to the fraud. One of the Defendant's objection was that the Plaintiff failed to comply with the provisions of 0.1 r. 8 in that the Plaintiffs having sued in the representative capacity for numerous persons have not obtained the permission of the court.

Held:

In the absence of the representative order, the claim on behalf of unnamed Plaintiffs could not stand and would be struck out.

- Order accordingly.

NYANZOBE d/o KADELYA vs. MAYOGE DAUD (1976) LRT 24

The Plaintiff who is also the appellant unsuccessfully sued the respondent in his capacity as a head teacher of a primary school claiming the return of her paddy fields which she alleged had been wrongly taken by the school. Both the primary, district and High Court decided against her because the evidence showed that the fields – one acre were in a school compound. The Respondent teacher was not awarded costs because 'the Appellant was **an old woman with limited means,"**

B. THIRD PARTY PROCEDURE: 0.1 r. 14

0.1 r. 14 explains when third party notice can be given. The **rule is confined to cases where a Defendant claims to be entitled** has to prove indemnity of a third party against him. The Defendant has to apply to the court for a third party notice. If the court is satisfied that the Defendant's claim against the third party is proper, it may allow him to present the notice. **The third party notice must be for the same cause of action.** In case of accident the insurance company is the third party.

Example:

When a party has been sued on a contract in connection with the business of the partnership, can apply to court for a third party notice so that other partners should contribute equally to the claim.

In simple damage suits, Defendant cannot apply for third party notice.

Example:

A sues B for trespass to land and if B has entered the land by the permission of C, B can not apply for a third party notice contract or misrepresentation. This was the building in the case of: **(EDWARD KIBONGE KAGGWA vs. L. CONSTAPERAI & ANOTHER (1963). E.A. 213.**

In this case the Plaintiff sued the Defendant for trespass to his land during which, it was alleged, the Defendant dug and removed some 1360 cubic yards of earth. The Defendant argued in his written statement of defence that he entered upon the land dug and carried away the earth in pursuance of a licence in that behalf granted to him by one called Njoki. A third party notice by leave was issued against Njoki by the Defendant claiming indemnity, and the case came before the court for directions under 0.1 r. 18 of the C.P.C.

Held:

(1) By the term of 0.1 r. 18 the court had to consider whether there was a proper question to be tried as to liability or a third party to make contribution or indemnity.

(2) No right to indemnity arose as a result of a grant of licence by Njoki to the Defendant and, accordingly there was no question to be tried as to liability.

The above case emphasizes the point that **in order for a third** party procedure to apply, the wrong act must arise from the same cause of action. That is so because the aim of third party procedure is to attempt to avoid multiplicity of suits as regards the same cause of action.

YAFESI WALUSIMBI vs. A. G. OF UGANDA (1959) E.A. 223.

The Plaintiff in the above case sued the A. G. claim damages for negligence. The A. G. applied for a third party notice to be issued and served against one Nsubuga vide 0.1 r. 14 of the CPC. The application was founded on alleged fraud. Subsequently, Nsubuga alleged fraud and breach of contract on the part of Yobu Saku. The A. G. again applied a third party notice to Yobu. Counsel for Yobu asked for the third party proceedings to be set aside on the ground that the cause of action and subject matter of the claim against Yobu were different from those between Plaintiff and Defendant.

Held:

1. In order that a third party be lawfully joined **the subject matter between the third party and Defendant must be the same as the subject matter between Plaintiff and Defendant and the original cause of action must be the same.**

2. As the Plaintiff was suing Defendant for negligence, the third party notices alleging fraud should be set aside.

- **Order accordingly**

TIME LIMIT FOR THIRD PARTY NOTICE

Third party notice must be issued to the third party within the limitation period prescribed by law. This was illustrated the in case of:

The Plaintiff sued the Defendants and claimed damages for personal injuries arising out of a motor accident. The Plaint was filed within the period of limitation. The Defendants sought by the third party procedure to make Carlo Zanfra the third party in the action and claimed against his contribution in respect of any judgment which might be obtained by the Plaintiff against them. The third party argued that he could not be joined in the suit as a period of limitation over an action for personal injuries had expired. The Defendants, however, submitted that the third party had no defence of limitation because the action against him was of contribution and not for personal injuries.

Held:

1. Where Defendant sued joins a third party to the action in order to obtain contribution, the third party does not become a Defendant to the main suit unless the Plaintiff wishes to make him so. **The third party having been joined is concerned primarily with the question whether he is liable**

to pay contribution to the Defendants. The main purpose of this procedure is to save unnecessary expense to and it may safe guard the position of the Defendants in view of the fact that if there were a second suit for contribution, the Defendants might find themselves embarrassed by decisions taken in the second suit different from those reached in the first.

2. **The right to contribution of the Defendant is a separate matter and could have been taken on a separate case within the three year period;** thus the right to contribution against the third party is not time barred. Therefore the defence adopted by the third party is not sound and is rejected.

   The third party has a right to be heard and defend his case. The defence can take place before or after the main suit between Plaintiff and Defendant.

   N.B.: Note the provisions of 0.1 r. 22 right of a third party to present a third party notice.

ORDER II – FRAME OF SUIT

0.1 deals with parties to the suit that is who should be Plaintiff or Plaintiffs and who should be Defendant or Defendants in the suit. 0. II however deals with causes of action to be in the plaint.

0.11 r. 2 states that the plaint has to contain the whole claim arising out of a transaction. The case of **ZUHURA d/o YUSUFU vs. JUMA SAIDI (1969) HCD 193 which has been explained in 0.VII** illustrates this rule. If the Plaintiff omits to sue in respect of any portion without permission of the court, he shall not afterwards be allowed to sue in respect of the portion so omitted.

Example:

A rents house to B for Shs. 1,000/= a month. B fails to pay rent for the months of April, May and June. When A sues B for the rent of April, he shall not afterwards sue him for the rents due for May and June. When he sued for the rent of April, he ought to have paid him for the months of May and June in one suit. However if the court thinks that the causes of action though founded in one transaction can be conveniently disposed of by two different suits, it can allow the causes of actions be tried separately.

Joinder of Causes of Action:

Several causes of action can be joined together against the same Defendant. The aggregate value of the subject matter shall determine jurisdiction of the court.

Failure to file a suit containing a claim for settlement of accounts and suit for dissolution of partnership is not a bar to file a fresh suit. In this respect there can be separate suit for settlement of accounts and suit for dissolution of partnership.

Case Law:

AKBER MERALI ALIBHAI VS. FIDA HUSSEIN AND CO. LTD AND OTHERS (1969) HCD 270.

In the above case, an earlier suit between the same parties was dismissed on the preliminary objection by the Defendant that the Plaintiff was a partner, thus he could not sue his co-partners as debtors until such time as the partnership had been dissolved and accounts taken. The Plaintiff then instituted the present suit seeking inter alia, a declaration that the partnership be dissolved. The Defendant argued that as the present claim could be raised in the earlier suit even in the alternative, the claim for dissolution was **res judicata** under s. 9 of the CPC. The

Plaintiff argued that the earlier suit referred to a claim for salary while the present one called for dissolution of the partnership and taking of accounts and the issue was therefore not res judicata.

Held:

1. The Indian authorities relied on by Mr. Lakha support the contention that where a previous suit is dismissed a subsequent suit on the same cause of action is not maintainable. They also indicate that parties to litigation are required to bring forward their whole case and are not permitted, except under special circumstances, to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in a contest but which was not brought forward through negligence, inadvertence or even accident.

2. Turning to the allegations which are disclosed in the pleadings, it appears that where a dispute as to whether the partnership was dissolved is or not. If the partnership was dissolved before the 17th July, 1965, when the plaint was filed, in the earlier suit, then I would be inclined to the view that the contention of res judicata would succeed. Assuming for the moment that it was not dissolved, was the Plaintiff obliged in the earlier suit to seek dissolution of the partnership and on enquiry into the accounts etc? Was he entitled if he so wished to allow the partnership to continue and seek an account without asking for dissolution of partnership? Under s. 194 of Cap. 433 he could do so. Thus it would not be proper to uphold the objection of Defendant on these grounds.

Action to continue.

From the above case it can be gathered that failure to file a suit containing a claim for settlement of accounts and suit for dissolution of partnership is not a bar to file a fresh suit. In this respect there can be a separate suit for settlement of accounts, and another for dissolution of partnership.

BURGKE COFFEE ESTATE LTD. & ANOTHER vs. LUTAHI AND ANOTHER (1962) … 328.

It is a case of declaration that the Plaintiffs are lawful directors; they sued for recovery of possession of a coffee estate and prayed for an injunction that the Defendant should not interfere with the property.

- Defendants preliminary objections were among others misjoinder of Plaintiffs and cause of action.

- The court ruled out that the Plaintiffs could bring separate suits as above. The Defendants were in fact four but only two names appeared in the plaint.

Joinder of Causes of Action:

It has already been stated above that 0.1 relates to parties to the suit and 0.11 relates to framing a suit. But the two orders can not be treated as relating to two distinct topics. **The question of parties involves that cause of action and a cause of action involves the question of parties.** A person is made a party because there is a cause of action against him and when causes of action are joined, parties are usually joined. A Plaintiff may not only join different causes of action against the same Defendant or Defendants as provided for in 0.11 r. 3 but he may also join different causes of action against different Defendants if he is able to bring his case within the above order and rule. The fact that different causes of action have been properly joined under this rule does not prevent the court whenever necessary from holding separate trials of different issues that may arise in that suit.

R. 3 of 0.11 is to be applied subject to any provision of law to the contrary such as r. 4 and 5 of this order; it presupposes that there are several causes of action to be united in a single suit. So where there is a single cause of action no question of misjoinder arises.

A joinder of several reliefs is not a joinder of several causes of action in a suit based on a single cause of action.

A. **One Plaintiff, One Defendant, Several Causes of Action**

This rule authorizes a Plaintiff to unite several causes of action against a single Defendant **where the causes of action arose from one transaction.** And in a proper case the Plaintiff should certainly avail him self of this provision. For if he brings two actions where one would have sufficed, he will probably have to pay of one action.

B. **One Plaintiff, Two or more Defendants, Causes of Action Joint against all the Defendants:**

Before this rule can be applied, the Defendants must be **jointly liable** in respect of each and every one of causes of action sought to be joined. It is not, however, necessary that each of such Defendants should be interested in all the relief claimed, provided that they are interested jointly in the main questions raised in the litigation. **For example:** A brings on action against his two agents to render accounts where they are jointly liable so to do between January 1988 and December, 1988. The relief against one agent can be in respect of months of January to June, and in respect of the other from July to December

But a suit against several Defendants for causes of action accrued against each of them separately and in respect of which they jointly liable is bad for misjoinder. Where, therefore, a suit was filed to eject several tenants in possession of Defendant parcels of land of the Plaintiff, it was held that the Plaintiff has united in the same suit not merely several causes of suit but several actions or suits against separate Defendants with result that the litigation has been conducted as though the Defendants were a community with common interest.

ORDER III – RECOGNIZED AGENTS AND ADVOCATES (LEGAL REPRESENTATIVES)

Any one suing in court in a representative capacity is a legal representative e.g. an agent on behalf of a principal, a trustee on behalf of beneficiaries. The legal representative of a deceased in a suit is an executor or administrator of the deceased's.

An intermeddler i.e. a trespasser to the property of the trespassed can be a legal representative. He should represent the estate for the interest of the deceased party and not only his action which he is owed. If there is a legal representative they should take the place of the intermeddler.

Any service of summons or any document relevant to the suit on legal representative shall be valid and effectual as if it had a made on the party in person.

ORDER IV – INSTITUTION OF SUITS

A civil case is instituted in court of filing a plaint. The Plaintiff is required to pay court fees while filing his plaint unless he sues as a pauper.

The plaint so filed should comply with the general principles pleadings as per 0.VI and those in respect of plaints as stipulated in 0.VII.

It is the duty of every court to keep a register of civil cases in which civil suits filed in such courts are to be entered serially and for each year.

ORDER V – ISSUE AND SERVICE OF SUMMONS

Having filed a suit in court and paid proper fees, the court has to issue summons to the Defendant. When the Defendant is present while filing the suit and admits the Plaintiff's claim, there is no need for the summons to be issued because the purpose of issuing summons would have already been completed.

Summonses are of two types: (a) For appearing in court and (b) For filing defence or written statement. Every summons must be **signed** by a judge or magistrate and **sealed** with the seal of the issuing court. **The summons must be accompanied by a copy of a plaint so as to let the Defendant know about the Plaintiff's claim and prepare himself for a written statement of defence.** Summons to appear and answer to the plaint may order the Defendant to bring all documents in his possession upon which he intends to rely in support of his case. If the summons is for the purpose of disposing of the suit, the Defendant may be called to produce witnesses in support of his case.

Service of summons is by tendering a copy of the summons to the Defendant personally,

or his agent empowered to accept service (personal service). **Where neither the Defendant nor the agent is available, summons may be served on a male member of the Defendant's family who is resident with him.** The person so served to sign on the original copy of the summons to acknowledge its receipt.

Where the Defendant refuses to accept the summons (or his agent or any other person the process server shall affix it on the outer door of the house of the Defendant or at a place easily seen, he shall then return the original of the summons to the issuing court with a report of service endorsed on it.

a) That he has affixed the copy and under what circumstances
b) By whom the house of the Defendant was identified, and
c) In whose presence the copy was affixed to the door or such conspicuous place.

Where there is more than one Defendant, the summons must be served on each Defendant. In case of partners carrying on business and are sued in their firm's name, service may be made upon any partner or upon any person who, at the time of service has control or management of the partnership business. In case the Defendant is a corporation, service may be affected on the secretary, any director, or principal officer of the corporation by registered post addressed to the corporation at the registered office.

If the Defendant lives in a another court's jurisdiction i.e. other than that in which a suit against him is lodged, the summons may be posted to the magistrate in whose jurisdiction the Defendant lives so that it can be served on that Defendant. Such other court will affect service and return the original of the summons to the issuing court duly signed by the Defendant. A record of proceedings of service can be attached to the summons. Other types or personal service of summons:

- to people in prison, outside the republic, people working in public service – service is through their officers in charge – in case of those outside the republic through embassies or courts.

Substituted Service – 0.V r. 20

All efforts should be made to effect personal service wherever it is possible. Temporary absence of the Defendant does not entitle the process server to affix the summons at the outer door of the Defendant's house.

Where the Defendant is avoiding service of summons the proper procedure is to apply for substituted service.

Substituted Service without Order of the Court: r. 17 & 18.

By affixing a copy of the summons on the outer door or some conspicuous part of the house in which the Defendant ordinarily resides or works. However the proper procedure is not to affix the summons at the outer door but to apply for the second type of substituted service i.e. by publishing the summons in the local newspapers.

Substituted Service with Order of the Court: 0.5 r. 20

Service is effected after obtaining an order of the court of affixing a copy of the summons in some conspicuous place in the court house and he also upon some conspicuous part of the house in which the Defendant is known to have last resided or carried on business or personally worked for gain, or in such manner as the court thinks fit. Such substituted service would be as good as and as effectual as if the service was on the Defendant personally.

A Case on Substituted Service:

MBOGO AND ANOTHER V. SHAH (1968) E.A. 93

The Respondent was knocked down and injured by a vehicle which was owned by the first Appellant and driven by the second Appellant. The Respondent notified the insurance company of the vehicle that he intended to hold that company liable to compensate him. Thus he served it with a notice under the Insurance (Motor Vehicles Third Party Risks) Act s. 10 (2) (a) (Kenya). The company through correspondence denied liability. The Company's advocate, however, refused to accept service of the

proceedings filed by the Respondent against the Appellants and service was effected by advertisement. No appearance was entered and no defence was filed. The Respondent obtained judgment ex parte against the Appellants which the insurance Company then applied to set aside. Its application was refused by the High Court. The company appealed against the refusal:-

Held:

1. In the circumstance, the judge applied correctly his discretion to refuse the application to set aside the judgment.

2. In cases of this type where substituted service on a Defendant is ordered, there should be included an order that his insurers be also served.

Appeal dismissed.

ORDER VI – PLEADINGS GENERALLY

Order VI r. 1 defines pleadings to mean the plaint or written statement of defence including written statement of defence filed by a third party and such subsequent pleadings as per 0.VIII r. 13.

The whole **object of pleadings is to bring the parties into an issue and all the rules relating to pleadings are there to prevent the issues to be enlarged.** Should the issues be allowed to be enlarged, they would prevent either party from knowing when the cause of action came on for trial, what the real point to be discussed and decided is.

In fact the whole idea behind the pleading is to narrow down the allegations of the parties into definite issues and thereby diminish expenses as well as delay especially as regards the amount of testimony required on either side at the hearing.

To attain this end, the Plaintiff is required to state concisely to his plaint **all the facts which constitute his cause of action.** He should allege what must, and not what may, be

a cause of action.

Likewise the Defendant should state in his word **all material facts on which he relies for his defence.**

When the result of pleading on both sides is that a material fact is affirmed on one side and denied on the other the question raised between the parties is called an **issue of fact.**

When one party answers his opponent's pleading by stating an objection on point of law the legal question thus raised between the parties is called an **issue of law.**

A Plaintiff's pleading is his plaint and a Defendant's pleading is his written statement of defence.

Sometimes a Plaintiff may file a WSD – such pleading forms part of his pleading. Or Defendant may file additional WSD; this also forms part of his pleadings. The Plaintiff's WSD and the Defendant's additional WSD are called subsequent pleadings (i.e. Replication).

The general principles on pleadings are:-

1. State your whole case in your pleadings i.e. set forth in your pleadings all the material facts on which you rely for your claim or evidence.

2. State the material facts only and not the evidence. Moreover do not anticipate your opponent's pleadings and do not plead to any matter which is not alleged against you.

3. State facts concisely but with precision. It is not necessary to allege any matter of fact which the law presumes in your favour or to which the burden of proof lies with your opponent.

4. The facts are to be divided in paragraphs and numbered consecutively. Dates, sums and numbers may be expressed in figures.

5. Finally pleadings must be verified, signed by the party and dated.

As already stated elsewhere in these notes the object of the pleadings is to enable the other party to know the facts on which the other party relies in order that he may be prepared to meet the case.

0.VI r. 4 All necessary particulars are to be embodied in the pleading. The object of particulars is to prevent surprise at the trial by informing the opposite party what case he was to meet, to define and narrow issues to be tried and save unnecessary expenses. As such particulars supplement pleadings which would otherwise be too vague and too general to ensure fair trial by giving notice of the case to be intended to be set up. The particulars will be ordered on the material facts on which the party pleading fillies for his claim or defence e.g. particulars on negligence, defamation etc. The principle equally applies to defence.

0.VI r. 5: Further and better statements of particulars:

If a party does not state in his pleadings all the particulars required by r. 4 the other party may apply for further and better particulars.

- The Defendant who claims the particulars should do so within reasonable promptitude and before putting in his defence lest he be deemed by a party in his pleading, but not denied by him.

- Further particulars will be ordered of the material facts alleged by a party in his pleading, but not denied by him.

- The expression **upon such terms as to costs or otherwise"** means that an order may be made directing that unless particulars are delivered within a certain time, the suit shall be dismissed. Failure to comply with the order – the defence can be struck out vide rule 16.

0. VI r. 6 Condition precedent:

- Strictly speaking condition precedent does not form part of the cause of action. Thus where a party intends to contest on any condition precedent he must distinctly specify the condition precedent in his pleading. He must state the terms of the condition, the names of the parties to it, and whether it was in writing or verbal.

0. VI r. 1 Departure:

- The rule provides what is called departure in pleading.

- The Plaintiff may not raise in his reply a ground of claim different from that raised in his plaint, nor can he in his reply set up facts inconsistent with those set up in his plaint. New claims or grounds of defence are raised by way of amendment of the plaint.

0.VI r. 8 Denial of Contract:

- All matters which go to show that the contract is sued on is void or unlawful must be specifically pleaded.

0. VI r. 9 Effect of document to be stated:

Where a material fact is evidenced by a document, the rule is that the document is material evidence, it is enough only to state the legal effect of it. – the object is to prevent long pleadings. However in an action of libel or slender it is necessary to state the exact words.

Rule 10: Malice is necessary part of the cause of action, in suits of slander – to be specifically alleged in the plaint.

Rule 16: The rule deals with amendments which a party desires to be made in his opponent's pleading – when the other party offends the rules of pleadings e.g. bringing in unnecessary or scandalous items. Nothing is scandalous if it is relevant. A pleading is embarrassing if it is drawn so that it is not clear what case the other party has to meet at the trial.

0. VI r. 17 Amendment of pleadings:

The preceding rule deals with amendments which a party desires to be made in his opponent are pleading e.g. scandalous. However this present rule deals with amendment which a party desires to be made in his own pleading.

- Amendments of pleadings will be allowed when the proposed **amendment will not alter the nature of the suit to introduce a new case altogether. The amendment will also be allowed if it will not bring injustice to the other side.** The court will allow amendment of pleadings if new facts will come into existence after filing of a suit so as to accommodate the changed circumstances.

N.B.: It is upon the court's discretion to allow or refuse to amend pleadings.

N.B.: 0.VI r. 19 requires pleadings to be verified. Object of the rule is to fix the party for allegation made is the plaint WSD to ensure that false allegations are not made freely and recklessly. False verification (swearing) is an offence under the Penal Code.

Where from one transaction two or more causes of action have arisen, the Plaintiff can bring both causes of action in one suit or do it separately e.g. separate trial for recovery of damages for the car and damages to personal injuries. This is the case where there is one Plaintiff and one Defendant.

Where there is more than one Plaintiff against one Defendant if separate causes of action accrue from the act of the Defendants, the Plaintiff may jointly sue the Defendants. On the other hand if there is more than one Plaintiff against one Defendant, the Plaintiffs may sue him jointly.

ORDER VII – PLAINT

A plaint can be defined as a document written in a formal manner embodying the cause of action and the relief sought. 0. VII r. 1 lists down contents of a plaint. The following are general matters to be included in the plaint:

a) Name of the court which will try the suit.

b) Proper description of the parties, their postal addresses, residences and occupations. This is necessary so as to have easy service of summons. If there are more than one Plaintiffs or Defendants, they should be numbered.

c) Facts constituting cause of action.

d) When the cause of action arose so as to determine if the suit is time barred or not.

e) Facts showing that the trial court has jurisdiction over the suit.

The plaint should also be verified, dated and signed by the Plaintiff. It is necessary that the plaint should contain such particulars in order to enable the Defendant and the court to know whether there is a case of action in it.

Each relevant fact should be narrated concisely in a separate paragraph. In money suit, the amount should be clearly stated. In contract cases if a condition in the contract has been violated indicate the date of violation. **Effect of absence of showing cause of action** is illustrated in the case of: **ALLI MUKHI vs. AMBLAL RAVSAR (1966) EA 557.**

The Defendant in his written statement objected in point of law that the plaint disclosed no cause of action where it alleged that the Defendant had wrongfully moved chattels let by the Plaintiff on hire to the tenants who were not parties to the suit. The plaint gave particulars of damage for loss of rent and for value of articles removed to the detriment of the Plaintiff reversion.

Argument of the court: It is a general accepted principle of law that to maintain on action of trespass to goods, the Plaintiff must have been in possession of the goods at the time of trespass. For trespass to goods like trespass to land is essentially an injury or disturbance to possession and not to ownership. In this case the plaintiff was not in possession of the chattels.

Held:

1. On these facts possession lay with the tenants Trespass, detinue and trover could not lay at the instance of the Plaintiff.

2. Removal of the goods from the tenants by itself was insufficient to constitute an action on the case, although such an action would lie if temporary or permanent injury/damage to reversion was pleaded.

- Preliminary objection upheld, and **plaint rejected for non disclosure of cause of action.**

However in the case of S. N. HIRJI vs. SADRUDIN ALIBHAI (1974) LRT. 13 Onyiuke J. was of the opinion that, 'The court can exercise its discretion to allow amendment of a plaint so as to disclose cause of action under precise of r. II of 0.VII.

Under 0.VII r. II the court has power to dismiss/reject a plaint which fails to reveal cause of action. This is a decree which can be appealed against. However such a dismissal is not a bar for an institution of a fresh plaint/suit which should be done within a period of limitation. **(Two remedies are open to the plaintiff (1) to appeal (2) to file a fresh suit after amending the plaint showing** cause of action).

0.VII r. 10: Return of plaint if the court has no jurisdiction to try the case. Time of limitation will start to run from the time the plaint is filed in the court of proper jurisdiction.

0. VII R. 14: All documents on which the Plaintiff relies should be annexed to the plaint and produced in court when the plaint is filed. A list of other documents should be attached to the plaint. Failure to do so will bar the Plaintiff from producing them at the

hearing of the case. However the court has discretion to allow documents not produced during the filing of the plaint be produced and admitted as evidence at a later stage. The Plaintiff may give a list of documents with their particulars which are relevant to the case. The list should be attached to the plaint as stated above.

0. VII r. 17: A book showing accounts – e.g. shop accounts if it is a part of the document relied in the plaint, the Plaintiff should extract its copy and be filed with the plaint after having certified that it is the same as the original.

It is important to note that the plaint must contain the whole claim. Omission of part of the claim in a suit is a bar to file a separate suit on it. This point has been elaborated in 0.11 r. 2 and in the case of **ZUHURA d/o YUSUF vs. JUMA SAIDI (1969) HCD 193.**

Facts:

In 1964 the appellant sued the Defendant for recovery of 32 cows said to be part of her deceased husband's estate. She obtained judgment on them. In 1968 she filed the present suit for recovery of 5 cows which she alleged belonged to her late husband. The primary court decided on her favour, the district court reversed it. On appeal to High Court:

Held:

A Plaintiff can not in the ordinary course of things be permitted to file a series of suits in respect of the same course of action. Not only this would be an abuse of the process of courts, but it might preclude a judgment debtor from over freeing herself from his obligations. The rule is embodied in 0.II r. 2 of the C.P.C. and is a salutary one. It would not have been impossible for the appellant, when she was about to institute her proceedings in 1964 to have made a fuller investigation as to her rights in the matter of her husband's estate and to have filed her action for everything that was her due.

Appeal dismissed.

The plaint should also disclose if the Plaintiff is a minor. In the case of **JOHN**

MAGENDO vs. N. E. GOVANI (1973) LRT. 60 the High Court directed that in such a circumstance there should be headed as follows:

COSMAS JOHN aged 15 years through Next Friend
JOHN MAGENDO ……. PLAINTIFF
versus
N. E. GOVANI …….. DEFENDANT

In the above example as the Plaintiff is a minor the suit is being brought by his guardian **JOHN MAGENDO** on his behalf. Facts of the case of **JOHN MAGENDO vs. N. E. GOVANI (1973) LRT. 60** are as follows:

On 04.09.68 the Plaintiff's son whilst cycling along the road came into collision with the Defendant's car and sustained injuries. The father on behalf of the son, a minor, sued the Defendant claiming compensation for personal injuries by him.

The district court ruled that the case was time barred – a period of more than a year had passed since the date of injury to the date of filing the plaint that is 04.09.68 – 24.10.69. The father/Plaintiff appealed.

Held:

1. The law of limitation as applied to minors, prior to March 1971 when the law of Limitation Act 1971 came into force is governed by s. 6 of the Indian Limitation Act, 1908, which is to the effect that the period of limitation begins to run from the time the minor comes of age and when the cause of action arises as in the case of adults.

2. A minor can sue by his next friend at any time while the disability continues although his next friend would have been time barred if he were suing in his own behalf.

3. It is the duty of a judge or magistrate conducting a case to try the case and determine it on its merits doing justice to each party according to law. It is

wrong for him to regard himself as a referee in a game even if both sides are represented by able counsels.

Appeal Allowed

NOTE: The High Court in allowing the appeal directed that the plaint should be amended to include the name of the minor child injured as a Plaintiff.

N.B.: Though it is emphasized that the plaint should contain the whole claim, nevertheless the Plaintiff is free to leave part of the claim so as to bring the suit within the jurisdiction of the court. If he does so he will be barred from suing again in respect of the portion left. See 0.11 r. 2 (2) and s. 10.

ORDER VIII – WRITTEN STATEMENT OF DEFENCE SET-OFF AND COUNTER CLAIM

A. WRITTEN STATEMENT OF DEFENCE (WSD.)

Written statement of defence is part of pleadings. After the court has admitted the plaint it will normally issue a summons to the defendant to require him to file a written statement of defence within twenty one days from the receipt of the summons. If the written statement of defence is not filed within the specified time, the Defendant has no right to file it later on without the permission of the court.

WSD should contain the heading of the case, after the heading if there is only one Defendant then the following words should follow **WRITTEN STATEMENT OF DEFENCE"** where there are more than one Defendant after the above words i.e. WSD it should be shown whether the WSD is "on behalf of Defendant No. 1 or 2 as they have been

mentioned in the plaint. **WSD should contain only a statement in a concise form of the material facts on which the Defendant relies for his defence but not the evidence by which these facts are to be proved.**

Denial in the written statement of defence must be specific. The Defendant must take each fact which is alleged against him separately i.e. in separate paragraphs and state clearly whether he admits or does not admit it. Every allegation of fact in the plaint will be taken to be admitted if it is not denied specifically or by necessary implication. The Defendant by his WSD may raise as many districts and separate defenses as he may think proper provided that they relate to the suit and are not embarrassing.

In WSD **the Defendant should start with preliminary objections.** These are mainly points of law and are very important because **they would first determine the jurisdiction of the court** and **other legal issues which will decide whether the suit should continue or be dismissed. The preliminary objections are jurisdiction, time limit, res judicata, non or misjoinder of parties and non payment of court fees. Non disclosure of cause of action** is yet another preliminary objection whose consequence if proved is the rejection of the plaint for amendment. 0. VII r. II.

Having taken preliminary objections on law the plaint is now subjected to be scrutinized on points of facts.

Effects of non specific denial.

a) The allegations in the plaint would be deemed as admitted.

b) Plaintiff need not prove his case (because evasive denial amounts to admission to a fact).

c) There is no need to frame issues on the plaint.

B. SET OFF – 0.VIII r. 6

Set off is a claim or legal right in a liquidated amount of money by the Defendant (debtor) as a defence to a whole or part of a money claim by the Plaintiff. In other words a set-off may be defined as **legal right by which a debtor is entitled to take into account a debt due to him by the creditor when being sued for a debt to the creditor (Plaintiff).**

Example:

A sues B. for recovery of Shs. 5,000/=. B. on his part claims that A was his agent and through agency A failed to carry out his duties and loss of Shs. 5,000/= or more occurred. The two claims **both being of definite pecuniary demands.** B here can set – off against the whole sum of Shs. 5,000/= A set – off, again it can said, **is a plea in defence pure and simple – which by adjustment would wipe off or reduce the Plaintiff's claim. In its enlarged sense it is a defence (shield) and a counter claim combined.** It is a defence to the extent of the Plaintiff's claim, and **a claim by the Defendant in the suit itself for the balance.**

CONDITION FOR A SET OFF

To put up the defence of set-off in the following conditions are to be satisfied.

i) The suit must be for the **recovery of money** and **the relationship between creditor and debtor must exist between the parties** to the suit.

ii) The amount to be set-off must be ascertainable; the unascertained amount can not be set-off.

Example:

A sues B for recover of Shs. 3,000/=. B on the other hand claims that A was his agent in a certain business and that loss of uncertained amount of money occurred which B wishes to set – off against A's claim of Shs. 3,000/=. In this case B's claim is for the uncertained amount. This rule was elaborated in the case of J. A. DIAS vs. AHMED

SALUM SWEDAN (1960) E.A. 984. In this case the Plaintiff sued the Defendant for the return of Shs. 3,200/= alleged to have been paid to the Defendant as a deposit. The claim was contested and the Defendant pleaded set-off and counter claimed Shs. 5,000/= averring that the Shs. 3,200/= were part payment by the Plaintiff on a sale of a motor vehicle. The magistrate rejected the claim of the Plaintiff and gave judgment for the Defendant. On appeal the Plaintiff argued that the magistrate had no Jurisdiction to entertain the counter claim as it was incompetent in the proceedings before him and that he had not considered all the evidence…..

Held:

The Defendant who has a claim against the Plaintiff exceeding the Plaintiff's claim can assert the **claim by way of set-off** and counter claim provided that:

a) The requisite court fee is paid as on a claim contained in a plaint.

b) **The set-off and counter claim is for ascertained amount.**

c) The amount is recoverable by the Defendant from the Plaintiff.

d) The amount is within the pecuniary jurisdiction of the court in which the suit is brought.

e) Both parties fill, in the Defendant's claim, the same characters as they fill in the Plaintiff's suit.

3. The set-off must be for the **purpose of removing the debt of the Plaintiff against the Defendant. A counter claim is different from a set off in this respect.**

Case Law: KISKA LTD. vs. DE ANGELIS (1969) E.A. 6

The respondent sued the Appellant for Shs. 69,765/20; the Appellant filed a set-

off and counter claim. In the process of hearing the suit, the Appellant admitted the Respondent's claim in full and by consent the set – off and counter claim were referred to a referee for decision. The referee found that the Respondent owed the Appellant Shs. 6,442.80. Thus the judge below gave judgment for the Respondent for Shs. 69,765.20 with costs and for the Appellant for shs. 76,208/= with costs. He ordered the costs for reference to be shared equally. The Appellant appealed against these orders for costs.

Held:

The proper procedure should have been for the judge to enter judgment for the Appellant for balance due to it with costs.

Appeal Allowed.

What happens if Defendant fails to plead set-off? For an answer read the case of **LARME vs. UGANDA TRANSPORT CO. (1967) E. A. 774.**

Court Fees:

The value of the claim and the set-off separately should be within the pecuniary jurisdiction of the court regardless whether when combined they exceed such limits. The rule also applies to equitable set-off.

EQUITABLE SET-OFF

It arises in cases in which the Defendant is allowed a set off even **in respect of an unascertained sum of money.** The essence of such claim is that there must be some connection between the Plaintiff's claim for a debt and Defendant's claim to set-off which will make **it inequitable to drive the Defendant to file a separate suit for example when they** arise out of the same transaction, **or where there is knowledge on both sides of an existing debt due to** one party and acknowledged by the other party. **Thus to sum up, equitable set-off.**

a) Can not be claimed as a matter of right.

b) It must arise out of the same transaction

c) It is of unascertained amount.

Example:

A agreed to build a house for B for Shs. 10,000/=. A sues B for the recovery of the money. B can bring a set-off because of defective work. The set-off covers all the three points above.

Where the amount claimed is unascertained, equitable set-off may be allowed in contradiction to legal set-off. Thus **legal set-off is claimed as a matter of right, while in equitable set-off the court has discretion either to adjudicate upon it or order it to be determined by a separate suit.**

Set-off has the effect of cross suit. Firstly in drafting the set-off the whole plaint must be traversed, then sub-title it "set-off" and proceed to draft it just like a plaint. On the prayer, there will be a prayer for dismissal of the suit, in the alternative the right to set-off. This is intended to **entertain two suits simultaneously. The court will be receiving evidence relating to the Plaintiff's case and evidence relating to the set-off, i.e. cross suit.** In the main suit the original Plaintiff remains as he is, while in the cross suit or set-off he becomes the Defendant and the original Defendant becomes the Plaintiff. **As these are two suits held simultaneously, the court is not bound to make a similar finding in both of them.** That is to say, where the Plaintiff loses in his case it does not automatically follow that the Defendant succeeds in the cross suit set-off.

C. COUNTER CLAIM 0.VII r. 9

Order 8 does not define what a counter claim is. However a counter **claim is a claim brought by the Defendant in civil proceedings against the Plaintiff on a cause of action which arose before the presentation of the written statement of**

defence. Unlike in a set-off, there is no need for the counter claim to be of a liquidated sum of money e.g. the Plaintiff can sue for the money lent and received while in the counter claim the Defendant can claim for vacant possession of a premises. This can be elaborated further as follows:

- In a suit between X and Y, X is a tenant and Y is a land lord. X had advanced money to Y. The original suit will be a suit for recovery of a debt. However at the same time the tenant X is in arrears of rent. Though he had lent the land lord Shs. 50,000/= but he is in arrears of rent to the tune of Shs. 20,000/=. On set off, the decree to be issued will be to the tune of Shs. 30,000/=. However the land lord Y having been ordered to pay X Shs. 30,000/= will have another cause of action for breach of covenant, therefore he can sue X for vacant possession of the premises. The land lord can only bring this cause of action in the main suit by way of counter claim. It can not be a set off. The Defendant i.e. land lord will include a counter claim in his written statement of defence under the provisions of 0.VIII r. 9.

Counter claim in other words is a cross-claim; it may be for liquidated or unliquidated sum of money. It may exceed in amount the Plaintiff's claim. If the amount which is found due to the Plaintiff on his claim exceeds the amount established by the Defendant on his counter claim, the Plaintiff will recover the difference. If however the balance is in favour of the Defendant judgment may be given for the Defendant for such balance or for any other relief – to which he may be entitled. (The established practice is to give separate judgments upon the claim and counter claim with the appropriate costs of each instead of one judgment for the balance.)

It should be noted that the cause of action on the counter claim can accrue at any time before the presentation of the written statement of defence. A counter claim is treated as a cross suit and is governed by the rules of pleading as a plaint as laid down in 0.VII. All the facts relied on by way of counter claim must be stated in numbered paragraphs following on in the same serial from those of the defence under the heading "counter claim" – so as to distinguish them from the facts alleged by way of defence. If any of the facts on which the counter

claim is founded have been already stated in the defence, they need not be re-stated in the counter claim, but may be incorporated by reference thus: "And by way of counter claim the Defendants repeats the allegations contained in paragraphs …… of the defence."

- Counter claim like a plaint may comprise of several distinct causes of action but the facts on which each cause of action is founded must be stated, as far as may be, separately and distinctly, and the relief claimed be stated specifically either simply or in the alternative.

If it can be shown that the counter claim is one which can not conveniently be disposed of in the pending action, or ought not to be allowed, the court will strike it out under 0.6 r. 16 or exclude it under r. 12 of this order (VIII). It must be pleaded properly or further particulars may be ordered under 0.VI r. 5.

A counter claim must always claim relief against the Plaintiff either alone or with some other person. It need not be a claim against the Plaintiff in the same capacity as that in which he sues. Under r. 10 (1) **the Defendant can also plead a counter claim against the Plaintiff along with some other person not already a party to the action** provided that it relates to or is in connection with the subject matter of the Plaintiff's claim. **He can plead such a counter claim against a co-Defendant with the Plaintiff. But he can not counter claim against any co-Defendant or third person alone without the Plaintiff,** though he can claim contribution, indemnity or other similar relief from such a person or a third party – 0.1 r. 14.

Whenever a counter claim is pleaded against a third person with the Plaintiff, the Defendant must place at the heading of his written statement of defence an additional title similar to the title in the plaint setting forth the name of such person and a copy of such WSD. Together with a notice requiring such a person, should he wish to defend the Defendant's counter claim, to file his written reply in answer to the counter claim, shall be served on him as if such notice were a summons and such counter claim were a plaint.

1.11(1) provides that the Plaintiff and the person (if any) must present to the court a written reply containing the statement of his defence in answer to the counter claim within 21 days from the date of service upon him of the counter claim or such longer period as the court may, on the application of such person, direct.

The rules with respect to a written statement of defence by a Defendant shall apply to a reply to a counter claim. Under r. 12 the court has power to exclude the counter claim on the ground that it ought to be disposed of by a separate suit or make such order that may be expedient.

DISTINCTIONS BETWEEN SET OFF AND COUNTER CLAIM

1. Whereas a set-off relates to **liquidated** amount of money, counter claim relates to **unliquidated** sum. Because the CPC does not provide for equitable set-off, the Defendant can still get the same relief as if the code made provision for equitable set-off by raising a counter claim.

2. Set-off gives rise to **cross suit.** However a **counter claim is an independent suit** which is to be held simultaneously and **it does not have a relationship with the claim which is raised in the main suit** i.e. suit **by the Plaintiff as in the case of a set-off.**

3. In a counter claim the Plaintiff (in the main suit) may institute 3rd party proceedings under rule 10.

Therefore where the Plaintiff in the counter claim is seeking to get an indemnity or contribution from a third party, 0.VIII r. 10 allows him to institute a third party proceedings. Likewise the Defendant may join a third party to the proceedings in respect of a counter claim.

NOTE:

The court has power to order the trial of the two suits separately because in their nature they are separate unlike in the cross suit (i.e. set-off in **which the relief in the cross suit depends on the determination of the other.** In a counter claim the eventual relief does not depend on the relief the Plaintiff is going to get in the main suit. Thus in a cross suit, there is a direct connection between the relief claimed in the main suit and the set-off; because here there are two independent suits, there could be joinder of parties who were not parties in the original suit.

Under r. 14 if the Defendant to the counter claim fails to put a reply to it, **the Defendant in the main suit who is the Plaintiff in the counter claim may in such a case request the court to enter judgement for him** or the counter claim. Such judgment shall be given as the court shall consider him to be entitled.

However failure to counter claim does not operate as res judicata. A Defendant is not under obligation to plead a set-off or counter claim, that is to say the omission does not operate as res judicata.

In a counter claim where 3rd party proceedings are instituted the effect is not to have only two suits, but three suits i.e.:

1. The original suit between X and Y
2. Counter claim between Y and X
3. Third party proceedings between X and A.

- The provisions relating to 3rd party procedure under 0.1 r. 14 should apply to 3rd party notice issued under).VIII.

- As counter claim gives rise to an independent suit certain basic procedural steps are to be followed:

1. Because the counter claim is in a nature of a plaint, then on submission or filing of the written statement of defence, the Plaintiff will have the right

to file a WSD to the counter claim. Therefore in those instances, the Plaintiff will have two procedural rights i.e.:

a) He may in one document reply to the WSD.
b) He may at the same time draft a WSD to the counter claim, that is a reply to the WSD. In drafting the WSD to the counter claim, he should comply with the provisions of C. VIII r. 12.

2. Under Or. 8 r. 12 the court has power in order separate trials where a counter claim has been raised or alternatively has power to strike out the counter claim. That power is discretionally and very discretion. However the court may order separate trials where it is of the opinion that the trial of the two suits simultaneously will confuse issues i.e. give rise to injustice.

3. Thirdly, where the court is of the opinion that simultaneous trials would lend to long delays and inconveniencies. As a general rule when the reply to the WSD has been filed, pleadings are regarded to have been closed.

R. 13 Or. 8 provides that no subsequent pleadings other by way of set off or counter claim or a defence to a set off or counter claim may be filed without the leave of the court – i.e. pleadings are concluded when the WSD is filed. However when the pleadings are ambiguous, the opponent may demand a statement of further and better particulars. Also after the WSD if the Plaintiff is of the opinion that the WSD raises issues which have to be replied, he has the right to reply to the WSD, but all those rights have to be exercised by leave of the court.

- The rationale behind this rule is that, although under the adversal system it is the duty of the parties to conduct their cases the court is given power and indeed it is its duty to control the proceedings. Allowing pleadings to continue uncontrolled may give rise to the parties wanting to file the pleadings on a matter of delaying the suit.

R. 14 of Or. 8 make it possible for the court to assess whether the subsequent

pleadings are in fact necessary for the purpose of determining the real matters in issue. The application is done by way of chamber summons.

- There is a proviso to r. 13 giving an exception to the requirement of leave to subsequent pleadings i.e. in respect to a reply to the WSD and reply to the reply of WSD which can be filed without leave of the court.

TWO RULES RELATING TO DRAFTING OF A WSD

1. All allegations by the Plaintiff have to be traversed seriatim. A general traverse can not be accepted.

2. Evasive denials are not allowed R. 3 Or. 8 relate to general denial and r. 4 relates to evasive denials. If the Defendant does not specifically deny an allegation which is in the plaint if shall be presumed that he has admitted it. – 0.8 r. 5

Case: E. A. P. & T. vs. TERRAZO PAVIORE 1973 LRT n. 58

In this case **ONYIUKE J.** commented on a general practice of including in the last paragraph & general denial as follows: "Save as herein before expressly admitted the Defendant denies each and every allegation of facts contained in the plaint as if the same were set forth seriatim and specifically denied."

WHEREFORE: The Defendant prays the Honourable Court for judgment as follows:-

i) The suit be dismissed with costs.
ii) Any other relief(s) that the Honourable court may deem fit.

Dated this …… day of …… 198….

At the bottom there should be VERIFICATION.

TWO TYPES OF GENERA TRAVERSE

1. A general traverse which is made to cover every allegation in the plaint without having attempted to traverse some of the main allegations separately. This is the kind of traverse envisaged under r. 3.

2. A traverse after the Defendant has denied or admitted most of the major allegations in the plaint. It is introduced by a lot of pleaders as a safety valve i.e. so as to avoid the effect of r. 5. That is to say if an allegation is not specifically denied then it will be presumed to have been admitted (normally found in the last para).

There was an objection in the TERRAZO's case where counsel attempted to argue that such form of a general traverse is illegal. **ONYIUKE J.** had this to say.

"A general or comprehensive traverse of the nature of para 4 of the WSD is allowed by usage and appears in practically every WSD, the courts sometimes frown on it but it continues to appear all the same. The effect of this form of traverse is to put the Plaintiff to proof; it shortens the pleading and it is not bad per se. but where its effect is to make it difficult for the Plaintiff or the court to know what the defence a Defendant is putting forward, then it may well be embarrassing and defective.

The effect of the case is that a general traverse is not bad per se except where its effect is to make it difficult for the Plaintiff to know what defence the Defendant is putting forward. It modifies the rule in r. 3.

ONYIUKE J. in the above case, followed the rule in the case of **WARNER W. SAPSON (1959) 1 AER 120** of page 123 which is taken to be the land mark case. It is in relation also to general traverse. The court said,

"The general denial is used in nearly every defence which goes out of the tempo, it comes at the end. The pleader had earlier gone through many of the

allegations in the statement of the claim and dealt with them. Some he has admitted, some he has denied. Whenever he knows there is a serious contest he takes the allegation and denies it specifically, but where he has no instructions on a particular allegation he avers it by a general denial of this kind so that he can if need be, put the Plaintiff to proof of it at the trial. Sometimes the pleader denies, sometimes he does not admit each and every allegation, but whatever phrase is used, it all comes back to the allegation, but whatever phrase is used, it all comes back to the same thing. The allegation is to be regarded as if it were specifically set out and traversed seriatim; in short it is a traverse no more no less. **The effect of traverse have been known to generations or pleaders, it costs upon the Plaintiff the burden of proving the allegation denied.** So, this general denial does no more than put the Plaintiff to proof.

The above means that the general denial at the end of the WSD is not bad in law and does not contravene r. 3, save where it may lead the Plaintiff to be confused as to what the defence is. Where a general denial is made after specific denial, it is not bad in law.

NOTE: Although such general denial is not bad in law, it is frowned at by the courts. In certain circumstances it may create an impression that the pleader is not sure in drafting his WSD i.e. betray lack of confidence on the drafter (incompetence) hence it should be used very rarely.

GENERAL DEFENCES TO BE INCLUDED IN A WSD

Three things are to be born in mind when drafting WSD. As a matter of form, **it is better to separate the different items intended to be included in a WSD** e.g. where there are items intended to be included separately. **The general format is to make all the preliminary objections, then the admissions and finally the denials thereafter the set-off or counter claims.**

GENERA DEFENCES;

1. Accord and satisfaction

2. Acquiescence
3. Condition precedent
4. Custom or usage
5. Capacity
6. Estoppel
7. Fraud
8. Illegality
9. Jurisdiction
10. Limitation
11. limitation
12. Misjoinder
13. Non-joinder
14. Mistake
15. Notice or insufficiency of notice
16. Payment
17. Penalty as opposite to damage
18. Defence under interest
19. Release
20.
21.
22.
23.
24. Res-subjudice
25. Tender
26. Undue Influence
27. Duress
28. Lack of special damage
29. Waiver
30. Want of cause of action

NB: These defences are to be considered even before drafting the WSD.

ORDER 8 R. 14

R. 14(1) discusses the consequences of failure to provide the WSD that when a

Defendant fails to provide it (WSD) the court may pronounce a judgment against the party (Defendant). The same applies to failure by the Plaintiff to provide a reply to the WSD i.e. **"Replication".**

NOTE: The purpose of the pleadings is for the parties to submit to the jurisdiction of the court. Such failure or silence will be deemed to have admitted to the allegation.

Sub. R. (2) gives the mechanism of pronouncing judgment when the WSD has been demanded and the Defendant has failed to produce it. There are two types of actions the court may take depending on the nature of the Plaintiff's claim.

a) If the Plaintiff's claim is on a liquidated amount of money, then he may enter on exparte judgment. Non-presentation of WSD will be taken to be an admission.

b) In case of unliquidated claim, the court can pronounce judgment only after an exparte hearing – i.e. **exparte proof** which can be secured in two ways – namely: - either the Plaintiff is allowed to prove his case ex-parte by bringing his witnesses to the court and examine them in absence of the Defendant. **The Defendant will thus be condemned without being heard.** However, **this is not against the rule of natural justice since he has been given chance but did not take it.**

OR - **exp-parte proof can be conducted by way of an affidavit** i.e. the Plaintiff will swear an affidavit to the effect that whatever he is claiming is true and the court will pronounce judgment on the basis of the affidavit (this method is the most common with the courts in Tanzania).

DEFENCES BETWEEN EX PARTE JUDGMENT AND EX-PARTE HEARING

1. In case of the former, there is not hearing at all where as in case of ex-parte hearing, there is hearing.

2. In exparte judgment both parties are not heard while in ex parte hearing, the Plaintiff is heard (but the Defendant is not).

3. In case of ex parte judgment the decision is necessarily in favour of the Plaintiff, whereas in ex parte hearing it is not always that judgment will be in favour of the Plaintiff.

R. 15 – 0.8 provides that during the course of proceedings the court will fix a hearing date. This may be made in two ways:-

1. On application (normally by the Plaintiff) however the Defendant has also a right to apply to the court for the hearing date to be fixed.

2. If no party makes such Application within 14 days after the close of the pleadings, then the court may on its own motion fix it and normally it is fixed according to the hearing calendar of the court.

APPEARANCE - 0 – IX

What is appearance? This is a three pronged process:

a) It is process by which parties to civil proceedings present themselves before the court.

b) It is a process by which the parties acknowledge the jurisdiction of the court.

c) It is a process by which parties to civil proceedings submit themselves to the jurisdiction of the court.

"**Appearance"** in the law of civil procedure has technical meaning; it does not mean a physical appearance of the parties before the court. It is submission to the jurisdiction of the court.

Under 0.3 r. 1, appearance can be made in three ways:-

a) The party himself may appear,

b) or by advocate or

c) by a recognized agent.

Under 0.9 r. 1 when the suit is called for hearing it is the duty of the parties to appear before the court, also when summons is served. Under Tanzania laws appearance before the Deputy Registrar is due appearance i.e. proper appearance.

CONSEQUENCES OF NON-APPEARANCE

There are two consequences for non appearance:-

a) Consequences of non appearance by Plaintiff:

When the Plaintiff does not appear, then the court will under 0.9 r. 8 be empowered to dismiss the suit. However if the WSD has been filed, or if the Defendant is before the court and admits, some of the allegation by the Plaintiff, then the court will dismiss the Plaintiff's plaint to the extent which is not admitted and proceed to pronounce judgment in favour of the Plaintiff in respect of what is admitted. **A dismissal under 0.9 r. 8 will be a dismissal on merits and hence shall operate as res judicata** i.e. it will be a dismissal for lack of prosecution. Although the dismissal will operate as res judicata the court is not prevented from setting aside such dismissal if the Plaintiff shows sufficient cause why he did not appear.

INSTANCE UNDER WHICH COURT CAN DISMISS A SUIT FOR NON APPEARANCE

There are three instances where the Defendant does not appear and a dismissal is ordered:

1. A dismissal of a suit is a punishment of the Plaintiff. Thus the Plaintiff

will be punished for **the Defendant's non appearance if the summons were not served as a result of the Plaintiff's failure to pay the necessary court fees for the service of the summons.** The suit would be dismissed because there would not have bear any suit.

2. **Where the summons is returned unserved because the Plaintiff failed to provide an adequate address.** It is not the duty of the court to look for the Defendant. Or where the summons is returned unserved and within a period of specified time the Plaintiff does not apply for the summons to be re-issued. On the day of the first hearing if it appears from the record that the summons was not served, the Plaintiff has a duty to apply for the re-issue. 0.9 r. 5 limits time for the application to 3 months. However under 0.9 r. 5(1) (a)-(e) there are exceptions to this rule.

   i) Summons can return unserved when the Defendant is actively avoiding service or

   ii) When the Defendant has changed his address and his present address is not known

   iv) When his (Defendant's) description is not adequate to identify him.

   R. 5(1) provides that although the court has power to dismiss the suit if summons in returned unserved and the Plaintiff has not applied within the limitation period, the court has discretion:-

   a) To extend the limitation period if is shown that the Plaintiff had done everything possible to discover the new address but has failed or

   b) It is shown the Defendant is

   c) In the court's opinion there is any other reasons e.g. illness.

This rule re-enacts the principle that the best service is personal service. If this fails then he may apply for substituted service under 0.5 r. 20.

3. **Where both the Plaintiff and Defendant do no appear,** in such a circumstance, **the Plaintiff's plaint is dismissed for non appearance of the Plaintiff.**

Dismissal under the above three circumstances is not dismissal, on the merits of the case, but on technicalities. Neither party would have been heard although applied where the Plaintiff does not appear there would be presumption of lack of prosecution – hence they would not operate as res judicata against the Plaintiff. This means that **subject to the law of limitation, the Plaintiff can institute again the suit on the same facts.** Therefore dismissal as a **punishment** is only to the extent of **delay of proceedings and extra costs.**

0.9 r. 4 and 9 r. 5(2):

Where a dismissal for Plaintiff's default is more serious (0.9 r. 8) the court will have to dismiss the Plaintiff's case when the Plaintiff does not appear, but Defendant appears – except where the Defendant admits to the Plaintiff's claim in which case the court will enter judgment for the Plaintiff. Also where the Defendant admits only a part of the Plaintiff's claim and denies the other, the court will enter judgment in favour of the Plaintiff only to the extend of the admission.

NOTE A dismissal under 0.9 r. 8 is a dismissal on the merits of case although no evidence is given because there would be a **presumption that the Plaintiff who does not appear to prosecute has no evidence against the Defendant. It will be a dismissal for lack of**

- A dismissal under r. 8 is res judicata, therefore no fresh suit can be filed in

respect of the same cause of action. However the Plaintiff can make an application under 0.9 r. 9 to the court which dismissed the suit for an order to set aside the dismissal. **The application shall be by a chamber summons supported by an affidavit to show sufficient cause why he did not appear.**

The term "sufficient cause" is not defined therefore it is subject to interpretation of the court. However **proof of illness, difficulty to transport, lack of notice of hearing have been taken to constitute sufficient cause.** However, lack of notice of hearing will only apply if the Plaintiff did not apply for the fixing of the date of hearing i.e. if the court on its own motion fixed a hearing date in which case it is the duty of the court having fixed a date of hearing on its own motion, to give the parties notice of the hearing date.

CONSEQUENCES WHERE DEFENDANT DOES NOT APPEAR FOR HIS OWN MISTAKE – 0.9 r. (1)

When the Plaintiff appears but the Defendant does not appear, the court has a duty to inquire as to whether the summons was duly served i.e. according to Or. 5. If it was served the court can take two different steps against the Defendant.

- The summons would have indicated that in case of non-appearance the court would proceed ex parte. Thus if the summons were for filing WSD, the court on application by the Plaintiff may allow the Plaintiff to prove his case ex parte in which case he will have the right to call witnesses in absence of the Defendant; these witness will not be cross-examined by the Defendant.

- **Alternatively the Plaintiff may prove his case by way of the Affidavit. However, when an order for an ex parte hearing is given and there is an adjournment the Defendant may appear on the adjourned day and apply to be heard. If the summons was for appearance the court in absence of the Defendant may enter judgment for the Plaintiff as ex parte judgment.** That judgment is not appeallable, but the Defendant under 0.9 r. 13 may apply to the court which passed it to have that judgement be set aside.

NOTE: **Always ex parte judgments are against the Defendants.** There are other circumstances in which parties will not appear and the hearing will continue e.g. if there are more than one Plaintiff, the court will proceed to try the case 0.1 r. 1 may apply to join them. The rest who appear will be presumed to be able to prescribe the suit on behalf of those absent and the judgment thereof will hind even those who are not present in court. However where there are more than one Defendant, the court can not enter an ex-parte judgment will be entered only when all Defendants do not appear.

EX PARTE DECREE/JUDGMENT

Ex parte judgment was defined in the case of MOSHI TEXTILE vs. DE VOEST (1975) LRT 17 to mean **a judgment given when there is no appearance by the party against whom it is given.** There is no appearance if the party has neither filed a WSD nor appeared personally or by his advocate or his agent. **However the definition is subject to one qualification i…. it appears to be wide enough to cover a default judgment against the Plaintiff.** MOSHI TEXTILE's case also defines the term "**a suit called for hearing." It says that a suit is called for hearing when it is to be heard for the first time. That a judgment under 0.9 r. 13 even where the Defendant does not appear is not an ex parte judgment where the Defendant appeared at the first hearing. The implication is that it is only one instance that an ex parte judgment can be entered i.e. on the first hearing. The ex parte judgment can not be entered against a Defendant who does not appear in subsequent hearing.** Under 0.9 r. 7 where the court has examined heave to the "Plaintiff" to prove his case ex parte and adjourned, the Defendant may apply to the court for leave to defend the case when the adjourned hearing resources and will have to give reasons why he was not in court when the first hearing was called i.e. on the appointed day.

R. 7 OF 0.9 Allows Defendant to make an application for the order to prove the case ex parte be set aside and be granted leave to defend his case. The rationale behind this rule is that his appearing on the first hearing raises the presumption that there are triable issues and hence the suit must be heard in full.

0.9 r. 13 provides that a Defendant who has had an ex parte judgment entered against him can apply to court to have it set aside on proving that the summons was not duly served or on showing any other sufficient cause.

NOTE: An ex parte judgment is not appealable because it was not contested. The only way to restore the suit is by way of an application to have it set aside. The effect of an ex parte judgment is not only the Defendant loses his chance to defend the suit, but also loses his right to appeal.

0.9 r. 13 gives a very wise discretion on the court which passed the ex parte judgment but does not define how the discretion is going to be exercised, it only says that the decree could be set aside but does not say what these sufficient reasons are. In the case of **OSANGA V. NABUNGO (1965)** e. a. 384 it was held that ignorance of crucial procedure was sufficient ground to set the judgment aside. On other instances, illness has also been held to be sufficient ground or cause. Case law has no agreement on one point i.e. the power of the court to set aside the decree is of unlimited discretion,. However in the course of deciding it **the court has to exercise its description judiciary omission of refusing to set aside the ex parte judgment is not appeallable, the appellate court will not interfere with it unless the trial court did not exercise the discretion judiciously.**

Cases: 1. MBOGO V. SHAH (1968) E.A. 93

2. JESSE KILENI V. MC CONNELL & ANOTHER (1966) E.A. 547

3. EVANS V. LARTLAM (1937) 2 AER 646.

In Evans v. Bartlam (supra) it was argued that there is no reason to interfere with the discretion of the judge in chambers who thought it proper to set aside the judgment unless it is clear that the discretion was wrongly exercised in which case the order should not be affirmed. ATKIN J. stated, ***"while the appellate court in the exercise of its appellate power is entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion on the***

grounds of law, yet if it sees that on other grounds, the decision will result in injustice, it has both the power and duty to remedy it." In other words the question of finding whether the reasons given by the Defendant are sufficient to have the decree set aside is a question of fact to be decided by the judge who entertains the application.

The case of Evans was followed in East Africa in the cases of Mbogo & Jesse Kimani (supra).

In MBOGO vs SHAH (supra) NEBOLD J. said that the judge has a discretion under 0.9 r. 13 but of course the discretion has to be exercised judiciously. A court of appeal should not interfere with the exercise of the discretion unless it is satisfied that the judge in exercising it had misdirected himself in some matter and had arrived at a wrong decision or unless it is manifest from the case as a whole that it was wrong and injustice had been occasioned. In this case the case of JESSE KIMANI was cited and it was commented that the statement was cast in wide form but said that is how it should be.

In **PATEL V. E.A.C.H. SERVICES LTD. (1974) E.A. 75** it was stated that **there are no limits or restrictions on the judge's discretion except that if he does vary the judgement, he does so on such terms as it is just.** The court said that in the exercise of his discretion, the judge may look at the question whether there are triable issues.

The case of PATEL is important also because it gives the nationale behind using the test of traible issues that the basic purpose of a civil trial is to finally dispose of the issues between the parties which can not be done by ex parte judgment. Hence it will be contrary to justice if an ex parte judgment was allowed to stand on mere technicalities.

There is no general rule as to what is sufficient cause to set aside ex parte judgment but there is one instance which was held to be not a sufficient cause. In **MUKERJEE V. MUJERJEE (1907) 34 Calcutta** first hearing to seek on adjournment was held to be not a sufficient ground hearing to set aside an ex

parte decree if after refusing an adjournment he withdraws from the case and thus the Defendant is left unrepresented and hence not 'appearing.' This is case supplements MOSHI TEXTILE's case (Jesse's case was also followed in Moshi's case) An advocate should appear for the purpose of hearing and not for seeking an adjournment.

0.9 r. 13 (1) relates to setting aside an ex parte decree while r. 13 (2) relates to setting aside ex parte judgment entered under 0.9 r. 6 (1) B when there is proof that a summons to appear had been duly served and the Defendant had not turned up.

DICTINCTION ORDER: DECREE AND JUDGMENT

S. 3 defines a decree or a formal expression of an adjudication and is what is considered to be **the determining final conclusion of the suit.** A decree **gives the right** and it is the one which can be **executed against judgment debtor.**

The same above section defines a **judgment as the decision of the court and the reasons behind it.** The **judgment does not give a right** i.e. **it can not be executed,** but **rather it merely declares a right.**

NOTE: Where there has been an ex parte hearing, a decree has to follow because the judge has to write a judgment as there had been ex parte proof.

Prayer to set aside ex parte decree a judgment in a chamber summons. (For Order that (write a title).

1. The ex parte decree passed by the Honourable Court against the Defendant on the …….. day of October 198… be set aside and a fresh date of hearing be fixed.

ORDER 10

Order 10 concerns examination of parties by the court i.e. the court has power under this order to examine the parties at the first hearing. **It is the duty of the court at the first hearing to ascertain whether really the parties are atg disputes (in U.S.A. this is called pre-trial conference).**

On the day of first hearing the court has to examine the parties for **the purpose of ascertaining what facts are admitted,** what are denied etc. It is not enough for the court to read the plaint. (0.10 r. 1).

Under r. 2 the court is also empowered at the first hearing and any subsequent hearing to orally examine the parties. The examination in the subsequent hearings may be in respect of questions suggested by the opposite party. A. 3 provide that the substance of the examination has to be recorded.

(R. 4: - If a party refuses to answer, then the court may enter judgment against him).

NOTE: In the course of the examination the parties may come to companies.

INTERROGATORIES 0.XI (DISCOVER. & INSP.)

Interrogatories are written questions which are put by a party to civil proceedings to his opponent and which must be answered by the opponent by filling an affidavit (an affidavit in answer to interrogatories). The written questions are to be put to the opponent with the leave of the court.

Under 0.11 r. 1 there is no limit to the time in which interrogatories may be exhibited. **The purpose of interrogatories is to enable the party to know the nature of his opponent's case.** Thus it goes to the intention of removing the element of **surprise** and civil litigation.

Secondly they are intended to secure admissions thus saving the time of the court and lessening the expenses of litigation. Where there are no admissions interrogatories will

held to indicate the areas in which the parties are in real dispute.

Case: MARRIOT V. CARIBERUAIM (1886) 17 QBD. 154.

It was the view of the court in this case that every party to the suit is entitled to know his opponent's case. However he is not entitled to know the facts which constitutes exclusively the evidence of the opponent's case because if he knows such facts an unscrupulous party could temper with the evidence and defeat the cause of justice or he could manufacture evidence in his favour to contradict the evidence of the opponent. He could shape his case in such a way as to defeat justice. Thus any interrogatories which are intended to secure knowledge of the evidential facts are prohibited in law.

There are two broad areas in which interrogatories will be allowed:-

(1) To ascertain the nature of the opponent does case i.e. material facts constitute the case.

Case:

- A. G. V. GASKILL (1882) 20 Ch. D. 519 at page 529
- Narriot v. chaisserlain (Supra)

The above cases are to the effect that knowledge of the nature of the opponent's case relates only to material facts.

(2) Interrogatories may be allowed to support the party's case:
Either directly i.e. when the party secures admissions from his opponent **OR** indirectly when the interrogatories impeach or destroy the opponent's case.
Cases: - HENSEY V. BRIGHT (1890) 24 QBD 445

- **A. G. VS. NEW CASTLE – UPON – THE CORP. (1897)**
- **RIDDER VS. BRIDGES (18885) 29 CD. 29**

The above case **relate to supporting one's case. There are however** questions or areas which interrogatories can not be administered:

(1) A party can not interrogate on evidential facts.
(2) He is not entitled to interrogate the opponent on confidential communications with his legal advisors.
(3) He can not interrogate on questions which will be injurious to public interest.

0.11 or 1 A party must apply to the court for leave to exhibit interrogatories. This is done by filing chamber summons ex parte which should be supported by an affidavit showing that the interrogatories are necessary either to meet the ends of justice, shorten trial or necessary to avoid unnecessary costs. A copy of the interrogatories has to be attached to the application.

FORMAT: (Title)
CHAMBER SUMMONS (as per 0.11 r. 1 and any other enabling provisions of law)

EX PARTE

LET ALL PARTIES CONCERNED …… for an order that the Plaintiff (or Defendant) be at liberty to serve on the Defendant (or Plaintiff) interrogatories in writing (a copy whereof is delivered herewith) and that the Defendant (or Plaintiff) does within (10) days answer the said interrogatories in writing by an affidavit and that the costs of and relating to this application be costs in the suit.

Drafting of questions: like in pleadings, every question should be concise, and should deal with one particular issue.

TITLE:

Interrogatories on behalf of the above named Plaintiff (or Defendant) for examination of the above named Defendant (or Plaintiff) pursuant to the order here in dated ……. Day of 198…

Questions:

1. Did you……?
2. Did you not …….?
3. If not where were you…….?

NOTE: Interrogatories should be set out in concise form, each interrogatory is to be set out in a separate paragraph and numbered consecutively. As pointed above, each interrogatory should deal with one issue only.

Where the interrogatories concern different defendants – indicate as follows: The Defendant AB is required to answer the interrogatories numbered …… served on this …….. day of ……. 198….. by ……. Advocate for the Plaintiff (or Defendant) to the above named Defendant (or Plaintiff) XY and PQ and his advocate.

The court has discretion to allow the exhibition of the interrogatories or to disallow them. In the exercise of this discretion it will be guided by principles in 0.11 rr. 5 and 6 which contain the factors to be considered by the court.

(1) The interrogatories must be relevant i.e. they must relate to the case which is before the court as opposed to what is known as fishing questions that is general questions without knowing exactly what you want.

(2) The court should refuse leave to exhibit interrogatories when it is of the opinion that they are not exhibited bonafide for the purpose of settling dispute.

(3) Whether the interrogatories are scandalous or not.

(4) The court should ask itself whether the interrogatories sought to be exhibited are sufficiently material at the stage at which the trial is that is to say the court can postpone exhibition of interrogatories to a later date or stage.

ANSWERING INTERROGATORIES

The party against whom interrogatories are administered is required by the law to answer any questions put to him. The answers are to be submitted within ten (10) days. 0.11 r. 9 contains sanctions for failure to answer the interrogatories. These sanctions are:

(1) The party exhibiting the interrogatories may apply to the court for an order by the court to compel the opponent to answer and will be penalized in costs.

(2) The court may order a viva voce examination of the party against whom the interrogatories are exhibited if the answers are ambiguous.

(3) The court may make necessary orders against the party who refuses to answer the interrogatories. In extreme cases this may entail pronouncing judgment against him.

FORMAT OF ANSWERING INTERROGATORIES

TITLE (Affidavit).

The answer of the Defendant/Plaintiff to the interrogatories Plaintiff/ Defendant pursuant to the order herein dated this ……. Day of ……. 198…

In answer of the said interrogatories (we the said CD of …….. (state residence) and GP of …….. (state residence).

MAKE OATH AND SAY AS FOLLOWS:

(1) To the 1st interrogatory namely (state in full the interrogatory) that (state the answer).

(2) ……

(3) To the 3rd interrogatory namely ……. That we object to answer on the ground that (state the ground of objection).
SWORN BEFORE ME at MOROGORO this …….. day of ……. 198…..

COMMISSIONER FOR
OATH

NOTE: This is an affidavit thus a statement on oath hence the answer can be used as evidence against the maker.

Hand in hand with interrogatories there is DISCOVERY i.e. a **process in which a party to civil proceedings gets knowledge of the documents which are in power and possession of the opponent and which are relevant to the proceedings.** Discovery is important as supplementary procedure to the procedure of interrogatories. **Whereas interrogatories are questions put to the opponent, discovery relates to documents.**

There are two types of documents covered under 0.11. There are documents which are referred to in the pleadings and those which are not referred to … since the procedure of discovery relates only to knowledge of the document then rule 10 does not relate to documents already referred to in pleadings.

Under 0.11 r. 11 of party may apply without affidavit for an order directing his opponent to make discovery on oath of documents which have been (or are) is discretionary upon

the court which may refuse on the ground that the application is premature or the discovery does not relate to the suit. A person against whom an order has been made is supposed to file an affidavit i.e. an affidavit of documents in which he will indicate the documents he intends to rely upon.

Under r. 13 once a discovery is made the opponent may demand the production (of the documents) for inspection. There are grounds upon which a person may refuse or resist discovery:-

(1) He may resist on the ground that the documents contain his exclusive evidence of his title (he being say, a land owner). The reason is that like interrogatories, discovery is intended to know the nature of the opponent's case and not for building up one's case through saboting evidence.

NB: If the opponent does not disclose the document, he can not be allowed to use it.

(2) He may resist on the ground that it is (the document) a privileged communication.

(3) That discovery at that stage is immaterial i.e. it does not serve any purpose in the suit.

Rule 13 – Inspection of documents

Rule 13 deals with inspection of documents. A party to civil proceedings is entitled to issue a notice to his o0pponent for inspection of documents which are in his power or possession. The notice has to be made that the discovery takes place within 3 days after its delivery and 10 days before the hearing …. i.e. inspection.

INTENTION OF INSPECTION: Whereas discovery is intended to inform the party about the existence of documents, inspection is intended to afford him the opportunity of looking at the documents. In the course of inspection he is also entitled to make copies of the documents. Inspection is normally done in the office of the advocate acting for the opponent and it should be made at reasonable hours within reasonable time **before hearing** i.e. normal working hours, Sundays excluded.

The question of inspection can be looked at in two perspectives. Inspection of documents referred in the pleadings and those discovered.

Inspection is covered under 2 rules. One is governed under r. 13 and the other under r. 14.

R. 13 and 14 relate to documents disclosed in pleadings R. 15 relates to discovered documents. The interest of both is however one namely to afford a party to know the contents of a document or documents.

R. 16 relates to inspection of books of accounts.
R. 18 provides for consequences for non-compliance with the order of discovery. It is the Plaintiff, it may lead to the **dismissal and to striking out of the WSD** if it is the Defendant.

ORDER 12 – ADMISSION

Rule 1: Any party may give notice to admit a document. The object of obtaining admissions is to do away with the necessity of proving facts that are admitted.

Admissions are of 3 types namely:-

(1) Admission in Pleadings

(a) **Actual:** i.e. those contained in the pleadings in answer to Interrogatories.

(b) **Constructive:** i.e. those which are the consequence of the form of pleadings adopted.

(2) **Admissions by agreement.**

(3) **Admissions by notice.**

The importance of admission consists in the fact that either party may at any stage of the suit move for judgment on the admission made by the other side.

Rule 2: Notice to admit documents.

Note: Admissions between co-defendants to which the Plaintiff is not a party, can not be treated as evidence against the Plaintiff.

Rule 3: Notice to admit facts.

Note that – "Unless the court otherwise directs"

Not withstanding that a party has refused or neglected to admit a document after a notice has been given to him under this rule, the court has discretion to award or refuse costs that discretion has to be exercised judiciously. That is to say instead of delivering interrogatories, a party can send to his adverse party a notice to admit facts.

Rule 4: Judgment on admissions

Scope of the rule: It enables either party at any stage of the suit to move for judgment on the admissions which have been made by the other side without waiting for the determination of the suit.

By this rule either party may get rid of so much of the suit as to which there is no controversy. However the rule is permissive it does not preclude a party, who does not avail of it and proceeds to trial in the ordinary way, from relying at the trial on the admissions made by the opposite party.

Note: "The court may make such order or give such judgment it may think just."

That is to say a judgment on admissions is not a matter of right, but is in the discretion of the court. So that if a case involves questions which can not conveniently dispose of a motion under this rule, the court may in the exercise of its discretion or refuse the motion.

Admission on pleadings

Under this rule either party may move for judgment upon admissions of fact made on the pleadings or otherwise. As pointed earlier on admissions in pleadings are either actual or constructive.

Actual admission: consists of facts expressly admitted either in pleadings or in answer to interrogatories.

Constructive admissions: usually arise where a Defendant has not specifically dealt with some allegations of fact in the plaint of which he does not admit the truth of every allegation if not denied specifically or by necessary implication will be taken to be admitted except as against persons under disability.

- Constructive admissions also arise where a Defendant denies an allegation of fact in the plaint evasively and does not answer a point of substance.

- Judgment may be given under this rule not only upon admissions made in the pleadings but upon admissions otherwise made. The words **"or otherwise"** are of general application and justify the giving of an immediate judgment when an admission is made by a letter of facts which show that the Defendant to the action. Again, a judgment may be given under this rule even upon a verbal admission if it is clearly proved.

- This rule was framed for the express purpose that if there was no dispute between the parties and if there was in the pleadings such an admission as to make it plain that the Plaintiff was entitled to a particular order at once upon option.

- However such an admission must be of facts as would shown that the Plaintiff is clearly entitled to the order asked for whether it be in the nature of a decree or a judgment or anything else.

ORDER 13

This order relates to production, impounding and return of documents. **0.7 r. 14 deals with documents relied upon in the plaint** that the Plaintiff should file along with the plaint any document he is suing upon. Only these in his power or possession which he must produce infilling the plaint. These are the documents which give him the cause of action e.g. dishonoured cheque or bill of exchange where a suit is founded solely on a document such document must be annexed to the plaint. This relates only to the Plaintiff.

0.13 is different in that it refers to documents which are to be relied upon in evidence i.e. they do not give parties cause of action.

0.13 r. 1: relates to documents which are relied upon and which are in power or possession of either of the parties and form the basis of evidence. Parties on the 1st hearing are required to produce all documents they are going to rely upon in the suit; they must submit them to the court.

The rule is intended to make sure that the production of suspicious documents is prevented that is to curb the possibility of a party altering documents to suit this case pending on evidence to be adduced in court.

The rule is mandatory. If a party does not comply with this rule, he can not then produce the document at a subsequent hearing unless he gives good reasons why he did not produce it at the first hearing. The court has the discretion to condone the related production of documents. This is exercised by the court judiciously. The court must

inquire into whether the document is genuine or not. Also it must satisfy itself that the document is relevant for the disposal of the suit and that its production will facilitate the determination of the suit.

0.13 r. 2: That there are two duties. One relates to the consequences of non production. The party must assign sufficient cause for non production and the court has to **record the reasons.** The 1st part of the rule casts a duty to the party to satisfy the court that they are not to blame for the belated production of documents.

- The second part costs a duty on the court to record the reasons why it is allowing belated production. The court is thus required to find out prima facie that the documents are **genuine.** This rule does not cover documents which are used to refresh the memory of witnesses (s. 168(1) of the Evidence Act, 1967). This section provides that a witness may while under examination refresh the memory by referring to the document written by himself. Subs. (2):- any document written by any body may be used to refresh memory.

S. 169 of the Evidence Act:- Whenever a witness refreshes his memory to own hand writing.

This gives the witness the right to refer to documents but not for a party to produce a document which he did not produce. A document produced in court becomes part of the records i.e. part of evidence or exhibit. Where a referred document can not be an exhibit, it can not form basis of the decision.

There are other documents produced by the plt. R. 2 does not cover documents which are produced at the time of disposition of the Plaintiff's witness. **There are two ways of producing a document i.e. at the time of filing or first hearing. Some reasons use the tactic of examining witness to produce documents. R. 2 of 0.13 prohibits this in civil hearing** (it is allowed in criminal procedure).

However the situation is different as far as the defendant's witnesses are concerned or the Defendant's cross examination of Plaintiff's witnesses. The Defendant may produce a document in the course of examining the Plaintiff's witnesses. That is allowed for the

purpose of credibility. The rules are less stringent on the Defendant because it is the Plaintiff's onus to prove and it is more likely for the Plaintiff to tamper with documents.

0.1 r. 18 provides that the court has discretion to allow the production of documents at a later stage if they were not produced. Under 0.8 r. 14 i.e. allows the Plaintiff to produce documents he was suing upon at a later stage. This can be equated to the existence of 0. 13 r. 2 i.e. a later production of documents can be allowed by the court if good reasons for doing so exist.

GROUNDS TO BE ASSIGNED FOR RELATED PRODUCTION

(1) The party may show that he did not produce it at the first hearing because the document was not in his power or possession.

(2) That the document did not exist at the first hearing e.g. a debt which is not acknowledged – that document is relevant a disposing of the suit. Technically, this is not belated production.

(4) That the document could not be produced because even after due diligence and extensive search, the party could not discover the document. The question of production of documents has to looked into the context of the evidence Act. S. 66 thereof provides that, all documents must be proved by direct evidence that is to say for documents; iot is the original document. Thus **the document supposed to be produced under 0.13 r. 1 is the original.** A document which is to be produced under the above order and rule must be **admissible** in evidence under the provisions of the Evidence Act. Thus copies are not admissible except where specifically allowed e.g. o. 13 r. 5 which provides for an exception – i.e. A letter book is a copy of the contents of a letter book in terms of pages because such a page can not be plucked. However one copy must be certified. Also a shop book or a book of accounts; the entries can be produced in a copy. The person seeking to produce the copy must submit the copy and **the original** for the court to certify that it is a true copy of the original. Having satisfied itself, the court can accept

the copy (accepts the copy) and return the original.

0. 13 r. 5(1) imposes a condition that only books which are in current use which are covered under r. 5 e.g. returns rationale being that civil litigation is not intended to hinder the carrying on of business.

- The other instances in which copies can be produced are public records which produced by a public officer and lastly accounts or entries and books of accounts belonging to persons other than the parties.

R. 4 provides that the court is supposed to make an endorsement on every document produced which will contain the title of the suit, name of the party producing it; date of its production, a statement of its having been admitted and signature or initials of the magistrate or judge. Once these are present then the documents form part of the records of proceedings. If not admitted the court will endorse the grounds of its inadmissibility and then return it to the party who produced it.

Once a document is admitted, it has to remain in the file i.e. not to be returned until the proceedings are concluded. It forms part of the record until either of the two things occurs. 0.13 r. 9 provides that where the suit is not appellable, documents will be returned to the parties after the conclusion of the suit e.g. where an ex parte judgment was been entered, the documents are be longer relevant. Secondly where the suit is appellable the document produced can be returned either:-

(1) Where the court is satisfied that no appeal has been filed and the time within which an appeal could have been lodged/filed has expired because the judgment debtor would be barred from appealing. The documents will no longer be **relevant** because the suit has been finally and conclusively determined.

(2) Where an appeal has been lodged and there has been a decision on appeal, the documents would be returned to the parties after decision in

appear.

EXCEPTIONS TO THE ABOVE RULE RELATING TO RETURN OF DOCUMENTS

(1) Where the document is ruled in admissible is returned immediately.

(2) Documents belonging to the parties and they have a right under 13 r. 9 to have them returned after the conclusion of the suit. However certain documents may not be returned e.g. those which in the opinion of the court have no more relevancies. The court has also power to impound documents.

(3) The impounding of documents is the act of the court of refusing to release the documents.

ORDER 14

This is the last order relating to preparatory stage in civil litigation. It is concerned with two processes:

(1) The settlement of issues

(2) The determination of agreed issues. In CPC settlement of issues means framing of issues.

WHAT ARE ISSUES:

Issues are material propositions which are asserted by one party and denied by the other. They are material propositions which the Plaintiff must prove so as to be entitled to a relief. We can also say that issues are material propositions which the Defendant must

prove so as to have a proper defence. Material propositions are of two types:

a) Issues of law – referred to as – preliminary issues

b) Issues of fact – referred to as – substantive issues.

The discussion is found under 0. 14 r. 1.

0. 14 r. 1(5) is to the effect that **it is the duty of the court of first hearing to ascertain as to which of the points the parties are at variance and frame issues accordingly.** That duty can not be discharged by waiting for the parties to frame issues. Parties merely assist in framing issues by coming to court on the day of the first hearing. The court may add or strike out some issues as it may deem fit. The duty of the court to frame issues is reiterated in the case of ODD JOES V. NUBIA (1970) E. A. 476.

WHY SHOULD THE COURT FRAME ISSUES?

The framing of issues is a very important step because **the outcome of the case will depend on the issues that have been framed.** Three points can illustrate why the court should frame issues and the importance of doing so:

(1) It is the issues and not the pleadings which guide the parties on how they will adduce evidence. In other words a party will not be allowed to adduce evidence which does not go on proving or disproving the issues framed. Such evidence will be irrelevant and hence inadmissible. Framing of issues helps to save costs and time of the court to hear irrelevant issues.

(2) To compel the court to address its mind to specific issues i.e. confines the court to specific areas in which the issues have been framed. This was the view of the court in the case of ODDS JOBS v. NUBIA (supra) and also in the case of NKALUBO v. KIBERIGE (1973) E. A. 103 at page 105.

There is a contrary view which has been presented in various cases in East Africa as against the general rule. There is an exception; the exception is where the

parties knew of the issues but they were not pleaded.

(3) The third point relates to **appeals.** If the case goes to appeal, the appellate court has to confine itself to issues framed in the trial court. So framing of issues places the issues on record for the purpose of appeal.

HOW ISSUES ARE FRAMED

This is found under 0. 14 r. 3. The court may use three sources to frame issues. The most obvious one is the pleadings and answers to interrogatories. The second one is the allegations made by either of the parties or their advocates. These allegations have to be made on oath in the form of an affidavit.

The third source is documents which have been produced.

Under 0. 14 r. 4 the court has also the power to examine the parties orally. This rule is two pronged:- Where the court is of the opinion that it can not frame issues without the court is of the opinion that it can not frame issues without examining parties who are not parties to the proceedings or documents of people not parties to the proceedings, then it can not order to examine them. Only then can the court frame issues in the affirmative. **Issues can not be framed in the negative, they have to be framed in such a way that the party will be required to prove them and not to disprove them.**

e.g. (1) Whether there was a consideration or not.
(2) Whether there was no consideration
(3) Was there no consideration.
(4) Whether there was consideration.

Of the four issues the fourth is the appropriate way of framing issues. Issues which are framed should not be vague.

CONSEQUENCES OF OMISSION TO FRAME ISSUES

Omission to frame issues is **a procedural irregularity which is not necessarily fatal to the proceedings.** Where the court of appeal is of the opinion that the omission to frame issues prejudiced the parties such omission would be fatal.
The court will hold that omission to frame issues prejudiced the parties **where the omission resulted into the parties failing to direct evidence to the issues. In such a case if any injustice occurs, it is incurable except by quashing the decision of the lower court.**
When the decision of the lower court is quashed, it will return the proceedings to it. This is what was discussed in the case of JOSEPH MARCO V. PASCAL RWEYEMAMU (1977) LRT. 59.

The court will not hold that the omission to frame issues was prejudicial to the party if it is of the opinion that despite not framing the issues the parties knew what was at issue and produced evidence in what they knew was at issue.

In ODD JOBS V. MUBIA (supra) it was said in relation to this point that "On the point that the court has no discretion to decree on issue which has not been pleaded, the attitude adopted by this court (EACA) is not as strict as that adopted in India. In East Africa the court may allow evidence to be called and may base its decision on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue had been left to the court for decision.

This view was stated in a different way in the case of NORMAN v. OVERSEAS MOTOR TRANSPORT (1959) E.A. In this case there was a submission that the requirement of framing issues was mandatory and therefore whether there is an omission to frame issues, the court can do nothing except to quash the decision of the lower court. The reason was that the failure to frame issues entailed a failure by trial judge to direct his mind to the issue. FORBES, V. P. stated that, "failure to frame issues is an irregularity. The question would appear to be whether the failure to frame issues not withstanding, the parties at the trial knew/what the real issue was and the court has taken evidence and duly considered it." This can be summarized as follows: **Whether the failure to frame issues resulted into the parties being unable to know what were the real issues between them, the parties knew the issues, then the omission is not fatal.**

NOTE: ODD JOBS & NKAUBO'S decided on the question of whether the court can decide on an issue which was not in the pleadings. These cases say that although as a general rule the court should not decide on issues not disclosed in the pleadings there are two circumstances under which the court can do so.

1. Where after adducing evidence the parties are taken to have left the issue for the court's decision. This happens in the course of submissions of the parties. Parties may feel free to submit on it.

2. Where although the issue has not been raised in the pleadings, parties themselves understood it clearly what was at issue between then and had had the opportunity to examine witnesses in adducing evidence in respect of the issue.

Ref. NERMAN V. OVERSEAS TRANSPORT (supra)

This case is to the effect that where parties have addressed their mind to an issue not in the pleadings, the general rule can be ignored.

WHAT IF ISSUES HAVE NOT BEEN FRAMED BY THE COURT

1. An appellate court will quash the decision of the court of first instance and order a retrial. This is only where the appellate court is satisfied that the omission occasioned injustice. That can be done after either the appellate court has framed the issues or without framing the issues.

2. An appellate court, once it has decided that the failure to frame the issues has occasioned injustice, may frame the issue and proceed to decide the case. This happens when there is sufficient evidence on record.

SUMMARY:

The omission to frame issues is a procedural irregularity which is not fatal to the

proceedings except when such an omission has occasioned an injustice i.e. if it appears that the parties or either of them failed to produce evidence regarding the issue.

Cases: 1. BLAY V. POLLARD & NORRIS (1930) AER. 2
2. JOSEPH MARCO V. PASCAL RWEYEMAMU (supra)
3. KASHAGA V. ERNEST KABOYA

Under 0. 14 r. 5 the court may at any time before judgment amend the issues framed or make an addition to the issues framed. It happens when in the course of hearing evidence the court is of the opinion that the evidence discloses more issues than the issues already framed, or when it discovers in the course of bearing the evidence that the issues framed put the onus of proof on the wrong party. The rule emphasizes the role of the court as that of directing the proper conduct of the proceedings.

When the court has amended or added to the framed issues, it has to give the parties an opportunity to adduce further evidence on the newly framed issues.

Ref. Case: DURVESH V. VIMAIN & FASSIO (1957) E.A.

Under r. 5 the court has also discretion at any time before judgment to strike out wrongly framed issues.

DETERMINATION OF ISSUES AT THE 1ST HEARING
(0. 14 RR. 6 & 7)

This implies that a decision has been made on the 1st hearing. Under r. 6 **parties to civil proceedings have a right to agree on the issues between them.** Although as a general rule the court may reject the issues if they are introduced under r. 2(5), the court can not reject them if introduced under r. 6 provided that certain conditions are met. Here the parties will be telling the court that they will be bound by the out come of the decision on the issues i.e.

If issues are answered in the negative or affirmative either of them will be bound to do

three of the following:-

Either transfers a specified sum of money to the opponent OR transfer some property held by one party to another OR one party will abstain from doing something in relation to the other. Here the role of the **court** is to say yes or no:- The dispute being as to the interpretation of a certain relationship and not to the out come of that relationship. Hence the assistance of the court is sought to interpret.

Under r. 7 the court will have to be satisfied on certain things i.e. if the agreement was duly executed by the parties (whether it was in writing which is a must).

The court must also be satisfied that the parties have a substantial interest in the decision and that the issues on dispute are fit to be tried. Once the court has satisfied itself as to the three above matters then it will record the issues as framed by it and it will pronounce judgment along the lines proposed in the agreement. **This is a very short or summary procedure which is intended to shorten civil litigation where there is no need of a protracted litigation** and can be equated to the American pre-trial conference.

0.14 also enacts a different procedure i.e. where the suit would not go to full trial where the parties have agreed on the issues. Technically that applies where there are interpretations of documents etc. It is akin to 0. 35 i.e. summary procedures. But here triable issues need be raised because they are presupposed to exist. The judgment and relief is already agreed by the parties.

ORDER 15

0. 15 concern the disposal of the suit at the first hearing. It concerns the subordinate courts under circumstances in which a summons to appear has been issued.

0. 15 (1) provides that where a summons to appear has been issued by any court other than the High Court, and the court is of the opinion at the first hearing that the parties are not at issue, it may enter judgment accordingly. **The court can satisfy itself that the parties are not at issue.**

(1) From the pleadings e.g. there are so many admissions

(2) After examining the parties under 0. 10

(3) Or after looking at the decision that has been issued under 0. 13.

Where there are more than one Plaintiff or Defendant the court can enter judgment in respect of those Plaintiffs or Defendants who are not at issue and proceed with those at issue. Where the Plaintiffs are at issue, the court will proceed with framing the issues under 0. 14 r. 1. After framing the issues the court will proceed with hearing the parties and enter judgment without the need of evidence.

Alternatively, the court may be of the opinion that parties' submissions are not enough and that evidence is needed. The court may thus adjourn the hearing.

0. 15 r. 4 relates to judgment by default in the subordinate court i.e. where the summons to appear has been issued and either party does not appear sufficient cause is assigned or appear without evidence, the court may enter judgment.

0.15 r. 4 together with 0.9 rr. 6. 0, and 9 deal with circumstances under which the court can dispose of the suit at first hearing.

0. 15 r. 1 deals with situations where the court is of the opinion that the parties are not at issue.

R. 3 - when the court, after framing issues, is of the opinion that the submissions of the parties are enough to dispose of the suit i.e. evidence is not needed.

R. 4 – When a party to proceedings fails to prosecute his case even after the issues have been framed. This failure has to be coupled with the lack of sufficient reasons.

The last two are steps taken only in the subordinate courts where the summons to appear has been issued. However even in the High Court, the procedure will be similar

to rr. 3 and 4.

If the court has decided that it can not dispose of the suit having framed the issues and the same have not been settled under 0. 14 r. 1, then the court will have to proceed with hearing evidence.

ORDER 16

0. 16 is about the **summoning and attendance** of witnesses.

S. 26 of the CPC provides that the provisions of ss. 23 and 24 it should apply in so far as witness summonses are concerned. S. 23 gives **the powers to the court to issue summonses when the suit is duly filed** i.e. to the Defendants.

S. 24 concerns the service of summons to the Defendant outside the jurisdiction of the court i.e. may send them to another court for the purposes of services. The above three sections when read together provide that the power of the court to issue summonses to witnesses is found under s. 26. However that power is to be exercised according to ss. 23 and 24 in that:-

(1) **A court may issue a summons to a witness only when a suit has been duly instituted** i.e. where there is no suit the court can not issue summonses.

(2) The power of the court also exceeds to its power to send the summons to another court for services i.e. when the witness sought to appear before the court lives outside the jurisdiction of the court, the High Court will normally send it to subordinate court.

WINTESS SUMMONSES

The general rule is that, it is the duty of the party seeking to rely upon a particular witness to secure his presence before the court. The presence can be secured **either voluntarily or by compulsion.** If voluntarily the court can not interfere. However if a witness is reluctant, the court has power to compel him to come to court.

Ref. Case:

HLARIUS KARARIO vs. KIRANI (1968) HCD NO. 95

This case repeated the general principle that, "the primary duty is on the party to a suit to arrange for the attendance of his own witnesses. If for any reason the party thinks the witness will not appear, it is open to him to request the court to issue a summons. If however the party takes no steps to secure the witness attendance he can not, as of right, request for an adjournment."

The same argument was presented in the case of **SILA MAYOYI vs. MULULU MBALI (1968) HCD 201.**

The court stated the principle that, "When a case is called, each party is expected to attend with his witnesses. Facilities are at the disposal of the parties to ensure the presence of reluctant or luggard witnesses."

This case was considered an issue whether an appellate court could reopen a matter which could have been determined in the court of first instance if the witness could have been present.

Under 0. 16 r. 1 a party to civil proceedings is entitled to make an application for a witness summons. Either the witness will be summoned to give oral evidence or to produce **documents.** The application should be made either to the court or to an officer of the court appointed on that behalf. It is also the duty of the parties to pay the costs for the summoning of witnesses. Before the summons is raised, and within a specified period, a party is supposed to deposit with the court an amount of money which will be

enough to cover expenses of the witness service i.e. traveling and living expenses and costs of service.

NOTE:

In criminal proceedings there is a particular fund used for paying the costs; that is the state bears the costs of the witnesses. However, in civil proceedings, it is the parties who bear the costs. Where the summons is applied for, the money which is enough to sustain the witness must be deposited with the court. 0. 16 r. 2 (2). In deciding the amount of money which is to be deposited, if the witness called is an expert witness then the rule provides that reasonable allowance be paid. This will depend (1) upon the time he spends in giving the actual evidence, (2) upon the time he has spent on researching on that particular evidence.

Experts are normally paid hourly unlike others who are paid daily. The money is to be deposited in court and is given to the witness when he is served with the summons. Under r. 4 if the money deposited is not sufficient, the court has power to demand more money.

Where a person has already appeared in court and there is default in paying additional money then the court can either recover the money by attaching the property of the party or discharge the witness before he gives evidence.

NOTE:

The presumption is that the court will not need the witness for more than one day; hence expenses will be in respect of the traveling expenses and the stay of that one day. But where the court detains the witness for more than one day i.e. the hearing continues from day to day. The court may order the party to pay more money. If he defaults, then the court may discharge the witness – r 4(2).

THE NATURE OF SUMMONS

A summons is a court document, **it contains the name of the court, title of the suit** i.e. names of the parties and its case number. It amends the person named therein to appear before the court as a witness. The name of the party on whose behalf he is supposed to give evidence has to be disclosed. It will also **indicate the day, time and case** he is supposed to appear in court. It must also **contain the signature of the authorized court officer** and **the court seal.** If he is supposed to produce documents, the document must also be mentioned in the summons. The summons must also **contain the consequences of his default.**

A witness who is summoned to give evidence must appear personally, but any person who is summoned only to produce documents can deport such documents in court or give it to another party to produce it or give it to the party to proceed himself.

The summons should be clear as to why witnesses are called. There are witnesses who are simply to produce documents while others are called to give evidence – and still there may be other called to give both evidence (oral) and produce documents. There are other witnesses who can be examined by the court without being summoned. The court has power to examine persons there and then if it considers such examination is necessary to the determination of the case. Formally the court will do so at the instance of the parties. This rule will cover witnesses who are not summoned. If the rule was not in the CPC, it would imply that only summoned witnesses could be examined.

After there has been an appearance by the witnesses, the court has power after examining them to release them. However, if they are not released, they have a duty to attend continuously the hearing until the court releases them. **A witness who discharges himself would be guilty of contempt of court. The court will decide when it no longer needs him.**

CONSEQUENCES OF NON-ATTENDANCE

Defective witness summons:

There is a specific requirement of the format of summons – therefore **no person has a**

duty/a defective summons and the court can not compel him to appear e.g. where a summons to produce a document. It was ambiguous as to the nature of the document to be produced. It must be struck out and a witness who did not appear because he did not understand the document to be produced can not be held to have disobeyed the summons.

Case: **RYAN INVESTMENTS LTD. vs THE U.S.A. (1970) E.A. 675.**

In this case there was an order to produce certain documents; it covered eleven pages. Because of its length it was ambiguous. Several questions arose in respect of the summons:

(a) Whether there was a specific legal remedy for striking out a defective summons.

(b) Whether a witness was entitled to refuse to appear if the summons is defective.

(c) Whether the court has power to set aside a witness summons which can not be obeyed.

As regards the first issue the court said there is no specific remedy permitting the striking out a defective summons. However the court has inherent power to strike out such summonses under s. 95 of the CPC.

As to the second issue the court answered that a witness is not bound to appear where the witness summons was improperly drawn or where it could not be obeyed. He can defend himself by invoking the inherent power of the court.

Regarding the third issue the court ruled that it is within the court's power to set aside a witness summons which can not be obeyed.

Case: **GANDESHA vs. KILINGI COFFEE ESTATE LTD. & ANOTHER (1969) E.A. 299.**

This case related to summoning a Defendant an advocate i.e. whether an advocate who

is prosecuting a party's case can be summoned as a witness. The court ruled that it was improper. That in fact the practice in Tanzania has been that an advocate can act on behalf of the contending parties. However as a matter of law, when he is sought to act as a witness, he should return his brief to the party i.e. ceases to be his advocate. The court in this case allowed him to give evidence because he was in a peculiar situation i.e. at one point in the conveyancing business he acted on behalf of both parties. Therefore **a witness is not bound to appear in response to a defective witness summons. He may do either of the two things:-**

(1) He may appear and raise objections i.e. refuse to give evidence (appear under protest).
(2) Before to appear at all.

If he appears and raises objections, the court has power to strike out the summons. Thus the court will be invoking its inherent powers, because there is no legal remedy where he has refused to appear at all, and then the court can not enforce any sanction against him.

PROPERLY DRAWN AND ISSUED WITNESS SUMMONSES

If a person does not obey a witness summons on the day of case the **court may issue a warrant of arrest against him and on the application of the party who issued the summons, the witness may be required to show cause why he should not be remanded in custody.**

The warrant of arrest may be issued with or without bail. On being brought to court under warrant of arrest, **the court may demand the witness to show cause why he should not furnish security for his appearance.** This may happen because the parties are not in court and hence can not **examine** him there and then. If he fails to furnish security, the court may remand him in custody until such time his evidence is taken. **Alternatively, the court may order the attachment of his property.** Such attachment should be of property the value of which does not exceed the amount of fine (Shs. 1,000/-) and costs of attachment.

Attachment can be lifted in two ways:-

(1) Because the attachment is made as security for his appearance it may be lifted after he has appeared and been examined or convinced the court that he will subsequently appear.

(2) When he has furnished security i.e. he has deposited money in court as security for his appearance.

The attached property may be **sold** for two purposes:-

(1) To set off the costs of putting the witness in civil prison.

(2) To pay the fine for his non appearance. The procedure of sale will be similar to the procedure of execution of a discreet.

A witness who is kept in custody pending the presentation of his evidence or his property attached is normally an uncooperative witness. The value of his evidence to the party who sought to use him is questionable. Therefore it is **advisable** only to use him if his evidence is very important – otherwise it is better not to use him at all.

These procedures underline the fact that under the adversarial system it is the party himself who will presecute his case – **thus he is in a better position to know his witnesses and secure the attendance of his witnesses.** However as an exception, the court may summon witnesses' suo motto – see 0. 16 r. 14.

R. 14 provide that the court may examine witnesses other than those who are produced by the parties. The rule presupposes that the court does not simply sit as an umpire; it has an **investigative role** to play in order to dispense justice. **The power is normally used to examine expert witnesses. It should never be used to build up a party's case.**

Ref. Case: JOSEPH MARCO v. P. RWEYEMAMU (1977) LRT. 59.

It was held in this case that when a witness is summoned under the provisions of r. 14,

he is the witness of the court and not a witness for any of the parties. The court should not use its power under this rule to help to strengthen a party's case.

Ref. Case: THOBIAS ZENDA vs. HARUN ZENDA (1977) LRT. 23.

According to this case r. 14 should be exercised very rarely. The judge stated thus:- "This rule empowers the magistrate to call at his own initiative an additional witness at any stage in the proceedings if he thinks it necessary to do so. However **this power should be exercised only rarely,** the broad rule being that it is for the party to present his own case to the court and not for the court to make a case for a litigant. The instances in which the provisions of this rule may be invoked will depend on the fasts of each case."

The two above cases read together they seem to rule that:-

(1) It is a duty of the party to civil proceedings to present his case which is discharged by investigating the case and presenting relevant evidence. The court under no circumstances should indulge in investigating a party's case and summon witnesses on behalf of a party.

(2) Court has power to summon witnesses other than those summoned on application by the parties.

(3) The witness no summoned are witnesses of the court and not of either of the parties.

PART C: COURT TO CONTROL PROCEEDINGS

As a general rule, the adversarial proceedings require the court to sit as a neutral umpire. Parties themselves prosecute the suit. However the duties of the parties go only to investigating the suit and presenting their evidence. The court becomes more and more active when it comes into hearing of the suit e.g. the power under 0. 16 r. 14. There are also two other devises by which the court is supposed to play an active rule in

controlling the proceedings.

(1) Under 0. 17 the court has power to order adjournment hence controlling proceedings.

(2) Power of the court to order a consolidation of suits i.e. vested in the court to order two or more suits between same parties to be heard as one.

ORDER 17

The literal meaning of adjournment is postponement to another date. As a general rule, when a hearing of a suit has begun, it is supposed to be continuous from day to day until determination. However the court has power on application of either party to order an adjournment to a subsequent date under 0. 17 r. 1.

But where there are witnesses in court, it can not order an adjournment until all witnesses are examined. It can order for an adjournment if there are no witnesses to examine. **No party to civil proceedings has a right to an adjournment. The power is discretionary upon the court.** An adjournment merely on the ground that a witness who volunteered to come to court has not turned up can not be obtained. There is a practice for advocates to file consent letters for an adjournment. That has been held by the High Court to be not automatic i.e. it can not automatically grant adjournment. **The court has a duty to make sure that there is a speedy conclusion of a suit. Therefore the court must control proceedings.** Also it has a duty to protect proceedings against parties who are intended in delaying the suit or against advocates who for their personal interests, seek for adjournment of a suit which can be heard promptly. This discretion thus has to be exercised judiciously.

Ref. Cases:

- **SHABANI MBEGA vs. KARADHA COMPANY LTD. & ANOTHER (1975) LRT. 13**

- **A. S. MASKINI vs. GEORGE MBUGUS & ANOTHER (1976) LRT. 62.**

The above two cases deal with consent letters. According to MASKINI's case the E.A.C.A. held that **although a consent letter might be a factor to be taken into consideration when the court is dealing with an adjournment, it does not follow that it will automatically grant it.** The business of the court should not be subject to the vagarics of business of advocates i.e. the advocates must regulate their diaries according to court diary and not vice versa.

SHABANI MBEGA's case was decided by the High Court of Tanzania **it was held that a consent letter filed by the parties to remove the case from the hearing list can not automatically remove the case, from the list. Such a letter cal merely operate as an application to the court for an adjournment or alternatively can operate as a notice to the court that the parties are going to seek for an adjournment.** Furthermore **an adjournment can not be sought as of right but can be obtained only on sufficient grounds.** Whether grounds are sufficient is a question of fact and thus depends on material facts of the case.

NOTE:

(1) Adjournment is to be granted at the instance of a party to the suit except where the circumstances are beyond his contract e.g. where the principal witness has not appeared even after a witness summons had been issued.

(2) The **illness** of the party's lawyer can not be a ground for an adjournment where it is found that the party had sufficient time to engage another lawyer. Alternatively where a party is represented his illness can not be sufficient ground of an adjournment if the lawyer is in court.

HOW WILL THE COURT PROCEED AFTER AN ADJOURNMENT

On the day of the next hearing if either of the parties does not appear, the court is empowered under r. 2 0. 17 to proceed with the suit according to 0. 9 i.e. may give judgment ex parte or dismiss it. If the adjournment was for the purpose of enabling the

party to produce evidence, if he fails to produce such evidence the court may proceed with issuing judgment.

Where the **adjournment is general** it is the duty of the parties to apply for a **hearing date** to be fixed. If no such application is made within 12 months then the court should issue notice to the parties to show cause why the suit should not be dismissed i.e. adjournment can not be granted indefinitely – r. 3.

By implication the Plaintiff has a duty to seek for appointment for a hearing date under r. 13 because it is in the interest of the Defendant that the suit be dismissed. On the expiry of the 12months.

If the parties in response to show cause for not dismissing the suit direct assign sufficient cause, the court has power to dismiss it under r. 4.

Where the adjournment was general and 3 years elapse without the parties applying for a hearing date to be fixed, the court has power to **strike out** the suit without giving the parties **notice** under r. 5Defendants. **There are other circumstances in which parties will not matter and the hearing will continue e.g. if there are more than one Plaintiff, the court will proceed to try the case.** 0. 1 r. 1 may apply to join them. **The rest who appear will be presumed to be able to prosecute the suit on behalf of the Defendant and the judgment thereof will bind even those who are not present in court.** However where there are more than one Defendants, the court can not enter an ex parte decree i.e. it will have to proceed to hear the suit. **Ex-parte judgment will be entered all Defendants do not appear.**

The effect of **dismissal under r. 4 is res-judicata** because such a dismissal is taken to be a **dismissal for lack of prosecution and be a dismissal on merits of the suit.** Even striking out of the suit under r. 5 is not on merits of the daces and hence subject to rule of limitation. The party may fresh proceedings, it must give the parties notice that the suit has been struck out.

ORDER 18

0.18 release to actual hearing of the suit and examination of witnesses. **The process of hearing is a process of proff taking.**

The Plaintiff will be attempting to convince the court that he has a right and the Defendant will try to convince the court that he is not liable. **This involves evidence.** According to CPC, civil litigation in Tanzania is conducted on the basis of two principles:-

(1) **Orallity** i.e. all proceedings are oral and even if there is a document, it has to be introduced orally.

(2) The CPC is modeled on **the principle of mediacy as opposed to the principle of immediacy.** That principle implies that the parties should be appearing before the court actually i.e. physically whereas immediacy means the link between the court and the party is an advocate. The process of hearing in Tanzania is oral hence there is a direct linkage between the parties and the court. 0.18 r. 1 deals with the party who has the right to begin or open the case. In a civil suit it is normally the Plaintiff because he has the burden of proving the case. Where there is a situation in which the Defendant bears the onus of proving the case he will open the case.

The party who have right to begin, begins by opening speech in which he will be arising his case, repeating that is in his pleading. He will tell the court what is his case, what he wants to prove and how he will prove. It is a summary introduction of the case. Opening speech is important because it helps the court to appreciate the procedures which the Plaintiff will follow, evidence he is going to produce etc. In Tanzania in practice opening speeches are rarely used because of two reasons:-

(1) The advocates are too lazy to prepare opening speeches.

(2) Where the parties are not represented opening speeches are not given because the parties do not know the procedure. Opening speech sets the ball rolling.

After opening speech then the party who begins calls his witnesses. The order of calling

witnesses is determined by the party himself. However **as a matter of practice, the more important witnesses** submission of no case to answer. **The case will stand or fall. By this ruling because if the court finds that there is a case to answer, it will proceed to give judgment.** If the Defendant elects to give evidence the proceedings will continue as if there has not been any such submission. But **when giving judgment the court will omit all evidence given by the will be taken into consideration when making the judgment.**

DAIKIN AIR CONDITIONING (E.A) LTD. V. HAVARD UNIVERSITY
HC DSM. CIV. CASE NO. 21/76 (unreported) Samatta J.
Discussed all the following cases.

SUMMARY

The CPC is silent on that to do in the case of submission of the case to answer – hence the case law.

Case Ref:
- ALEXANDAR V. RAYMON (1936) IKB. 169
- PAREY V. THE ALUMINIUM CORP. LTD. (1940) 162 LTR 236
- LAURIE V. RAGLAT BUILDING CO. LTD. (1942) IKB 152.

The above three cases discuss the effect of a submission of no case to answer i.e. **when the Defendant submits that he has no case to answer it does not mean that he it so facto loses his right to call evidence.** His right is lost when a further procedural step is taken e.g. – EVIDENCES TOURING CO. (ROAD SERVICES) LTD. V. AFRICAN PRODUCE AGENCY (1949) LTD. (1962) E.A. 190.

- STOREY V. STOREY (1960) 3 AER 279 these two cases qualify or amplify the above three cases by showing the circumstances in which Defendant loses his right if he elects not to call evidence. These his conduct – he could be so interpreted.

In VYE V. VYE (1960) 2 TLR 29 which followed RAMSDEM V. RA,DEM (1954) 2 aer 623. According to VYE's case the proper procedure if a submission of no case to answer is made by the Defendant in a negligence case he is required to elect whether to

stand on his submission and if be he does so there can not be a new trial. There are instances in which the Defendant submits that there is no case to answer. They are two according to VYE's and RAMDEM's case.

By submitting that there is no case to answer the Defendant is telling the court either of the two things:-

(1) Where there is such submission the Defendant will be saying that accepting that **the Plaintiff's evidence at its face value no case has been disclosed in law** i.e. he is questioning the legality of the action taken.

(2) That the evidence produced by the Plaintiff is so unsatisfactory or unreliable **that the court should find that the burden of proof has not been discharged.** He is questioning the burden of proof that it has not been satisfactorily discharged by and that it amounts to having there been no case to answer. Thus it should not form the basis of liability. **This is a question of fact.**

IN ALEXANDER V. RAYSON – above – the rationale for the procedure to put the Defendant to election that is **when decision is based on evidence then the judge in fact becomes a judge of facts, It is not proper for a judge of facts to be called upon to make a decision on facts of the case before he has been given an opportunity to listen to the evidence.** This implies that where a submission has been entered, and the Defendant elects not to give evidence, the situation (judge of fact) is, "It is not right that the judge of facts should be asked to **express an opinion on the evidence until the evidence is completed"** the responsibility for not calling rebutting evidence should be on the Defendant's counsel and no one else. This means the court should not call any witness if the Defendant does not bring rebutting evidence. Also the court should he be called to give any opinion until the close of proceedings because as a judge of fact.

By submitting that there is not calling the court to make a finding of facts. They are technical points calling the court to make a finding of law. Findings of facts can be made only when there have been full hearings. **The procedure of putting the Defendant to an election implies that the Defendant is called upon to put the court in a position of a judge of facts** i.e. make a finding of facts.

Ref. Case: THOBIAS ANDA V. HARUN ZENDA (1977) LRT 23.

This case is relevant in respect of 0. 18 r. 10 i.e. whom a magistrate or judge is prevented either by death or otherwise from proceeding with a partly heard case another magistrate or judge who takes over can make case of the records of the proceedings magistrate or judge. **When a magistrate starts hearing a case he is supposed to complete it because there are several impressions or questions e.g. of credibility, demeanor of witnesses etc. which are not normally recorded by are vital to the final decision.** R. 10 is an exception to this general rule and the exceptions are very strict. As a matter of practice, when a partly heard case goes to another magistrate, the procedure should be to start the hearing a fresh. The above rule i.e. r. 10 lays down three circumstances:-

(1) When the magistrate dies – there is no need to start a fresh hearing.

(2) When he is transferred

(3) For any other cause – depending on the peculiar circumstance of the case. Under those circumstances the new magistrate can make use of the record. **THOBIAS ZENDA'S case cautions that there could be cases where the issue which is going to be decided is to be decided purely on the impressions of the magistrate** i.e. not of the evidence, but of the parties themselves and their witnesses. It is an impression that which can not be recorded.

It was observed in Zenda's case that there might be cases where the issue to be decided depends wholly or almost wholly on the credibility of a witness in which case the question of seeing the witnesses and watching their demeanors becomes of crucial importance. In such circumstances the succeeding magistrate might well come to the conclusion that in order to do justice to the case the trial be finalized by the magistrate who commenced it.

The court may at any stage of the suit inspect property or anything which is the subject matter of the suit. Under r. 12 the court has power to recall witnesses who have already

been examined. Also the court has power to examine witnesses immediately if they live outside the jurisdiction of the court or if he is going to travel on safari. On application by the party who needs such immediate examination, the opposing party should be given a notice of the examination and the examination must be in his presence for cross examination.

Ref. Case on appearance: MR. MOHAMED V. LARJI VISRAN AND CO. (1937) 4 eaca 1

In this case a plaint was filed the Defendant entered an appearance. On the day of hearing, the Defendant's advocate applied for an adjournment because the principal witness was sick. The issue was whether the court could grant it. The court rejected the advocate's application, thus he withdrew from the case. The court entered on ex parte judgment. On appeal the issue was whether there was an ex parte judgment.

The judge quoted MARHURJEE'S case that there was no ex parte decree. He distinguished an advocate duly instructed to proceed with the case and in which the advocate is not duly instructed e.g. only instructed to seek an adjournment in which case he can not be said to have entered an appearance. However if the advocate is duly instructed but seeks an adjournment on other grounds and withdraws from the case after an adjournment is referred, that is an appearance. Ref. 0. 9 r. 6 (ii).

ORDER 19 (AFFIDAVITS)

An affidavit is a written statement of sworn evidence. In civil proceedings, there are two ways of proving cases:-

(1) By oral evidence given on oath

(2) By way of written evidence which is sworn i.e. an affidavit. The distinction between the two is that whereas a witness who gives his evidence orally can be cross examined on application by the opposite party; **in written evidence there is no cross-examination although** the said witness who had written his evidence

can also be cross examined on application by the opposite party. Also whereas the **demonaour** of a witness who presents his evidence orally can be observed or examined by the court, the latter can not. Hence the evidential value of oral evidence is higher than the latter.

BASIC RULES RELATING TO DRAFTING OF AFFIDAVITS

(1) All affidavits **must be sworn in the first person singular** i.e. a witness can not swear an affidavit on hear say or on behalf of another. He must swear on facts which he knows.

(2) Affidavits are statements of evidence not pleadings nor are they submissions. Thus affidavits should not be argumentative and they should not seek to draw conclusions i.e. **they should be bare statements of facts.**

(3) All facts depend to an affidavit have **to be set up in consecutively numbered paragraphs** which should be separate.

(4) Where the facts which are deponed to on information **the source of information has to be disclosed.** The rationale is that when they **are in dispute the source of information can be summoned.** Likewise all facts which are deponed to on matters of belief have to be **supported by the grounds of the deponent's belief** in order to enable the court to question those grounds of the deponent's belief.

(5) The deponent has to **sign the affidavit** before a commissioner for oaths.

Rule 3:- says that affidavits shall be confined to such facts as the deponent is able to prove them. The rule implies that because affidavits are statement of sworn evidence, they are governed by the Evidence Act. Therefore the rules against hearsay apply oral evidence as well as affidavit.

However where affidavits are used in **inter locutory application i.e. those applications made in between the proceedings** and do not constitute the substance of the

proceedings. The rules of hearsay can be waived. **These applications are only intended to regulate the proceedings.**

WHERE AFFIDAVITS DO NOT COMPLY WITH PROVISIONS OF ORDER 19

The affidavit may be thrown out of court if the defects go to the root of the affidavit. However if striking out of some portions of the offending statement can cure the affidavit, then the court has power to cure it that way.

Ref. Cases:

- **PROJECT PLANNING CONSULTANTS LTD. V. TANZANIA AUDIT CORPORATION (1974) LRT. 10**

- **NBC V. M. S. DESAI (1969) HCD 206**

2.3 DEF judgment decree;

Judgment is the reasons grants of the court's decision plus the decree itself A decree constitutes of the decision of the court i.e. a formal expression of the decision of the court. The case of MANDANI/CUSE V. WILKINSON (1954) 21 E.A.C.A. 98 at page 102 the court said that **there can not be a decree unless the proceedings were a suit** – therefore a decree is a formal expression of the court's decision in a suit. That whereas as an in order there is a formal expression of the decision in a suit. That whereas as an in order there is a formal expression of the decision of the court in proceedings which are not a suit e.g. interlocutory proceedings, a decree must be in a suit **Whereas dicrees arise in suits, orders may arise in proceedings which are not suits.** An application to the Supreme Court was not a suit – it could not result into a decree but only in an order. Decrees and orders are actually exclusive.

A decree within the meaning of 5.3 can prima facie be passed only in a suit within the meaning of the same section. The courts adjudication in any other matter is an order unless the law provides that it shall be otherwise.

In Tanzania, the case has been supported by the case of SIKH SAW MILLS v.

MTWARA/MIKINDANI TOWN COUNCIL (1972) HCD 72. In Kenya, there is the case of RUNSULAN & CO. v. SODA WATER FACTORY (1934) 16 KLR 50.

Distinction between a judgment and a decree and an order applies to their respective consequences. A **judgment** gives no right but merely declares a right. What gives a right is a **decree** which can be executed.

NOTE: A judgment does not conclude a suit; it is the decree which conclusively determines the suit.

An order relates to interlocutory proceedings which are only intended to regulate the procedure; an order does not finally and conclusively determine the proceedings. **Also distinction between the three may be seen in the context of appeals.** One can not appeal against a judgment because it does not give a right. However, because the judgment must state the reasons for the rights granted, then it must be annexed to the memorandum of appeal.

Ref. Case: MTWARA/MIKINDANI'S case (supra). The judgment will show the appellate court the basis of the decision/decree. Appeal is from a decree.

S. 76 of the CPC provides for the general powers of appeal and relates mainly appeals from decrees; while S. 74 relates to **appeals** from orders s. 70 relates to appeals from decrees. The three sections down three points:-

(1) **Appeals from decrees is a matter of right**: Any person who is aggrieved by any decrees has a right to appeal. All decrees are appellable as of right. However as regards orders, not all of them are appellable as of right.

(2) **The general rule in respect of appeals from orders** is that an order is not appeallable as of right except under S. 74 and 0.40. The two of them give the impression that those orders which are appellable as of right are **those orders which are potentially capable of affecting the parties' rights.** But a simple interlocutory order can not be appellable as of right because it does not finally and conclusively determine the suit.

Orders like refusing to set aside exparte decree, or set aside a dismissal for default are potentially capable affecting the rights of the parties. Under s. 74 and 0. 40 these areas (orders) are appellable. However other orders like attachment of property for a judgment are not appellable as of right. This is a merely a procedural stop intended to guarantee the plaintiff that in case he wins the suit he will be able to execute the decree. OR orders to incarcerate the Defendant in a civil prison do not affect the rights of the parties and do not finally and concussively determine the suit.

When an order is not appellable as of right leave of the court to appeal against the order must be obtained. If it is refused, an appeal can not lie.

NOTE:

(1) An order is commonly known in Tanzania as a ruling. **The test of appealing against an order as of right is whether the order finally and inclusively determines the suit.**

(2) A ruling is technically equated to a judgment since it contains more things and as order i.e. it gives also the **reason for the order**. Its difference (order) from a ruling is that a ruling is the decision of the court not in a suit but in interlocutory proceedings. In other words a ruling is a statement of the reasons behind an order.

Under 0. 20 r. 1 and S. 96 of the CPC the court has a duty to write a judgment at the end of the hearing. The rule says that the court shall pronounce judgment at the end of the hearing or for another date on which it shall pronounce the judgment. The rule implies that the court may either pronounce the judgment at the end of the hearing or wait until it has written it.

PROCEDURE OF WRITING A JUDGMENT

The judgment has to be written under the personal supervision of the magistrate or a judge who heard the case. This is necessary because:-

(1) There are some **impressions** e.g. demeanour or momentary impressions in the course of the trial which may not be recorded but are important in appreciating the evidence.

(2) The magistrate or judge who heard the case will have the circumstances behind the case. Writing the judgment does not mean personal physical writing – he can dictate it. **The judgment has to be singed and dated by the trial magistrate or judge.** This is because, **once the judgment is dated and signed it can not be altered** – the element of **judgment is dated and signed it can not be altered** – the element of functus officio in writing a judgment.

This rule is intended to prevent possibilities of people who write judgment to change their minds. However there is an exception to this rule which is known as **the slip rule.**

Ref. Case:

TANGANYIKA HAULAGE LTD. V. CORETCO LTD. (1979) LRT. 45.

This case discussed the slip rule which provides that although judgment once dated and signed it can not be altered; the trial magistrate or judge can effect corrections to typographical errors. This rule is contacted under S. 96 of the CPC which provides that clerical or arithmetical errors in a judgment may at any time be corrected by the court either on its own motion or on application by either of the parties:

NOTE: The slip rule can not be applied to alter substance of the judgment once it is dated and signed.

S 20 r. 4 provides for the contents of the judgment and it identifies the elements of the judgment. S. 3 of the CPC defines what a judgment it says **"a judgment is a statement of reasons behind the court's decision and the decision itself. This definition is narrow.**

0. 20 r. 4 numerates contents of a judgment.

(1) It should contain the statement of the case which it state for summary of the Plaintiff's opening speech and Defendant's opening speech but together.

(2) It should contain the decision of the court. He says that the issues have been framed the decision of the court on every issue must be indicated.

(3) It should contain grounds for the decision. These are given by reviewing the evidence.

(4) Lastly, it should contain the orders which are given by the court. However every judge or magistrate has got his own style of writing a judgment that what matters is that the four points must appear in the judgment.

After a judgment, a decree has to be issued – r. 6. As a general rule a decree is a formal expression of the court's decision and therefore, it can not contradict the judgment. It has to contain the title of the suit, particulars of the claim and a statement of the reliefs – R. 6(1). Under R. 6 (3) the court has power to order in the decree that costs payable by one party should be set of by those which are payable by the other party. The decree must also be dated and signed by the judge or magistrate after being satisfied that it does not contradict the judgment.

In Kenya the law is clear as to who should extract the decree from the judgment. In Tanzania r. 6 is silent on this question.

S. 28 of the CPC relates to the duty of the court to pronounce judgment but is also silent on the question of drawing a decree. **In practice however it is the person who has been awarded the decree who is to extract the decree.** This means that having pronounced judgment the court will sit down and wait for the winner to draft the decree and send it to the court for signature and court seal. **If the winner does not draft the decree, he will have problems in appealing.** Though in practice a person who lost can not draw the decree himself, he may apply to the court for the winner to show because why the decree should not be drawn or the court itself will draw **the decree for the purposes of**

appeal. The application is made under S. 95. The loser will argue that the winner abuses the process of court by not drawing a decree in time.

The magistrate or judge who issues the judgment has the duty to sign and seal the decree. However r. S provides exceptions where the magistrate or judge who heard the case is unable to do it, the succeeding magistrate or judge can do it upon satisfying him that the decree is in accordance with the judgment. The rationale of the allowance is that there are no questions of fact in signing the decree. The records speak for themselves; it is a pure clerical job. It is easier to have correct interpretation of a judgment then drawing a decree then interpreting evidence.

NATURE OF DECREE IN PARTICULAR CASES

(a) **Decree For Recovery of Immovable Property:**

The decree has to contain such descriptions as it will be enough to identify the property. If it is in a registered land, then the decree should contain the title number issued under the Land Registration Ordinance Cap. 334. If it is a decree for delivery of property it should contain the amount of money.

(b) **Decrees for Payment of Money (Nomey Decrees)**

These can be satisfied in two ways:

(i) By paying the decretial amount fully in one installment.

(ii) By paying in installments determined either by the court or by the parties.

A money decree can contain either of the two directions. The court has power to order payment by installments. 0.20 r. 11 simply says that the court may, after sufficient reasons have been given, allow payment by installments. These sufficient reasons are not defined in the code or by case law. It depends on the particular facts of each case.

The decree should also indicate the nature of the installments e.g. in five equal monthly installments. Under R. 11(1) the court has also power to postpone the satisfaction of money decrees. **This postponement is different from stay of execution of decree pending appeal.** The rule does not define how the court can exercise them discretion.

The payment can be postponed on the application of the judgment debtor. This postponement is made at the instance of the court itself – r. 11 (1) but r. 11(2) of the instance of the judgment debtor. Under sub rule 1 the court must be given sufficient reasons for the postponement, but under sub rule 2 there is no need for sufficient reasons to be given – it only requires the judgment debtor to apply for it and the consent of the judgment creditor. When postponement is ordered under 0. 20 r. 11(1) the court has power to award interest – s. 29 of CPC. Interest should be 7% per annum or any other reasonable rate. R. 11 (2) – there are also provisions relating to interest. That rate is determined by the parties and not by the court.

(1) **Decrees of Possession and Hesne Profits:**

Provisions of 0. 20 r. 11 relates only to money decrees. When the court ordered postponement of a decree or payment by installments, the decree **itself remains intact. It is only the nature of payment that is affected.** 12 relates to decrees for possession and mesue profits. In a suit for occasion the court can issue 3 alternative decrees:-

(a) A decree for possession
(b) A decree for mesue profits

(c) A decree rents due.

(2) By any other method directed by the court. When payment into court is made, the judgment debtor is taken to have discharged his obligation under the decree provided that he has paid the necessary fees. It is upon the court to deliver the money to the judgment creditor. This it will do by issuing notice to the judgment creditor. However, sometimes the judgment Debtor may be willing to pay out of court or there could negotiations which could lead to adjustment of the decree or compromise of the decree in full satisfaction.

Where such agreement has been made, then it is the duty of the judgment creditor to inform the court that payment out of court has been made or any adjustment has been done. 0. 21 r. 2(1). When that report is made it is the duty of the court to record such payment or adjustment. Once recorded then it can be said that the judgment debtor is discharged. However if the judgment creditor does not discharge his duty under r. 2 (1) the judgment debtor may apply to the court for a notice to issue for the judgment creditor to show causes why payment should not be recorded. Under 0. 21 r. 2 (2) the judgment debtor will require the judgment creditor to show cause why payment should not be recorded. This procedure is intended to secure two purposes:-

(1) The requirement that a judgment creditor reports if a payment out of court or an adjustment for purposes of registration avoids the chances fraudulent judgment debtor from going to court and claim that he had paid the money.

If the judgment debtor could be allowed to go to the court to report the payment, this could invite fraud. When the judgment creditor goes to the court it is a sufficient admission.

(2) It is to prevent fraudulent judgment creditors from getting double payments. He could receive the money and not go to court hence not releasing judgment debtor who will then face the danger of execution of the decree against him. R. 2(3) is to the effect that if payment has not been recorded, then the judgment debtor can not be released. If there is no payment out of court, the decree is a decree

not for money.

The court has certain powers under the rule. It may inquire on future and past mesue profits and rents. Mesue profits are the profits which would have accrued to the party was he in possession. The court has power to award mesue profits for the past and future e.g. up to the time the suit or judgment or up to the time of title delivery.

As a result of the enquiry, the court will be in a position to pass a decree in accordance with the inquiry. The court in essence constitutes itself into an administrator of the deceased where the suit relates the deceased and pay debts. The court will deal with such estate as if it was the property of an insolvent person i.e. will pay debts on the basis of secured and unsecured creditor's r. 13.

R. 14 deals with pre-exception suit – these are not very common in Tanzania. They relate to land, especially free hold titles. They relate to the sale of land i.e. there could be a sale which has not been concluded e.g. buyer has not paid the purchase price and the seller files a suit to pre-empt the sale on the ground either that the sale should not proceed etc. The effect of the pre emption suit is the prevention of the sale and thus the person who is so prevented has to deposit the purchase money in court. The court will direct when payment should be made upon conclusion of the adjudication, the court shall, in the decree, apportion the claims – referred to as superior and inferior pre-emptor.

In the decree the court has power to award interest because a decree is a debt due (refer to r. 1). The interest should be 7% and in any case it should not exceed 12% per annum.

ORDER 21 (EXECUTION)

Every right has a remedy. In civil litigation the right is granted by the decree (i.e. by the courage of the decree). However, still there is no remedy. The remedy is found in the execution i.e. in the course of enforcement of the decree. Thus 0. 20. There are different methods of execution of decrees, depending on their nature.

Execution of Money Decrees:-

There are different ways of executing money decrees:

(1) By payment into the court, i.e. Defendant pays into the court the decretal amount.

Other Decrees:

The court which passed the decree has power to execute a decree. However there could be other courts which could have power to execute a decree i.e. transferee court. The High Court may send its decree to any court subordinate to it for execution and a court of a resident magistrate may send its decree to any other court which is within its territorial jurisdiction for purposes of execution. A court which is outside the jurisdiction for the purposes of execution may also be asked by the resident magistrate's court to execute the decree. RM's court in Dsm. For example may t4ransfer a decree to RM Rukwa who also could transfer it to there courts in that region for purposes of execution.

SS. 31 – 35 are substantive provisions dealing with execution of decree.
SS 33 – 37 provide for which courses are to execute decrees.

S. 33 provide that a decree may be executed by the court which passed it of by the court to which the decree is sent (transferee court). As a general rule it is the court which passed the decree which can execute it. But a decree holder can apply for transfer as per s. 34 of the CPC i.e.:-

(1) Where the property is outside the territorial limits of the court which passed the decree, the decree should be transferred to a court with territorial jurisdiction.

(2) Where judgment debtor does not have property in the territorial limits of the court which passed a decree but has property in another jurisdiction.

(3) Where the judgment debtor actually resides outside the territorial limits of the court which passed the decree.

The court has power to transfer for any other reason. Superior courts will tend to

transfer decrees to subordinate courts for execution. 0. 54 have to be read together with 0. 21 r. 3. According to 0. 20 r. 3 if a decree is sought to be executed against immovable property situated within the limits of 2 courts' jurisdiction any of the two courts can be used to execute the decree.

POWER AND DUTIES OF TRANSFEREE COURTS

S. 35 provides for duties of a transferee court. A transferee court has a duty to execute the decree as if it was its own decree and it has to certify if the executor is levied and if not to give reasons why – because it is this certification which will release the judgment debtor.

S. 36 provides for powers: - powers of a transferee court are to be as those of the court which passed the decree. There is a distinction between an ordinary transfer and a precept.

The ordinary transfer is secured under s. 34 and precept under s. 37. The distinction lies in the extent to which the transferee courts operate. Under s. 34 the transferee court has all powers as those of the court which passed the decree. When it is immovable property the judgment creditor has to apply to court to issue a precept in regard of immovable property to another court. The power of the transferee court is only to attach the precept to the property. The transferee court will only hold the property and will do nothing more.

The power to hear objections against the attachment etc. will remain with the court executing the decree. Precept is a request made on the application of a decree holder by a court executing the decree to another court that immovable property which is within the jurisdiction of this other court – be attached pending further orders. The court to which the precept is issued will only have the power to attach the property and once it is attached it has to wait for further directions from the court which executed the decree. The court which receives the precept is simply assisting the other court in executing the decree.

Once the property is attached in pursuance to the precept issued under s. 37 the duty of the court to which the precept is issued, will be to hold the property for a period not

exceeding 2 months and if no further order is issued by the court issuing the precept; then the attachment has to be revoked.

The proviso to s. 37 allows the extension of the period of attachment by the court executing the decree and therefore the court holding the property will have to continue holding it. Since attachment is a prelude to sale then the presumption is that within the two months there would be an order for sale.

NOTE:

For purposes of execution and transfer of decree the court of RM is above that of DM and therefore the High Court will always send a decree to the court of the RM which shall re-transfer it either to the court of DM or PC.

0. 21 r. 5 (procedure of transfer). The court transferring the decree has to do two things:

(1) It has to send the copy of the decree to the transferee court.

(2) Also it has to send a certificate showing the extend to which the decree has been satisfied or whether there have been adjustment and the extend of adjustment. This will enable the transferring court to know the extend of the decree which has to be executed.

After executing, the transferee court has to send a certificate of execution order for the issuing court to show this and if no execution to show this with reasons. This certificate will be conclusive proof of execution and the executing court will file it without any further need for proof r. 6.

HOW EXECUTION IS SECURED

NOTE: Judgment in any case only gives right. The power to realize a right comes from a decree and this power to realize a right is given by an execution order. **Therefore no execution can be done without a court order.** Any procedure which has to be taken at

the instance of the decree holder with the leave of the court. Under 0.21 r. 9 a party desiring an execution must make an application to the court.

MADOLE NDICHI vs. MAKONGORO NYARAJI (1968) HCD 28.

A decree holder had been given a decree. Before execution he learnt that the judgment debtor had transferred his animals to another place (to a friend) for safe keeping avoiding execution. The decree holder with his decree went and took the animals from the friend. He was sued and found liable because under 0.21 r. 9 one can not execute a decree without leave of the court. The fact that he knew of the fraud was not sufficient reason to skip leave of the court. Such execution can render one criminally liable in tort for trespass etc. The rule intends to prevent judgment creditors from executing decrees without leave of the court, hence there be breach of peace.

APPLICATION FOR EXECUTION

Under 0.21 r. 9 all applications for executions must be in writing save in respect of money decrees i.e. where there is a money decree and the judgment debtor is in court an oral application can be made by the judgment creditor to have him arrested and be put in a civil prison before a warrant is issued. The application has to be made immediately after the judgment. The purpose of putting him in prison is to restrain him pending the issue of a committal warrant. This procedure is only a short cut to the normal procedure. The application can be made in respect of money decrees because money decrees are ascertainable. In Tanzania there is a civil procedure form No. 10 for the application. R. 10 (2) provides that every application to the court has to contain the following:

(1) Title – which will comprise of the name of the court, the case number and the parties.
(2) The date on which the decree was passed.
(3) Because there is a possibility of stay of execution in case of appeal, the application has to indicate whether an appeal has been referred or not.
(4) Where there has been part payment or adjustment the extent of execution must accordingly be shown in the decree in order to enable the court to determine how much it is going to allow in execution.
(5) It must be indicated whether there were other executions and the outcome of

those execution.

There are several modes of executions:

(a) By attachment e.g. of property, salary, income, decree, a garnish order etc. The attachment of property may lead into sale.

(b) Arrest and imprisonment is another mode of execution.

(c) By an appointment of official receiver.

(d) By delivery of property.

The above are alternative means of execution supposing that an application was for an attachment and an attachment warrant had been issued together with an order for sale – but after sale, the proceeds are not enough or there was an attachment of salary and the judgment debtor resigned from his employment in which case the alternatives may be resorted to – to compel and judgment debtor to discharge his obligation under the decree. The court must be put in a position of assessing whether the former forms of execution had been fruitful – hence the requirements enumerated above. The court must decide whether issuing the order would be fruitful or futile.

(6) The application must also indicate the dicretal amount whether there have been a cross decree or not.

(7) The name of the party against whom execution is sought and the mode of execution desired. Where the decree is in favour of several judgment creditors and judgment creditor may apply for execution. The court may order for execution provided that it makes provisions for protection of the other creditors who did not apply for execution.

Where there are cross-decrees between the same parties the court may allow a set-off. This also relates to decrees between the same parties but in different suits. If the amount awarded to the application for execution is greater than the amount awarded to the Respondent, than execution would be ordered only in

respect of that amount which is more in respect of the amount in a lessor decree.

2 decrees any be executed simultaneously on receiving the application the court must check whether it conforms to the fore under r. 10. If not it may rehect it or order an amendment. If it does (i.e. conforms) the court will register and order an execution. The court does not have power **to refuse/reject executions Ref. case TWENSCHE OVERSEAS TRADING CO. (T) LTD. V. E. A. CYCLE CORP. (1968) HC. 27.**

In the above case it was ruled that the provisions of 0. 21 r. 15 (4) are mandatory i.e. once the court has before it a proper application for execution it has a duty to register and order execution.

0. 21 r. 15(4) and r. 19 should be read together. The court may on its discretion refuse an application. Under r. 19 the court was discretion to order execution against a person or his property. This rule refers to a situation where execution has already been ordered. That no execution can be ordered both against the person and his property.

ABETMENT OF SUITS (0. 22 (xxii)

This is in effect or it can happen in two ways:

(1) By death of a party in case the action does not survive.

(2) By insolvency.

As a general rule a suit does not abate if there is a survival of the suit. The right to sue is the right to obtain relief which was prayed for by the deceased. However a right to sue will abate when the right is personal – it does not survive – e.g. damages for defamation. The major question should be whether the relief sought could not be enjoyed or whether granting it could be nugatory. The principle is based on a Roman law doctrine which states, action personalis moritur cum persona. The doctrine means that for injuries to the person alone not affecting a property of any kind the remedy ceases upon the death of the door or the sufferer.

Example: Partnership – the right to sue survives, hence a suit will not abet until there is a last surviving partner.

There is a procedure which has to be followed when one of the parties dies and an action survives. An application has to be made to have the legal representatives joined

to the suit. If the party does not apply within limitation period, the defendant may apply for the suit to be dismissed. The party must apply to the court to have the fact on the death recorded. When a legal representative is joined in an action which has survived, he will have a right to defend himself plead, receive court processes etc.

INSOLVENCY

A party who has been declared a bankrupt can not sue or be sued. Where an official receiver has been appointed to look for the business of the bankrupt, the official receiver will have a right to sue on behalf of the insolvent party. However his right only relates to the business of the insolvent. Before being a party the official receiver must apply to the court to have his name substituted for that of the insolvent. If he fails to apply with the limitation period the suit abets.

SUMMARY

There can not be any abetment where the party dies after the hearing of arguments and before judgment. The reason is that on abetment can only occur if one party is not present. However if the abetment can only occur if one party is not present. However if the party before dying gives his arguments, the suit can not be abetted – as it will be a decision on merit. If he is found liable the estate will shoulder the burden. There is no abetment when a legal representative has already been recorded. The death of the un-necessary party does not affect the proceedings. If only one legal representative of the deceased is already on record, but other legal representatives are not sought to be brought on record, then the suit abets. In pleading, one or two of the legal representatives of the deceased Defendant is enough. The reason is that those legal representatives can adequately represent the estate of the deceased Defendant.

0.24 (xxiv)

0. 24 envisage a situation whereby the Plaintiff goes to the court and Defendant says “I am ready to pay” R. 1 of 0. 24 allow the Defendant to deposit in court the amount claimed. Thereafter the court will give the Plaintiff notice that the money had been paid.

Under r. 2 the court will require the Plaintiff to collect the money, it may be

The court may, when the Plaintiff accepts the money as part payment, proceed under r. 4 of 0. 24 to adjudicate over the balance. When the Plaintiff accepts the amount as being in full satisfaction under r. 4 (2) of 0. 24, the court has discretion as regards to costs, Payment through the court makes the parties avoid costs.

ORDER 25 (xxv)

R. 1 relates to security to costs and the Plaintiffs. Where the Plaintiff does not reside in Tanzania and does not own immovable property other than the property in dispute in Tanzania, the court may demand that he deposits a certain amount of money in court. The purpose is to prevent harassment of opposite party. Likewise where a party is permanently leaving Tanzania when an order to pay security for costs is made, but the party Plaintiff does not obey it the court will make an order dismissing the suit.

On dismissal of the suit for failure to pay costs, the party may apply to court to have dismissal be set aside. However the dismissal will not be set aside unless the Defendant has a right to be heard.

ORDER 26 (0.xxvi)

0. 26 relate to commissions there are four types of commissions:

(1) Commission to examine witnesses
(2) Commission to local investigation
(3) Commission to examine accounts
(4) Commission to make partitions.

(1) COMMISSION TO EXAMINE WITNESSES

Under O 26 r. 1 the court may examine witnesses who can not appear before the court. The witnesses are of two types.

(a) Those who are within the jurisdiction of the court but can not be compelled as they are protected by law e.g. diplomats. To know who is protected and who is not, one has to look at the law.

(b) Those who are outside of jurisdiction of the court – LEOPOLD WALFORD (ZAMBIA LTD.)V. A. G. HUNTER (1973) LRT.59. According to this case evidence should as far as possible be oral (viva voce). There are two kinds of evidence – written (affidavit) and oral. The other kind of

written evidence is by way of commission in which the principle of mediacy is departed from. So evidence by commission departs from the general rule that all evidence should be oral and given personally.

Application for commission may be made either by court's own money or either of the parties or a witness. The application must be supported by an affidavit which will contain facts which necessitate commission Powers of court 0. 26 r. 4. The court has the power to issue a …..Commission for a witness who is beyond territorial limits of it ….jurisdiction. It may also order commission for a witness who is about to leave its territorial limits. It has …… commission to military officer (security officer), who…may be prejudicial to state……all courts have power to issue commissions, but no court has power to issue …….High Court.

When a person to be examined lives outside Tanzania, the commission will be issued to the court of that country or a letter of request will be issued to a High Court of that country.

A person to which the commission is issued has to examine witnesses, record the evidence and return the records to the court which issued the commission. He may record his personal observation of demeanour of witnesses. Where is is possible, the witness will be given the day and time of examination and may be given a right to cross examination.

Evidence by commission should be sparingly applied by a trial court for it may lend to injustices. According to LEOPOLD V. WALFORD…..where….noted as follows, "The decision by a trial court to issue a commission or a letter of request is essentially an exercise of judicial discretion, and the applicant must satisfy the court that the evidence is necessary and secondly that there is good reasons why the person who is required to give it should not be required to do so at the trial. The ground of saving expenses can not override the importance of personal attendance of vital witnesses to the issues which are crucial to the proper determination of the case."

Important: Where a party did not have an opportunity to cross examine the opponent

during the commission, such evidence can not be read in court unless the parties are personally in court.

COMMISSION FOR LOCAL INVESTIGATION: 0.26 r. 9

The object of making local investigation is to assist the court to form an impression on certain points in dispute. For instance if the dispute is in respect of land, the court may be able to form an impression as to the boundaries state of the land etc.

The commissioner will write a report on the matter, such commissioner can not be examined by a party unless the party raises objections on some issues on the report. A party may also examine the commissioner for clarification. The report of the commissioner is part of the record of the court and therefore there is no need of examining the commissioner.

Where commission to make local investigation is issued, the court should as far as possible avoid the practice of issuing various or many commissions on the same subject matter as this may lead to conflicting

COMMISSIONS TO MAKE PARTITIONS

These commissions are issued in respect of suits relating to immovable property. The commission may be issued to one commissioner or to more than one commissioner. It is issued only where there is a preliminary decree in a suit relating to immovable property.

TWO STAGES:

(1) Preliminary decree – this preliminary decree will tell the parties of their rights to partition. Secondly, it will determine the shares. When one has a preliminary decree it does not mean that one proceeds to executing it immediately. The preliminary decree only determines the right. Preliminary decree can not be executed. What can be executed is the final or absolute decree. In partition case where there is a preliminary decree the court may issue a commission to one or more commissioners to make a partition. The commissioner(s) will have

powers to devide the property. The division could be physical or financial. If physical division is not practicable financial division can be made by way of sale of the property and share the proceeds. In addition the commissioner(s) may order monetary compensation to those who leave the property from those who remain in possession of it.

(2) After making a partition, a commissioner must write a report to the court showing if there is no objection forms the parties the court may then enter an absolute decree. If there is objection, the court may inquire as to how the partition was made and may then uphold the commission, quash it and substitute it with its own or alternatively order a fresh commission.

COMMISSION TO MAKE ACCOUNTS

The court has power, when it feels it necessary to do so, to issue commission to any person for the purpose of examining and adj usting accounts. For example, where a partnership is about to be dissolved, to be examined. Examination of accounts enable the which they otherwise do not have. The commissioner(s) must be given all necessary aid as will enable him to perform his duties. He must report the findings to the court.

GENERAL POINTS RELATING TO COMMISSIONS

(1) All commissions issued under the CPC ultimately are intended to enable the court to reach a proper conclusion. They do so by enabling the court to have the necessary information before it before making up its mind on a certain issue which is in dispute. Thus a commission to examine witnesses will enable the court to have evidence which will otherwise be not there if the procedure was not followed. Commissions enable the courts to have crucial evidence before it at a minimum expense. A commission to examine accounts will enable the court to have experts examining the accounts on its behalf thus it ensures that the court is properly advised before making a decision. Commissions enable the court to use experts and their knowledge which is otherwise non-existent in the court to decide on the modalities for partitioning before a decree for partitioning is made absolute.

(2) All commissions are intended to minimize costs of litigation.

(3) Any person appointed a commissioner under the CPC acts on behalf of the court and therefore for the purpose of the CPC a commissioner is regarded as a civil court, thus a commissioner may summon witnesses, he may demand the attendance of the parties – reluctant witnesses may be penalized as if they have disobeyed a summons of the court (r.17 (1) of 0. 26 refers). The summoning of witnesses must be made through the court. Thus although a commissioner is regarded as a civil court he is not entitled to issue court processes himself. Because he is regarded as a civil court, the commissioner has the following powers:

(a) To examine parties and their witnesses or any other person whose evidence he considers relevant.

(b) To examine documents or any other thing relevant to the suit.

(c) He has power to enter upon any premises at any reasonable time for the purpose of executing his commission – 0. 26 r. 16 refers.

(d) He has power to proceed with executing the commission in the absence of the parties if the parties have refused to appear before him – 0. 26 r. 18.

SUMMARY ON COMMISSIONS:

Commission to examine witnesses is a delegation of the powers of the trial court to another court or person who will act on behalf of the trial court under the circumstances outlined under o. 26.

The commissioner by virtue of s. 57 of the CPC will be acting for and on behalf of the trial court. Accordingly it will have all the powers of a trial court. These powers are as follows:

(a) To summon and hear witnesses

(b) To examine documents

(c) Power to record evidence

However its duty will not be to deal with the case on merits – its duty is restricted merely to that of taking evidence.

Case: PREMCHAND RAICHED v. SERVICES (1969) E.A. 514.

In this case the court observed that, "The basic principle is that so far as possible, all evidence in a suit should be taken viva voce before the trial court. Any one who seeks to

have evidence taken in any other way seeks to have evidence taken in any other way is seeking an indulgence from the court and must show good reason to justify the application."

N. B: See also Onyike's J. opinion in LEOPOLD v. WALFORD Case (above).

Orders are of two types: (1) Final and Conclusive Orders (2) Orders which are not final and are only meant to regulate procedure.

The first types of orders are what we call Decree. They are meant to determine rights of the parties and are made at the end of hearing. The second types of orders leave the status quo of parties intact. They are made not at the end of hearing but in the course of hearing. These orders are called interlocutory orders. Sections 68 and 69 of the CPC give courts powers to issue orders for the purposes of regulating procedure. S. 68 enumerate orders i.e.

(1) The court may issue a warrant of arrest or detention
(2) The court may issue an order of attachment of property before judgement.
(3) The court may issue an order to temporary injuction
(4) The court may appoint a receiver before the end of conclusion of the proceedings. S. 68 also explain the purpose of issuing those orders – which the purpose is to ensure that justice is done. Hence interlocutory orders are important for the purpose of regulating procedures only.

(I D M)
INSTITUTE OF DEVELOPMENT MANAGEMENT
MZUMBE
ORDER 33 – (xxxiii)…INTERPLEADER SUIT

Is a suit which is brought by a party who is in possession of a subject matter to which he is claiming no interest but none than the other persons are claiming interest to it.

The inter-pleader procedure is a procedure whereby a person with no interest in a thing intervenes and deposits the thing in court so that court may decide the rival claim about the ownership of the thing. The procedure is initiated by 0.33 r.1. Normally a person who holds property files a claim against the rival claim and he must file an affidavit that he

has no interest in the subject matter except the cost of holding the property and must satisfy the court that there are rival claims between the claimants and thirdly that there is no collusion between him and any of the defendants.

Upon the court being satisfied with regard to the above three conditions, it will discharge the person holding the property with assurance that he will give the property to the rightful owner. The court will have then to determine as to who will be the defendant and who the plaintiff is.

SUMMARY

Inter-pleader procedure is a procedure where by a person who has no interest in a particular thing but is in possession of it intervenes and deposits the thing in court, at the sometime there are two or more claimants. The court is asked to discharge him and decide on the rights of the parties. Inter-pleader suits are instituted by way of an originating summons where no suit is pending. The applicant must/satisfy the court as required under 1. Of o.33. He must also show willingness to transfer the property or to dispose of it in the manner deemed fit by the court.

The court has to make an order where there is no a pending as to whether there is a triable issue, and where there is, along the defendants is to be the plaintiff etc. The court may decide the suit summarily. If there is a pending suit, the court may substitute the right parties in the original suit and discharge the applicant if it is convinced that they are not liable.

If there is such liability the applicant may be a party so that the court may determine his liability.

Case: SARJOIN v. GAUTANA (1966) E.A. 338.

SPECIAL CASE OR BY WAY OF CASE STATED O.34 and S.65

0.34 r. 1 deals with the form and contents of the arguments which are to be subject of the case by way of special case R.(2) provides that the facts must be divided. R.2 provides that where the agreement relates to delivery of property the value of the property must be estimated in the arguments. R.3 provides that the agreement must be framed in accordance with rr. 1 and 2. Moreover r.3(2) provides that the agreement

must be numbered and registered. R.4 provides that parties to the agreement must be within the jurisdiction of the court. On the other hand R.5 provides for disposal of the agreement by the court. The same rule but sub rule 1 state that the court must be satisfied that

(a) An agreement had been executed

(b) The parties to that agreement have a bona fide interest

(c) That the agreement is a fit case to be decided by the court.

What is a "special case" then?

There are certain suits which are regarded as friendly suits. In such suits, …….the parties do not institute by presenting plaints – what parties say in effect is that they are interested in a decision be it of fact or law. To this end, they enter into a written agreement, stating such questions for the opinion of the court to such questions. The parties are saying that when the court had made its opinion on the question be it on law or fact, they will pay a certain sum of money to either of them to be determined by the court only……must provide in the agreement ……..some certain property…….will be delivered one party or the other. The……

to do or refra of from doing such particular acts must be speci……..in the agreement.

The agreement is then filed in court and the court in…….such agreement is filed must have jurisdiction to entertain ……is suit of the amount or value of the subject matter improved in agreement. After the agreement is filed, it must be registered……and numbered as a suit – r.3 (2) 0.34. Then notice must be …….to all parties by whom it was presented—0.34 r. 5. Unpon……satisfied on the three conditions (agreement duly executed …..fide interest and a fit case) then the court shall proceed ……pronounce judgement to be followed by a decree r.5(2). The…..effect of filing an agreement (as r.4) is that the parties…..be subject and bound to the jurisdiction of the court.

ORDER 35 (xxxv) – SUMMARY PROCEDURE

This is a situation whereby the plaintiff as of right entitled to judgement without the defendant as of right, being entitled to enter appearance.

The object or purpose of summary procedure is that a plaintiff who has a claim of liquidated sum should get judgement without further delay.

1) A suit upon a bill of exchange
2) A suit for recovery of income tax
3) A suit for any legal on……..

Under 0.363 of 1968 the CPC was amended by Amendment of the 1st Schedule (Rules). Under this amendment several other instances were included e.g. suits by TANESCO for recovery of meter rents and other claims connected with supply of electricity.

Another suit which can be brought under summary procedure is recovery of rent, debt, etc. due to the government or local authority. The purpose for summary procedure was stated in ZUMLA v RALLI …..LTD (1969) M. A. 691at page 694. The court ……"Order 35 is intended to enable the plaintiff with a liquidated

> Claim to which there is no defence to obtain a quick and a summary judgment without being unnecessarily kept from what is due to him by the delaying tastics of the defendant. If the judge to when the application is made considers that there is any reasonable ground of defence of the claim, the plaintiff is not entitled to summary judgement."

The procedure under which summary judgement can be asked from the court is provided for under 0.35 r.2 (1). When a plaintiff wants to institute a suit by summary procedure, he must file a suit in a normal manner endorsing it "summary procedure." A copy should be sent to the defendant. If the defendant thinks that he has a defence, he has to file an application by way of chamber summons accompanied by an affidavit and giving his defence. By his application, the defendant will be asking the court to allow him to appear and defend the case.

When the court receives the affidavit it has to consider whether the defendant has a defence. If it considers that the affidavit reveals sound defence which is maintainable, it will allow the applicant to defend the suit. The defendant has no automatic right to appear and defend the suit endorsed "summary procedure." He can only appear if his application is accepted in the court. If by in advance way or otherwise the zadefendants do not fill application to appear, the court will proceed to judgement. It should be noted that summary procedure does not negate other cardinal principles of justice e.g. the

principal that "no one should be condemned unheard." Hence if the affidavit discloses a defence the court must allow the application. The court should not ask itself whether or not the defence is true. The truth of the……..defence of the defendant will be considered in the hearing. In considering whether the affidavit discloses a defence, the court will ask itself whether the defence discloses triable issued i.e. contentious issues. Triable issues will arise when there is an allegation from one side and a good defence from the other side.

Case: HASSANI v. BANK OF BELGIUM (1938) EACA 89
KUNDANLAL RESTAURANT v. DEVSHI (1952) E.A.77

In HASSANI v. BANK OF BELGIUM; the court held that, "the test for determining whether the defendant has got good defence or ……is whether the facts as alleged by the defendant, if proved …….would in themselves be a good defence." This view was resitorate

In the case of KUNDANLAL RESTAURANT v. DEVSHI where the court said the rule is that a defendant who has a statable and arguable case must be given a leave to defend." The same was the view in the case of CHUMANTILAL and COMPANY v. ADAM (1952) 22 EACA 92 at page 93 where the court said, a defendant who has a statable and arguable defence must be given the opportunity to state it and argue it before the court. All the defendant has to show is that there is a definite triable issue of fact.

SANTOSH KUZAR v. MOOR SINGH (1958) C.R. 1211

Once the application to defend the suit has been filed when court has discretion to grant leave conditionally or unconditionally. Normally the court will grant leave to appear and defend unconditionally. It was held in this case that once it is found that there is a triable issue, leave should be given unconditionally. The test for determinating whether there was a real or sham defence is whether the facts alleged by the defendant are, if established, to a good defence. The court at this stage can not go further than that.

On the other hand, if the court finds, that the affidavit can not be said to disclose really triable issues, or if the court doubts the bone fide of the defence, then it may grant conditional leave to appear and defend. A conditional leave to appear and defend means

that the defendant would have to fulfill the given conditions e.g. depositing some money as security, or it may be that he should pay the costs of the suit whatever the outcome of the suit. This is provided under 0.35 r.3(2).

R.3 (1) (a) and (b) enumerates conditions upon which leave may be given.

It may be that a plaint discloses matters which fall under 0.35 (summary procedure) and matters which do not squarely fall under this order. In such a situation the court has two options:

(1) It may deal with only those matters falling rightly under 0.35 and leave the other matters to proceed in the normal way.

(2) To reject the plaint altogether.

Case: UGANDA TRANSPORT CO. LTD. v. COUNTY DE LA PASTURE (1954) 21 EACA 163.

The court held that there is clearly no discretion to allow many claim to be brought by summary procedure if is not precisely within the terms of 0.35 r. 1. If the suit is brought according to the above order and rule, the title of the suit must be summary procedure 0.35. This will inform the defendant that there is a suit pending against him of which he has no automatic right to appear and defend. Thus he has to apply for leave to appear and defend the suit within 10 days from when the summons was served to him.

If the defendant defaults, or if the defendant applies to appear and defend and the leave is not granted, it means that the plaintiff has a right to summary judgement. This is in accordance with 0.35 r. 2. If the leave ….. .and defend granted, then the suit ……procedure. It becomes summary procedure only if the defendant fail to file an application for leave to appear and defend or having applied to appear and defend, the application (not raising triable issues) is turned down – CHUTANTILAL – case above refers.

If the case does not fall strictly under 0.35 r. 1, the court can either allow amendment enabling plaintiff to strike out those matters not falling squarely under the above order and rule. Alternatively, the court may proceed with the issues which squarely fall under the order and leave the matters which are outside it to proceed in the normal way.

Case: E. N. CORNELL & CO. LTD. v. SHANTAGKARA DESH. (1936-51) 6 ULR. 603.

According to the case of KARACEORGELYS v. EMMANUEL HAURONDS (1993) 11 TLR 42, when there is an alternative relief to the plaintiff the suit can not fall under summary procedure. The CPC provides for instances when the experts procedure may be set aside.

Whereas in Tanzania the defendant's appearance is not automatic, it is automatic in Kenya. When the plaintiff applies by notice of motionq ` for summary judgement. The court will not ask itself whether defendant has filed his defence, but whether there is a case for which summary judgement has been made. The defendant has to file an affidavit resisting summary judgement. On the part of the plaintiff, he has to ask for summary judgement in the course of hearing the suit.

Summary judgment is for a debt or liquidated money with or without interest. It can also be for recovery of land. If the court is satisfied that the suit falls under the above subject matters, then it will go to issue summary judgement. Thereafter the case goes in the normal way. In Tanzania 0.35 must be read together with S.82(c) of CPC.

o.xxxxi. ORDER OF ARREST AND DETENTION BEFORE JUDGEMENT

It is found under 0.36 r. 1-5. Under s. 68 the court is given power, but the section does not prescribe the procedure of issuing such order. Procedure is found under 0.36. The warrant is issued only against the defendant, and it is issued by application of the plaintiff by way of chamber summons supported by an affidavit. R.1 of 0.36 provides that plaintiff must satisfy the court by affidavit