

Tanzania

Judicature and Application of Laws Act

High Court (Commercial Division) Procedure Rules, 2012 Government Notice 250 of 2012

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Tanzania

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Part I – Preliminary provisions

1. Citation

These rules may be cited as the High Court (Commercial Division) Procedure Rules, 2012.

2. Application

- (1) These Rules shall unless expressly provided otherwise apply to all commercial cases before the Court with lenience in application during the first year.
- (2) In the case of any *lacuna* in these Rules the provisions of the Code shall apply.

[Cap. 33]

3. Interpretation

In these Rules unless the context otherwise requires:—

“**Code**” means Civil Procedure Code Act;

[Cap. 33]

“**commercial case**” means a civil case involving a matter considered by the Court to be of commercial significance, including any claim or application arising out of a transaction of trade or commerce but not limited to:—

- (a) the formation of a business or commercial organization;
- (b) the management of a business or commercial organization;
- (d) the contractual relationship of a business or commercial organization with other bodies or person outside the business or commercial organization;

[Please note: numbering as in original.]

- (d) the liability of a business or commercial organization or official of the business or commercial organization arising out of its commercial or business activities;
- (e) the liabilities of a business or commercial person arising out of that person’s business or commercial activities;
- (f) banking and financial services;

- (g) the restructuring or payment of commercial debts by or to business or commercial organization or person;
- (h) the enforcement of arbitral award;
the enforcement of awards of a regional court or tribunal of competent jurisdiction made in accordance with a Treaty or Mutual Assistance arrangement to which the United Republic of Tanzania is a signatory and which forms part of the law of the United Republic;
- (i) admiralty proceedings; and
- (j) arbitration proceedings;

“**Court**” means the Commercial Division of the High Court of Tanzania referred to under rule 5 of these Rules;

“**judge in charge**” means the Judge in charge of the Court and any other judge acting in that capacity;

“**mediator**” shall be either a Judicial officer defined under the judiciary Administration Act, or any other law, or any such person appointed by the Chief Justice under the provisions of rule 9 subrule 1 of these Rules;

[Cap. 237]

“**Registrar**” means the Registrar of the Court and shall include Deputy Registrar and any person acting in that capacity;

“**witness statement**” means a statement given pursuant to rule 48 of these rules *in lieu* of examination in chief;

“**value of the commercial claim**” means the claim or value of the subject matter to which the claim relates.

4. Administration

The Court shall in administering these Rules, have due regard to the need to achieve substantive justice in a particular case.

Part II – Administrative provisions

5. Jurisdiction

- (1) These shall be a Commercial Division of the High Court of Tanzania vested with both original and appellate jurisdiction over commercial cases.
- (2) The Court shall have and exercise original jurisdiction in a commercial case in which the value of the claim shall be at least one hundred million shillings in case of proceedings for recovery of possession of immovable property and at least seventy million shillings in proceedings where subject matter is capable of being estimated at a money value.
- (3) The Commercial Division registry shall be at Dar es Salaam and at any other registry or registries as the Chief Justice may determine.

6. Court Users’ Committee

- (1) There shall be a Commercial Court Users’ Committee.
- (2) the Commercial Court Users Committee shall consist of:—
 - (a) the Judges of the Court;
 - (b) two advocates nominated by the Tanganyika Law Society;

- (c) two State Attorneys nominated by the Attorney General; and
 - (d) five other persons nominated by lawfully established organizations representing the business community.
- (3) The tenure of office of a member of the Commercial Court Users' Committee shall be three years renewable once.
- (4) A committee member may resign from his position by tendering a resignation notice to the judge in charge of the Court, who shall seek for replacement of the resigning member from the responsible authority.

7. Responsibility of the Commercial Court User's Committee

The Commercial Users Court Committee shall be responsible for advising the Court on matters of court practice and appointing persons who are knowledgeable in commercial case to serve as assessors.

8. Assessors remuneration

- (1) The assessors shall be remunerated or compensated in a manner determined by the Chief Justice upon recommendation of the Commercial Court Users' Committee.
- (2) The remuneration determined under sub-rule (1) shall be published in the *Gazette*.

9. Appointment and remuneration of mediators

- (1) The Chief Justice upon recommendation by the Commercial Court Users' Committee, may appoint persons with mediation skills to serve as mediators and the Registrar of the Court shall keep a Register of such appointed mediators.
- (2) The presiding Judge or Registrar may nominate a mediator from the list of mediators appointed under sub rule 1 of this rule.
- (3) The mediators shall be remunerated or compensated in a manner to be determined by the Chief Justice upon recommendation of the Commercial Court Users' Committee.
- (4) The remuneration determined under sub rule 3 shall be published in the *Gazette*.
- (5) The mediators shall, on first appointment, subscribe to the oath or affirmation in the form set out in the Second Schedule to this Act.

Part III – Institution of suits

10. Institution of proceedings

- (1) Proceedings in the Court shall, except in the case of proceedings which by these Rules or under any written law are required to be instituted by any specified mode of commencement, be instituted by plaint or by originating summons.
- (2) Proceedings:—
 - (a) in which the sole or principal question at issue is or is likely to be one of the construction of any written law or of any instrument made under any written law, or of any deed, contract or other document, or some other questions of law; or
 - (b) in which it is unlikely to be any substantial dispute of fact, unless the plaintiff intends in those proceedings to apply for judgement under Order XIV of the Code or for any other reason considers the proceedings more appropriate to be instituted by a plaint;may be instituted by way of originating summons.

11. Particulars of originating summons

Every originating summons shall contain the following particulars:—

- (a) the name of the Court in which the suit is brought;
- (b) the name, description and place of residence of the plaintiff;
- (c) the name, description and place of residence of the defendant, so far as they can be ascertained;
- (d) a statement of the questions on which the plaintiff seeks the determination or direction of the Court or as the case may be; and
- (e) a concise statement of the relief or remedy claimed in the proceedings with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.

12. Additional particulars to be contained in the plaint

- (1) Notwithstanding the provisions of rule 1 of Order VII of the Code, the plaintiff shall file, along with the plaint, the full address, including e-mail, fax and telephone number of a plaintiff and defendant or their advocates to the extent known to the plaintiff.
- (2) Without prejudice to the modes of service of summons provided by these Rules or any other law, the e-mail address and fax provided, may be used by the Court and the parties for effecting services and other necessary communication throughout the course of the suit.

13 Commercial Case Register

- (1) The Court shall cause to be maintained a register of cases to be known as the Commercial Case Register.
- (2) The Commercial Case Register shall be used for recording the cases instituted in the court together with particulars of cases as may be determined by the registrar.

14. Assignment of suits

The Judge in-charge of the Court or any other Judge acting in that capacity or the Registrar in the absence of any Judge shall, unless the circumstances do not permit, within a maximum of one day after the institution of a suit, cause it to be manually or electronically assigned to a specific Judge.

15. Summons to file a defence

Where a suit has been duly instituted, a summons may be issued to the defendant at the time when the suit is assigned to a specific Judge to file, in accordance with rule 19 of these Rules, a written statement of defence to the claim.

16. Signing of summons

A summons shall be signed manually or electronically by a Judge, Registrar or such officer as may be appointed by the Judge in charge for that purpose and be sealed with the seal of the Court.

17. Electronic substituted service

- (1) Notwithstanding the provisions of rules 9 to 33 of order V of the code, substituted services may be effected electronically by way of e-mail or facsimile using the addresses previously disclose and used between the parties in their business transaction.
- (2) A copy of such service shall be simultaneously copied to the Court.

- (3) For the avoidance of doubt, a sent status report shall be deemed as proof of service.

18. Presumption of service

Where service is not duly effected on a defendant but such defendant enters an appearance before the Court on the day he was supposed to appear according to the summons, the service shall be deemed to have been duly effected on him and to have been so served on the date on which he entered appearance.

19. Format of pleadings and other legal documents

- (1) The format of pleadings presented for filing to the Court shall be in paragraphs, "Times New Roman" font type, twelve font size, 1.5 line spacing and shall not be in more than ten pages.
- (2) Any pleading that does not conform to sub rule (1) shall be rejected.

20. Filing of defence

- (1) Where a summons has been served in accordance with rule 14 to the defendant and the defendant wishes to defend the suit, that defendant shall, within twenty-one days from the date of service of the summons file to the Court a written statement of defence.
- (2) A Judge or a Registrar, may, upon an application by the defendant before the expiry of the period provided for filing defence or within seven (7) days after expiry of that period showing good cause for failure to file such defence, extend time within which the defence has to be filed for another ten days and the ruling to that effect shall be delivered promptly.
- (3) The extended ten days under sub-rule (2) shall be counted from the date of the order of the court for extension of time.

21. Documents accompanying defence

Without prejudice to the provision of Order VIII of the Code, the provision of rule 10 shall apply *mutatis mutandis* on filing of written statement of defence.

22. Failure to file written statement of defence

- (1) Where any party required to file written statement of defence fails to do so within the specified period or where such period has been extended in accordance with sub rule (2) of rule 19, within the period of such extension, the Court shall upon proof of service and on application by the plaintiff in Form No. 1 set out in the Schedule to these Rules enter judgement in favour of the plaintiff.
- (2) The decree obtained under this rule shall not be executed unless:—
 - (a) the decree holder has, within the period of ten days from the date of judgment, published a copy of decree in at least two news papers of wide circulation in the country; and
 - (b) a period of twenty one days from the date of expiry of the period of ten days referred to under paragraph (a) has lapsed.

23. Setting aside a default judgment

- (1) Where a judgment has been entered in pursuant to Rule 22 the Court may, upon application made by the aggrieved party, within twenty-one days from the date of the judgment, set aside or vary such a judgment upon such terms as may be considered by the Court to be just.
- (2) In considering whether to set aside or vary the judgment under this rule, the Court shall consider whether the aggrieved party has:—
 - (a) applied to the court with the period specified under sub rule (1); and

- (b) given sufficient reasons for failing to file a defence.
- (3) Where judgment is set aside, the order shall be effective upon the aggrieved party or judgment debtor filing and serving a defence within the period specified by the Court.
- (4) Where the defendant fails to file a written statement of defence within the period specified by the Court pursuant to sub rule (3), the default judgment shall revive.
- (5) The judgment revived pursuant to sub rule (4) shall not be set aside.

24. Amendment of pleadings

- (1) The Court may, at any stage of the proceedings, allow the plaintiff or any party to the proceedings to amend the plaint or pleading, on such terms as to costs or otherwise as may be just and in such manner as it may direct.
- (2) Subject to sub-rule (1), any party to any proceedings may amend his pleading at any time before service to the other party without order of the court subject to payment of prescribed fees.
- (3) The Court's order of amendment under this rule shall be for the purpose of:—
 - (a) correcting any defect or error in any proceedings; or
 - (b) determining the real question in controversy or to achieve justice between the parties.
- (4) An amendment shall be made by filing a fair copy of the amended document, which shall indicate the amendment made, and serving a copy of the amended document on the other party or parties.
- (5) Where:—
 - (a) the amendment is ordered during the trial or hearing of any action or proceedings; or
 - (b) all parties are present when the amendment is made the Court may in its discretion, amend the document in the Court's file and service on the parties shall not be necessary.
- (6) The provisions of this rule shall apply *mutatis mutandis* to other pleadings and applications.

25. Admission and request for time to pay

- (1) A defendant who makes an admission of the claim referred to under Order XII of the Code may request for time to pay the amount admitted.
- (2) The defendant's request for time to pay shall be filed with his admission.
- (3) The defendant's request for time to pay shall be supported by a statement of his financial position including details of all his bank accounts.
- (4) The statement shall be verified on oath by the defendant as being correct and may be used as evidence of the defendant's financial position at the date it was signed in any subsequent proceedings with regard to the enforcement of any judgment given upon the plaintiff's claim.
- (5) For the purposes of this rule "request for time to pay" means a proposal by a party against whom a claim is made of a date of payment or a proposal to pay by installments at the rate specified in the request.

26. Procedure where time is not agreed

- (1) Upon the defendant filing an admission of the claim and request for time to pay, the Court shall enter judgment on the amount claimed and admitted.
- (2) Where the plaintiff does not accept the defendant's offer as to the time of payment, he shall state his reasons for rejecting the defendant's proposal as to the time of payment.

- (3) The Registrar shall consider the defendant's request for time to pay and the plaintiff's objection and make orders as to the installments payable and interest if claimed on such terms as he considers fit, provided that the aggrieved party may refer the matter to a judge whose decision shall not be appealable.

27. Consequences of failure to pay by installment

Upon failure by the defendant to make any of the installments which are due, the defendant's right to pay by installment shall be abrogated and the plaintiff and be entitled to execute the decree for the outstanding sum in full without further notice.

Part IV – Pre-trial and scheduling conference

28. Power to make and give directions for disposal of suits

- (1) The Court shall, within fourteen working days from the day of completion of pleadings, on its own motion direct any party or parties to the proceedings to appear before it, in order that the Court may make such order or give such direction in relation to any interim applications which the parties have filed or intend to file as it considers just, for the just, expeditious and economical disposal of the suit.
- (2) Where any party fails to comply with any order made or direction given by the Court under sub rule (1), the Court may dismiss the suit, strike out the defence or counterclaim or make such other order as it considers just.
- (3) The Court may, in exercising its powers under sub-rule (2), make such order as to costs as it considers just.
- (4) Any order or direction given or made against any party who does not appear before the Court when directed to do so under sub-rule (1), may be set aside or varied by the Court on such terms as it considers just.

29. Pre-trial conferences to be held when directed by the Court

- (1) Without prejudice to sub-rule (1) of rule 24, at any time before any case is tried; the Court may direct parties to attend a pre-trial conference relating to the matters arising in the suit or proceedings.
- (2) The Court may, at the pre-trial conference, consider any matter including the possibility of settlement of all or any of the issues in the suit or proceedings and require the parties to furnish the Court with any such information as it considers fit, and may give all such directions as it appears necessary or desirable for securing the just, expeditious and economical disposal of the suit or proceedings.
- (3) The court may, having made directions under this rule or rule 24, on its own motion or upon the application by any party, if any party defaults in complying with any such directions, dismiss such suit or proceedings or strike out the defence or counterclaim or enter judgment or make such order as it considers fit.
- (4) Any judgment or order made under sub-rule (3) may be set aside by the Court, on the application of the party against whom such judgment or orders was made, on such terms, as it considers just.
- (5) The Court may, at any time during the pre-trial conference where the parties are agreeable to a settlement of some or all of the matters in dispute in the suit or proceedings, enter judgment in the suit or proceedings or make such order to give effect to the settlement.

30. Notification of pre-trial conferences

- (1) Party to the proceedings shall be informed of the date and time appointed for the holding of the pre-trial conference in their presence or by way of a notice in Form No. 2 set out in the Schedule to these Rules.
- (2) Each party shall comply with any directions given *viva voce* or in such notice as the case may be.

31. Failure to appear of one or more of parties

- (1) Where at the time appointed for the pre-trial conference, one or more of the parties fails to attend, the Court may:—
 - (a) dismiss the suit or proceedings;
 - (b) strike out the defence or counterclaim;
 - (c) enter judgment;
 - (d) make such other order as it considers fit.
- (2) An Order made by the Court in the absence of a party concerned or affected by the order may be set aside by the Court, on the application of that party within fourteen days from date of the order, on such terms as it considers just.
- (3) Subsequent to the first adjournment, if all parties fails attend the pre-trial conference, the court shall dismiss the suit.

32. Speed track of case

- (1) Except for circumstances not provided for under these Rules, the provisions of Order VIII A and Order VIIIB of the Code shall not apply in determining speed track of commercial cases.
- (2) All commercial cases shall proceed and be determined within a period of ten months from the date of commencement, and not more than twelve months.
- (3) Thirty days before the expiry of the time prescribed under sub rule (2), any party to the proceedings may orally apply to the Court for extension of life span of the case, and the Court may upon sufficient reasons adduced grant the application and the party in favour of whom the extension is made shall bear the costs of such extension, unless the Court directs otherwise.

Part V – Court annexed mediation

33. Mediation

Where the suit is not settled or dismissed under the provisions or rules 28, 29 or 32 of these Rules, the Court shall direct the parties to submit to mediation and upon making such Order the Court shall appoint a mediator who shall, within seven (7) days of his appointment, set a date for the first session of mediation.

34. Attendance to mediation

- (1) The party or his advocate or both, where the parties are represented shall be notified in the form set out in Form No. 3 in the Schedule, and shall attend the mediation session.
- (2) Where a third party may be liable to satisfy all or part of a judgment in the suit or to indemnify or reimburse a party for money paid in satisfaction of all or part of a judgment in the suit, the third party or his advocate may also attend the mediation session, unless the Court orders otherwise.

35. Authority to settle

- (1) A party to a mediation session shall have authority to settle any matter during the mediation session.
- (2) A party who requires the approval of another person before agreeing to a settlement shall, before the mediation session, arrange to have ready means of communication to that other person throughout the session, whether it takes place during or after regular business hours.

36. Failure to attend

Where it is not practical to conduct a scheduled mediation session because a party fails without good cause to attend within the time appointed for the commencement of the session, the mediator may:—

- (a) dismiss the suit, if the non-complying party is a plaintiff, or strike out the defence, if the non-complying party is a defendant;
- (b) order a party to pay costs; or
- (c) make any other order that is deemed just.

37. Restoration of the suit dismissed for non appearance to mediation

- (1) Any party aggrieved by an order made by the mediator under Rule 36 of these Rules may, within seven days from the date of the order, file in Court an application in Form No. 4 set out in the Schedule to these Rules for restoration of a suit or a defence.
- (2) Upon the applicant showing good cause and establishing that fees and costs for restoration of mediation as provided by the High Court of Tanzania (Commercial Division Fees) Rules, 2012 have been fully paid, the mediator shall set aside orders made under rule 36 of these Rules and restore the suit or the defence and issue a notice for mediation, provided that such application shall be made within fourteen (14) days prescribed for mediation.

38. Purpose and nature of mediation

- (1) In conducting any mediation session under these Rules:—
 - (a) the parties shall strive to reduce cost and delay in litigation, and facilitate an early and fair resolution of disputes; and
 - (b) the mediator shall facilitate communication between or among the parties to the dispute in order to assist them in reaching a mutually acceptable resolution.
- (2) Without derogation from the generality of sub rule (1), the mediator:—
 - (a) shall, in an independent and impartial manner, do everything to facilitate parties to resolve their dispute;
 - (b) may, where necessary, conduct joint or separate meetings with the parties and may make a proposal for a settlement;
 - (c) may, where services of an expert may be obtained at no cost or where such services may be obtained at a cost, and if parties agree to pay such costs, obtain expert advice on a technical aspect of the dispute, which advice shall be given in an independent and impartial manner and it shall have advisory effect;
 - (d) shall be guided by principles of objectivity, fairness and natural justice, and shall give consideration to, among other things:—
 - (i) the rights and obligations of the parties;

- (ii) the usages of the trade concerned; and
 - (iii) the circumstances surrounding the dispute, including any previous business practices between the parties;
 - (e) may, at any stage of the mediation proceeding and in a manner that the mediator considers appropriate, take into account the wishes of the parties, including any request by either of the parties that the mediator shall hear oral statements for a speedy settlement of the dispute; and
 - (f) may, at any stage of the mediation proceedings, make proposals for the settlement of the dispute.
- (3) A request for the services of an expert under this rule may be made by the mediator with the consent of parties or by any party with the consent of the other party.

39. Confidentiality

All communications at a mediation session and the mediation notes and records of the mediator shall be deemed to be confidential and party to a mediation may not rely on the record of statement made at or any information obtained during the mediation as evidence in Court proceedings or any other subsequent settlement initiative, except in relation to proceedings brought by either party to vitiate the settlement agreement on the grounds of fraud.

40. Duration of mediation

A mediation period shall not exceed a period of fourteen days from the date of the first session of mediation.

41. End of mediation

A mediation shall come to an end when:—

- (a) the parties execute a settlement agreement;
- (b) the Mediator cancels a mediation session under rule 36 for non-compliance by any of the parties;
- (c) the Mediator, after consultation with the parties, makes a declaration to the effect that further mediation is not worthwhile; or
- (d) fourteen days expires from the date of the first session of mediation.

42. Failure to reach settlement by mediation

Where upon the conclusion of mediation no settlement agreement is reached, the suit shall revert to the trial judge who shall continue with the proceedings from the point when and at which the suit was referred for mediation.

Part VI – Appearance, hearing and examination of parties

43. Appearance and consequences of non appearance at trial

- (1) Appearance of parties and consequences of non appearance shall be regulated by the provision of Order IX of the Code.
- (2) Where the Court has entered an *ex parte* judgment or passed a dismissal order or any other order in accordance with Order IX of the Code, it shall be lawful for the Court, upon application being made by an aggrieved party within fourteen days from the date of the judgment or the order, to set aside or vary such judgment or order upon such terms as may be considered by the Court to be just.

44. Appearance of advocates before the Court

- (1) An advocate who appears in the Court shall be:—
 - (a) fully acquainted with facts of the case in relation to which he appears and fully authorized to enter into agreements, both substantive and procedural, on behalf of his client; and
 - (b) prepared to discuss any applications that have been submitted and remain outstanding.
- (2) Failure to comply with this rule shall cause the advocate on record to be condemned to pay costs, unless sufficient reasons are adduced.

45. Opening statement

- (1) The Court shall, at the commencement of the trial, invite a plaintiff or his advocate to make a short opening statement after which it shall call upon the defendant or his advocate to make a short opening statement.
- (2) Unless the presiding judge is of the view that the trial shall proceed more efficiently if advocates make submissions on points of law in opening, all legal arguments shall be reserved for closing submissions.

46. Adjournments

- (1) Where the hearing of the suit has commenced it shall be continued from day to day until all the witnesses in attendance have been examined.
- (2) Notwithstanding the provisions of sub rule (1), at any stage of the provided that:—
 - (a) the party orally or in writing applying for adjournment pays to the Court the fees for adjournment sought as provided by the Court Fee Rules whether or not condemned to pay costs for adjournment and unless the Court considers fit to wave the costs or fees considers fit to wave the costs or fees under this rule, the same shall be paid before the next hearing;
 - (b) no adjournment shall be granted at the request of a party, or parties except where the circumstances are beyond the control of the party or parties as the case may be;
 - (c) the fact that the advocate of a party is engaged in another court, shall not be a ground for adjournment unless that advocate is appearing before a superior court;
 - (d) where the illness of an advocate or his inability to conduct the case for any reason, other than his being engaged in another court, is put forward as a ground for adjournment, the court shall not grant adjournment unless it is satisfied that the party applying for adjournment could not have engaged another advocate in time; and
 - (e) in the event of an adjournment at the instance of the Court, the reasons for the adjournment shall be recorded and the Court shall endeavor to fix the hearing date within the shortest period possible but not more than thirty days.

47. Procedure where no application is made on suit adjourned *sine die*

Where the hearing of a suit has been adjourned generally, the Court shall, if no application is made within six months of the last adjournment, dismiss the suit.

48. Witness statement

- (1) A witness statement shall:—
 - (a) be made on oath or affirmation;
 - (b) contain the name, address and occupation of the witness;

- (c) so far as reasonably practicable, be in the intended witness's own words;
 - (d) sufficiently identify any documents to which the statement refers without repeating its contents unless this is necessary in order to identify the document;
 - (e) not include any matters of information or belief which are not admissible and where admissible, shall state the source of any matters of information or belief;
 - (f) neither contain lengthy quotation from documents nor engage in legal or other arguments;
 - (g) be dated and signed or otherwise authenticated by the intended witness;
 - (h) include a statement by the intended witness that he believes the statements of fact in it to be true, and
 - (i) be in numbered paragraphs.
- (2) The witness statement shall be substantially in the form prescribed in the Third Schedule of these Rules.

49. Witness statement of evidence in chief in suit commenced by plaintiff

- (1) In any proceedings commenced by plaintiff, evidence-in-chief shall be given by a statement on oath or affirmation.
- (2) The statement shall be filed within seven (7) days of the completion of mediation and served as directed by the court;

Provided that a party's obligation to serve a witness statement is independent of any other party's obligation to file and serve its respective statement.

50. Hearing of suit and power of court to control evidence

Notwithstanding the provisions of sub rule (1) of rule 48(1), the Court shall at the Final Pre-trial Conference determine the manner in which evidence is to be given at any trial or hearing by giving appropriate directions as to:—

- (a) the issues on which it requires evidence;
- (b) the way in which any matter is to be proved; and
- (c) which witness will be required for cross examination.

51. Assessors

- (1) Where the trial judge finds it necessary that the trial of a suit shall be conducted with the aid of assessors, the Court shall summon assessors from a list submitted to the Court by the Commercial Court users' Committee.
- (2) The Court assessors shall be required to declare any personal interest in a case in which he is to sit.
- (3) A trial of a suit with aid of assessors shall be conducted with not less than two assessors who shall be generally knowledgeable of the concerning the suit.
- (4) Where in the course of the trial one or more of the assessors is absent, the Court may proceed and conclude the trial with the remaining assessor or assessors.

52. Affidavit evidence in suits commenced by originating summons

- (1) In any cause or matter commenced by originating summons and on any application made by chamber summons, evidence shall be given by affidavit unless the Court otherwise directs.

- (2) The Court may, on the application of any party, order the attendance for cross-examination of the deponent of any such affidavit.
- (3) Where an order has been made under sub rule (2) of this rule, and the deponent in question does not attend, his affidavit shall not be used as evidence unless the court is satisfied that there are exceptional reasons for his failure to attend.
- (4) Where the Court admits an affidavit of a person who has failed to appear for cross examination, lesser weight shall be attached to such affidavit.

53. Striking out part or whole of the witness statement

During the hearing of the suit and upon an oral application by a party or *suo motu*. the Court may order that any inadmissible, scandalous, irrelevant or otherwise oppressive matter be struck out of any witness statement.

54. Fluency of witness in the language of the Court

- (1) The witness statement shall be recorded in the language of the court.
- (2) Without prejudice to the generality of sub rule (1) of this rule and where a witness is not sufficiently fluent in the language of the Court, the witness statement shall be in any language and a certified translation may be provided.
- (3) Where a witness is not fluent in the language of the Court, the cost of interpretation or translation during cross-examination shall be borne by a party seeking to rely on such a witness' statement.
- (4) Notwithstanding the provisions of sub rule (1), where a witness is not conversant with the language of the Court but can make himself understood and can understand written language of the Court, the statement need not be in his own words, provided that these matters are indicated in the statement itself. It must however be written so as to express as accurately as possible the substance of his evidence.

55. Consequences of failure to serve witness statement

Where a witness statement in respect of an intended witness is not served on the other party within the time prescribed by these Rules, the witness may not be summoned for cross examination unless with leave of the Court, in the absence of which lesser weight shall be accorded to such statement unless the other party elects not to have witness called for cross examination.

56. Cross examination

- (1) A party who intends to rely on a witness statement as evidence shall cause his witness to attend for cross-examination.
- (2) Where the witness fails to appear for cross examination, the Court shall strike out his statement from the record, unless the Court is satisfied that there are exceptional reasons for the witness's failure to appear.
- (3) Where the Court admits a witness statement of a witness who has failed to appear for cross examination, lesser weight shall be attached to such statement.

57. Use of witness statements for other purposes

Except as provided by this rule, a witness statement may be used only for the purpose of the proceeding in which it is served except where the witness gives consent in writing to some other use of it or the Court gives permission for some other use of the witness statement which has been put in evidence.

58. Evidence by video link

The Court may, on an application by a party, allow a witness to give evidence without being present in the courtroom, through a video link at the cost of the application.

59. Recording of evidence

- (1) An official record shall be made of every hearing and such record shall consist of the following:—
 - (a) in a hearing where an electronic recording system approved and managed by the Court or any other person appointed by the Court is used, the audio recording; and
 - (b) in a hearing where an electronic recording system is not used, the notes of hearing recorded in such manner as the Court may determine.
- (2) Any party may, in writing, request for a copy or a transcript of the official record of hearing upon payment of such fees as the Registrar may determine.
- (3) A request for a copy of an official record of hearing consisting of an electronic recording shall be made in writing.
- (4) The granting of the request shall be subject to approval of the Court if made by a person other than the parties to the suit.
- (5) The registrar may, in approving the request under sub rule (3), impose such conditions or make directions in relation to the release and use of the copy of the electronic record as he considers fit.

60. Certification of transcript

- (1) The Court shall, after the conclusion of the case and upon request of a party, produce an official transcript of the hearing to be provided to the parties simultaneously in soft copy at the parties' costs.
- (2) The parties shall proof read the transcript and make necessary corrections which shall be tracked or highlighted without altering the content of the proceedings.
- (3) The parties shall submit their corrected transcripts to the registrar and serve each other within a period of twenty one days from receipt of the Registrar's transcript.
- (4) Where any dispute arises as to the correctness of the transcripts verified by the parties, the aggrieved party shall notify the Registrar within a period of seven (7) days from receipt of the corrected transcript.
- (5) The Registrar shall upon receipt of notification under sub rule (4) or *suo motu* invite the parties to resolve any dispute by making reference to the official audio recording and his decision on such dispute shall be final.
- (6) On receipt of the corrected transcripts from the parties; or upon resolving any dispute in terms of sub rule (4), or upon failure to comply with sub rules (3) and (4), the registrar shall certify the authenticity of a transcript of the official record of hearing.

61. Prohibition of unauthorized audio recording

- (1) A person shall not make any electronic recording of any hearing without the approval of the Court.
- (2) A person who contravenes the provision of sub rule (1) commits an offence of contempt of court and shall, upon conviction be liable to imprisonment for a term not exceeding six months or a fine not exceeding three million shillings, or to both such fine and imprisonment.

62. Duration for which record is to be kept

Every official record of hearing shall be kept for a period of five years from the date of final determination of the case or if an appeal is preferred five years from the date of determination of the appeal.

63. Striking out an application and an affidavit without hearing

A Judge may without hearing the effected party:—

- (a) strike out an affidavit, counter affidavit or reply to counter affidavit which in his opinion contravenes any provision of the law currently in force, and shall subsequently notify the said party;
- (b) make any consequent order, including striking out the application, where he deems fit.

64. Skeleton written arguments

Submissions shall proceed orally, preceded by skeleton written arguments submitted to the trial judge at least three working days before the oral submissions, provided that failure to prepare skeleton submissions shall not be a ground for adjournment or seeking extension of time to file skeleton written arguments and the hearing shall proceed notwithstanding the failure to present such skeleton written arguments.

65. Time limit for submissions

- (1) Oral arguments in support of an application or in reply or a rejoinder shall not exceed twenty minutes for each party submitting, provided that the Court upon a request made prior to commencement of arguments and after taking into consideration the nature of the matter, may extend time within which to make arguments.
- (2) Notwithstanding the generality of sub rule (1), the parties or their advocates may with the consent of the Court file written submissions.
- (3) Where the Court grants leave to file written submissions, the same shall be filed within seven days:
—
 - (a) after the conclusion of the trial;
 - (b) from the date of the order requiring filing of such submissions, or such other period as the judge may direct;

Provided that time for filing and exchange of submissions, reply and rejoinder does not exceed a total of thirty days.

66. Preparation for submission

- (1) An advocate or a party to the proceedings after the closure of the defendant's case may apply for leave of the Court for time to prepare closing submissions, provided that the time allowed shall not exceed seven days or as the Court may consider fit.
- (2) Where the Parties or advocates are under an obligation or duty to file legal documents such as plaint or written statement of defence, or reply to the written statement of defence, originating or chamber summons, affidavit, written submissions or skeleton submission or any other documents shall conform to rule 18 and shall be filed in Court accompanied with electronic copies to the Court's official email addresses.

67. Judgment and decree

- (1) The Court shall, at the conclusion of hearing deliver judgment within a period of sixty days in case of a judgment or thirty days in case of ruling.
- (2) Where a judge fails to comply with the provisions of sub rule (1), he shall state in the Court record the reason for such failure.
- (3) Every judgment shall embody at the end a summary of the reliefs granted by the Court.

68. Summary judgment

Notwithstanding the provisions of Order XXXV of the code, the court may give summary judgment against a party on the whole of a claim or on a particular issue if it considers that:—

- (a) the plaintiff has no real prospect of succeeding on the claim or issue; or
- (b) the defendant has no real prospect of successfully defending the claim or issue; or
- (c) there is no other reason why the case or issue shall be disposed of at a trial.

Part VII – Appeals**69. Appeal from subordinate Court**

- (1) An appeal against the decision of the subordinate Court on a commercial case may be made to the Court.
- (2) Appeal shall be made by giving a notice of appeal in Form No. 5 set out in the Schedule.
- (3) An appellant may appeal against the whole or any part of a decision.
- (4) A notice of appeal shall be filed within fourteen days from the day on which the decision was pronounced, and shall state whether the whole or part, and what part of the decision is appealed against.
- (5) The Court appealed from shall, upon receipt of the notice of appeal and upon payment of the prescribed fee, supply to the appellant a certified copy of the proceedings, a copy of the judgment and decree.
- (6) As soon as the certified copies are ready, the Court shall notify the appellant and respondent in Forms No. 6 set out in the Schedule respectively.

70. Lodging memorandum of appeal

- (1) The appellant shall, within thirty days from the date of receipt of the notification issued under rule 68 unless the Court otherwise orders, lodge in the Court a memorandum of appeal containing grounds of appeal.
- (2) The memorandum of appeal shall be accompanied with a copy of a decree and judgment appealed against.
- (3) Every ground of appeal shall state briefly the substance of the judgment appealed against and shall contain definite particulars of the point of law or fact in respect of which the appeal is made and, except with leave of the Court, the appellant shall not be permitted on the hearing of the appeal to rely on any ground other than those set out in the grounds of appeal.
- (4) The appellant shall within the period limited for the filing of the memorandum of appeal together with copies of the relevant documents to each party which has been served with the notice of appeal.

71. Order of addresses

The Court shall, at the hearing of an application or appeal, hear first the applicant or appellants, then the respondent and then the applicant or appellants in reply.

72. Cross appeal

- (1) At the hearing of an appeal where notice of a cross appeal has been given, the Court will ordinarily hear the appellant first on the appeal, then the respondent on the appeal and on the cross appeal, then the appellant in reply on the appeal and on the cross-appeal and finally the respondent in reply on the cross-appeal.
- (2) The Court may dismiss the cross appeal but shall not allow any preliminary objection, application, appeal or cross appeal without calling on the opposing party.
- (3) The provisions of this Rule shall apply where notice of grounds for affirming the decision has been given, in the same way in all respects as where notice of cross appeal has been given.
- (4) The notice of cross appeal referred to under sub rule (1) shall be in the form set out in Form No. 7 in the Schedule to these Rules.

Part VIII – General provisions**73. Powers of registrars**

In addition to the provision of Order XLIII of the Code, and rule 10 of the High Court Registry Rules, the Registrar of the Court in the proceedings before the Court may conduct mediation under Part IV of these Rules.

[GN. No. 96 of 2005]

74. Consequences of a defective affidavit

- (1) Where the Registrar is of the opinion that an affidavit in support of an application or a counter affidavit contravenes Order XIX of the Code and section 8 of the Notaries Public and Commissioners for Oaths Act, he may reject the application or the counter affidavit and notify the relevant party or parties.

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- (2) Notwithstanding the provision of sub rule (1), the affidavit or counter affidavit shall not be deemed defective unless:—
 - (a) it is not signed by the deponent;
 - (b) it is not completed and signed by the person before whom the affidavit was sworn or affirmed;
 - (c) it does not contain the full name, address and qualification of the person before whom it was sworn or affirmed; or
 - (d) it does not contain a declaration/verification or contains a defective declaration/verification.

75. Amendment of judgment, ruling or order

The clerical or arithmetical mistakes in judgments, ruling, decrees or orders, or errors, arising therein from any accidental slip or omission may, at any time, be corrected by the court either of its own motion or upon request of any of the parties.

76. Revocation and savings

- (1) Rules 5A, 5B and 5C of the High Court Registry Rules are hereby revoked.
- (2) Notwithstanding sub-rule (1), any proceedings, orders, decision or anything lawfully made or done under the revoked rules shall continue and be deemed to have been made under these Rules.

[GN. No. 96 of 2005]

First Schedule (made under rules 21(1), 26(1), 30(1), 68(2), (6), 69(6) and 72(4))**Forms**

[Editorial note: The forms have not been reproduced.]

Second Schedule (made under Rule 9(5))**Oath of a Mediator**

I, _____ having been appointed as Mediator for the Commercial Division of the High Court, do hereby swear/affirm/declare that I will freely and without fear or favour, affection or ill-will, discharge the functions of a mediator, and that I will not directly or indirectly reveal any matters relating to such functions to any unauthorized person or otherwise than in the course of duty.

SO HELP ME GOD

Sworn/affirmed/declared before _____ this _____ day of _____ 20_____

Third Schedule**Form**

[Editorial note: The form has not been reproduced.]