

## ANALYSIS OF RESOLUTION OF CLIENT - ADVOCATE DISPUTES UNDER THE TANZANIAN ADVOCATES ACT

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### **Abstract**

*The nature of client-advocate relationship in most cases present difficulties in resolving disputes arising out of this relationship. The difficulty is caused by the nature of services offered by advocates and information asymmetry between the two parties. Client – advocate disputes hinge on six core duties of an advocate. These are litigation fairness, loyalty, confidentiality, reasonable fee, public service and competence. It is revealed in this article that clients have always suffered at the hands of their advocates. On one hand, it is revealed that in resolution of client-advocate disputes the Advocates Committee operates in a situation where there are no rules of accountability, expediency, expedited procedure, neutrality and impartiality. On the other hand, courts (judges) have in many cases declined to take action against advocates who commit misconducts before them. It is concluded that although the Advocates Act provides for the resolution of client-advocate disputes, it is inadequate in several aspects. It is recommended that over and above other initiatives being made to improve delivery of legal services to clients and the general public, the Act needs to be amended to provide for among others simplified procedures of resolving client-advocate disputes; there should also be adequate remedies to a complainant who successfully proves his complaint against the advocate. Finally, courts should deal with advocates' discipline according to profession laws of order and conduct.*

**Key words:** *Advocates Act, Client-Advocate Disputes, Advocates Committee, Consumer, Court.*

### **1.1 Introduction**

The Client-Advocate relationship presents challenges in enforcement of the laws governing the legal profession and in resolving consumer disputes in particular.<sup>1</sup> The challenges are due to difficulties in determining and drawing a line on what constitutes client-advocate relationship and what falls outside the said relationship.<sup>2</sup> Furthermore, there are challenges relating to multiplicity of organs

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See Cohen M., "Entering into Business Transactions with Clients is Full Potential Conflicts' *Oregon State Bar Bulletin*, December, 1993, p.29; Pearce R., "The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar," *70 N.Y.U Law Review*, 1995, p.1229 and; Perillo J., "The Law of Lawyers' Contracts is Different," *Fordham Law Review*, vol.67, 1998,443 available at <http://ir.lawnet.fordham.edu/flr/vol67/iss2/8>, accessed on30/3/2015; Hazard G., "The Future of Legal Ethics," *Yale Law Journal* volume 100, 1990, p. 1239 available at <http://digitalcommons.law.yale.edu/fss-papers> accessed on12/3/2015.

2 In many jurisdiction including England where the Tanzania legal profession claims its origin, there has been difficulties in resolving consumer disputes. In some situations where clients have lodged cases against their lawyers in courts, Common Law Court have refused to recognise the existence to client – lawyer relationship. For a detailed discussion on the English Legal System see, Martin, J., *The English Legal System*, Hodder Education, London, 2010; Kerridge R. and Davis G., "Reform of the Legal Profession: An Alternative Way Ahead," *Macmillan Law Review*, vol. 62, 1999, p. 807 and; Perillo J., "The Law of Lawyers' Contract is Different," *Fordham Law Review Journal*, vol.67, Issue 2, 1998, p.479.

vested with powers to deal with and resolve consumer disputes.<sup>3</sup>

This article presents an analysis of resolution of consumer disputes. The analysis is based on the principles of consumer protection law. For that matter, the article adopts and uses the words “client” and “consumer” interchangeably. It starts a theory/assumption relating to legal services, it proceeds with a general description of resolution of consumer disputes; institutional framework for resolving disputes between a client and his advocate; the law, practice and procedure of resolving consumer disputes and; analysis of the law and procedure relating to resolution of client-advocate disputes.

### 1.2 Nature of Legal Services: Theories and Assumptions

Legal services in the world are considered to fall under the category of credence services. Credence service is a service whose qualities cannot be evaluated by a consumer even after consumption but has perceived value.<sup>4</sup> In credence services the consumer can neither evaluate the skills of a service provider nor dictate the type and qualities of the service. In most cases, it is the service provider who decides for the consumer. Writing on the credence nature of legal services, Harris states that “professional-client relationship is one based on *power*. The professional has what the client needs: he or she defines the manner in which the service is to be given and, equally importantly, defines the very nature of the client’s problem. Typically, the client cannot argue that the professional’s opinion or advice is wrong, inaccurate or inappropriate, for it is usually acknowledged by the client that the professional knows best what is in the client’s interests.”<sup>5</sup>

It is common, for instance, when a consumer engages an advocate to pursue a claim for trespass to property, it is an advocate who decides on the way to approach the court. He also decides on the sequence of claims to the court (i.e. proceed by way of a plaint or ordinary application; pray for either injunctive orders or any other relief). Over and above, the consumer cannot evaluate the skill and ability of that advocate to pursue that claim. All these are governed by utility theory. The theory is to the effect that where the consumer is unable to assess the qualities of a particular service, he relies on external factors (such as price, advertisement, guarantee etc) in making purchasing decision.<sup>6</sup> By theory these external factors do not necessarily guarantee a consumer of the presence of the qualities he prefers.<sup>7</sup>

3 The challenges relate to cooperation and coordination of these organs. For a detailed discussion on measures to be taken in order to resolve the challenges relating to multiplicity of organs vested with concurrent jurisdiction of protecting consumers see, Miller D., “Competition and Consumer Protection: The Relationship in Practice in Jamaica” 5th IDRC PRE-INC Forum on Competition and Development, cited by Tessema S., “A Critical Analysis of the Enforcement Framework of Consumer Protection in Ethiopia: Challenges and Prospects” LL.M (Commercial Law) Thesis, University of Addis Ababa, 2011, p.20.

4 Kathleen M. & Andrew P., “Consumer Information Search and Credence Services: Implication for Service Providers,” *Journal of Service Marketing*, vol. 27, Issue 1, 2013, pp. 49-58.

5 Harris P., *An Introduction to Law*, 6<sup>th</sup> edition, Butterworths, London, 2002, p.439.

6 Rehavi M., & Johnson, E., “Physicians Treating Physicians: Information and Incentives in Childbirth,” 2013, Retrieved from <http://papers.ssrn.com/abstract=2295856>.

7 Dulleck U., Kerschbamer R, & Sutter M., “The Economics of Credence Goods: An Experiment on the Role of Liability, Verifiability, Reputation, and Competition,” *The American Economic Review*, 101(2), 2011b 526–555. Retrieved from <http://www.ingentaconnect.com/content/aea/aer/2011/00000101/00000002/art00004>.

There are several assumptions governing credence services such as legal services.<sup>8</sup> Information asymmetry and necessity of legal services are the basic assumptions. The current approach is that in order to offer adequate protection to a consumer, consumer markets in collaboration with other stakeholders should produce adequate information that enables a consumer to make a rational purchasing decision. The expected information should relate to price, quality, safety, risks and availability of alternative services in the market. This assumption does not hold water in supply of legal services. There are restrictive and prohibitive rules on advertisement and self promotion by advocates.<sup>9</sup> Advocates possess more information on brands of legal services than consumers do. As a result, consumers are overcharged, subjected to fraud practices and receive services of poor quality.<sup>10</sup>

An assumption of necessity is not common in consumer protection law. It is a developing assumption which has not captured much attention of authors. This assumption is common in criminal and contract law. While in criminal law, it is a defense to criminal liability especially murder charges; in contract law, it is a critical factor for reimbursement to a person who has supplied necessities of life to minors.<sup>11</sup> Generally, legal services is a necessary and has no substitution. Every person is presumed to be a consumer of legal services. All aspects of life be it business, politics, marriage, inheritance, travel/trips, national and international relations, sports, neighbourhood and others involve legal aspects. The role of legal services and advocates in the development of a society is paramount. Dias & Paul have the following to say on the relationship between law and other development processes;

There is a relationship between legal development and professional development... Political leaders as different as Haile Selassie and Julius Nyerere spoke of the importance of lawyers. And so of course did professional leaders and educators. Two roles of lawyers are emphasized: the establishment of "rule of law" and the creative use of law as an "instrument of development".<sup>12</sup>

The other famous writer Friedmann writes on the role of the lawyer and demand for legal services. He writes as follows;

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- 8 Other assumptions relating to credence services and goods as well are presence of perfect and fair competition among traders and; presence of market forces that ensure majority and equal participation in the market process. All these are governed by a theory of free market economy.
- 9 See rule 4 and 5 of the Rules of Professional Conduct and Etiquette of the Tanganyika Law Society. See also section 47 of the Advocates Act, Cap. 341, [R.E. 2002]
- 10 Mugyabuso E., "Protection of Legal Services Consumers in Tanzania: an Examination of the Law," *LST Law Review*, vol. 2, Issue 1, 2017, p.28 at pp.32-33.
- 11 Nditi N., *General Principles of Contract Law in East Africa*, 1<sup>st</sup> edition, Dar es Salaam University Press, Dar es Salaam, 2009, p. 34
- 12 Dias C., & Paul J., "Lawyers, Legal Professions, Modernization and Development" in Dias C., et alia. (eds.) *Lawyers in the Third World: Comparative and Developmental Perspectives*, Uppsala Offset Center, AB, Uppsala, 1981, p.11 at p.14.

The contemporary lawyer... in the developing nations must become an active and responsible participant in development plans. An ever increasing... part of the work of the lawyer is neither litigation nor the resolution of disputes. It lies in the scope and formulation of policies, in the exercise of legal powers constructively enabling or altering the relations between private legal parties *inter se*, between public authorities and private parties, between governments and foreign investors, and the like... In all these questions the lawyer must play an important, often decisive part. It is he who must draft the necessary legislation, or the complex international agreements, it is he who will usually be the principal or one of the principal representatives of his country in international negotiations... It would be as artificial as it would be wasteful of the still desperately scarce trained manpower resources of developing countries to believe that the lawyer should or could confine himself to strictly legal issues.<sup>13</sup>

Theories and assumptions relating to legal services should shape the systems responsible with resolution of consumer disputes. Rules, procedures, techniques and the general principles of resolution of consumer disputes should take into account weak position of consumers in the market in terms of lack of inadequate information to make rational purchasing decisions. They should also take into account of other market forces that operate in favour of suppliers of services.

### 1.3 General Description of Resolution of Consumer Disputes

Resolution of consumer dispute is very critical and important in ensuring that markets are not only operating in accordance with the principles of free market economy, but also that they operate on fair and respectable manner that fosters public trust and participation in building the economy.<sup>14</sup> The principles of resolving consumer disputes are usually based on policy objective that aim at making markets an inclusive system that strengthens economic growth.<sup>15</sup>

Resolution of consumer disputes is not a simple task.<sup>16</sup> Suppliers are in the better position of either defending themselves by employing competent lawyers or; manipulating the dispute resolution systems so that the decisions are made in their favour.<sup>17</sup> Over and above, the dispute resolution systems and mechanisms

13 Quoted from Dias C., & Paul J., "Lawyers, Legal Professions, Modernization and Development" in Dias C., et alia., (eds.) *ibid*, p.11 at p.15.

14 For a specific description of a term "dispute" more especially in relation to employment see Tutinwa B., "Dispute Resolution" in Rutinwa B., et alia., *the New Employment and Labour Relations Law in Tanzania: An Analysis of Labour Legislation in Tanzania*, University of Dar es Salaam School of Law, Dar es Salaam, p. 151.

15 For a detailed discussion on the resolution of disputes in the markets see Ellison J., et alia, *Business Law*, third edition, Business Education Publishers Ltd, London, 1994, p.53.

16 The resolution of consumer disputes is affected by a number of factors such as ability of the consumer to defend his claim, efficiency of the courts/quasi judicial tribunals in resolving the consumer disputes, availability of legal aid schemes to consumers, complexity of the laws and procedures, and enforcement of decisions and awards. For a detailed discussion on these and other factors see Ellison J., et alia, *Business Law, ibid.*, pp.403-488.

17 For a detailed discussion on the advantages that suppliers have over consumers and the rationale for consumer protection see Ruhl G., "Consumer Protection in Choice of Law," *Cornell International Law Journal*, vol.44, 2011, p.569 at p.571; Gillian K., et alia "Information-Based Principles for Rethinking Consumer Protection Policy," *Journal of Consumer Policy*, vol. 21, 1998, p. 131 at pp.133-134; George L., et alia "A Theory of a Consumer Product Warranty," *Yale Law Journal*, vol.90, 1981, p.1297; Stefan H., "An Economic Analysis of Consumer Protection in Contract Law," *Germany Law Journal*, vol.4, 2003, p.1137.

are in most cases operated on technicality basis, poorly equipped with both manpower and physical resources and; characterized by bureaucratic tendencies and traditions.<sup>18</sup> All these have an impact on the efficiency of the mechanisms of resolving consumer disputes. In order to minimize the impact of deficiencies inherent in consumer dispute resolution systems some scholars have developed some requisite propositions for an effective dispute resolution system.<sup>19</sup> These propositions are described as hereunder

### 1.3.1 Early Identification of Issues

Disputes between consumers and suppliers arise at various stages depending on the nature and terms of the transaction. For instance; a dispute between the bank and the consumer of bank services; i.e., financial services arise when the bank, as the supplier of services, fails to honour the consumer's instructions. The dispute may also arise where a bank discloses confidential information of the consumer. Where a consumer of bank services has been advanced with a loan, a dispute between him and the bank may arise either where he fails to pay the instalments in accordance with the schedule of payment or; where the consumer does anything which affects the status and ownership of the property which is a subject of security for a loan.<sup>20</sup>

Consumers play a vital role in economic development. Though their position is weak; they are the biggest group in any market. Above all, they constitute a group of taxpayers. So, in order to keep the economy vibrant; when a dispute arises between the consumer and the supplier, it is often desirable that at early stage issues that are contested are clearly identified so that no time is wasted in dealing with unfocussed issues. The objective is to foster a high level of disclosure of relevant information that will encourage an informed discussion between the parties. Mutual trust and an informed discussion facilitate the parties to place "all cards on the table." Suspicion of each other is the first communication inhibitor

18 Caldeira J., "The Rule of Law and Independence of the Mozambican Judiciary," *Journal of Tanganyika Law Society*, vol.1, Issue No.3, 2007, p.93; Finnegan D., "Judicial Reform and Commercial Justice: The Experience of Tanzania's Commercial Court" Background Paper Prepared for the World Development Report, 2005; Jayawickrama N., "The Bangalore Principles of Judicial Conduct" in Peter M and K. Hellen (eds) *Law and Justice in Tanzania: Quarter of a Century of the Court of Appeal*, Mkuki na Nyota Publishers, DSM, 2007, p. 265; Karume, A., "The Courts of Law Should be Impartial and Fair Institutions," in Peter M and K. Hellen (eds) *Law and Justice in Tanzania: Quarter of a Century of the Court of Appeal*, Mkuki na Nyota Publishers, DSM, 2007, p. 43; Mkapa W. "The Legal System should be more Accessible to More Tanzanians," in Peter M and K. Hellen (eds) *Law and Justice in Tanzania: Quarter of a Century of the Court of Appeal*, Mkuki na Nyota Publishers, DSM, 2007, p. 33 and; Mwapachu H., "The Need to Promote Community Participation in Improvement of Legal Services," in Peter M and K. Hellen (eds) *Law and Justice in Tanzania: Quarter of a Century of the Court of Appeal*, Mkuki na Nyota Publishers, DSM, 2007, p. 49.

19 Hunderson J., "Judicial Review of Manufacturers' Conscious Design Choices: the Limits of Adjudication," *Columbia Law Review*, Vol.73 Issue No.8, 1974, p. 1531. Available at <http://scholarship.law.cornell.edu/facpub> accessed on 12th September, 2015. Luoga F., "Resolution of Tax Disputes: A Brief Review of the Law in Tanzania"; a paper prepared for submission by a Tax Appeals Tribunal to an East African Conference, 2015, p.2. See also Yusoff S. et alia "Legal Approach to Unfair Consumer Terms in Malaysia, Indonesia and Thailand," *Partanika Journal of Social Science and Humanities*, vol 20(S), 2012; pp. 43-55 and; Makaramba R., "Breaking the Mould; Addressing the Practical and Legal Challenges of Justice Delivery in Tanzania: Experience From the Bench," in Binamungu C., et al (eds.), *60 Years of Advancing Justice and Rule of Law From 1955-2015*, Tanganyika Law Society, Dar es Salaam, 2015, p. 66 at p.74.

20 For the detailed discussion on the emerging challenges facing consumers of financial services see Nangela D., "Promoting E-commerce in Specific Service Sectors: An Examination of the Banking Sector in Tanzania," *Tanzania Lawyer Journal*, vol. 1, 2015, pp.41-79.

and invites distortion of facts and obscures the real issues that should be resolved. Often where such is the case, an impasse develops and complicates a dispute resolution process.<sup>21</sup>

### 1.3.2 Neutrality and Impartiality of Institutions

Most jurisdictions have institutions that are mandated with powers of determining and deciding on the consumer-supplier disputes. These institutions take various forms. Courts, quasi-judicial tribunals and administrative organs are typical examples of such institutions.<sup>22</sup> The impartiality and neutrality of these institutions depend on the law and procedures of establishing them, the manner of appointment of their officers and; sources of budget and other resources of running them.<sup>23</sup>

Resolution of consumer disputes requires the establishment of impartial and neutral institutions.<sup>24</sup> This fosters the consumers' confidence in the systems.<sup>25</sup> Often this in turn instills in the consumers a sense of confidence which is necessary for lodging their disputes with the said institutions and offering maximum cooperation in resolving the dispute.<sup>26</sup>

### 1.3.3 Accountability Rules

Consumer disputes can lead to serious financial implications to suppliers and consumers alike. An arbitrary decision by either the court or tribunal may cause serious loss to the consumer or the supplier through the orders of payment of costs to the successful party. In the same way a decision on the consumer dispute which cannot be either challenged or enforced is perilous.

Where there are no rules on accountability of the court/tribunal in making the decision it becomes easy to fetter the dispute resolution mechanisms by either delaying in making a decision or by basing the decision on matters that do not bring a dispute to finality. Accountability rules are intended to ensure that a decision which is made in relation to the dispute lead to respectability of the system by the general public.<sup>27</sup>

21 Luoga F., "Resolution of Tax Disputes: A Brief Review of the Law in Tanzania"; *ibid*, p.2. For a detailed discussion on the general description and nature of disputes in Oil and Gas Industry, see Dundas H., "Dispute Resolution in the Oil and Gas Industry, An Oilman's Perspective," *Journal of Oil, Gas and Energy Law Intelligence (OGEL)*, vol.3, 2004, p.73; Connerty A., "Dispute Resolution in the Oil and Gas Industry," *Journal of Energy and Natural Resources*, vol.20, No.2, 2002, p.144 and; Mgaya R., Dispute Resolution in Oil and Gas Industry: Why Do Participants in the Oil and Gas Industry Prefer International Commercial Arbitration in Litigation? *Tanzania Lawyer Journal*, vol.1, No.2, 2014, p.74.

22 Makaramba R., "Breaking the Mould; Addressing the Practical and Legal Challenges of Justice Delivery in Tanzania: Experience From the Bench," *Op cit.*, p.74.

23 Karume, A., "The Courts of Law Should be Impartial and Fair Institutions" *Op cit.*, p. 43.

24 UNCTAD, "Manual on Consumer Protection," 2004, pp. 34-36.

25 For the detailed discussion on the application of the rule of impartiality in Oil and Gas Industry, see Alam N., "Independence and Impartiality in International Arbitration- An Assessment," *Journal of Oil, Gas and Energy Law Intelligence (OGEL)*, vol.1, No.4 2003, cited by Mgaya R., Dispute Resolution in Oil and Gas Industry: Why Do Participants in the Oil and Gas Industry Prefer International Commercial Arbitration in Litigation? *Op cit.*, p.81. For a brief state of independence of the judiciary in Tanzania as one of the institutions which resolve consumer disputes, see the cases of *Hamis Masisi and Others v. R* (1985) TLR 26 and; *Ally Juu ya watu v. Loserian Mollele* (1974) LRT no.6.

26 For a similar situation on neutrality and impartiality of institutions in resolution of tax disputes see Luoga F., "Resolution of Tax Disputes: A Brief Review of the Law in Tanzania"; *Op cit.*, p.2.

27 Luoga F., *ibid*, p.2.

### 1.3.4 Expediency

Resolution of consumer disputes requires a highest degree of expediency.<sup>28</sup> Generally, consumers do not prefer engaging in lengthy proceedings and litigations. This is because sometimes the relief which is claimed is nominal.<sup>29</sup> Lengthy proceedings and litigation afford opportunity to suppliers to distort the evidence and even to rob the consumers to either withdraw or abandon their claims in promise of nominal consideration.<sup>30</sup>

The virtue and spirit of expediency is most of the time distorted by the absence of the rules on accountability.<sup>31</sup> Usually rules governing resolution of consumer dispute stipulate timeframe within which a consumer may file a complaint against the supplier of services.<sup>32</sup> Fortunately, the said laws do not stipulate the time limit within which the said disputes are to be determined.<sup>33</sup> It is advisable that consumer disputes are determined within a possible shortest period for purposes of ensuring that consumers are instilled with the spirit of filing their disputes with relevant authorities when their rights are violated.<sup>34</sup>

### 1.3.5 Expedited Procedures

Consumer disputes need to be resolved within the shortest possible time<sup>35</sup> Since some consumer rights are easily overtaken by events.<sup>36</sup> Where consumers demand to be supplied with information relating to a specific quality or quantity of a product, the right may be overtaken by event when the said product is no longer offered for sale in the market. Due to the nature and fragility of consumer rights, measures are usually recommended to be taken by establishing special adjudication bodies such as courts and tribunals to deal with and resolve consumer disputes expeditiously.<sup>37</sup>

Expedited procedures are supposed to be crafted in such a manner that enables the consumer, in the case where he can't afford the services of the advocate, to state his case with no difficulty.<sup>38</sup> The preferred way of achieving this is by having

28 UNCTAD, "Manual on Consumer Protection," 2004, p.34.

29 For a detailed discussion on Consumer Behavioral Anomalies see Russell B. and Thomas S., "Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics," *Cal. Law Review*, vol.88, 2000, p.1051 cited by Ruhl G., "Consumer Protection in Choice of Law," *Cornell International Law Journal*, vol.44, 2011, p.570 at p.582.

30 See Twaib F., *The Legal Profession in Tanzania: Law and Practice*, *Op cit.*, p. 286.

31 Luoga F., *Op cit.*, p.2.

32 In Tanzania, the time within which a consumer may file a case/complaint against the seller or supply of services depends on the nature of the cause of action. Most causes of actions of cases filed by consumers relate to contract and tort. The law applicable in Tanzania is Law of Limitation Act, Cap 89 [R.E. 2002]

33 Although the Civil Procedure Code, Cap. 33 [R.E. 2002] provides for the speed tracks for determining the disputes, adherence to the same has been too low leading to increased work logs in courts. An examination needs to be done in relation to adherence with timeframe set by Employment and Labour Relations Act, Act No. 6 of 2004 for resolving employer-employee disputes.

34 For a similar situation on Expediency in resolution of tax disputes see Luoga F., *Op cit.*, p.2.

35 See Luoga F., *ibid*, p. 2 For the general discussion on the contribution of the nature of the judicial system and its contribution to the delay in the resolution of disputes and justice delivery see Makaramba R., "Breaking the Mould; Addressing the Practical and Legal Challenges of Justice Delivery in Tanzania: Experience From the Bench," *Op cit.*, p.72.

36 UNCTAD., "Manual on Consumer Protection," 2004, p.34.

37 Henderson J., "Judicial Review of Manufacturers' Conscious Design Choices: the Limits of Adjudication," *Columbia Law Review*, volume 73, Issue No.8, 1973, p.1531.

38 Mkapa W. "The Legal System should be more Accessible to More Tanzanians" *Op cit.*, p. 33. See also Mramba S., & Lamwai M., "The Land Dispute Settlement in Tanzania Mainland and Zanzibar: A Comparative Analysis" *LST Law Review*, volume 2, Issue 1, 2017, p. 1.

a standard form of stating a complaint by filling in the specific form. The said form should include aspects where the consumer states the points in dispute, undisputed points, and documents intended to be relied upon, reliefs claimed and; disclosure clauses.<sup>39</sup> Standard forms are preferred because experience shows that delays in resolution of consumer disputes are among others a result of inefficient drafting of pleading. Pleadings which do not precisely state the facts, issues in disputes and reliefs claimed attract objections and hence; lengths proceedings.<sup>40</sup> The use of standard forms therefore, reduces the number of objections that are likely to be raised.

All the above are the cornerstone for an effective consumer dispute resolution system. The presence of the above elements in the consumer protection law do not of themselves guarantee effectiveness of the system. These factors and others, like willingness of the consumers to use the system, affordability and accessibility of the system count.<sup>41</sup> All the above points will be used to analyse the effectiveness of the system of resolving consumer–advocate disputes.

## 2.0 Nature of Client-Advocate Disputes

The nature of disputes between clients and their advocates is somewhat complicated. The complication is due to the multiple duties that an advocate has. An advocate owes duty to his client, court, adversaries and to the general public.<sup>42</sup> These duties, at one point or another conflict each other. In the case of *Rondel v. Worsley*, the House of Lords observed as follows on the conflict of duties;

Every counsel has a duty to his client fearlessly to raise every issue, advance every argument and ask every question, however distasteful, which he thinks will help his client’s case. But as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of profession, and to the public, which may and often does lead to conflict with his client’s wishes or with what the client thinks are his personal interests.<sup>43</sup>

In resolving the conflict of duties, the advocate is supposed to take a cause which does not render any of the duties irrelevant.<sup>44</sup> For instance, while the advocate has a duty to defend his client jealously, he has a duty to the opponent side to act fairly by not engaging in any act that may frustrate the opponent’s right. The

<sup>39</sup> An example may be drawn from the Tanzania Employment Law, i.e., Employment and Labour Relations Act, 2004 which provide specific forms for lodging a complaint. See also the Employment and Labour Relations (Forms) Rules, 2007.

<sup>40</sup> For the consequences relating to poor drafting of pleading see Order VI rule 16 and 17 and Order VII rule 11 of the Civil Procedure Code, [Cap 33 R.E. 2002].

<sup>41</sup> UNCTAD, “Manual on Consumer Protection,” 2004, pp.34-36.

<sup>42</sup> Carol maintains that the current duties of an advocate is the expansion of the duties that medieval lawyers had in the thirteenth century in Europe where lawyers took oaths to abide by a list of ethical precepts... the core precepts/concepts were litigation fairness, competence, loyalty, confidentiality, reasonable fee and public service. See Carol R., “Standards of Conduct for Lawyers: An 800-Year Evolution,” *SMU Law Review*, 2004 p.1385. See also Hazard G., “The Future of Legal Ethics,” *Yale Law Journal*, vol.100, 1991, p.1239.

<sup>43</sup> *Rondel v. Worsley* [1969]1 AC 191 at p.227.

<sup>44</sup> Mtavangu V., “Balancing the Duty to the Court and to the Client: A Dilemma of Legal Practice in Tanzania,” *Open University Law Journal*, vol.4, 2013, p.147.



advocate also has a duty of disclosing relevant information that is necessary for the court to make a right decision.<sup>45</sup>

Generally, consumer-advocate disputes revolve around six core duties of an advocate. These are litigation fairness, competence, loyalty, confidentiality, reasonable fee and public service. **Table 1** below shows the Nature and number of pending disputes in the Advocates Committee.

**Table 1: Nature and Number of Pending Disputes in the Advocates Committee: 2012-2017**

Year	Nature of the Dispute					
	Litigation Fairness	Loyalty	Confidentiality	Reasonable Fee	Public Service	Competence
2012	3	0	0	31	0	41
2013	10	4	3	2	0	34
2014	10	0	3	8	0	28
2015	10	0	4	7	0	30
2016	9	1	1	4	0	29
2017	7	1	0	3	1	26

**Source:** Compiled from Reports of the TLS Governing Council to the Annual and Half Annual General Meetings of 2012 – 2017

### 3.0 Institutional Framework for Resolution of Client-Advocate Disputes

Disputes between advocates and their clients have at all times raised concern on difficulties in resolving the same.<sup>46</sup> Lack of statutory definitions of “ethics” and “misconduct” has caused jurisdictional un-certainties and overlapping of functions between institutions responsible with resolution of consumer disputes.<sup>47</sup> In the midst of this, consumers are always faced with the dilemma of choosing the appropriate forum to file their complaints.<sup>48</sup> Over and above, some of the decisions/orders made by some statutory bodies in respect of consumer disputes are not enforceable.<sup>49</sup> Under the Advocates Act, there are two main organs which are responsible for resolving consumer disputes. The Advocates Committee, and the Courts. The establishment, composition, law and procedure of resolving consumer disputes lodged in these organs are discussed hereunder.

<sup>45</sup> In the case of *Rondel v. Worsley* [1966]3 WLR 950 at 962, Lord Denning had the following to say on the resolving the conflict of duties that an advocate has. he said; “counsel must accept the brief and do all he honourably can, because his duty is not only to his client. He has a duty to the court which is paramount. It is a mistake to suppose that he is a mouthpiece of his client to say what he wants; or his tool to do what he directs. He is none of these things. He owes allegiance to a high cause. It is the cause of truth and justice. He must not knowingly conceal the truth... He must see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions of his client, if they conflict with his duty to the court. The code which requires a Barrister to do all this is not a code of law. It is a code of honour. If he breaks it, he is offending against the profession and is subject.

<sup>46</sup> Twaib F, *The Legal Profession in Tanzania: Law and Practice*, Op Cit., p. 252.

<sup>47</sup> *Ibid.*, p. 252.

<sup>48</sup> Lugaziya M., “Professional Ethics for Lawyers: Are They Democles’ Swords Over Law Practitioners?” *Tanzania Lawyers Journal*, Vol. 1, 2015, p.63 at p.93.

<sup>49</sup> *Mkono and Company Advocates v. J.W Ladwa (1977) Ltd*, (2002)1 E.A 145.

### 3.1 Advocates Committee

#### 3.1.1 Establishment and Composition

The Advocates Committee is a quasi-judicial tribunal established under section 4 of the Advocates Act.<sup>50</sup> Its composition is one judge of the High Court of the United Republic nominated by the Chief Justice, the Attorney General (AG) or the Deputy Attorney General (DAG) or the Director of Public Prosecutions (DPP) and one Practising Advocate nominated by the Council of the Law Society.<sup>51</sup> The Chairperson to the Committee is the Judge.<sup>52</sup> The quorum for the Committee to transact business is two members one of whom must be the AG or the DAG or the DPP.<sup>53</sup>

#### 3.1.2 The Jurisdiction of the Committee and the Procedure of Hearing

The committee has original jurisdiction to hear three types of matters.<sup>54</sup> These are an application by an advocate to have his or her name removed from the roll of advocates; an application by any person to remove an advocate's name from the roll of advocates and, to hear allegations of misconducts made against advocates.<sup>55</sup>

In principle, the disciplinary proceedings against an advocate are initiated by the presentation of the notice of allegation of misconduct which comes to the attention of the Attorney General. This notice may take any form.<sup>56</sup> The person making the allegation may instead of or in addition to appearing before the committee be required to support his allegations by an affidavit setting out the facts on which he relies as proof of the misconduct.<sup>57</sup> Where, in the opinion of the committee, neither the affidavit nor the notice discloses a *prima facie* case, the committee may refuse such application or may dismiss the allegations without requiring the advocate to whom the application or allegation relates to show cause why his name should not be removed from the roll or to answer the allegations, as the case may be.<sup>58</sup>

In practice, most of the complaints and allegations against advocates are lodged with the Tanganyika Law Society (TLS). The complaints that fall under the jurisdiction of the Ethics Committee are dealt with and determined at that level of the Ethics Committee.<sup>59</sup> Complaints which fall within the jurisdiction of the Advocates Committee are channelled by the Ethics Committee to the Council of the Tanganyika Law Society with the recommendation that the same be forwarded

<sup>50</sup> Cap 341 [R.E. 2002].

<sup>51</sup> Section 4(1) of the Advocates Act. In terms of section 4(8) of the Act the Committee may appoint any public officer to be the secretary to the Committee.

<sup>52</sup> In the absence from any meeting of the High Court Judge duly nominated by the Chief Justice, either the Attorney General, the deputy Attorney General or the Director of Public Prosecutions shall be the chairman of the meeting. *Ibid*, section 4(4).

<sup>53</sup> *Ibid*, section.4(5).

<sup>54</sup> Twaib F., *Op cit*, p.278.

<sup>55</sup> Section 13(1) of the Advocates Act.

<sup>56</sup> *Ibid*, section10 and 11.

<sup>57</sup> *bid*, section 12.

<sup>58</sup> *Ibid*, section 13(2).

<sup>59</sup> Mugyabuso E., "Protection of Consumers of Legal Services of Advocates in Tanzania: an Analysis of Law and Practice," *Op cit*, Chapter Five.

to the Advocates Committee. The Council considers the recommendation and makes an inquiry to ascertain whether the matter be forwarded to the secretary of the Advocates Committee. This is done by taking into account factors such as whether the allegations sufficiently disclose a misconduct, and whether the matter is capable of being settled before it reaches the Advocates Committee.<sup>60</sup>

Where the application or the notice made by any person (or by the Council of the Tanganyika Law Society for matters which have been filed with the Society) in respect of the allegation of misconduct of an advocate establishes a *prima facie* case, the Committee has power to require the advocate in respect of whom such application is made, or in respect of whom such allegation is made to show cause why his name should not be removed from the roll of advocates or to answer the allegation made, as the case may be.<sup>61</sup>

An advocate, in respect of whom the allegations are made has a right of hearing before the Committee. As part of the right to be heard, he is entitled to not less than seven days' notice informing him of the date fixed for hearing and informing him of such date and particulars of the application or allegation. The notice is supposed to be accompanied with a copy of an affidavit, if any made in respect of the application or allegation and; should notify him of the time and place when and where he may inspect and make a copy of any other document in possession of the Committee which the advocate deems relevant to the application or allegation.<sup>62</sup>

Proceedings before the Committee are usually held in camera.<sup>63</sup> The proceedings before the Committee in respect of matters relating to allegations brought against the advocate are deemed to be judicial proceedings.<sup>64</sup> In the course of hearing the Committee may hear such witnesses and receive such documentary evidence as in its opinion may assist it in coming to a conclusion as to the truth or otherwise any allegation made against the advocate.<sup>65</sup>

The burden of proving the allegations on the misconduct of an advocate lies on the party or any person who has moved the Committee. The standard of proof applicable to proceedings before the committee is the same as in criminal trials, i.e., *beyond reasonable doubt*.<sup>66</sup> In the case of *Re Advocate v. Advocates Committee* the court of Appeal for Eastern Africa said as follows;

We agree that in every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for, and we cannot envisage anybody of professional men sitting

60 Twaib F., *The Legal Profession in Tanzania: Law and Practice*, Op cit. p.279.

61 Section 13(2) of the Advocates Act.

62 *Ibid*, section 13(3)(a).

63 Report by a member of the Tanganyika Law Society in the Advocates Committee to the Half Annual General Meeting held in Arusha Tanzania On 16<sup>th</sup> August 2014, pp.1-2 of the Report.

64 Section 14(3) of the Advocates Act.

65 *Ibid*, 13(3) (b). Under s.14(1) of the Act the Committee with the approval of the Chief Justice, may from time to time make rules for purposes of regulating the hearing and determination of applications brought before the Committee.

66 Twaib F., *The Legal Profession in Tanzania: Law and Practice*, op cit. p.286.

in judgement on a colleague who would be content to condemn on a mere balance of probabilities.<sup>67</sup>

Upon the conclusion of the hearing the Committee makes the decision/ order. The decision of the Committee is that of the majority, and in case of equality of votes, the Chairman, in addition to his deliberative vote as a member of the committee, has a casting vote.<sup>68</sup> After hearing both sides and their witnesses the Committee may, if it is satisfied with the truth of the allegations upon which the application is founded or any allegation of misconduct made against the advocate; direct that the name of the advocate be removed from the Roll; admonish the advocate; or suspend the advocate from practicing for such period as the Committee may direct.<sup>69</sup> The Committee further has power to make any such order as to payment by any party of any costs or witnesses expenses as it may think fit and any such order shall be deemed to be an order of the High Court and may be enforced in the like manner as the order of the High Court.<sup>70</sup>

The decision of the Committee is appealable. Any advocate aggrieved by any decision or order of the Committee may within thirty days of such decision or order appeal to the Full Bench-High Court against such decision or order. In any appeal against the decision or order of the Advocates Committee, the Committee shall be made a party thereto and shall have a right to be represented at the hearing and to oppose the appeal.<sup>71</sup> After hearing the appeal, the High Court may affirm, reverse or vary the decision or order appealed against, and may in addition thereto exercise all powers conferred upon the High Court by the Civil Procedure Code in relation to appeals from civil suits.<sup>72</sup>

### 3.1.3 Analysis of the Adequacy of the Law and Practices in Resolving Consumer Disputes by the Advocates Committee

#### 3.1.3.1 Procedure, Practices and Jurisdiction

Procedure denotes sequence of events and steps that parties to the complaint/ dispute and the court/tribunal have to take in order to have a complaint resolved.<sup>73</sup> The execution of the functions of the Committee presents procedural

<sup>67</sup> (1955)22 EACA 260; see also *Y.A.S Mchora v. Advocates Committee*, Misc Civil Appeal No. 13 of 1985 High Court of Tanzania, at Dar es Salaam and; *Charles Mtwailunga v. Advocates Committee* (1955)22 EACA 260. In *Mchora's case* the court required that in order a conviction to lie against the advocate two things should exist i.e. there must be a proof of an act of misconduct and a proof of an evil intent to engage in a misconduct. For the detailed discussion on these cases and the standard of proof in cases of misconducts involving advocates see Twaib F., *The Legal Profession in Tanzania: Law and Practice*, op. cit., p. 285.

<sup>68</sup> Section 4(6) of the Advocates Act.

<sup>69</sup> *Ibid*, section 13(4).

<sup>70</sup> *Ibid*, section 13(5).

<sup>71</sup> *Ibid*, section 24A.

<sup>72</sup> *Ibid*, section 24A (2). Every appeal against the decision of the Advocates Committee is heard by a Full Bench of the High Court composed of not less than three judges, see S.24A (4) of the Advocates Act. For a discription of the general powers of the High Court in relation to appeals see s.76 of the Civil Procedure Code, Cap 33 [R.E. 2002].

<sup>73</sup> Calabresi H., "Toward a Test for Strict Liability in Torts," *Yale Law Journal*, vol.81, 1972, p.1055 cited by Henderson J., "Judicial Review of Manufacturers' Conscious Design Choices: the Limits of Adjudication" in *Columbia Law Review*, volume 73, Issue No.8, 1973. Footnote no.3 at p.1533 and at p.1535. Henderson defines procedure as a social process of decision which ensures to the affected party a particular form of participation- that of presenting proof and arguments and enabling a court/tribunal to come to a right decision.

difficulties to consumers. The committee conducts all its meetings in one place, i.e Dar es Salaam.<sup>74</sup> It has no offices in other regions. Some of the complaints from upcountry are either lodged with the TLS Chapters or the judiciary.<sup>75</sup>

Complaints which are lodged with the judiciary are always forwarded to TLS. TLS processes these complaints through its Ethics Committee and only a few which fail to be settled get forwarded to the Advocates Committee which sits in Dar es Salaam. All complainants from upcountry whose complaints are lodged with the Committee are supposed to travel to Dar es Salaam to prosecute their complaints. This situation leads to high costs associated with travelling to and staying in Dar es Salaam. In turn, some complainants opt to drop their complaints against their advocates. In between 2013-2015, out of sixteen complaints which were lodged by complainants residing upcountry, nine were withdrawn or dismissed for non-appearance. Although there is no concrete evidence on the cause of withdrawal or non-appearance by complainants, the issue of costs of travelling to and staying in Dar es Salaam to pursue their complaints also count.<sup>76</sup> **Table 2** shows the status of complaints lodged from upcountry.

**Table 2: Status of Complaints Lodged from Upcountry: 2013-2017**

Year	Number of Complaints Filed by Upcountry Complainant	Number of Complaints Dismissed for Non appearance of the Complainants.	Number of complaints determined on merit
2013	5	4	1
2014	7	3	4
2015	4	2	2
2016	4	3	1
2017	1	1	0

**Source:** Compiled from Reports of the TLS Governing Council to the Annual and Half Annual General Meetings of 2013 - 2017.

The procedure of lodging a complaint against an advocate is by submitting a notice of allegation to the Attorney General.<sup>77</sup> The complainant may in addition, be required to file an affidavit in support of his or her allegations.<sup>78</sup> This procedure is difficult for complainant to comply with. The problem with this procedure is that most complainant are not capable of preparing/drafting affidavits. When a complainant is ordered to file an affidavit, he is therefore compelled to secure an advocate who can assist him to prepare the affidavit. He is supposed to pay for the services of drafting the affidavit and attestation. In the course of collecting

74 Report by a member of the Tanganyika law society in the Advocates Committee to the half annual general meeting held in arusha, Tanzania on 16<sup>th</sup> August 2014, p.2.

75 Mwanza chapter had registered forty six complaints by August, 2015, Arusha Chapter had registered fifty nine complaints. In Mbeya, up to July, 2015, the TLS Mbeya Chapter had not recieved any complaint from the consumer because the committees which could deal with the same were not yet formed.

76 Interview with Anastazia Moro, TLS Members Services officer on 22/10/2015.

77 Section 10 and 11 of Advocates Act.

78 *Ibid*, section 12.

data, two respondents who happened to lodge their complaints in the Advocates Committee have confirmed to have withdrawn their complaints on among others, the ground of being required to look for an advocate who would assist them to draft the affidavit.<sup>79</sup>

The other inhibiting procedure relates to hearing and the standard of proof. The law requires a complainant to prove his case beyond reasonable doubt.<sup>80</sup> In practice the notice of the complaints (and an affidavit if any) are in most cases general, not detailed and are accompanied by very few documents as exhibits intended to be relied upon. The defences (counter affidavits) which are filed by advocates are usually detailed, specific and accompanied with numerous documents. Some defences yet contain preliminary objections.<sup>81</sup> The consumers cannot be expected to single out the applicable provisions of the law and make use of the document in proving his/her complaint to the required standard.<sup>82</sup> Therefore, most of the complainants loose their complaints not because they have no genuine complaints but because their adversaries are better knowledgeable in the law and procedure.

The other important aspect is the limited jurisdiction of the Advocate Committee.<sup>83</sup> According to the information supplied by the consumers and other respondents, there are so many misconducts and offences committed by advocates. Out of the many misconducts and offences, very few manage to get reported to relevant authorities. Even those few complaints which are reported to the said authorities (such as TLS, Attorney General Office and to Courts) not all get brought before the Advocates Committee. For instance, in the year 2013 there were sixteen complaints reported to the TLS but only four complaints were forwarded to the Advocates Committee.<sup>84</sup> Generally, the Committee has neither mechanisms nor power of inspection to detect misconduct which are never reported or are

79 They all maintained that the costs of preparing and attesting the affidavits were in the high side. One complainant was asked to pay Tshs.30,000/= and the other was asked to pay Tshs. 50,000/= for preparation and attestation.

80 Twaib F., *The Legal Profession in Tanzania: Law and Practice*, Op cit. p.286. See also *Re Advocate v. Advocates Committee* (1955)22 EACA 260; *Y.A.S Mchora v. Advocates Committee*, Misc Civil Appeal No. 13 of 1985 High Court of Tanzania, at Dar es Salaam and; *Charles Mwailunga v. Advocates Committee* (1955)22EACA 260.

81 For example *Application No 10 of 2013 Swabaha Mohamed Shosi v. Alfred J. Akaro Advocate* was struck out on the basis of the preliminary objection raised by the respondent.

82 Commenting on the procedural constraints before the advocates Committee Twaib says: the ordinary lay person cannot be expected even to have the general knowledge about the relevant legal terminologies, let alone appreciate their practical legal meaning, and far less apply them against two trained and experienced legal practitioners (an advocate who is represented by another advocate- which is mostly the case). The lay man finds it difficult (or even impossible) to frame a complaint and to collect relevant evidence. For a detailed discussion of procedural constraints see Twaib F., *The Legal Profession in Tanzania: Law and Practice*, Op cit., p.288. *Y.A.S Mchora v. Advocates Committee*, Misc Civil Appeal No. 13 of 1985 High Court of Tanzania, at Dar es Salaam.

83 Under section 11, 12 and 13 the Committee cannot move *sua motto*. It can only deal with a misconduct or offence committed by an advocate only when there is an application or notice in respect of the same.

84 The complaints which were forwarded include Application No. 14 of 2013: *Stefan Gleixner v. George Benard Mwapira, Advocate*: The matter was dismissed on 19/6/2014 for default of appearance; Application No. 13 of 2013: *Barton R. Ngosipe v. Geoffrey Martin Kipusulu, Advocate*: The matter was dismissed on 17/6/2014 following the complainants' default to file an amended application and non-appearance to give reasons for his failure to amend the application; Application No. 03 of 2013: *Makao Khamis v. Martin Rwehumbiza, Advocate*: The matter was struck out on 17/6/2014 as the application was defective in the eyes of the law and; Application No. 05 of 2013: *Fabian Manase Payowela v. Protace Kato Zake, Advocate*: The matter was dismissed on 11/6/2014 for want of prosecution. For the details on these and other complaints see a report by a member of the Tanganyika Law Society in the Advocates Committee to the Half Annual General Meeting held in Arusha Tanzania on 16<sup>th</sup> August 2014.

reported to other authorities but are not forwarded to the Committee. Further to the above, not all misconduct or offences forwarded to the Committee are concluded on merit. Some are either dismissed on technical grounds or the clients are seduced to drop them on settlement.<sup>85</sup> **Table 3** shows the pattern of decisions of the Advocates Committee.

**Table 3: Pattern of Decisions of the Advocates Committee: 2013-2017**

Year	Decided Complaints	Decisions on Merits	Decisions on Technicalities	Complaints Marked Settled/ Withdrawn	Dismissed for want of Prosecution	Orders to Re-file	Others
2013	76	1	9	30	27	5	4
2014	7	1	1	0	4	1	0
2015	4	1	0	0	0	3	0
2016	11	2	3	3	2	0	1
2017	19	3	2	2	10	0	2

**Source:** Compiled from Reports of the TLS Governing Council to the Annual and Half Annual General Meetings of 2012 – 2017

### 3.1.3.2 Composition

The Advocates Committee is composed of one judge of the High Court of the United Republic nominated by the Chief Justice, the Attorney General (AG) or the Deputy Attorney General (DAG) or the Director of Public Prosecutions (DPP) and one Practising Advocate nominated by the Council of the Law Society.<sup>86</sup> All members of this committee are lawyers by profession. Consumers have suspicion on the impartiality of the Committee.<sup>87</sup> Twaib addressing the composition constraint of the Committee says: lawyers are entirely their own judges; even though the majority are not members of the private legal profession. To borrow from an old age adage, they are birds of the same feathers. The fact thus remains that they are all lawyers, and are therefore members of the same professional group. They are all members of the same clan, and some of them have been on the same side of intra- professional divide for a long time.<sup>88</sup> Non lawyers can therefore be excused from questioning their impartiality.<sup>89</sup>

<sup>85</sup> Twaib maintains that the client having lost a case possibly due to his advocates' non appearance on a day set for hearing, is content with a merely a refund (or even part thereof) of the fee paid to the advocate! The client gets no compensation for loosing the case at the fault of the advocate. This graphically illustrates the precarious position the complainant occupies in the disciplinary process. Complaints against advocates have been dropped without inquiries being made as to whether the misconduct complained of has been actually committed or not. See Twaib F., *Op cit.*, p.286.

<sup>86</sup> See section 4 of the Advocates Act.

<sup>87</sup> Twaib F., *Op cit.* p.287.

<sup>88</sup> *Ibid*, p.287. In another work Twaib maintains that times really changes very fast: at one time one is a colleague at the Bar as an advocate; there is time when he moves to another position as a judge. All in all, occupation of the new position as a judge does not make one forget all he used to when he was an advocate (emphasis mine). See Twaib F., "Crossing the Bridge: From Bar to Bench," in Binamungu C., et al (eds.), *60 Years of Advancing Justice and Rule of Law From 1955-2015*, Tanganyika Law Society, Dar es Salaam, 2015, p.104.

<sup>89</sup> Twaib F., *The Legal Profession in Tanzania: Law and Practice*, *Op cit.*, p.287.

In this committee, the consumers are unrepresented. The justification which is frequently given in opposing the idea of having members of the committee from non-legal profession is that dispute resolution is a legal process that involves receiving of evidence, analysing facts and applying relevant provision of law in the light of the evidence adduced. It is usually argued that a lay person cannot be able to cope with this process.

### 3.1.3.3 Remedies

Where the misconduct or offence committed by an advocate against his/her client is proved; the Act provides for limited remedies. These remedies relate to removal of the name of the advocate from the Roll; admonishing the advocate; or suspending the advocate from practising for such period as the Committee may direct.<sup>90</sup> The Committee further has power to make any such order as to payment by any party of any costs or witnesses expenses as it may think fit.<sup>91</sup>

These remedies are not adequate in two senses. One, these remedies do not address either adequately or partially the injury suffered by consumer.<sup>92</sup> An example is where an advocate is engaged to represent a client in a civil suit. The client pays all the fees but the advocate fails to discharge his obligation properly leading to a judgement being entered against his client. So the client loses not only the fees he has paid to the advocate but also the case itself and he is condemned to costs.<sup>93</sup> In this scenario the Act does not give power to the committee to issue either an order or grant a remedy which makes the consumer to stand in a position he would be if the advocate had discharged his duties properly.

Secondly, although the Committee has power to make any such order as to payment by any party of any costs or witnesses expenses as it may think fit, such order is issued in very few situations. Even where it is issued, it does not cover all the expenses that a consumer goes through in pursuing the matter before the Committee. Such orders for examples do not re-emburse the complainant the costs incurred in preparation and attestation of an affidavit which supports a notice of allegation of misconduct, expenses incurred by a complainant himself such as travel and accommodation and; other incidental costs that a complainant incurs in pursuing his matter against the advocate.<sup>94</sup>

The other aspect relating to insufficiency of remedies is absence of the right to appeal by the client against the decision of the Advocate Committee. The wording of s.24A of the Advocates Act is clear that only an advocate aggrieved by the decision of the Advocates Committee can appeal against that decision to the High

<sup>90</sup> Section13(4) of the Advocates Act.

<sup>91</sup> *Ibid*, section13(5).

<sup>92</sup> Twaib maintains that legal recognition of the right must be backed up by a remedy or relief to the victim. Otherwise, it is meaningless. It is absurd where such remedy, though available in law, is practically impossible or extremely difficult to enforce. See Twaib F., "Crossing the Bridge: From Bar to Bench," *Op cit.*, p.104 at p.108.

<sup>93</sup> *George Shambwe v. Attorney General and another* (1997) TLR 176. In this case it was clearly stated that the court does not have anything to do with the difficulties that the client may have with his legal representative. See also Twaib F., *The Legal Profession in Tanzania: Law and Practice*, *Op cit.* p.286.

<sup>94</sup> Incidental costs include expenses incurred in seeking legal advice in relation to the complaint.



Court.<sup>95</sup> Further, the Advocates Act does not impose a mandatory requirement for a client to be joined or made a party to an appeal preferred by an advocate against the decision of the Advocates Committee. All appeals against the decision or order of the Advocates Committee are brought against the Advocates Committee itself.<sup>96</sup> The client, who is the victim of the advocate's misconduct or offence can neither be made a party to an appeal or be allowed to appeal against the decision of the Committee. This deprives a consumer a right to legal redress which also involves a right to appeal.

### 3.1.3.4 Time

The other inadequacy of the law is the length taken to determine complaints. The law does not state timeframe within which consumer disputes are to be determined. There is a delay in determining the complaints submitted to the Committee.<sup>97</sup> Between 2010 and 2013 the Committee decided seventy-five disputes. This means that the committee was determining approximately nineteen complaints per year. Out of the seventy-five disputes, one dispute was pending for thirteen years.<sup>98</sup> The rest were pending in the committee between three and eight years.<sup>99</sup> In the period between February and September, 2015 the Committee determined four complaints.<sup>100</sup> As already indicated most of the complaints are not lodged directly to the committee. They are in most cases lodged first with the TLS. The delay referred to in the Advocate Committee is additional to time wasted in dealing with the same matters by the TLS Ethics Committee and the Council.

The delay is usually causing difficulties to the consumers.<sup>101</sup> On one side the delay has caused many complainants to abandon their complaints due to expenses they incur in following up their matters. On the other side, the accused advocates have been taking advantage of the delay to persuade the complainants to drop their complaints on an understanding that they would be refunded the fees (or part thereof) so paid to the advocate.<sup>102</sup>

As always insisted by lawyers, justice delayed is justice denied; due to delays in determining the complaints sometimes parties (either an advocates against whom the complaints are lodge or the complainants) pass away before the dispute is

95 Section 24A(1) of the Advocates Act reads "Any Advocate aggrieved by any decision of the Committee under this Act may, within thirty days of such decision or order, appeal to the High Court against such decision or order."

96 *Ibid*, section 24A (3).

97 At the beginning of March 2014 there were 48 matters pending before the committee. Up to June, 2014 only 7 matters were closed by either being dismissed, struck out or being withdrawn by the respective complainants.

98 Application No.8 of 2000: *The Attorney General v. E.D Kisusi Advocate*. This matter was withdrawn on the 20/11/2012 with leave to re-file.

99 For the details on these and other complaints see a reports by a member of the Tanganyika Law Society in the Advocates Committee to the Half and Annual General Meetings for the year 2013, 2014 and 2015.

100 For the details on these complaints see a reports by a member of the Tanganyika Law Society in the Advocates Committee to the Half and Annual General Meetings for the year 2015.

101 Delay in the administration of justice generally has multiple impacts ranging from economic, social and psychological. In the case of *Amratlal Damodar Maltaser and another v. A.H Hariwalla T/A Zanzibar Hotel* [1980] TLR 31, the Court of Appeal of Tanzania by referring to the case of *Allen v. Sir Alfred McAlpine and Sons Ltd* [1968]2 Q.B 229, summarized the impact of delay in the administration of justice in the following words; "time and again people have complained at the law's delay and to use Lord Denning's eloquent words; 'counted it as a grievous wrong, hard to bear. Shakespeare ranks the whips and scorns of time. Dickens tells how it exhausts finance, patience, courage and hope."

102 Twaib F., *The Legal Profession in Tanzania: Law and Practice*, Op cit. p.286.

determined. For example Application No. 70 of 2003 between *Hezron J. Magori and Moses Maira Advocate* and; Application No. 7 of 2006 between *S. Kinyahembe and Mohamed Mkali Advocate* were marked abated on 7<sup>th</sup> December, 2009 and 18<sup>th</sup> June, 2008 respectively following the demise of the complainants.<sup>103</sup> The first complaint was pending in the committee for six years and the second was pending for two years. Of recent, *Application No 12 of 2012; The Interim Manager, National Investments Company Limited (NICOL) Versus Dr. Herbert H.H. Nyange, Advocate* and; *Application No 5 of 2017; National Investments Company Limited (NICOL) Versus Dr. Herbert H.H. Nyange, Advocate* were marked abated in March, 2018.

#### 4.0 Court

The High Court plays an important role in dealing with the misconducts and offences committed by the advocates either against the courts or clients.<sup>104</sup> The powers of the High Court over the misconducts and offences committed by advocates are not limited. These powers are vested in each judge of the High Court.<sup>105</sup> The said powers are also vested in the Chief Justice.<sup>106</sup> Generally, the Advocates Act does not provide for the procedure which is supposed to be used in exercising the powers vested into the judges.<sup>107</sup>

The Chief Justice or the High Court has power, for any reasonable cause to admonish any advocate or to suspend him from practising during any specified period or make an order of removing his name from the Roll.<sup>108</sup> Every judge of the High Court has power to suspend any advocate in like manner temporarily, pending a reference to, or disallowing such suspension by the High Court.<sup>109</sup>

Whereas, appeal by an advocate against the Order or decision of the Chief Justice lies to the Court of Appeal; an appeal by an advocate aggrieved by the decision or order of a judge of the High Court lies to the Advocates Committee. The appeal is supposed to be preferred within thirty days of such decision or order.<sup>110</sup>

The law sets a simple procedure of admonishing or suspending an advocate temporarily.<sup>111</sup> The procedure does not require the presence of a complaint from

103 For the details on these and other complaints see a reports by a member of the Tanganyika Law Society in the Advocates Committee to the Half and Annual General Meetings for the year 2013, 2014 and 2015.

104 It should be appreciated that the misconduct by advocates do not only affect their clients and courts. The misconduct may affect the general public or the whole system of administration of justice.

105 Section 22 (1) of the Advocates Act powers judges of the High Court to admonish the advocates for their misconduct. It does not extend to judges of the Court of Appeal or magistrates. This follows from the fact that advocates are admitted as advocates of the High Court and not the Court of Appeal. Appearance and audience in the Court of Appeal is not a matter of right.

106 *Ibid*, section 22 (2)(a).

107 For the details on the constitutionality of section 22(2)(a) and (b) of the Advocates Act see *Zephrine Galeba v. the Honourable Attorney General*, Miscellaneous Civil Cause No. 5 of 2010, High Court of Tanzania, at Dar es Salaam, (Unreported).

108 Section 22(2)(a) of the Advocates Act.

109 *Ibid*, section 22(2)(b).

110 *Ibid*, section 22(2)(c).

111 For the details on the procedure of disciplining advocates see *Re Dr. Masumbuko Lamwai*, Reference No.4 of 1997, (Unreported) cited in the case of *Zephrine Galeba v. the Honourable Attorney General*, Miscellaneous Civil Cause No. 5 of 2010, High Court of Tanzania, at Dar es Salaam, (Unreported).

any person.<sup>112</sup> The judge is empowered to act *suo motto*.<sup>113</sup> This procedure would and probably helps clients who fear or are unable to raise their complaints against their advocates before the presiding judges. The problem that probably leaves consumers of legal services unprotected is application of and willingness of the judges to exercise the powers vested into them.

All the judges interviewed admitted to have exercised the said powers sparingly against advocates who take up their clients' cases and fail to deliver requisite services by not appearing and filing documents/pleadings timely.<sup>114</sup> Judges, instead of admonishing advocates for non-appearance or failure to file document within time, have been striking out cases and awarding costs against clients.<sup>115</sup> The main argument by the judges is that clients have a legal duty of making sure that their advocates perform their duties diligently.

The cases which are being dismissed and struck out against clients whose advocate do not enter appearance or fail to file documents within time are now increasing. This is partly due to the introduction of the Big Results Now (BRN) strategy in the judiciary. The BRN seeks to measure the performance of the judges by output. The performance by judges under the BRN strategy is measured by the number of cases disposed of in a specified period of time. As a consequence, in cases where an advocate would be admonished for non-appearance, judges prefer to strike them out. By doing so judges look to have disposed of many cases while in reality it is the opposite as the same dismissed cases are brought again either as applications or as fresh suits for cases which are not barred by the law of limitation.<sup>116</sup>

## 5.0 Conclusion

Although the Advocate Act provides for the resolution of consumer disputes, it is inadequate in several aspects. The Advocates Committee which deals with consumer disputes is composed of among others members who are also suppliers of legal services. This creates a conflict of interest. Twaib maintains that the Committee lacks legitimacy. This violates a rule that require a person/

112 See references by Israel Magesa, Ephraim Ngasala, Julius Ishengoma and Francis Nduyanabo, Reference number 1, 2 and 3 of 1997 (unreported) decided on 24 April, 1998 cited in the case of *Zephryne Galeba v. the Honourable Attorney General*, Miscellaneous Civil Cause No. 5 of 2010, High Court of Tanzania, at Dar es Salaam, (Unreported).

113 Section 22(2) of the Advocates Act.

114 Commenting on unnecessary adjournment of cases Lugaziya says: cases get adjourned unnecessarily because counsels are not prepared and very unfortunately, this habit has been encouraged, not discouraged by magistrates and judges, who have the mandate to control the proceedings before them, and may only exercise discretion to adjourn, else they can refuse to adjourn. See Lugaziya J. "Professional Ethics for Lawyers: Are They Damocles' Sword Over Law Practitioners?" *Op cit.*, p. 90. See also the case of *Felix Tumbo v. TTCL and another* [1997] TLR 57.

115 Explaining the role of legal practitioners and the consequences that follow where they fail to discharge their duties Twaib says: "... Practicing lawyers have to prepare for court work. Advocates read decisions of the higher judiciary as much as do the judges themselves. You draft contracts and transaction documents that require meticulous attention to detail, because clients expect high performance. The preparation of pleadings and other court papers is the everyday routine for a court lawyer. As practitioners, you have to be extra careful. In that process, you learn. For, you know you encounter Preliminary Objections (P.Os) from the opposite counsel when you make mistakes in the preparation of these papers. You are also aware that you may face the wrath of us the judges. We are sometimes only too happy to strike out defective plaintiff whenever the opportunity presents itself." See Twaib F., "Crossing the Bridge: From Bar to Bench," *Op cit.*, p.104 at p.107.

116 An interview with judge P. Kente on 7th October, 2015.

group of persons not to be judges in their own causes.<sup>117</sup> Over and above, there are problems relating to either lack of or presence of procedures that render the realization of consumer rights impossible. Further, the law does not provide for any adequate remedy to a client who manages to prove the complaint against an advocate.

There have been efforts towards amendment of the Advocates Act. Of recent; there was an attempt to overhaul the legal profession structure by establishing the Board to regulate the provision of legal services. Other efforts include the introduction of **TAMS** (*Tanzania Advocate Management System*) and publication of *the Advocates (Professional Conduct and Etiquette) Rules 2018 and; The Advocates (Disciplinary and Other Proceedings) Rules 2018*. All these initiatives are/were based on specific justification other than protection of consumers of legal services. In order to address problems facing consumer in filing and determining their disputes before the Advocates Committee, the following measure are recommended:

1. Section 4(1) of the Advocates Act should be amended so as to include a representation of consumers of legal services in the composition of the Advocates Committee. The representative may be appointed by the Chief Justice from companies which consume legal services frequently or from human rights organisations. This will increase the impartiality and legitimacy of the Committee.
2. Section 13(4) and (5) of the Advocates Act should be amended by including remedies that can adequately redress the injuries suffered by the consumers at the hands of their advocates. Where a consumer succeeds to prove his case against the advocate, the Advocates Committee should be mandated to issue orders relating to payment of compensation and/or a fine so as to put a consumer in a position he would be if an advocate had behaved in accordance with the law. Where the circumstances so require the payment of compensation or a fine should be over and above an order of suspension or removal of the name of an advocate from the roll.
3. The procedure of filing, hearing and determining the disputes before the Advocates Committee should be simplified to enable the consumers to apprehend the same. The procedure should be simplified as follows:-
  - i. Instead of using a notice of allegation and affidavit to lodge a complaint with the Advocates Committee, the Advocates Act should be amended by adding a Schedule. This schedule should contain a *Complaint Form* which can be used in instituting a complaint. The form should contain necessary matters that are needed for the determination of the dispute. The content of the form may include names and addresses of the parties, cause of action, and statement of facts, reliefs sought and; list of documents that a complainant wishes to rely on.

<sup>117</sup> Twaib E, *op cit.*, p.287.

- ii. Due to the nature of most consumers, that they are poor and ignorant of both the laws and their rights, the committee should have its own prosecutors to prosecute the complaints lodged by consumers. Consumers who are willing and are able to prosecute their dispute themselves should be left to do so.
  - iii. Section 14 of the Advocates Act should be amended by adding subsection (4) which should provide for the time limit within which a dispute is to be determined. Taking into account the fragility of consumer rights, a consumer dispute is supposed to be determined within six months from the time when the same is lodged in the Advocates Committee.
  - iv. Section 24A (1) of the Advocates Act should be amended by deleting the word "any advocate" and replacing the same with a word "any party" so as to accord equal right of appeal by either an advocate or consumer who is aggrieved by the decision of the Advocates Committee
4. Courts should play an active role in protecting the consumers by exercising their inherent powers of disciplining advocates for misconducts and other acts which reflect incompetence, lack of loyalty, fraud, negligence and the like. This may be done by ordering advocates to pay costs relating to dismissing or striking out of a suit for non-appearance of an advocate, filing of defective pleadings and other documents and failure to take necessary legal steps for doing clients' work.