ACCESS TO JUSTICE AND INEVITABLE REFORMS TO THE CIVIL JUSTICE SYSTEM: REFLECTIONS ON CASE MANAGEMENT AND LEGAL AID IN TANZANIA

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> "Much as we all agree that a court is like a '*Temple of Justice*' - a sacred place for administering justice, judges no longer have to sit patiently as "Monks" awaiting for the unfolding "battle of wits" between two rival parties in a legal dispute. There is need now for our judiciaries to think seriously and take action by having in place court management and case management. This requires judges to assume a more active role in managing both their case dockets (*case management and case flow management*) and the courts (*court management*) thus fulfilling the vision of "*timely and quality justice for all*."
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> Honorable Mr. Justice Robert V. Makaramba[2]

Abstract

The article examines two aspects of the on-going reform to civil justice in Tanzania which are the introduction of case management and the state of the legal aid services. It states that any access to justice can only be achieved if the system provides legal aid services to indigents or those of slender means as well as providing the necessary resources to defend legal rights or to prosecute his or her case in order to bring equality among the parties to a dispute. To ensure timely justice, case management is central to effectively reduce the legal costs of civil litigation, delays, formality, technicality and complexities of the legal process. The article borrows experiences from other commonwealth jurisdictions where case management has been instituted such as Great Britain and Singapore. Tanzania has a common law adversarial system for its civil justice system. Although the article is by no means a comprehensive study of the performance of the judiciary in Tanzania it provides a useful reflection of the civil justice system in Tanzania.

Key Words: *Civil Justice, Administration of Justice, ADR, Litigation, Judiciary*

1.0 Introduction

"Timely access to justice for all" is the phrase chosen as encapsulating the ideals guiding the ongoing legal sector reform programme and the draft 2008 Legal Sector Policy in Tanzania. At the root of this motto lies the determination of the government of Tanzania to ensure that the administration of justice is made

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available to all and with consideration to equality, equity, and fairness. In making sure that access to justice is practical, it must be real, effective, comprehensive, and unimpeded. All persons must be afforded access to equitable justice and legal services no matter their rank in society. As Sir Jack Jackob put it, "the ends of access to justice will include the dismantling of the barriers obstructing the road to justice and put in place a new or restructured framework towards the attainment of justice. The barriers include the legal costs of civil litigation and delays, the uncertainties, formalities, technicalities and complexities of legal process."[3]

Access to justice is a composite concept including elements of access to formal and informal justice as well as legal representation and legal aid.[4] In his Report, "Access to Justice" of July 1996 to the Lord Chancellor on Civil Justice System in England and Wales, Lord Woolf, Master of the Rolls, identified the following principles as fundamental in ensuring access to justice in any civil justice system, namely, the system must (a) be just in the results it delivers, (b) be fair in the way it treats parties to a dispute, (c) offer appropriate procedures at a reasonable cost, (d) deal with cases with reasonable speed, (e) be understandable to the stakeholders or those who use it, (f) be responsive to the needs of those who use it, (g) provide as much certainty as the nature of particular cases allows, and (h) be effective for being adequately resources and organized.[5]

This article reflects two aspects of the ongoing reform to civil justice in Tanzania, namely the introduction of case management and the state of the legal aid services. It argues that any access to justice can only be achieved if the system provides legal aid services to indigents or those of slender means as well as providing the necessary resources to defend legal rights or to prosecute his or her case in order to bring equality among the parties to a dispute.[6] Additionally, this article argues that case management is the only mechanism that can effectively reduce the legal costs of civil litigation, delays, formality, technicality and complexities of the legal process. In other words, the management of a case must be the responsibility of the court and not the litigants. In its reflections, this article borrows experiences from other commonwealth jurisdictions where case management has been instituted such as Great Britain and Singapore. Tanzania has a common law adversarial system for its civil justice system. To be sure, this article is by no means a comprehensive study of the performance of the judiciary in Tanzania and does not cover all critical supportive elements needed to implement case management, such as the use of

[3] J. I. H. Jacob, *The Fabric of English Civil Justice*, (London: Stevens & Sons, 1987), at 277.
[4] Mohamed Chande Othman, *Keynote Address by Chief Justice on the occasion of the Annual Conference of the Tanganyika Law Society*, 17 February 2012, Arusha, Tanzania, p. 8.
[5] Lord Woolf, *Access to Justice Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, by Right Honorable the Lord Woolf, the Master of the Rolls, July 1996, London, Her Majesty's Stationery Office, Norwich, para 1, p. 2.
[6] D. H. Genn 'Do-it-yourself law: Access to Justice and the Challenge of Self-representation', 32 Civil Justice Quarterly, 4, (2013), 411-444, 414.

Information Communication Technology (ICT), adequate human resources, leadership, political will, and adequate infrastructures.

2.0 The Context of Reform in Tanzania

Article 107A of the Constitution of Tanzania 1977 contains core values pertaining to the dispensation of justice by the judiciary.[7] The Key principles include (a) impartiality to all, without due regard to one's social or economic status, (b) not to delay dispensation of justice without reasonable grounds, (c) to award reasonable compensation to victims of wrong doings committed by other persons, and in accordance with the relevant law enacted by the Parliament, (d) to promote and enhance dispute resolution among persons involved in the disputes, (e) to dispense justice without being tied up with overly technical provisions which may obstruct dispensation of justice.

Despite those commitments and benchmarks in the Constitution, Tanzania continues to suffer from inordinate delays in the disposal of cases and limited access to justice. The delays compound costs and time involved in civil litigation at a disproportionate rate. The Chief Justice of Tanzania, His Lordship Mohamed Chande Othman, sympathetically and plainly stated that part of the population, in particular rural communities, have no ready or equal access to a formal justice system. They either have no court buildings, judges, or magistrates. Some regions are without a single practicing advocate, as nearly all advocates available in Tanzania are unaffordable and concentrated in a few major cities.[8] Yet, the country does not yet have a comprehensive legal aid scheme. The civil justice system is therefore too unequal, too costly, too uncertain, and too slow to deliver the justice, hence the public outcry.

One of the prime causes of delays is unregulated adjournments, as part of the case management, as opposed to the intrinsic nature of the cases. For instance, the pilot project case flow analysis at the High Court of Tanzania at Dar es Salaam, for civil cases filed between May 1986 and November 2011, indicates that during that period 65% of all adjournments were associated with parties to the cases while 35% were adjourned by the court.[9] The Chief Justice of Tanzania warned that only an adjournment grounded on sufficient or good reasons is acceptable and that adjournments cannot be the norm by which judicial proceedings are conducted.[10] It is noteworthy that, as early as 1986, the Law Reform Commission of Tanzania had

[7] Introduced through Article 17 of Act No.3 of 2000 and Article 16 of Act No.1 of 2005.
[8] M. C. Othman, *op. cit fn* 3, at 9-10.
[9] *Ibid,* at 24.
[10] *Ibid.*

examined the dilemma of delays in the disposal of civil cases.[11] In 2006, Dr Angelo Mapunda reviewed the main Act governing civil procedure (the Civil Procedure Code 1966[12]) He observed the serious divergence from the principles set out in Article 107A of the Constitution of the United Republic of Tanzania. He noted that the civil justice system suffered from "too expensive litigation which only few can afford; delays in bringing cases to conclusion; lack of equality between parties; uncertainty; unpredictability; too complex and incomprehensible procedures; too adversarial and difficulty in realizing or enforcing decrees and orders."[13]

Following the Case Flow Analysis Study, which was carried out in 2010 to establish the *status quo* of judicial procedures in adjudication of cases and challenges in the administration of justice system, the government of Tanzania started implementing recommendations made in the report. Two sets of recommendation were made, namely, i) legislative changes and ii) key policy actions.[14] In assessing the recommendations emanating from the report, a total of 30 policy recommendations were identified based on (a) improving work flow, (b) renovating legal registries, and (c) streamlining the case flow management system. This entailed modernizing archives through the introduction of metal filing shelves and colour-coded files, automation of case assignment system and case tracking system, and installation of Local Area Network (LAN) for intranet services for official business by all senior judicial officials.[15] It was expected that judicial procedures would be simplified, the amount of time needed for a case to be heard and disposed would be reduced, and t the possible entry points for corruption would also be reduced.

This article reflects two aspects of the ongoing reform to civil justice in Tanzania, namely one case management and second the state of legal aid services. These two aspects are part of core values enshrined under Article 107A of the Constitution of Tanzania that must be regarded by the judiciary in their dispensation of justice.

3.0 Case Management

Case management has a three dimensional aim, namely, the just resolution of disputes, at proportionate cost, and within a reasonable time.[16] This is achieved by

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[11] United Republic of Tanzania, Law Reform Commission of Tanzania, *Report on Delays in the Disposal of Civil Cases*, Report No. 1 of 1986; The Law Reform Commission of Tanzania, *Report of the Comprehensive Review of Civil Justice System in Tanzania*, Presented to the Minister for Justice and Constitutional Affairs, Dar es Salaam, May, 2013. p. 16.

[12] A statute *in pari material* from the Indian Civil Procedure Code 1908.

[13] Angelo M. Mapunda, *Comprehensive Review of the Civil Justice System in the United Republic of Tanzania: A Position Paper on Review of the Government Proceedings Act, (Cap. 17), the Arbitration Act (Cap. 15), the Appellate Jurisdiction Act (Cap. 141) and (iv) the Civil Procedure Code (Cap. 33)*, submitted to the Law Reform Commission of Tanzania in March 2012.

[14] Judiciary of Tanzania, *Timely Justice to All: A Challenge to Change: Report on Case Management and Registry Re-organization*, by the Senior Legal Advisor, Judiciary of Tanzania at the Dar es Salaam High Court Zone, Mr. Keenan G. Casady, 2011.

[15] Implementation of these recommendations formed part of the outcome indicators of the Legal Sector Reform Programme (LSRP) in the Performance Assessment Framework (PAF) of the General Budget Support (GBS) Annual Review.

[16] J. R. Williams '"Well, That's a Relief (From Sanctions)!" – Time to Pause and Take Stock of CPR r.3.9 Developments Within a General Theory of Case Management', 33 *Civil Justice Quarterly* 4 (2014), 394-411 at 396; K. M. Vorrasi, 'England's Reform to

shifting the ultimate responsibility for the control of civil litigation from litigants (and their advocates) to the court to dictate the progression of a case.[17] When courts manage the entire process, it's likely to achieve greater efficiency. This does not undermine the adversarial nature of litigation, but rather places the responsibility for regulating time and expense with the court itself, which has the ability to fairly consider the needs of all parties to litigation. The independence and impartiality of the judiciary must remain at the core of civil litigation.[18]

It has been argued that effective case management should include (a) a robust approach where timetables are realistic, observed, and costs are kept proportionate to what parties are prepared to pay, (b) the use of ADR, (c) encouraging and assisting the parties to settle cases, (d) allocating each case to a speed track and to the judges with relevant expertise and ensuring the case remains with the same judge as far as possible (i.e. a docket system as practiced e.g. in USA), (e) early identification of issues for full trial, (f) summary disposal of weak cases and hopeless issues, (g) transparency on costs and increasing the client's knowledge of the progresses and costs involved, and (h) standardized case management directives and preventive sanctions, as opposed to punishment for procedural non-compliance.[19] Under such case management, unnecessary litigation will be avoided and litigation itself will be short, affordable, less complex, and more cooperative, all while remaining adversarial.

There are two kinds of case management systems. First, the case load management system and Second the case flow management system. The former is deployed in management of cases which require special focus on the allocation of resources required (e.g. scheduling of judge's workloads, listing and diarizing of cases), while the later support the management and progress of individual cases, from inception to final disposal. Both systems are linked, reinforce each other, and are closely related to the use of ICT for judges and courts.[20]

It is noteworthy that although case management is widely accepted as one of the best ways of expediting case disposal at proportionate cost (to the value and type of the case), some see it as a cure worse than the disease. In the context of the adversarial system, critics have argued that managerial judging erodes the nature of judging and is a symptom of a critical flaw in the philosophy of a one-size-fits-all

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Alleviate the Problems of Civil Process: A Comparison of Judicial Case Management in England and the United States' 30 *J. Legis* (2004), 361.

[17] H.H. Judge S. Stewart and A.Bouche, "Civil Court Case Management in England and Wales and Belgium: Philosophy and Efficiency", 28 *Civil Justice Quarterly* 2 (2009), 206.

[18] N. Wilson, "Concurrent and Court-appointed experts- from Wigmore's "Golgotha" to Woolf's "Proportionate Consensus"", 32 *Civil Justice Quarterly* 4 (2013), 493-507 at 507.

[19] L. Woolf, *op. cit fn* 4, at 14, 18. Also see Lord Justice Jackson, *Review of Civil Litigation Costs*, by Lord Justice Jackson, December 2009, p. xxiii.

[20] *Ibid*, at 288.

rules scheme; it facilitates the decline of trials and the shrinking pool of trial lawyers; case-management decisions are opaque, standardless, and unreviewable, heightening the risk that judges abuse of their power. Additionally, case management is viewed as inherently flawed, as it require judges to make rational decisions in contexts in which they lack sufficient data, leaving them at risk of substituting their own biases.[21]

Tanzania started the case management system as a way to facilitate timely access to justice for all in accordance with Article 107A of the Constitution. The following international best practice elements of case management have, so far, been legislatively integrated under the civil procedure justice in Tanzania.

3.1 Introduction of Alternative Dispute Resolutions (ADR)

ADR is globally practiced as a way to overcome the economic burden on businesses due to the compensation culture driven by litigation. It is perceived as less protracted and expensive compared to litigation and it disposes of disputes faster. Additionally, successful mediation enables business relationships to continue and reputations among litigants to remain publicly intact.[22] In 1994, Tanzania introduced the ADR to facilitate better access to justice by aiding parties in reaching a resolution through alternative means other than the usual court trials.[23] All civil disputes, except those filed in the commercial division of the High Court where attempts to settle the disputes have been undertaken under a mechanism established by any other laws, must be mediated before going to a trial. A period of 21 days, after conclusion of pleadings, are set for the judge or magistrate presiding over a matter to resolve the case through negotiation, mediation, arbitration, or such other procedures not involving a trial.[24] ADR is performed within the framework of pre-trial settlement and scheduling conferences. Under the High Court (Commercial Division) Procedure Rules 2012 mediation cannot exceed a period of 14 days from the date of the first session of mediation.[25]

In case the matter is not resolved in the ADR, a final pre-trial settlement and scheduling conference is held, presided over by the judge or magistrate assigned to try the case for the purpose of giving the parties a last chance to reach an amicable settlement of the case and for enabling the court to schedule the future events and steps which are bound or likely to arise in the conduction of the case, including the date or dates of trial.[26] Much as the ADR in specific cases is a prerequisite of a trial,

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[21] S. S. Gensler, "Judicial Case Management: Caught in the Crossfire", 60 *Duke L.J.* (2010), 669 at 726.
[22] S. Shipman, "Waiver: Canute against the tide?", 32*Civil Justice Quarterly* 4 (2013), 470-492 at 471.
[23] GN. No. 422 of 1994 and Order VIIIA Civil Procedure Code 1966. Also see the Chief Justice Circular (No. 1 of 2002) of 29 April 2002 titled: Operation of the Alternative Dispute Resolution System.
[24] Order VIIIA Rule 3 of Civil Procedure Code 1966. Also see G.N. No. 140 of 1999.
[25] GN 250 of 2012 made under section 4 of the Judicature and Application of Laws Act, Cap. 358.
[26] Order VIIIB rule 3 of the Civil Procedure Code 1966.

as parties may not proceed to a trial without it, courts cannot oblige parties to settle, even on frivolous, querulous, and vexatious disputes. As it is practiced in England, the court may only encourage them to settle, but not force them. However, in England, the Court of Appeal in *Halsey v. Milton Keynes General NHS Trust* [27] rejected the idea of issuing orders that oblige litigants to undertake ADR procedure as unconstitutional.[28] In this way, ADR is not seen as an alternative but a complement to usual court systems. That is partly why Lord Justice Dyson in *Halsey v. Milton Keynes General NHS Trust*[29] held that mandatory mediations infringe on human rights in terms of the European convention on Human Rights. ADR should therefore, to some observers, not be integrated into the civil justice system in a normative and coercive sense, as a society is better served by a more functional court system with ADR as an attractive alternative for those less concerned with rights to litigation.[30] In this context, the right to a fair and impartial procedure is every bit as important as the outcome. ADR, in whatever form it may take, is traditional, with no justice inherently in its procedure. It is facilitative to justice, and that is why, in some cases, legal aid application can be denied if parties refuse to go through ADR and choose to immediately commence with a trial.[31]

The 'without prejudice rule' is applicable in Tanzania and therefore inter-partes communications and all deliberations made in ADR are deemed confidential and inadmissible in evidence and immune from disclosure at trial. The only exception to this inadmissible rule is in relation to proceedings brought by either party to vitiate the settlement agreement on the grounds of fraud.[32] The justification for this rule is the public policy of encouraging, as far as possible, parties to speak freely and frankly and settle their disputes without resort to litigation.[33] Furthermore, Tanzania, like Great Britain,[34] does not use a single docket system and therefore a judge or magistrate presiding over the ADR cannot preside over the same matter at a trial. In the case of courts with a single judge or magistrate, the ADR procedures will have to be dispensed with and parties be permitted to proceed to a trial to remove the bias and undue influence that a particular judge may have in the case.

It is noteworthy that the supporters of a docketing system argue that the system increases the expedition and quality of proceedings by motivating judges to improve their case management practices. It is one of the practiced methods of instilling a

[27] *Halsey v. Milton Keynes General NHS Trust,* [2004] 1 WLR 3002.
[28] *Halsey v. Milton Keynes General NHS Trust,* [2004] 1 WLR 3002, also discussed in S. Shipman, "Compulsory Mediation: the Elephant in the Room", 30*Civil Justice Quarterly 2 (2011),* 163- 191.
[29] *Halsey v. Milton Keynes General NHS Trust,* [2004] 1 WLR 3002.
[30] M. Brunsdon-Tully, "There is an A in ADR but Does Anyone Know What it Means Anymore?" 28 *Civil Justice Quarterly* 2 (2009), 218.
[31] *Ibid*, at 223.
[32] Section 39 High Court (Commercial Division) Procedure Rules 2012.
[33] See Oliver, L.J in *Cutts v Head* [1984] Ch. 290 CA as quoted in A.K.C. Koo "Confidentiality of Mediation Communications", 30 *Civil Justice Quarterly* 2 (2011), 192-203 at 193.
[34] It has also been observed that in some parts of England, eg London and Manchester, the practice of docketing exist. See L. S. Jackson, *op. cit fn* 18, at 232.

proprietary interest in the judges which increases their interest in effective case management. It enables judges to account for the size and age of their case inventory, and thereby creates a competitive environment amongst judges.[35]

3.2 Introduction of Case Speed Tracks

All civil cases are given a speed track in which they are to be determined. It is the responsibility of a presiding judge or magistrate to consult the parties and their advocates, if any, during the scheduling and settlement conferences, and determine the appropriate scheduling order for the tracking. The scheduling order sets out the dates and time for future events or steps in the case, including preliminary applications, affidavits, counter affidavits, notices, and the use of procedures for alternative disputes resolution.[36]

There are four categories of speed tracks. Speed Track One is reserved for cases considered by the judge or magistrate to be fast cases, capable of being, or required in the interests of justice to be, concluded quickly, within a period not exceeding ten months from commencement of the case. Speed Track Two is for cases considered by the judge or magistrate to be normal cases capable of being or, required in the interests of justice to be, concluded within a period not exceeding twelve months from commencement of the case. Speed Track Three is for cases considered by the judge or magistrate to be complex cases capable of being, or required in the interests of justice to be, concluded within a period not exceeding fourteen months. Speed Track Four is for cases considered by the judge or magistrate to be special cases which fall in none of the three abovementioned categories, but which nonetheless need to be concluded within a period not exceeding twenty-four months.[37]

The High Court Commercial Division has its own set of speed track of cases. The above four categories of speed tracks are generally not applicable to commercial cases filed at the division. The High Court (Commercial Division) Procedure Rules requires all commercial cases to be determined within a period of ten months and not more than twelve months from the date of commencement.[38]

As a general rule, no departure from or amendment of the scheduling order is permitted unless the court is satisfied that such departure or amendment is necessary in the interests of justice and the party in favour of whom such departure or amendment is made shall bear the costs of such departure or amendment. However, the court may order otherwise regarding costs implications of any amendment or departure from the scheduling order. Furthermore, any adjournment

[35] K. Takeshita "Overcoming Judicial Reluctance to Secure Effective Case Management", 33*Civil Justice Quarterly 3(2014)*, 281-306 at 284-285; *Ibid* at 218-219.
[36] Order VIIIA Rule 3(2) of the Civil Procedure Code 1966.
[37] Order VIIIA Rule 3(2A) of the Civil Procedure Code 1966.
[38] Section 32 the High Court (Commercial Division) Procedure Rules 2012.

may be permitted for reasons beyond the control of the parties or the court.[39] In any case, courts are given inherent power to make such orders as may be necessary for the administration of justice or to prevent abuse of the processes of the court.[40]

The High Court Commercial Division has a stricter set of rules on adjournments. It requires the party applying for adjournments to pay to the court the prescribed fees of Tsh. 150,000 and 200,000 for adjournment of trial and mediation respectively.[41] Furthermore, the illness of an advocate or his inability to conduct the case may only be the ground for an adjournment if the court is satisfied that the party applying for adjournment could not have engaged another advocate in time. It is also immaterial that the advocate is engaged in another matter in another court except if he is appearing in the superior court. In case the adjournment is moved at the instance of the court, the reasons for such adjournment must be recorded and the court endeavor to fix the hearing date within the shortest period possible but mot more than thirty days.[42] Additionally, where the hearing of a case has been adjourned *sine die* without any application made within six months of the last adjournment, the court shall dismiss the suit.[43]

The Law Reform Commission of Tanzania has recommended the amendment of Rule 3, Order VIIIA to empower the Principal Judge, Judges/Magistrates-in-Charge in consultation with presiding judge or magistrate concerned, to prescribe a shorter speed track for any case or application they consider to have economic, social, or political significance for the purposes of the shorter speed track. This is consistent with the Principal Judge's Circular Number 1 of 2007 ref. HCC/C.40/8/134 of 26 February 2007 underscoring the need for the court to speed up conclusions of civil cases with wider economic connotations or involving local or central governments, as well as be vigilant against delays occasioned by Advocates who, after securing temporary injunctive orders, deliberately delay the progress of cases.[44]

3.3 Limiting Appeals and Revisions on Interim Orders

In an attempt to curb the use of appeals on interim orders to delay the disposal of cases, various laws were amended in the year 2002 to prevent appeals or applications for revision on any preliminary or interlocutory orders of the courts unless such decision or order has the effect of finally determining the matter.[45] This prohibition extends to all courts including subordinate courts. Preliminary orders

[39] Order VIIIA Rules 4-7 of the Civil Procedure Code 1966.
[40] Section 95 of the Civil Procedure Code 1966.
[41] First Schedule of the High Court of Tanzania (Commercial Division Fees) Rules, 2012 [GN 249 of 2012]. Usual exchange rate is Tshs/US$ = 2,000/1.
[42] Section 46(2) the High Court (Commercial Division) Procedure Rules 2012.
[43] Section 47 the High Court (Commercial Division) Procedure Rules 2012.
[44] Law Reform Commission, *op. cit fn* 10, para 22.20.2, at 45-46.
[45] The Written Laws (Miscellaneous Amendments) (No. 3) Act, 2002. The amended laws included the Civil Procedure Code 1966, the Magistrates' Courts Act 2 of 1984, and the Appellate Jurisdiction Act 1979.

are common in determining the preliminary objections raised by litigants or court *suo motu* on points of law, mainly seeking to amend the pleadings, clarify matters, or dismiss the case and thereby save the courts' time and the parties. Common grounds for preliminary objections include points on lack of jurisdiction, failure to disclose a cause of action, limitations, and res judicata. If upheld, a preliminary objection summarily closes the matter.[46]

3.4 Tracking Performance Statistics

The Judiciary has set its sights on clearing their backlog of cases within two years. This is also a monitoring criterion for administration of justice as indicator One in Goal Four of Cluster III on Governance and Accountability of the National Strategy for Growth and Poverty Reduction (known in Kiswahili acronym as MKUKUTA).[47] Accordingly, as part of the strategy, it had embarked on the process of collecting performance statistics on an annual basis, focusing on the workload of individual judges. It has been established that tracking performances based on the workload of an individual judge is crucial for a visual representation of the distribution of the case load amongst the personnel of the court, but it does not take into account that most cases require a certain minimum timeframe to be disposed. Therefore, the judiciary also needs to know general timeframes for case disposal in order for it to set realistic goals and benchmarks because knowledge of clearance rates for various case types of cases over a period of time is crucial in identifying emerging problems and targeting improvements.[48]

It needs to be recognized that in the past, the judiciary had no data base on civil cases, such that various cases could disappear from the track and become completely forgotten, thereby contributing to delays and backlogs.[49] According to the Law Reform Commission of Tanzania, "judiciary needs a proper system of case management which ensures not only speedy flow of cases through the courts, but also does not allow cases to disappear from the attention of court".[50]

4.0 The Assessment of the Case Management in Tanzania

Case management is about judicial reform and the provision of justice. The performance of the judiciary is hard to accurately measure and globally standards and indicators t measure it varies widely. Ordinarily, performance measurement entails juggling cost-value of inputs over outputs and the improvement in quality.

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[46] *Bank of Tanzania v. Devram P. Valambia*, Civil Application No. 153 of 2003, Court of Appeal of Tanzania, Dar es salaam(Unreported).

[47] Goal 4 deals with rights of the poor and vulnerable groups to be protected and promoted in the justice system. The indicators are (a) percentage of court cases outstanding for two or more years, (b) percentage of prisoners in remand for two or more years compared to all prisoners in a given year, (c) percentage of detained juveniles accommodated in juvenile remand homes, (d) percentage of districts with a team of trained paralegals.

[48] Ministry of Constitutional and Legal Affairs, *An Assessment of the Legal Sector in Tanzania*, 2014 at 19-20.

[49] See the Chief Justice's Circulars No. 1 of 1992 and Number 3 of 1997 as discussed in Law Reform Commission, *op. cit fn* 10, at 77.

[50] *Ibid*, at 77.

According to Waleed Haider Malik, this makes measuring the performance of judicial systems complex and difficult, hence not an exact science. It is difficult to compare outputs against inputs of the justice system because the output of the judiciary is usually an intangible, indivisible service, with potentially enormous externality value. Furthermore, the periods of production are always uncertain because the course of trials and court actions may be drawn out and diffused.[51] The basic international benchmarks for the efficiency of the judiciary is mainly determined by how quickly and consistently the court system provides legal services, including adjudication of cases.

According to Waleed Haider Malik, the standard efficiency measures include clearance rates, the number of cases decided per judge, the waiting time, the number of writs issued, the time between case filing and judgment, the number of hours judges sit a year, the internal efficiency of financial resources (measured by cost per case processed), and total expenditure as a percentage of national budget.[52] The quality of dispute resolution is determined by the manner in which rights and obligations are enforced, while the performance test for a satisfactory judicial system is reflected in whether it improves life and increases public confidence in the rule of law (on features like the independence judiciary, lack of corruption, and the transparency of the system). Quantitative measures which can also affect the quality include numbers of pending cases or backlogs, the level of total court fees, the number of judges per capita, the number of lawyers per capita, expenditure per case in legal assistance programs, proportion of cases that go to appeals, the number of cases decided through ADR, and expenditures of the judiciary as a share of the National budget.[53]

In the context of Tanzania, statistics on the performance of the judiciary are staggering.[54] It has been observed that despite the above efforts and legislative reforms, in the civil justice procedures and management in Tanzania, the judiciary has not been able to dramatically change its ability to manage cases or speed up the administration of justice.[55] According to the Assessment of the Legal Sector in Tanzania of 2013, the Commercial Court Division is the best performing of the divisions of the High Court in Tanzania, while the primary courts have the best case load completion of the entire judiciary. The caseload of Commercial Court Division is comparatively, 35 times, smaller than that of the general division and other divisions of the High Court. However, in terms of its own performance, it still has

[51] W. H. Malik, *Judiciary-led Reforms in Singapore: Framework, Strategies, and Lessons* (Washington DC: The International Bank for Reconstruction and Development, 2007), at 65.
[52] *Ibid* at 65-66.
[53] *Ibid* at 66-67.
[54] The United Republic of Tanzania, Judiciary, *The 2010 Annual Statistics of the Judiciary of Tanzania*, June 2012, p. viii.
[55] Also see Ministry of Constitution Affairs and Justice, *A Study on the Status of Judicial Case Backlogs in Tanzania Mainland, 2004-2008*, Legal Sector Reform Programme and National Bureau of Statistics, 2009.

backlogs of cases and delays. The clearance rate[56] of the Commercial Court Division was 93.2% in 2008/9, dropped to 45.3% in 2009/2010, and stabilized to 60.4% and 64.2% in 2010/2011 and 2011/2012 respectively.[57] Among other things, this trend makes commercial justice expensive and not readily available for the economy.

The average clearance rate of primary courts is 74.2%. Their clearance rate was 74.3% in 2008/2009, 78.3% in 2009/2010, 63.9% in 2010/2011, and 80.4% in 2011/2012.[58] It has been suggested that the reasons behind the good performances at the lower courts includes systems of measures that the judiciary has been implementing at the primary courts level (including rehabilitation, construction of better infrastructures, employment of more magistrates, and the absence of complex procedural rules). As a result, it has been argued that, from an "access to justice" perspective based on clearance rate, Tanzanians using Primary Courts (who are more likely to be the poor) are having better access than those higher up the hierarchy.[59] Since lawyers have no right of audience in primary courts in Tanzania, arguably the court is also spared of adjournment-minded lawyers.[60] As the former Attorney General of California, Evelle Younger, once said "An incompetent attorney can delay a trial for years or months. A competent attorney can delay one even longer."[61]

The commercial Court Division is also a pioneer within the judiciary in various aspects of case and case flow management. According to Honorable Justice Robert Makaramba, the then Judge In Charge of the commercial division, the court has developed and adopted (a) a partial case management system and has set time standards for disposal of cases, which are frequently monitored with case disposal reports issued on a monthly and annual basis; (b) specific time frames for events, thus making case processing more certain and predictable, which reduces the time litigants and advocates have to spend at the Court waiting for their cases to be called; and (c) general policy and rule of discouraging adjournments by imposing a penalty for unjustified adjournments.[62] The Court has also recognized the benefit of utilizing mediation and pre-trial settlement as an alternative to litigation, with 20% of its cases generally being disposed of at pre-trial stage through mediation.[63]

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[56] The number of resolved cases as a percentage of the number of pending cases plus cases carried over from the previous year, showing the progressive increase in caseload resolution year on year.
[57] Ministry of Constitutional and Legal Affairs, *op. cit fn* 47 at 22.
[58] *Ibid* at 26.
[59] *Ibid*
[60] In 2012, the government of Tanzania approved the judiciary to start recruiting primary court magistrates with a law degree (i.e. Bachelor of Laws). About 300 magistrates were on track to be deployed at the primary courts. See M. C. Othman, 'Access to justice and Justice Delivery in Tanzania', 1 *Zanzibar Yearbook of Law*, (2011), 3-15, at 10. The Law Reform Commission of Tanzania has recently recommended that Advocates and State Attorneys should be allowed to appear in Primary Courts where the court is presided over by qualified law graduates. See Law Reform Commission, *op cit fn* 10, para 2.4.4.2 at 67.
[61] Quoted in L. Leo, "Case Management – Drawing from the Singapore Experience", 30, *Civil Justice Quarterly 2 (2011)*, 143-162, at 162.
[62] See The High Court (Commercial Division) Procedure Rules 2012 and High Court of Tanzania (Commercial Division Fees) Rules 2012.
[63] M.C Othman, *op. cit fn* 3, at 18.

The Chief Justice of Tanzania, Mohamed Othman Chande, speaking at the Annual Conference of the Bar Association in 2012 year, empathetically wondered why there is a pile of interlocutory appeals at the Court registries in spite of the known position of the law in force for the past 12 years prohibiting appeals and revisions of interim orders? Adding: "*Are we seriously testing the law or teasing its limit altogether? Does one really have to 'chase every rabbit down its burrow'*?"[64] Corollary to this, the Chief Justice also noted the visible proliferation of preliminary objections being raised in civil litigations for the sake of raising one, including the submission of some uncontested facts contrary to the law and thereby undermining the very aim of the preliminary objections and unnecessarily prolonging time and cost of litigation.[65]

There is also reluctance and timidity in the minds of litigants in using ADR in Tanzania to settle disputes. The Chief Justice observed that, while worldwide interest in the potential of ADR in resolving commercial and civil disputes has mushroomed, in Tanzania the trend is the inverse. For instance, from 2000-2010 only 20% of all cases filed at the Commercial Court Division of the High Court were settled through mediation, and the indication shows the downward trend of the use of ADR.[66]

The observations by the Chief Justice need to be taken seriously, not only because they were said by the Head of the Judiciary responsible for the supervision of the disposal and management of cases,[67] but also it is authoritative proof that case management has not achieved the expected results. It is also a clear signal of a problem of undue laxity in the application of and compliance with civil procedures and the continued courts' tolerance for the procedural non-compliance culture of lawyers. Arguably, this constitutes the root cause of the poor performances of the judiciary in relation to easing the backlog of cases and timely dispensation of civil justice without undue delay as per Article 107A of the Constitution. The judiciary also lacks a robust benchmark and key performance indicators necessary in case management, as will be discussed below with other examples from other jurisdictions.

The Business Environment Lab on Contract Enforcement, Law and Order of the Tanzania's Presidential Initiative 'Big Results Now (BRN)' depicts challenging facts on the current affairs on case backlog, ADR and case managements systems in Tanzania.[68] It observes that, first, the case backlog programme attempted under

[64] *Ibid*, at 22.
[65] *Ibid*, at 23.
[66] *Ibid*, at 19.
[67] Section 24(1) of the Judicial Administration Act 2011.
[68] BRN was initiated in October 2012 by the Government of the United Republic of Tanzania, with support of the 39 mil pounds from DFID, as a mechanism to effectively oversee, monitor and evaluate implementation of its development plans and programmes. It is being implemented through the Transformation and Delivery Council (TDC), the President's Delivery

LSRP was unsuccessful mainly because stakeholders especially judges were resistant to outsiders (ie., non-judges) being brought in to finalize cases. As of December 2013 the backlogs of cases aged above two years existed at the courts as follows: Court of Appeal of Tanzania, 426 cases, the High Court, 1,743 civil cases and District and Resident Magistrates' Courts, 1,186 cases. The backlog at Commercial Division of the High Court was 260 cases aged above one year.

Second, the ADR was still not effective due to lack of expertise and awareness of ADR, resistance by advocates for lack of understanding of its benefits as well poor legislative regime which provides for court-annexed mediation by judges only without independent mediators. Law firms often use international arbitration. The only success story was at the Commercial Division of the High Court where mediation accounted for 13% of all disposed cases in 2013.

Third, the records and case management systems were in shamble partly allegedly for lack of commitment from user's (ie., judges) to change. The judiciary does not actively manage cases, standards are not adhered hence unnecessary adjournments with impunity and there is little incentive for advocates and parties to have cases managed more effectively. It is estimated that over 50% of cases take 30 to 90 days from filing to preliminary objections, 66% of cases take 90 to 1,000 days to progress from pre-trial hearing to trial, and 66% of cases take 150 to 1,000 days from trial to decision.[69]

The Law Reform Commission of Tanzania has also unearthed another contributing factor to the delay of the disposal of civil cases, namely, mentions. This is a court practice to monitor the progress of the case outside the scope provided for under the Civil Procedure Code. It has been observed that the practice of adjournment by mention order is not supported by any law and unnecessarily lengthens the process of litigation.[70] It has therefore been recommended that, the courts should not allow parties to apply for substantive relief, such as dismissal of a suit or default judgment, on a date designated for the mention of the case. And, the Civil Procedure Code should be amended to regulate the practice by prescribing specific stages through which civil proceeding shall pass through and should also fix time-limits for each stage of civil proceeding.[71]

Bureau (PDB) and Ministerial Delivery Units (MDUs). BRN is modeled on the Malaysia similar programme and began its work in 2013.

[69] Law & Development Partnership, "*Big Results Now - Business Environment Lab - Commercial Justice Report*", Department for International Development (DFID) Tanzania, 3 April 2014, at pp. 18, 21, 27-28.

[70] Law Reform Commission, *op. cit fn* 10, at 14.

[71] *Ibid*.

5.0 The State of the Legal Aid Services in Tanzania

Access to justice requires a robust legal aid service in which underprivileged, disadvantaged, and low income groups will be assisted in claiming or defending their rights before the courts, against powerful and wealthy litigants. Without legal aid services in civil matters, the equality before the law is questionable and the vision of increasing access to justice, specifically for the poor and disadvantaged, becomes a myth. Access to justice is what Article 107A of the Constitution of Tanzania seeks to achieve. As the Chief Justice of Tanzania, once said, legal representation and legal aid are essential requirements of access to justice. To say the least, the Chief Justice observed that in Tanzania "In civil matters, the closest the law has gone is only to exempt legal aid organizations and those with insufficient means (*"pauper"*) from the payment of court fees.[72] This too is grossly insufficient to ensure adequate legal representation of indigent litigants."[73] Despite the presence of civil society organizations, Universities/law schools, and organized bar initiatives providing legal aid services in Tanzania, there is no law that guides or provides for legal aid services in civil matters. Even in criminal matters, free legal aid is limited to indigent-accused facing capital offence charges only.[74] The current position of Tanzania is similar to that of England prior to1696, where only the accused persons facing treason were entitled to be represented by a lawyer.[75]

It is perplexing to note the low level of attention given to legal aid services. For instance, the recent 2013 report on 'Comprehensive Review of Civil Justice System in Tanzania,' by the Law Reform Commission of Tanzania, contains no discussion or recommendation on the need for legal aid in civil matters as part of access to justice.[76] The study was undertaken to explore ways to improve the machinery of civil justice in Tanzania by means of reforms in jurisdiction, procedure, regulation of private legal practice, and court administration, and in particular to reduce delay, cost, and complexity.[77] Arguably, civil matters are perceived as private matters, with no danger of depriving one's physical liberty and the state should have no special interest in it. Even in other major countries, like the U.S., citizens have no constitutional or statutory right to the assistance of counsel for civil litigation in either Federal or state Courts.[78] This is a narrow approach of looking at legal aid necessity in civil litigation because civil justice is also a public service.[79] Besides that, often the government and other powerful entities sue or are sued by indigents, for

[72] Also see the Court Fees Rules (GN No. 308 of 1964), Court of Appeal Rules (GN No. 102 of 1979).
[73] M. C. Othman, *op.cit fn* 3, at 12.
[74] Legal Aid (Criminal Proceedings) Act (Cap. 21 R.E. 2002). Also see M.C. Othman, *op.cit fn* 3, at 11-12.
[75] R. Assy, "Revisiting the Right to Self-representation in Civil Proceedings" 30 *Civil Justice Quarterly 3 (2011),* 267-282 at 275.
[76] This is not oblivious of other efforts by the Law Reform Commission to promote and recognize paralegals for the provision of legal aid services. See Law Reform Commission of Tanzania, Report on the Scheme for Provision of Legal Services by Paralegals, Presented to the Minister for Justice and Constitutional Affairs, December 2004 at Dar es Salaam.
[77] Law Reform Commission, *op. cit fn* 10.
[78] L. K. Yuille, "*No One's Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*", 42 *Colum. J. Transnat'l L.* (2004), 863 at 872. Also see W. P. Quigley, "*Legal Services:* The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960's to the 1990's", 17 *St. Louis U. Pub. L. Rev.* (1998), at 241.
[79] J. R. Williams, *op. cit fn* 15 at 395.

instance, in land acquisition cases. As alluded to above, the Law Reform Commission of Tanzania is suggesting fast-tracking of all cases perceived as having economic, social, or political significance in local or central governments.[80] It is no wonder that all other major reports on access to justice have consistently recommend legal aid as an essential element of access to justice. The reports includes the 1996 Legal Sector Report of Tanzania, [81] 1996 Lord Woolf's Report on Access to Justice,[82] 2009 Lord Jackson Report on Review of Civil Litigation Costs,[83] 2012 Word Bank Implementation Completion and Results Report on the Accountability, Transparency and Integrity Project (ATIP) of the United Republic of Tanzania[84], and the 2014 Legal Sector Assessment Report by the Ministry of Constitutional and Legal Affairs of Tanzania.[85] It is submitted that the absence of legal aid schemes of any kind in civil cases in Tanzania is one of the major weaknesses of access to justice in the country. The adversarial system has complex and arcane procedures as it is designed to operate by lawyers representing the indigent rather than laypersons representing themselves.[86]

It is common knowledge that efforts and plans to establish a policy and legal framework governing legal aid services provisions in the country exist in the newly created Department for Public and Legal Services in the Ministry of Justice and Constitutional Affairs. They support the existing civil society organizations actively engaged with legal aid services, such as the Tanganyika Law Society. It is also within the election manifestos of the ruling party to enact a law that will regulate and formalize legal aid services and legal aid providers, including paralegals in Tanzania.[87] These efforts are commendable, although government funded and regulated legal aid schemes are long overdue. The urgency and need for a robust policy and law on legal aid services needs to be taken seriously for the sake of access to justice in Tanzania. The issue now, after over fifty years of independence, should not be whether to have government funded and regulated legal aid schemes, but what should be covered under the scheme. For instance in England, the Legal Aid and Sentencing of Offenders Act 2012, which came into force in 2013, has replaced the Legal Services Commission for the Legal Aid Agency and excluded legal aid provision in matters of debt, welfare benefits, employment, education, non-asylum

[80] Law Reform Commission, *op. cit fn* 10, para 22.20.2 at 45-46.
[81] The United Republic of Tanzania, *Legal Sector Report, Financial and Legal Management Upgrading Project (FILMUP)*, 1996 at pp. 72-75.
[82] L. Woolf, *op.cit fn* 4.
[83] L. S. Jackson, *op. cit fn* 18.
[84] Implementation Completion and Results Report on the Accountability, Transparency and Integrity Project (ATIP) of the United Republic of Tanzania, World Bank, Public Sector Reform and Capacity Building Unit, Country Department East Africa, Africa Region.
[85] Ministry of Constitutional and Legal Affairs, *op. cit fn* 47.
[86] D.H. Genn, *op. cit fn* 5, at 434.
[87] CCM Election Manifesto of 2005-2010 (para 108(j)) and 2010-2015 (para 186(j)).

immigration, criminal negligence, criminal injury cases, some aspects of private family law, as well as housing disputes.[88]

6.0 Implementation of Case Management in other Jurisdictions: Lessons

Case management is being practiced in many jurisdictions in order to achieve greater judicial efficiency and thereby settle disputes on the merits, at proportionate cost, and within a reasonable timeframe. For the avoidance of generalizations, this section does not seek to compare all indicators of the efficiency and quality of performance across jurisdictions, because any cross country comparison has limited value because classification methodologies, procedures, complexity of cases, and the jurisdiction of courts vary across countries.[89] Considering the transactional and contextual environments of the judiciary in Tanzania, this part seeks to draw possible lessons from the challenges of affecting effective case management in select countries, namely Great Britain and Singapore. These countries are common law, like Tanzania, and Singapore is widely considered successful, while Great Britain is is still struggling with a culture of non-compliance and the delays and costs associated with it, despite massive legislative reforms undertaken to implement the case management. In fact Singapore by 2012 was considered as the fastest country in the world in determining the cases as it took an average of 150 days involving 21 procedural steps to determine a suit.[90]

6.1 Great Britain

The case management started being implemented in England and Wales as a result of the recommendations of Lord Woolf's report on Access to Justice in 1996.[91] Lord Woolf identified the core problems of the English civil justice system as being too expensive, too slow, too uncertain, too unequal, too fragmented, too adversarial, and too ignored. There was no clear overall responsibility for the administration of civil justice. Cases were run by the parties instead of courts and rules of court were ignored by parties and not enforced by the court.[92] It was recommended that courts should have the final responsibility in determining procedures fit for each case, setting realistic enforceable schedules, and allocating all contentious cases to speed tracks. The new system, among other things, was to include principles of equality, economy, proportionality, and expedition in dealing with cases justly. The use of ADR and legal aid funding were emphasized at all civil courts in making litigations less costly, minimal as well less adversarial, and more cooperative.[93] Rules of procedures were simplified to make litigations shorter and certain by enforcing time

[88] D.H. Genn, *op. cit fn* 5, at 413.
[89] W. H. Malik, *op. cit fn* 50 at 65.
[90] Mohamed Chande Othman, Opening Remarks on the Occasion of the 4th Roundtable Discussion of the Commercial Division of the High Court of Tanzania, 20th July 2012, Dar es Salaam, p. 3.
[91] L. Woolf, *op. cit fn* 4.
[92] *Ibid*, at 2.
[93] Also see L. A. Mistelis, "ADR in England and Wales", 12 *Am. Rev. Int'l Arb.* (2001), at 167.

scale and court orders. Automatic sanctions were introduced for procedural non-compliance. [94]

The Civil Procedure Rules 1998 (the CPR) were introduced in England to implement the above Lord Woolf's recommendations. The issue of case management was further reviewed in the report on Review of Civil Litigation Costs by Lord Justice Jackson in 2009. Lord Justice Jackson was required to review case management procedures as well as rules on costs of civil litigation and make recommendations to promote access to justice at proportionate cost.[95] After the review, Lord Justice Jackson recommended a series of improvements including a legal aid scheme, the use of contingency fee agreements, fixed costs in fast track litigations, and limitations on the 'no win, no fee' agreements. It was also recommended that ADR be further promoted, but not made compulsory for all proceedings, single docket system be introduced, and where practicable, allocating cases to judges should be based upon the relevant expertise of the particular judge. [96]

Despite the above efforts, it has been observed that following the introduction of the CPR, the courts initially took a robust approach to case management based on Lord Woolf's call for a culture change. Yet, over time the courts started to become more tolerant of non-compliance culture.[97] The change of culture anticipated by Lord Woolf remains not yet fully achieved.[98] Failure to enforce compliance is still causing delay, expense, and vexation in civil litigation. Andrew Higgins observes that "history has shown that calls to change the culture of litigation, without rules forcing parties to bring about the desired change, can be forgiven with the passage of time. We have been there before."[99] This is associated with English attitudes of treating procedural matters as trivial matters, for which law is not interested (*de minimis non curat lex.)* As a result:

> "Historically, English courts have taken a lax attitude to non-compliance with procedural rules and court orders. This was based on the philosophy that procedural rules were not trip wires to justice, and that except in cases of intentional non-compliance or inordinate delay which prejudiced the rights of other party, the court should decide the case on the merits if it was still able to do so."[100]

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[94] L. Woolf, *op. cit fn* 4, at 6-7.
[95] Also see M. E. Stamp, *"Are the* Woolf Reforms an Antidote for the Cost Disease? The Problem of the Increasing Cost of Litigation and English Attempts at a Solution**",** *U. Pa. J. Int'l Econ. L* 22 (2001) at 349.
[96] L. S. Jackson, *op. cit fn* 18, at xvi-xxiii, 66-70.
[97] A. Higgins, "CPR 3.9: The *Mitchell* Guidance, *the Denton* Revision, and Why Coded Messages Don't Make for Good Case Management", 33 *Civil Justice Quarterly* 4 (2014), 379-393 at 392.
[98] J. R. Williams, *op. cit fn* 15, at 398.
[99] A. Higgins, *op.cit fn* 96, at 391.
[100] *Ibid*, at 381.

It has also been noted that the thrust of English civil justice reform has been to indiscriminately divert many cases away from courts towards ADR, not as a primary means to settle disputes, but as a way to primarily reduce existing court delays and associated costs. The English people seem resigned to the fact that court proceedings are time consuming and ADR is the appropriate method for expediting them.[101] Furthermore, English courts also have the challenge of setting goals in such as key performance indicators, routine collection of information on all cases, and constant monitoring. The only benchmarks set for civil cases relates to an increase in the settlement of contentious small claims, the completion if small claims within 30 weeks, and an increase in the amount of online civil work. There are no performance indicators set on clearance rate. Apart from the problem of limited key performance indicators in civil matters unlike in criminal matters, there is also little leverage on ICT to support civil case management, which remains largely a paper-based process.[102] In sum, the deficiencies in the English approach to case management are caused by lack of robust key performance indicators, lack of rigorous monitoring and supervision, and inconsistency in enforcement, unless there are orders and sanctions.

6.2 Singapore

In the early 1990s, Singapore had a massive backlog of cases, with over 10,000 cases and 44% of all cases took between 5 to 10 years to be disposed. More than 2,000 cases at the Supreme Court had trial dates available three or more years later. But after the introduction of case management, amongst other reforms, by 2009, the judiciary of Singapore was rated by the World Economic Forum as the most efficient in the world, with all cases being disposed of within 18 months of filing and clearance rates of 85% and 83% in the Supreme Court and subordinate courts respectively.[103] It is noteworthy that in 2008/2009, Singapore had a population ratio of one judge to every 42,629, while England had a ratio of one judge to every 14,822 persons. In terms of volume of cases, English courts had an average of 1,891 cases per judge while Singapore had an average of 1,825 cases per judge. These statistics make strong justification for the comparison between Singapore and England.[104] Tanzania has a total of 16 and 81 judges at the Court of Appeal and the High Court respectively. With a grand total of 97 judges, Tanzania has a population ratio of one judge to every 453,609 persons.[105]

The judiciary is credited with leading initiatives through case management as an image of its performances. According to Lionel Leo, the key features of the Singapore system of case management which have successfully eliminated undue

[101] L. Leo, *op. cit fn* 60 at 143.
[102] *Ibid* at 146-147.
[103] *Ibid* at 144-145.
[104] *Ibid* at 145.
[105] 'State Losing too Many Cases: Kikwete', The Citizen (T), 5 February 2015.

delay of cases are largely "the maintenance of a system for the vigorous monitoring and supervision of case progress, as well as an uncompromised but fair approach towards procedural non-compliance."[106] The judiciary formulated key performance indicators and benchmarks in assessing the overall functionality of the justice system. The goal was to dispose of any case within 18 months of filing. Automatic discontinuation of cases was introduced for inactive cases of more than a year and the granting of a reinstatement order for such cases was an exception rather than the norm.[107] ICT supported the system through the introduction of Electronic Filing System (EFS) and the Application and Case E-Management System (ACES) to track cases.

Three key performance indicators were adopted, namely, clearance rate, lifespan of cases, and waiting periods. Clearance rate was used to give a quick overview of the overall efficiency of the courts and to also monitor individual categories of cases, so as to predict rising trends and prepare remedial actions. Lifespan of cases is used to monitor the progress of each case by reporting how long each case takes to clear the system and making sure that a case doesn't exceed its speed track. The waiting period indicator relates to court processes and is made public. It ensures that cases that are ready for trial have trial dates which are not too far off in the calendar and avoids any delay that may be attributed to the courts. It acts as a reminder to advocates to keep their dates intact and uncompromised.[108] Singapore's approach to non-compliance is said to rest on two pillars. First, trial dares are generally inviolable and are treated as a milestone dates. Second, cases must conform to the set benchmarks, of which the most complex case must be finished within 18 months.[109]

7.0 Conclusions and Recommendations

Tanzania has yet to embrace and promote a comprehensive case management as a technique for addressing the ever growing caseload which contributes to case delays and consequently to delay in dispensation of justice.[110] Efforts and plans are there and need to be appreciated. Also, clear leadership from the judiciary seem committed with regards to the ideals of case management, change, and universal access to justice. That is why efforts to promote case management within the framework of access to justice have been limitedly promoted, such as at the Commercial Court Division. The Commercial Division of the High Court was established as a response to the inefficient judicial system demonstrated by the case delay in 1990s.[111]

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[106] L. Leo, *op. cit fn* 60, at 150.
[107] *Ibid* at 153.
[108] *Ibid* at 156.
[109] *Ibid* at 159-160.
[110] R. V. Makaramba, *op. cit fn* 1, at 5.
[111] M. C. Othman, *op. cit fn* 89, at 1.

Furthermore, the Civil Procedure Code, together with other critical legislation, have been amended to introduce pre-trial settlement and scheduling conferences, ADR, case speed tracks, as well as the general prohibition on revision and appeals on interim orders. The judiciary is streamlining the case flow management system within other major reforms, such as piloting the automation of the case assignment system and case tracking system based on the workload of individual judges, as well improving the statistics unit.

It is also noteworthy that the existing delays of cases cannot entirely be blamed on the judiciary, as there are many factors (not well covered in this paper) contributing to the existing state of affairs. This includes lack of necessary ICT supports as the judiciary is almost 100% manual and paper based system, budgetary constraints, insufficient number of judges and other judicial officers in comparison to the population and case workloads, limited infrastructures, limited use of ADR by litigants, as well as limited access to legal aid services for indigent persons. Moreover, some rural communities either have no court buildings, judges, or magistrates. Hence they are physically outside the formal justice system.[112]

That said, the experiences of Great Britain and Singapore are very revealing and their experiences need to be adopted and adapted in the context of Tanzania. It is clear that the presence of good laws without a clear, fair, and uncompromised approach to procedural non-compliance is not enough to change the existing lax attitude toward non-compliance with procedural rules and court orders anchored in the common law practice that procedural rules are not trip wires to justice as *de minimis non curat lex*. This attitude has to change and the judiciary must firmly and fairly enforce the rules and sanctions by treating trial dates as milestone dates.

The Law Reform Commission of Tanzania has recommended to the judiciary that they create a database on cases to ensure the efficiency of case management. This implies the absence of a database on all civil cases. It has also recommended that in order for the judiciary to attain its goal of disposing of cases within two years and reducing the level of backlog of cases, courts should carry out regular stock taking by physically counting the case files and arranging the results of the count in accordance with the years of pendency in the court concerned.[113] These recommendations are commendable, though not very realistic. In the 21st century, physical counting the case files, even in a well-organized registers, is labour-intensive in the already thinly staffed judiciary of Tanzania and is likely to yield low productivity. The judiciary must embrace the ICT in the processes of case tracking,

[112] The United Republic of Tanzania, note 78, pp. 24-25.
[113] Law Reform Commission, note 10, pp. 77, 115.

routine collection of information on all cases, and constant monitoring. Issues like e-filling, e-court services and electronic recording systems must be given a priority. It is very promising to note that the judiciary has already adopted the ICT Roadmap, with an ICT Policy and Strategy waiting operationalization.[114] So far, at the High Court Commercial Division, electronic substituted service by way of e-mail and facsimile is allowed.[115] At the same division, electronic recording systems are piloted, encouraged and even a witness may give evidence through a video link without him being present in the courtroom.[116]

Furthermore, the judiciary must tackle the challenge of a lack of realistic and robust key performance indicators for monitoring and evaluating within the framework of case management. The only benchmark set by the judiciary is to dispose of cases within two years and the commitment to reduce the level of backlogged cases. There are no performance indicators set on clearance rate within the case flow management, which is still largely biased on tracking the workload of individual judges instead of overall efficiency of the judiciary. It is important for the judiciary to evaluate its performance by identifying shortcomings and finding the way forward instead of laying the blames for the problems.[117]

It is submitted that key performance indicators should include the clearance rate, decongestion rate, lifespan of cases, and waiting periods. These indicators have been tested and internationally recognized as critical for any rigorous monitoring and supervision of the overall performance of the civil justice system. Capacity building and sensitization on backlog clearance programme to the members of the bench and the bar should sustainable be done to clear case backlogs.

It is submitted that delays in court litigation are likely inevitable if ADR is not promoted to solve cases that would otherwise be decided in trials. Independent mediators should be allowed and encouraged to complement the existing court annexed mediations. The advantages of ADR over court litigation are obvious and need to be systematically told and reiterated with all stakeholders, especially the bar. Accordingly, it is further submitted that a single docketing system should be permitted in cases of a single judge or magistrate on duty/station, so that all civil cases have the opportunity to go through ADR as a first choice.

In addition, a comprehensive legal aid scheme in civil litigation needs to be instituted. As former President of Tanzania, Benjamin William Mkapa, once said, the majority of taxpayers who sustain the judicial system in Tanzania are poor, and if

[114] R. V. Makaramba, *op. cit fn* 1, at 6.
[115] Section 17 High Court (Commercial Division) Procedure Rules 2012.
[116] Section 58 High Court (Commercial Division) Procedure Rules 2012. Also see Othman, note 57, p. 13.
[117] M.C. Othman, *op. cit fn* 89, at 6.

the access to justice is determined by ability to afford professional legal counsel then the majority poor will be shut off from it. Instead of taxing majority to provide justice to minority who can afford it, the government should ensure that no citizen is unable to access justice on the basis of economic status.[118]

[118] Quoted in M.C. Othman, *op. cit fn* 59, at 11.