THE ROLE OF COURTS IN SUPPORTING FINANCIAL SECTOR REFORMS IN TANZANIA

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1. Introduction

1.1 If has been said, and rightly so that –

> *"when business people want creative legal opinion, lawyers often give them business advice".*[2]

You, ladies and gentlemen, are business people. I am a lawyer. I know no business nor do I own any. Yet many of you may find this paper just another business advice! Kindly forgive me, if that should be the case.

That cautious approach however, does not prevent me from making the following, early observation namely, that the topic on which I have been asked to write this paper, is just half way complete. It is my opinion that it should have read: "The role of the Courts in supporting Financial Sector Reforms in Tanzania and the Role of Financial Sector in supporting Judicial Reforms in Tanzania. I will show in this paper how the second limb is equally important, more demanding and more pressing.

1.2. The topic that I am supposed to discuss is quite broad. I do realize that I do not have both the knowledge and competence to analyse it perhaps to the satisfaction of you all, ladies and gentlemen. But I will try. In so doing however, it is quite important that I put a disclaimer at this early stage namely that since I am not authorized or competent enough to speak for and on behalf of the Judiciary, then whatever is stated in this presentation are

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[2] Ronald Kelly, an American Business Executive.

my personal views. They do not in any way whatever, stand for or reflect the official position of the Judiciary Leadership.

2. The Concept:

Under the Constitution of the United Republic of Tanzania[3], the Judiciary is vested with judicial powers. It means therefore that the Judiciary of the United Republic and that of Zanzibar are the sole organs entrusted with the duty of interpreting the laws of this country and adjudicating over disputes that may arise between its people, both human and juridical. In so doing, the people in this country expect judges and magistrates of Tanzania to act with almost, what may be said to be, semi-super human abilities and behaviours in wisdom and propriety, and in decorum and humanity.

2.2 We may, however, tend to forget some salient factors. We may for example, not want to accept that judges and magistrates are also human beings, who live and work in an environment similar to the rest of society. We may also wish not to agree that in order for a judge or magistrate to carry out his duties more effectively, he needs an equally devoted support staff. We may not be aware, perhaps, that a judge or magistrate plays a role similar to that of an umpire. The parties may assist in reaching an early resolution of their dispute or they may prolong it. The judge only has both statutory and inherent powers to see to it that "things move". Such moves are always governed by the "interest of justice" Thus Jim Carrigan[4] was correct, in my view, when he once lamented:

> *" I am sick and tired of hearing about the number of cases disposed of when we discuss the judicial system… we should know that the job of courts is not only to dispose of cases but to decide them justly. Don't we know that the business of Courts is justice…"*

In deed dispensing justice is the paramount duty of Courts in Tanzania and hopefully worldwide. The process may be fast. But mere speedy "is not a test of justice. Deliberate speed is. Deliberate speed takes time. But it is time well spent so" it has been said[5].

[3] 1977, Article 4; Chapter Five, Art. 107 and Art. 107B.
[4] Justice, Supreme Court of Colarado, USA.
[5] Felix Frankfurter.

3. Conceptualising the Concept:

3.1. What is expected of the Courts? Or specifically put, what do Bankers expect the Courts to do when they file their cases? The answer to the two questions is obvious. Bankers, like other stakeholders , expect courts to act justly, effectively, efficiently and speedly in disposing of cases. They expect this to be done by adhering to the highest judicial ethics and observing a sense of responsibility to society. I am made to believe that if the foregoing is truly correct and adhered to, then you need not worry. But most likely the situation is not that much rosy. That is why we are here today.

3.2 One of the reasons that led to the establishment of the Commercial Court was to have a place where business disputes could be resolved by adhering to what is stated under 3.1. above. It had become increasingly clear that the general court set up, could not meet the demands of an increasingly fast changing economic environment of Tanzania. Stakeholders, Bankers inclusive, demanded the establishment of a specialized court which was expected to act as a catalyst for enabling the private sector play an increasingly active role in the economic development of the country.

3.3 In so far as the banks are concerned, it had become frustrating in the sense that debt recovery was a time consuming process. Debtors used Courts to obtain orders which delayed liability or the execution process. Injunctions were misused and over stretched even beyond their legally recognized limits. Once an injunction was obtained by the debtor against a financial institution, nothing else was forthcoming. In so doing, Banks and other financial institutions' ability to lend money to other borrowers became frustrated. In brief, while the rest of the country was forging ahead economically, the courts of law were used to frustrate those efforts. That was wrong. The law institutions, especially the Courts, should become principal tools for the promotion of business growth. In order to be so, it is my view, that law and the courts in particular must move faster and be more responsive to social or business change. The Courts, which interpret the law, should not only frustrate those positive changes in society but they should also not remain static while everything else moves on. Courts must develop and adopt themselves to the "signs of time" in society.

3.4 But while we speak of Courts, we should also look at our Banks, their operations and growth. We should look at this from historical perspective. Gone are the days when we used to que for hours in Banks just to get services from "overworked" staff on the other side of the Counter. At times banks had more staff on the other side of the said counter running from one end to the other, or passing documents from one supervisor to the other, than the customers they served. NBC, City Drive for example, was famous for big crowds of (forced) clients waiting for service. At the upper floor, left, the Chairman and Managing Director could be seen watching helplessly from the window of his office! To the workers, once you left the office to go to a bank, nobody expected you to be back because it was not uncommon to spend three to four hours waiting for "service".

3.4.1 Some Banks do not have formal contract documents that are to be signed by the Bank (the lender) and the borrower. Instead, there is a formal letter for "Application for Short Term Loan". The borrower is then required to sign at the end of that document whether he accepts the offer. In some cases, Banks do start to disburse funds even before the borrower sends back the signed acceptance note or even before security is provided. It is fair, I think, to warn you/inform you of recent views expressed by the Court of Appeal[6], to the effect that mere acceptance of the terms and conditions on the duplicate document does not constitute a contract inter partes. The views hitherto held that -

> "*I have always believed the law to be this, that when an offer is made to another party, and in that offer there is a request express or implied that he must signify his acceptance by doing some particular thing then as soon as he does the thing, he is bound…*[7]

are no longer considered to be good law (on banking contracts). Perhaps that is a food for thought for lawyers. To Bankers, I am sure, your minds will be preoccupied with pertinent

[6] In the case of Hotel Travertine Ltd. and Others versus National Bank of Commerce (Civil Appeal No. 82 of 2002).
[7] Per Lord Blackburn in Brogden versus Metropolitan Railway Co. (1877) 2 App. Cs. 666 (HL).

questions such as, how is the NBC going to recover the 400m/- extended to Hotel Travertine if there existed no contract in *senso stricto*? Or, if there was no contract but the borrower proceeded to collect the money totaling 400m/- basing his authority to do so on that document considered to be a contract, cannot the Court see the relevancy of that document and consider that conduct as an expression of a binding contract? I have no answers to such questions. What I can advise is that it is high time Bankers reviewed their lending documents and/or policies in order to avoid such calamities.

3.4.2 Still same banks start disbursing funds even before the security documentation is regularised. Some cases that have come before us point to the irresistible belief that properties, such as houses mortgaged are over valued. In some cases the borrower's status is taken for granted. That is an uncalled for risk.

3.4.3 Further confusing is the status of spouses when it comes to matrimonial homes. While it is important that before entering into any contracts, the banks should be cautious of this increasingly lame defence by defaulters, it is advisable that banks should observe comments by this Court made in various decisions concerning the role and place of spouses in mortgaged properties. Likewise the provisions of the 1999 Land Act on this matter need to be noted.

4. <u>The Parties – Their Place and Role</u>

In this increasingly complex world, Banks should have a hind sight whenever giving out loans. The Swahili saying that "*kukopa harusi, kulipa matanga*" has never lost its truism. On the part of the borrower, a 1732 proverb by Thomas Fuller that "*you cannot fly with borrowed wings*" is equally true. Problems start when there is default. There is only one Bank which has clearly defined terms in its contract document that "in case of dispute then the said dispute should be referred to the Commercial Court". Thanks for such confidence. But there is the other extreme – that disputes should be referred to arbitration in London (or New Jersey) and the like! One wonders, why London, why not, for example, the services of The Tanzania Institute of Arbitration! I know that Banks with such terms and conditions (of reference to arbitration overseas) are branches of big banks world wide. But

if we are talking of developing the financial sector of Tanzania, then such Banks should consider utilizing the services of dispute resolution mechanisms locally available. The entire Court system (with the exception of the Court of Appeal and Primary Courts) in Tanzania has a well developed mediation system that could resolve such disputes faster and less expensive compared to London or New Jersey.

4.2. What is still lacking is what I may call education to borrowers. These people should know right from day one that they are duty bound to repay the loan as per terms. I know the interest rates are comparatively high. But a borrower should know all that before he takes money from the lender. I am also aware that some borrowers do complain now and then that they do not get all the money applied for. A certain percentage is taken by bank officials who "facilitated" the loan. There have been nasty exchanges in Courts between defaulters and bank witnesses on this issue! It is up to you to look into that problem.

4.3. There have also been complaints against Banks that the "confidentiality" aspect of the relationship between a banker and customer is being eroded at a faster pace. This is blamed on some unfaithful bank staff who reveal customers' financial status to strangers even where the law does not compel them to do so. Also being complained of is the effects of information technology to the confidentiality of customers status. Can a customer's status be prevented from being revealed to any bank staff other than the one who is authorized to handle it? Can any body press a button on a computer and get all the information about a given customer? I am not an IT expert. But if that claim is correct, then it needs to be looked into by all Bankers and lawyers alike. Likewise those laws that require banks to reveal financial status of a customer need to be looked into – whether they conform with the provisions of Article 16(2) of the 1977 Constitution of the United Republic of Tanzania – the Grund Norm. That Article guarantees the privacy of an individual, including privacy to property. Can there be a third option applicable to our financial institutions – an option between complete secrecy, the Swiss type and openness – as it used to be here. I am informed that even the Swiss Banks are opening up, in rare and extreme situations. But I am also

aware that some people do not prefer banking their money for fear of the "Big Brother's" eyes and ears!

4.4. I am also informed that financial institutions now keep a "black list" of certain unreliable customers. That is credible as an 18th century saying by Benjamin Franklin goes – "Creditors have better memories than debtors". Whether all financial institutions respect that list and decline to extend new facilities to such customers, is open to discussion. We are aware at the Commercial Court that certain people have been and are being sued by different banks for default. Large sum of money are involved. One wonders then, is there cooperation and exchange of information between banks?! It is my view that bank loans aim at facilitating a borrower to begin and not to succeed in his endeavours. Not otherwise. Therefore where a customer is, unable to carry the goat, other financial institutions should not put the ox upon him.

5. The Role of Courts:

5.1. The Judiciary in Tanzania has a hierarchy that you may know. It starts with the lowest Courts – the Primary Courts. It then climbs up to the District Courts and Courts of Resident Magistrates, well to the High Court. Above the High Court is the Court of Appeal. Each of these Courts has its prescribed jurisdictional competence, except the High Court which has unlimited jurisdiction.

5.2. Most of the cases filed by financial institutions are before the High Court. A few are in the Resident Magistrates Courts. The immediate question is – how does this structural set up help the advancement of the aims and objectives of financial institutions in the restructuring of this country's economy?.

5.3. The above question may be answered by looking at the role of courts. It is stated herein above that the principal role of any courts is adjudication of disputes brought before it. Such adjudication if done with deliberate speed, saves both time and money on the part of litigants. That is in addition to such adjudication being guided by efficiency and high ethical standards. Therefore any Court, at any level, must observe

the above in dispensing justice. Banks, like any other litigant, may remind us in the Courts System, of the above profound requirements in case we do not perform.

5.4. In so far as this country is concerned, the Commercial Court has been playing an active role, in recent years, to see to it that justice is done to litigants with deliberate speed. The following statistics are a clear indication.

5.4.1 As at 31 December 2005, a total number of cases filed (since its inception in 1999) is 1229. Out of that number, 1116 cases have been completed... that is about 90.81% of all cases filed.

5.4.2 The average time cases have taken during that period is 6.34 months. There are cases which have taken more than one year to complete. This is due to reasons beyond our control. Yet there are cases which have taken only a few days, some being concluded at the mediation stage.

5. In so far as bank related cases are concerned, it is important to note that we had more cases filed between the years 2000 and 2002. That number has, however, been decreasing in recent years. The following chart speaks for itself:-

NUMBER OF CASES FROM BANKS[8]

YEAR	FILED	DECIDED	PENDING
1999	-	-	-
2000	42	42	-
2001	138	132	6
2002	104	101	3
2003	20	18	2
2004	12	12	-
31 OCTOBER, 2005	16	7	9
TOTAL	332	312	20

[8] Source: Commercial Court Records 1999 - 2005

Over 95% of judgments delivered were in favour of the Banks. This is mainly because over 70% of those cases are for debt recovery. We had however, three cases of one bank/financial institution suing another bank/financial institution.

One may ask – why 6 cases from 2001 were still pending as at 31 October 2005? Two explanations to that. One is that one of the parties in each of those cases had preferred to go to the Court of Appeal for redress. That meant that we had to stay (suspend) the proceedings before the Commercial Court, as the law stipulates. Those cases took longer to go through the Court of Appeal process than normal. As of 31 January, 2006, out of the 6 cases, 4 have been remitted to the Commercial Court for continuation with the trial. Out of those 4, two of them have, in the meantime, been settled out of Court by the parties.

5.6. Applying to the Court of Appeal for Review or Revision of interlocutory orders was a process open to litigants. It has since been abolished as it became apparently clear that it was abused and used as one of the delaying tactics. The abolition of such interlocutory appeals/applications made things move faster. It is worth noting here that unlike in the ordinary courts, no appeals against interlocutory orders of the Commercial Court were allowed at any other stage of the proceedings until the case has been concluded. That move made cases faster and pre-empted parties who tried to use delaying tactics to meet their ends. An exception to that general rule was (and still is) that a party could appeal against such an order if the said order disposes of the suit.

5.7. When one discusses the Role of Courts in supporting financial sector reforms, one cannot ignore two other pressing factors. The first of such factors and frequently cited by litigants, including Bankers, is that cases may move fast in the Commercial Court but once they go on appeal, they face the same, old problems of delays. There could be some truth in that observation. However one has to appreciate the fact that the Commercial Court, in addition to some efficient mechanisms in place, uses ultra modern technology which facilitates fast disposal of cases. The Court of Appeal does not have such facilities yet, to the best of my knowledge. Comparatively speaking however, appeals from the

Commercial Court are put on the fast track. That makes them move faster in the Court of Appeal's Cause List.

5.8. The second factor is the execution stage. There are concerns expressed – and they are not infrequent – that some Court Brokers do conspire with judgment debtors in frustrating the execution process. That concern has been addressed to the relevant authorities in the judicial hierarchy. At a seminar organized for Court Brokers, two years ago, a need was expressed to look into the relevant law and rules governing the activities of Court Brokers. The intention is to update the same and close likely loopholes used by unscrupulous characters to frustrate execution processes. I know that the relevant authorities are working on the issue. But, it has also come to our knowledge that some bank officials do collude with those unscrupulous Court Brokers and or litigants. Procedures leading to sales by public auction have been tempered with. Prices of and values of property to be sold have been determined/fixed in bank offices and prior to the date of sale! The open market process is sometimes ignored. Parties who purchase the auctioned property are sometimes "fake" ones. All the above have resulted into objections being opened up in Court or even resistance to delivery to decree holder or *bona fide* purchaser. Financial institutions ought to or should cooperate with Courts of law to rid ourselves of such people amidst us.

5.9. The shortcomings observed above come to the Court's attention either through the usual court process or by way of complaints received through administrative channels. I kindly request all Bankers not to hesitate to inform the Court's leadership when such problems occur. However, another ideal way of solving those issues is by using the Commercial Court Users Committee. This Committee which has statutory backing, advises the Court Management on all matters pertaining to the smooth administration of the same. Financial Institutions are represented on that Committee.

Other representatives are from the Court's management (all judges and registrars), from the Attorney General Chambers, from Tanganyika Law Society, and from the Business Community, including financial institutions. Therefore it is my hope that

Bankers will not hesitate to make use of any of the Committee Members to make their feelings known.

5.10. What the Users Committee does to the Commercial Court is more or less similar to what case management committees do at ordinary Courts. Their major role is to help case management – see to it that cases move fast. Case management Committees have also statutory backing. They see to it that Criminal as well as Civil cases (therefore banking inclusive) move fast through the court process. What is needed, if I may note, is to reactivate such Committees at all levels of the Court hierarchy where they are supposed to exist.

5.11. I have spent considerable time discussing the Court process at both the Court of Appeal and the High Court (Commercial Court) in particular. Following the successes registered by the Commercial Court, there are moves now being considered, to establish what will be known as "small claims courts". These courts, to be specialized in Commercial matters will be at the level of regions (Resident Magistrates Courts). Therefore, it is my esteemed hope that should those Courts work with similar proficiency as the Commercial Court is, business disputes (banking inclusive) of a small nature will be resolved faster and effectively.

6. Making it known

6.1. A disturbing accumulation of issues always runs through a single thread – are all these issues known to those who matter? The answer is not easily forthcoming. The Judiciary is one of the three pillars of any modern democratic state. What takes place in the Judiciary therefore, should be known to the other pillars, the Executive and the Legislature. I hope this is the position in Tanzania today. However, what I know is that some of the obstacles facing a smooth administration of justice in Tanzania are products of historical and economic relationship among the three pillars of State. Historically the Judiciary, in my view, has remained the "weaker" pillar among the three. During colonial times, it was not clearly demarcated. Provincial and District Commissioners (therefore Members of the Executive) had judicial powers as well. The Native Courts were left to deal with the

"natives" and their customs so long as they were not contrary to law and not repugnant to natural justice. The unification of all judicial matters into one hierarchy in 1963, promised to be a positive, hopeful start. However the emergency of a one party democracy, saw again the activities of the judicial organs being sidelined. It was not uncommon to see Party Branches determining issues that would have been properly dealt with by Courts. Although Tanzania main land remained with a strong, independent Judiciary, one may argue that this was not because the system allowed that. Rather, it was due to the strong but understanding of the President (Nyerere) on one side and a strong, no nonsense Chief Justice (Nyalali) on the other. With the re – emergency of multi party democracy in Tanzania, one remains hopeful that the Judiciary has, once again, regained its rightful position in society.

6.2. Economically, the Judiciary has been on the poor end. Budgetary constraints have hindered its development plans. Coupled with the historical neglect, the Judiciary in Tanzania today finds itself with few, dilapidated buildings, understaffed and with a network of facilities that are uncoordinated. All the goodwill expressed by politicians (members of the Executive) in favour of the Judiciary and its independence, has not been satisfactorily translated into tangible ends. Budgetary allocations remain to be below half of the real needs. Even though the Judiciary (and Ministry of Law and Constitutional Affairs) have been categorized as belonging to the three or four strategic Ministries who should get priority in funding allocation, yet when it comes to implementation, the Judiciary is the worst off. There has been calls for rectifying the situation. Proposals have been floated around. One needs to see the end results. Robert Kennedy once said:

> *"Just because we cannot see clearly the end of the road, that is no reason for not setting out on an essential journey. On the contrary, great change dominates the world and unless we move with change, we will become its victims".*

What is important here is not to lament or write and then end up. I put it to you ladies and gentlemen Bankers – where and how can the Banking and Financial Sector at large assist (of course without being seen to compromise the Judiciary)? You expect effective and efficient services from the Judiciary. The same Judiciary is under staffed, has poor facilities, etc. Surely you cannot expect much milk from an underfed cow. You feed it

properly and you will get good results. For example: Magistrate Courts are understaffed. The Institute of Judicial Administration at Lushoto, on the other hand, could train more Magistrates if it were not because of lack of buildings and other facilities. It has approached several financial institutions – some represented here – to invest in construction of hostels and lecture rooms there. In return the government would guarantee repayment of that money. Reluctant negotiations have been going on for years now, with no end in sight! At the same time Tanzanians have continued to complain – lack of Magistrates! Is this outcry not heard by those who have and control the flow of money in this country?

6.3. Another example touches on the Commercial Court. Initially this Court was established with the financial help of DANIDA and The Bank of Tanzania. DANIDA refurbished the Kivukoni Court House and funded the construction of our Arusha Branch. This was in addition to provision of some equipment. The Bank of Tanzania also donated several equipments for the smooth performance of the Court. The government of Tanzania has continued to provide funds for the operations of the Court under a retention scheme. In the meantime the Court has grown from infancy to one with an international recognition and reputation. It is in this respect that the Commercial Court of Tanzania was asked, a few months ago, to coordinate and organise a meeting cum seminar for similar Courts in Africa. The purpose of that gathering is to instill and harmonise common efforts for the improvement of delivery our services. Commercial Courts from East Africa, Saddc and West African countries would participate. I know some Banks represented here have branches in those countries as well. Quality services offered by Commercial Courts in those countries would be similar to what you demand from us here in Tanzania. Likewise such a meeting will give birth to cooperation in all professional aspects of Court work and enhance the exchange of information, professional materials and what have you. Tribunals such as the COMESA one or the East African Court of Justice would as well take part in the conference. Issues such as cross-boarder trade conflict resolution would be high on the agenda. A budget of about US $ 60,000/- had been prepared.

We are unable to raise that money. So the project has remained on the drawing board! Given the advantages expected from that meeting, can the financial institutions represented here come up with a solution? I look forward to that.

7. The Way Forward

7.1. The liberalization of the Banking business in Tanzania is hardly two decades old. That is too short a period to register enviable results. The economy itself still has to grow. Mortgage markets have to show signs of success. New laws are still being tested at different levels of the judicial system. Few law firms are specializing in the banking sector. Above all, we still have people in prominent positions of decision making whose line of thinking and analysing issues is pre – 1992. We have therefore, a long journey to go in order to achieve what we want.

7.2. The long journey ahead of us requires that we forge ahead purposely. The business sector needs to work closely with the legal cum judicial sector in – achieving our expectations. To begin with, we should - as I have shown in this paper – identifying areas of cooperation. We should, for example, make maximum use of the facilities we have in Tanzania. Mediation and arbitration may be concluded with great success here and faster than resorting to overseas services.

7.3. The Hotel Travertine cases is an eye opener. You should bring your contract documents to date and in line with legal requirements. Likewise you should conduct your lender – borrower affairs more professionally and transparently.

7.4. Lastly, it is my hope that financial institutions shall become more proactive in assisting judicial institutions in their endeavours so that the latter can offer better services to the former. It can be done. Let each one of us play its part.

Thank you for your attention