

**PRELIMINARY HEARINGS AND
TRIALS IN CIVIL CASES
(Summons for directions up to
Final submissions)**

**A PAPER PRESENTED AT THE INDUCTION/ORIENTATION OF
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BY

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INTRODUCTION

- Civil procedure is the body of rules that regulate the conduct of civil proceedings.
- It lays down the methods whereby such proceedings are commenced, steps that are taken at particular stage and how such steps are to be taken.
- It also provides the modes of enforcing the decisions of court.
- Civil and criminal procedure on the one hand and evidence on the other constitute what is called adjective law, in contradistinction to substantive law.
- Substantive law defines legal rights, duties and liabilities of parties while adjective law is concerned with the procedure to follow at the trial.

SOURCES OF CIVIL PROCEDURE

- The sources of civil procedure are; The Constitution, Judicature Act, Civil Procedure Act, Magistrates Courts Act, Civil Procedure Rules, Rules made under Judicature Act.
- Civil Proceedings are mainly regulated in all courts by the Rules of Court. Each court has its own set of rules (High Court and Magistrates Courts use the Civil Procedure Rules except G2. Sometimes other tribunals are also empowered to apply the civil procedure rules with necessary modifications.
- There is a Rules Committee which comprises of CJ, AG,DCJ,PJ, 2 representatives of ULS and Director LDC. See S.40
- They are responsible for making rules regulating practice and procedure. S.41

JURISDICTION

- Jurisdiction means the power or authority of a court of law to hear and determine a cause or matter.
- The court must be satisfied that it has jurisdiction; legal power or authority to hear the matter.
- The court must look at the subject matter-pecuniary jurisdiction or territorial jurisdiction especially for magistrates courts. High Court has unlimited jurisdiction in civil matters.
- Jurisdiction is a creature of statute and parties cannot vest court with jurisdiction.
- High Court can transfer a matter to a lower court but the reverse is not true.

PARTIES

- Every civil suit is commenced by proper parties. Such party should have *locus standi* or legal standing. A right to evoke the jurisdiction of court
- Natural persons or non natural persons like Partnerships, Companies or Associations or Nongovernmental organisations.
- Natural person of unsound mind or minor may only sue through next friend or be sued through a guardian ad litem.
- Government can sue or be sued through the Attorney General. Article 250
- Public bodies created by Acts of Parliament can sue or be sued especially if they are given a corporate status.
- A deceased person cannot commence or defend an action. Likewise unincorporated non-statutory bodies, associations, members, clubs are not legal persons.

CAUSE OF ACTION

- A cause of action is the basis for suing. In simple terms, a complaint against the defendant.
- There must be a cause of action before the intending litigant can sue. Such a right can only arise if certain material facts exist.
- It is a factual situation the existence of which entitles one person to obtain a remedy against another person.
- The main determinants of a cause of action; plaintiff enjoyed a right, the right was violated and the defendant is liable. See *Auto Garage v Motokov*
- A cause of action is only determined from the plaint and its annexures.

MODES OF COMMENCING ACTIONS/Pleadings

- Every suit shall be instituted in such a manner as may be prescribed by the rules.
- The following originating process is prescribed under different legislations: Plaint (Specially Endorsed Plaint), originating summons; Notice of Motion; Petition Chamber summons, complaint on oaths or in case of response by filing WSD, affidavit in reply, or Answer to Petition.
- Pleadings are drafted in compliance with the rules under any of the titles. Pleadings are statements drawn up and filed by each party to a legal proceeding sets forth or responds to the allegations or claims.
- Pleadings should disclose clearly and precisely the real issues which are dispute between the parties.
- Pleadings provide a guide for the proper mode of trial.

SERVICE OF COURT PROCESS

- When a suit has been filed, the defendant or respondent must be served in the manner prescribed.
- It is the responsibility of each party to prepare, produce and serve pleadings upon the opposite party.
- Service of summons shall be as far as practicable be person and if not on the agent or an adult member of the family or the company place of business or via email or other available means of communication between the parties (Electronically) by email or Twitter/X or WhatsApp.
- Court may order substituted service within jurisdiction if summons cannot be served in the ordinary way in such other manner as the court thinks fit.
- Under the current dispensation of ECCMIS service of process may be by automatic electronically

SUMMONS FOR DIRECTIONS

- Where a suit has been instituted by way of a plaint, the plaintiff shall take out summons for directions in order for the court to deal with any interlocutory matters and give directions for fair, efficient and effective disposal of the matter.
- The summons for directions shall be taken out within 28 days and if not taken out within that time the suit shall abate or shall be removed from the list of pending suits.
- Where the suit has abated, the plaintiff may subject to the law of limitation, file a fresh suit.
- The court has a duty to consider all matters related to the case and also examine the status of the action or consolidate all appropriate matters including all interlocutory applications.
- Court shall consider whether any evidence on particular matters shall given by way of affidavits or orally or witness statements, whether there any expert witnesses or whether the un-inspected exhibits will be admitted in evidence.

SCEHDULING CONFERENCE

- Scheduling conference shall contain the following elements;
 - ✓ Examination of pleadings of the case and extraction of case summaries for each party;
 - ✓ Identification of agreed facts between the parties, agreed issues and agreed documents;
 - ✓ Exploring the prospect of out of court settlement: Arbitration, Mediation ,Negotiation or Reconciliation:
 - ✓ Possible settlement of some aspects of the case by way of consent Judgment.
 - ✓ Give directions and timetable for trial
- The parties may agree to have a written joint scheduling conference duly signed by the parties covering the above elements.

The Trial

- All the proceedings taken and discussed before culminate in the trial.
- At the hearing all issues of facts must be tried upon evidence led at trial.
- The order of proceedings at the hearing of a suit in cases in which pleadings have been filed is that party on whom the burden of proof is thrown by the nature of the material issues or questions between the parties as determined by the court, begins.
- The party who begins calls his first witness and examines him/her in chief or gets his witness statement admitted as his evidence in chief; Thereafter the witness is cross-examined and may be re-examined by plaintiff counsel.
- Parties are bound by their pleadings when leading evidence and should not lead evidence to support a case that is not presented in their pleadings.
- Cross-examination is intended to weaken, neutralise or demolish the case of the opponent and to establish or support a party's case by means of the opponent's witness.
- Cross examination is not confined to questioning the witness on the facts in issue and material to the case but also as to his credit by injuring his character.
- The plaintiff will close his case and then the defendant will open his/her case by leading evidence in support of their defence.
- While the trial is in progress the court may question a witness called by any of the parties; by way of seeking clarification. Court has wide powers to this end.
- Court has power to adjourn a hearing of a suit if it thinks expedient for the interest of justice to do so..
- The parties may make written or oral submissions in support of their cases. Even without submissions of the parties, the court has a duty to write a decision since there is evidence on record.

JUDGMENT OR RULING

- Judgment/Ruling, that is, the reasoned and binding judicial decision of the court is delivered at the end of the trial. It is the last part of the trial proceedings.
- A Judgment or ruling may be pronounced in open court and may be delivered by email to the parties or other electronic mode. It may be delivered by the registrar of court on instructions of the trial judge.
- A judgment or ruling of court must demonstrate in full a dispassionate consideration of the issues properly raised and heard and must reflect the results of such an exercise.
- It should be clear in the judgment that the court considered all evidence at the trial and having placed them on an imaginary scale the balance of admissible and credible evidence tilted towards a successful party.
- The totality of evidence should be considered in order to determine which has weight and which has no weight at all. The court must weigh the conflicting evidence adduced by both parties and then draw his own conclusions.
- The Judgment/ruling of court takes immediate effect from the day and time it is pronounced or delivered by court unless the court orders otherwise.

Execution

- The decisions of court are executed by way of execution proceedings before a registrar.
- The different modes of execution include;
 - by delivery of any property specifically decreed.
 - By attachment and sale or sale without attachment of any property
 - By attachment of debts
 - By arrest and detention in prison of any person
 - By appointing a receiver.
 - In such other manner as the nature of the relief granted may require.

Costs

- Award of costs is governed by the provisions under Section 27 of the CPA.
- Interest may also be awarded on costs at any rate not exceeding 6% p.a.
- Costs are awarded to advocates as remuneration for exercise of their professional skill and to litigants in person strictly for work and disbursements.

Conclusion

- Civil Procedure is wide and the paper is by no means exhaustive.
- Major purpose was to stimulate your interest in the subject, give leads to the essential principles and to points of check in case of a need for further study.
- What stands out;
 - A Judge needs to be alive to the entire procedure from the time the matter is filed in court and to the practices within court that help in expeditious disposal of cases.
 - Always remember the court has inherent powers to manage its proceedings. S 98 of CPA
 - A decision of a court is as effective as the clarity of the orders issued by the court.
 - Always bear in mind: ***“An order that is unclear is largely unenforceable; and an order that is unenforceable is an order passed in vain”***.

END

THANK YOU FOR LISTENING