
4-20-2009

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Recommended Citation

Geoffrey Kiryabwire, *The Development of the Commercial Judicial System in Uganda: A Study of the Commercial Court Division, High Court of Uganda*, 2 J. Bus. Entrepreneurship & L. Iss. 2 (2009)
Available at: <https://digitalcommons.pepperdine.edu/jbel/vol2/iss2/3>

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THE DEVELOPMENT OF THE COMMERCIAL JUDICIAL SYSTEM IN UGANDA: A STUDY OF THE COMMERCIAL COURT DIVISION, HIGH COURT OF UGANDA

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I. INTRODUCTION

Uganda, unlike the United States, does not have a state and federal court system. There is only one national court system provided for under chapter five of the Constitution of The Republic of Uganda 1995. The lower courts are referred to as Magistrates Courts, which are not courts of record (judgments cannot be used as precedents in other courts). The Superior Courts, which are courts of record, start with the High Court (which has unlimited jurisdiction save for the interpretation of the Constitution). Appeals from the High Court go to the Court of Appeals, and appeals from the Court of Appeals go to the Supreme Court. The Uganda Court of Appeals acts as the constitutional court in the first instance, with appeals then going to the Supreme Court.

Traditionally in most common law countries, including Uganda, there were two divisions of the Courts: civil and criminal. All civil cases were heard in civil division, while all criminal cases were heard in the criminal division. For purposes

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of defining the cases, all non-criminal cases were deemed to be civil cases. This gave the civil division wide latitude of jurisdiction to handle what was deemed to be civil cases. Matters related to tort, land, family, contracts, company, financial institutions intellectual property and others all came up before the civil judge.

The current trend, as part of the process of judicial reform taking place in many jurisdictions, is to create specialized divisions that can deal more specifically with these subjects, hence the establishment of Commercial Courts to deal with commercial disputes. Divisions of the High Court in Uganda now include the civil division, criminal division, commercial court division, family division, land division, anti-corruption court division, and war crimes division.

The idea of a Commercial Court, however, is not really new. The Commercial Court in England has existed for a very long time. It grew out of a notice issued to Judges of the Queen's Bench division in February 1895,² which created a separate commercial list to handle cases of a commercial business nature. It is important to note that the Commercial Court in England was not a distinct court of the High Court, but rather a particular judge was dedicated to handling commercial business. The main purpose of the commercial list at that time was to bring speedy determination to such cases. The Commercial Court, as it later became known particularly under Lord Justice Mathew (d.1908), was very successful in bringing cases to a speedy and satisfactory determination without undue technicality or unnecessary expense.

I. CREATION OF COMMERCIAL COURTS

In order to understand the role of Commercial Courts, it is necessary to see how these courts have evolved. A review of selected jurisdictions which have in the last decade or so created Commercial Courts, reveals some common trends. On January 6, 2004, Michael McDowell T.D., the Minister of Justice, Equality and Law Reform of the Republic of Ireland, announced the creation of a Commercial Division of the High Court (popularly called the Commercial Court) to begin on January 12, 2004. Minister McDowell described it as "a very significant development of the Irish Court system."³

The court has a one-million Euro threshold and the new commercial list covers a wide range of business transactions. The court has introduced new fast track and pre-trial procedures to speed up trials. The Case Management System is such that core issues, consistent evidence and the use of techniques such as witness statements are all agreed to in advance. Electronic evidence and the use of standardized IT formats are also in place.

Available feedback from Irish Lawyers indicates that the Irish Commercial Court has lived up to its expectations—resolving commercial cases effectively, efficiently and quickly.

² Commercial Court (England and Wales), [http://en.wikipedia.org/wiki/commercial_court_\(England_and_Wales\)](http://en.wikipedia.org/wiki/commercial_court_(England_and_Wales)) (last visited July 27, 2006).

³ Judiciary of Ghana Home Page, http://www.judicial.gov.gh/commercial_court/home.htm. (last visited July 27, 2006).

The World Bank/IFC publication, "Doing Business 2009," which compares the ease of doing business in 181 countries worldwide (pages 51 to 52), observes that the most popular judicial reform in Africa over the last five years has been the introduction of specialized commercial courts or commercial sections within the existing courts. It cites Uganda, Tanzania, Kenya, Madagascar and Zambia as African countries which have had such courts for a longer time.

Ghana celebrated the first anniversary of its commercial division (established on March 4, 2005) under the theme "The development of Commercial law and resolution of disputes through the Commercial Court."⁴ The Chief Justice of Ghana, Lord Chief Justice George Kingsley Acquah, at the anniversary pointed out that the Government of Ghana's declaration of a "golden age of business" for its country, placed a responsibility on the judiciary to sustain and maintain a high level of investor confidence in the administration of justice and that the commercial division of the High Court must radiate that confidence. He further stated that the court would, in addition to general commercial claims, extend its jurisdiction to commercial crimes and investment related land disputes.

In a bid to beat white collar crimes, specialized commercial crime courts were established to quickly and efficiently deal with such cases. Opening one such court at Port Elizabeth, the Deputy Minister of Justice and Constitutional Development, Adv. J. de Lange MP said in his speech (June 27, 2005).

"White collar crime has become a serious problem and to deal with it decisively we have set up a Dedicated Commercial Crimes Court. The first court established in Pretoria 1999 has successfully led a government initiative to act decisively against white collar crime. The performance of the existing Dedicated Commercial Court Centres has been impressive. . ."⁵

In Lesotho, the Central Bank of Lesotho has assisted the government of Lesotho to accelerate the establishment of a commercial court.⁶ In providing this assistance, the Central Bank of Lesotho believed that delays in adjudicating commercial cases would be avoided and thus promoted sound financial intermediation. According to the Report Doing Business 2009, other African countries that have established commercial courts include Burkina Faso, The Democratic Republic of The Congo, Mauritania, Mozambique, Nigeria and Rwanda. The Report also found that as a result of the introduction of these courts in Africa the average time (overall) to resolve a commercial dispute has dropped by 19%, from 604 to 492 days.

However, Commercial Courts are also being established outside the common law jurisdictions. The Iris Project of the University of Maryland reports that Peru has decided to establish a commercial law court system because businesses in Peru had reported that courts there lacked the technical capacity to handle commercial

⁴ *Id.*

⁵ Mayor Faku, Remarks at the Official Opening of the Dedicated Commercial Court, Port Elizabeth (June 27, 2005) (transcript available at http://www.doj.gov.za/m_speeches/sp2005/2005_06_27_commercial_court.html).

⁶ Doing Business 2009: Comparing Regulation in 181 Economies, available at http://www.doingbusiness.org/documents/DB09_overview.pdf.

cases.⁷ Meanwhile USAID is reported to be assisting Morocco and the Republic of Serbia in setting up commercial courts.⁸

Clearly, the driving force behind the creation of Commercial Courts is the desire to facilitate the resolution of business/commercial disputes in a quick, efficient and effective manner that ensures economic growth.

II. THE HISTORY OF THE COMMERCIAL COURT IN UGANDA

The history of the Commercial Court in Uganda is no different from other jurisdictions that have established commercial courts. The establishment of the Commercial Court in Uganda as a division of the High Court was a direct recommendation of the 1995 Justice Platt Commission of Inquiry Report on "Delays in the Judicial System."⁹ During its hearings the commission received views from the business community in Uganda. Some of the major concerns were that the Courts at the time were not able to fully appreciate neither specialized commercial disputes nor handle such cases in an efficient and expeditious manner. These concerns were raised in the mid-1990's when the business landscape in Uganda was rapidly changing as a result of the government driven programs of liberalization and privatization of the economy. Consequently, this led to a shift of emphasis from state to privately owned businesses which placed greater expectations on the judicial system.

The President of Uganda, during a nationwide address on January 26, 1995, charged the judiciary to put in place measures to facilitate investors in their court disputes.

The Ugandan judiciary then started to reorganize itself with a view to creating a commercial division of the High Court. On June 20, 1996, then Chief Justice W.W. Wambuzi issued Legal Notice No. 5 of 1996, entitled "Constitutional Commercial Court (practice) Directions 1996" (now Statutory Instrument Constitution No. 6), creating the Commercial Division of the High Court as a Commercial Court. Direction 2 of the instrument states: ". . . [I]t has been decided to establish, a Commercial Court capable of delivering to the commercial community an efficient, expeditious and cost-effective mode of adjudicating disputes that affect directly and significantly the economic, commercial and financial life in Uganda."

The Commercial Court began its work but did not get its distinct character until January 15, 1999 when it moved to separate premises from the High Court and, more importantly, started its own independent registry. It is important to point out that Uganda was probably the first country in Africa to create a commercial court in 1996.¹⁰ The court celebrated ten years of its existence in 2006.

⁷ IRIS Center at the University of Maryland, Dept. of Economics , <http://www.iris.umd.edu> (last visited July 27, 2006)

⁸ USAID, <http://www.usaid.gov/>.

⁹ Establishment under legal Notice No. 3 of 1994.

¹⁰ Judiciary Uganda, High Court Divisions, http://www.judicature.go.ug/index.php?option=com_content&task=view&id=91&Itemid=142 (last visited Feb. 9, 2009).

III. REFORMING THE COMMERCIAL JUSTICE SYSTEM IN UGANDA THROUGH THE COMMERCIAL COURT

I would like to discuss the reforms from two perspectives. First, from the reforms introduced to provide an efficient, expeditious and cost effective mechanism for the resolution of disputes, and second, from the feedback of statistics and surveys.

The first reform for the court has been to be pro-active. Historically, Judges had seen their role as umpires in the disputes and rarely descended into the dispute arena. However, Direction 5(2) of the statutory instrument setting up the court (supra) significantly charges this. It provides as follows: “. . .The procedure in and progress of a commercial action shall be under the direct control of the commercial Judge who will, to the extent possible, be pro active.”

The control of judicial proceedings by the Commercial Judge strikes adventurism by counsel and improves efficiency. One indicator that this initiative is bearing results is that the average number of adjournments before a case is completed has been greatly reduced.

In addition, all cases brought before the Court have to go through a rigorous pre-trial case management procedure called scheduling. This has been made possible by an amendment to the Uganda Civil Procedure Rules¹¹ which introduced a new order 10B (now Order 12 of the Civil Procedure Rules) that requires all cases to be scheduled and to take account of the possibility of using Alternative Dispute Resolution (ADR). Case scheduling allows for better efficiency and allocation of judicial time to any particular case. Priority can therefore be given to cases which are better prepared to go to trial as opposed to handling cases on a first-come, first-serve basis, which was the procedure in the past. Furthermore, pre-trial scheduling allows the court to establish the real issues for trial, thus reducing litigation time.

Further, the court has improved its access to justice for its users by converting itself into a multi-door court house. This was done by adding ADR through mediation to the services the court provides. This was made possible through the introduction of court annexed mediation. This followed a two year Mediation Pilot Project¹² where disputes are forwarded to an ADR provider known as the Centre for Arbitration and Dispute Resolution (CADER). This gives parties an opportunity to try out mediation before the case comes to trial. CADER also carries out institutional-based arbitrations.

Another reform initiative that the court has put in place is the creation of a Court Users Committee¹³ (“CCUC”). The CCUC meets quarterly and acts as a forum where the court and the court users can evaluate the work of the Court. This

¹¹ Civil Procedure (amendment) Rule, Statutory Instrument 26 (1998) (Uganda).

¹² Under the Commercial Division (Mediation Pilot Project) Rules 2003 Statutory Instrument 71 of 2003. These are currently under review.

¹³ Its membership includes Judges of the court, the courts registrars, the Uganda Law Society, The Attorney General's Chambers, The Institute of Bankers/Uganda Bankers' Association, Uganda Insurance Association, Uganda National Chamber of Commerce, Uganda Manufacturers Association, Uganda Investment Authority, The Faculty of Law Makerere University just to mention a few.

allows the court to make quick responses to any matter of concern.

The improvement of court room technology, especially the recording of court proceedings, is another initiative of the commercial court. Most courts in Uganda still record evidence by long hand writing, and thus the process is inefficient.

The court has now published specialized commercial law reports, which report the decisions of the court and the appeals to the appellate courts, since 1997 in order to improve on legal research. These are the first official law reports to be published in Uganda since 1973 (the courts and legal practitioners have been relying on legal digests of cases). Decisions of the Commercial Court can also be accessed free through links on www.commonlii.org or www.saflii.org.¹⁴

The construction of a custom-built commercial court house has helped to better facilitate the activities of the courts. This has been another of the many initiatives of the commercial court. Many courthouses in Uganda predate independence and are not easily adapted to suit new initiatives like IT and a multi-door courthouse. Custom-built courthouses have gained popularity in Africa where many countries share the Ugandan difficulty of having very old courthouses. As a result, Tanzania, Kenya and Ghana have all dedicated special courthouses to the commercial court.

On October 30, 2006 the court published a “Customer’s Charter” outlining the court’s commitment to its users in terms of the time taken to handle cases and other best practices that users could expect of the courts.

Last, but not least, is the creation of statistical records to track the work of the court, its judges, and other personnel. In this regard a data base called Computerized Case Administration System (CCAS) has been developed to generate the required statistics. This allows for greater transparency and accountability within the court.

IV. THE PERFORMANCE OF THE COURT

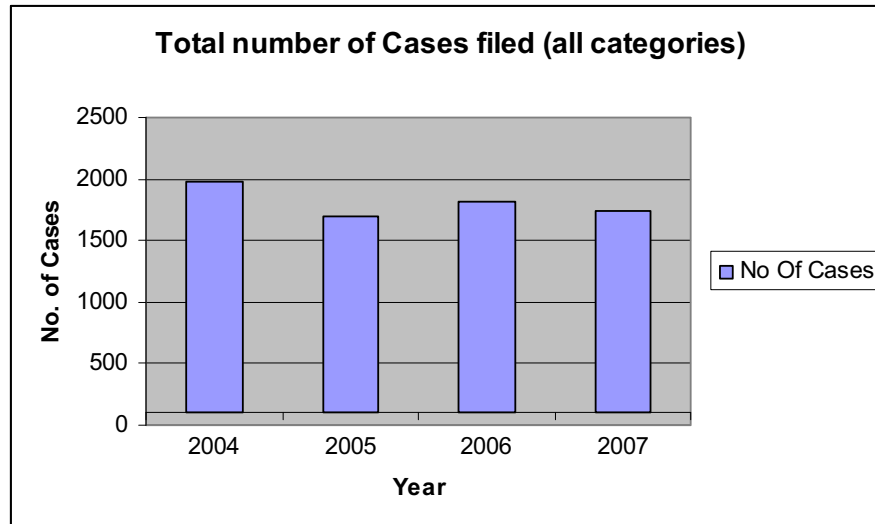
The court has an establishment of four judges, two registrars and thirty-five support staff. The judges largely work alone as they do not have lawyers who act as judicial assistants to ease their work in the area of judicial research. The court is based in the capital city of Kampala but covers the entire country. This has led to criticism of the court as not being equally accessible to the whole country. However, the Ugandan Judiciary is working on the introduction of small claims court/procedure which is likely to address the needs of the small and medium-size enterprises found outside the main cities and towns in Uganda.

As can be seen from Figure No. 1 the caseload per judge is quite high.

¹⁴ See <http://www.commonlii.com> (follow “571 databases” hyperlink; then select desired database); <http://www.saflii.org> (follow “databases” hyperlink; then select desired database).

Figure No. 1.

	2004	2005	2006	2007
No. of Cases	1,972	1,703	1,819	1,742



The four judges have an average caseload of 452.25 per judge per year. The drop of cases between 2004 and 2005 shows the immediate impact of the mediation pilot project the court initiated, while the rise in 2006 shows a climb when the mediation pilot project had ended and had not been replaced with an interim program.

Figures 2 and 3 show the extent of case backlog experienced by the court from 2006 to 2007. The court has defined case backlog to mean any civil suit that has been pending for two years or more without resolution.

Figure No. 2: Aging of Pending Civil Suits as of December 31, 2006.

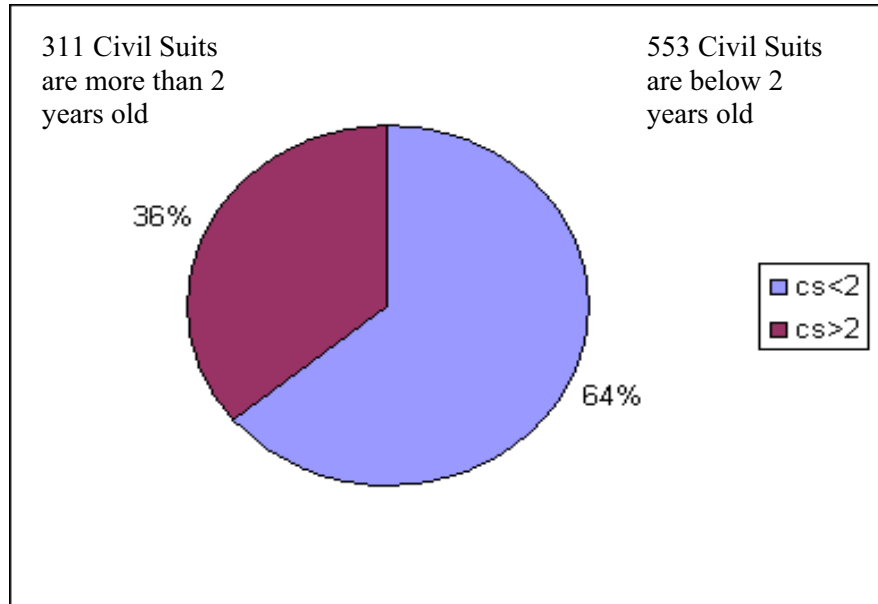
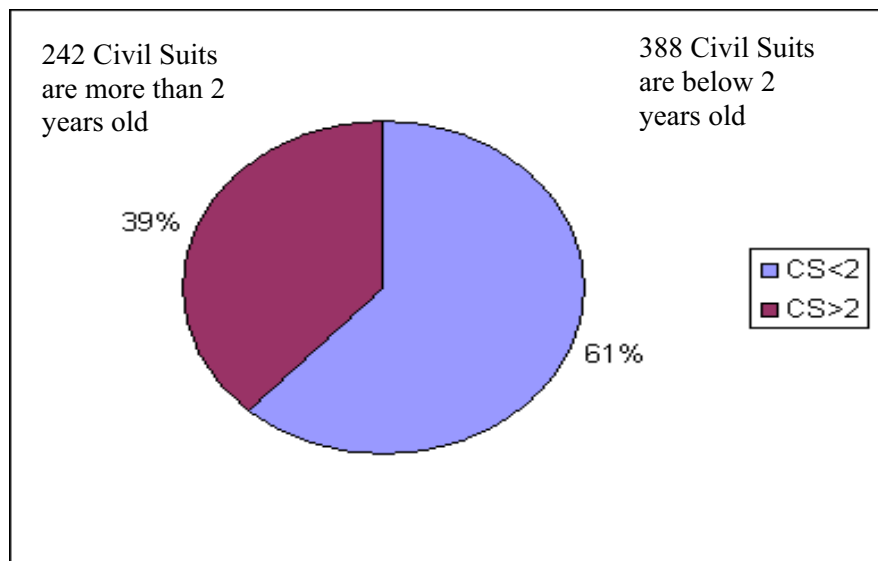


Figure No. 3: Aging of pending Civil Suits as of December 31, 2007.



The above figures show that between 33% and 40% of the court's work is affected by case backlog. The civil suit backlog declined by 17.9%, which is against the target commitment of 15% made by the court to The Justice Law and Order Sector, a justice working group in Uganda.

The court also committed itself to an adjournment rate of 2.00 per case and

managed to work around this target, as can be seen in figure No. 4 below.

Figure No. 4: Target Adjourment rate per case (all categories) 2.00.

Year	Adjourment rate
2005	2.08
2006	2.10
2007	2.15

Court-annexed mediation continued to play an important role in the court's business. The court's 2006 Annual Report shows that 60% of all cases referred to the court's mediation Registrar between November 2005 and August 2006 were either partially or fully settled. This was up nearly 50% over the pilot project results between 2003 and 2005.

On a comparative basis with other developed countries, I have decided to review results published in the 2009 Doing Business Report (supra) covering the results in Uganda, USA and Italy.¹⁵

Figure No. 5 shows basic economic data of each country and its rating with regard to the ease of doing business out of 181 countries covered by the report.¹⁶

Figure No. 5.

Country	Per Capita (US\$)	Population (m)	Ease of doing business rank
Uganda	340	30.9	111
USA	46,040	301.6	3
Italy	33,540	59.4	65

Figure 6 shows the ranking in terms of contract enforcement through the courts. It can be seen that though Uganda lags behind the United States, it is ranked ahead of Italy in enforcing contracts.

Figure No. 6¹⁷

Indicator	Uganda	USA	Italy
Procedures (Number)	38	32	35
Time (days)	535	300	655

¹⁵ THE WORLD BANK, DOING BUSINESS 2009 141, 143, 112(2008), http://www.doingbusiness.org/Documents/FullReport/2009/DB_2009_English.pdf.

¹⁶ *Id.* at 6.

¹⁷ Doing Business-Economy Rankings, <http://www.doingbusiness.org/economyrankings/>.

Cost (% of claim)	44.9	9.4	45.6
Rank in enforcing contracts	117	6	127

A survey of independent publications on the work of the Commercial Court in Uganda shows the following comments: “Best practices have been instituted at the Commercial Court. Cases are handled expeditiously and in a business sensitive manner which has yielded high levels of satisfaction amongst the business community.”¹⁸

Dr. Margaret Kigozi, the Executive Director of the Uganda Investment Authority (Member of the Commercial Court Users Committee), in a paper to the CCUC dated February 27, 2004, said, “[t]he operations of the Commercial Court have had a positive effect on commerce and promotion of business and investment prospects, and have made our work of marketing Uganda as an investment destination easier . . . Uganda Investment Authority commends the reforms of the Commercial Court.”

The role of the Commercial Court of Uganda has even received positive feedback in international reviews. The International Finance Corporation (IFC), in 2004,¹⁹ expressed the following view: “In Tanzania and Uganda, Judicial dispute resolution has been streamlined recently and is now more efficient than in many industrialized countries.”²⁰

V. CONCLUSION

The Commercial Court Division of the High Court of Uganda has registered significant success in the adjudication of commercial justice in Uganda. This is a result of a deliberate policy of reform of the judicial practice by the leadership of the Ugandan Judiciary. Limited resources in terms of manpower, training and finance continue to be restraints in achieving better results. The best practices of the Commercial Court are being rolled out to other divisions and courts in Uganda so that there is uniform impact of these reforms in the entire Ugandan Judiciary.

¹⁸ *Id.* The follow-up survey section 1.3-1.

¹⁹ Ahmed Badawi-Malik, *IFC and the Financial Times Open Conference on Improving Physical and Regulatory Infrastructure to Lower the Cost of Doing Business in Africa*, <http://www.ifc.org/ifcext/pressroom/ifcpressroom.nsf/PressRelease?openform&0E24C0929169D60785256E8B0071176C>. The International Finance Corporation and the Financial Times held a conference on developing business and infrastructure in Africa enhancing the role of the private sector, May 5-6, 2004.

²⁰ *Id.*