

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 92 OF 2021

(Arising from the Commercial Case No. 104 of 2020)

COMMUNITY PETROLEUM LIMITED 1ST APPLICANT

PETER KAALE 2ND APPLICANT

JACOB KAALE 3RD APPLICANT

VERSUS

ORYX OIL COMPANY LIMITED 1ST RESPONDENT

YUSUPH WASHOKERA 2ND RESPONDENT

RULING OF THE COURT

K. T. R Mteule J

20/9/2021 & 30/11/2021

The Applicants in this application are seeking for an order to restore mediation which was dismissed on 15th June 2021. They are also praying for cost and any other relief.

The application originates from the Commercial Case No. 104 of 2020 in which the applicants were the Defendants. On 15th June 2021, the case was called for mediation before Hon Ntandu DR. The 1st, the 2nd and the 3rd Defendant were not in appearance. Consequently, the mediator remitted the case file to the Trial Judge for the parties to be heard on prayers to strike out the defence for the non appearance of the Defendants or otherwise.



In response to what was already on record, the 1st to 3rd Defendants filed this application praying for restoration of the mediation session.

The application is filed pursuant to the provisions of Rule 36(c), Rule 37(1)(a),(b) and Rule 37(2) of the High Court (Commercial Division) Procedure (Amendment) Rules, 2019 (hereinafter referred to as "**Commercial Court Rules**") and Section 3A(1)&(2) and 3B(1)(a) of the Civil Procedure Code [Cap 33 R.E. 2019] (hereinafter referred to as the "**CPC**").

The applicants filed an affidavit in support of the application which was countered by the Respondent through counter affidavit sworn by 1st Respondent's Counsel Gerald Shita Nangi.

The application was heard by a way of written submissions. I have noted that in the written submission, the Respondent briefly addressed a procedural illegality in this application. According to the Respondent, the application has been prematurely brought before this court because.

According to the 1st Respondent currently the matter is seized with the Court for necessary orders in terms of Rule 36 of the Commercial Court Rules. It is only after the Court has heard parties in terms of Rule 36 then Applicant would take other necessary steps.

The issue of prematurity, if confirmed will have a conclusive effect in the application. In this respect I am of the view that it is important to first deal with it, since it challenges the competence of the application in court.

The application is seeking for an order to restore the mediation which was dismissed on 15th June 2021. I have gone through the proceedings of 15th June 2021 to see what transpired. On this date, the court having

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recorded the absence of the 1st, 2nd, and 3rd Defendants, did make the following order:

"The 1st, 2nd and 3rd Defendants are aware of this mediation Session because they were present When the matter was Scheduled today for mediation but for reasons best known to them did not enter appearances today and their absence has made the mediation Impracticable. Under the Circumstances I remit the case back to the trial judge so that the parties may be heard on prayers to strike out the defence of the 1st, 2nd, and 3^d defendant or otherwise."

Order: Matter scheduled for necessary orders on 10/8/2021 at 8.15 am. Case file to be placed before the trial judge.

From the above words of the Hon Deputy Registrar who was the mediator, I did not see a dismissal order. From what I gather from these proceedings, parties were directed to appear before the trial judge so that a prayer can be made for striking out of the defence. Filing this application for restoration of a mediation which was dismissed while no dismissal order is not appropriate. The applicant is applying against non existing order. I agree with the Respondent that the application is prematurely brought or else it has been brought against non existing order and need to be struck out. Consequently, I hereby strike out the application for being improperly brought in Court.



A handwritten signature in blue ink, appearing to read "Katarina T. Revocati Mteule".

KATARINA T. REVOCATI MTEULE

JUDGE

30/11/2021