

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

COMMERCIAL CASE NO. 62 OF 2022

BETWEEN

POLLO ITALIA TANZANIA LIMITEDPLAINTIFF

VERSUS

EURO POULTRY TANZANIA LIMITED1ST DEFENDANT

PEDRELII ALFIERO.....2ND DEFENDANT

MOHAMED JALALUDIN HUSSEIN HASHIM3RD DEFENDANT

RULING

Date of last order: 27/06/2023

Date of ruling:30/06/2023

AGATHO, J.:

This ruling was triggered by the counsel for 1st defendant's prayer made on 27/06/2023 when the matter was fixed for first PTC that the court should dismiss the case for the Plaintiff's failure to comply with the court order of discovery given on 20/04/2023.

To appreciate the gist of the ruling, it suffices to state the background albeit briefly. The plaintiff has filed a suit Commercial Case No. 62 of 2022. In that suit the plaintiff is claiming inter alia that the consent judgment in

Commercial Case No. 192 of 2017 was procured by fraud. The 1st defendant is resisting that suit and filed the Written Statement of Defence. Further, the said 1st defendant applied to the court vide Misc. Commercial Application No. 214 of 2022 for the order for discovery of books of account/audited financial statements of the plaintiff. The court through its ruling delivered on 20/04/2023 granted the application and ordered the plaintiff to do the discovery. On that date the court adjourned the main suit to 25/05/2023 to afford time to the plaintiff to comply with the court order. On 25/05/2023, the trial judge was in Mwanza for official duties. The case was thus adjourned to 14/06/2023 before Hon. Minde, the Deputy Registrar. This in other words gave the plaintiff more time to comply with the discovery order. On 14/06/2023 when the matter came for necessary orders the court discovered that the plaintiff has not implemented the order for discovery. It then gave the plaintiff one week, that is 7 days to comply with the court order of 20/04/2023. The order ought to have been executed by 21/06/2023. And the court proceeded to make other orders including that the first PTC to be conducted on 27/06/2023.

When the matter was called for 1st PTC on 27/06/2023, Ms. Halima Semanda, the plaintiff's counsel told the court that the plaintiff engaged

Auditors (Hansem Assurance) to fetch the document sought to be discovered as per the court order. The Auditors informed the plaintiff that they have failed to secure the document and they have got insufficient information to do auditing. The plaintiff's counsel prayed that the matter to proceed as scheduled to the end. She prayed the court to record that the plaintiff has done efforts to comply with the orders given on discovery of documents.

Mr Rico Adolf, advocate for the 1st defendant submitted in opposing the submission and the prayer by the plaintiff's counsel. He noted that the court ordered on 14/06/2023 that the plaintiff should comply with the court order in the ruling dated 20/04/2023 that of discovery of documents and not to conduct auditing as the plaintiff's counsel submitted.

The 1st defendant's counsel submitted further that the plaintiff has wilfully decided not to comply with the order of discovery for the following reasons:

1. The order was issued two months ago. And the plaintiff was granted two adjournments, but she has repeatedly failed to comply with the court order.
2. The plaintiff has failed to demonstrate how they have engaged third parties such as Business Registration and Licensing Agency (BRELA)

and Tanzania Revenue Authority (TRA) who are also custodians of such documents. She has not submitted before this court any document indicating that they have approached the said authorities requesting such document.

3. That the order for discovery was not only for financial statements, but it included other documents such as MEMARTS and Form 14 A. But the plaintiff has not provided any reason as to why those other documents have not been filed.
4. That if at all the documents were lost then this court should have been furnished with police loss report showing when and under what circumstances the documents were lost.

It was Mr. Adolf's submission that, since the plaintiff has failed to comply with the order of discovery, they are moving the court by Order XI Rule 18 of the Civil Procedure Code [Cap 33 R.E. 2019] providing that if the failure is by the plaintiff, then she shall be liable for her suit to be dismissed for want of prosecution. The learned counsel referred the effect of failure to comply with court orders as it was stated in **Ester Malongo Simwatimwa and 2 Others v Registered Trustees of Morovian Southwest Province, Misc. Land Appeal No 58 of 2021 HCT, Mbeya District**

Registry, at page 3 citing **Olam Tanzania Limited v Halawa Kwilabya, Civil Appeal No. 17 of 1999 CAT**. The 1st defendant's counsel invited the court to adopt the wisdom in cited cases together with Order XI Rule 18 of the CPC and order the dismissal of the suit with costs to both defendants.

Ms. Semanda for the plaintiff in her rejoinder, she submitted that it is not true that the plaintiff has failed to comply with the order of this court as she has submitted earlier. That she took initiative to comply with order of 20/04/2023. However, the time was not enough for her to collect some information. At this point she referred the Court of Appeal guide that lower courts need to be more inclined to have cases heard and finalized on merit in line with the overriding objective as per the case of **Dar Express Company Limited v Matthew Paulo Mbaruku, Civil Appeal No. 132 of 2021 CAT** at page 11. In that case it was held inter alia that rules of procedure are hand maiden. As to allegation that the matter has been adjourned twice, on the first adjournment she submitted that the judge was on official trip and the second one it was plaintiff's fault that she prayed for adjournment. In the end she prayed that this matter to be heard and finalized on merit.

The issue to be determined here is whether the plaintiff did implement the court order for discovery, the order of discovery of document which has material bearing on this case? From what has been submitted by the learned counsel for the plaintiff it is apparent that the order of discovery was not implemented. The plaintiff engaged the auditors to do auditing and they decried accessing limited information for the audit process. It is equally plain that the plaintiff did not attempt to inquire from other authorities especially BRELA and TRA possessing the document. That in the court's view is failure to execute the court order of discovery. It is trite law that a court order must be respected.

In **Karori Chogoro v Waitihache Merengo, Civil Appeal No. 164 of 2018 CAT at Mwanza** at page 7, the CAT cited with approval the High Court decision in **TBL v Edson Dhobe, Misc. Civil Application No. 96 of 2006** which held that:

"Court orders should be respected and complied with. Courts should not condone such failures. To do so is to set bad precedent and invite chaos. This should not be allowed to occur."

The plaintiff has pleaded with the court to invoke the overriding objective principle as held in several CAT decisions including **Dar Express Company Limited v Matthew Paulo Mbaruku, Civil No. 132 of 2021 CAT** at page 11. However, the court is firm that the overriding objective principle cannot be used blindly especially where there is clearly provision of the law providing for a particular procedure or rule that a party has breached. In **Paulo Francis Kilasara v Stanbic Bank Tanzania Ltd, Civil Application No. 80/01 of 2019 CAT at Dar es salaam at page 13** the CAT held that the overriding objective cannot be used blindly. The CAT went further citing its decision in **Puma Energy Tanzania Limited v Roadways (T) Ltd, Civil Appeal No.3 of 2018** which held that the overriding objective was not designed to blindly disregard mandatory procedural requirements going to the root of the matter before the Court. This court's perspective is that the discovery order given goes to the root of the matter.

There is no need to expend energy to explain the role of discovery of documents in civil litigation. Failure to comply with discovery order may be interpreted as a deliberate foul a party plays in civil litigation where fair play and rule again surprises is cherished. This court is a guardian of both substantive and procedural justice.

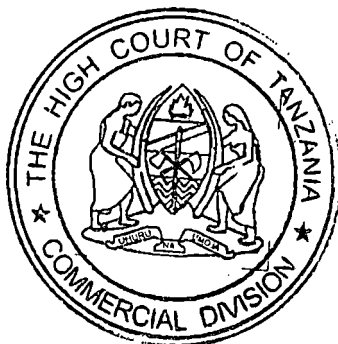
Since the consequences of non-compliance with order of discovery are grave as the party's claim may be dismissed and the court may draw adverse inference, it is thus in the interest of the parties to honestly comply with the court order for discovery of documents to avoid any dreadful repercussion.

As per order XI Rule 18 of the Civil Procedure Code [Cap 33 R.E. 2019] the implication of not complying with discovery order is that if it is the plaintiff then her suit shall be dismissed. Since the court held herein above that the plaintiff has failed to comply with the discovery order, this suit is liable for dismissal. It is consequently dismissed for want of prosecution.

Given the circumstance of this case each party shall bear its costs.

Order accordingly.

DATED at DAR ES SALAAM this 30th Day of June 2023.



U. J. AGATHO

JUDGE

30/06/2023

Date: 30/06/2023

Coram: Hon. U.J. Agatho J.

For Plaintiff: Halima Semanda, Advocate

For 1st Defendant: Athanas Wigan, and Rico Adolf, Advocates

For 2nd Defendant: Absent

For 3rd Defendant: Claudio Msando, Advocate

C/Clerk: Beatrice

Court: Ruling delivered today, this 30th June 2023 in the presence of Halima Semanda, Advocate of the Plaintiff, Rico Adolf and Athanas Wigan Advocates for the 1st Defendant, Claudio Msando, Advocate for the 3rd Defendant but in the absence of the 2nd Defendant.





U. J. AGATHO

JUDGE

30/06/2023