IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM

MISC. COMMERCIAL APPLICATION NO.121 OF 2023
(Arising from Commercial Case No.55 of 2023)

MEK ONE GENERAL TANZANIA LIMITED…… APPLICANT

VERSUS

VIVO ENERGY TANZANIA LIMITED……RESPONDENT

Date - Last Order: 3/10/2023.
Date of the Ruling: 28/11/2023.

RULING

NANGELA, J:

This ruling is in respect of an application brought under Order IX Rule 10 of the Civil Procedure Code, Cap.33 R.E 2019.

Through the services of Deogratius William Ringia, *Learned Counsel*, the Applicant herein brought the chamber summons and its supporting affidavit under a certificate of urgency and has divulged the reasons justifying the urgency of the matter.

In this application, the Applicant is praying for orders of the court as follows: -

1. That, this Honourable court be pleased to order the Respondent herein to make a discovery of the following documents evidencing or showing:
   (a) Manufacturer Authorization from Vivo Energy to GSM Tanzania Limited
   (b) All Letters of conversation between TANESCO and Vivo Energy.
   (c) Minutes of Negotiations between TANESCO and Vivo Tanzania Limited.
   (d) Tender advertisement- Tender No. PA/001/2022-23/HQ/G/191
   (e) Tendering Document-Tender No. PA/001/2022-23/HQ/G191.
   (f) Tender submittedby bidder-Tender No. PA/001/2022-23/HQ/G/191.
   (g) Evaluation report-Tender No.PA/001/2022-23/HQ/G/191.

(h) Minutes of all Tender Board meetings pertaining to the Tender No. PA/001/2022-23/HQ/G/191 and CR for approval of evaluation report and conducting negotiations.

(i) Minutes of Negotiations if any in respect of Tender No. PA/001/2022-23/HQ/G/191.

(j) Notification letter-Tender No.PA/001/2022-23/HQ/G/191.

(k) Award Letter-Tender No.PA/001/2022-23/HQ/G/191.

2. That the costs of this Application be provided for; and

3. Any other Order or relief this Honourable Court may deem fit to grant.

On the 25th day of August 2023, the Respondent, through the services of Mr. Josiah Noah Samwel, *Learned Counsel*, filed a counter affidavit which was as also replied to by the Applicant on the 8th day of September 2023.

On the 7th day of September 2023, the matter was called on for orders and it was ordered that the hearing of this Application be made by way of written submission. The scheduling order was given, and I am glad that the parties fulfilled their filing obligations.

Submitting in support of the Application, firstly, the counsel for the Applicant adopted the affidavit sworn by Mr. Deogratius William Ringia in support of the application, as well as the affidavit in reply, sworn by Advocate Judith Ulomi, all to form part of the Applicant's submission.

In his argument, Dr. RugemelezaNshalla, appearing for the Applicant, submitted that the basis of this application is Commercial suit No. 55 of 2023 to which the Applicant herein is the Plaintiffclaiming about the Defendant's breach of the Distribution Agreement entered between herself and the Respondent. He submitted that, despite there being such an Agreement,the Respondent went ahead and signed a tender yet again with TANESCO (Tender No. PA/001/2021-22/HQ/G/152) for the supplyof similar goods which the Applicant was contracted to exclusively supply in the Primary Area of Responsibility (PAR).

Dr. Nshalla argued that, as evinced in paragraph 10(a)-(e) of the Plaint constituting the Commercial Case No. 55 of 2023, the breach started some time back. He therefore urged this court to make an order of discovery of documents as listed in the chamber summons to assist the Applicant and the court in arriving at a just decision regarding the issues raised by the Applicant in the Plaint filed in this court.

To strengthen his argument, he placed reliance on the decision of the Court of Appeal in the case of **Gold Coin Finance Co. Ltd & another vs Lyander Sam Macha,** Civil Appeal No. 233 of 2016. In that case, a principle was laid to the effect that the basis of discoveries of documents should be the principle of "relevance". He further found support in **Sakar Code of Civil Procedure** 11th Edition Reprint 2012 Volume 1 on page 1326 where the learned author stated as follows, that:

> "The concluding portion of Order 11 rule 1 distinguishing between discovery and cross-examination, shows that discovery must be

directly relevant to the matters in issue…"

In his submission, Dr. Nshalla argued further that, item (a) in the list attached to the chamber summons aims to prove the claims under para10 (a)-(e) of the Plaint while items (b) to (k) support the claim of the breach of the Distributorship Agreementwhich exists as between the parties. He submittedthat this court should also rely upon and make an order for the discovery based on the need to establish as to whom the possession of the documents. To support his submission, he placed reliance on the case of **Euro Poultry (T) Ltd vs. Pollo Italia**,Misc. Commercial Application No. 214 of 2022.

He submitted that, looking at item (a)-(k) of the list of documents sought to be discovered, it will be evident that theRespondent is either a maker, addressee, and/or is in possession thereof.Countering the Respondent's claims that the application is unnecessary, irrelevant, and wastage of the court time, Dr. Nshallasubmitted that, that notion is erroneous if looked at from the standpoint of what **Sarkar in Civil Procedure Code**(supra) stated.

To conclude his submission, the learned counsel of the Applicant submitted that, the application was timely brought and meets the established principles for the granting of an order of discovery. He consequently urged this court to grant this application with cost as it will not onlyexpedite the disposal of the pending case in this court but also help the court to arrive at a just decision.

Responding to Dr. Nshalla's submission, Mr. Dismas Mallya, the learned counsel for the Respondent, urged this court to dismiss this application. He, in the first place, questioned its competency arguing that the affidavit in support of the application and the reply to the counter affidavit have been deponed by two different advocates. He contended that, while Advocate Deogratius Ringia deponed the affidavit filed in supportof this application,it was Ms. Judith Ulomi who deponed the Affidavit inreply to the counter affidavit. He contended thatboth are strangers to this case and, hence,they are not conversant with the facts deponed to.

Mr. Mallya submitted further that, if one is to lookat this application, it will be noted that it originated from the

Commercial Case No. 55 of 2023 whereby the Applicant is the Plaintiff, and the Respondent is the Defendant. Both advocates mentioned above are not parties to those proceedings and, therefore, lack the capacity, power, and authority to swear any affidavit in support of the application on behalf of the Applicant.

To support his position, he relied on the case of **Lalago Cotton Ginnery and Oil Mills Co. Ltd vs. The Loan and Advances Realizations Trust (LTA)**, Civil Application No. 80 of 2002, arguing that the Court of Appeal ruled that an advocate can swear and file an affidavit in proceedings in which he appears for his client, but only on those matters which are in the advocate's personal knowledge. He argued that such a principle was cited with approval in the case of **Tanzania Breweries Limited vs. Herman Bildad Minja**, Civil Application No. 11/18 of 2019.

From the above authorities and stand, Mr. Malya contended that the counsels mentioned above were strangers to the suit, as vividly clear that in the main suit, the applicant was represented by Advocate Dr. Rugemeleza A. K. Nshalla

and, therefore,the said application is incompetent for being supported by incompetent affidavits.

Having adopted the contents of his counter affidavit filed in opposition to this applicationto form part of his submission, Mr. Mallya responded further that, although the Applicant has tried to convince this court that all documents wished to be discovered as mentioned in the chamber summons are relevant to the case, the Applicant's advocate has failed to show how each of the documents mentioned in chamber summons is relevant to the suit. For that reason, he considered the cases relied on by the Applicant as being distinguishable.

He argued that in the case of **Gold Coin Finance Co. Ltd & Another** (supra), the key point on discovery was the issue of relevancy of the documents sought to be discovered but argued that in the application at hand, the Applicant has failed to show the relevancy of the documents mentioned in the chamber summons to the matters before the court.

Regarding the document mentioned in item 1(a), it was the Respondent's counsel submission that the counsel for the Applicant has alsofailed to show how relevant the

document is and could not give even the proper particular of the document. He contended that, in item 1(b) of the chamber summons, the Applicant has mentioned alot of documents including letters and communications between TANESCO and the Respondent.

On that note, Mr. Mallya submitted that the Applicant is not certain of what documents exactly are required to be produced, and hence due to that failure of specific description, it is hard on the part of the respondent to reply in respect of the request to discover.He cited the case of the **Motor Mart & Exchange Limited vs. The Standard General Insurance Co. Limited** [1960] IEA 616, where the High Court of Uganda, at Kampala, cited with reference the case in the Court of Appeal of England in **White vs. Spafford & Co** [1901] 2K.B 241, whereby it was held that the discovery sought must be of a species, not a genus.

Mr. Mallya submitted further that, regarding the minutes stated on Item 1(c) which relates to negotiations between TANESCO and the Respondent, the Applicant was alsonot certain as to the dates on which the meeting of those minutes required to be discovered from the Respondentwere

held and, therefore, it is hard to trace the minutes.It was his further submission that, regarding documents under Item I (d) (e) (f) and (j), the same already formed part of records and those annexed as Annexure VETL-4 to the Amended WSD filed by the Respondent in respect of the suit and will be tendered during the trial to support its defence.

He argued, therefore,that the Applicant's act of demanding them now was a waste of this court's precious time for reasons only known to the Applicant.

Mr. Mallya submitted further that, as regards the documents listed on items I (g) and (h), which are Evaluation Reports and Minutes of all Tender Board Meetings in respect of Tender No. PA/001/2022-23/HQ/G/191, the fact is that theRespondent has never had such documents because the documents if so exist are supposed to be kept by the procuring entity (TANESCO) and cannot be for distribution to bidders. He cited again the case of **Motor Mart & Exchange Limited** (supra).

Lastly, in respect of the documents under item I (i)(k) which are minutes and Award Letter, it was Mr. Mallya's submission that the two documents are documents which

even the Applicant is not so sure of their existence. He contended that, looking at the chamber summons itself the word used is **"if any**", meaning, therefore, that, the Applicant is not sure of what she wants. He submitted, in principle, nothing to make discovery of the documents which do not exist or where the exercise is just a speculation of the Applicant on the existence of those documents.

Given all such submissions, Mr. Mallya urged this court to dismiss the application for discovery of the documents listed in the chamber application with costs.In a brief rejoinder, Dr. Nshalla reiterated the submissions made in chief. He argued that such submission does meet all the requisite principles for discovery as it was stated in the case of **Gold Coin Finance Co. Ltd** (supra).He rejoined further on the issue of competency of this applicationfollowing the Respondent's faulting the affidavit supporting the chamber application and the affidavit in reply and stated that there is no law which has been violated by the Applicant's counsels to so invalidate the application.

He pointed out Order X1 rule 10 of the CPC Cap 33 R.E 2019 arguing that the same is instructively that:

> "any party may, without filing any affidavit, apply to the court for an order directing any other party to any suit to make discovery on oath of documents…"

Because of that authority, he rejoined that, the court should not be detained much on the issue of propriety of the affidavits filed by the Applicant's counsel. Arguing in the alternative, Dr. Nshalla submitted that, the Applicant's counsels have not been restricted to swear affidavits on behalf of their client. He relied on the case of **Lalalgo Cotton Ginnery and Oil Mills Co. Ltd**(supra) noting that it does not perse outlaw such conduct by an advocate where he/she swears an affidavit on behalf of his/her clients.

Moreover, the counsels submitted that Advocate Judith Ulomi has made an appearance in the application and main suit, i.e., Commercial Case No. 55 of 2023 and, for that matter, she is not a stranger to this application. He submitted that; she has even jointly drawn the submission in support of this application together with counsel Dr. Rugemeleza Nshalla. He concluded,therefore, thatMr. Ringia and Ms. Ulomi are advocates in the conduct of these matters, and

they are, hence,conversant, and competent to depose the affidavits in question.He urged this courtto grant the application with costs.

From the rival submissions summarized here above, the issue I need to address is whether this court should grant the prayers sought by the Applicant. To be able to respond to the above, one needs to look at whether the Applicant has met the requisite conditions or factor(s) for the granting of an application for discovery of documents.

To begin with, I find it necessary to state that the discovery of documents is a procedural device that a party to a civil litigation or criminal action is allowed to deploy before the commencement of the trial, to demand or require the adverse party to disclose information that is essential to the requesting party's preparation of its case, and which documents are in the possession, control, or knowledge of that party. It falls within the bigger notion of disclosure of information and may be effected through which encompass other devices such as the use of interrogatories, and document production.

The utility of such a methodical device or process of uncovering the truth is that it helps to not only narrow the issues in a law suit which the court would have gone to length to unravel but also ease the obtaining of evidence not readily accessible to the Applicant (the requesting party) for use at trial. Besides, it can also be used to ascertain the existence of information that may be introduced as evidence at trial unless such information is privileged information.

Under our laws, this legal device is provided for under Order 11 Rule 10 of the Civil Procedure Code, Cap.33 R.E 2019 (hereafter referred to as the CPC). The provision states that:

> "Any party may, without filing any affidavit, apply to the court for an order directing any other party to any suit to make discovery on oath of documents which are or have been in his possession or power, relating to any matter in question therein and on the hearing of such application the court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at the stage of the suit,

> or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit: Provided that, discovery shall not be ordered when and so far as the court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs…."

Commenting on the application of Order XI rule 10 of the CPC, the Court of Appeal in the case of **Gold Coin Finance Co. Ltd** (supra),held that the underlying principle for ordering discoveries is the principle of "relevance". The Court relied, with approval, on the decision of this Court in the case of **Moto Matiko Mabanga vs. Ophir Energy PLC & 2 Others**, Misc. Commercial Application No.24 of 2016, (HC) (Commercial Division) (unreported).

In the Ugandan case of **Karuhanga & Anor Vs Attorney General & 2 Or**s Misc. Cause No. 0060 Of 2015, [2015] UGHCCD 39 (28 May 2015) it was stated that discovery is contingent upon a party's reasonable belief that he or she has a good cause of action or defence. In the case of **Gold Coin Finance Co. Ltd** (supra), the Court of Appeal

did add another dimension to take onboard when dealing with an issue of discovery application stating that: *"fairness is one of the factors that should inform the court in dealing with the issues of discoveries".*

From the above cited cases, it is my considered view, therefore, that, for an application for discovery to succeed, the following at minimum factors must exist,that is to say: (i) the party seeking for production of documents from the other party must be before the Court to which the application is made, (ii) the suit must have pending issues for determination by that court, (iii) the document sought must be relevant to the determination of the pending suit before the court, (iv) the party from whom the documents are sought to be discovered is privy to them, is directly in possession of them or is required by law to be in possession thereof and (v) the whole exercise is informed by the need to uphold fairness and not just a disguised form of "*fishing expedition*" meant to ascertain information for purposes of commencing an action or developing a defence.

Reverting to the application at hand, the compelling question will be whether it has met the above criteria. At

least, there is no dispute that the Applicant herein is a party to the matter, which is currently pending before this court, i.e., Commercial Case No.55 of 2023. The first factor is therefore well established. The second factor is also established since the issues in the pending suit are yet to be resolved as the matter before the court is at its preliminary stages before the hearing.

Moreover, given what Order VIII rule 16 of our CPC provides, one cannot wait until a final pre-trial conference is held since all applications and objections need to be cleared before the first pre-trial conference is held. As such, the application is rightly brought in time.

Perhaps what seems to be a controversial factor and which the parties seem to have been at loggerheads is the third one, regarding whether the information sought from the Respondent is relevant or not. The term "*relevancy*"is mainly related to the relationship of one fact to another and is determined not by law but by common sense and logic. In his submission, the counsel for the Respondent has argued that the Respondent has not shown how relevant each of the documents sought to be discovered is to the suit.

In particular, the learned counsel has argued that the Applicant needs to be specific by giving the particulars. I think doing so is stretching the rules too far because one cannot provide details of a document that is not in his or her sight. That will be impossible in my view since he or she does not have it in the first place. In my view, what needs to be adhered to is to be precise about the kind of document that one needs rather than being general. That seems to be what the case of **White vs. Spafford & Co.** [1901] 2K.B 241 cited in **Motor Mart & Exchange Ltd vs. The Standard General InsuranceCo. Ltd** [1960]1E.A 616 meant where it reiterated that "*the discovery sought must be of species, not genus*."

In this application, the itemized documents in the list provided in the chamber summons are what this court should look at and determine whether such documents sought bearany relevance to the suit and whether the applicant has been specific enough to be able to identify each document rather than being general, a fact which would invite this court to reject such a request. From the list provided, it is my view that except for items (b), (h), and (i) which contain generality

that is akin to guesswork, the rest of the items are sufficiently specific to make the Respondent able to locate the documents needed to be availed to the attention of the applicant.

In my view, item (h), for instance, cannot be documents that are in the Applicant's possession or even which the Applicant is privy to or is knowledgeable of simply because, those are documents which, will typically and solely be in the possession of the procuring entity (in this case TANESCO).

Since the Applicant has no access to such since TANESCO is not even a party to this matter or the pending suit, such item falls outside the realm of documents that can be brought within the fold of discovery of documents and do not meet the fourth criteria which require that the party from whom the documents are sought to be discovered be privy to them, or be directly in possession of them or be required by law to be in possession thereof. As may be noted, the Respondent is a mere bidder and not the procuring entity whose Tender Board is the custodian of its own Tender Board

minutes, including those about the respective tender No.PA/001/2022-23/HQ/G/191.

As regards items (b), (h), and (i) these are too general and the Applicant seems to be casting the nets too wide, and/or becoming speculative. As the fifth criterion or factor pointed out earlier here above would indicate, the whole exercise should not only be informed by the need to uphold fairness but should not be a disguised form of a "*fishing expedition*". In principle, no court will permit parties applying for discovery of documents to embark on a "fishing expedition" in the hope of locating a document to assist their case – there must be a basis beyond mere speculation.

In the case of **In re Ski Train Fire,** 230 F. Supp. 2d 392, 400 (S.D.N.Y. 2002) the court emphasized that one has to be specific and "*Plaintiffs may not conduct a fishing expedition*". This has been a longtime honoured legal principle dating back to the eighteenth century in the case of **Buden vs. Dore**, 28 Eng. Rep. 284 (Ch. 1752).

From the foregoing discussion, I find that save for the items number (b), (h), and (i) which I have considered to be way too general and speculative, the rest of the items are

specific and bear relevance to the issues or matters which are subject to determination by this court in the Commercial Case No.55 of 2023. Fairness in justice delivery is the hallmark and mission of any judicial decision-making body and such cannot be attained unless the truth and,nothing but the truth, is laid bare.

One final issue before I pen off is the submission raised by Mr. Mallya concerning the affidavits deponed by the two counsels for the Applicant. In my view, being the counsels who are in conduct of the matters before the court, they can swear an affidavit about matters within their knowledge as was clearly stated in **Lalago's case** (supra).

As I look at the affidavit filed in support of the application and the reply to the counter affidavit all of which are filed by the learned counsels appearing for the Applicant in this Application and in the main case, I see nothing which goes beyond the stated principles in the **Lalago's case** (supra). For that reason, I see no point in the Respondent's argument and submission.

All said and done, save for what I have stated in respect of items (b), (h) and (i), I find merits in the

application, and I hereby grant the prayers subject to the limits which I have so far laboured to explain. As regards the costs of this application, given that the parties have a pending suit yet to be disposed of prudence will guide that I make no orders as to costs.

It is so ordered.

DATED AT **DAR-ES-SALAAM** ON THIS 28TH DAY OF NOVEMBER 2023

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DEO JOHN NANGELA

JUDGE