

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

COMMERCIAL CASE NO. 152 OF 2019

AGE TECHNOLOGIES
TANZANIA LIMITEDPLAINTIFF
VERSUS
TURBINE TECH LIMITED.....DEFENDANT

R U L I N G

Date of Last Order: 09/09/2020
Delivery of Ruling: 20/11/2020

NANGELA, J.:

This is a ruling arising from an application by the Defendant for restoration of mediation. It arises from the main case, a **Commercial case No 152 of 2019**, pending before this court. The current application was made under Rule 37(1) of the *High court (Commercial Division) Procedural Rules, 2012 GN 250 as amended by GN 107 of 2019*. In this application, the applicant seeks to be heard for orders that:

“this court be pleased to grant an order for restoration of mediation which was dismissed on the 6th day of August 2020 on the ground that the Defendant failed to enter appearance during the mediation sessions, owing to the travel restrictions imposed due to COVID -19”.

In order to have a better understanding of the present ruling, I find it apt to narrate, albeit briefly, the background material facts leading to it. It is on record that, on 7th August, 2020, when this matter came for necessary orders, Ms. Kavola

Semu, learned Advocate for Plaintiff, applied before this Court to have the written statement of defence be struck out for failure of Defendant to attend scheduled mediation. The counsel for the Defendant informed the Court that, the Defendant had failed to enter appearance during the mediation sessions, owing to the imposed world-wide travel restrictions due to COVID-19.

Upon that background, this Court, on 6th August, 2020 made the following orders:

- (1) That the defendant shall pay costs to the plaintiff for days spent on mediation which they didn't attend.
- (2) That the mediation be restored under Rule 37(1) and (2) of the High court (Commercial Division) Procedural Rules, 2012 GN 250 as amended by GN 107 OF 2019.
- (3) Mention on 9th September, 2020 at 9:30 for ascertainment of whether the above orders complied with.

On 9th September, 2020, when this case was called on for mention before me, Mr. Godwin Nyaisa, learned Advocate, represented the Plaintiff while the Defendant applicant enjoyed the service of Ms. Paulina Mtui, learned Advocate. On the material date, Mr. Godwin Nyaisa, informed the court that, although the Plaintiff was served with an application for restoration of mediation on 14th August, 2020, the Plaintiff was yet to be paid costs as per the Orders of this Court dated 6th of August, 2020.

In addition to that, Mr. Nyaisa submitted that, in terms of the provision of Rule 37(3) of the rules, where the defaulting party fails to comply with the orders made under rule (1) and (2), the consequence is to dismiss the suit, if the defaulter is the Plaintiff, or strike out defense, if defaulting party is Defendant. In the view of that, it was argued that, since

defaulter is the Defendant and, has not complied with the orders of this Court dated 6th of August, 2020, the consequences is to strike out the defense for non-compliance with the orders of the Court.

For his part, Ms. Paulina, learned advocate for the Defendant, conceded that, indeed, the costs ordered by the Court on the 6th August 2020, have not been paid. She hastened to add, however, that, the non-compliance was perpetuated by the Plaintiff who did not send the Defendant with the exact bill indicating the costs. In the alternative, she prayed to be availed with the requisite bill of costs for her to process and pay the requisite costs accordingly.

In a brief rejoinder, Mr. Nyaisa submitted that, the orders were for the Defendant to pay costs to the Plaintiff, so the requirement that the innocent party should now send demand to be paid cost incurred should not be accepted. Expounding his submission further, he submitted that, if the Defendant was diligent and honest, the Defendant should have taken steps to ascertain the amount from the Plaintiff. In addition to that, he submitted that, the costs for appearance are provided under the rules of this Court; and, the amount is TZS 150,000 per appearance.

In the view of the above submissions, Mr. Nyaisa urged this court to strike out the Written Statement of Defence, as the Defendant has not met the conditions stipulated by law. I have given due consideration to the rival submissions by the legal counsel for parties herein. The task of this Court at present is to determine the merits or otherwise of this application. As already stated herein above, earlier this Court relying on rule 36(1) and (2) of the *High court (Commercial Division) Procedural Rules, 2012 GN 250 as amended by GN 107 of 2019*, ordered the Defendant, being the defaulting party, to pay costs for not appearing before the mediator on the days scheduled for mediation.

It was not disputed that the order of the Court was not complied with. Because the Defendant does not dispute that fact, the question then becomes whether the Defendant's failure to pay cost was perpetuated by the Plaintiff as the Defendant seems to allege. It has been contended, that, the Defendant failed to pay the requisite costs because the Plaintiff failed to submit the claim and the amount which ought to have been paid. On the other hand, the counsel for Plaintiff was of the view that, the amount to be paid as cost for non-appearance is well known because that amount is stipulated per each appearance in the courts fees.

Looking at the sequence of events, it is clear that the Defendant was ready to pay the requisite costs. The only problem is the approach which the Defendant adopted, that is to say, waiting for the Plaintiff to initiate the process. Since that was not a deliberate action, but rather a misconception or rather a mistake of fact, this Court can at least tolerate the submissions by the learned counsel for the Defendant.

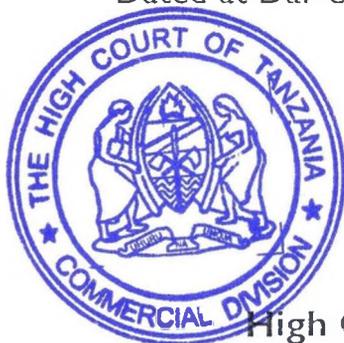
I therefore need not be detained by that issue, and, for that matter, I hereby direct the Defendant to forthwith pay the requisite costs which, as the learned counsel for the Plaintiff stated, are well known per each appearance (i.e., TZS 150,000/= per each appearance). The same should be paid within seven (7) days from the date of this ruling. Let me emphasize here that, there will be no excuse for that since orders of the Court must be strictly observed.

As regards the substantive part of the prayer to have the matter restored for mediation, the prayer has been brought under Rule 37(1) and (2) of the *High court (Commercial Division) Procedural Rules, 2012 GN 250 as amended by GN 107 of 2019*. Rule 37(2) of the Rules requires the person applying for restoration of a mediation process to show cause and must demonstrate that the requisite fees have been paid to the Court.

I have gone through the request for restoration and I am satisfied that, since the reason for inability on the part of the Defendant to appear for mediation was due to COVID-19, that reason is sufficient to restore the mediation process and allow the parties to mediate their case. In the upshot, the prayer for restoration is hereby granted. The file is to be placed before the mediator with a view to proceed with the mediation as prayed by the Defendant.

It is so ordered.

Dated at Dar es Salaam this 20th day of November, 2020.



Handwritten signature of Deo John Nangela in blue ink.

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DEO JOHN NANGELA
JUDGE

**High Court of the United Republic of Tanzania
(Commercial Division)**

Ruling delivered on this 20th day of November 2020 in the presence of Mr. Florian Francis, learned Advocate for the Plaintiff and Mr Michael Lugina, Advocate for the Defendant.



Handwritten signature of Deo John Nangela in blue ink.

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Deo John Nangela,
JUDGE

**High Court of the United Republic of Tanzania
(Commercial Division)**

20/11/2020