

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM SUB DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL CASE NO. 16 OF 2023**

**ALMANIAH HEAVY EQUIPMENT (EA) LTD.....PLAINTIFF**

**VERSUS**

**NCL INTERNATIONAL LIMITED.....DEFENDANT**

**RULING**

Date of Last Order: 31/08/2023.

Date of Ruling: 08/09/2023.

**E.E. KAKOLAKI, J.**

In terms of the provisions of Order VIII Rule 25(2) of the Civil Procedure Code, [Cap. 33 R.E 2019] (the CPC) and after conducting the 1<sup>st</sup> pre-trial conference, on 18/07/2023 this Court appointed the High Court of Tanzania Mediation Centre as mediator and ordered the parties to appear before the mediator for mediation session on 25/07/2023, as the mediation process was to be finalised within 30 days from the first day of mediation. According to the record when the file was placed before the mediator who conducted five sessions consecutively, only the plaintiff appeared with her director save for the defendant's advocate who appeared once in the last session but one and

promised to procure appearance of the defendant's director, before the matter was adjourned for the last mediation session on 18/08/2023.

It appears on the 18/08/2023 when the matter came before the mediator, only plaintiff's director one Simone Geisser and advocate Michael Kasungu appeared ready to proceed with mediation session, before the mediator marked the mediation failed for non-appearance of the defendant in five consecutive sessions and forwarded back the case file to the trial judge for consideration of Order VIII rule 29 of the CPC against the defendant.

On 31/08/2023, when the matter was called for final pre-trial conference, counsel for the plaintiff Mr. Michael Kasungu, having explained what happened resulting into failure of mediation process as ordered by the mediator on 18/7/2023, prayed to the Court to strike out defendant's Written Statement of Defence and dismiss her counter claim in this suit under Order VIII Rule 29(a) of the CPC, for failure to appear before the mediator in compliance with court's order. On defendant's side Mr. Augustino Kusalika advocate, resisted Mr. Kasungu's prayers arguing that, his client could not attend last but one mediation session on 11/08/2023 as he was away at Musoma before the session was lastly rescheduled to 18/08/2023. According to him, that was the reason as to why mediation was marked failed. On the

advocate's absence on 18/08/2023 he explained that, when mediation session was adjourned lastly on 11/08/2023, applicant's advocate was present, but on the 18/08/2023 while on the way to the Mediation centre was reached by phone call from one of the officers in the Mediation centre informing him that, his matter was about to take off. And that, when arrived at the centre premises was told that the matter had already been marked failed. In his submission, non-appearance was not cause by negligence of either the client/defendant or her advocate, thus this Court should refrain from invoking the provisions of Order VIII Rule 29(a) of the CPC as prayed. Regarding to the counter claim it was his submission that, it is in the interest of justice that both parties be heard on the same on merit regarding the claims by the defendant against the plaintiff.

In rejoinder Mr. Kasungu was insistent that, the law should be followed as there is no justification in Mr. Kusarika's contention that his client (defendant) was not traceable since both parties being legal entities run by directors or other officers of the company could not have missed someone to attend the session to represent the defendant in compliance with mediator's order of 11/08/2023, that the defendant should appear on the next date 18/07/2023 for mediation purposes. He lamented further that, as

no prior notice was given either to the plaintiff or the mediator/court, the defendant's act signified nothing than negligence on her part which in law does not constitute good cause.

As regard to the reasons for advocate's absence, he held the view that, as officers of the court advocates are bound to obey to court's orders and directives reasoning that, since Mr. Kusalika was present on 11/08/2023 when the mediation session was adjourned to 18/08/2023, he was full aware of the date and time, but unfortunately failed even to communicate any mishap on his part either to the plaintiff's advocate or the court/mediator. He added that, there was also no evidence that, Mr. Kusalika communicated with the mediation centre's officer on the 18/08/2023 as he would want this court to believe, hence lack of diligence in defending this matter. On those grounds Mr. Kasungu, pressed the Court to invoke the provisions of the Order VIII rule 29 of the CPC though not couched in mandatory terms as parties are bound by the same.

I have carefully followed both parties fighting submission and accord it with the deserving weight. The issue is whether this Court should invoke the provision of Order VIII Rule 29(a) of the CPC against the defendant as, prayed by Mr. Kasungu for failure to comply with court's orders to appear

before the mediator for mediation. It is true as submitted by Mr. Kasungu that, court's order when issued must be respected and obeyed by parties, as any court's act of condoning non-compliance sets a bad precedent and that should not be allowed. This Court in the case of **Tanzania Breweries Ltd Vs. Edson Dhobe & 19 Others**, Misc. Civil Application No. 96 of 2000 (HC-unreported), insisting on the importance of Court in making sure that its orders are observed and complied with had this to say:

*"...It goes without saying that the filing was done one day late without leave of this court. This is not proper. **Court orders should be respected and complied with. Court should not condone such failures. To do so is to set a bad precedent and invite chaos. This should not be allowed to occur.** Always court should exercise firm control over proceedings."* (Emphasis added)

Applying the above cited principle which I am fully persuaded with to the facts of this case, it is in undisputed terms to this Court that, on 18/07/2023 when conducted the 1<sup>st</sup> Pre-Trial Conference in the presence of both parties, issued an order for them to appear before the mediator for mediation which according to the record five sessions were held by the mediator. It is also uncontroverted fact that, in all five sessions only defendant's advocate Mr.

Augustine Kusarika appeared once on 11/08/2023, without being accompanied with the defendant's director as the plaintiff was fully represented by her advocate Mr. Michael Kasungu and ready to proceed with mediation. Following non-appearance of defendant's director or principle officer on 11/08/2023 and given the promise by Mr. Kusarika to procure his appearance on the next session the mediator proceed to set the last mediation session to 18/08/2023. It however turned out that, on 18/08/2023 without notice to either plaintiff's advocate or the mediator as rightly submitted by Mr. Kasungu, the record shows both defendant and her advocate defaulted appearance.

The argument by Mr. Kusarika that, he failed to appear timely in the mediation session on 18/08/2023, after receiving a phone call from one of the Mediation Centre officer while on his way to that centre that, his matter was about to take off, with due respect to him is unworthy buying for two reasons. **One** that, as rightly submitted by Mr. Kasungu, defendant's advocate was aware of the date and time scheduled for last mediation session but without notice to either plaintiff's advocate or mediator, both defendant and her advocate opted not to appear. **Second**, there is no proof as correctly stated by Mr. Kasungu that, Mr. Kusarika was notified of the

start of his matter before he allegedly found already marked failed. It therefore remain to be a mere statement or argument by advocate without proof. It is settled law that, a statement or argument by advocate does not constitute evidence. This stance was aired by the Court of Appeal in the case of **Tina & Co. Limited and 2 Other Vs. Eurafrican Bank (T) Ltd Now known as BOA Bank (T) Ltd**, Civil Application No. 86 of 2015 (CAT-unreported) when cited with approval the Ugandan Court of Appeal case of **Trasafrica Assurance Co. Ltd Vs. Cimbria (E.A) Ltd** (2002) E.A where the court held that:

*"As is well known a statement of fact by counsel from the parties is not evidence and therefore, court cannot act on."*

Further to what is stated above, there is no assigned reason as to why the defendant failed to appear in Court on 18/08/2023 through her director(s) or any principal officer, who would have made the mediation session successful and in full compliance of this Court's order of 18/07/2023. In my humble view non-appearance of both defendant who would have been represented by any principal officer and her advocate, without any notice or reasonable cause amounted to negligence and it was in full non-compliance of this Court's order of 18/07/2023, which disobedience this Court cannot

condone as it was also held in the case of **Tanzania Breweries Ltd** (supra). Had the defendant been seriously desired to defend her case and prosecute the counter claim she would have complied with this Court's order, failure of which she stands to suffer the consequences.

I am aware of the fact that the provisions of Order VIII rule 29(a) of the CPC in which this Court is invited by Mr. Kasungu to invoke is not coached in mandatory terms. The said Order VIII Rule 29(a) of the CPC reads:

*29. Where it is not practicable to conduct a scheduled mediation session because a party fails without good cause to attend within the time appointed for the commencement of the session, the mediator shall remit the file to the trial judge or magistrate who **may-***

*(a) **dismiss the suit**, if the non complying party is a plaintiff, or **strike out the defence**, if the non complying party is a defendant. (Emphasis supplied)*

Though the above provision is not coached in mandatory terms that does not mean that, parties can conduct themselves in contravention of the Court's order and the Court condones such violation. Any non-compliance or contravention of court's order by the party without any justification must be punishable in accordance with the law. In this matter since the defendant



and her advocate defaulted appearance before the mediator for mediation session hence contravention of this Court's order of 18/07/2023 as held above, I find this is a fit case to invoke the provision of Order VIII Rule 29(a) of the CPC. Thus the issue is answered in affirmative.

In the premises and for the fore stated grounds, I find merit in Mr. Kasungu's prayers and proceed to strike out defendant's Written Statement of Defence and dismiss her counter claim raised against the plaintiff. I further order that, the plaintiff's case shall proceed ex-parte against the defendant.

Cost in cause.

It is so ordered.

Dated at Dar es Salaam this 08<sup>th</sup> September, 2023.



E. E. KAKOLAKI

**JUDGE**

08/09/2023.

The Ruling has been delivered at Dar es Salaam today 08<sup>th</sup> day of September, 2023 in the presence of both parties' advocates and Mr. Oscar Msaki, Court clerk.



E. E. KAKOLAKI  
**JUDGE**  
08/09/2023.

