


**THE UNITED REPUBLIC OF TANZANIA
(JUDICIARY)
THE HIGH COURT – LAND DIVISION**

ORIGINAL JURISDICTION

LAND CASE No. 27 OF 2022

- | | | |
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| <ol style="list-style-type: none">1. ZEBADIA WANCHARA CHACHA2. RHOBİ SAMWEL KEGOYE3. MNIKO SAMWEL KEGOYE4. MARWA NGARİBA MNIKO5. HEZRON MAKARANGA SANDO6. GIRIMBE MACHUGU NYAMARUGU7. GETRUDA RAPHAEL NGARARE8. MWITA CHACHA ROSWE9. CHARLES MAGORI ANTHONY10. MANKO GHATI MWITA11. GEORGE MWITA NYAMAHYOI12. MARIA MUNGE MARWA13. MARIA MUSA İBRAHİM14. FRANCIS PIUS MKAMI15. BHOKE MWITA CHACHA16. MATİNDE MASEKE MWERA17. JAMES MARWA MAHANDO18. JOSEPHAT MWITA TUGARA19. NEEMA RHOBİ PETER20. GRACE ROBIN MOTENGI21. DANIEL RYOBA NYAMTARA22. WINFRIDA ZAKARIA MAKURI |  | PLAINTIFFS |
|--|---|-------------------------|

Versus

NORTH MARA GOLD MINE LIMITED DEFENDANT

RULING

26.03.2024 & 17.04.2024
Mtulya, J.:

On 8th June 2023, **Mr. Waziri Mchome**, learned counsel for the **North Mara Gold Mine Limited** (the defendant) had appeared in this court and prayed for registration of list of additional documents named: Report of the Chief Government Valuer; Satellite Images

displaying the area in dispute; Land Forms No. 3, 4, 69; Makubaliano ya Uhakiki wa Mali; and Compensation agreements arguing that the documents are material in the case and were pleaded in the defendant's written statement of defence. **Dr. Chacha Murungu**, learned counsel for the plaintiffs, on the day, did not protest the move. As the move was not contested and the materials were pleaded in the case, this court had granted leave Mr. Mchome to register the same on or before 11th July 2023.

On 10th July 2023, a day before the indicated deadline, Mr. Mchome had complied with the order and registered all the indicated materials. However, in between 8th June 2023 and 11th July 2023, Mr. Mchome had raised three (3) points of law, which were then resolved in favor of the plaintiffs. The Ruling on the points was delivered on 22nd August 2023, and the same date Dr. Murungu had complained on list of additional documents called Report of Chief Government Valuer (the Report) arguing that the Report was brought in summary and some of the plaintiffs' materials are missing.

According to Dr. Chacha, the case was brought in court to search for the rights of the parties, transparency and justice. In his opinion, the purpose of inviting the whole original Report is to read or else the plaintiffs to be given access to peruse the contents. The prayer was not protested by Mr. Mchome, but he had a proviso that

the Report is huge and contains a summary of approximately six thousand (6,000) individuals hence it will take some heavy schedule of time. Following the proviso and the need of justice and transparency in the dispute, this court had ordered Mr. Mchome to take necessary measures in bringing the Report in court for the plaintiffs to access the same. The defendant then was ordered to bring the Report on or before 12th September 2023 and parties to appear for necessary orders on the same date. However, on the indicated date, Mr. Mchome could not register the same for reasons of confusion on whether it was the whole Report or missing materials of some plaintiffs.

On avoidance of confusions and difficulties involved in bringing the huge Report, so called, this court on 11th November 2023, had ordered the plaintiffs to pay a visit and access the report at the defendant's premises and they should do so on or before 29th February 2024. However, the plaintiffs could not access the same for reasons displayed by the defendant's letter dated 11th March 2024, admitted in the case as attachment A and formed part of the proceedings of 26th March 2024. Attachment A produced a total of four (4) reasons of the delay in complying with the order.

In brief, the reasons were: first, implementation of the order is impracticable as there are no facilities to the public at the Mining Site to photocopy 38 bulky volumes each of approximately 300

pages of A3 paper size; second, the production of those reports is patently prejudicial to the defendant's defence case; third, disclosure of personal information of many persons who are not party to the proceedings is fatal; and fourth, extracts related to the defence case have been registered and originals of the extracts will be registered during the hearing of the case. At the very end of Attachment A, the defendant wrote that: *what the plaintiffs are asking for contain information which is not relevant to this case and relates to persons who are not parties to the case.*

The case was then scheduled for necessary orders on 26th March 2024, and two learned minds of the defendant, **Mr. Audax Kameja** and **Mr. Waziri Mchome**, appeared in this court to explain the reasons of delay or the so-called change of circumstances. In brief, the dual learned counsels submitted that the defendant had encountered challenges in attempting to execute the court order hence prayed for alteration of the order to suit the new discovered circumstances cited in Attachment A.

The dual had moved further to add the fifth reason of unnoticed clause in the Report contending that the Report contains Confidential Clause 15, which bars third parties to access the Report as it contains confidential materials. In the opinion of the defendants' learned counsels, even if the order is complied by necessity, it will breach the indicated confidential clause. The dual

counsels thought further that costs and time of the parties will be extensively consumed if the order is complied hence may delay the case. Finally, the dual learned minds prayed this court to vary its order for interest of justice and speed trial to both parties in the case.

The reasons and submissions of the defendants' learned counsels to vary the order were bitterly protested by Dr. Chacha assisted by **Mr. Daud Mahemba**, learned counsels for the plaintiffs. In their opinion, the defendant does not protest existence of the order, but had deliberately declined the court's order. According to the dual counsels, there are several reasons to show that the defendant had disobeyed the order, namely: first, reminders letters on the need to access the Report from the plaintiffs' advocates to the defendant. To substantiate their statement, the dual counsels have registered a bundle of conversation letters in attachment B, C, and D; second, the defendant had produced reasons of impossibility or change of circumstances in attachment A out of time. In justifying their submission, the dual counsels stated that the letter was drafted on 11th March 2024 and registered in this court on 14th March 2024 whereas the leave granted to the plaintiffs ended on 29th February 2024; and third, the defendant was aware of Clause 15 of the Report regulating confidentiality of the materials in the Report.

In the opinion of the dual counsels, the defendant has brought in the instant case illegal prayer without abiding with the law in: first, Order VIII Rule 23 of the **Civil Procedure Code [Cap. 33 R.E. 2019]** (the Civil Code) for want of departure of scheduling orders and raising of interlocutories; second, Order XLIII Rule 2 of the Civil Code on filing application with chamber summons supported by affidavit; third, section 78 of the Civil Code on review of the court's orders; fourth, the law regulating *functus officio* which prohibit varying court's own orders; and fifth, section 3 and Part II Column 3 of the **Law of Limitation Act (Cap. 89 R.E. 2019]** (the Law of Limitation) in bringing review out of thirty (30) days.

Finally, the dual counsels contended that application registered out of time must suffer dismissal order or remedies enacted in Order XXI Rule 19 of the Civil Code as there is willful disregard of the court's order. In their opinion, this court may wish to struck out the defence and issue a default judgment against the defendant in accordance to Order VIII Rule 14 (1), 15 & Order XI of the Civil Code read together with Order V of the Civil Code. In support of the move, the dual counsels have produced a total of twelve (12) precedents of this court and Court of Appeal, which are not necessary to be cited inhere.

In rejoining their previous submission, the defendant's learned counsels thought that the plaintiff's learned advocates have brought

another application in the case without any notice to the defendant. According to the dual, a bundle of twelve (12) precedents was registered in the instance protest, but only two (2) are material to the present circumstances, namely: **Pollo Italia Tanzania Limited v. Euro Poultry Tanzania Limited**, Commercial Case No. 62 of 2022 and **Sylivester Lwegira Bandio & Another v. National Bank of Commerce Limited**, Civil Appeal No. 125 of 2018. In the defendant's learned counsels' submission, the dual cases have introduced two (2) important matters, *viz*: first, the applicant who prays for struck out order must register an affidavit to formalize his complaint and not mere bunch of allegations from the bar; and second, Order XI Rule 18 of the Civil Code is invoked when there is willful omission on part of the defendant and it is employed as a last resort. In order to resolve the dual indicated issues, the defendant's learned counsels thought that this court has to scrutinize the facts produced in the case.

The dual learned counsels of the defendant submitted further that the defendant did not breach the order of this court, and even if it is said so, it is the first time and there are good reasons for the omission. According to the dual, apart from a surprise application, the plaintiffs' counsels have brought in the case issues related to *res judicata*, *functus officio* and time limitation, which are points of law produced in the course of replying the prayers of the defendant.

However, the dual had a brief touch on them contending that *functus officio* and *res judicata* are invited when disputes were resolved to the finality, which is not the case in the present contest. Similarly, the dual submitted that the issue of section 78 of the Civil Code and review cannot apply in the present prayer as the main source of the prayer was photocopying of the Report and not discovery and inspection and there are reasons on difficulties of implementing the order of discovery and inspection. The dual thinks that the prayer of variation of the order is not regulated by section 78, Order XI Rule 18 & Order XLII of the Civil Code or section 3 of the Law of Limitation, but section 95 of the Civil Code on inherent powers of the court.

I have perused the facts of the present contest, submissions of the learned minds, section 95 of the Civil Code and the indicated precedents in **Pollo Italia Tanzania Limited v. Euro Poultry Tanzania Limited** (supra) and **Sylivester Lwegira Bandio & Another v. National Bank of Commerce Limited** (supra). The law in section 95 of the Civil Code was enacted, briefly, in the following words: *nothing in this Code shall be deemed to limit the inherent power of the court to make such orders as may be necessary for the ends of justice*. I short, this court may wish to make any necessary orders for the ends of justice.

In cherishing the move, this court in the decision of **Pollo Italia Tanzania Limited v. Euro Poultry Tanzania Limited** (supra), at page 7 of the Ruling, thought that: *failure to comply with discovery order may be interpreted as deliberate foul a party plays in civil litigation where fair play is cherished*. This court then warned at page 8 of the decision that: *non compliance with the discovery order has grave consequences*. However, in the case, this court at page 3 of the Ruling noted that the order was issued two months prior to the decision and the plaintiff was granted two (2) leave, but could not comply with the order.

The Ruling of the Court of Appeal in **Sylivester Lwegira Bandio & Another v. National Bank of Commerce Limited** (supra) on the other hand, at page 17 of the decision, shows that: an order dismissing a suit or striking out a defence under Order XI Rule 18 of the Code can only be made as a last resort and where the court satisfies itself that the omission is willful. On how to gauge whether a party deliberately declined the order, the Court of Appeal thought that it is: *a question of fact which has to be determined based on factual depositions in the affidavit and counter affidavit in line with the surrounding circumstances*.

In the instant protest between the parties, facts of the matter shows that the defendant had declined only once and produced reasons of difficulties in implementing the order. The defendant had

moved further to explain the reasons of the decline and prays this court to consider them to have merit in order to vary the order. It is unfortunate the plaintiffs' learned counsels have declined any assistance to scrutinize each reason and the alleged difficulties. They replied them generally with one item of willful refusal of court order and striking out of the defence, which it has its own specific procedures enacted in Order XI Rule 18 of the Civil Code.

If the plaintiffs so wish to invite Order XI Rule 18 of the Civil Code, they have to comply with the terms enacted in the Order and directives of this court in the precedent of **Pollo Italia Tanzania Limited v. Euro Poultry Tanzania Limited** (supra), and procedures displayed in the precedent of the Court of Appeal in **Sylvester Lwegira Bandio & Another v. National Bank of Commerce Limited** (supra)

In the present case parties are in land dispute contesting on the rate of compensation which is displayed by the Report. This is a center of dispute and the court must allow parties to enjoy the same for interest of justice. Parties in civil suits must be honest and register all necessary materials and if not, necessary orders may be issued to cherish fair play in civil proceedings. In certain circumstances, orders are issued to see whether there is a real dispute between the contesting parties.

In the instant complaint, Mr. Chacha had noted some confusions and missing of facts on some of the plaintiffs on the list of additional documents and prayed to access the original Report in custody of the defendant. The defendant's learned counsels were consulted before the order was issued and did not protest the move. The order was then issued and the plaintiffs have shown efforts to access the information, but the defendant has been producing reasons.

In the record, the defendant had produced a total of five (5) reasons of difficulties in implementing the court's order, namely: first, implementation of the order is impracticable as there are no facilities to the public at the Mining Site to photocopy 38 bulky volumes each approximately 300 pages of A3 paper size; second, the production of those reports is patently prejudicial to the defendant's defence case; third, disclosure of personal information of many persons who are not party to the proceedings is fatal; and fourth, extracts related to the defence case have been registered and originals of the extracts will be registered during the hearing of the case.

The reasons of the defendant can briefly be replied as follows: first, the exercise of accessing the Report is only concerned with the present parties. The parties in the present case shall put in place necessary measures for the plaintiffs to access information related to

this case, limited to the plaintiffs' materials; second, the defendant will not be prejudiced as the materials are relevant to the determination of the rights of the parties and carry the substance of the dispute; and finally, necessary materials concerning the plaintiffs are accessed for interest of justice.

I am aware the defendants' learned counsels have produced clause 15 of the Report. However, they declined to move further to show the extent of confidentiality of the Report as far as the present plaintiffs are concerned. It is unfortunate that some of the Report's information were brought in the additional list of document and only in extracts. The defendant's learned counsels had remained mute on the subject and allegations of missing information. They may be better positioned to know the reasons of remaining mute.

This is a court of law and justice and empowered under section 95 of the Civil Code to issue any orders, when it sees fit, for interest of justice. In any case, Clause 15 of the Report concerns confidentiality to specific purpose to which it refers. In the present case, a dispute has been registered and the Report is relevant material in arriving at justice of the parties. I do not see any fault for the plaintiffs to access the original Report, short of that there is no real dispute in this court. In short, that is the meaning of justice or fair play in search of justice to the parties.

I understand, the defendant's learned counsels at the very end of Attachment A had complained that the information which the plaintiffs are asking is not relevant to this case and relates to persons who are not parties to the case. I think, the argument declines the whole substance of the dispute, which is a claim of land rights and adequate compensation according to the law regulating land, valuation and compensation issues.

I am also aware of several complaints registered during the hearing of the contest and replies on the subject. However, they do not move into the merit of the contest and I need not reply them. I said in this Ruling that the contest is on the accessibility of the Report from the order of this court to resolve the issue missing or summary of information.

In the upshot, I think, the defendant has not produced good reasons to decline the order, save for a minor modification, as I indicated above. Having said so, I order the defendant to take necessary measures to make the original Report available for reading of the materials related to the plaintiffs only. I award no costs in the present contest as it was aimed at rendering justice to the parties.

It is so ordered.

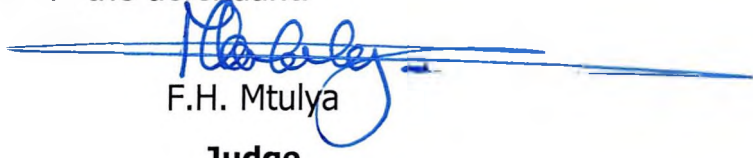



F.H. Mtulya

Judge

17.04.2024

This Ruling was delivered in Chambers under the Seal of this court in the presence of the first, second, fourth, eighth and tenth plaintiffs and their learned counsels, **Dr. Chacha Murungu** and **Mr. Daud Mahemba** and in the presence of **Mr. Waziri Mchome**, learned counsel for the defendant.



F.H. Mtulya

Judge

17.04.2024