**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 117 OF 2015**

**JV TANGERM CONSTRUCTION CO.LIMITED**
**& TECHNOCOMBINE CONSTRUCTION**
**LIMITED (A JOINT VENTURE) ..... PLAINTIFF**

**VERSUS**

**TANZANIA PORTS AUTHORITY ..... 1ST DEFENDANT**
**ATTORNEY GENERAL ..... 2ND DEFENDANT**

## RULING

**ISMAIL, J.**

29th September, & 1st October, 2021

Midway through the hearing of the plaintiff's case, the latter's counsel moved the Court to allow them to file a notice to produce and an additional list of documents to be relied upon. This prayer was granted, and the plaintiff's counsel were given until 24th September, 2021, to file the said documents and serve copies thereof on the defendants. Pursuant to the said order, and consistent with the provisions of Order VII Rule 14 (2) of the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC), the applicant filed a list of additional documents that the plaintiff intends to rely on. The list has

enumerated 8 items of additional documents that are intended to be relied on by the plaintiff. Besides the list of documents, the plaintiff's counsel have also filed seven notices to produce. The notices, filed under section 67 (1) (a) (i) and (iii) of the Evidence Act, Cap. 6 R.E. 2019 (Cap. 6), are accompanied by copies of the documents that are believed to be in the 1st defendant's possession.

The filing of the notices to produce and the list of additional documents has bred a formidable opposition from the defendants' counsel. Through a notice of preliminary objection, filed on 29th September, 2021, four grounds of objection have been raised. The objections have punched holes in the notice to produce and additional list of documents, contending that they are bad in law for being:

(a) *In contravention of the scheduling Order and Order VIII Rule 23 of the Civil Procedure Code, Cap. 33 R.E. 2019;*

(b) *In contravention of the scheduling Order and Order XIII Rule 2 of the Civil Procedure Code, Cap. 33 R.E. 2019;*

(c) *In contravention of scheduling Order and Order VII Rule 15 Civil Procedure Code, Cap. 33 R.E. 2019; and*

*(d) An abuse of court process circumventing the Ruling of the Court dated 22nd September, 2021 in respect of the tendering and admissibility of documents by the Plaintiff's witness.*

Disposal of the preliminary objections took the form of oral hearing that saw a battery of the State Counsel, led by none other than Mr. Gabriel Malata, the Solicitor General, address the Court in support of the objections, while Messrs Michael Ngalo and Seni Malimi, learned counsel, turned up for the plaintiff.

As a prelude to his submission, Mr. Malata reminded the Court that,on 13th May, 2016, the Court conducted the 1stPre-trial Conference (PTC) at which the plaintiff informed the Court that she would not have any applications, discoveries or interrogatories. The plaintiff further stated that she intended to file a list of additional documents. Mr. Malata further submitted that, on 27th September, 2016, the Court conducted a Final Pre-trial Conference during which the plaintiff informed the Court that she had already filed a list of additional documents that were intimated at the 1st PTC. It was then, the counsel contended, that the scheduling order was closed.

Turning on to item (a) of the objections, Mr. Malata argued that the notice to produce and the list of additional documents filed on 24th

September, 2021, contravened Order VIII Rule 23 of the CPC, which prohibits a departure or amendment of the schedule unless the Court is convinced that the departure is necessary. He argued further that, in terms of section 1 of the Interpretation of Laws and General Clauses Act, Cap. 1 R.E. 2019, the use of the word "shall" in the said provision means a prohibition of taking some action unless the Court is satisfied and permits otherwise. The counsel took the view that such permission can only be given after filing a formal application which would require assigning reasons as to why a departure is necessary. On this, he cited the decisions in ***Stanbic Bank Tanzania Limited v. Nolan*** [2003] 2 EA 674, in which it was held that departure from the scheduling order has to be through a formal application; and ***Deposit Insurance Board, the Liquidator of FBME Bank v. Anamary Bronkhorst***, HC-Misc. Civil Application No. 118 of 2018 (unreported). It was the counsel's view that, subsequent to 27th September, 2016, any departure from the scheduling order, to allow the filing of the notice to produce and the list of additional documents to be relied upon, had to be preceded by a formal application.

With regards to item (b), the counsel's contention is that Order XIII of the CPC requires that good cause be shown for production of documentary evidence which should have been received under Rule 1. In such a case, he

argued, the Court must be satisfiedwith the reason, and that that can only be done through a chamber summons, supported by affidavit, under Order XLIII of the CPC. Mr. Malata contended that, since the filing of the documents and the intended production was not preceded by an application for leave then the documents are misplaced and filed in contravention of the law.

Submitting on item (c), Mr. Malata stated that the notice to produce and the list of additional documents are in contravention of Order VII Rule 15 of the CPC, which requires the plaintiff to state the person in whose possession the documents sought to be relied on are. He argued that section 67 of Cap. 6, sought to be relied upon is a non-starter, since the said documents were neither attached to the plaint nor is it indicated that the same are in the possession of the defendants. He took the view that the notices and the list of additional documents are misplaced, the filing of which is in contravention of the law.

With respect to item (d), the contention is that the filing of these documents is an abuse of the court process and intended to circumvent the order of the Court issued on 22nd September, 2021, on production and admissibility of the copies of the documents. Mr. Malata argued that, having failed to convince the Court on the admissibility of secondary evidence, the

plaintiff's counsel are using the opportunity to right the wrongs that led to the refusal by the Court. This, he argued, amounted to a pre-emption of the position of the Court, which is unacceptable and untenable. To fortify his argument, the counsel cited the cases of ***Valerian Chrispin Mlay v. Nathan Aalex***, HC. Misc. Civil Application No. 34 of 2018; ***Mary John Mitchell (Legal representative of Isabela John) v. Sylivester Magembe Cheyo& Others***, CAT-Civil Case No. 161 of 2008 (both unreported). In Mr. Malata's view, the net effect of all this is to rely on ***Ihembe Industries Ltd v. Royal Insurance (T) Limited & Another***, HC-Civil Case No. 14 of 2007 (unreported), ***Deposit Insurance*** and ***Stanbic Bank*** (supra),and expunge the said documents from the record.

In his rebuttal submission, Mr. Ngalo began with item (d) of the objections which castigated the plaintiff's course of action as an abuse of the court process. He denied that the filing of the notices and the list of additional documents amounted to a pre-emption or a circumvention which borders on the abuse of the court process. It was his contention that an abuse of the court process would only occur where a party repeatedly uses the court process or prefers proceedings which are vexatious, frivolous, or doing what the law does not permit. Mr. Ngalo contended that the points of objection raised are not pure points of law as they require an analysis of

arguments, and that the defendants have to demonstrate why and how the plaintiff has abused the court process. In any case, the counsel contended, the said ruling has not been availed to them. He urged the Court to disregard the objection.

Regarding the rest of the objections, the contention by the learned counsel is that a serious exception ought to be taken with respect to the objections. This is in view of the fact that, what was filed by the plaintiff are notices to produce and not applications. He argued that a scheduling orderunder Rule 23 neither bars the parties from filing notices under the Evidence Act nor does it require a formal amendment of the scheduling order. The counsel argued that it is no wonder that no authority has been cited therefor. He argued that formal applications are filed out of nothing else but the court practice. With regards to departure from the scheduling order, Mr. Ngalo cited the decision in the ***National Bureau of Statistics v. NBC &Another***, CAT-Civil Appeal No. 113 of 2018 (unreported). It was Mr. Ngalo's contention that the documents filed are intended to provide a fair trial to the parties so that their rights are fully and comprehensively decided on merit. He argued that, in this case, the defendants have not shown that they will be prejudiced or suffer any injustice as a result.

The counsel further submitted that, these being just notices to produce, their filing does not convey any mileage to the plaintiff, adding that the actual tendering of the attached documents may be objected.He was emphatic that objecting to them at this stage would be pre-mature and uncalled for. To aid his cause, he cited the case of ***Eusto Ntagalinda v. Tanzania Fish processors Ltd***, CAT-Civil Appeal No. 23 of 2012 (unreported). He argued that Order XIII Rule 2 does not provide for filing of a formal application, and that good cause under that provision is when one intends to rely on the documents.

With respect to the contravention of that Order VIII Rule 15 of the CPC, he submitted that this rule is permissive. He emphasized that trial courts should not read automatism, and that as a court of justice it must conform to the overriding objective. He cited the decision of ***Interchem Pharma Ltd (in Receivership) v. Karen Benjamin Mengi& 2 Others***, HC-Misc. Commercial Application No. 32 of 2016 (unreported), in which it was held that the Court should dispense substantive justice to the parties. He urged the Court to overrule the objections.

Weighing in for the plaintiff was Mr. Malimi who began with expounding the operation of the principle of overriding objective. He argued that the gravamen of the complaint is the notice to produce and the list of

additional documents. He argued that the defendants'counsel has not stated how they would be prejudiced. Taking a swipe at the objection, the counsel contended that the principles of overriding objective had been swept under the carpet. He took the view that the counsel treated the notice to produce as it contains new documents. He submitted that the same documents which were filed and shared five years ago.

With respect to the list of documents, the counsel argued that it is a known practice that such documents are filed under Order XIII Rules 1 and 2 of the CPC once the window of attaching them to the plaint is closed. The counsel argued that the objection ought to await the time when a particular document is tendered for admission and not in its blanket form. On assigning reasons, the contention by Mr. Malimi is that such reasons cannot be assigned for each of the filed documents. He argued further that, when the scheduling order was made, way back in 2016, it was not meant that the door be closed, as the law allows production of documents at any stage of the proceedings. Regarding the ***Ihembe Industries Case***, Mr. Malimi submitted that the case is distinguishable as the documents were disclosed from the beginning.

On the alleged pre-emption, the contention by Mr. Malimiis that the defence's submission would hold water if there was an objection. In this

case, there was none at the time of filing. He imputed double standards in the conduct of the proceedings. This is in view of the fact that on 22nd September, 2021 the defendants applied to depart from scheduling orders and lodged an application for filing a supplementary witness statement. He contended, however, that the notice to produce and the list of documents are not an application. He urged the Court not to be confined to unnecessary or undue technicalities.

The learned counsel urged the Court to overrule the objections with costs.

In his rejoinder, Mr. Malata argued that the overriding objective invoked by the plaintiff's counsel should not be applied as a gateway from the mandatory requirements of the procedural law. On this, he cited the case of ***Mondorosi Village Council & Others v. TBL & Others***, CAT-Civil Appeal No. 66 of 2017; and ***Puma Energy (T) Limited v. Diamond Trust Bank (T) Limited***, CAT-Civil Appeal No. 54 of 2016 (both unreported).

On abuse of the court process, the counsel submitted that the defendants have demonstrated the instances of the abuse of the court process, and that such demonstration was done through the ***Mitchell case*** which talks about the pre-emption. He added that the ruling of the Court

had a bearing on the documents filed in contravention of the law. He contended that the notices and the list of documents are a pre-emption.

With regards to filing a formal application, Mr. Malata was firm that the requirement has been underscored in a number of cases, including the ***Stanbic Bank case*** (supra), and that such procedure is intended to demonstrate compliance. He maintained that Order VIII Rule 23, read together with Order XIII Rule 2, require that good cause be shown, and that this can be done through an affidavit which would contains grounds for the application. This, he said, is consistent with the decisions in ***Stanbic Bank case*** (supra) and ***Ihembe case*** (supra). In all instances, the counsel contended, leave of the Court must be sought. He distinguished the ***National Bureau of Statistics case*** (supra), arguing that the same was on speed track, with nothing to do with departure from the scheduling order for filing of notices. Mr. Malata contended that, contrary to what Mr. Ngalo argued, the ***Ntagalinda case*** highlighted the imperative nature of complying with Order VII Rule 14 of the CPC which requires that documents to be relied upon be attached to the plaint.

Commenting on the ***Interchem Pharma case,*** the counsel argued that the case dwelt on the need for having a formal application, a distinguishing feature in the instant matter. On whether the defendants will

suffer any prejudice, Mr. Malata argued that this is a court of law and that decisions are arrived at through an application of the law.On this, the counsel argued, Order XIII Rules 1 and 2 was flouted as the permission sought now ought to have been applied way back in 2018, before the trial commenced. He argued that the plaintiff's failure to comply with the law was prejudicial to the law and to justice.

On whether the objections were prematurely raised, the counsel's contention is that the timing is right, based on Order XIII of the CPC; while with respect to the Court ruling delivered on 22nd September, 2021, the argument is that the same would also be prejudiced and pre-empted by the plaintiff's conduct. The counsel urged the Court to sustain the objections.

I have dispassionately leafed through these long-drawn submissions. Let me begin by thanking the counsel for being industrious in their submissions. The rival arguments were nothing short of splendid and invaluable.

As I delve into the substance of the parties' disputation, it behooves me to begin my disposal by looking at item (d) of the defendants' objection. This ground castigates the plaintiff's action, terming it an abuse of the court process, and one that is intended to pre-empt the decision of the Court, made on 22nd September, 2021. The plaintiff's counsel have roundly given it

a wide berth. The argument is that their action fits no where in the definition of an abuse of the court process.

The law is settled in this respect. It is to the effect that, courts are enjoined to ensure that they protect themselves from any possible abuse of its powers or procedures in the conduct of proceedings. They must, as a matter of implicit obligation, guard against actions of unscrupulous parties who turn the courts into a theatre for endless, repetitive and frivolous litigations,and actions which are known as an abuse of court process (See: ***Zephrenus Clement Marushwa v. The Attorney General & 4 Others***, HC-Land Application No. 241 of 2018 (MZA-unreported). To appreciate the import of this principle it is apposite that the definition of the term and the scope of its application be shared. The ***legal dictionary.com*** defines it to mean:

> *"... the act of using the legal process – during a legal proceeding – to harass another party to the suit, to intentionally incur costs with the intent that the other party will be ordered to pay those costs, or to delay the court action."*

A more broadened definition of the term is gathered from ***Black's Law Dictionary***, 6th ed., Continental Edition 1981-1991 p. 990 at 10-11 which defines an abuse as:

*"everything which is contrary to good order established by usage that is a complete departure from reasonable use.... An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use."*

Across jurisdictions, this term has been a subject of wide judicial interpretation. In the captivating decision in the Nigerian case of ***Amaefule& Others v. The State*** (1998) 4 SCNJ 69 at 87, Oputa J.SC held:

*"A term generally applied to a proceeding which is wanting in bonafides and is frivolous, vexatious and oppressive. In his words abuse of process can also mean abuse of legal procedure or improper use of the legal process."*

It was further held that:

*"... abuse of court process create a factual scenario where appellants are pursuing the same matter by two court process. In other words, the appellants by the two court process were involved in some gamble a game of chance to get the best in the judicial process." (see Agwusin v. Ojichie)*

While the foregoing decision laid a key foundation, it is the decision of the High Court of Kenya (Constitutional & Human Rights Division) that came

up with the most comprehensive definition and circumstances under which an abuse of court process may arise. This was in the case of ***Graham RiobaSagwe& 2 Others v. Fina Bank Limited & 2 Others***, Petition No. 82 of 2016, wherein it was held at p. 6:

> *"It is settled law that a litigant has no right to pursue paripasua two processes which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps.* ***On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks****. In humble view, the two processes are in law not available to the petitioners. The petitioners cannot lawfully file this petitions and seek similar reliefs relying on substantially the same grounds as the application referred to above. The pursuit of the second, that is this petition constitutes and amounts to abuse of court or legal process."* [Emphasis added]

At page 5 of the said decision, the learned bench laid the following emphatic position:

> *"The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and*

*conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents. The situation that may give rise to an abuse of court process are indeed inexhaustive, it involves situations where the process of the court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:*

*(a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.*

*(b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.*

*(c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.*

*(d) Where an application for adjournment is sought by a party to an action to bring an application to court for leave to raise issue of fact already decided by court below.*

*(e) Where there is no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.*

*(f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.*

*(g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.*

*(h) Where two actions are commenced, the second asking for relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent."*

From these comprehensive excerpts, the critical issue to be resolved is whether it can be saidthat the plaintiff's actions subsequent to the Court's ruling are an abuse of the Court process. My scrupulous reading of the cited decisions and a review of the actions taken by the plaintiff do not convey any semblance of a feeling that the act of filing notices to produce and a list of documents to be relied upon are anywhere close to an act which may be considered to border on an abuse of the court process. The order that adjudged that the documents sought to be admitted were an inadmissible

secondary evidence did not have the effect of preventing the plaintiff from taking any further action, provided that such action did not amount to re-introduction of the said documents through a channel that was adjudged irregular. The plaintiff's latest effort cannot be termed or interpreted as a re-introduction of any of such documents. None of the eight situations listed in the ***Graham RiobaSagwe& 2 Others v. Fina Bank Limited & 2 Others***(supra) can be said to fit into the plaintiff's quest for tendering the documents attached to the notice to produce and the list of additional documents to be relied upon.

The defence team has also taken the view that the plaintiff's actions constitute a pre-emption or a circumvention of the order of the Court, a contention that has been valiantly opposed by the plaintiff's counsel. The latter's view is that there is no pending objection which would be pre-empted by the plaintiff's notices and the list. I choose to go along with the latter's view. Once the decision was made on the admissibility of the documents, the objection raised by the defendants was disposed of and the chapter was closed. There was nothing left in respect of which the danger of pre-emption would be perceived. I am also of the view that filing of the notices and the list of documents to be relied on cannot be said to be an abhorrent act of circumventing what the ruling adjudged as irregular. In that

regard, therefore, I hold that the decisions in ***Mitchell*** and ***Mlay*** (supra) cited by Mr. Malata are, with respect, of no consequence.

As I get to the tail end of my discussion on this point, let me express my support to the alternative argument raised by Mr. Ngalo, regarding the legal purity of this limb of objection. I take the view that this is a serious allegation which cannot be ascertained without calling into action an evidence which would prove the allegation. This would certainly entail carrying out a hearing at which evidence would be adduced and rebutted before a finding is made. This would, in my considered view, relegate the objection to a normal factual argument whose contest would be settled by the weight of a party's evidence.

In view of the foregoing, it is my conviction that this limb of objection is misconceived and lacking in merit. I overrule it.

The rest of the objections have dwelt on the propriety or otherwise of the filing of the notices to produce and the list of additional documents that the plaintiff intends to rely upon. The contention by Mr. Malata is that such filing is violative of the scheduling order and the provisions of Order XIII Rules 1 and 2, Order VIII Rule 23 and Order VII Rule 15 of the CPC. This contention has been discounted by MessrsNgalo and Malimi, both of whom take the view that the filing of the said documents is unblemished. They

have also taken the view that this Court should be enjoined to stick to its wider role of operating in the best interest of justice.

I will start with the controversy surrounding the filing of the list of additional documents that the plaintiff intended to rely on. This is a new list of documents that the plaintiff intends to rely on, subsequent to the additional list whose filing was done subsequent to the scheduling order dated 13th May, 2016, when the parties met for the 1st PTC. On that date, the Court ordered that such documents be filed within two weeks from the date of the scheduling order. Worth of a note, is the fact that such filing was in conformity with the requirements enshrined in Order VII Rule 14 (2) of the CPC which states as hereunder:

> *"Where the plaintiff relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint."*

The requirement in the just cited provision goes along with the imperative need by the parties to produce documentary evidence that is in their possession at the first hearing of the suit, unless an extension for such production is granted. This is pursuant to Order XIII Rules 1 and 2 of the CPC. The issue to be resolved here is whether the documents which are

enumerated in the list of documents can be received at this point in time *i.e.* after the first hearing of the suit. The view held by the defence is that, in the absence of a formal application assigning reasons for not complying with the law, that isn't permissible. Barring the filing of a formal application which is a subject for another day, Mr. Malata's contention in this respect is valid and plausible. The plaintiff missed the train when she failed to file the list of documents after she filed the list of documents two weeks from scheduling order, or any time before the first hearing of the suit. The alternative to that avenue was to use the window providedunder Order VII Rule 18 (1) or Order XIII Rule 2 of the CPC.

Order VII Rule 18 (1) of the CPC provides as follows:

> *"A document which ought to be produced in court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly,* ***shall not, without leave of the court,*** *be received in evidence on his behalf at the hearing of the suit."* [Emphasis added]

This provision means that production of a document which was not annexed to the plaint or entered in the list can only be done if leave of the court is sought. It complements what is stated in Order XIII Rule 1 which

underlines the need for having the court's accession before such document is adduced. Glancing at the record of the proceedings in the instant matter, nothing conveys the feeling that leave of this Court was sought and granted for production of the documents stated and attached to the list of attachments. This means that, the alternative avenues that the plaintiff would use to surmount the hurdle imposed by the defence are all closed.

The insistence of adherence to Order XIII Rule 1 (1) of the CPC has been expounded judicially. In the Indian case of ***Ashoka Marketing Ltd v. Rothas Kumar & Others*** AIR 1966 Cal 591, 70 CWN 729, quoted in the decision of this Court in ***Bank of Africa Tanzania Ltd v. OM-Agro Resources Ltd & 7 Others***, HC-Comm. Case No. 139 of 2019 (unreported), the Calcutta High Court considered an *imparimateria* provision to Order XIII Rule 1 (1) of the CPC and observed:

> *"Now, the scheme of the Code is such that the date fixed by the summons, for appearance of the defendant, cannot be the date of hearing of the suit or the date contemplated by Rule 1 of Order XIII of the Code, for production of documents, if the suit be a contested one .... The scheme of the Code is such that the* ***interrogation and discovery, production and inspection of documents should all be completed before a case be taken up for hearing on evidence.*** *I respectfully agree ... that* ***the word 'hearing'***

*is one of those comprehensive words which may be used with a more or less extensive meaning according to the context. In the context in which they are used, the words* ***"at the first hearing of the suit"*** *in Order XIII Rule 1, mean that hearing,* ***after the pleadings completed and before issues are framed under Order XIV****. Up to that stage, production of documents are permissible,* ***without cause being shown****, as contemplated by Rule 2 of Order XIII,* ***but thereafter "good cause must be shown for late production of documents."***

The quoted excerpt cements the fact that actions done subsequent to the commencement of the hearing and without permission or leave of the Court are nothing but an infraction of the law. The plaintiff's counsel has urged the Court to be inspired by the upper Bench's decision in ***Ntagalinda's case*** (supra). But, as Mr. Malata submitted, this case does more harm than aid his cause. Besides giving alternative avenues in the subject in contention, it underscores the need for the courts to ensure that filings done subsequent to the hearing are done with the leave of the Court, lest they be rejected out of hand. Borrowing a leaf from the said decision, I cannot help but agree with Mr. Malata that the **list of documents** to be

relied upon has been 'sneaked' into the Court without a prior blessing by the Court. in the result, I sustain this objection.

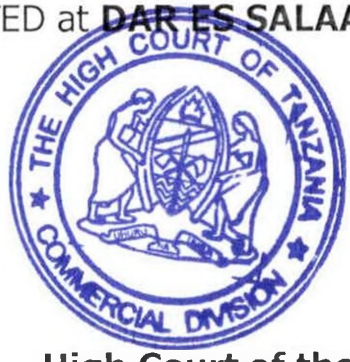
With regards to the notices, my unflustered conclusion is that the objection is wayward and untenable. This is because the provisions cited by Mr. Malata, as the basis for the objection, do not apply to notices to produce, filed by the plaintiff. Whereas the objections by the defence are premised on the provisions of the CPC, matters pertaining to the notices to produce are governed by the provisions of Cap. 6, specifically section 68. This provision does not provide for time frame within which such notices have to be filed in court. Such filing does not depend on the stage at which the proceedings have reached, except that they should not be filed when a party's case has been closed. Thus, the talk of such notices to constitute applications which would not be filed subsequent the scheduling order, or without a departure from or amendment of the order is, in my considered view, specious and unconvincing. I hold the view that such filing is perfectly consistent with the law that created them and governs their filing. The only condition precedent, however, is that the documents sought to be produced must be in the possession of the adverse party. Such fact would be determined at the stage of the production in court.

Glancing at the notices, it is gathered that the same have been preferred under section 67 (1) (a) (i) & (iii) of Cap 6. With respect to the plaintiff's counsel, this quotation was flawed. The appropriate provision in this respect is section 68 which confers the right to ask for production of the document. Section 67 deals with proof of cases through secondary evidence in their general form. Noting that the error is trifling, tolerable and not going to the root of the matter, I choose to live with it. Overall, I hold that the objection in this item is misconceived and I overrule it.

In the upshot of all this, and save for the objection on the list of documents to be relied on, which is sustained and the list is expunged, the rest of the objections are overruled. Let the hearing of the matter proceed on the date to be appointed by the Court and communicated to the parties.

It is so ordered.

DATED at **DAR ES SALAAM** this 1st day of October, 2021.




**M.K. ISMAIL**

**JUDGE**

**High Court of the United Republic of Tanzania**
**(Commercial Division)**
**01/10/2021**