

TANZANIA / JUDGMENT

CIVIL APPEAL NO 435 OF 2021 SIMPLY FRESH TANZANIA LIMITED AND 4 OTHERS VS YASMINE HAJI

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TANZLIIDECIDED
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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM (CORAM: NDIKA. 3.A.. GALEBA. 3.A. And MGEYEKWA. J.A. ^ CIVIL APPEAL NO. 435 OF 2021 SIMPLY FRESH TANZANIA LIMITED..... 1st APPELLANT KENTAKUMAR PATEL..... 2nd APPELLANT MAHESHKUMAR PATEL..... 3rd APPELLANT GLASS & GLAZINGS AFRICA LIMITED.....4TM APPELLANT VERSUS YASMINE HAJI..... . RESPONDENT (Appeal from the Ruling of the High Court of Tanzania, Commercial Division at Dar es Salaam) (Ismail J.) dated the 13th October, 2021 in Commercial Case No. 76 of 2020 JUDGMENT OF THE COURT 21st October & 8th November, 2024 MGEYEKWA. J.A.: The appellants, Simply Fresh Tanzania Limited, Kentakumar Patel, Maheshkumar Patel and Glass & Glazings Africa Limited are appealing against the decision of the High Court (Commercial Division) at Dar es Salaam, dated 13th October, 2021 in Commercial Case No. 76 of 2020 in which the High Court refused to grant extension of time within which to file a witness statement of the second appellant who, the court was informed, was the sole witness in the suit. Briefly, the background to the present appeal is as follows: The appellants jointly lodged Commercial Case No. 76 of 2020 against the respondent for a declaration that the latter had derogated from her contractual obligations as a guarantor of two loans amounts of USD 2, 017, 000.00 and 7ZS. 1,453, 000, 000.00 issued by Bank M Tanzania PLC, forcing the first, second and third appellants to step in and pay the outstanding loan. They also prayed for an order for the respondent to make good the defaulted loans in favour of the first, second and third appellants. The appellants also prayed for an order of general damages, payment of interest and costs of the suit. Before the hearing of the suit, on 9th August, 2021, the matter was scheduled for the Final Pre-trial Settlement and Scheduling Conference where the High Court ordered the parties to file witness statements within 14 days from the date of the said order. Following the order, the respondent lodged the witness statement within time, while the appellants missed out on the time set by the High Court. Subsequently, the appellants applied for 2 extension of time within which to file the witness statement of the second appellant out of time. Nonetheless, upon hearing the application, the learned trial Judge did not find any of the grounds

fronted by the appellant being sufficient cause to account for the delay. As a result, the application was dismissed with costs. In the aftermath, the Court dismissed the suit for the appellant's failure to file witness statement in support thereof. Dissatisfied, the appellants preferred the instant appeal to the Court seeking to assail the decision of the High Court initially based on three grounds, but as it will become obvious in due course, this appeal is predicated on the following single ground of appeal, namely: "The trial court erred in law in dismissing the appellants' Application for extension of time to file Witness Statements in Misc. Commercial Application No. 119 of 2021 despite valid reasons assigned thereto and despite the application being made promptly and diligently." At the hearing of the appeal before us, the appellants enlisted the legal representation of Mr. Peter Kibatata, learned counsel, while the respondent was represented by Mr. Simon Barlow, learned counsel. As intimated above, before hearing the appeal, Mr. Kibatata abandoned the second and third grounds of appeal retaining the above sole ground of appeal. On taking the floor, on the sole ground of the appeal, the learned counsel sought to fault the learned Judge for refusing to grant extension of time to file the witness statement, while the appellants had adduced good cause for extension of time to do so. Elaborating, he asserted that the High Court did not accord any weight the appellants' grounds advanced for extension of time which was that, the second appellant travelled to Switzerland due to COVID 19 restrictions where, he was isolated hence unable to travel. To buttress his submission, he referred the Court to paragraph 5 (i) of the supporting affidavit. The learned counsel went on to submit that the High Court ought to have found merit in his submission because even the respondent was, like his client, in Switzerland. He finally submitted that the delay was also contributed to by the fact that he was attending criminal sessions cases in the High Court which kept him away from the conduct of the proceedings. In conclusion, the learned counsel for the appellants implored us to allow the appeal. Mr. Barlow, on the other hand, was completely unyielding holding a position that the appeal had no merit. He defended the High Court decision as sound and reasoned. Elaborating, he argued that the learned Judge determined the application based on the grounds placed before him and found that the appellants' grounds were untenable, relying on the case of *Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania*, Civil Application 2 of 2010 [2011] T7CA 4 (3 October 2011 TanzLII). Mr. Barlow further contended that the period of delay from 9th August, 2021 when the order was issued to 20th August, 2021 which was the last day for filing the witness statement was unaccounted for. On the contention that the second appellant traveled to Switzerland, the learned counsel for the respondent spiritedly argued that no sufficient evidence was adduced by the appellants to support their allegation. He argued that being in Switzerland is not an excuse since the respondent was also in Switzerland, yet she managed to file her witness statement. In that respect, Mr. Barlow urged the Court to dismiss the appeal for being devoid of merit. Having considered the submissions by the parties on the sole ground of appeal, we find that, the issue in controversy that calls for our consideration in this appeal, is whether the appellants advanced sufficient reasons in explaining their failure to file the witness statement within the time that was set by the High Court. The record of appeal is clear that the appellants preferred an appeal to this Court against the learned Judge's refusal to grant them extension of time to lodge a witness statement. Before the High Court, their grounds for the

delay as were reflected in paragraph 5 (i) of the supporting affidavit were thus: "5 (i) The second Plaintiff Mr. Kentakumar Pate! was self-isolating in line with Covid-19 protocols, subsequent to which he left Tanzania for Switzerland, and then London, United Kingdom on 28 August, 2021. In that regard, I have to make arrangements for his witness statement to be sent to him for signature where he is. I may, in due course, if he is not back in the country by the hearing date, that is 28 October, 2021, also I will have to make arrangements for him to testify via video-link. Mr. Patel is not only the 2nd Plaintiff, but also the Principal Officer of the 1st Plaintiff, and thus, his statement is crucial. I could not, further, file the statement of the 1st Plaintiff, Mr. Maheshkumar Patel alone because not only is his statement tied to that of Mr. Kentakumar, more so as both as Principal Officers of the 1st Plaintiff, but also the orders were for all statements to be filed simultaneously." Going by the above paragraph, Mr. Kibatata submitted that the High Court could have relied on it and granted extension of time for the appellants to lodge the witness statement. Although the above quoted paragraph of the affidavit was suggestive of the fact that the second appellant could not be traced to sign the witness statement, the said affidavit is silent as to the proof of the second respondent's travel to Switzerland and if he was self-isolated. In our view, and as rightly observed by the learned trial Judge, without any documentary proof, to that effect, like copies of travel documents or tickets, the learned counsel's submission remains a mere statement from the bar. Finally, we do not think the issue of Mr. Kibatata attending to criminal sessions is of any relevance. We think so because, even if he would not be attending to criminal sessions, still according to him the person who was to sign the witness statement was in Europe. So, the issue is irrelevant. Thus, we find no merit in the sole ground of appeal, and we dismiss it. In the upshot, we have found no reason to fault the decision of the learned Judge of the High Court in dismissing the application for extension of time for the appellants to lodge the witness statement of the second appellant. Accordingly, the appeal stands dismissed with costs. DATED at DAR ES SALAAM this 8th day of November, 2024. G. A. M. NDIKA JUSTICE OF APPEAL Z. N. GALEBA JUSTICE OF APPEAL A. Z. MGEYEKWA JUSTICE OF APPEAL The Judgment delivered this 8th day of November, 2024 in the presence of Ms. Rebecca Ezekiel, learned counsel for the Appellants and Mr. Simon Barlow Lyimo, learned counsel for the Respondent is hereby certified as a true copy of the original.

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