

TANZANIA / JUDGMENT

ZURI ORGANICS LIMITED AND ANOTHER V

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TANZLIIDECIDED
31 July 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MOSHI SUB REGISTRY AT
MOSHI MISC. CIVIL APPLICATION NO. 11985 OF 2024 (Originating from Civil Case No. 01 of 2023
of the High Court of Tanzania at Moshi) ZURI ORGANICS LIMITED 1ST
APPLICANT EMMANUEL GODLOVE MAFIE 2ND APPLICANT VERSUS ZANJI
SPICE LIMITED RESPONDENT

RULING

29/08/2024 & 09/09/2024 SIMFUKWE, J. The instant application was filed under section 14(1) and (2) of the Law of Limitation Act, Cap 141 (R.E 2019). The applicants prayed for the following orders: 1

- a) That, this court be pleased to grant an extension of time to file application for setting aside *ex parte* judgment pronounced on 31st July 2023.
- b) And any other relief that this court may seem just and fit to grant. The application was supported by an affidavit sworn by the second applicant Emmanuel Godlove Mafie, the director and purported minority shareholder of the first applicant. It was resisted by the counter-affidavit of Ms Patricia Eric, the learned counsel of the respondent. In his affidavit, the second applicant stated *inter alia* that the applicants had no knowledge completely of existence of the case. He said that he became aware on 22nd April 2024 when the matter had reached execution stage which was also determined *ex parte*. In her counter affidavit, the learned counsel for the respondent stated that the applicants were aware of Civil Case No. 01 of 2023. However, they refused to appear purposely. Ms Patricia stated further that the applicants were aware of the matter because they had been communicating with her all along. She attached to the counter affidavit copy of publication of summons in Mwananchi Newspaper, WhatsApp chats between the second applicant and the respondent's advocates in respect of the progress of the case, notice of judgment and the execution case. 2 During the hearing of the application, the applicants were represented by Ms. Wakuru Buzana learned counsel while the respondent had the service of Ms. Patricia Eric and Ms. Lilian Didas Mushi learned counsels. The application was heard orally. Ms Wakuru Buzana adopted the affidavit of the second applicant and submitted among other things that their client was

informed about the ex parte judgment on 22/4/2024 when he was called by the court broker. He was informed that the court broker was authorized to execute a decree that was pronounced on 31/7/2023. She acknowledged that Order VII rule 15 of the Civil Procedure Code, Cap 33 R.E 2019 gives a time limitation of sixty days to set aside the ex parte judgment. She was of the view that if their client was informed on time, he could have made an application to set aside the ex parte judgment before 29/9/2023. It was submitted further that on 18/5/2023 the respondent/plaintiff was closing her case, there was no order or notice that required their client to attend on the date of delivery of judgment. She said, it is a legal procedure that judgment must be pronounced in the presence of both parties. In our scenario, the applicant was supposed to be summoned or given notice as the matter was conducted ex parte pursuant to Order XX rule 1 of the CPC. Ms Wakuru stressed her point by making reference to the case of 3 Stephan Ngalambe vs Onesmo Ezekia Chaka and Another, Misc. Land Application No. 5 of 2022 (HC) at page 19 of the judgment. Ms Wakuru continued to complain that, in this case, when judgment was delivered, their client was not aware of it. The respondent and his advocate were present. In the cited case despite the fact that the applicant was not present when the main case was being heard, he was notified about the date of delivery of judgment. Thus, the same could have been done in our case, as the consequences of the delivered judgment could follow the applicant. In her endeavour to account for the days of delay after the applicants became aware of the ex parte judgment, Ms Wakuru contended that from 22/4/2024 to 20/5/2024 the second applicant approached their offices for legal assistance of how to move forward in respect of the judgment pronounced against them. By considering the fact that time had elapsed under Order VII rule 15 of the CPC, they sought to move this court seeking for extension of time to set aside the ex parte judgment. The learned counsel was of the opinion that their client had accounted for the delay. She supported her argument with the case of Wambura N. J Waryuba V. The Principal Secretary Ministry of Finance and Another, Civil Reference No. 2 of 2021, CAT, in which the applicant 4 accounted for the delay and his application for extension of time was granted. Ms Patricia started her reply by adopting her counter affidavit together with its attachments to form part of her submission. She proceeded to submit that for this court to grant this application for extension of time, the main issue should be whether the applicant has shown good cause. The following should be the factors to be considered:

1. Was the application brought promptly?
2. Is there valid explanation for the delay?
3. Was the applicant diligent on his part or was there lack of diligence on part of the applicant?
4. Has the applicant accounted for each day of delay? Ms Patricia disclosed that those factors were mentioned in the case of Attorney General v. Emmanuel Malangakisi, Civil Application No. 138 of 2019 [2023] TZCA 63 (24 February 2023). Starting with the first factor of the application being brought promptly; it was stated that in the counter affidavit at paragraph 3 it is indicated that the applicant was aware of the proceedings from the beginning to the end. It was averred that copy of notice of judgment was sent to him via WhatsApp, which

was delivered. It was sent on 2nd day of October 2023. Ms Patricia alluded that applicant cannot say that he knew about the execution on 22/4/2024 instead of 2nd October 2023 or 21st February 2024, while he was properly notified in accordance with the law. On that basis, it was submitted that the applicant has not accounted for the days of delay. 5 The learned counsel sought aspiration from the case of Sebena Technics Dar es Salaam LTD vs Alfred Kirchsten, Civil Application No. 91/81 of 2022 [2024] TZCA 9 (21 January 2024) (Tanzlii), in which at page 10, the Court said that: “With respect, I wish to state that the Court cannot work on blanket statements to make decision on matters that requires justification.” Ms Patricia closed her submission by urging this court to be guided by the Latin Maxim” *Vigilantibus non dormientibus jura subveniunt*” which translates that the law aids the vigilantes and not those who sleep over their rights. She prayed that this application be dismissed with costs for the applicants have been sleeping over their right as they have failed to account for each day of delay. In rejoinder, Ms Wakuru was quick to agree that there was substituted service through publication done by the respondent. However, she was of the view that the same cannot be used as a reason that the applicants were aware of the judgment delivered on 31/7/2023. She subscribed to the case of Stephan Ngakambe (supra) in which the applicant was found to have sufficient cause. It was reiterated that the proceedings of the main case do not show that the applicants had knowledge of the judgment delivered on 31/7/2023. Addressing the issue of WhatsApp messages as a way of notifying the applicant; the learned counsel observed that it was improper procedure as it is not good practise of the law. She said that the proper procedures are under Order V of the CPC. She was not sure how the WhatsApp messages were maintained and questioned their authenticity. 6 In conclusion, Ms Wakuru prayed this court to extend time to set aside the ex parte judgment and any other relief which deem just and fit to grant. Having considered the affidavits and oral submissions of both parties, the issue for determination is whether this court can exercise its discretion based on rules of reason and justice, and grant extension of time to the applicants as prayed. In the case of Ngao Godwin Losero v. Julius Mwarabu, Civil Application No. 10 of 2015, the Court of Appeal of Tanzania held that: “As a matter of general principle that whether to grant or refuse an application like the one at hand is entirely in the discretion of the Court. But the discretion is judicial and so it must be exercised according to the rules of reason and justice.” Emphasis supplied In another case of Attorney General v. Consolidated Holdings Corporation and Another, Civil Application No. 26 of 2014, the Court of Appeal of Tanzania stated inter alia that: “....in each case the court must be satisfied by the reason(s) of the delay, the length of the delay, the degree of the prejudice to the respondent if the application is granted and 7 the point of contention in the intended action.” Emphasis mine Back to the case at hand, the learned counsel for the respondent was settled that the applicants were aware of both, the main case and execution application. She attached to her counter affidavit copy of publication of summons in Mwananchi Newspaper, WhatsApp chats between her and the second applicant in respect of the progress of the case, notice of exparte judgment and the execution case. At the same time, the learned counsel for the applicants was certain that the applicants were not aware of Civil Case No. 01 of 2023 and Execution No. 91765. She was of the opinion that publication of summons was not an

assurance that the applicants were aware of the suit filed against them. Concerning the WhatsApp messages; Ms Wakuru asserted that it was improper procedure and not good practice of the law. She referred to the procedures of service prescribed under Order V of the CPC. However, despite acknowledging that there was substituted service, it seems that the learned counsel for the applicants was not aware that the same was among the proper prescribed procedures of service. Respectfully to the learned counsel for the applicants, Order V rule 16(1), (2) and (3) of the CPC provides that: 8 “16.-(1) Where the court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that, for any other reason, the summons cannot be served in the ordinary way, the court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain or in such other manner as the court thinks fit.

- (2) Service substituted by order of the court shall be as effectual as if it had been made on the defendant personally.
- (3) Where service is substituted by order of the court, the court shall fix such time for the appearance of the defendant as the case may require.” In our case, apart from the WhatsApp messages, there is no dispute that the applicants were served through substituted service. Substituted service is regarded by the law as effective just like service effected to the defendant personally. Therefore, the contention of the learned counsel for the applicants that her clients were not properly served are unfounded. 9 Concerning WhatsApp messages which were challenged by the learned counsel for the applicants; section 64A of the Evidence Act, Cap 6 R.E 2022 provides that: “64A.-(1) In any proceedings, electronic evidence shall be admissible.
- (2) The admissibility and weight of electronic evidence shall be determined in the manner prescribed under section 18 of the Electronic Transaction Act.
- (3) For the purpose of this section, “electronic evidence” means any data or information stored in electronic form or electronic media or retrieved from a computer system, which can be presented as evidence.” Emphasis added I am of considered opinion that WhatsApp messages fall within the definition provided under subsection (3) (supra). Section 18(1) of Electronic Transactions Act provides that: “18(1): - In any legal proceedings nothing in the rules of evidence shall apply so as to deny the admissibility of data message on ground that it is a data message.” 10 Whether the said messages were authentic or not, it is settled now that before relying on any electronic evidence, the court has to satisfy itself in respect of its evidential weight (authenticity). See section 18(2) (a) –
- (d) of Electronic Transaction Act Cap 442 R.E 2022 and the case of Geita Gold Mining Ltd vs Simon Kajuna (HC Labour Revision No. 111 of 2019) [2020] 1; (27 August 2020) (Mgeyekwa J, as she then was). Moreover, it is established principle of electronic evidence that integrity of electronic records system in which an electronic record is recorded or stored is presumed

authentic unless there is evidence to the contrary. See section 18(3) of Electronic Transactions Act, Cap 442 R.E 2022 as amended in Legal Sector Laws (Miscellaneous Amendments) Act, 2023, Act No. 11 of 2023. In the present matter, I have examined copies of attached WhatsApp printed messages, I am confident that the messages have probative value. The messages are self-explanatory that the second applicant was informed about the cases which were instituted against them. He replied almost all messages which were sent to him through WhatsApp. Thus, they cannot say that they were not aware of the cases filed against them, as the reason for the delay. The same is against the rules of reason and justice. 11 That said, I find this application devoid of any merit and dismiss it forthwith with costs. It is so ordered. Dated and delivered at Moshi this 09th day of September 2024. X S. H. SIMFUKWE JUDGE Signed by: S. H. SIMFUKWE 09/09/2024 12

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