

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

**(CORAM: JUMA, C.J., MUGASHA, J.A., And NDIKA, J.A.)**

**CIVIL APPLICATION NO. 438/08 OF 2017**

**TELLA BUPAMBA..... APPLICANT**

**VERSUS**

**ELISHA ABEL SHIJA.....RESPONDENT**

**(Application for leave to appeal against the decision of the  
High Court of Tanzania at Mwanza)**

**(De-Mello, J.)**

**Dated 16<sup>th</sup> day of January, 2014**

**in**

**HC. Civil Appeal No. 24 of 2005**

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**RULING OF THE COURT**

3<sup>rd</sup> & 8<sup>th</sup> October, 2018.

**MUGASHA, J.A.:**

The applicant is by way of second bite seeking leave to appeal against the decision of the High Court in Civil Appeal No. 24 of 2005 which originates from Application No. 76 of 2000 before the defunct Mwanza Regional Housing Tribunal. The said tribunal handled disputes between landlord and tenants before the coming into force of the current land dispute resolution mechanism.

A brief background as gathered from the documents accompanying the application is to the effect that, being aggrieved by the High Court

Civil Appeal No. 24 of 2005, on 10/9/2015, the applicant filed the notice to appeal in terms of Rule 83(1) of the Rules. Thereafter, initially, he unsuccessfully applied to the High Court for leave to appeal in terms of Rule 45(b) of the Rules, but the application was struck out. Subsequently, he unsuccessfully applied for extension of time to apply for leave to appeal. The application was dismissed and in addition, leave was refused. This is what made the applicant to bring the present application.

The application is brought under Rule 45(b) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and section 5(1) (c) of the Appellate Jurisdiction Act Cap. 141 R.E. 2002 (the AJA) on among others, the following grounds:-

- a) This Application for Leave to Appeal to the Court of Appeal on point of Law is a second bite after the High Court refused the first Application on 3<sup>rd</sup> March, 2017.

The application is supported by the affidavit of TELLA BUPAMBA, the applicant who among other things, has deposed that:- **One**, being aggrieved by the decision of the High Court in Civil Appeal No. 24 of

2005, lodged a notice of appeal on 21/1/2014. **Two**, Following the striking out of his initial application for leave, the application for extension of time was not successful and in addition leave was refused. **Three**, this application for leave to appeal to the Court of Appeal is a second bite after the first application was refused by the High Court of Tanzania on 3<sup>rd</sup> March, 2017.

The application was challenged by the respondent through the affidavit in reply of Mr. Constantine Mutalemwa the respondent's counsel. To buttress their arguments, parties filed written submissions in support and opposition of the application in accordance with Rule 106 (1) and (8) of the Rules.

The application was confronted with a notice of preliminary objection on three points challenging the competence of the application as follows:-

1. That the application is incompetent as both the Notice of Motion and supportive affidavit are not duly signed/endorsed by the Applicant as the drawer thereof as stipulated in the case of **Ashura Abdulkadri versus The Director Tilapia Hotel, CAT,**

Mza Civil Application No. 2 of 2005, Mwanza Registry (unreported).

2. That the application is incompetent as it is supported by a defective affidavit on account that its jurat does not show whether the applicant was either personally or introduced to the Commissioner for Oaths at the time of signing the relevant affidavit as stipulated in the case of **Amani Girls Home versus Issack C. Kamela** CAT, MZA Civil Application No. 18 of 2014, Mwanza Registry (unreported).
3. Alternatively, affidavit is defective as it was signed by the Resident Magistrate, as the Commissioner for Oaths, contrary to sections 3(1) (a) and 10(2) (a) of the Notaries Public and Commissioner for Oaths Act, [Cap 12 R.E. 2002] read together with section sections 3(1) and 3(2) (a) of the Advocates Act [Cap 341 R.E. 2002].

However, at the hearing Mr. Mutalemwa the learned counsel for the respondent prayed to withdraw the notice of preliminary objection following a brief dialogue with the Court on the propriety or otherwise of the application seeking leave to appeal to the Court. We thus marked the Preliminary Objection withdrawn.

Addressing us on the point raised by the Court, Mr. Mutalemwa the learned counsel for the respondent submitted that, the present application for leave is premature having been sought by the applicant without obtaining extension of time under Rule 10 of the Rules. He thus urged us to strike out the application on account that it is premature. He did not press for costs.

On the other hand, the applicant being a lay person unrepresented, apart from conceding to the shortfall, he asked the Court to avail him an opportunity to rectify the mistakes so that he can pursue the intended appeal.

Following the striking out of the application for leave, the applicant who was still desirous of challenging the High Court decision, filed Misc. Land Application No 235 of 2016 seeking extension of time to apply for leave to appeal to the Court. The application was pursued under sections 5(1) (c) and 11 (1) of the AJA.

Section 11 (1) of AJA grants the High Court among others, powers to extend the time for making an application for leave to appeal. Moreover, Rule 47 of the Rules reads as follows:

*"Whenever application may be made either to the Court or to the High Court, it shall in the first instance be made to the High Court or tribunal as the case may be, but in any criminal matter the Court may in its discretion, on application or of its own motion give leave to appeal or extend the time for the doing of any act, notwithstanding the fact that no application has been made to the High Court.*

Rule 10 on the other hand provides that:

*10. The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended.*

The time limit fixed by the Rules include the time limit within which to apply for leave to appeal as specified under Rule 45(a) of the Rules which provides:

*" where an appeal lies with the leave of the High Court, application for leave may be made informally, when the decision against which it is desired to appeal is given, or by chamber summons according to the practice of the High Court, within fourteen days of the decision;"*

In the light of stated position of the law, both the High Court and the Court have concurrent jurisdiction but by virtue the provisions of Rule 47 of the Rules, the applicant had to go to the High Court first. Since the application for extension of time was dismissed by the High Court, the remedy was to try a second bite in this Court under Rule 10 of the Rules. (See **TANZANIA REVENUE AUTHORITY VS TANGO TRANSPORT COMPANY LTD**, Civil Application No. 5 of 2006 (unreported)).

The remaining burning issue is the High Court's refusal to grant leave to appeal. Though the application for extension of time to apply for leave cited section 5 (1) (c) which regulates appeals to the Court requiring leave of the High Court or the Court, the requisite application

for leave was not before the High Court to enable it to deal with it in the first instance as required by Rule 47.

In **THOMAS DAVID KIRUMBYO AND ANOTHER VS TANZANIA TELECOMMUNICATIONS CO.LTD**, Civil Application No 1 of 2005 (unreported), the Court was faced with almost a similar scenario whereby following the dismissal of an application for extension of time to apply for leave, the applicants by way of second bite sought leave to the appeal to the Court. Apart from holding that, the dismissal of the application presupposes it was heard on its own merits, the Court extensively discussed on the concurrent jurisdiction of the High Court and the Court on matters of appeals requiring leave under section 11 (1) of the Appellate Jurisdiction Act. Thus, the Court among other things said:

*"...the position of the law is clear and unambiguous. The application for leave to appeal or extension of time in which to appeal shall be made to the High Court. Thereafter, and as provided under rule 43 (b), where application for leave has been made to the High Court and refused, the application shall be made to the Court within fourteen days of refusal..... From the Ruling of*



*the High Court in respect of which "second bite" is sought, the grounds for dismissal were such that it cannot be said affirmatively that it was refused.... **The application for leave to appeal was therefore not heard on merit. In that situation, it is doubtful in my view that the application can be said to have been refused within the meaning of rule 43 (b).** It follows that for an application which in effect was not heard at all on merit, it is inconceivable that the application to this Court after dismissal... can be described as second bite."* ( Rule 43 b under the old Rules is similar to Rule 45 (b) under the current Rules.)"  
[Emphasis supplied].

In the light of settled position of the law, since the application for leave was not before the High Court to be decided on the merits, the refusal order was wrongly determined and is of no consequence. In this regard, it cannot be safely vouched that the initial application for leave was determined by the High Court as required by Rules 45 (b) and 47 of the Rules to warrant the present application before the Court by way of second bite.

As already indicated, if the applicant successfully obtains extension of time to apply for leave under Rule 10 of the Rules in a second bite, he

may file an application for leave to appeal in the first instance before the High Court.

That said and done, we find the present application for leave by way of second bite not tenable. We are thus constrained to strike it out with no order as to costs. It is so ordered.

**DATED** at **MWANZA** this 5<sup>th</sup> day of October, 2018.

I. H. JUMA  
**CHIEF JUSTICE**

S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.



J. R. KAHYOZA  
**REGISTRAR**  
**COURT OF APPEAL**