**IN THE COURT OF APPEAL OF TANZANIA**
**AT IRINGA**

**(CORAM: JUMA, C.J., MZIRAY, J.A. And MKUYE,J.A.)**

**CIVIL APPLICATION NO 351/17 OF 2018**

**MUSTAFA ATHUMANI NYONI.....APPLICANT**

**VERSUS**

**ISSA ATHUMANI NYONI.....RESPONDENT**

**(Applicant for leave to appeal from the Judgment of the High Court of Tanzania at Songea)**

**(Hon. Kwariko, J)**

**dated the 11th day of Sept, 2014**

**in**

**Civil Appeal No 44 of 2013**

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# R U L I N G OF THE COURT

22nd & 26th August, 2019

**JUMA, C.J.:**

The applicant, MUSTAFA ATHUMANI NYONI brought this application for leave to appeal to the Court of Appeal after the High Court had refused his first application for leave. He brought his application under Rules 45 (b), 48 (1), (2), (4), 49(1), (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

According to the affidavit that supports this application, the dispute between the applicant, and the respondent ISSA ATHUMANI NYONI, trace

back to the District Land and Housing Tribunal for Songea where the applicant had earlier sued the respondent to claim 200 acres of land. When the Tribunal dismissed his claim, the applicant appealed to the High Court at Songea by way of Land Appeal No. 03 of 2012. On 11th September, 2014 Kwariko, J. (as she then was), dismissed that appeal, pointing out that when the applicant applied for the allocation of disputed land on behalf of his clan, he had by then not been appointed the administrator of the estate of his late father. He therefore lacked requisite legal standing to sue. On 25th September 2014, the applicant applied for leave of the High Court at Songea to appeal to this Court. On 9th March 2015, his first application for leave was refused by Fikirini, J., hence this second application for leave which the applicant filed on 23rd April, 2015.

The respondent affirmed an affidavit in reply on 13th November, 2018 to oppose the application for leave. He at the same time filed a notice of preliminary objection containing four grounds.

At the hearing of the application for leave, the applicant was represented by Mr. Dickson Ndunguru, learned counsel while the respondent was represented by Mr. Mwamgiga Samwel, learned counsel.

As is the established practice of the Court, the two learned counsel agreed to first deal with the four grounds in the notice preliminary objection.

With respect to the first ground of objection, which contends that the application for leave of this Court is time barred, the learned counsel for the respondent submitted that this application infringes Rule 45 (b) of the Rules which provides that every application for leave to this Court after the refusal by the High Court must be lodged within fourteen (14) days of refusal. He elaborated that since the High Court at Songea refused the applicant's application for leave on 9th March 2015, by filing his application for leave 23rd April, 2015 he had taken forty-five days after the refusal by the High Court. This violated Rule 45(b) of the Rules. To support his submission that the application for leave before us is time barred for being filed beyond the fourteen days, Mr. Mwamgiga Samwel referred us to the case of **ARUNABEN CHAGGAN MISTRY VS. NAUSHAD MOHAMED HUSSEIN & 3 OTHERS,** CIVIL APPLICATION NO. 40 OF 2015 (unreported). Apart from praying for the dismissal of his application the learned counsel for the respondent prayed for costs.

In reply, Mr. Dickson Ndunguru for the applicant initially submitted that this application is within the fourteen days prescribed by Rule 45 (b).

He argued that this application is well within the period if we go by a copy of the Ruling of the High Court (Fikirini, J.) which, according to the learned counsel, was inadvertently excluded from the record of this application. Further, he submitted that the date (9/3/2015) affirmed in the affidavit of the applicant as the date when the High Court (Fikirini, J.) refused to grant leave, was a typographical error which misrepresent the correct date of the decision of the High Court. When we reminded him that we can only consider this application in light of those documents that are part of the record of application, he came round to concede that the application before us was indeed filed out of time and is as a result incompetently before the Court. He urged us to strike out the application but urged us to let each party to bear its own costs.

On our part we are in agreement with the advocates for the respective parties that from 9th March 2015 when the High Court refused the application for leave, until 23rd April, 2015 when this application was filed to apply for leave, forty five days had passed and this was well beyond fourteen days. Rule 45 (b) of the Rules which prescribe the fourteen days within which to apply for leave in this Court after refusal by the High Court states:

*45 (b) where an appeal lies with the leave of the Court, application for leave shall be made in the manner prescribed in rules 49 and 50 and within fourteen days of the decision against which it is desired to appeal or,* ***where the application for leave to appeal has been made to the High Court and refused, within fourteen days of that refusal****;* [Emphasis is added].

The position of the Court regarding the time frame to apply for leave after refusal by the High Court is reflected in several decisions. In **BAZIL GERALD MOSHA & THREE OTHERS VS. ALLY SALIMU,** CIVIL APPLICATION NO. 3 OF 2012 (Unreported) the Court observed:

*On the law and the facts, High Court having refused the applicants' first application for leave to appeal to this Court on 17/02/2012 and this application having been filed on 29/8/2012, one hundred and twenty three days after the expiry of the fourteen days prescribed period of time, it was beyond doubt time barred under Rule 45(b) and thus incompetent.*

*It is well established that the underlying policy rationale for periods of limitation, statutory or elementary such as Rule 45(b) include that of diligence in the speedy determination of disputes*

*with a reasonable, rather than an unreasonable or inordinate length of time; of fairness to the opposing party who is not to be the subject of an indefinite threat of being dragged into Court undetermined dates by an applicant who does not pursue his or her remedies timely; interminably and at promoting certainly in the rights and title of preventing the potential loss of evidence, oral or document and of public interest in the timely resolution of disputes. (See, Halsbury's of England, IIIrd Ed, Vol. 24, p. 189, para 130;* ***Tolcher v Gondon*** *[2005] NSWCA 135). As correctly observed by the Supreme Court of Canada in M (K) V M (H) (1992) 3 S.C.R. 6, pp 29-30:*

*"The diligence rationale is that one expects an applicant to act diligently and not to "sleep over their rights".*

*Rule 45(b) governs the time limit for lodging an application for leave to appeal to this Court where an appeal lies with leave of the Court or where an application for leave to appeal has been made to the High Court and has been refused as is the situation at bar.*

*Furthermore, considering that an application under Rule 45(b) also encompasses one that is a second bite from a similar and earlier application that was refused by the High Court, the more the incentive, we think, for an applicant to lodge his or her application with the fourteen days limitation period specified therein.*

*On a close consideration of the matter, with respect, we cannot subscribe to Mr. Jonathan's contention that Rule 49(3) could be invoked to salvage the application and circumvent the limitation period spelt out in Rule 45(b).* ***One****, Rule 45(b) prescribes the limitation period fixed by law and it is set out in absolute, if not clear-cut terms.* ***Two****, on a plain reading of the sub-Ruie and applying a purposive interpretation, Rule 49(3) cannot be construed to override the prescribed time limits set out in Rule 45(b) as to do that would leave the fourteen days limitation period required for all application there-under to the whims of each and every applicant to prefer his or her application on an indeterminate and uncertain date, depending on the date of receipt from the High Court of a copy of its drawn order refusing leave to appeal. Furthermore, it would completely defeat the very purpose of the period of time prescribed there-under and the uniform application of the sub Rule to all such applications. We are of the respectful view that the time limit prescribed in Rule 45(b) was not intended to be open ended. To hold otherwise would displace the purpose for which it has been promulgated.*

***Third****, we are fortified in our reading of Rule 45(b) in the way we have elaborated, as an applicant who fails to meet the time prescribed there-under is not without a remedy. This, Mr. Jonathan readily agreed. The door is open for any belated*

*extension of time and on a showing of good cause.*

For the foregoing reasons, we see no utility to discuss the remaining grounds of objection. We sustain the first ground of objection and find this application to be incompetent and it is accordingly struck out with costs.

**DATED** at **IRINGA** this 23rd day of August, 2019.

I. H. JUMA
**CHIEF JUSTICE**

R. E. S. MZIRAY
**JUSTICE OF APPEAL**

R. K. MKUYE
**JUSTICE OF APPEAL**

This Ruling delivered on this 26th day of August, 2019 in the presence of Mwamgiga Samwel for Mr. Dickson Ndunguru, learned counsel for the Applicant and Mr. Mwamgiga Samwel, learned counsel for the respondent, is hereby certified as a true copy of the original.


E.F. FUSSI
**DEPUTY REGISTRAR**
**COURT OF APPEAL**