IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: JUMA, C.J., MKUYE, J.A., And WAMBALI, J.A.

CIVIL APPLICATION NO. 121/03 OF 2019

KESSY RAYMOND KIMWAGA .....APPLICANT

VERSUS

BI. MOSHI OMARY (as a survivor of one ABAS SAID).....RESPONDENT

(Application for leave to appeal from the decision of the Court of Resident Magistrate of Dodoma- with Extended Jurisdiction at Dodoma)

(M. J. CHABA SRM - EXT. JURISD.)

Dated the 30th day of December, 2016

in

PRM. DC. Civil Appeal No. 4 of 2012

RULING OF THE COURT

15th & 18th September, 2020

WAMBALI, J.A.:

The applicant, Kessy Raymond Kimwaga was the defendant in Civil Case No. 14 of 2008 which was instituted in the District Court of Dodoma at Dodoma by the respondent. The suit was at the end of the trial decided in favour of the respondent. Aggrieved, the applicant lodged DC Civil Appeal No. 7 of 2012 in the High Court of Tanzania at Dodoma, which in terms of

section 45(2) of the Magistrates Court Act, Cap 11 R.E 2002 (the MCA) was transferred to the Senior Resident Magistrate (M. J. Chaba) with extended jurisdiction. Consequently, the suit was registered, heard and determined at the Court of Resident Magistrate at Dodoma as PRM. DC. Civil Appeal No. 4 of 2012. Unfortunately, the applicant lost the appeal and subsequently he lodged a notice of appeal against that decision to this Court. Moreover, he lodged Miscellaneous Civil Application No. 53 of 2018 in the High Court at Dodoma seeking leave to appeal as the suit originated from the District Court.

When the said application was placed before Mlacha, J. for hearing, the learned judge required counsel for the parties, among others, to answer a question as to whether the High Court could handle an application for leave to appeal to this Court against the decision of the Resident Magistrate exercising extended jurisdiction. Counsel for the parties, namely Mr. Godfrey Wasonga and Rev. Kuwayawaya Stephen Kuwayawaya who appeared for the applicant and the respondent respectively submitted in support of their respective position regarding the propriety of the application before the High Court. In short, according to the record of the application, both expressed

the opinion that the application was properly before the High Court and therefore it was not wrong for a judge to determine it.

The learned judge of the High Court considered the submissions of learned counsel and after he made reference to the provisions of section 45(2) of the MCA he came to the conclusion that the application was wrongly placed before him for hearing as he had no jurisdiction. Consequently, he not only struck out the application with no order as to costs but he also directed as follows:-

> *"I direct the applicant to file it in the RM'S Court at Dodoma at the Register of RM with extended jurisdiction, if still interested..."*

It is from that decision of the High Court that the applicant has approached the Court in terms of Rule 45(b) of the Tanzania Court of Appeal Rules, 2009 (the Rules) applying for leave to appeal against the decision of the Court of Resident Magistrate with extended jurisdiction as a second bite, contending that his first application was refused by the High Court. The application is supported by the affidavit deposed by Kessy Raymond Kimwaga, the applicant. On the other side, the respondent did not lodge an

affidavit in reply as required by Rule 56(1) of the Rules but was duly represented by a learned counsel at the hearing of the application.

When the application was placed before us for hearing on 15th September, 2020, Mr. Godfrey Wasonga appeared for the applicant. Essentially, in his submission, he reiterated his position he took in the High Court and emphasized that the application was wrongly refused by striking it out as the judge had jurisdiction to grant the applicant leave to appeal. He argued further that the application was properly lodged at the High Court as the Court of Resident Magistrate has no jurisdiction to entertain the application as directed by the learned judge. When we asked him as to whether the High Court determined the application on merit to the extent of concluding that the striking out amounted to the refusal of the application in terms of Rule 45(b) of the Rules, he conceded that although the parties were heard concerning its merit, the substance was not dealt with in the said ruling. However, he maintained that the current application for leave to appeal is properly before the Court as a second bite and thus the Court should consider and determine it as per the applicant's prayer. In conclusion, he prayed that the application be granted with costs.

On the adversary, Rev. Kuwayawaya Stephen Kuwayawaya, who appeared for the respondent briefly submitted that the application is not tenable because the High Court did not determine it on merits as it ended by being struck out. He argued further that the applicant could have properly come before the Court for a second bite if the previous application was dismissed by the High Court, which is not the case. He thus urged us to dismiss the application with costs. On the other hand, the learned counsel maintained the position he took at the High Court and argued that the High Court had jurisdiction to determine the application and not the Court of Resident Magistrate as directed by the learned judge.

Having heard the counsel for the parties, we think the issue for determination is whether the application is merited.

From the record of the application and as conceded by counsel for the parties, the application for leave to appeal before the High Court was not refused as it was not considered on the merit. On the contrary, it was struck out after the learned judge held the view that it originated from the decision of the Senior Resident Magistrate exercising extended jurisdiction. In this

respect, we are in agreement with the observation of the learned judge that the High Court had no jurisdiction to entertain the application for leave as we have emphasized in several decisions of this Court including **Oscar Pendeza v. The Republic,** Criminal Appeal No.363 of 2015 (unreported). Thus, it cannot be validly concluded that the application for leave before the High Court was refused based on the substance of what was presented by the applicant. In the result, we hold a firm view that the current application cannot qualify to be determined under the provisions of Rule 45(b) of the Rules as argued by the counsel for the applicant and the respondent who submitted in favour of determining this application on merit. In similar circumstances, in the case of **the Managing Director Kenya Commercial Bank (T) Limited and Another v. Shadrak J. Ndege,** Civil Application No.7 of 2009 (unreported), the Court observed that where the application for leave is not refused in the High Court, the applicant cannot try a second bite under Rule 43 (b) of the 1979 Rules, which is the current Rule 45 (b) of the Rules.

On the other hand, we entertain no doubt that in terms of section 45(2) of the MCA, the High Court is empowered to transfer an appeal which

is instituted in its registry to be heard by a Resident Magistrate upon whom extended jurisdiction has been conferred by section 45(1) of the same Act. Besides, though the provisions of section 45(2) of the MCA envisages the transfer of an appeal whose decision is the subject of another appeal before this Court, it is our considered opinion that the said transfer also involves an application for extension of time and leave to appeal to this Court to be heard by the Resident Magistrate with extended jurisdiction sitting in the Court of Resident Magistrate. We are fortified in this position by the provisions of section 11(1) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 (the AJA) which provides as follows:-

> *"Subject to subsection (2), the High Court or,* ***where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, may extend the time for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, for making an application for leave to appeal*** *or for a certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired".*
>
> (Emphasis Added)

In the circumstances, we do not, with respect, agree with the submission of the learned advocates for the applicant and the respondent that a subordinate court presided over by a Resident Magistrate exercising extended jurisdiction is not empowered to hear an application for leave to appeal to this Court. We have no doubt that such subordinate court presided by a resident magistrate with extended jurisdiction also enjoys the extended jurisdiction as envisaged by the provisions of section 11 of the AJA reproduced above.

However, it is settled law that a Court of Resident Magistrate cannot exercise extended jurisdiction until a formal order of transfer by the appropriate authority of the High Court is made to the specific Resident Magistrate and the respective court so that the respective appeal or application which is validly lodged in the High Court is registered in the appropriate register of that court before its determination. It is in this regard that in **Erney Gasper Asenga v. The Republic**, Criminal Appeal No. 238 of 2007 (unreported) the Court held, among others that:-

"(1) It is now trite law that once a formal order of transfer has been made, the transferred appeal shall be registered in the court of resident magistrate, given a fresh number and be heard and determined in that court. An appeal from a decision of that court under those circumstances lies directly to this Court.

"(2) It is now settled law that in the absence of a formal order by the High Court transferring the appeal to resident magistrate court with extended jurisdiction the proceedings before such a magistrate and the decision therefrom are a nullity".

(See also **Hamis Mchachali v. The Republic**, Criminal Appeal No. 205 of 2006 and **The Republic v. Banyanyirubusu s/o Gasper and 4 Others**, Criminal Appeal No. 18 of 2006 –both unreported).

From the settled position stated above, the next issue for our consideration is whether the learned High Court judge properly struck out the application which was lodged in the High Court. To this question, we think the application was improperly struck out as it was validly lodged before the High Court. It follows that the direction of the learned judge for

the applicant to lodge it at the respective Court of Resident Magistrate was, with respect, misconceived. This is in view of the fact that the Court of Resident Magistrate could not implement that direction as that was not a transfer order as, firstly, the application had been struck out. Secondly, the Court of Resident Magistrate could not register the application and transfer to itself for hearing as there was no formal order from the High Court. We are settled that as the learned judge was seized with the said application, upon discovering that the application had to be heard by a resident magistrate with extended jurisdiction, he should have placed it before an appropriate authority for necessary order of transfer. In the event, the direction he made cannot be implemented in view of the settled position of the law we have alluded to above. We are of the opinion that a separate register in the Court of Resident Magistrate under extended jurisdiction is intended to register appeals and applications transferred by the High Court to that court to a specific Resident Magistrate with extended jurisdiction. It is not the Resident Magistrate in charge who can assign the relevant application whose appeal was transferred to that court by the High Court. Indeed, the transfer to that court cannot be without the name of the particular magistrate.

In the circumstances, we are settled that the present application which was not determined on merit by the High Court for lacking jurisdiction, cannot be considered and determined as a second bite in terms of Rule 45 (b) of the Rules as the previous application was not refused as envisaged in that Rule.

On the other hand, considering the peculiar circumstances which led to the striking out of the application at the High Court; and mindful of the fact that parties have been in the subordinate court since the year 2008, more than twelve years; we think for the purpose of expeditious and timely disposal of proceedings in the courts of law and in the interest of justice an intervention of this Court is necessary. In the result, in terms of sections 3A (1) and (2) and 3B (1) (a) and (c) of the AJA and Rule 4 (2) (a) and (b) of the Rules, we direct that Miscellaneous Civil Application No. 53 of 2018 which was struck out be restored in the High Court Register. We further direct that upon its restoration the judge in charge should cause it to be transferred to be heard by a resident magistrate with extended jurisdiction at the Court of Resident Magistrate at Dodoma as soon as practicable.

In the end, serve for the direction we have made, we hold that the application is not tenable before the Court. We accordingly strike it out with no order as to costs.

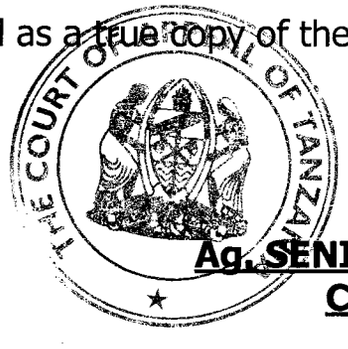
DATED at **DODOMA** this 17th day of September, 2020.

I. H. JUMA
CHIEF JUSTICE

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

The Ruling delivered this 18th day of September, 2020 in the presence of Mr. Godfrey Wasonga for the Appellant and Charles Simon holding brief for Rev. Kuwayawaya Stephen Kuwayawaya for the Respondents is hereby certified as a true copy of the original.



E. K. NKYA
Ag. SENIOR DEPUTY REGISTRAR
COURT OF APPEAL