IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION No. 382/01 OF 2019

JUMA M. NKONDO .....APPLICANT

VERSUS

TOL GASES LIMITED/TANZANIA OXYGEN LIMITED .....1ST RESPONDENT
ABDULRAHMAN MOHAMED KHATIBU.....2ND RESPONDENT

(Application for extension of time in which to apply for leave to appeal from the Ruling and Order High Court of Tanzania at Dar es Salaam)

(Kaduri, J.)

dated the 19th day of March, 2015
in
Civil Case No. 108 OF 2009
.....

RULING

2nd July & 12th August, 2021

KIHWELO, J.A.:

In this application the applicant, by way of Notice of Motion filed on 9th September, 2019 under Rules 10, 45A(1)(b) and (3), 48(1) and (2), 49(1) and 4(1)(2)(b) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) is seeking extension of time to apply by way of second bite for leave to appeal to the Court against the Ruling of the High Court dated 19th March, 2015 in Civil Case No. 108 of 2009. This follows refusal of the initial extension of time sought before the High Court under section 11(1) of the Appellate

Jurisdiction Act, Cap 141 R.E 2002 (now R.E 2019) (henceforth "AJA"). Apparently, the applicant is applying for leave to appeal to this Court.

At the hearing of the application before me, the applicant appeared in person fending for himself while Mr. Samson Mbamba, learned counsel, entered appearance for the second respondent and also held brief for Mr. Isaya Matambo, learned counsel for the first respondent.

The respondents filed an affidavit in reply and furthermore the first respondent raised a preliminary point of objection, the notice of which was filed on 5th February, 2020 to the effect that:

> *"1. That the application is incompetent for being supported by an affidavit not attested according to the law."*

At the hearing of the application and in line with the practice of this Court where there is a notice of preliminary objection raised in an appeal or application, the Court determines the preliminary objection first before allowing the appeal or application to be heard on merit. I allowed the preliminary objection to be heard first, before hearing of the application on merit.

In his brief submission in support of the preliminary objection, Mr. Mbamba contended that apart from the preliminary objection raised by the

first respondent whose notice was lodged on 5th February, 2020, the respondents have just noted that the application before the Court is omnibus as the applicant has combined two applications one relating to extension of time to file an application for leave to appeal under Rule 10 of the Rules and the other one relating to leave to appeal to this Court. He further argued that while the first application is entertained by a single Justice under Rule 60 of the Rules, the second application is determined by the Court. Reliance was placed in the case of **Rutagatina C.L. v. The Advocates Committee and Another,** Civil Application No. 98 of 2010 (unreported). Mr. Mbamba decided to abandon the earlier preliminary objection raised by the first respondent on account that the same has been cured by the overriding objective principle and finally he argued further that given the noted infraction the application was incompetent and therefore, is liable to be struck out.

In reply, the applicant did not concede to the preliminary objection and in the contrary he forcefully argued that the Court was properly moved by the relevant law as the application for extension of time is predicated on Rule 10 of the Rules while application for leave is predicated on section 5(1)(c) of the AJA. He further argued that looking at the cited provisions of the law there was nothing wrong with the present application which he did not find to be omnibus and therefore competent before the Court. He distinguished

the cited case of **Rutagatina** (supra) in that the Court was moved by both section 5(1)(c) of AJA and Rule 10 of the Rules and that the case was before three Justices without jurisdiction to grant extension while the instant case is before a single Justice with jurisdiction to grant extension of time.

He further contended that the application is properly before the Court because an application for extension of time under Rule 10 of the Rules may be granted upon good cause and the application for leave is granted upon good reasons but a good reason is also reason for granting an extension of time implying that in certain occasions a single Justice of the Court may grant extension of time by pre-existing good reasons and by so doing automatically grants both. In buttressing further his argument, he cited the case of **Kalunga and Company Advocates v. National Bank of Commerce Ltd**, Civil Application No. 124 of 2005 (unreported). He therefore prayed that the preliminary objection should be dismissed.

Mr. Mbamba rejoined by arguing that the point for determination is whether the two prayers that are combined in the notice of motion, that is application for extension of time to appeal under Rule 10 of the Rules and leave to appeal under Rule 45A (1) of the Rules are omnibus. He insistently contended that the two applications cannot be laid under one application on

the reasons stated in the cited case of **Rutagatina** (supra). The reason being one is heard by a single justice while the other one is entertained by three justices.

Mr. Mbamba further argued that the case of **Kalunga and Company Advocates** (supra) was decided prior to the amendments of the Rules when a single justice of appeal had powers to grant leave to appeal and therefore that case is not applicable in the circumstances of the instant matter whereas the **Rutagatina** (supra) is applicable because it was decided based upon the current rules.

I have dispassionately considered the submissions by the applicant and Mr. Mbamba and I have examined the notice of appeal as well as the reliefs sought by the applicant and I fully subscribe to the proposition taken by Mr. Mbamba that the application is not properly before the Court because of being omnibus. The reason is not far-fetched as the applicant is seeking for two distinct reliefs which is extension of time to file an application for leave to appeal to the Court and leave to appeal to the Court. The instant application is contrary to the general scheme of the Rules more particularly Rules 44-66 which govern applications made under the Rules. There is, in this regard, a long line of authority to the effect that each application filed under the Rules appearing in PARTS III, IIIA and IIIB have to be presented

separately and that there is no room for a party to file two or more applications in one. If we may just cite a few, in **Rutagatina** (supra) dealing with a similar situation this Court stated that;

> *"Under the relevant provisions of the law an application for extension of time and an application for leave to appeal are made differently. The former is made under Rule 10 while the latter is preferred under Section 5(1)(c) of the Appellate Jurisdiction Act read together with Rule 45. So, since the applications are provided for under different provisions it is clear that both cannot be "lumped" up together in one application, as is the case here.*
>
> *The time frames within which to prefer the applications are also different. For example, by its nature an application under Rule 10 has no time frame within which to be filed. Under Rule 45 a time frame of fourteen days is prescribed under both (a) and (b) thereto in the case of an application for leave to appeal in civil matters.*
>
> *In determining both applications the considerations to be taken into account are different. An application under Rule 10 may be granted* ***upon good cause shown****. An application for leave is usually granted if there is good reason, normally on a point of law or on a point of public importance, that calls for this Court's intervention."*

More glaring infractions is also conspicuously seen from the fact that in both applications their jurisdiction is different as it was observed in the case of **Rutagatina** (supra) that:

> *"An application under Rule 10 is at the exclusive domain of this Court. Under Section 5(1)(c) of the Appellate Jurisdiction Act and Rule 45 of the Rules both the High Court and this Court have jurisdiction to determine applications for leave to appeal.*
>
> *Furthermore, in terms of Rule 60(1) of the Rules as application for extension of time is heard by a single Justice whereas under sub-rule 2(a) thereto an application for leave is determined by the Court."*

To cull from the excerpts of the decision above, the situation at hand falls squarely under the same footing with the instant matter before this Court. With due respect, the submission by the applicant is misconceived and I am inclined to agree with the submission by Mr. Mbamba that the case of **Kalunga and Company Advocates** (supra) was decided in 2006 under the old Rules which allowed a single Justice to determine an application for leave to appeal while the case of **Rutagatina** (supra) was decided in 2011 after the amendments of the Rules in 2009.

To say the least, none of the provisions which were invoked by the applicant provides room for any party to file two applications in one, as

happened here. In view of the above, therefore, the applicant was, as a matter of law, required to file the two applications separately. Since the application for leave to appeal was dependent upon being granted an extension of time to apply for such leave, it was incumbent upon the applicant that he should have at first lodged a requisite application for such extension of time.

In view of the aforesaid, I am inclined to sustain the preliminary objection and strike out the application with costs.

DATED at **DAR ES SALAAM** this 12th day of August, 2021.

P. F. KIHWELO
JUSTICE OF APPEAL

The Ruling delivered this 12th day of August, 2021 in the presence of the applicant in person, Ms. Aziza Msangi hold brief Mr. Isaya Matambo, counsel for the 1st respondent, and Ms. Aziza Msangi, counsel for the 2nd respondent is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

G. H. Herbert
DEPUTY REGISTRAR
COURT OF APPEAL