IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: WAMBALI, J.A, SEHEL, J.A And KIHWELO, J.A.)

CIVIL APPLICATION NO. 367/01 OF 2020

RAJABU JOHN MWIMI.....APPLICANT

VERSUS

MANTRACT TANZANIA LTD .....RESPONDENT

(Application for leave to appeal against the decision of the High Court of Tanzania at Dar es Salaam)
(Dyansobera, J.)

dated the 10th day of October, 2017
in
(DC) Civil Appeal No. 70 of 2016

RULING OF THE COURT

14th & 31st March, 2022

SEHEL, J.A.:

By a notice of motion, the applicant seeks leave to appeal to the Court trying to impugn the decision of the High Court of Tanzania (Dyansobera, J.) dated 10th October, 2017 in DC. Civil Appeal No. 70 of 2016. The application is made under Rule 45 of the Tanzania Court of Appeal Rules, 2009 (as amended) (henceforth "the Rules") and it is supported by an affidavit of the applicant himself.

The facts giving rise to the present application as can be gathered from the affidavit in support of the application are such that; on 27th May, 2012 a car, carelessly driven by the respondent's driver, caused an accident along Morogoro road at Shekilango area in Kinondoni District whereby the applicant sustained bodily injury. When taken to court, the driver pleaded guilty. He was convicted on his own plea of guilty and sentenced to pay a fine or in default of payment of fine, to serve a prison term of three months. He managed to pay the fine.

On the other hand, the applicant was compensated by the respondent's insurance company for the injuries sustained. He was paid One Million and Five Hundred Thousand Tanzanian Shillings (TZS. 1,500,000.00). The applicant was not satisfied with the compensation. He thus filed a suit against the respondent in the District Court of Kinondoni at Kinondoni ("the trial court") claiming payment of TZS. 95,000,000.00 as general and specific damages. At the end of the trial, the trial court entered judgment in favour of the applicant. It thus ordered the respondent's insurance company to pay the applicant TZS. 40,000,000.00 being both specific and general damages.

The respondent was aggrieved by the finding of the trial court. It filed an appeal to the High Court. In its decision delivered on 10th October, 2017 the High Court (Dyansobera, J.) allowed the appeal by quashing and setting aside the judgment and decree of the trial court.

That decision did not please the applicant, he thus lodged a notice of appeal on 18th October, 2017. Since the decision on the dispute arose from the District Court, the applicant was required to obtain leave to appeal to the Court. As he was late, he sought and was granted an extension of time to lodge the application for leave. On 3rd September, 2019 the High Court (Ngwala, J., as she then was) granted him fourteen days (14) within which to lodge the application for leave from the date of the ruling. Following that order, the applicant filed an application for leave before the High Court. At the hearing of the application, the counsel for the respondent raised a preliminary objection that the application was time barred. The High Court (De Mello, J., as she then was) upheld the objection having noted that the applicant was late by two days as he filed the application on 18th September, 2019 whereas he was supposed to file it on 16th September, 2019. In that respect, the application was dismissed with costs. Upon such dismissal order, the applicant has filed the present application under the pretext of a second bite.

When the application was called on for hearing on 14th March, 2022, the applicant appeared in person, unrepresented whereas Mr. Karori Tarimo, learned advocate, appeared for the respondent.

The applicant had nothing much to submit about his application. He simply adopted the affidavit and urged the Court to grant the requested leave to appeal on the grounds stated in the notice of motion.

Mr. Tarimo did not file any affidavit in reply. He explained that the respondent did not file affidavit in reply because he is not opposing the application on the facts. Rather, he was opposing it on a point of law. Submitting on the point of law, Mr. Tarimo argued that the Court has no jurisdiction to determine it because the present application which was filed under the pretext of a second bite, cannot be termed as a second bite. He explained that the High Court did not determine the application for leave on merit, instead, it was dismissed on a point of preliminary objection that was raised by the counsel for the respondent. He submitted that the application was found to be time barred hence it was dismissed with costs. It was his further submission that since the application for leave was not determined by the High Court, the applicant cannot come to the Court under the umbrella of a second bite. He contended that if he was not

satisfied with the dismissal order on time barred, he ought to have filed an appeal against that decision or sought an extension of time and filed a fresh application for leave.

In the alternative, Mr. Tarimo argued that the application for leave is time barred because it was filed beyond the fourteen (14) days period prescribed under Rule 45 (b) of the Rules. He added that if there was any justification for the delay, the applicant ought to have sought a certificate of delay in terms of Rule 45 (b) of the Rules.

With that submission, Mr. Tarimo prayed for the application to be struck out with half costs.

The respondent being a layperson simply urged us to consider his application and grant it because he said, he belatedly filed it as he was not supplied in time with the copy of the ruling and spent considerable time to seek for a translator to translate to him the decision which was written in English language. Re-joining on costs, he prayed that each party should bear its own costs.

We have dispassionately considered both the record of the application and the submissions made by the parties. As stated earlier, the present application has its genesis from Civil Case No. 15 of 2014 which

was before the District Court of Kinondoni at Kinondoni. It is trite law that an order arising from the District Court falls under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019 ("the AJA") which provides: -

> *"(1) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal –*
>
> *(a) ...*
>
> *(b) ...*
>
> *(c) with leave of the High Court or the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court.*

The above provision of the law is crystal clear that every order, decree, judgment, decision or finding of the High Court which does not fall under section 5 (1) (a) or (b) of the AJA is appealable with leave of the High Court or the Court. This means that, both the High Court and the Court have concurrent jurisdiction in an application for leave (see: - **Awiniel Mtui & 3 Others v. Stanley Ephata Kimambo**, Civil Application No. 19 of 2014 (unreported)). However, such an application, in terms of Rule 47 of the Rules, shall in the first instance be made to the High Court or

Tribunal, as the case may be. For ease of reference, we reproduce Rule 47 as hereunder: -

> *"Whenever application is 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." (Emphasis is added)*

Further, Rule 45 (b) of the Rules which prescribes time within which to lodge an application for leave provides: -

> *"Where an appeal lies with the leave of the Court, application for leave shall be made ...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)*

In the case of **Tella Bupamba v. Abel Shija,** Civil Application No. 238/08 of 2017 (unreported) the Court was faced with an application for leave to appeal, as a second bite. In that application, the applicant had, initially, filed in the High Court an application for leave which was later on

struck out. He thus filed in the same court an application for extension of time and leave to appeal. Both applications were dismissed. As he was still desirous to appeal to the Court, he filed a second application to the Court seeking leave to appeal. Having noted that the application for extension of time to lodge an application for leave was dismissed, the Court had this to say on the application for leave to appeal that was entertained and dismissed by the High Court:

> *".... 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."*** (Emphasis is added).

Going by the record of the application, after the applicant was granted an extension of time, he filed an application for leave to appeal to the Court in the court of the first instance, that is, the High Court as per Rule 47 of the Rules. Nevertheless, the said application was not determined on merit. We have stated herein that, the High Court Judge

observed that the applicant was late by two days in filing the application for leave and went on to dismiss it with costs. Since the application for leave was dismissed at the preliminary stage it is obvious that it was not determined on merit. As such it cannot be said that it was refused by the High Court to warrant the applicant to come to the Court on the second bite under Rule 45 (b) of the Rules.

Rule 45 (b) of the Rules can only come into play after the applicant had first made an application for leave to appeal in the High Court and it refused. It is upon such refusal the applicant may approach the Court within fourteen days from the date of refusal to seek for leave to appeal as a second bite. Since the first application which was in the High Court was not determined on merit, we entirely concur with Mr. Tarimo that the Court has no jurisdiction to entertain the applicant's application under the umbrella of a second bite. For that reason, we find that the application before us is incompetent.

Having found merit in the first point of law, we do not see the need to go into the alternative argument relating to time limitation, since this point is enough to dispose of the application.

In the light of the foregoing, we find merit in the first point of law. We accordingly uphold it and proceed to strike out the incompetent application for leave. Given the circumstance and the manner the preliminary point of law was raised in that there was no prior notice nor a list of authorities filed to the Court, we order that each party shall bear its own costs.

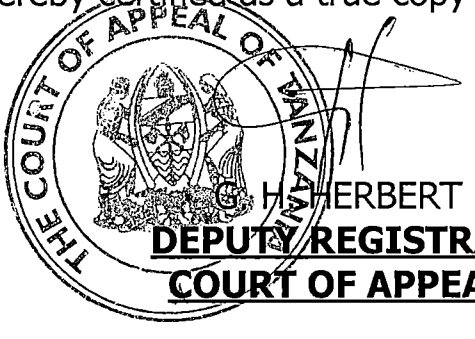
DATED at **DAR ES SALAAM** this 30th day of March, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The ruling delivered this 31st day of March, 2022 in the presence of the Applicant in person and Ms. Victoria Gregory, learned counsel for the Respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL