

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO. 572/01 OF 2019

BENEDICT M. KEZIRAHABI..... APPLICANT

VERSUS

LOVENESS MARY D. KEZIRAHABI.....RESPONDENT

**(Application for extension of time to file an application for leave to appeal against the
decision of the High Court of Tanzania, District Registry at Dar es Salaam)**

(Mutungi, J.)

dated the 28th day of September, 2017

in

Misc. Civil Application No. 503 of 2016

RULING

5th & 13th October, 2022

KEREFU, J.A.:

The applicant, Benedict M. Kezirahabi, has lodged this application seeking orders for extension of time within which to lodge an application for leave against the decision of the High Court at Dar es Salaam, (Mutungi, J.) dated 28th September, 2017 in Misc. Civil Application No. 503 of 2016. The application is brought by way of notice of motion lodged on 31st December, 2019 under Rules 10 and 45 (b) of the Tanzania Court of Appeal Rules (the Rules). The Application is supported by an affidavit of the applicant. On the other hand, the respondent has filed an affidavit in reply opposing the application.

For a better appreciation of the issues raised herein, it is important to explore the background of the matter and the factual setting giving rise to the current application. The application traces its origin from the decision of the High Court (Arufani, J.) dated 18th February, 2016 in respect of Probate and Administration Cause No. 4 of 2010. Being aggrieved by that decision, the applicant lodged a notice of appeal on 18th March, 2016 to challenge the said decision. However, and having detected that he was out of time to obtain leave to appeal to this Court, he successfully lodged a Misc. Civil Application No. 219 of 2016 in the High Court (Feleshi, J.) seeking extension of time to file the said application. Subsequently, the applicant filed Misc. Civil Application No. 503 of 2016 seeking leave to appeal. Having heard the parties, the High Court (Mutungi, J.) dismissed the said application with costs on 28th September, 2017.

Dissatisfied, and believing that the High Court's decision (Mutungi, J.) that refused him leave to appeal is appealable, the applicant lodged a notice of appeal in this Court on 9th October, 2017 to challenge the said decision. Thereafter, and having noted that he was again, out of time to file an application for leave to appeal, he filed Misc. Civil Application No. 105 of 2017 seeking extension of time. On 25th October, 2018, the High

Court (Mgeta, J.) granted that application by giving the applicant fourteen (14) days to file an application for leave to appeal. In compliance with the court's order, the applicant filed Misc. Application No. 750 of 2018 for leave to appeal to this Court. Upon hearing the parties and having noted that an application of similar nature was previously filed and determined by the same court, the High Court (De-Mello,J.) on 12th November, 2019 dismissed the said application with costs on account of the High Court being *functus officio*.

Undaunted, the applicant lodged the current application as indicated above. However, the application was confronted with a notice of preliminary objection lodged by the respondent on 25th March, 2022 challenging its competence that:

- (a) The application is bad in law as the applicant has not properly invoked the jurisdiction of the Court; and*
- (b) The application for extension of time to file an application for leave to appeal in this Court is made for purposes of challenging the High Court's decision which is non appealable.*

When the application was placed before me for hearing, Mr. Alex Mashamba Balomi and Mr. Danstan Nyakamo, both learned counsel entered appearance for the applicant and the respondent, respectively.

As the practice of the Court demands, the preliminary objection has to be disposed first before determination of the application on merit. Having that in mind, I invited the counsel for the parties to address me on the preliminary objection raised by the respondent.

Mr. Nyakamo argued in general that, by virtue of the provisions of section 11 (1) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] (the AJA) read together with Rules 45 (b), 45A (1) (b) and 47 of the Rules, both the High Court and this Court are vested with concurrent jurisdiction of granting leave to the applicant to appeal to this Court as well as, in cases of delay, to extend time to file such application. He argued that since both courts have concurrent jurisdiction on this matter, upon refusal by the High Court to grant leave to the applicant, the remedy available to him was to file a similar application in this Court, as a second bite, within fourteen days from the date of that refusal but not an appeal against such decision. To buttress his proposition, Mr. Nyakamo cited the case of **Tanzania China Friendship Textile Co. Ltd v. Charles Kabweza & Others**, Civil

Application No. 62 of 2015 and **Patrick George (As an Attorney of Ramadhani Omary) v. Zainabu Omary**, Civil Application No. 499/08 of 2020 (both unreported). He then insisted that, since the applicant is seeking extension of time to appeal against the decision of the High Court which is non-appealable, the application is misconceived and non-maintainable. He thus, urged me to strike out the application with costs for being incompetent.

In response, Mr. Balomi strongly disputed the preliminary objection and the submissions made by his learned friend by narrating the historical background to this application as indicated above and argued that, the applicant has taken various steps before the High Court to challenge the impugned decision including lodging of the notice of appeal timely in this Court. He contended that, since this application was lodged after several attempts made before the High Court, the Court, under section 11 (1) of the AJA and Rule 45A (1) (b) read together with Rule 47 of the Rules, has jurisdiction to entertain the application. It was his further view that, the issue as whether the decision of the High Court sought to be challenged is appealable or not, cannot be determined at this stage of extension of time. That issue, according to him, will be considered and determined during the

hearing of an appeal. As such, Mr. Balomi prayed for the preliminary objection to be overruled with costs.

In a brief rejoinder, Mr. Nyakamo reiterated his previous submission and urged me to sustain the preliminary objection with costs.

Having examined the record of the application and the oral submissions advanced by the counsel for the parties for and against the preliminary objection, the main issue for my determination is whether the objection raised is meritorious.

From the factual setting in this application, it is clear that the applicant is seeking extension of time to file an application for leave to appeal against the decision of the High Court (Mutungi, J.) which refused him a leave to appeal to this Court. As correctly submitted by Mr. Nyakamo, matters related with leave to appeal to this Court are governed by Section 11 (1) of the AJA read together with Rules 45 (b), 45A (1) (b) and 47 of the Rules. For avoidance of doubt Rule 45 (b) of the Rules provides that:

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 an application for leave to appeal has been made to the High Court and refuse, within fourteen days of that refusal;...”

47. *“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...”*

In the same spirit and if the applicant is time barred to apply for leave and his application for extension of time to that effect has been refused by the High Court, he is as well required to file a similar application in this Court as a second bite. To facilitate the appreciation of the position put forward herein, I find it apposite to also reproduce the contents of Rule 45A (1) (b) of the Rules, which provides that: -

“45A (1) Where an application for extension of time to: -

(a) NA;

(b) apply for leave to appeal; or

(c) NA

is refused by the High Court, the applicant may within fourteen days of such decision apply to the Court for extension of time.”

Pursuant to the above provisions, it is clear that, both the High Court and this Court enjoy concurrent jurisdiction to grant leave as well as to extend time within which an application for leave can be made. It is also

clear that, where jurisdiction to entertain an application is conferred on both courts, the application must be made first to the High Court. It is upon determination of that application at the High Court, the applicant, if denied leave or an extension of time to apply for leave, can file a fresh application in this Court as a second bite. It is settled that, in a second bite application, the applicant is required to file a fresh application which has nothing to do with the one that was initially before the High Court and refused. In other words, in the second bite application, an applicant is not appealing against the High Court decision, because such decision is not appealable. In the **Bishop Roman Catholic of Tanga v. Casmir Richard Shemkai**, Civil Application No. 507/12 of 2017 (unreported), the Court elaborated the position by observing that:

*"Our careful reading of Rule 47 of the Rules, we think that a party who is refused the application in the High Court, in making the same application to the Court **in the second bite, is not bound to front the same grounds advanced at the High Court. He can as well raise new ones in the fresh application and the Court is enjoined to consider them.**" [Emphasis added].*

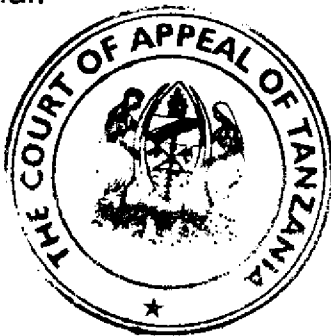
Now, since in the instant application, the applicant is seeking extension of time to file an application for leave to appeal against the decision of the High Court (Mutungi, J.) which refused him a leave to appeal to this Court, I agree with Mr. Nyakamo that this application is misconceived and un-maintainable because the intended appeal is on a decision of the High Court which is non appealable. In the circumstances, I, as well, find the submission made by Mr. Balomi to be misconceived.

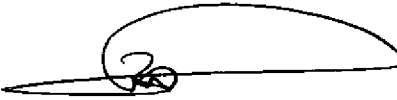
Consequently, and for the above reasons, I sustain the points of preliminary Objection raised by the respondent and hereby struck out the application with costs for being misconceived and thus incompetent.

DATED at DAR ES SALAAM this 10th day of October, 2022.

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 13th day of October, 2022 in the presence of Mr. Alex Balomi, learned counsel for the Appellant and Ms. Yusta Kibuga, learned counsel for the Respondent is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL