IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 295/01 OF 2021

(CORAM: MKUYE, J.A., KIHWELO, J.A. And MAKUNGU, J.A.)

STELLA MAEDA.....1st APPLICANT

MUSTAFA OMARI .....2nd APPLICANT

VERSUS

MULTI TRAVEL TOURS LIMITED.....RESPONDENT

(Application from the decision of the High Court of Tanzania, Dar es Salaam District Registry at Dar es Salaam)

(Mgonya, J.)

dated the 15th day of June 2021
in
Misc. Civil Application No. 608 OF 2017

.....

RULING OF THE COURT

26th October & 4th November, 2022

KIHWELO, J.A.:

The applicants are seeking to invoke the jurisdiction of this Court under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 (the AJA) and rules 45 (b), 48(1), 49(1) and (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules) intending to challenge the decision of the High Court of Tanzania, Dar es Salaam District Registry at Dar es Salaam (Mgonya, J.) in Miscellaneous Civil Application No. 608 of 2017 dated 15th June, 2021 which granted the application and set aside the dismissal order

in Civil Case No. 12 of 2004 made by Dyansobera, J on 4th September, 2017. The applicants are therefore, seeking leave to appeal before this Court.

We find imperative to briefly give a historical account of this matter which has a protracted background. The applicants and the respondent had a historical dispute dating way back in 2004 when the respondent instituted a civil case against the applicants and three others not parties to the instant application in Civil Case No. 12 of 2004 at Dar es Salaam District Registry in which the respondent claimed that the applicants knowingly and wrongly conspired to obtain 31 airline tickets issued by the respondent as ticketing agent for various airlines which were undercharged to the tune of US$ 54,188.00. It was further alleged that, the applicants knowingly and wrongly conspired to obtain other 19 airline tickets to the tune of US$ 25,000.00. The matter was first mentioned before Ihema, J. on 27th February, 2004 and later the same was fixed for First Pre-Trial Settlement and Scheduling Conference which was conducted on 23rd September, 2004.

As it were, on 28th February, 2006 the High Court (Mihayo, J.) marked the mediation failed and from that time onwards the matter was fixed for hearing on different consecutive dates but could not take off as

planned on account that the principal witness was not around. Unfortunately, the matter was fixed for hearing on various dates but yet it did not take off and even after taking off it was not concluded for more than fifteen years. Consequently, on 4th September, 2017, Dyansobera, J. in terms of section 95 of the Civil Procedure Code, Cap 33 R.E. 2002 (CPC) dismissed the suit for want of prosecution in the interest of justice and in order to prevent further abuse of the court process. Unhappy, the respondent lodged an application for setting aside the dismissal order which was granted by Mngonya, J. Disgruntled, the applicants have lodged the instant application for leave.

The application is supported by an affidavit of Stella Maeda, the first applicant, containing 12 paragraphs. The applicants also lodged written submissions in support of the application in terms of rule 106 (1) of the Rules which Prof Abdallah J. Saffari, learned counsel for the applicants prayed to adopt.

The respondent on his part, filed an affidavit in reply affirmed by Roman Selasini Lamwai, the respondent's counsel herein. Along with the affidavit in reply, he lodged written submissions in reply in terms of rule 106 (7) of the Rules which Mr. Lamwai, prayed to adopt.

Before we could go into the hearing of the application in earnest, we prompted the learned advocates for either side to address us on whether the application before this Court was competent. Upon a brief dialogue between the Bench and the Bar, it was unanimously agreed that counsel should address the Court in both the issue prompted by the Court and the application.

Responding to the inquiry by the Court, Prof Safari contended that the application has been lodged before the Court instead of the High Court because both, the High Court and the Court have concurrent jurisdiction when it comes to granting leave. The learned counsel admittedly, argued that rule 47 of the Rules requires that an application for leave be preferred first to the High Court and only on a second bite the application should be made to the Court. However, he argued further that, the provision of section 5 of the AJA which is the parent law on appeals to this Court is permissive in that one may apply for leave before the High Court or before the Court and according to him, he has preferred to apply directly to the Court because there is more trust in the Court than the High Court.

Arguing in supporting of the application the applicants' complaints were premised on what Prof Safari called to be failure by Hon. Mgonya, J. to assign reasons in her scanty three pages ruling as opposed to a

detailed thirteen pages ruling by Hon. Dyansobera, J. which adequately demonstrated how the respondent was intentionally employing delaying tactics towards progression of the suit at the detriment of the applicants. He went on to submit that Justice Mgonya abrogated the provisions of rule 4 of Order XX of the CPC in relation to the contents of the judgment. Reliance was placed in the case of **Willy John .v. Republic** [1956] EA 509 and **Republic v. Heziron Magori** [1970] HCD 148 in which the court stressed the need to set out the process upon which the conclusion in the reasoning has been reached.

In reply, Mr. Lamwai was brief and focused. He began by addressing two legal issues. **One**, he submitted that, the application has been brought under section 5 (1) (c) of the AJA and invited the Court in exercising its jurisdiction to refer to section 5 (2) (d) of the AJA which bars appeal or revision in any preliminary or interlocutory order or decision of the High Court which do not finally and conclusively determine the suit. He went further to submit that, the impugned order set aside the dismissal order and directed the matter to proceed for hearing on merit, as such, it cannot be the basis of an appeal in terms of section 5 (2) (d) of the AJA as stated above. He therefore, beseeched us to dismiss the application.

Two, he submitted that, truly, rule 47 of the Rules, is very categorical and clear that whenever an application has to be made either to the High Court or the Court, then the lower court has to be visited first, and urged us in the alternative to strike out the application with costs.

In further reply to the application, Mr. Lamwai contended that Mgonya, J. was right to set aside the dismissal order because she found out that sickness is never ones choice and therefore the respondent had good cause to warrant the granting of the application and setting aside the dismissal order of Dyansobera, J and for that reason, he reiterated his prayer for dismissing the application with costs.

After a careful consideration of the entire record and the rival submissions by the parties, there remains only one contentious aspect that needs to be resolved and that is whether or not the application is competent before the Court.

Our starting point will involve a reflection of the law that provides for application for leave. For the sake of clarity, we wish to excerpt the provisions of section 5 (1) (c) of the AJA and rule 47 of the Rules. Section 5 (1) (c) provides, thus:

> *"5 (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-*

(c) ***with the leave of the High Court or of the Court of Appeal****, against every other decree, order, judgment, decision or finding of the High Court."* [Emphasis supplied]

Rules 47 of the Rules provides that:

> ***"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 on 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 supplied].

Clearly, from the excerpts cited above, the provision of section 5 (1) (c) of the AJA is permissive in the sense that an application for leave may be lodged before the High Court or the Court of Appeal. However, rule 47 of the Rules that regulates appeals to the Court and other matters incidental to the making, hearing or determination of appeals, requires that, whenever it is desirable to make an application for leave either before the High Court or the Court of Appeal, it shall in the first instance be made to the High Court.

We have emboldened the excerpt above to emphasize that an application of this nature under section 5 (1) (c) of the AJA which cannot be read in isolation, but rather is to be read together with rule 47 of the Rules, has to be made before the High Court as a first instance and only when leave of the High Court is not granted, the applicant will come before the Court by way of a second bite.

Back to the application under our consideration, the applicants have come to this Court seeking to challenge the decision of Hon. Mgonya, J. who allowed the application and set aside the dismissal order of Hon. Dyansobera, J. Prof. Safari admittedly argued that, section 5 (1) (c) of the AJA vests concurrent jurisdiction upon the High Court and the Court and that the applicants opted to come to this Court because they have more trust in this Court than the High Court. In our respectful opinion, we think, this argument is erroneous and misleading.

We entertain no doubt that the law is very categorical and clear in that an application for leave like the one in the instant matter has to be lodged at the High Court in the first instance and only when the High Court denies, the applicant has to come to this Court as a second bite and the reason is not far-fetched, the Court of Appeal as much as possible should be left for more serious and deserving matters and only in

exceptional circumstances like an application for leave by way of a second bite the Court should be approached. The applicants therefore, assuming for the sake of arguments that the application was appealable, they came before this Court prematurely, as they were required first to visit the High Court and only after refusal of leave by the High Court, then they would come to this Court as a "second bite". The Court pronounced itself in this issue in the case of **Justin Joel K. Moshi v. CMC Land Rover (T) Ltd**, Civil Application No. 93 of 2009 (unreported) in which faced with analogous situation but under the old rules we held that:

> *"In view of what is stated in the above rules, this application was intended to come to this Court for "a second bite" as it were, only after it was refused by the High Court. We have demonstrated above that the order of the High Court which dismissed the application was done in error and the same has been quashed and set aside. That being the position, then, this application is therefore erroneously before the Court. It is not yet ripe for a "second bite" in this Court. The application for a second bite before the Court is premature and therefore incompetent. It is therefore struck out."*

That said, we think, it will only be pretentiously academic to deal with the rest of the arguments. In the circumstances, we find the

application is misconceived and incompetent and accordingly, we strike it out with costs.

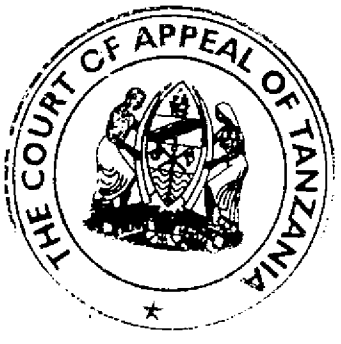
DATED at **DAR ES SALAAM** this 3rd day of November, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Ruling delivered this 4th day of November, 2022 in the presence of Mr. Jumbe Saffari, learned counsel for the Applicants and Ms. Mary Lamwai, learned counsel for the Respondent, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL