IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUGASHA, J.A., KITUSI, J.A. And FIKIRINI, J,A.)

CIVIL APPLICATION NO. 385/02 OF 2023

EXIM BANK TANZANIA LIMITED.....APPLICANT

VERSUS

RIZIWAN MOHAMEDALI REMTULLA.....RESPONDENT

(Application for leave to appeal to the Court of Appeal of Tanzania arising from the Judgment and Decree of the High Court of Tanzania at Arusha

(Komba, J.)

dated the 3rd day of October, 2020

in

Civil Appeal No. 05 of 2020

RULING OF THE COURT

3rd & 7th November, 2023

MUGASHA, J.A.:

This is a second bite application for leave to appeal against the decision of the High Court in the judgment handed down on 7/10/2022 following the refusal of the initial application before the High Court in its Ruling dated 31/1/2023. The application is predicated on Rule 45 (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and it is accompanied by the affidavit of **EDMUND AARON MWASAGA,** a principal officer of the applicant.

The grounds on which the application is premised are as follows: **One,** that the subordinate court had no territorial or pecuniary jurisdiction over the matter**; two,** whether the respondent proved on the balance of probability during the trial that the applicant was negligent on allowing the ATM skimmer to draw the account of the respondent; **three**, whether the appellate Judge was correct in holding that the applicant had acted negligently technologically, thus allowing the withdrawal of money beyond limit; **four,** whether the Judge was correct in holding that the applicant breached duty of care to the respondent; **five,** whether the appellate Judge was correct in failing to hold that the doctrine of *volenti non fit injuria* applied in the circumstances against the respondent; **six,** whether the learned appellate Judge was correct in failing to hold and infer a negative inference with regards to the respondent's failure to call key witness to support his case; **seven,** whether the honourable appellate Judge was correct in failing to apply section 122 of the Evidence Act, Cap 6 R.E 2022 in the circumstances for inference of certain facts; and **eight,** whether the honourable appellate Judge was correct in holding that Exhibit P1 a brochure, constituted terms and conditions of contract between the applicant and the respondent.

A brief background underlying this application is as follows: Before the District Court of Arusha, the respondent herein sued the applicant for the recovery of a sum of TZS. 32,926,747.17 alleged to have been illegally withdrawn in the Republic of South Africa from his account situated at Mt. Meru branch within the City of Arusha. Efforts to have the said money returned to the respondent were not successful which prompted the respondent to sue the applicant in a matter which was concluded in favour of the applicant following its dismissal with costs. Undaunted the respondent successfully filed an appeal before the High Court which overturned the trial court's decision. Given that the matter originated from the subordinate court an appeal to the Court is subject to obtaining leave, which was refused by the High Court, in the present application the applicant by way of a second bite is seeking leave to appeal to the Court.

At the hearing in appearance was Mr. Roman Masumbuko, learned counsel for the applicant and Mr. Elvaison Maro, learned counsel for the respondent. Although the application was uncontested, we had to satisfy ourselves on the propriety or otherwise of the application as per the dictates of Rule 45 (b) of the Tanzania Court of Appeal Rules which requires an application of this nature to be filed within fourteen days

from the date of initial refusal save where the Registrar has excluded time used for the preparation of the decision.

On taking the floor, Mr. Masumbuko submitted that the application is properly before the Court given that following the refusal of the initial application on 31/1/2023, six (6) days later, the applicant wrote a letter to the Deputy Registrar seeking to be supplied with a copy of the decision, and subsequently lodged this application seven (7) days after being supplied with a certificate of delay on 28/4/2023. In a nutshell, Mr. Masumbuko fragmented the prescribed fourteen (14) days between **one,** the dates of the initial refusal and the applicant's request to be supplied with the refusal decision; and **two,** the dates between the issuing of the certificate of delay and filing the present application counting. In this regard, he argued that with the fragmentation put together, the application filed on 12th day was within the prescribed fourteen (14) days. He added that, the role of the Registrar under Rule 45(b) of the Rules is confined to excluding time utilized for the preparation of a copy of the impugned decision but not to interfere with the applicant's right to file an application in a second bite within the prescribed period of fourteen (14) days.

On the other hand, Mr. Maro had an opposite view as he believed that Mr. Masubmuko's line of argument was geared at bringing the import of Rule 90 in the interpretation of Rule 45 (b) of the Rules which is not correct. Yet, he also went along the line of fragmentation having pointed out that, since the applicant's letter was lodged after nine days from the date of the refusal, considering that subsequently this application was filed after seven days after issuing the certificate of delay, that makes a total of fifteen days and as such, the application lodged on 5/5/2023 was filed beyond the prescribed fourteen (14) days.

Having considered the rival arguments, it is undisputed that an application seeking leave on a second bite should be filed within fourteen days of the refusal as per the dictates of Rule 45 (b) of the Rules which stipulates:

> *"45. In Civil matters: -*
>
> *(a) .....*
>
> *(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 the application for leave to appeal*

has been made to the High Court and refused, within fourteen days of that refusal; provided that, in computing the time within which to lodge an application for leave in the Court under paragraph (b), there shall be excluded such time as may be certified by the Registrar of the High Court as having been required for preparation of a copy of the decision subject to the provisions of rule 49(3)."

In terms of Rule 49 (3) of the Rules, an application for leave in a second bite must be accompanied by the initial decision refusing leave. The proviso to Rule 45 (b) of the Rules, embraces a situation whereby in case of delay to file a second bite within the prescribed fourteen (14) days, the Registrar can exclude and certify the period utilised for the preparation of the impugned refusal decision. Obviously, although it is not expressly stated, it can safely be presumed that it is incumbent on the applicant to request for the impugned decision from the Registrar. However, the period within which the request has to be made, the essence of service to the adverse party and consequences for non-compliance is a quagmire let alone the date from when the period of

exclusion runs. Apparently, Rule 90 (1) which governs the timelines of filing an appeal stipulates as follows:

> *"90. -(1) Subject to the provisions of rule 128, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged with:*
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> *(a) a memorandum of appeal in quintuplicate;*
> *(b) the record of appeal in quintuplicate;*
> *(c) security for the costs of the appeal;*
>
> *save that where an application for a copy of the proceedings in the High Court has been made within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery of that copy to the appellant*
>
> *(3) An appellant shall not be entitled to rely on the exception to sub-rule (1) unless his application for the copy was in writing and a copy of it was served on the Respondent.*
>
> *(4) Not applicable.*

(5) Subject to the provisos of subrule (1), the Registrar shall ensure a copy of the proceedings is ready for delivery within ninety (90) days from the date the appellant requested for such and the appellant shall take steps to collect copy upon being informed by the Registrar to do so, or within fourteen (14) days after the expiry of the ninety (90) days."

Under the cited Rule, besides improvising that an appeal must be filed within sixty (60) days of the notice, in case of delay, the intending appellant can rely on the excluded period as certified by the Registrar if he/she had earlier on requested to be supplied with the certified decision and proceedings within thirty (30) days of the decision and has served the respondent with the requisite request letter. The time for filing an appeal begins to run after the intending appellant is issued with a certificate of delay.

Apparently, both the learned counsel gave divergent views on the applicability of Rule 90 because it governs the modality and prescribed timeliness for filing an appeal. However, on our part it is our considered view that, under Rule 90 (1), (3) and (4) certainty and clarity can be discerned on **one,** the modus and time in which the intending appellant can move the Registrar for the purposes of excluding the certified period

beyond the prescribed sixty (60) days, **two,** the manner of computation of the period to be excluded and when it starts to run coupled with the conditions precedent to be complied with by the intending appellant which include requesting certified documents within thirty days of the impugned decision or else lose the right to enjoy the exclusion period.

In the circumstances, we decline the learned counsels' proposal to fragment the fourteen (14) days period to be pegged on the date of requesting the decision refusing leave and from the date of issuing the excluded period as certified by the Registrar. We say so because such interpretation is likely to cause confusion resulting into a miscarriage of justice. Thus, we take inspiration from what obtains under Rule 90 (1) of the Rules given the prescribed certain and conducive process for the intending appellant to pursue an appeal. In the premises, on a second bite the delayed application for leave should be filed not later than fourteen (14) days after the Registrar issues a certificate of delay excluding time for the preparation of the refusal decision. Thus, counting from 29/4/2023, the present application lodged on 5/5/23 was filed within the prescribed period of fourteen (14) and it is properly before the Court.

Given that the present uncontested application is properly before the Court, although the Court is vested with discretionary powers in determining an application for leave to appeal, the discretion must be judiciously exercised and on materials before the Court and as a matter of principle leave can be granted where the grounds on which it is sought raise a novel point of law worth determination by the Court. See: **BRITISH BROADCASTING CORPORATION VS ERICK SIKUJUA NG'MARYO,** Civil Application No. 133 of 2004, **RUTAGATINA C.L VS THE ADVOCATES COMMITTEE AND ANOTHER,** Civil Application No. 98 of 2010, **MS. AIRPORTS PROPERTIES LTD VS REGISTRAR OF TITLES AND ANOTHER,** Civil Application No. 389/17 of 2020 (both unreported) and **SIMON KABAKA DANIEL VS MWITA MARWA NYANGANYI AND 11 OTHERS** [1989] TLR. In the latter case the Court among other things it was emphasised that, in an application for leave to appeal to the Court of Appeal, the applicant must demonstrate that there is a point of law involved for the attention of the Court of Appeal.

Moreover, given the judicious discretion in determining an application for leave to appeal, the Court should restrain itself from considering and deciding the substantive issues that are to be dealt with

on appeal in order to avoid making decisions on the substantive issues before the appeal prematurely and before it is heard. See: **THE REGIONAL MANAGER TAN ROADS LINDI VS DB SHAPRIYA AND COMPANY LIMITED,** Civil Application No, 29 of 2012 (unreported).

Guided by the stated position of the law, the grounds on which leave is sought are on among others, that the subordinate Court had no territorial jurisdiction over the matter given that the cause of action between the parties arose in South Africa and not in Tanzania given that the sum of TZS. 32,916,747/= was withdrawn in South Africa from an account maintained in Tanzania. Although this was not raised before the High Court, it is settled law that the question touching on jurisdiction can be raised at any time including this stage of seeking leave to appeal on a second bite.

In the premises, the issue raised by the applicant touching on the Resident Magistrates' Court not being clothed with jurisdiction to adjudicate Civil Case No. 3 of 2013 raises a point of law worth for the Court's consideration. The remaining grounds raised constitute substantive complaints and issues to be dealt with on appeal and not at this stage of seeking leave to appeal because it is not upon the Court before which leave is sought to determine the merits and demerits of

the impugned judgment as that is the domain of the Court which sits on appeal. See: **THE REGIONAL MANAGER TAN ROADS LINDI VS DB SHAPRIYA AND COMPANY LIMITED** (supra).

In view of what we have endeavoured to discuss, the application is granted leave to appeal against the decision of the High Court in Civil Appeal No. 5 of 2020. The intended appeal should be filed not later than sixty (60) days from the date of this Ruling.

DATED at **ARUSHA** this 7th day of November, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

This Ruling delivered this 7th day of November, 2023 in the presence of Mr. Valentine Nyalu holding brief for Mr. Roman Masumbuko, learned counsel for the Applicant, also, holding brief for Mr. Evaison Maro, learned counsel for the Respondent, is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL