

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

(CORAM: MWANDAMBO, J.A., ISSA, J.A., And ISMAIL, J.A.)

CIVIL APPLICATION NO. 450/16 OF 2023

CENTRAL ELECTRICALS INTERNATIONAL LIMITED APPLICANT

VERSUS

**CHINA RAILWAY JIACHENG
ENGINEERING CO. (T) LIMITED RESPONDENT**

**(Application for second bite leave to appeal to the Court of Appeal of
Tanzania against the Ruling and Order of the High Court of Tanzania,
(Commercial Division) at Dar es Salaam)**

(Nangela, J.)

dated the 9th day of February, 2023

in

Misc. Commercial Cause No. 36 of 2022

RULING OF THE COURT

7th & 16th November, 2023

ISSA, J.A.:

This is the second time the applicant is seeking leave to appeal to this Court. The High Court, vide Misc. Commercial Application No. 7 of 2023 dismissed the application for leave for being time-barred on 9.2.2023, hence, this application termed in legal arena as a second bite. The motion is predicated on section 5(1)(c) of the Appellate Jurisdiction Act (AJA) and Rules 45(b), 48(1) and 48(2) of the Tanzania Court of

Appeal Rules, 2009 (the Rules) and is supported by an affidavit affirmed by Akbar Meghji, the Principal Officer of the applicant.

The following brief background facts will serve the purpose of appreciating the essence of the present application. On 5.6.2008, the applicant and respondent executed a subcontract agreement for electrical installation works in respect of Hotel and Property Development (Kendwa project) at Kizimkazi, Zanzibar. The subcontracted works were valued at USD 6,332,110.24. The applicant performed its obligation and the respondent paid her a total of USD 6,339,462.6. The applicant kept on demanding from the respondent additional payment for additional works amounting to USD 1,733,674. The respondent disputed the additional works and additional payments. There being such a dispute the matter was sent to an arbitral body; the National Construction Council (NCC) which appointed a sole arbitrator; Engineer Kumbwaeli Salewi.

On 25.5.2022 the arbitrator published an award in which he awarded the applicant USD 1,704,944.99 as the outstanding balance as per the signed Final Account dated 14.1.2015. On 24.8.2022 the respondent submitted the award to the High Court in Misc. Commercial Cause No. 36 of 2022 with a view to challenging the award for being

ambiguous and beset with serious irregularities. The High Court on 9.2.2023 set aside the award for the reason that the arbitrator lacked jurisdiction as the reference before him was time barred. The claim arose in 2012/2013 but the reference to arbitrator was made on 12.5.2020 after seven years contrary to prescribed time of six years as per item no. 7 of the Schedule to the Limitation Act.

The applicant being aggrieved by that order lodged a notice of appeal on 24.2.2023 and filed an application for leave at the High Court in Misc. Commercial Application No. 7 of 2023 on 9.3.2023. The application for leave hit a snag when the respondent lodged a notice of preliminary objection that the application for leave was incurably defective for contravening the mandatory requirement of Rule 63(1) of Arbitration (Rules of Procedure) Regulations, 2021 which provides that a leave to appeal should be filed within 15 days upon delivery of the order. The High Court on 26.5.2023 delivered its ruling which upheld the preliminary objection and dismissed the application for leave for being time-barred. Following that dismissal, the applicants have accessed this Court seeking leave on a second bite.

In contesting the application, the respondent filed an affidavit in reply which was affirmed by Xu Fei, the Principal Officer of the

respondent. The application has again met the resistance from the respondent who raised a preliminary objection contending that:

"The Court has no jurisdiction to entertain the applicant's application under the umbrella of a second bite application provided under Rule 45(6) of the Rules ..."

At the hearing of the application before us, Mr. Zakaria Daudi and Mr. Yassin Maka, learned advocates, appeared for the applicant whereas Mr. Rico Adolf, learned advocate, appeared for the respondent. The Court resolved to hear both the preliminary objection and the merit of the application

Mr. Adolf adopted the affidavit in reply and submitted that the application for leave before the High Court was dismissed for being time-barred. The applicant has come to this Court on a second bite, but the Court has no jurisdiction as the application does not qualify for second bite under Rule 45(b). He added that the application before the High Court was not refused; rather it was dismissed at the preliminary stage which means that it was not decided on merit. He bolstered his argument by a decision of this Court in **Rajabu John Mwimi V. Mantract Tanzania Limited**, Civil Application No. 367/01 of 2020 (unreported) where on page 8 to 9 the Court said that a second bite application can be

brought to Court when it is refused by the High Court. He submitted that in this case the application for leave was not refused but it was dismissed. He prayed for this application to be struck out with costs.

Mr. Daudi, on the other hand, submitted that the Court has jurisdiction to determine the application under Rule 45(b) after the refusal by the High Court. The aggrieved party has 14 days to apply for second bite application for leave. Mr. Daudi relied on several decisions of this Court in support of his argument. Specifically, he cited the cases of **MM Worldwide Trading Company Limited and 2 Others V. National Bank of Commerce Limited**, Civil Appeal No. 258 of 2017, **Arunaben Chaggan Mistry V. Naushad Mohamed Hussein and 3 Others**, Civil Application No. 40 of 2015, **Twaha Michael Gujwile V. Kagera Farmers Cooperative Bank**, Civil Application No. 352/04 of 2021, and **Awiniel Mtui and 3 Others V. Stanley Ephata Kimambo (Attorney of Ephata Mathayo Kimambo)**, Civil Application No. 19 of 2014 (all unreported).

Mr. Daudi argued that, according to these cases, dismissal on time limitation is taken to be dismissal on merit as it falls under Rule 45(b) of the Rules which entitles an aggrieved party to apply for a second bite before the Court. Placing reliance on **Arunaben Chaggan** (supra),

Twaha Michael Gujwile (supra), and **MM Worldwide** (supra), he submitted that the word “refusal” has been broadened to cover the dismissal order on limitation. He prayed for the dismissal of the preliminary objection.

In rejoinder, Mr. Adolf submitted that the case of **Arunabel Chaggan** was decided in 2016 and the case of **Rajabu Mwimi** was decided in 2022. He urged the Court to take the position taken in the recent decision of the Court. He added that, if the application at hand is allowed it will open a pandora’s box of second bite time-barred applications.

In addition, Mr. Adolf distinguished the cases cited by Mr. Daudi. He submitted that in **Twaha Michael’s** case the application was determined on merit and refused, but in **M.M. Wordwide’s** case it was not mentioned that the application was time-barred. On the other hand, in **Rajabu Mwimi’s** case the Court defined what is refusal and it did not narrow down the meaning.

After hearing the rival arguments from the learned advocates there is a suggestion that according to case law, there are two positions with respect to the jurisdiction of the Court on second bite applications. The first position allows a second bite application where the first application before the High Court was refused on merit and bars application which

was dismissed at preliminary stages without hearing the merit. The second position is that a second bite application can be entertained even if the first one was dismissed at preliminary stages.

Our starting point is Section 5(1)(c) of the AJA which provides:

"In Civil proceedings, except where any other written law for the time being in force provides otherwise, and 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.

This provision 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 AJA is appealable with leave of the High Court or Court. This means both the High Court and the Court have concurrent jurisdiction in an application for leave (see: **Awiniel Mtui and 3 Others V. Stanley Ephata Kimambo** (supra)). However, such an application, in terms of rule 47 of the Rules must in the first instance be made to the High Court or Tribunal as the case may be. Further, rule 45(b) of the

Rules, which is the crux of this application, prescribes time and manner within which to lodge an application for leave. It 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 supplied)*

This Court in **Rajab John Mwimi** (supra) interpreted this provision at page 9 and stated:

"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."

Therefore, in order for the matter to be said that it has been refused that matter must have been decided on merit. It should not have been dismissed at the preliminary stages. This position was also taken in our earlier decision of **Tella Bupamba V. Abel Shija**, Civil Application No. 238/08 of 2017 (unreported) when the Court was dealing with

second bite application for leave after the first application for extension of time and leave was dismissed. The Court said:

"... In the light of settled position of the law, since the application for leave was not before the High Court to be decided on 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 Rule 45(b) and 47 of the Rules to warrant the present application before the Court by way of second bite."

Coming back to the cases which have been relied upon by Mr. Daudi, in **Twaha Michael Gujwile** (supra) the High Court dismissed the appeal filed by Twaha Michael on 7/2/2017. His application for leave to appeal to this Court was refused on 29/5/2020. He then applied for leave on this Court as a second bite. The Court had this to say:

"The applicant has therefore miserably failed to bring before us material upon which we can exercise our jurisdiction to grant the order sought. This Court, on a second bite, has no jurisdiction to evaluate, and reverse the decision of the High Court which refused the applicant leave to appeal to the Court. We cannot sit on

appeal of that decision. To be precise, a second bite is not an appeal”.

In that decision, the application for leave was heard on merit and then refused by the High Court. Hence, the Court had jurisdiction to entertain the second bite application for leave, but that jurisdiction did not extend to evaluating and reversing the decision of the High Court. This decision does not support the argument advanced by Mr. Daudi because the application for leave was refused on merit.

In **MM Worldwide** case (supra), the Court was faced with an issue as to whether it is open for a trial court to adjudicate on a suit founded on a subject matter already declared as time barred in a former suit before the same court. Here, again, the Court was faced with a different issue altogether and on page 9 it explained the effect of dismissal. It referred to our previous decision of **Olam Uganda Limited suing through its Attorney United Youth Shipping Company Limited V. Tanzania Harbours Authority**, Civil Appeal No. 57 of 2002 (Unreported) at page 10 and 11 where the Court stated:

“In our considered opinion then, the dismissal amounted to a conclusive determination of the suit by the High Court as it was found to be not legally sustainable. The appellant cannot refile

another suit against the respondent based on the same cause of action unless and until the dismissal order has been vacated either on review by the same court or on appeal or revision by this Court.”

On the other hand, in **Arunaben Chaggan** (supra) which Mr. Daudi anchored his argument, the High Court dismissed an application for leave to appeal to this Court as it was time-barred. The applicant went back to the High Court and filed an application for review asking the High Court to substitute the dismissal order with an order striking out the application. The High Court was not moved and it dismissed the application for review. Undaunted, the applicant came to this Court on revision. An objection was raised that the applicant should have come to Court on a second bite and not by way of revision. The Court had this to say at page 5:

“We are of settled view that the proper forum for redress in respect of that decision is the Court of Appeal through another application commonly known as second bite. We are further of the view that the question as to whether the order of dismissal falls within the ambit of refusal is not the business of the party to decide. It is the

Court of Appeal which has the mandate to do so upon being properly moved.”

This earlier decision did not interpret the word refusal, only allowed an aggrieved party to approach the Court on a second bite when his earlier application for leave was dismissed for whatever reason. With due respect to the learned counsel, this case did not discuss what a refusal is. It left the matter to the Court to decide after the application has been filed.

It has been submitted that the latter decisions of the Court from **Tella Bupamba V. Abel Shija**, Civil Application No. 238/08 of 2017 have clarified what refusal is and have demonstrated that it is only when the case has been decided on merit and dismissed that it can be said that it has been refused by the High Court under Rule 45(b). Conversely if the application has been dismissed without hearing the merit of the application then the aggrieved party cannot come to Court on a second bite.

The decision in **Arunaben Chaggan** does not assist the applicant as the position of law is now settled and very clear. Consequently, we sustain the preliminary objection raised by the respondent's learned advocate which spares us from determining the merit of the application.

In the upshot, the application is hereby dismissed with costs for being incompetent.

It is so ordered.

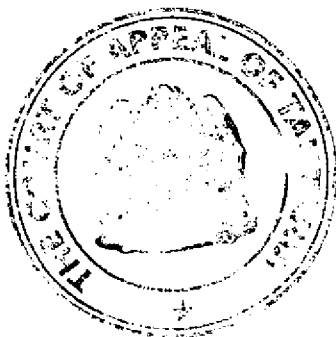
DATED at **DAR ES SALAAM** this 15th day of November, 2023.


L. J. S. MWANDAMBO
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Ruling delivered this 16th day of November, 2023 in the presence of Mr. Rico Adolf, holding brief for Mr. Yasin Maka, learned counsel for the Applicant, also in the presence of Mr. Rico Adolf and Mr. Peter Kamyia, learned counsels for the Respondent, is hereby certified as a true copy of the original.




S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL