IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: OTHMAN, C.J.,BWANA,J.A. And MANDIA,J.A.)

CIVIL APPLICATION NO. 3 OF 2012

1. **BAZIL GERALD MOSHA**
2. **VALERI GERALD MOSHA**
3. **SEMEN GERALD MOSHA**
4. **HASINTI GERALD MOSHA**

.....APPLICANTS

VERSUS

ALLY SALIMU..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania At Arusha)

(Mugasha, J.)

dated the 8th day of October, 2010
in
Civil Appeal No. 38 of 2002

RULING OF THE COURT

17th & 21st March, 2014 &

OTHMAN, C.J.:

In this application, the applicants seek leave of the Court to appeal against the decision of the High Court at Arusha (Mugasha, J.) in D.C. Civil Appeal No 38 of 2002 delivered on 8/10/2012. Their first application for leave to appeal to this Court having been refused by the High Court (Mzuna, J.)on 17/02/2012, they have now proffered this application under Rule 45(b) of the Court of Appeal Rules, 2009.

At the hearing of the application, Mr. Peter Mushi Jonathan, learned Advocate represented the Applicants. Mr. Apollo Maruma, learned Advocate represented the respondent.

Given that it was apparent on the material before us that the applicants' first application for leave to appeal to the Court was refused by the High Court on 17/02/2012 and the instant application was lodged on 29/08/2012, we raised a point of law, ***suo motu,*** whether or not in view of Rule 45(b) the matter was competent before us.

Mr. Jonathan candidly acknowledged that the High Court having refused leave to appeal on 17/02/2012, the fourteen days time prescribed under Rule 45(b) within which to file another application for leave to appeal to this Court had not been complied with. However, he in genuinely sought recourse to Rule 49(3) to overcome the prescribed time appointed under Rule 45(b) by arguing that the applicants could not have filed the application within fourteen days of the decision of the High Court, as they were only supplied with a copy of a drawn order on 15/08/2012 (ERV. 16459892), a supplementary document without which an application under Rule 45(b) could not have been properly filed. He contended that the applicants, had no control over the time it took the High Court to supply to whom a copy of the drawn order. All dependent on the speed of the High

Court in making one available. He invited the Court to invoke Rule 10 to grant the applicants an extension of time for the filing of the application after the expiry of the time prescribed under Rule 45(b), good cause having been shown.

Resisting, Mr. Maruma succinctly submitted that the application was time barred under Rule 45(b) as the fourteen days time prescribed there under was fixed by law. That there was neither a formal application before the Court nor good cause shown by the applicants for which an extension of time could be granted.

Rule 45(b) provides:

> *"45. In Civil proceedings-*
>
> *(a).....*
>
> *(b)* ***where an appeal lies with leave of the Court, application for the leave shall be made in the manner prescribed in Rules 49 and 50and*** *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 added)*

Rule 49

(1) Every formal application to the Court shall be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts.

(2) An application may, with the leave of the Court or with the consent of the other party, lodge one or more supplementary affidavits, and an application for such leave may be made informally.

(3) Every application for leave to appeal shall be accompanied by a copy of the decision against which it is desired to appeal and where application has been made to the High Court for leave to appeal by a copy of the order of the High Court.

On the law and the facts, High Court having refused the applicants' first application for leave to appeal to this Court on 17/02/2012 and this application having been filed on 29/8/2012, one hundred and twenty three days after the expiry of the fourteen days prescribed period of time, it was beyond doubt time barred under Rule 45(b) and thus incompetent.

It is well established that the underlying policy rationale for periods of limitation, statutory or reglementary such as Rule 45(b) include that of diligence in the speedy determination of disputes with a reasonable, rather than an unreasonable or inordinate length of time; of fairness to the opposing party who is not to be the subject of an indefinite threat of being dragged into Court undetermined dates by an applicant who does not pursue his or her remedies timely; interminably and at an of promoting certainly in the rights and title of preventing the potential loss of evidence, oral or document and of public interest in the timely resolution of disputes. (See, Halbury's of England, IIIrd Ed, Vol. 24, p. 189, para 130; **Tolcher v Gondon** [2005] NSWCA 135). As correctly observed by the Supreme Court of Canada in M(K) V M (H) (1992) 3 S.C.R. 6, pp 29-30:

> *"The diligence rationale is that one expects an applicant to act deligently and not to "sleep over their rights".*

Rule 45(b) governs the time limit for lodging an application for leave to appeal to this Court where an appeal lies with leave of the Court or where an application for leave to appeal has been made to the High Court and has been refused as is the situation at bar.

Furthermore, considering that an application under Rule 45(b) also encompasses one that is a second bite from a similar and earlier

application that was refused by the High Court, the more the incentive, we think, for an applicant to lodge his or her application with the fourteen days limitation period specified therein.

On a close consideration of the matter, with respect, we cannot subscribe to Mr. Jonathan's contention that Rule 49(3) could be invoked to salvage the application and circumvent the limitation period spelt out in Rule 45(b). **One**, Rule 45(b) prescribes the limitation period fixed by law and it is set out in absolute, if not clear cutterms. **Two**, on a plain reading of the sub-Rule and applying a purposive interpretation, Rule 49(3) cannot be construed to override the prescribed time limits set out in Rule 45(b) as to do that would leave the fourteen days limitation period required for all application there under to the whims of each and every applicant to prefer his or her application on an indeterminate and uncertain date, depending on the date of receipt from the High Court of a copy of its drawn order refusing leave to appeal. Furthermore, it would completely defeat the very purpose of the period of time prescribed there under and the uniform application of the sub Rule to all such applications. We are of the respectful view that the time limit prescribed in Rule 45(b) was not intended to be open ended. To hold otherwise would displace the purpose for which it has been promulgated.

Third, we are fortified in our reading of Rule 45(b) in the way we have eleborated, as an applicant who fails to meet the time prescribed there under is not without a remedy. This, Mr. Jonathan readily agreed. The door is open for any belated applicant to approach the Court under Rule 10 by seeking an extension of time and on a showing of good cause.

That apart, we are also of the settled view that an analogy cannot be drawn from the proviso in Rule 90(1) which governs civil appeals to argue as Mr. Jonathan faintly tried to do, that in computing the time within which the application for leave to appeal under Rule 45(b) is to be filed, the time required to obtain copy of the drawn order from the High Court is or ought to be excluded. The submission made on behalf of the appellants was that a copy of the drawn order was only supplied by the High Court on 15/08/2012 and counting that date as the effective date, when the application was filed on 29/8/2012, it was within fourteen days thereof.

With respect, no such rule as Rule 90(1) or its equivalent exists for applications under Rule 45(b). If one was intended under the Rules it would been expressly provided for, as is the case with Rule 90(1) which is applicable to civil appeals.

Finally, we would agree with Mr. Maruma that at this stage it would not be proper for us to invoke Rule 10 to grant an extension of time, there

not having been a formal application lodged before us. That apart, the reasons advanced by Mr. Jonathan to the effect that the High Court was responsible for the delay in belatedly issuing a copy of the drawn order only on 15/08/2012 may be valid in an application under Rule 10, it is of no assistance to the applicants on the instant point of law.

In the result and for the foregoing reasons, we hereby proceed to declare the application incompetent and it is accordingly struck out. As the point of law was raised by the Court, *suomotu*, there shall be no order as to costs. It is so ordered.

M. C. OTHMAN
CHIEF JUSTICE

S. J. BWANA
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

M. Malewo
DEPUTY REGISTRAR
COURT OF APPEAL