THE REPUBLIC O F UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[CIVIL DIVISION]

MISCELLANEOUS APPLICATION NO. 615 OF 2019

1. M/S EMMAUS FOUNDATION LIMITED

THE REGISTERED TRUSTEES OF EMMAUS

2. FOUNDATION TRUST

3. FR. ISIDORE MBALEEBA ::::::::::::::::::::::::::::::::

APPLICANTS

VERSUS

1. M/S EMMAUS FOUNDATION INVESTMENTS (U) LIMITED

2. GIUSEPPE GIAMONNA :::::::::::::::::::::::::::::::: RESPONDENTS

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

RULING:

At the hearing of this application Mr. Paul Kuteesa, learned counsel for the Respondent, raised two preliminary objections to the application. The first one is this application for leave to appeal was brought outside the time set by law and as such it is incompetent. Counsel submitted that the application seeks leave to appeal against the decision in H.C.M.A No. 392 of 2018 which was heard

and determined, on 16/08/2019. That under Rule 40 (2) of the Judicature (Court of Appeal) Rules, the time prescribed for filing an application for leave to appeal is fourteen days. That the said Rules apply to this court by virtue of Rule 2(1) (supra) and that as of 30/08/2019, the Applicant should have filed the application; which he did not do but instead filed it on 09/09/2019 way beyond the prescribed time. That as such the application is incompetent as it contravenes the law and should be dismissed with costs.

The second objection is that the application is brought against the 2nd Applicant who was never a party to the case from which the intended appeal arises. That the ruling and orders show that the 2nd Respondent was never party. That it is improper and there is no basis for bringing an application for leave to appeal against him. That as such the application should be as against the 2nd Respondent dismissed with costs.

In reply Mr. Jude Byamukama learned counsel for the Applicant, concede that indeed H.C.M.A No. 615 of 2019 was filed outside the time prescribed by law for filing applications for leave to appeal. That, however, court should exercise its inherent power under Section 98 CPA to validate the application and have it heard on

merits. That the ruling for which leave is sought was delivered on 16/08/2019 only in presence of the Respondent and that there is no indication that the Applicants were aware and just kept away. That they took efforts to appeal, albeit late; and that it is a fact which court ought to consider.

Counsel further submitted that the Applicants filed H.C.M.A No. 51 of 2020 to validate the application for leave to appeal. Counsel also relied on the case of ***Musa Sbeity & Another vs. Akello John HCMA No. 249 of 2019,*** where court held that it would be good practice to hear applications for leave and validation concurrently.

Counsel further argued that this is the kind of application where Article 126 (2)(e) of the Constitution should be invoked to ensure that substantive justice is administered.

Regarding the second objection, Mr. Byamukama submitted that the ruling and order over which leave to appeal is sought, just like the application, indeed do not bear the 2nd Respondent as party. That, however, the underlying Company Cause No. 2 of 2018 had the 2nd Respondent as party. That it is clearly just a question of the manner in which the application and ruling are headed. Counsel

prayed that the objections be overruled to avoid multiplicity of proceedings in courts.

Opinion:

Court observes at the outset that the Applicant, through their counsel, concede that they filed the application for leave to appeal outside time set by law. Therefore, regardless of the reasons for the late filing, the Applicant would not be entitled to rely on Section 98(supra) which provides for the inherent power of court. It is now settled law that a party cannot rely or invoke Section 98 (supra) where there is another provisions of the law that specifically provides for the particular situation/circumstances. See: ***Magem Enterprises Limited vs. Uganda Breweries Ltd [1992] KALR 101; Biiso vs. Tibamwenda [1991] HCB 92; Taparu vs. Roitel [1965] EA 618 at p. 619.***

In the instant application extension of time is specifically governed under Section 96 CPA which provides as follows;

> ***"Enlargement of time.***
>
> ***Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge***

that period, even though the period originally fixed or granted may have expired."

Therefore, the Applicant is legally precluded invoking inherent power of court under Section 98 (supra) where a specific provision of the law exists to address the situation. Extension of time is governed by section 96 (supra) while leave to appeal is governed by Rule 40 of the Judicature (Court of Appeal) Rules (supra).

Under Rule 40 (supra) the only remedy available to the Applicants would not be to apply for extension of time in this court but to file a separate application to the Court of Appeal; also subject to the limitation of time set by law. Even assuming that the Applicant was not precluded to apply under Section 98 (supra) the Applicant has not advanced any sufficient reason that would be the basis for court to invoke its inherent power to extent the time. Court would have perhaps exercised its discretion if the Applicant filed the application for leave at the same time with the application to extend time for filing the application for leave to appeal. This was not done, which distinguishes the ***Musa Sbeity case*** (supra) cited by counsel for the Applicant from the instant case. Suffice to note that the instant application for leave to appeal was filed without first obtaining an

order extending time to file the application out of time. It means that H.C.M.A No. 51 of 2020, which was filed subsequently long after the application for leave had been filed and fixed for hearing, cannot cure or revive the application for leave which is incompetent for having been filed out of time set by law. As it were, H.C.M.A No. 615 of 2019 was "dead on arrival" incompetent *ab initio* and the application the subsequently filed would resurrect it. Ordinarily, the application for extension of time ought to have either preceded the application for leave to appeal or both brought concurrently. Anything beyond that rendered the application for leave to appeal incompetent and the subsequent application in H.C.M.A No. 51 of 2020 overtaken and no effect at all.

Regarding the second objection, the submissions that the Applicants were absent at the reading of the ruling baseless. Firstly, if that was indeed the case, the Applicant should have applied to court before and well within time. This was not done.

Secondly, the intended appeal is filed against the decision in H.C.M.A No. 392 of 2018 in which the 2nd Respondent was not party. It is not merely a question of heading of the ruling and the order, as erroneously claimed by counsel for the Applicant. The

Applicant, like plaintiff, is *dominus litis*, which means he/she has the right to choose who to sue and from whom he/she knows and /or believes he/she will have a remedy against. Parties to H.C.M.A No. 392 of 2018 were carefully chosen by the Applicants thereto. They never chose the 2nd Respondent in the instant application. He was not a party then and cannot be party now. He is, therefore, neither a proper party nor a necessary party for purposes of this application for leave to appeal. It follows that the application against him is misplaced and incompetent.

The next effect is that the application is wholly incompetent and for that reason it is dismissed with costs. For the same reasons, H.C.M.A No. 51 of 2020 is overtaken by events and of no effect. It is also struck off.

BASHAIJA K. ANDREW

JUDGE

14/02/2020