



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**Misc Civ Appli 1 of 2008**

**APA INSURANCE CO.LTD:.....APPLICANT**

**VERSUS**

**DOLPHINE ATEMBA OPANDA:.....RESPONDENT**

**R U L I N G**

Before me is an application under S. 3A, 63E and 79G CPA and orders 49 rule 5 and order 50 rule 1 CPR. It seeks two main prayers:-

a) .....

b) .....

c) This Honourable court be pleased to extend time within which to lodge an appeal from the judgment and decree in **ELDORET CM.CC.NO.443 of 2007** between **DOPHINE ATEMBO OPANDA** versus **APA INSURANCE COMPANY LTD.**

d) This Honourble court be pleased to issue temporary orders of stay of execution of judgment and decree in **ELDORET CM.CC.NO.443**

**of 2007** between **DOLPHINE ATEMBA OPANDA** versus **APA INSURANCE COMPANY LTD** pending the hearing and final determination of the intended appeal.

e) Costs of this application be provided for.

There are also Eldoret Misc.Applications No.2 and No.3 of 2008 which seek similar order by the same applicant. The counsels in this application are the same as in the other two and they have agreed that the ruling in this file abide to the other two.

There are grounds on the face of the application and a supporting affidavit by **RICHARD K. CHERUIYOT** the advocate for the applicant. The grounds and the averments in the affidavit are to the effect that judgment in the lower court was delivered on 19<sup>th</sup> November 2007 in absence of both counsels who have not been notified of that date. Counsel for the applicant learnt of the judgment on 24<sup>th</sup> November 2007 and promptly informed the applicant. On 17<sup>th</sup> December 2007 the applicant gave

instructions to his counsel to appeal. The counsel prepared memorandum of appeal but inadvertently failed to file it by 19<sup>th</sup> Dec.2007 when the 30 days were ending. He explained that he closed his offices on 18<sup>th</sup> December, 2007 and was to reopen on 7<sup>th</sup> January 2008 but due to clashes which occurred after the General elections he was only able to reopen on 21<sup>st</sup> January 2008 when he promptly filed this application. He admitted the mistake was his and not that of the applicant. He submitted that the applicant will suffer substantial loss if stay is not given.

The respondents in this application and the other two swore replying affidavit. They first attacked the supporting affidavit and stated that it was sworn by the counsel and not the applicant. They averred that issues are contentious and the applicant should have sworn the affidavit.

Secondly all the three respondents swore they are persons of means and capable of refunding the decretal sum if the appeal succeeds. Mr. Andambi who appeared for them entirely relied on those affidavits.

I have carefully considered the application, affidavits and submissions. The counsel for the applicant deponed that it was his office which failed to file the appeal in time. Thus it was only proper for the counsel to swear the affidavit to explain why the appeal was not filled in time. The applicant gave instructions in time and therefore could not explain the failure to file appeal in time. To that extent therefore the counsel was the proper person to swear the affidavit. However the affidavit did not stop at only explaining the delay. It also talked of the respondents being persons of straw. That averment, I concur, is a contentious one but I will revert to it later.

Having heard the explanation as to why the appeal was not filed in time I am satisfied with that explanation. Mr. Cheruiyot was candid and bold enough to say that it was his office which failed though inadvertently. They received instructions on 17<sup>th</sup> December, 2007 and closed their office on 18<sup>th</sup> December 2007. It is quite possible that they overlooked filing of the appeal before closing the office. I accept the explanation.

Further he deponed that they were to open on 7<sup>th</sup> January 2008 but due to the insecurity which followed the General election they were only able to open on 21<sup>st</sup> January 2008. Every Kenyan knows of the ugly clashes that followed the election. Infact even this court took time after that to re-open. The explanation is therefore reasonable. This application was filed on 21<sup>st</sup> January 2008, the day the Advocate re-opened the office. It was filed timelessly. In the circumstances I will allow prayer C of the application. The court therefore extends time in which the applicant can file the appeal. Appeal be filed within 14 days from today's date.

Prayer (d) was for a stay of execution pending the hearing and determination of the intended appeal. Applicant submitted that he is ready to deposit decretal sum in an interest earning account. As I said the advocate had sworn that respondent is a man of straw. With respect such a fact should only have been deponed to by the applicant. It is a contentious issue as it can be seen from the replying affidavit. The advocate does not even say how he came to the conclusion that the respondent is a man of straw.

The respondent on their part have deponed that they are capable of refunding the decretal sum. The respondent in this application deponed that she is a farmer while those in the other two files deponed that they are businessmen. That may be so but none of them exhibited any documents to back their claim. That would have assisted this court in reaching its decision. Now, seeing that the court has allowed the applicant to file an appeal there is need to see that at least some of the decretal amount is safe until the intended appeal is heard and determined. In the circumstances I order stay of execution of the judgment and decree until the intended appeal is heard and determined in the following terms:-

1) The applicant do pay the respondent half (1/2) of the decretal

sum excluding costs within 30 days from today's date.

2) The other half (1/2) of the decretal amount and the whole of taxed costs be deposited in an interest earning account in the joint names of the two counsels within 30 days.

3) Costs will be in the intended appeal.

Dated and Delivered in Eldoret on 15<sup>th</sup> day of February, 2008.

**KABURU BAUNI**

**JUDGE**

**IN THE PRESENCE OF**

C/C - David

Mr. Shivaji for Cheruiyot for applicant

N/A - for Respondent

**KABURU BAUNI**

**JUDGE**

**ORDER:** This ruling to abide to Eld. Hc. Misc. Applications Nos 2 and 3 of 2008.

**KABURU BAUNI**

**JUDGE**