



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL APPLICATION NO. 95 OF 2012**

**AFRICA MERCHANT INSURANCE COMPANY LIMITED:.....:APPLICANT**

**VERSUS**

**STEPHEN KIPROTICH ABUN:.....:RESPONDENT**

**RULING**

The application before me is for leave to appeal out of time.

The applicant also asks this court to grant an order of stay of execution until the appeal was heard and determined.

On the face of the said application, the matter would appear to be relatively straightforward. That is because a party against whom a judgement was entered, wishes to be given an opportunity to challenge that judgement, through an appeal. However, because his intention to appeal was expressed after the lapse of the period within which an appeal could have been filed, the applicant has come to court to seek leave to appeal.

In answer to the application, the Respondent's first point is to draw the Court's attention to the fact that the applicant was not a party to the case in relation to which it now seeks to appeal.

The applicant is cited as being **AFRICA MERCHANT INSURANCE COMPANY LIMITED**. Therefore, the Respondent submitted that the applicant was never a party to the suit in respect to which it now sought leave to appeal.

There is no doubt at all that the party against whom the Respondent herein got Judgement was **AFRICA MERCHANT ASSURANCE COMPANY LIMITED**.

The applicant has failed to demonstrate its connection to either the **ELDORET CMCC NO. 395 of 2011**, or to the Defendant in that case.

Furthermore, the Memorandum of Appeal which was annexed to the application, cites the appellant as **STEPHEN KIPROTICH ABUN**, whilst the applicant herein is cited as the Respondent.

Stephen Kiprotich Abun has not expressed any desire to appeal against the Judgement which was in his favour. Therefore, it was a serious error for the Applicant to prepare a draft Memorandum of Appeal which indicated that the Respondent intended to appeal.

I cannot grant leave to one person to enable him file an appeal on behalf of another person. That other person has not expressed any intention to appeal. This court cannot compel him to appeal, just because

another person had cited him as the appellant, in the draft Memorandum of Appeal.

The affidavit in support of the application was sworn by Andrew T. Kiboi, the learned advocate for the Applicant.

He deponed that immediately after the trial court had passed judgment, on 5th November, 2012, he notified this client about it. He also sought his clients further instructions concerning the intended appeal.

However, his client did not revert to him until after the time provided for lodging an appeal had lapsed.

Regrettably, the deponent does not tell us why his client did not give him instructions timeously. And the client did not given any reason for failing to give instructions concerning the appeal, within the time prescribed. In the circumstances, this court is totally unaware of the reasons why an appeal was not filed on time.

Meanwhile, I appreciate that the liability of the Insurer was based on an alleged Insurance Cover which it had provided to one ISAACK CHIRCHIR, in respect to his motor vehicle, registration number KAV 473G. That vehicle is alleged to have been involved in an accident on 22nd March, 2010.

The defence of the insurer was that the policy of insurance it had issued, had lapsed on 12th January, 2009.

The insurer also asserted that the plaintiff never served it with the requisite statutory notice.

On a prima facie basis, those two lines of defence raise substantive legal issues. However, this court is unaware of the nature of evidence which was led at the trial, or the manner in which the trial court determined the legal issues.

In the circumstances, I cannot ascertain whether or not the intended appeal has overwhelming chances of success.

Accordingly, I find no merit in the application. It is therefore dismissed, with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT ELDORET**

**THIS 6TH DAY OF FEBRUARY, 2014**

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**FRED A. OCHIENG**

**JUDGE**