

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPLICATION NO. 242 OF 2017

ABAGUSII WELFARE ASSOCIATION.....APPELLANT

VERSUS

DIXON KIBAGENDI.....RESPONDENT

R U L I N G

1. Abagusii Welfare Association, the Applicant, has sought in the main an order that leave be granted to it to file an appeal out of time.
2. According to the papers filed and the affidavit of ROSE NYANCHOKA OKEMWA the matter it is alleged to have proceeded at trial *ex parte* and a judgment was delivered on 10/3/2017 in the absence of the applicant whereafter the Applicant made an application dated 28/4/2017 to set aside but the same was itself dismissed on the 8/9/2017 hence the current application.
3. Despite service the Respondent did not file away opposition to the application and on the 10/4/2018 the court ordered that the matter proceeds *ex parte* pursuant to Order 51 Rule 14(4).
4. Even though the Applicant says the matter proceeded in their absence, the judgment and ruling by the trial court exhibited, in this application show that on the date the plaintiff gave evidence, the Applicant's advocate, one Mr. Nabwana, was actually in court when the matter was set to be heard at 11am. However, when the matter resumed at the appointed time the advocates did not attend. It is therefore not surprising that the judgment was also delivered after due notice had been served but in the absence of the Applicant and its counsel.
5. On those facts the Applicant contends that it has arguable points to urge on appeal including the point that it was denied the right to be heard.
6. Whether or not to grant leave to appeal out of time is a discretion vested upon the court and purposed to achieve the very purpose of the justice system to afford to parties a right to be heard and access to justice.
7. The remedy of extension of time is not a right of a party but a measured consideration the court resorts to based on the wider interests of justice. See *Nicholas Kiptoo Arap Korir Salat vs I.E.B.C & 7 Others [2014] eKLR*.
8. In this matter, I cannot but say that the applicant and counsel cannot escape the prospects of being cast in the light of lacking candour in the prosecution of its defence. However, I have read the ruling dismissing the request to set aside and the judgment and noted that there is a sum of Kshs.1,000,000/= awarded as damages plus costs. I consider the sum not so modest a sum. I also consider that the suit having been grounded on the tort of defamation, the applicant may feel shut from the seat justice if the request to have the appeal filed out of time is not granted. In any event should the appeal fail the Respondent will not only get the sum awarded at trial but also costs and interests. Essentially no prejudice will ensue by grant of an order extending time to file any appeal.
9. For the reasons that the matter proceeded *ex parte*, without evidence on the part of the applicant, even if that be due to an undoing by counsel, the litigant should not be denied his day in court. I allow the application, extend time to file the appeal and order that the appeal be filed within 24 hours from time this ruling is pronounced.
10. On the prayer for stay pending the hearing and determination of the intended appeal, I hold the view that such a prayer is not available on this miscellaneous application. I understand the law to permit the court to grant stay pending appeal only where there is an appeal filed and not prior to an appeal being filed.
11. Let the costs of this application be costs in the intended appeal.

Dated and delivered at Mombasa this 11th day of April 2018.

P.J.O. OTIENO

JUDGE