



REPUBLIC OF KENYA



KENYA LAW
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**Bhatti & 2 others v Giddie (Civil Application E142 of 2021)
[2021] KECA 111 (KLR) (22 October 2021) (Ruling)**

Neutral citation: [2021] KECA 111 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E142 OF 2021
F SICHALE, JA
OCTOBER 22, 2021**

BETWEEN

MEHREEN BHATTI 1ST APPLICANT

MEHERISH BHATTI 2ND APPLICANT

SHAMA ASIF 3RD APPLICANT

AND

KAMAL S. GIDDIE RESPONDENT

(Being an Application for extension of time within which to file and serve the Notice and Record of Appeal against the judgment of Serгон J dated 13th December 2019.) IN (Milimani HCCC No. 231 of 2015))

RULING

1. Before me is a motion dated 15th April, 2021 and brought pursuant to the provisions of Rule 4 of the [Court of Appeal Rules](#) 2010, in which the applicants seek the following orders:
 1. Spent.
 2. THAT the Court be pleased to extend time within which the applicants can file and serve their Notice of Appeal as well as the Record of Appeal.
 3. THAT costs of this application be provided for.”
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Anthony Maina Macharia, the advocate who has the conduct of this matter on behalf of the applicants who deposed *inter alia* that the applicants had already filed a Notice of Appeal against the judgment of Sergon, J dated 13th December, 2019, which was filed on time but unfortunately they failed to file and



serve their Record of Appeal on time which was occasioned by the time it took for the proceedings to be typed.

3. He further deposed that it was only this year that the proceedings were typed and finalized in terms of certification and that further it was only this year that they were able to have the Certificate of Delay signed by the Deputy Registrar which was after expiry of the time of filing and service of the Record of Appeal. He further deposed that the applicants had an arguable appeal with a high probability of success and that the respondent shall stand to suffer no prejudice should the time be extended.
4. The applicants in their submissions reiterated the grounds on the face of the motion and submitted that the respondent will not suffer any prejudice should the application be granted and that the instant application was merited. Consequently, they urged the Court to allow the same.
5. On the other hand, it was submitted for the respondent *inter alia* that the applicants had not offered any justifiable and/or credible reason to warrant this Court exercise its discretion in their favour and allow extension of time to file and serve the Notice and Record of Appeal out of time since the instant application was filed on 7th May, 2021, 4 months after the applicants had been issued with a Certificate of Delay on 12th January, 2021, which delay had not been explained.
6. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the rival written submissions by the parties, the cited authorities and the law.
7. The applicants motion is brought, under Rule 4 of this Court's Rules. The said Rule provides:

“4. Extension of time

The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

8. The principles upon which this Court exercises its discretion under Rule 4 are firmly settled. The Court has wide unfettered discretion whether to extend time or not. However, in exercising its discretion the Court should do so judiciously, and in accordance with the principles set out in *Leo Sila Mutiso V. Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997* where the Court stated:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

9. In the instant case, the impugned judgment was delivered on 13th December, 2019 whereas the instant application is dated 15th April, 2021 and was filed on 7th May, 2021. The applicants contend that failure to file and serve the Record of Appeal on time was occasioned by the time it took for the proceedings to be typed together with the Certificate of Delay. A cursory perusal of the record herein shows that the Certificate of Delay annexed to the applicants' application is dated 12th January, 2021 whereas the instant application was filed on 7th May, 2021, a period of about 4 months from the date when the Certificate of Delay was issued. No explanation has been offered by the applicants for this delay



which is no doubt inordinate and neither has it been stated to the satisfaction of this Court the action that the applicants took from 12th January, 2021 when they were issued with the Certificate of Delay. In my considered opinion, the delay herein is inordinate and the same has not been explained to the satisfaction of this Court.

10. As to whether there is a possibility of the appeal succeeding, I am mindful of the fact that I cannot say more regarding this issue sitting as a Single Judge.
11. As regards prejudice, the respondent will be denied the right to enjoy the fruits of his judgment which has been occasioned by the applicants' delay in prosecuting their appeal.
12. Taking into totality all the circumstances in this case, I find that the applicants have not demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion under Rule 4 of the Court as laid out in Leo Sila Mutiso case (supra), to extend time.
13. Accordingly, the applicants' application dated 15th April, 2021 is without merit and the same is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

F. SICHALE

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JUDGE OF APPEAL

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

Signed:

DEPUTY REGISTRAR

