



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(Coram: Gicheru, J.A. (IN CHAMBERS))**  
**CIVIL APPLICATION NO. NAI. 191 OF 1994**

**BETWEEN**

**FRANCIS MWANZA MULWA.....APPLICANT**

**AND**

**PAMELA MARY KIKUMU.....RESPONDENT**

**(Application for extension of time to serve Notice of Appeal**

**out of time in an intended appeal from an order of the**

**High Court of Kenya at Machakos (Osiero, J.) dated 11th July, 1994**

**in**

**H.C.C.C. NO. 23 OF 1990)**

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**RULING**

In this application, the applicant has sought extension of time within which to serve the Notice of Appeal lodged in the superior court on 15th July, 1994. That Notice of Appeal was served on counsel for the respondent on 4th August, 1994 - 13 days out of time. The applicant's reasons for this delay are that during the period between 18th July to 2nd August, 1994 he underwent a series of Medical consultations and tests which occupied alot of his time and was therefore unable to attend to matters pertaining to the case the subject-matter of the Notice of Appeal referred to able and to his office generally. Besides, the process server whom the applicant had given instructions that he should be given the notice of appeal for service upon counsel for the respondent was not seen until 3rd August, 1994 on which latter date the said Notice of Appeal was handed over to him. The fact of late service of this Notice of Appeal came to the applicant's attention on 12th August, 1994 when he returned to his office after taking a rest on the advice of his doctors. He made this application on 13th September, 1994 - about one month after his return to his office. To him therefore, the delay in serving the Notice of Appeal as is mentioned above was not unreasonable and would not occasion a miscarriage of justice.

The response of counsel for the respondent is that the applicant was the author of the delay in serving

the Notice of Appeal in question. Indeed, according to him, the respondent disputes that the applicant had a series of medical consultations and tests and in any event, from the superior court ruling dated 11th July, 1994 which is the subject-matter of the Notice of Appeal in question, the projected appeal is frivolous. To counsel therefore, the applicant's application is without merit and should be refused.

Whether or not the applicant's intended appeal is frivolous is not a matter that can be properly debated in an application such as the present one in view of the materials presently available in the record of the same. In any case, after service of the Notice of Appeal on 4th August, 1994 it was clear to the respondent that the same was served out of time. Since then no step was taken to have the same struck out under rule 80 of the Rules of this Court. If the respondent was seriously of the view that the applicant's projected appeal was frivolous, the first thing she should have done is to seize the opportunity of the delay in the service of the Notice of Appeal and apply to this Court to have it struck out. She did not avail herself of that opportunity and has waited until the hearing of the present application to complain that the intended appeal is frivolous.

That, with the material before me, I do not know. At any rate, whether or not the applicant's allegations that during the period between 18th July to 2nd August, 1994 he was undergoing a series of medical consultations and tests which disabled him to be in his office and therefore attend to matters pertaining to the service of the Notice of Appeal referred to above are true, I consider that a delay of 13 days in serving the said Notice upon the respondent is not grossly inordinate to warrant his disentitlement of his evinced intention to appeal to this Court against the ruling of the superior court dated 11th July, 1994. In the exercise of my discretion under rule 4 of the Rules of this Court, I therefore grant the applicant's application and order that the time for serving the applicant's Notice of Appeal be and is hereby extended to 4th August, 1994 so that the same shall henceforth be deemed to have been duly served upon the respondent within the extended time. As the applicant is to blame for the delay in the service of the said Notice of Appeal, the costs occasioned by this application are awarded to the respondent in any event.

Dated and delivered at Nairobi this 8th day of March, 1995.

**J. E. GICHERU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**