



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NO 36 OF 2008

LAWRENCE M. MAIKWEKI.....APPLICANT/1ST RESPONDENT

AND

PETER KAIRU KIAI1ST RESPONDENT/APPELLANT

MICHAEL NDICHU NDUNGI.....2ND RESPONDENT

TIMOTHY KAMAU GITHOGORI3RD RESPONDENT

DAVID NJOROGE MBUGUA.....4TH RESPONDENT

(Application to strike out Civil Appeal No. 36 of 2008 being an appeal from the judgment of the High Court of Kenya at Nakuru (Kimaru, J) dated 14th November, 2006 in H.C.C.C. No. 464 of 1998)

RULING OF THE COURT

By the Notice of Motion dated 3rd March, 2008 the applicant seeks an order under **rule 80** of the Court of Appeal Rules that **Civil Appeal No. 36 of 2008 - Peter Kairu Kiai vs Larence M. Maikwei & 3 Others** be struck out on the ground that the appeal was instituted in the name of a dead person in contravention of **rule 83(1)** of the Court of Appeal Rules.

It is conceded that the appellant Peter Kairu Kiai died on 17th July, 2006. This has been confirmed by Gazette Notice of 8034 of 6th October, 2006 relating to his estate. It is apparent that Peter Kairu Kiai the (*appellant*) died even before the impugned judgment of the superior court was delivered on 14th November, 2006.

Rule 83(1) provides:

An appeal shall not be instituted in the name of a person who is dead but may be instituted in the name of his legal representative.”

It is clear from that rule that an appeal cannot be instituted in the name of a dead person and that it can only be instituted in the name of the legal representative of the deceased person. The rule is not qualified in any way.

In the result **Civil Appeal No. 36 of 2008** is incompetent having been instituted in the name of a dead person.

Accordingly, the application is allowed with the result that **Civil Appeal No. 36 of 2008** is struck out with no orders as to costs.

Dated and delivered at Nakuru this 6th day of March, 2009

P. K. TUNOI

.....

JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR