

REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
CIVIL APPEAL 402 OF 1996

CORAM: AGANYANYA J.A (IN CHAMBERS)

BETWEEN

1. **ALOISE MPALALE LIBOLOLO1ST**
APPLICANT

2. **CHELDON ATAMA MIIMA 2ND**
APPLICANT

AND

KEFA GUDAHI RESPONDENT

(Being an application for extension of time to file a notice of appeal and record of appeal out of time in an intended appeal from the judgment and decree of the High Court of Kenya at Kakamega (Tanui J.) dated 2nd February 1994

in

H.C.C.C. NO. 190 OF 1986 (O.S.)

R U L I N G

This is an application for extension of time to file notice and record of appeal out of time. The intended appeal is meant to challenge the judgment of Honourable Mr. Justice B.K. Tanui dated 2nd February, 1994. This is permitted under **Rule 4** of this Court's Rules where the court, which means one member of the bench, can hear the same and consider whether or not to grant it depending on the circumstances of each case.

There are no grounds shown on this application upon which it is based but there is a supporting affidavit deposed to by the applicant which avers that after the decision of the learned Judge delivered on 2nd February 1994 he was aggrieved by it and he instructed his lawyer to lodge an appeal and also instructed him to apply for stay pending appeal; but that after he gave these instructions he fell sick and was bedridden. He was only able to move on 5th December 1996. He travelled to Nairobi on 6th December 1996 and held discussions with his former advocates who advised him that the appeal had not been filed for lack of filing fees. The applicant then instructed present counsel to file the appeal since he was convinced he had a good appeal with high chances of success. He swore this affidavit on 17th December 1996 in support of the present application which the new counsel had signed on 13th December 1996 and which he lodged in this Court on 18th December 1996.

On 24/11/2008 counsel for applicant appeared before me and presented his arguments on the application based on the application and the supporting affidavit. Neither the respondent nor his counsel appeared though served. He referred the court to various documents showing how the appellant went through a period of medication up to sometime 1996. All these averments and submissions this Court has no quarrel with. But there are orders on this record indicating that the respondent is deceased all of which were made in the presence of counsel for the applicant or his representative. Counsel says nothing to disapprove these orders, though they have been the cause of adjournments of the hearing of this

application previously. In the circumstances I will make no formal order thereon and will adjourn it for a fresh hearing date to be fixed at the Registry after it is confirmed that the respondent is or is not deceased and appropriate action taken to substitute him.

Dated and delivered at Kisumu this 28th day of November 2008.

D.K.S. AGANYANYA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR