



**REPUBLIC OF KENYA**  
**HIGH COURT AT KITALE**  
**CIVIL CASE 15 OF 2002**

**MASAI SAKWA & 40 OTHERS ::::::::::::::: PLAINTIFFS**

**VERSUS**

**ALFRED TUMWET & 2 OTHERS ::::::::::::::: DEFENDANT**

**R U L I N G**

This application has been brought by four persons, namely **JANE CHEPTOWAN KITIYO, EDWARD MASAI, JOSEPHINE CHEBASA NGEIYWA, and PATRICK MASANDICH MASAI.**

Each of the applicants is the legal representative of the estate of one or the other of the plaintiffs.

Jane Cheptowan Kitiyo is the legal representative of the estate of the late James Kitiyo Simalwa. Edward Masai is the legal representative of the estate of the late Masai Sakwa. Josephine Chebasa Ngeiwa is the legal representative to the estate of the late Ngeiwa Chesimik. Whilst, Patrick Masandich Masai is the legal representative to the estate of the late Masai Kiboi Masandich.

Each of the applicants seeks the revival of the suit in relation to the estates which they represent. They also ask that after the said respective suits are revived, they should substitute the deceased plaintiffs.

As the circumstances of the applicants are not similar, it is important that due consideration be accorded to each applicant separately.

However, before getting down to the facts of each applicant, I feel that it would be appropriate to first set out the relevant and applicable law.

The starting point is Order 23 rule 8 (2) of the Civil Procedure Rules, pursuant to which the applicants have moved the court. The said rule provides as follows;

***“The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.”***

When dealing with an application brought under that rule, the Hon. G.B.M. Kariuki J. held as follows in **BENJAMIN SIPITALI MUNGWANA VS. NORAH KHAOYA SHEM & ANOTHER, KAKAMEGA HCCC NO. 189 OF 1989.**

***“Certainly, the Applicant cannot be said to have been prevented by a sufficient cause from continuing the suit during the period after the abatement of the suit in August, 2002 to the year 2004 before the Applicant applied for the grant of Letters of Administration for the simple reason that he did nothing to enable him to continue the suit and the reason why he did nothing has not been explained.”***

The learned judge proceeded to dismiss the application for the revival of the suit. That ruling was delivered on 3/11/2005.

In a more recent decision, which was delivered on 10/5/2006, the Hon. Dulu Ag. J. (as he then was), held as follows, in **MARK AKHONYA AMUNZE VS. GOPALBHAI KARSAN PATEL & 3 OTHERS, ELDORET HCCC NO. 52 OF 1999 (O.S.);**

***“ I am afraid, I find that the applicant has not discharged his burden of proving to court, on a balance of probabilities, that there was sufficient cause that prevented him from continuing with the suit, to justify its revival.”***

The applicants before me appear to have been well aware of the need to prove that they had been prevented by sufficient cause from continuing with the suit before the same abated, as that was one of the grounds upon which the application is founded.

The 1<sup>st</sup> applicant, Jane Cheptowan Kitiyo disclosed in her affidavit that she had been appointed as an administrator to the estate of the late James Kitiyo Simalwa on 18/8/2003.

From the grant exhibited by the applicant, it is clear that James Kitiyo Simatwa passed away on 6/4/1997.

As the Succession Cause in which the applicant was granted letters of administration is No. 49 of 2002, the defendants submitted that the applicant had failed to explain the delay of 5 years, between the demise of the plaintiff and the application for the grant of letters.

The defendants also submitted that the applicant failed to explain the delay in bringing this application, after she had obtained the letters of administration. That subsequent delay is of 3 years.

A look at the affidavit of the applicant reveals that there had been a disagreement within the family about the person to be appointed as an administrator. If that be the case, then the 1<sup>st</sup> applicant can be deemed to have tendered an explanation which constituted sufficient cause for the period between 6/4/1997 and 18/8/2003.

However, the said applicant had not offered any explanation for the delay in bringing this application, after she had obtained the letters of administration. I will revert to that issue later.

Meanwhile, the 2<sup>nd</sup> applicant, Edward Masai explained that Masai Sakwa died on 1/2/2002. In effect the suit by Masai Sakwa abated on 31/1/2003.

The 2<sup>nd</sup> applicant was granted letters of administration 5/7/2003.

The only delay in respect of the 2<sup>nd</sup> applicant is for the period between 5/7/2003 and 27/10/2006, when he brought this application. As that delay is similar to that on the part of the 1<sup>st</sup> applicant, I will revert to it later.

The 3<sup>rd</sup> applicant, Josephine Chebasa Ngeiwa disclosed that Ngeiwa Chesimik passed away on 22/7/1997. However, the applicant did not explain why she waited until 2005, to apply for letters of administration. In effect, I find that the 3<sup>rd</sup> applicant has failed to demonstrate that she had been prevented by any sufficient cause from continuing with the suit.

The 4<sup>th</sup> Applicant, Patrick Masandich Masai told the court that Masai Kiboi passed away on 22/6/2005. The Applicant applied for letters of administration promptly, and the court issued a limited grant, for the purposes of prosecuting the suit. The said grant was issued on 9/6/2006.

It is true that by the date when the grant was issued to the 4<sup>th</sup> applicant, the suit had not yet abated. However, the applicant has explained that he was unable to prosecute the action before it abated, because of logistical and financial reasons which made it impossible for him to liaise with his advocates.

In my considered opinion, the reason advanced by this applicant is reasonable, and I do hold that it constitutes sufficient cause.

Reverting now to the 3 year delay in the bringing of this application, after the 1<sup>st</sup> and 2<sup>nd</sup> applicants had obtained letters of administration, I find that both applicants did not offer any explanation.

Nonetheless, as the suits in relation to the plaintiffs for whom the 1<sup>st</sup> and 2<sup>nd</sup> applicants have taken out letters, had abated, it mattered little that they had obtained letters. They could still not have taken any steps in the suits, as the suits had abated.

A perusal of the court file reveals that the Defence to this action was only filed on 31/10/2005. Thereafter, the hearing of the case was put-off on several occasions, as the advocate for the defendants had expressed a desire to file a Notice of Preliminary Objection.

As the hearing of the case has not commenced, I hold the considered view, that although a delay of 3 years is ordinarily deemed to be unreasonable, in the exceptional circumstances prevailing in this case, the delay is not prejudicial to the defendants. When I talk of exceptional circumstances, I have in mind the fact that the Defence was only filed on 31/10/2005. To my mind, the period of delay would then only begin to run from that date. Therefore, the period which has not been explained by the 1<sup>st</sup> and 2<sup>nd</sup> applicants is less than one year.

As the subject matter of the suit is land, I hold the view that it would be in the interests of justice to adjudicate on the matter substantively.

In the circumstances, the applications of **JANE CHEPTOWAN KITIYO, EDWARD MASAI** and **PATRICK MASANDICH MASAI** are granted.

In other words the suits relating to James Kitiyo Simatwa, Masai Sakwa and Masai Kiboi Masandich are revived; and the three applicants are to substitute the deceased plaintiffs. The costs of the three applicants shall be in the cause.

However, as regards the application of NGEIYWA CHESIMIK, the same is dismissed. But as the suit of Josephine Chebasa Ngeiywa had already abated, I make no order as to the costs of the application.

Dated and Delivered at Kitale, this 23<sup>rd</sup> day of July, 2007.

**FRED A. OCHIENG.**

**JUDGE.**