



REPUBLIC OF KENYA



**KENYA LAW**  
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**Maasay & another v Konchellah & 2 others (Environmental and Land Originating Summons E005 of 2023) [2024] KEELC 278 (KLR) (23 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 278 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KILGORIS**  
**ENVIROMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2023**  
**EM WASHE, J**  
**JANUARY 23, 2024**

**BETWEEN**

**PETER NDIWA MAASAY ..... 1<sup>ST</sup> APPLICANT**

**RUTH ACHIENG MBOYA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JAMES LATON KONCHELLAH ..... 1<sup>ST</sup> RESPONDENT**

**RODAH TIPIS ..... 2<sup>ND</sup> RESPONDENT**

**JOSIAH KIPKEMOI RUTTOH ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Applicant herein Kakui Lemasho Nawangas (hereinafter referred to as “the Applicant”) who is the Legal Representative of the 1<sup>st</sup> Defendant James Laton Konchellah herein filed a Preliminary Objection dated 11.10.2023 (hereinafter referred to as “the present PO”) against the 1<sup>st</sup> and 2<sup>nd</sup> Applicant’s (hereinafter referred to as “the Respondents”) in the Originating Summons dated 22.03.2023 (hereinafter referred to as “the suit”) on the following grounds; -
  - a. That the Court lacks jurisdiction to hear and determine this matter at it constitutes an estate of a deceased person in LR No.transmara/Kimintet “D”/850,LR No.Transmara/Kimintet “D”/1309 and LR No.Transmara/Kimintet “D”/1310.
  - b. That no claim for adverse possession shall issue against an estate of a deceased person.
  - c. That the 1<sup>st</sup> Respondent was post humorously sued contrary to the provisions of Order 24 of the Civil Procedure Rules, 2010.
  - d. That the suit before this Honourable Court amounts to an abuse of due process and the same ought to be dismissed and/or struck out with costs



2. The present PO was duly served upon the Respondents and thereafter canvassed by way of written submissions.
3. The Applicants filed their submissions on the 06.11.2023 while the Respondents filed theirs on the 17.11.2023.
4. The Honourable Court has perused the present PO together with the submissions by the parties herein and in its considered view, the issues for determination can be summarised as follows; -
  - Issue No.1- Can a claim of adverse possession be instituted after the demise of the registered owner?
  - Issue no.2- Is the present suit an abuse of the court process?
  - Issue no.3- Is the present PO merited?
  - Issue no.4- Who bears the costs of the present PO?
5. The issues for determination having been duly outlined hereinabove, the same will not be discussed hereinbelow.

**Issue No.1- Can a claim of adverse possession be instituted after the demise of the registered owner?**

6. The first issue for determination is whether this Honourable Court has the jurisdiction to entertain a suit for adverse possession against a registered owner who has since passed away.
7. According to the Applicant, the Respondents herein are seeking a claim of adverse possession against the properties known as LR No.Transmara/Kimintet“D”/850, LR Transmara/Kimintet“D”/1309 and LR No.Transmara/Kimintet “D”/1310 .
8. According to the Applicant, the property known as LR No.Transmara/Kimintet “D”/850 was registered in the name of the Late James Laton Konchellah who died on the 30.05.2021.
9. Consequently therefore, upon the demise of the registered owner James Laton Konchellah, the property known as LR No.Transmara/Kimintet “D”/850 became part of the estate of the deceased and no claim for adverse possession can be instituted against the deceased registered owner.
10. The Applicant further relied upon the provisions of Order 24 of the Civil Procedure Rules, 2010.
11. On the other hand, the Respondents submitted that the person sued in the present suit was a lawful administrator of the Estate of James Laton Konchellah.
12. According to the Respondents, the Applicant had obtained a Letter of Limited Grant Ad Litem on the 23.02.2022 through the proceedings known as Kilgoris P& A Cause No. E003 of 2022.
13. Consequently therefore, the Applicant was indeed legally authorised to act on behalf of the Estate of James Laton Konchellah including being sued and/or sued on behalf of the said Estate.
14. The Respondents also relied on the provisions of Section 2(1) of the Law Reform Act which in their view allowed any cause of action to survive upon the demise of any party.
15. First and foremost, what are the guiding principles that any Court of law should consider when dealing with a Preliminary Objection.



16. In the celebrated case of *Mukbisa Biscuit Manufacturing Co. Limited v westend Distributors Limited* (1969) EA,696 a preliminary Objection was described as follows; -

“ a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”

17. According to the Originating Summons dated 22.08.2023 and the subsequent Replying Affidavit by the Applicant dated 11.10.2023, there are certain facts which have been ascertained.

18. The first fact which is not in dispute is that the property known as LR No.Transmara/Kimintet “D”/850 is registered in the name of James Laton Konchellah.

19. The second fact which is not disputed is that the registered owner James Laton Konchellah died on the 30.05.2021.

20. The third fact not in dispute is that the property known as LR No.Transmara/Kimintet “D”/850 was still registered in the name of James Laton Konchellah on the 22.08.2023 when the Originating Summons by the Respondents was filed in Court.

21. The fourth issue is that the Applicant is the holder of a Limited Grant Ad Litem issued on the 23.02.2022 under the proceedings known as Kilgoris P&A Cause No.E003 of 2022.

22. The issue for determination at this point in time is whether the 1<sup>st</sup> Defendant was alive or had passed away on the 22.08.2023 when this suit was filed before this Honourable Court.

23. For avoidance of doubt, the heading of the Originating Summons dated 22.08.2023 is as follows; -

Republic of Kenya

In the Environment & Land Court

at Kilgoris

In The Matter Of The Limitation Of Actions Act

and

In the Matter of Land Parcels Reference No.transmara/kimintet “D”/850,1309,1310.

Between

Peter Ndiwa Maasay.....1<sup>st</sup> Plaintiff

Ruth Achieng Mboya.....2<sup>nd</sup> Plaintiff

versus

James Laton Konchellah.....1<sup>st</sup> Defendant

Rodah Tipis.....2<sup>nd</sup> Defendant



Josiah Kipkemoi Ruttoh.....3<sup>rd</sup> Defendant

24. The 1<sup>st</sup> Defendant herein James Laton Konchellah is identified as the registered owner of the property known as LR No.Transmara/Kimintet “D”/850 as on 22.08.2023 when this suit was filed.
25. On the other hand, the Applicant submits that on the 22.08.2023 when this suit was filed, the said James Laton Konchellah who is the 1<sup>st</sup> Defendant was already died.
26. The Applicant has presented a Death Certificate issued on the 16.06.2021 confirming that the James Laton Konchellah had indeed passed away on the 30.05.2021.
27. Clearly therefore, the 1<sup>st</sup> Defendant known as James Laton Konchellah was indeed deceased as at 22.08.2023 when the present Originating Summons were filed by the Respondents.
28. The Applicant herein has presented a number of authorities on this issue which this Honourable Court fully associates with and has nothing more useful to add.
29. In essence therefore, the Respondents herein filed a suit against one James Laton Konchellah who was dead on the August 22, 2023 and therefore the proceedings against James Laton Konchellah are a nullity from inception.

**Issue No.2- Is the present suit an abuse of the court process?**

30. The second issue for determination is whether or not this suit is an abuse of the Court process.
31. According to the determination in Issue No.1, the Respondents herein filed the present suit against the late James Laton Konchellah yet he was already deceased.
32. Such a suit is therefore an abuse of the Court process and can not be entertained as such proceedings are a nullity.

**Issue No.3- Is the present po merited?**

33. The Applicant having successfully demonstrated that the Respondents suit is an abuse of the court process as well as a nullity, then the present PO succeeds.

**Issue No.4- Who bears the costs of the present PO?**

34. Costs usually follow the event and in this present PO, the Applicant is awarded the costs of the present PO as well as the Originating Summons dated 22.08.2023.

**Conclusion**

35. In conclusion therefore, this Honourable Court hereby makes the following Orders in determination of the Preliminary Objection dated 11.10.2023; -
  - a. The premilinary objection dated 11.10.2023 is merited.
  - b. The suit as against the 1<sup>st</sup> defendant james laton konchellah and the property known as LR No.Transmara/Kimintet “d”/850 be and is hereby struck out from the substantive originating summons dated 22.08.2023.
  - c. The plaintiffs/respondents will meet the costs awarded to the applicant both in the present preliminary objection dated 11.10.2023 as well as the originating summons dated 22.08.2023.



**DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 23<sup>RD</sup> OF JANUARY 2024.**

**EMMANUEL.M.WASHE**

**JUDGE**

In the presence of:-

Court Assistant: Mr. Leken

Advocates for the Applicant: Mr. Nyambati for 1<sup>st</sup> Respondent/Applicant

Advocates for the 1<sup>st</sup> Respondent: Mr. Kiprotich for the 4<sup>th</sup> Respondent

Mr. Ogari for the Plaintiff

