



**Mulwa v Kimuyu (Environment & Land Miscellaneous Case
E006 of 2024) [2025] KEELC 3510 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3510 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND MISCELLANEOUS CASE E006 OF 2024**

A KANIARU, J

APRIL 30, 2025

BETWEEN

ALPHONCE KALI MULWA PLAINTIFF

AND

WILLIAM MATOLO KIMUYU DEFENDANT

RULING

1. By a motion on notice dated 30.5.2024 filed in court on even date, the defendant – William Matolo Kimuyu – wishes that the suit filed by the respondent – Alphonce Kali Mulwa – in the lower court, Kitui, as CMC ELC Case No. 66 of 2018, be transferred to this court for trial and determination. The motion is expressed to be brought under Order 51 of Civil Procedure Rules, Sections 1A, 1B, and 18 of the *Civil Procedure Act*, Articles 50 and 159 (2, (d) of *the Constitution* of Kenya and all enabling provisions of the law. But the prayer for transfer of the suit is not the only one. There are others. In a more specific way, the prayers sought are as follows:

Prayer 1: Spent.

Prayer 2: That this honourable court be pleased to withdraw, CMC ELC Case No. 66 of 2018, from Kitui Chief Magistrate’s Court and transfer it to the Kitui Environment and Land Court – High Court for hearing and adjudication.

Prayer 3: That the plaint, defence and counter-claim filed by the parties herein be duly considered and adjudicated upon by the Environment and Land Court – High Court – Kitui.

Prayer 4: That any proceedings or directions in the Chief Magistrate’s Court regarding this matter be stayed pending the transfer and subsequent proceedings at the Environment and Land Court – High Court.



Prayer 5: That costs of the application be in the suit.

2. The motion is premised on the grounds, inter alia, that the lower court matter is a dispute over ownership of a portion of land which is part of the land known as YATTA B2/KWA VONZA/2, over which both the respondent and the applicant are asserting ownership; that the applicant has filed a defence and counter-claim which is weighty and is based principally on adverse possession; that the lower court lacks jurisdictional competence to handle a case of adverse possession, hence the need to transfer it; that this is the court seized of the requisite jurisdiction; that transferring it would uphold the tenets of substantive justice; and that the respondent stands to suffer no prejudice if the suit is transferred.
3. The motion came with a supporting affidavit which elaborates and emphasizes the grounds advanced.
4. The respondent opposed the application via grounds of opposition dated 9.7.2024. In the response, the respondent stated, inter alia, that a suit filed in a court without jurisdiction is a nullity and there is therefore nothing capable of being transferred; that an order of transfer cannot be made unless the court from which it is being transferred has jurisdiction in the first place; that the applicant has admitted that the lower court from which the matter is being transferred lacks jurisdiction; and that the only recourse available to the applicant is to withdraw his counter-claim in KITUI CM ELC No. 66 of 2018 and file a compliant one in a court seized of jurisdiction.
5. The application was canvassed by way of written submissions. The applicant's submissions are dated 30.9.2024. The applicant started by giving the background to the case. He pointed out that the respondent sued him in the lower court claiming ownership of the disputed land. He responded by filing a defence and a counter-claim as his ownership of the disputed land predates that of the applicant. The counter-claim is based on adverse possession and the lower court is bereft of jurisdiction to handle it.
6. According to the applicant, the issues to be addressed relate to whether the lower court has jurisdiction to handle matters involving adverse possession; whether this court can exercise its supervisory power to transfer such suit; and whether the transfer is necessary to ensure equitable and just resolution of the dispute in line with the tenets of substantive justice.
7. On the issue of adverse possession, or more specifically the jurisdictional gamut of the lower court regarding the issue, the applicant submitted that the lower court is without jurisdiction. According to the applicant, there is complexity inherent in the claim of adverse possession often touching on intricate land ownership issues which calls for expertise that the lower court does not have. To reinforce the position taken on the issue, the cases of Kibutiri –vs- Ruiru Farm Ltd & Another [2007] eKLR, Nairobi City Council –vs- Thabiti Enterprises Ltd [2016] eKLR, and Njoki Wainaina –vs- Josphat Githachuri & 3 others; National Land Commission & Another (interested parties) [2021] eKLR were cited and quoted as deemed necessary.
8. As to whether this court can transfer the matter, it was submitted that it can and for this position, Sections 128 and 150 of the *Land Act*, Section 13 (2) of the *Environment and Land Court Act*, Articles 162 (2) (b) and 165 (6) and 7, of *the Constitution* of Kenya, 2010, and Section 18 of the *Civil Procedure Act*, among others, were cited. Also cited was the case of Equity Bank Limited –vs- Bruce Mutie Mutuku T/A Diani Tour Travel [2016] eKLR. All this was done to make the point that this court can invoke its supervisory jurisdiction and exercise its authority to transfer the lower court matter to itself in order that it can determine the applicant's counter claim.
9. The final issue relates to whether the transfer sought will ensure just and equitable resolution of the dispute in order to serve the interests of substantive justice. The position taken by the applicant is that



the transfer will precisely serve that purpose. The decided cases of Mutanga Tea & Coffee Company Ltd. –vs- Shikara Limited & Another [2015] eKLR, and East African Court of Appeal in Kagenyi – vs Musiramo & Another [1968] EA 43 were cited to drive the point home.

10. The respondent’s submissions are dated 16.10.2024. The respondent quoted Section 18 of the [Civil Procedure Act](#) (Cap 21), which is the statutory anchor that forms the basis of transfers. That section is clear that transfer of suits is the exclusive preserve of the High Court and/or courts of equal status. The respondent pointed out that the party wishing to have any matter transferred has the burden of justifying the transfer. Various cases, among them, Gaikia Kimani Kiarie –vs- Peter Kimani Kiramba [2020] eKLR, Kithita Ngeana –vs- Mwaniki Kisume [2018] eKLR, Alcot Wiz Trading Co. Ltd & 2 others –vs- John (K) Ltd [2023] eKLR Abraham Mwangi Wamigwi –vs- Simon Mbiriri Wanjiku & Another [2012] eKLR, Boniface Waweru Mbiyu –vs- Mary Njeri & Another [2005] eKLR and Wamathu Gichoya –vs- Mary Wainoi Magu [2015] eKLR were cited and quoted at length as deemed appropriate.
11. Running through the cases, is a discernible position that the onus is on the one applying for transfer to make out a strong case justifying the transfer (See Gaikia Kimani’s case (supra) while quoting the Ugandan case of David Kabungu –vs- Zaikaragu & 4 others, HCC No. 36 of 1995, Kampala) and that usually, the factors to consider include the balance of convenience, questions of expense, interests of justice and possibilities of hardship, among others (See for instance the Kithita Ngeana’s case (supra) while quoting David Kabungu’s case (supra)).
12. The respondent submitted further that the power to transfer cases under Section 18 of the [Civil Procedure Act](#) is only applicable to cases filed in courts that have the requisite jurisdiction to handle them. What is sought to be transferred in the matter at hand is said to be a matter filed in a court without jurisdiction. The respondent in this regard placed reliance on Alcott Wiz case (supra) and Gaikia Kimani’s case (supra). Further back-up was supplied by citing and quoting the case of Abraham Mwangi Wamuregi’s case (supra), Boniface Waweru’s case (supra) and Wamathu Gichoya’s case (supra).
13. Ultimately, this court was asked to dismiss the applicant’s application.
14. I have considered the application, the grounds of opposition filed in response, and the rival submissions. I will start by saying that jurisdiction is what confers on the court the authority to entertain a dispute. This was clearly spelt out by the Supreme Court in the case of Kamau Macharia & Another –vs- Kenya Commercial Bank Limited & 2 others [2012] eKLR where the court delivered itself thus:

“A court’s jurisdiction flows from either [the Constitution](#) or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by [the Constitution](#) or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law.”
15. The applicant cited the case of Equity Bank Limited –vs- Bruce Mutie Mutuku T/A Diani Tour Travel [2016] eKLR to underscore the importance of jurisdiction. He then made the point, purportedly relying on that authority, that the Superior court should intervene to transfer matters filed in court without jurisdiction to courts “with the requisite jurisdiction.”
16. In my view, the applicant is wrong and his reliance on the case is misguided. Here is a relevant observation by the Court of Appeal in that same case:

“In numerous decided cases, courts, including this court, have held that it would be illegal for the High Court in exercise of it’s powers under Section 18 of the [Civil Procedure Act](#) to



transfer suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent suit would be to muddle up the waters and allow confusion to reign...”

From all this, it is clear that Equity Bank’s case (supra) cannot be authority for the proposition that cases filed in court without jurisdiction can be transferred to courts with jurisdiction. To use the words of the court in the case, allowing it “would be to muddle up the waters and allow confusion to reign...”

17. The proposition taken in Equity Bank’s case (supra) is in harmony with Boniface’s Waweru’s case (supra) and Wamathu Gichoya case (supra) cited by the respondents. It is the same position that emerges in Abraham Wamuigwi’s case (supra).
18. I think it is now clear that the position taken by the respondent is the correct one in law. To reinforce it further, there is the case of Phoenix of E.A. Assurance Company Limited –vs- S. M. Thiga t/a Nespaper Service [2019] eKLR where the Court of Appeal observed:

“We are not persuaded that the proposition by the respondent is correct in law. Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction.”

This point is very well made by the respondent in his submissions. It is the correct position in law.

19. It is clear therefore that the correct position in law is as stated by the respondent. The applicant filed a case of adverse possession in the lower court knowing well that the lower court has no jurisdiction to handle it. He now wants this court to transfer the matter to itself and try it. The law does not allow what the applicant is asking for.
20. It is notable that in this ruling, I have largely concentrated on the prayer for transfer, which is actually the main prayer in the application. I have done so because the other crucial prayers, which in essence are prayers 3, 4 and 5, are dependent upon the outcome of the prayer for transfer. It is now abundantly clear that the prayer for transfer cannot be allowed. I hereby reject it. Consequently, the entire application fails and I hereby dismiss it with costs to the respondent.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT KITUI THIS 30TH DAY OF APRIL, 2025.

In the presence of;

Mungata for Applicant

Kamwendwa for Respondent

Court Assistant - Musyoki

A. KANIARU

JUDGE- ENVIRONMENT & LAND COURT, KITUI

30/04/2025

