



**Helmann v Mbogo & another (Environment & Land Case
60 of 2014) [2025] KEELC 3458 (KLR) (25 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3458 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 60 OF 2014**

**LL NAIKUNI, J
APRIL 25, 2025**

BETWEEN

WALTER ALOYS HELMANN PLAINTIFF

AND

JACQUELINE WAWIRA MBOGO 1ST DEFENDANT

EMILY KARENDI MBOGO 2ND DEFENDANT

RULING

I. Introduction

1. This Honorable Court is tasked on making the determination of the Notice of Motion applications dated 14th November, 2024. It was instituted by Jacqueline Wawira Mbogo and Emily Karendi Mbogo, the 1st and 2nd Defendants. Additionally, there was also another Notice of Motion application dated 18th November, 2024 filed by Walter Aloys Hellmann, the Plaintiff herein.
2. Upon service of the application, parties filed their replies accordingly. The Honourable Court shall be dealing with them at a later stage of this Ruling. Although the Honourable Court will deal with the applications distinctly and separately, but simultaneously deliver an omnibus Ruling.

II. The 1st and 2nd Defendants' case

3. The 1st & 2nd Defendants was premised on Articles 40, 159 (2) (d) of the *Constitution* of Kenya, 2010, Sections 1A, 1B, 3A and 18 of the *Civil Procedure Act*, Cap. 21, Section 19 of the Environment and *Land Act*, No. 19 of 2011, and all other enabling provisions of the Law. The Defendants sought the following orders:-
 - a. Spent.



- b. That upon Hearing this Application inter-parties, this Honorable Court be pleased to transfer this suit pending trial before it to Maua Chief Magistrates' Court for Hearing and disposal.
 - c. That this Honorable Court be pleased to issue any further or better orders in the interest of justice.
 - d. That the costs of this Application be provided for.
4. The application by the Applicant herein was premised on the grounds, testimonial facts and averments made out under the 18 Paragraphed Supporting Affidavit of – Emily Karende Mbogo, the 2nd Defendant/ Applicant herein sworn and dated on the same day as the Application with two (2) annexures marked “EKM - 1a to 1b” annexed hereto. The Applicant averred that:-
- a. This suit involved the ownership, title and occupation of a suit property known as Kiegoi/ Kinyanka/1993 which was located within Igembe South, the County of Meru.(Annexed here to and marked as “EKM- 1a and EKM-1b” were copies of title deed and copy of Green Card dated 9th May, 2012 and 28th February, 2016 respectively in proof of this fact).
 - b. Neither the Defendants nor the Plaintiff resided at Mombasa County. As a matter of fact, the 1st Defendant resided in Germany since the year 2005 whereas the 2nd Defendant resided within the County of Meru as well.
 - c. The Defendants never carried out any businesses within Mombasa County.
 - d. Since re-opening of this case, the deponent had filed her joint defence with her Co – Applicant where she had disputed the territorial jurisdiction of this Court.
 - e. Most of the Defendants’ witnesses hail from Meru County, including the 1st Defendant’s elderly mother, Mary Irima who resided at Meru County on the suit property.
 - f. It would be extremely difficult and costly to avail all the defendants’ witnesses at Mombasa for Hearing.
 - g. The defendants were desirous of having the court visit the locus in quo to prepare a ground visit report on its occupancy and its developments thereon and the same would be extremely difficult and costly if it were to be done by the Deputy Registrar, Mombasa ELC Court.
 - h. This Honorable Court lacked territorial jurisdiction over the subject property.
 - i. It was just, mete and expedient to transfer this suit to Maua Chief Magistrates’ court for Hearing and disposal as the property was worth less than a sum of Kenya Shillings Twenty Million (KShs. 20,000,000/-) or if at all a superior court, the Meru ELC which court had supervisory jurisdiction over Maua Chief Magistrates’ court and not his Honourable Court.
 - j. The transfer of the file to the subordinate court would help this court in dispensing justice fairly, effectively and efficiently at a reasonable cost to respective parties.
 - k. For context the suit property known as Kiegoi/ Kinyanka/1993 was barely one kilometer away from Maua Chief Magistrates’ Court.
 - l. Courts of law were duty bound to ensure hearing and disposal of cases in a manner that is cost effective to all parties.
 - m. It would be extremely expensive and unaffordable to the Deponent to facilitate her witnesses to Mombasa County for hearing and disposal of this matter.



- n. She was the duly registered owner of the property prior to changes to the register that had been made as a result of the now set aside default ex – parte judgment and she therefore ought to be afforded a fair chance to defend her title to the property.
- o. Two of her key witness, including the former owner, one David Nyaga and the current occupier/licensee of the property (Mary Irima) were fairly aged and could not travel over 600 km for hearing of the case, which would otherwise end up locking them out from participating in the hearing.
- p. The deponent also desired for the court to visit the locus in quo prior to the defense case to ascertain developments and occupations and the same can only be affordable to his co – applicant and herself if done by a court near the suit property in this case Maua Chief Magistrates’ Court or Meru ELC Court exercising supervisory jurisdiction over Maua Chief Magistrates’ Court.
- q. It would be in the interest of justice that this Application be allowed as prayed.
- r. This court has the inherent powers to make orders as it deems appropriate in order to facilitate just, efficient, cost effective disposal of disputes between the parties.
- s. It was just, mete and in the interest of justice that this Application be allowed as prayed.
- t. No prejudice would be suffered by the Respondent if the Application is allowed as he is neither a resident of Mombasa nor a citizen of Kenya and in any case, he was the sole witness in support of his case.

III. The Response by the Plaintiff/Respondent to the Notice of Motion application dated 14th November, 2024

- 5. The Plaintiff/Respondent opposed the application dated 14th November, 2024 through a 15th Paragraphed affidavit sworn by the WALTER ALOYS HELLMANN, the Plaintiff himself on 26th November, 2024. He averred that:-
 - a. Paragraphs 1 and 2 were denied and the Defendants/Applicants.
 - b. Paragraphs 3, 4, 5, 7 and 8 are denied and the Defendants/Applicants. The Plaintiff filed the suit after the 1st Defendant/Affidavit fraudulently transferred the suit property to the 2nd Defendant/Applicant when our marriage ended. The transfer was calculated to defeat any claims for matrimonial property rights. The nature of the prayers sought in the Plaint are declaratory orders for which the geographical location of the suit property was/is not a material factor.
 - c. This Honourable Court had unlimited original jurisdiction to hear and determine the issues raised in the suit.
 - d. The Plaintiff met and married the 1st Defendant/Applicant in Mombasa and to his knowledge her last primary resident in Kenya was in Mombasa.
 - e. Paragraphs 6, 8, 9 and 10 were denied and the Defendants/Applicants are put to strict proof. If at all the alleged witnesses are resident in Meru as alleged then any alleged hardship in physical attendance can be alleviated by way of virtual court proceedings.



- f. Paragraph 11 was denied and the Defendants/ Applicants were put to strict proof. All parties had been afforded an opportunity to present their evidence and witness by this Honourable Court.
- g. Paragraph 13 was denied and the Defendants/ Applicants were put to strict proof. The issue before the Honourable Court was not a boundary dispute to necessitate a site visit on the suit property.
- h. Paragraph 14 was denied and the Defendants/Applicants were put to strict proof. The application was an afterthought and has been filed to delay the hearing of the suit. This suit was filed in 2014 and the hearing date for 20th November 2024 was confirmed on 9th July 2024. The Defendants/Applicants had been making piecemeal applications for one reason or the other which applications had only delayed the conclusion of the matter.
- i. In response to Paragraph, this Honourable Court's powers should not be abused to enable any further delays in this matter and it would be fair and just for all parties for this matter to be heard on merits by this Honourable Court.
- j. Paragraphs 16, 17 and 18 were denied and the Defendants/ Applicants were put to strict proof.
- k. The Application was an afterthought and an abuse of the court process and ought to be struck out with costs.
- l. The Replying affidavit is made in response to and to oppose the Notice of Motion dated 14th November, 2024.

IV. The Notice of Motion dated 18th November, 2024 by the Plaintiff

- 6. The Notice of Application dated 18th November, 2024 by the Plaintiff was premised on the provision of Articles 40 & 159 (2) (d) of the Constitution of Kenya, 2010; Sections 1A, 1B, 3A of the Civil Procedure Act, Cap. 21; Order 51 of the Civil Procedure Rules, 2010, and all other enabling provisions of the Law.
- 7. The Plaintiff sought the following orders:-
 - i. That the Honourable Court be pleased to grant orders to compel the bank Manager Co - Operative Bank Meru Branch supply the Plaintiff/Applicant with certified bank statements for account number 0112024148400.
 - ii. That the costs of this Application to be in the cause.
- 8. The application by the Applicant herein was premised on the grounds, testimonial facts and averments made out under the 10 Paragraphed Supporting Affidavit of – Walter Aloys Hellmann, the Plaintiff/ Applicant herein sworn and dated on the same day as the Application with two (2) annexures marked “AH - 1” annexed hereto. The Applicant averred that:-
 - i. The deponent operated a bank account no. 0112024148400 at Co-operative Bank Meru Branch.
 - ii. There were transactions concerning the suit property that were made on/ from that bank Account.
 - iii. The Deponent had made an effort to obtain the bank statements but the bank had been unresponsive and he was apprehensive that unless compelled, the delay from the bank may



prejudice his case as he would be denied evidence. Annexed in the affidavit and marked as “WAH – 1” as a bundle were copies of the letter dated 12th July 2024, cheque leaves, the bank’s email dated 23rd July 2024 and his email dated 24th July 2024.

- iv. The Plaintiff required the bank statements as part of his evidence at trial and would be prejudiced should the bank statements not be availed.
- v. There was no prejudice to be suffered by the Defendants/Respondents should the orders sought to be granted as they will have opportunity to cross-examine the evidence at trial.
- vi. The Honourable Court had unfettered discretion to grant the prayers sought to meet the needs of justice.
- vii. Should the orders not be granted as prayed he would stand to suffer irreparable harm by not having his evidence to rely on at trial.
- viii. It was in the interest of substantive justice that the Honourable Court exercised its unfettered discretion to grant the orders sought ex parte.

V. The Response to the Notice of Motion application dated 18th November, 2024

9. The Defendant/Respondent opposed the application dated 18th November, 2024 through a 15th paragraphed affidavit sworn by the Emily Karendi Mbogo, the 2nd Defendant herein on 26th November, 2024 where she averred that:-
 - a. The Application dated 18th November 2024 was devoid of any merit, scandalous, vexatious and an abuse of court process and an attempt to pull the court into the sphere of disputing parties and did not contain a genuine attempt of invoking this court’s discretionary powers on discovery of documents. She challenged the Applicant to strict proof of all the grounds on the face of the Application and facts contained in paragraphs 2-9 of his supporting affidavit.
 - b. For starters, the Plaintiff despite seeking an order against Co-operative Bank of Kenya had not joined the aforesaid Bank as a party to the Application. Issuing an order against the Bank without affording the bank a chance to be heard would amount to condemning the bank unheard.
 - c. A court of law could not issue orders in vain. In this case, the applicant sought account statement for an alleged account operated in the years 2005 - 2008 i.e. to say over 16 years ago since the account fell dormant.
 - d. Any orders for the bank to provide statements ought not to be made unless there was confirmation that the records are available; a confirmation that the Applicant had not provided to the court.
 - e. The maximum amount of time that a Kenyan bank was under an obligation to keep records was a period of seven (7) years only. (Attached in the affidavit and marked was the CBK’s Circular No. 13 of 2023 issued on 8th November 2023 in proof of this fact).
 - f. The request as made was vague as it did not specify the timelines of the account statement needed. She verily believed that the Applicant was only desirous of engaging the court and the bank on a fishing expedition without any specificity of the transactions in question.



- g. A request for discovery must be specific and not general. In this case, the Applicant was requesting for the bank to provide statements of all his entire account transactions without any specificity.
- h. As a matter of fact, from the Applicants own annexures, the Applicant failed to provide to the bank any specificities in regards to the transactions requested by him. The Applicant had no specific transaction that was in dispute but an attempt to engage the court tilted the balance of equality of parties in litigation in his favour.
- i. The Plaintiff had made the request for discovery over 10 years after allegedly filing his case and the same is an afterthought.
- j. The Plaintiff's suit was largely on fraud allegedly committed between the 1st defendant and herself (as the land was currently in her name) and had nothing to do with any bank transactions in his account as alleged or at all and no proper basis has been laid on the face of the Application to draw a nexus between the bank transactions and his registration as an owner of the property.
- k. The Deponent prayed that the Application be dismissed with costs to him as the same was devoid of any merit.

VI. Submissions

- 10. While all the parties were present in Court, they were directed to have the two (2) Notice of Motion applications dated 14th November, 2024 and 18th November, 2024 respectively be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and on the Honourable Court reserved to deliver its Ruling on notice accordingly. Eventually, it was delivered on 25th April, 2025.

A. The Written Submissions of by the Plaintiff to the Notice of Motion application dated 14th November, 2024

- 11. The Plaintiff through the office of Messrs. Mwashushe & Company Advocates filed their written submissions dated 16th January, 2025. M/s. Mwashushe Advocate commenced the submissions by stating that the Defendants/Applicants filed the Notice of Motion application dated 14th November 2024 seeking orders to transfer the suit to Maua Chief Magistrates Court. The Plaintiff/Respondent opposed the application through the Plaintiff's Replying Affidavit dated 26th November 2024. The parties were directed to file submissions to dispose of the application. On behalf of the Plaintiff/Respondent, the Learned Counsel submitted that as follows:
- 12. On the issue arising for determination were whether or not the suit should be transferred as prayed for and who should bear the costs of the application.
- 13. On the issue of whether the suit should be transferred. The Learned Counsel submitted that this Honourable Court was established under Article 162 (2) (b), Constitution 2010 and Sections 4 and 13 of the *Environment and Land Court Act*, No. 19 of 2011. The provision of Article 162 (2) (b) of the *Constitution* 2010 provides: -

Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

- (a) employment and labour relations; and



- (b) the environment and the use and occupation of, and title to, land.
14. The provision of Section 4 of the *Environment and Land Court Act* provides: -
- (1) There is established the Environment and Land Court
 - (2) The Court shall be a superior court of record with the status of the High Court.
 - (3) The Court shall have and exercise jurisdiction throughout Kenya.
15. While the provision of Section 13 of the *Environment and Land Court Act* provides: -
- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2)(b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 - (2) In exercise of its jurisdiction under Article 162(2)(b) of the *Constitution*, the Court shall have power to hear and determine disputes-
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.
16. The Complaint, dated 18th March 2014, details the core dispute: a claim for matrimonial property interest in the suit property, which, until the plaintiff filed the divorce suit, was registered in the 1st Defendant's name and fraudulently transferred to the 2nd Defendant to defeat the Plaintiff's matrimonial property claim. The divorce was finalized by the decree absolute dated 23rd January 2018, after the present suit had been filed. The Plaintiff/Respondent had also filed Mombasa Matrimonial Property Case O.S. No. 9 of 2023 pending before the Family Court. The orders sought in this suit were merely to preserve the suit property pending the determination on whether or not the Plaintiff/Respondent had a matrimonial property interest in the suit property.
17. At the time of filing the suit, an action for declaration of rights in a matrimonial property under the provision of Section 17 of the *Matrimonial Property Act*, 2014 could be made to any Court. This suit was filed on 20th March 2014. The *Matrimonial Property Act* commenced on 19th January 2016. The Matrimonial Property Rules, 2022 commenced on 29th July 2022. This means that at the time of filing this suit, the Plaintiff/Respondent was pursuing a matrimonial property claim and under the existing legal framework as of 20th March 2014, the *Matrimonial Property Act*, 2014 did not specify which Court had jurisdiction to hear and determine such claims.
18. The Learned Counsel submitted that Hon. Justice Nyamweya in the case of: - "Jane Wambui Ngeru – Versus - Timothy Mwangi Ngeru [2015] eKLR" held:-

“No particular Court is identified by the Act, and can therefore be any Court that has been given jurisdiction to hear matrimonial disputes. The High Court is in this regard granted



original and unlimited jurisdiction in civil matters by the Constitution under Article 165(3). The Marriage Act of 2014 in addition provides that the courts that will hear matrimonial causes arising under the Act are resident magistrate's courts and within the limits provided under the law as to their jurisdiction. It is thus the current legal position that concurrent jurisdiction is given to various courts to hear disputes relating to matrimonial property rights including this Court. The only limitation applicable to this Court is that it can only hear such disputes if they involve or relate to land.”

19. The Learned Counsel averred that as of the year 2014, the suit was properly filed before this Court. The legal framework was later remedied by Rule 6 of the Matrimonial Property Rules, 2022 which established the High Court as the Court with jurisdiction to hear matrimonial property claims. They hasten to add that the only limit conferred by Rule 6 of the Matrimonial Property Rules, 2022 is pecuniary on the value of the property, there are no limitations on geographical/territorial jurisdiction. They further added that the Defendants/Applicants' attempted to challenge the territorial jurisdiction of the Mombasa Family Court (Mombasa Matrimonial Property Case O.S. No. 9 of 2023) was dismissed. The present application was therefore a second bite at the cherry and an abuse of the court process.
20. The Learned Counsel humbly opined that the Defendants/ Applicants' argument that the provision of Section 12 of the Civil Procedure Act, cap. 21 should be applied was improper. This Honourable Court derived its jurisdiction from the provision of Article 162 (2) of the Constitution, 2010. Statutory provisions could not override constitutional provisions. Other reasons cited to justify the transfer were not tenable. On travelling costs for witnesses, this could be mitigated by virtual court proceedings which were now a conventional practice. On the intended site visit, the same was unnecessary. This was not a boundary dispute to necessitate a site visit by the Court. Further, this was an afterthought tailored to fit the Defendants' argument for a transfer and had not been raised by the Defendants in their pleadings or for pre-trial considerations by the Court.
21. According to the Learned Counsel, if at all the suit was to be transferred then the suit ought to be transferred to the Mombasa Family Court so that parties could ventilate all issues. They relied on the findings of the Supreme Court of Kenya in the case of: “Adega & 2 others – Versus - Kibos Distillers Limited & 5 others (Petition 3 of 2020) [2020] KESC 36 (KLR)” and “Kangara – Versus - Rock and Pure Limited & 2 others [2024] KEELC 4527 (KLR)”. They prayed that the Honourable Court found that the orders sought are not merited and dismisses the application with costs.
22. On who bore the costs of the Application. The Learned Counsel submitted that the application was not merited. They prayed that the application be dismissed with costs to the Plaintiff/ Respondent.
23. The Learned Counsel relied on the following authorities:-
 - a. “Jane Wambui Ngeru – Versus - Timothy Mwangi Ngeru [2015] eKLR”.
 - b. “Kangara – Versus - Rock and Pure Limited & 2 others [2024]KEELC 4527 (KLR)”
 - c. “Adega & 2 others – Versus - Kibos Distillers Limited & 5 others (Petition 3 of 2020)[2020] KESC 36 (KLR) (Constitutional and Human Rights) (4 August 2020)(Ruling)”.
24. In conclusion, the Learned Counsel submitted that the application was not merited and they prayed that this Honourable Court dismissed the application dated 18th November, 2024in its entirety, with costs to the Plaintiff.



B. The Written Submissions of the Defendant on both the Notices of Motion dated 14th and 18th November, 2024

25. The Defendants through the Law firm of Messrs. Njindo Matiba & Co. Advocates, filed their written submission dated 30th November, 2024. Mr. Matiba Advocate commenced his submissions by stating that before the Court there were two Applications by the Parties to the dispute. The 1st Application by the Defendants' dated 14th November 2024 seeks for orders of transfer of this suit for trial before Maua Chief Magistrates' court or the Meru ELC. The grounds of the Application are as enunciated on the face of Application and as contained in the supporting Affidavit sworn by the 2nd Defendant/Applicant together with its annexures. The Defendants' Application had been opposed by the response filed vide a replying affidavit sworn by the Plaintiff sworn on 26th November, 2024.
26. Contemporaneously, the Plaintiff also filed his own Application dated 18th November 2024 where the Plaintiff sought for an order that the court does compel the bank manager-Co-operative Bank-Meru Branch to supply the Plaintiff/Applicant with certified bank statements for Account No. 0112024148400. The Defendants filed a Replying Affidavit dated 26th November 2024 in answer and opposition to the Application for compelling production by a third party filed by the Plaintiff. On 20th November, 2024, the Learned Counsel submitted that this Honorable Court gave directions that both Applications be disposed of together by way of written submissions. These submissions are filed in compliance with the aforesaid court directions.
27. The brief background, according to the Learned Counsel the genesis of both Applications is quite the opposite. On one side, it is undeniable that the Plaintiff instituted this suit in the year 2014. Thereafter, he prosecuted this suit ex-parte without ever indicating that he needed the bank statements from Cooperative-Meru Branch and got a Judgment based on his evidence. Since the year 2014 to sometimes on 18th November, 2024, the Plaintiff had never indicated that he needs an order for discovery and or compelling production of documents by a third party in order to prove his case i.e. to say for over 10 years.
28. On the other hand, the Defendants were only allowed to defend this claim sometimes in July 2024. Once the matter was slated for compliance with Pre-Trial Directions after the case was re-opened, the Defendants challenged the territorial jurisdiction of this court to hear and determine this suit vide the statement of defence filed on their behalf and further filed this instant application seeking transfer of the suit to Maua Chief Magistrates' Court or Meru ELC Court.
29. The Learned Counsel relied on the following issues for determination:-
- a. Whether the Application for transfer of the suit by the defendants is merited.
 - b. Whether the Application for compelling production and/or discovery by the Plaintiff is merited.
 - c. Who should pay the costs of these two Applications
30. On whether the Application for transfer of the suit by the Defendants is merited. The Learned Counsel submitted that the provision of Section 18 of the *Civil Procedure Act*, Cap. 21 provides that the High Court shall have the powers on the application of either of the parties, and or on its own motion with notice to such parties to:-
- a. To transfer any suit, appeal or proceedings pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same;



- b. Withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter try or dispose of the same; or transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or retransfer the same for trial or disposal to the court from which it was withdrawn.
31. The provision of Section 13(1) of the *Environment and Land Court Act* gives the ELC court both original and appellate jurisdiction to deal with all disputes relating to the provision of Article 162(2) of the *Constitution* that relate to land and environment. These disputes include disputes relating to use of, occupation of and title to land. The court, having equal status as the High court has the requisite jurisdiction to hear this Application for withdraw and transfer of this ELC Suit pending before it, under Section 18 (a) of the *Civil Procedure Act*, from it to MAUA CHIEF MAGISTRATES' COURT or in the alternative to Meru ELC Court.
32. On whether the suit should be transferred the Learned Counsel submitted that Section 12 of the *Civil Procedure Act*, Cap. 21 provides for the place of instituting a suit. The Section provides as follows: -
Subject to the pecuniary or other limitations prescribed by any law, suits-
- (a) for the recovery of immovable property, with or without rent or profits;
 - (b) for the partition of immovable property;
 - (c) for the foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property;
 - (d) for the determination of any other right to or interest in immovable property;
 - (e) for compensation for wrong to immovable property
 - (f)
- where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate: Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business, or personally works for gain.
33. According to the Learned Counsel, vide the Plaintiff's own admission in his Replying Affidavit, he averred that he filed the suit before Mombasa ELC Court because that was the place where he met the 1st Defendant before allegedly marrying her back in the year 2004. The Plaintiff did not deny the fact that the 1st Defendant at the time of instituting the suit in the year 2014 used to reside at Germany. Further, neither did he deny that the 2nd Defendant was not a resident at Mombasa nor deny that indeed the suit land is located within Meru County, and within a stone throw distance from Maua Chief Magistrates' Court. They submitted that the official searches and copy of the title deed annexed to the supporting affidavit to the Application clearly showed that the property was located at Meru. It was their humble submission that a blanket denial of facts contained in the supporting affidavit was not enough to dislodge the truthfulness of those facts. Accordingly, it was the Learned Counsel's submission that the Defendants were able to prove that indeed neither them nor the land was located at Mombasa. There was no justification howsoever to file the case at Mombasa County unless with ulterior motive.



34. Further, the provisions of Section 12 of *Civil Procedure Act* were couched on mandatory terms. The Plaintiff was mandated to institute the suit within the local limits of whose jurisdiction the property was situate or where the Defendants reside or work for gain. Whereas and undoubtedly so, this court has jurisdiction to hear and determine Environment and land suits under Article 162(2) of the *Constitution* throughout Kenya, such hearing and trial before it ought to be done in a manner that is cost effective to parties including the defendants. The Defendants indicated that their witnesses were based at Meru. These witnesses, include, the previous owner of the property before it was registered in the name of the 1st Defendant, the current occupier of the property, the contractor who constructed the property standing on the suit property and contractors who installed electricity on the suit property.
35. In addition, the provision of Order 47 Rule 6 (2) of the Civil Procedure Rules, 2010, provides that the Court may on its own motion or on application by either party and for cause shown order that a case be tried in a particular place to be appointed by the court: Provided always that in appointing such particular place for trial, the court shall have regard to the convenience of the parties and of their witnesses and to the date on which such trial was to take place, and all the other circumstances of the case.
36. The Learned Counsel relied on the provision of Sections 1A, 1B,3A of the *Civil Procedure Act*, being the oxygen principles were meant for the attainment of justice between parties who come to court. In “Omar Dhadho – Versus - Mohamed Masoud & another [2019]eKLR”, Justice C.K. Yano at Mombasa held thus: -
- “The court is therefore under statutory obligation while interpreting the provisions of the Act or exercising the powers conferred upon it thereunder to give effect to the overriding objective and in order to attain this objective, the court must strive towards ensuring the efficient disposal of the business of the court, the efficient use of the available judicial and administrative resources and the timely disposal of the proceedings at a cost affordably the respective parties To achieve this, the court is entitled, where it deems appropriate, to direct that a matter filed in one place be heard by the same court sitting at a different place. The decision whether or not to order transfer depends largely on the facts and the circumstances of a particular case. The Plaintiff’s argument that although Malindi may be near, it is more expensive does in my view not hold water. In my view, no good reason has been given why the suit was filed in Mombasa and not in Malindi.”
37. In the present circumstances, the Learned Counsel further argued that there was no cogent reason given why the suit was filed in Mombasa and not in Meru, a distant of over 600 KM between the two Counties. As a matter of fact and from grounds on the face of the Application, the Applicants urged the court to either transfer the file to Maua Chief Magistrate Court or Meru ELC Court due to prohibitive costs and the convenience where a visit to locus is necessary as they propose. Section 12 as read with Section 15 of the *Civil Procedure Act* thus provided that a suit be either filed where the defendant reside or work for gain at the time of institution of suit or where the suit property is situated. None of these conditions have been met by the Plaintiff. Allowing the suit to proceed before this court would fly against the need to ensure suits are conducted effectively and at a cost affordable by the respective parties
38. The Learned Counsel went further to state that the Plaintiff had not denied that it would be expensive to facilitate the witnesses to Mombasa for Hearing. In his reply, he averred that online hearing would cushion the defendants of such costs. Whereas, the suggestion is noble, the Plaintiff ought not to dictate how the defendants wish to conduct their defence. They urged the court to take judicial notice of the fact that a trial involves the court observing the non-verbal cues of witness in determining their



credibility among other tools available to court. This could only be properly done where the witnesses are subjected to physical attendance, as had become the norm even in light of the technological advancement.

39. The Learned Counsel stated that vide Gazette Notice No. 5178 of 25th July, 2014, the then Chief Justice of Kenya, Willy Mutunga gave practice directions on institution of suits before the ELC Court as follows: -

“ 14. All new cases relating to the environment and the use and occupation of and title to land not falling under paragraph 8 above shall be filed in the nearest Environment and Land Court for hearing and determination by the said court and must be within the purview of the jurisdiction conferred upon the Environment and Land Court with particular regard to the jurisdictional limitations set under Article 162(2) (b) of the Constitution and Section 13 of the Environment and Land Court Act No. 19,2011.

15. Where a matter has been wrongly filed at the Environment and Land Court Registry, the practice directions notably:-Practice Directions Relating to the Filing of Suits, Applications and References in Proper Court(Gazette Notice No.1756/2009)shall apply, and the matter shall be directed for filing in the appropriate court(s) in tandem with those practice directions.”

40. The aforesaid practice directions were framed in mandatory terms. The same was to ensure comity of practice before the ELC Court as provided for by Section 12 and 15 of the Civil Procedure Act. They submitted that the provision of Article 162(2)(a) of the Constitution must be read conjunctively with other enabling provisions of the law and the practice directions including Gazette Notice No. 5178 of 2014 (referred above) issued by the Chief Justice to allow for smooth handling of the cases at a reasonable cost to parties.

41. Clearly according to the Learned Counsel, this suit was filed in the wrong court or registry. The practice directions provide for a remedy to such a scenario under practice direction No. 15 by inter alia for transfer of the case and the same to be filed in the correct court. We urge the court to invoke its inherent powers and order that the matter be transferred to either Maua Chief Magistrates' court as the property was valued under a sum of Kenya Shillings twenty Million (Kshs. 20, 000, 000/=) or Meru ELC Court, being the nearest ELC Court pursuant to practice directions No. 14 of Gazette Notice No. 5178 of 2014 on practice before the ELC COURT for hearing and determination being the ELC Court within the local limits of the suit property.

42. According to the Learned Counsel while discussion the position of territorial jurisdiction in our laws and the place of suing as provided for in the Kenyan laws, the Court of Appeal in the case of:- “Allan Fwamba Malilo – Versus - Tai Construction Company Limited” held as follows: -

“We do not agree with Mr. Murunga that the issue of territorial jurisdiction of a court can be treated as a procedural technicality that it ought to be discarded by our courts. The Civil Procedure Act contains elaborate details regarding the place of suing. These provisions should not be disregarded, otherwise untold hardship and injustice may be occasioned to litigants by way of suits being filed indiscriminately before any court.”

43. The Learned Counsel submitted that this Honorable Court to be persuaded by the Defendants submissions that this suit was not filed in the nearest ELC Suit to the Suit Property and accordingly orders the same to be transferred to the nearest ELC Court as per the guiding practice directions of



this court. In doing so, they urged the court to find the Application by the Defendants' meritorious and allow the same as prayed.

44. On whether the Application seeking to compel production of documents by a third party by the Plaintiff was merited. The Learned Counsel argued that the Application by the Plaintiff was premised under Articles 40 and 50 of the *Constitution* and the oxygen principles. The Plaintiff has not brought himself within the purview of Order 11 on discovery and or production of documents by the opposite party in his Application. Discovery was a tool of assisting the court in properly determining the disputes between parties. The provision of Order 11 Rule 3(2)(d) of the Civil Procedure Rules, 2010 provides that a court may make orders for discovery or inspection as may be appropriate to the case. In the case of:- "Nyanza Management Limited & another – Versus - National Bank of Kenya Limited & 3 others (Commercial Case 68 of 2018)[2023]", Aburili J while dismissing a similar Application held that discovery should be limited solely to matters in contention and matters which are relevant; which relevance is to be gauged by pleadings or particulars provided. The court went further to posit that discovery was only intended at aiding a party access documents to his case that are solely in the custody of the opposite party in order to level the litigation ground between parties and that the process of discovery should not be used as a fishing expedition. A court should also not be used by a party to help such a party gather evidence against the other party in an adversarial system such as theirs.
45. The Defendants strongly opposed the Application through the Replying Affidavit dated 26th November 2024 sworn by the 2nd Defendant. In summary, the 2nd Defendant urged this court to find that the Application was grossly incompetent as the Plaintiff had not pleaded with any specificity what he was seeking from the honorable court. It is trite law that parties are bound by their own pleadings and the Plaintiff could only be given what he sought. In this instance, they submitted that the Application by the Plaintiff was too broad to allow the Defendants discern whether the Plaintiff was making an application for discovery or one to compel production of certain documents, namely a bank statement by a third party.
46. According to the Learned Counsel bank statements were secondary evidence. They were meant to support primary evidence produced by a party to a dispute. In this case, the Plaintiff sought to compel the bank to provide it with the necessary secondary evidence to support its case. The Plaintiff had not indicated what primary evidence he wished to reinforce with the bank statement. In addition, the Plaintiff indicated that he operated the bank account between the year 2005 and the year 2008. There was no indication what specific year was of interest to Plaintiff so as to enable the order to compel the bank to produce statement be more specific and not too broad. It was their submission that allowing such an application with such a wide range of years would only involve the court in a fishing expedition with the hope of getting some evidence from the aforesaid account.
47. Secondly, the Plaintiff in his Application only stated of suffering prejudice if the account statements are not availed. This is not enough. The Plaintiff had the burden of demonstrating, which he had not, how his alleged bank account was related with his cause of action allegedly based on fraud that happened in the year 2012 when he alleges the 1st Defendant transferred the suit property to the 2nd Defendant. As a matter of fact and from his own admissions, the alleged account seized being active in the year 2008. How then did it involve a land transaction that only happened, as per his own pleadings and documents in the year 2012, that was to say, a period of over 4 years later. This could not be the case. They urged the court to find no relationship at all between the bank statements of an account that went dormant in the year 2008 and the transfer of the suit property that happened in the year 2012. As was stated in "Nyanza Management Limited & another – Versus - National Bank of Kenya Limited (supra)", an Applicant must show the relevance of the documents sought to his pleadings



to bring himself within the provisions of Section 22 of the Civil Procedure Act. The Plaintiff had not demonstrated the relevance of his application to compel production and his pleadings.

48. Thirdly, whereas the Application for production may be made by any party, the Plaintiff sought documents from a third party but failed to serve the bank with the Application. The Counsel submitted that the application of this nature ought to be served upon the party from whom such information was being sought. This was so, to avoid issuance of orders that may be difficult to enforce for various reasons. For instance, it was noteworthy that the account fell dormant in the year 2008 i.e. to say over 16 years. The Central Bank of Kenya that regulated banks, such as Co - Operative bank only mandated banks to keep customer records including all transactions for a minimum period of 7 years (See annexure marked as “EKM – I” to the Replying Affidavit sworn by Emily Karendi). There was no guarantee that beyond the 7 year statutory period the aforesaid bank kept the bank statements. Further, there was no confirmation of the existence of the information or the fact that the bank is just unreasonably withholding such information.
49. The Learned Counsel asserted that issuing compelling orders against the Bank without first confirming the existence of the bank account with the bank may fly right against the principles of natural justice. This was so because if orders sought were issued without the bank being heard, and it so happened the account statements were unavailable, the bank’s agent, including manager - Meru Branch may be liable for contempt of court orders. They submitted that the right procedure would have been to serve co-operative bank with the Application so as the bank could have a chance to respond on the critical aspect of availability of documents. The fact that the bank was not served rendered this Application void.
50. Lastly, it was worth noting that the Plaintiff initially prosecuted his case ex-parte before this court without indicating to court that he at any time needed the orders now currently being sought. There is no evidence since the year 2014 that he at any given point needed court assistance to that effect or an indication whether he had ever issued a notice to produce to any party pursuant to the provisions of Section 68 as read with Section 69 of the Evidence Act. There are no grounds on the Application why he has suddenly changed tune and now desires to have the alleged account statements availed by the bank. They submitted therefore that the Application had been made as an afterthought and only meant to invite the court to a fishing expedition for evidence in support of his case, an invitation that they urged the court to resist. Consequently, they submitted that the Application by the Defendant was devoid of merit and the same be dismissed with costs to the Plaintiffs.
51. On who should cater for the costs of the Application, the Learned Counsel submitted that both applications had been opposed. Where a successful party succeeded in his/ her claim, costs out to ordinarily follow the event unless otherwise ordered by Court, in its absolute discretion and vice versa. They prayed that the Plaintiff shoulders the costs of both applications.
52. In conclusion the Learned Counsel submitted that judicious exercise of judicial authority is the corner stone of our justice system. Both parties sought the exercise of the inherent and discretionary powers of the court prior to the Hearing of the Suit. They urged the court to be guided by the provisions of the Article 159 of the Constitution and deliver itself in a manner that promotes just, expeditious, proportionate and accessible resolution of disputes between parties. Such accessibility involves cost effectiveness of any dispute resolution mechanism.

C. The Written Submissions by the Plaintiff to the Notice of Motion application dated 18th November, 2024.

53. The Plaintiff, through the office of Messrs. Mwashushe & Company Advocates filed their written submissions dated 16th January, 2025. M/s. Mwashushe Advocate commenced the submissions by



stating that the Plaintiff/Applicant filed the Notice of Motion dated 18th November 2024 seeking orders to compel the bank manager Co-operative Bank Meru Branch to supply the Plaintiff/Applicant with certified bank statements for account number 0112024148400. The application was supported by the Supporting Affidavit dated 18th November 2024 sworn by the Plaintiff/Applicant and the annexures therein. The Defendants opposed the application through the Replying Affidavit sworn by the 2nd Defendant on 26th November, 2024. The parties were directed to file submissions to dispose of the application. On behalf of the Plaintiff/Applicant, they submitted as follows:

54. On the issues for determination the Learned Counsel relied on the issue of whether or not the application should be granted to allow the release of the bank statement and who should bear the costs of the application. On the 1st issue the Learned Counsel submitted that it is trite law that he who alleges must prove (Section 107 Evidence Act). The provision of Section 22 of the Civil Procedure Act grants authority to this Honourable Court to make such orders as may be necessary or reasonable relating to the discovery and production of documents producible as evidence. The provision of Order 18 Rule 2 of the Civil Procedure Rules, 2010 required parties to state their case and produce evidence in support of the issues which they are bound to prove.
55. In the Plaint dated 18th March 2014, the Plaintiff/Applicant claimed that he purchased the suit property with his funds, but the suit property was registered in trust to the 1st Defendant/Respondent, who upon the breakdown of the marriage, fraudulently transferred it to the 2nd Defendant/Respondent to sidestep the Plaintiff's matrimonial interest in the suit property. It was therefore essential for the Plaintiff to produce evidence of the purchase and/or any other payments for the acquisition and development of the suit property. The bank statements would not only constitute the Plaintiff/Applicant's evidence of the acquisition and development of the suit property; it would be a grave injustice for the Plaintiff/Applicant to be denied an opportunity to ventilate his claim against the Defendants fully.
56. Further, the evidence would also assist the Honourable Court in making a just determination of the issues in the suit. They humbly submitted that the Court ought to crave to have all evidence availed to it. In the annexure marked as "WAH - 1" the Plaintiff/Applicant had proved that he is/was an account holder at the bank. The Plaintiff/Applicant's efforts to have the statements released had not been successful hence the application for the Court's intervention. The Application was precise. Prayer 1 sought the bank statements for the account stated therein. This account was operational for about three (3) years from the time the suit property was purchased, to its development. The Plaintiff/Applicant sought all the statements for that account.
57. The Defendants/Respondents would not suffer prejudice if the bank statements are released. They would have an opportunity to cross-examine the bank statements at trial. Further, the Defendants, in paragraph 13 of their Statement of Defence dated 11th July 2024, have demanded that original documents be produced; they could not oppose the Plaintiff/Applicant's efforts to obtain them at the same time. The Learned Counsel also acquiesced that there was also no prejudice to be suffered by the bank should the orders be issued. All the bank was required to do was comply and release the statement or report to the Court on the reasons for non-compliance, if any. By the letters served upon the bank and email communication, the bank was aware that the Plaintiff/Applicant was seeking the bank statements. If the statements did not exist, nothing could be easier than the bank indicating the same to the Plaintiff/Applicant.
58. Contrary to the averments in the 2nd Defendant's Replying Affidavit, the contents of annexure and marked as "EKM - 1" were an advisory on anti-money laundering and countering terrorism funding. That context was irrelevant to the present application. The Plaintiff/ Applicant had a right to a fair



trial and that included his right to present his evidence for the Court's determination. They prayed that the Honourable Court found that the orders sought are merited and allows the application.

59. On who should bear the costs of the Application. The Learned Counsel argued that the Application was merited and the evidence sought would enable the Court to reach a just determination, they prayed that the application be allowed with costs to the Applicant.
60. In conclusion, the Learned Counsel submitted that the application was merited and they prayed that this Honourable Court allowed the application dated 18th November, 2024 in its entirety with costs to the Plaintiff/Applicant.

VII. Analysis & Determination.

61. I have carefully read and considered the Notices of Motion applications dated 14th November, 2024 and 18th November, 2024 by the Defendants and Plaintiff respectively, the submissions and the myriad of cases cited herein by parties, the relevant provisions of the Constitution of Kenya, 2010 and statutes.
62. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
 - a. Whether Honourable Court can grant the orders of transfer of this suit to Maua Chief Magistrate Court or the Meru Environment and Land Court as sought in the Notice of Motion application dated 14th November, 2024 and whether this Honourable Court has the jurisdiction to hear and determine this suit to its conclusion.
 - b. Whether if (a) is in the affirmative if this Court has the jurisdiction to determine the Notice of Motion Application dated 18th November, 2024
 - c. Who will bear the Costs of Notices of Motion applications dated 14th November, 2024 and 18th November, 2024.

Issue No. a). Whether Honourable Court can grant the orders of transfer of this suit to Maua Chief Magistrate Court or the Meru Environment and Land Court as sought in the Notice of Motion application dated 14th November, 2024 and whether this Honourable Court has the jurisdiction to hear and determine this suit to its conclusion

63. Under this Sub heading, the Honourable Court now wishes to apply the able legal principles, the first issue for determination under this subtitle is jurisdiction. Jurisdiction means a courts power to decide case or issue a decree. In Kenya, the Environment and Land Court is a statutory creation by the Constitution of Kenya under the provision of Article 162 (b). Here, the Courts are vested it with original and unlimited jurisdiction. From the preamble of the ELC Act, the jurisdiction of the court is defined as

“.....a Superior court to hear and determine disputes relating to the environment and the use and occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes.....”

64. Under the provision of Sections 4 and 13 (1) of the Environment Land court Act this court has the legal mandate to hear any matter related to environment and land including the one filed by the Plaintiffs hereof. In the case of the ELC (Malindi) in the case of:- “Kharisa Kyango – Versus - Law Society of



Kenya (2014) eKLR”. Further, in the now famous case of “Owners of Motor Vessel “Lilian S” – Versus - Caltex Oil (Kenya) Limited (1989) IKLR” dealt with a court, jurisdiction thus:-

“Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given”.

16. Additionally, still on the same point, in the case of “County Government of Migori – Versus - I N B Management IT Consultant Limited (2019) eKLR” whereby court being faced with an objection regarding jurisdiction, analyzed the law and observed as follows:-

10 The jurisdiction point raised by the Respondent herein clearly meets the foregone criteria being a pure point of law. That jurisdiction is everything is a well settled principle in law. My Lordship Ibrahim, JSC in Supreme court of Kenya Civil application No 11 of 2016-“Hon (Lady) Justice Kalpana H Rawal Versus Judicial Service Commission and others when in demystifying jurisdiction quoted from the decision in Supreme court of Nigeria supreme case No 11 of 2012- “Ocheja Immanuel Dangama – Versus - Hon. Atoi Aidoko Aliaswan and 4 others where Walter Samuel Nkanu Onnoghen, JSC and expressed himself as follows;-

.....it is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity deed on arrival and of no legal effect whatever that is why an issue of jurisdiction is granted and fundamental in adjudication and has to be dealt with first and foremost.....”

65. In the instant case, the Plaintiff pursues inter alia through a Plaint dated 18th March 2014, details the core dispute: a claim for matrimonial property interest in the suit property, which, until the Plaintiff filed the divorce suit, was registered in the 1st Defendant’s name and fraudulently transferred to the 2nd Defendant to defeat the Plaintiff’s matrimonial property claim. The divorce was finalized by the decree absolute dated 23rd January 2018, after the present suit had been filed. The Plaintiff/Respondent had also filed Mombasa Matrimonial Property Case O.S. No. 9 of 2023 pending before the Family Court. The orders sought in this suit were merely to preserve the suit property pending the determination on whether or not the Plaintiff/Respondent had a matrimonial property interest in the suit property.



66. According to the Plaintiff at the time of filing the suit, an action for declaration of rights in a matrimonial property under Section 17 of the *Matrimonial Property Act*, 2014 could be made to any Court. This suit was filed on 20th March 2014. The *Matrimonial Property Act* commenced on 19th January 2016. The Matrimonial Property Rules, 2022 commenced on 29th July 2022. This means that at the time of filing this suit, the Plaintiff/Respondent was pursuing a matrimonial property claim and under the existing legal framework as of 20th March 2014, the *Matrimonial Property Act*, 2014 did not specify which Court had jurisdiction to hear and determine such claims.
67. The Defendants on the other hand contend that the Plaintiff did not deny the fact that the 1st Defendant at the time of instituting the suit in the year 2014 used to reside at Germany. Further, neither did he deny that the 2nd Defendant was not a resident at Mombasa nor deny that indeed the suit land is located within Meru County, and within a stone throw distance from Maua Chief Magistrates' Court. They submitted that the official searches and copy of the title deed annexed to the supporting affidavit to the Application clearly showed that the property was located at Meru. It was their humble submission that a blanket denial of facts contained in the supporting affidavit was not enough to dislodge the truthfulness of those facts.
68. A suit property, in relation to Matrimonial property is defined by the provision of Section 6 (1)(c) of the *Matrimonial Property Act*, 2015 as
 “any other immovable and movable property jointly owned and acquired during the subsistence of the marriage”.
69. The determination as to whether or not the suit property is matrimonial does not oust the jurisdiction of this court. In the case of “BWM – Versus - JMC (2018) eKLR” it was held
 “For avoidance of doubt, the court notes that the *Matrimonial Property Act* does not define the court that disputes relating to the matrimonial property disputes should be referred for determination. It is this the current legal position that concurrent jurisdiction is given to various courts to hear disputes relating to matrimonial property rights including this court. The only limitation applicable to this court is that it can only hear such disputes if they involve or relate to occupation, use, and title to land. I find nothing to oust the jurisdiction of this court and I proceed to determine the Preliminary Objection.”
70. It is trite law and the provision of under Section 15 of the *Civil Procedure Act* states that suits should be instituted where the Defendant (s) resides or where the cause of action arose. The suit property known as Kiegoi/ Kinyanka/ 1993 is located in Meru County which falls under the jurisdiction of the ELC Meru. The provision of Section 13 of the *Civil Procedure Act*, Cap. 21 provides that:
 “Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different courts, the suit may be instituted in any court within the local limits of whose jurisdiction any portion of the property is situate, provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such court.”
71. I have examined the annexures as provided by the parties and this Court is satisfied the said property is located in Meru County therefore the most suitable Court vested with the jurisdiction to hear and determine it would be a court in Meru. Having determined as much then does this Honourable Court have the power to transfer a suit to another jurisdiction?



72. The provision of Section 18 (1) (b) of the *Civil Procedure Act* gives the High Court powers to withdraw and transfer suit instituted in the subordinate court.

“On the application of any parties and after notice of the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage

- (b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter-
 - (i) try or dispose of the same; or
 - (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - (iii) retransfer the same for trial or disposal to the court which it was withdrawn.”

73. Hon J.N. Mulwa J observed as much in “Julius Lekuruito & another – Versus - Nottingham Mwangi & another (2018) eKLR” in which the court held:-

“Subject to the pecuniary or other limitations prescribed by any law, suits—

- (a) ...
- (b) ...
- (c) ...
- (d) for the determination of any other right to or interest in immovable property;
- (e) ...
- (f) ...

where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate:”

74. In the case of “David Kabungu – Versus - Zikarenga and 4 others Kampala HCCS No. 36 of the 1995” Okello J, held that;

“Section 18 (1)(b) of the *Civil Procedure Act* gives the Court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo motto by the Court without application by any party. The burden lies on the applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another Court is not sufficient ground though it is a relevant consideration. As a general rule, the Court should not interfere unless expense and difficulties of the trial would be so great as to lead to injustice. What the Court has to consider is whether the applicant has made out a case to justify it in closing the doors of the Court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction...It is well established principle of law that the onus is upon the party applying for a case to be transferred from one Court to another for due trial to make out a strong case to the satisfaction of the Court that the application ought to be granted. There are also authorities that the principal matters to be taken into consideration are, balance of convenience, questions of expense, interest of



justice and possibilities of undue hardship, and if the Court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused... Want of jurisdiction of the Court from which the transfer is sought is no ground for ordering transfer because where the Court from which transfer is sought has no jurisdiction to try the case transfer would be refused”

75. Besides the above guidelines which have equally been highlighted in various judicial precedents, Courts are further required to consider the real motive or character for transfer of a case from one Court to another. In the instant case, the Applicant is relying on the ground inter alia; lack of territorial jurisdiction.
76. Under the provision of Sections 17 and 18 of the *Civil Procedure Act*, Cap. 21 upon an application by a party, or on its own motion, the High Court may transfer the suit to another subordinate Court with territorial jurisdiction, when justice of the case demands such action. It is also instructive that if no objection as to place of suing is raised in the subordinate Court in the first instance, it cannot be raised on appeal unless there has been a consequent failure of justice – Section 16.
77. In the case of “Hangzhou Agrochemicals Industries Ltd. – Versus - Panda flowers Ltd [2012] eKLR” the Court held: -

“In my view, which view I gather from authorities and from the law, the Court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and marinating witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. If the Court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case”.
78. Luckily, both parties agree that the suit is located in Meru County. Sections 1A and 1B of the *Civil Procedure Act*, Cap. 21 implores the courts to ensure and facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. In furtherance of the overriding objectives, the courts are mandated to among others, ensure the just determination of proceedings, efficient disposal of business of the court, the efficient use of available judicial and administrative resources and the timely disposal of proceedings at a cost affordable by the litigants.
79. I therefore see no reason why parties should spend money, time and resources traveling to Mombasa from Meru while they can be heard before the Magistrates Court in Maua where the pecuniary amount of the suit is determined to be less than a sum of Kenya Shillings Twenty Million (Kshs 20,000,000/-) and where the suit property being contended is in Meru; if the court finds itself in a need to visit the property being that in land matters it is crucial to access the situation on the ground then it will be an embarrassment to the whole system having to move a court all the way to Meru County whereas there are Environment and Land Courts in that County.
80. In the end the Honourable Court finds in favour of the Defendants and finds the Notice of Motion application dated 14th November, 2024 merited and therefore allow the same entirely.



Issue No. b). Whether if (a) is in the affirmative if this Court has the jurisdiction to determine the Notice of Motion Application dated 18th November, 2024 by the Plaintiff

81. Under this sub title the Honourable Court is called upon to examine the Notice of Motion application dated 18th November, 2024 and its merit after its jurisdiction has been ousted. Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If the suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction upon itself. On this point I seek refuge from the Court of Appeal decisions of “Civil Appeal No. 6 – Phoenix East Africa Assurance Co. Limited – Versus – S.M Thuga T/A Newspaper Services” and “Macfoy – Versus United Co. Limited (1961) 3 ALL ER 1169” where the court stated inter alia:-

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so.....”

82. As already examined and determined above, the suit ought to be filed in Maua Chief Magistrates’ Court or where the suit value has been proved to exceed a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/-) then the same should be filed in the Environment and Land Court Meru. The only Court to grant the orders sought from the application is the Chief Magistrate’s Court.

83. Therefore, based on the foregoing reasoning, I am left with no alternative but to strike out the Notice of Motion application dated 18th November, 2024 with costs to the Defendants. The Plaintiff is at liberty to file the same afresh in the correct forum.

Issue No. c). Who will bear the Costs of Notices of Motion applications dated 14th November, 2024 and 18th November, 2024.

84. It is now well established that the issue of costs is discretionary of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to means:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

85. The proviso of Section 27 of the *Civil Procedure Act*, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”



86. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise. See the decisions of Supreme Court “*Jasbir Rai Singh – Versus - Tarchalan Singh*” eKLR (2014) and “*Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited*, (2014) eKLR”.
87. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.
88. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In “*Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited* [2014] eKLR” the court noted that;
- “The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”
89. In this case, as this Honourable Court is of the opinion that the Defendants shall have the costs of the Notices of Motion application dated 14th November, 2024 and 18th November, 2024.

VIII. Conclusion & Disposition

90. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below order:-
- a. That the Notice of Motion application dated 14th November, 2024 be and is hereby found to have merit and the same is allowed entirely with costs.
 - b. That the Notice of Motion application dated 18th November, 2024 be and is hereby struck out with costs for lack of jurisdiction.
 - c. That this Honorable Court do and hereby issues an order for the Deputy Registrar ELC Mombasa to immediately cause the transfer of this suit pending trial before Maua Chief Magistrates’ Court for its hearing, determination and subsequent disposal.
 - d. That the matter to be mentioned before the Chief Magistrate, Maua on 29th May, 2025 for directions on how to dispose off this matter.
 - e. That the Defendants shall have the costs of the Notices of Motion dated 14th November, 2024 and 18th November, 2024 to be paid by the Plaintiff.



It is so ordered accordingly.

**RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT
MOMBASA THIS 25TH DAY OF APRIL 2025.**

.....

**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT
AT MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Kalekye, the Court Assistant.
- b. M/s. Mwashushe Advocate for the Plaintiff/Respondent
- c. No Appearance for the Defendants/Applicants

HON. LL NAIKUINI (ELC JUDGE)

