



Biwott & another v Amin; Tanui (Interested Party) (Miscellaneous Application E004 of 2025) [2025] KEELC 3391 (KLR) (24 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3391 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
MISCELLANEOUS APPLICATION E004 OF 2025**

CK YANO, J

APRIL 24, 2025

BETWEEN

ZENDERA KIPLAGAT BIWOTT 1ST APPLICANT

MARGARET JEMUTAI KANGOGO 2ND APPLICANT

AND

KANIKA NITIN AMIN RESPONDENT

AND

WILLIAM KEMEI TANUI INTERESTED PARTY

RULING

1. This is a ruling in respect of the Applicants' Notice of motion dated 17th January, 2025 seeking for orders that: -
 1. Spent.
 2. Spent.
 3. Spent.
 4. The suit currently before the Chief Magistrate's court at Eldoret being Eldoret MCELC No. E012 of 2023 (O.S) is hereby transferred to this honourable Court for hearing and determination of the suit.
 5. Costs of the Application is granted to the Applicants.
2. The Application is based on the grounds on the face of the Motion and the 1st Applicant's supporting affidavit sworn on 17th January, 2025. The 1st Applicant states that on 25th January, 2023, they lodged Eldoret MCELC No. E012 of 2023 (OS) seeking ownership of land parcel No. Eldoret Municipality



Block 12/31 (the suit property) by way of adverse possession. That the suit is still pending before the subordinate court. However, by judgment delivered on 11th October, 2024 in Nairobi Court of Appeal No. E141 of 2022, the Court of Appeal declared that Magistrates Courts have no jurisdiction to determine claims of adverse possession.

3. It is the 1st Applicant's case that although the subordinate court has been divested of jurisdiction, the suit was commenced 2 years before the decision of the Court of Appeal, hence it cannot affect the legality of the commencement of the suit or render it void ab initio. Further, that the Court of Appeal declared that this court has exclusive jurisdiction to entertain matters of adverse possession, hence the need to urgently transfer the matter to this court.
4. The 1st Applicant expressed apprehension that the Respondent and Interested Party might move to have the suit before the subordinate court struck out. It was deponed that the Respondent has trespassed onto the suit property and commenced developments thereon relying on the fact that the subordinate court cannot intervene in lieu of the Court of Appeal decision. That the Applicants need to seek this court's intervention by way of a temporary injunction after the transfer to stop the Respondent's actions.
5. The 1st Applicant also deponed that vide Eldoret ELC No. E028 of 2021 (OS) pending before this court, the Interested Party also claims rights under adverse possession over the suit land. That the transfer sought herein will facilitate a determination on the need to consolidate the two matters to avoid wastage of judicial resources. The 1st Applicant contended that this court has the jurisdiction and inherent power to transfer a matter from the subordinate court, and added that they would suffer irreparably if the orders sought are not granted. Further, that the instant application was filed without inordinate delay.
6. The Application was opposed through the Replying Affidavit sworn on 28th January, 2025 by Anne Halwenge Odwa, the Advocate in conduct of the matter on behalf of the Respondent. She deponed that there is no competent suit before the magistrate's court capable of being transferred to this court. She deponed that the issue of jurisdiction did not arise from the Court of Appeal's decision, but has always been there since the subordinate court lacked pecuniary jurisdiction to handle the claim in the first place. She contended that the instant Motion is a veiled attempt to defeat the defence put forth challenging the competency of Eldoret MC ELC No. E012 of 2023(OS).
7. She further deponed that the court has no jurisdiction to transfer a matter from a court of no jurisdiction to this court. That allowing the claim would amount to legitimising an invalid and incompetent claim and would prejudice the Respondent given the defence already put forth. She asked that the instant application be dismissed with costs to the Respondent.

Submissions:

Applicant's Submissions;

8. The Application was canvassed by way of written submissions. In their submissions dated 20th February, 2025 the Applicants argued the Motion on two issues. The first was whether the magistrate's court had jurisdiction to entertain the matter at the time of its commencement. On this Counsel for the Applicants submitted that the Court of Appeal in Civil Appeal No. 287 of 2016 determined that Magistrate's Courts have jurisdiction to determine land matters according to their pecuniary jurisdiction. In addition, that Section 26 of the ELC Act clothed magistrates gazetted by the Chief Justice with jurisdiction to preside over environment and land matters subject to their pecuniary jurisdiction. Counsel relied on Patrick Ndegwa Munyua vs Benjamin Kiiru Mwangi & Another (2020)



eKLR and Eloto & Another (Suing for themselves and as Administrators of the Estate of Peter Eloto Larai - Deceased) vs Sirite & Another (Environment and Land Originating Summons E001 of 2023) (2024) eKLR.

9. On the allegation that the Magistrate's Court has no pecuniary jurisdiction to entertain the suit, Counsel pointed out that the Respondent had provided no evidence of the value of the suit property to show that the said court lacks pecuniary jurisdiction. Counsel further submitted that no preliminary objection or defence was filed in the Chief Magistrate's Court to challenge its jurisdiction, and he relied on *Re Estate of Mutugi Mbutii (Deceased) (2018) eKLR*. Counsel contended that since the Court of Appeal decision came 2 years after the suit had been commenced, it cannot be applied retrospectively to drive a party away from the seat of justice. He asked this court to find that the Chief Magistrate's Court had jurisdiction to deal with Eldoret MCELC No. E012 of 2023(OS).
10. The Applicants' second issue was whether this court has the power to transfer the suit from the Chief Magistrate's Court to the ELC. Counsel argued that there is no express provision in the Magistrate's Court Act barring subordinate courts from dealing with disputes arising from adverse possession. Counsel argued that prior to the Court of Appeal decision, this court had upheld the jurisdiction of Magistrate's Court to deal with the disputes, and is now duty bound to provide a solution to avoid injustice on innocent parties. Counsel alleged that the parties had a legitimate expectation to access justice in view of the then prevailing interpretation of the law.
11. Counsel for the Applicants cited the inherent power of the court under Sections 1A, 1B and 3A of the *Civil Procedure Act* to transfer matters either horizontally or vertically to avert injustice. Counsel also cited Section 18 thereof granting the High Court power to transfer or withdraw suits to and from subordinate courts. Counsel relied on *Protus Hamisi Wambada & Another vs Eldoret Hospital (2020) eKLR* and the Ugandan case of *National Examination Board, HC Civil Misc. Application No. 18 of 2010*. It was submitted that the Court of Appeal could not have intended its decision to adversely affect matters that were already in court, and that it should thus be appreciated as forward-looking to inform future adverse possession claims. Counsel urged the court to find merit in the Motion and grant the orders sought with costs.

Respondent's Submissions;

12. On the other hand, the Respondent in his submissions dated 24th February, 2025 argued the Motion on one issue, whether the orders sought should issue. Counsel submitted that this court has no jurisdiction to grant the orders sought since there is no competent suit before the Magistrate's Court capable of being transferred. Counsel raised the argument that the Magistrate's Court did not have the pecuniary jurisdiction to entertain the suit before it, which is why the Interested Party filed Eldoret ELC No. E028 of 2021(OS) in this court and not the subordinate court.
13. Consequently, Counsel repeated the allegation that the issue of jurisdiction has always been there and did not arise out of Nairobi Civil Appeal No. E141 of 2022. Counsel for the Respondent submitted that allowing the claim would legitimise an invalid/incompetent claim, which should be disallowed as it would prejudice the Respondent. The Respondents counsel relied on *Phoenix od E.A. Assurance Company Limited vs S.M. Thiga t/a Newspaper Service (2019) eKLR* and *Gaikia Kimani Kiarie vs Peter Kimani Kiramba (2020) eKLR*. Counsel prayed that the application be dismissed with costs to the Respondent.

Analysis and Determination:

14. This Court has carefully read and considered the Application, the rival affidavits and the written submissions and the issues that arise for determination are:-



- i. Whether the Magistrate's Court had jurisdiction to entertain the suit when it was filed;
- ii. Whether this court has the power to transfer the suit from the subordinate court to the ELC; and
- iii. Who shall bear the costs of this suit?

Whether the Magistrate's Court had jurisdiction to entertain the suit when it was commenced

15. The law relating to transfer of suits is very clear. An order for the transfer of a suit from one court to another cannot be made unless the suit was in the first instance commenced in a court which had jurisdiction to try it. If that suit was commenced in a court that had no jurisdiction to entertain the dispute, it would then mean that the said suit is a nullity in law and is incompetent. Consequently, the Court would not have jurisdiction to transfer the matter to any other court.
16. It follows therefore, that the power to transfer a case from the subordinate courts to the High Court and courts of equal status for hearing may only be exercised if the court in which it was commenced is a court vested with competent jurisdiction over the dispute. It is for this reason that there is need to explore whether the Eldoret MCELC No. E012 of 2023 was filed in a court seized with jurisdiction to entertain a claim on adverse possession.
17. In *Macharia & another vs Kenya Commercial Bank Limited & 2 others* (2012) KESC 8 (KLR), the Supreme Court of Kenya held that a Court's jurisdiction flows from either *the Constitution* or legislation or both. Further, that a Court of law can only exercise the jurisdiction conferred to it by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.
18. Article 169(2) of *the Constitution* directed parliament to enact legislation conferring jurisdiction, functions and powers on Magistrate's courts. Consequently, the Magistrates' Court Act was enacted to define the jurisdiction of the various subordinate courts. Under Section 7(3) of the Magistrate's Court Act, the Civil jurisdiction of Magistrates Courts is set out as follows:-
 - (3) A magistrate's court shall have jurisdiction in proceedings of a civil nature concerning any of the following matters under African customary law—
 - (a) land held under customary tenure;
 - (b) marriage, divorce, maintenance or dowry;
 - (c) seduction or pregnancy of an unmarried woman or girl;
 - (d) enticement of, or adultery with a married person;
 - (e) matters affecting status, and in particular the status of widows and children including guardianship, custody, adoption and legitimacy; and
 - (f) intestate succession and administration of intestate estates, so far as they are not governed by any written law.
19. With regards to land matters, under Section 26(3) of the *Environment and Land Court Act*, the Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country. Exercising the authority granted by that provision, the Chief Justice has over time gazetted magistrates to hear land matters.



20. However, Section 26(4) thereof specifically restricts the extent of the jurisdiction that can be exercised by Magistrates' Courts as far as environment and land matters are concerned and provides that:-

- (4) Subject to Article 169(2) of *the Constitution*, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle:-
- (a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and
 - (b) matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the *Magistrates' Courts Act*.

21. The jurisdiction of Magistrates over land disputes is further defined at Section 9(a) of the Magistrates' Court Act as follows: -

9. Claims in employment, labour relations claims, land and environment cases

A magistrate's court shall:-

- (a) in the exercise of the jurisdiction conferred upon it by section 26 of the *Environment and Land Court Act* (Cap. 8D) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to—
 - (i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (ii) compulsory acquisition of land;
 - (iii) land administration and management;
 - (iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (v) environment and land generally;

22. It is evident from the above discourse that there is no express statutory provision vesting the Magistrates' Courts with jurisdiction over claims on adverse possession. That jurisdiction is conferred on the High Court (read ELC) by virtue of Section 38(1) of the *Limitation of Actions Act*, which specifically provides that:-

38. Registration of title to land or easement acquired under Act

- (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

23. Section 13 of the ELC Act gives the ELC original and appellate jurisdiction to hear and determine environment and land disputes in accordance with Article 162(2)(b) of Constitution. For this reason, although the *Limitation of Actions Act* refers to the High Court, the ELC being a court of equal status to the High Court vested with jurisdiction of land disputes, that Jurisdiction then automatically falls on the ELC.



24. Indeed, the Court of Appeal in *Sugawara vs Kiruti* (Sued in her capacity as the administratrix of the Estate of Mutarakwa Kiruti Lepaso alias Mutaragwa Kiruti Lepaso alias Mutaragwa Kiroti Leposo and in her own Capacity) & 3 others [2024] KECA 1417 (KLR), which decision is the subject of this application, held that:-

“In other words, reference is to the “High Court” as the court to which such cases are heard, and given the dictates of *the Constitution* set out above, this should be construed to mean the “Environment and Land Court”, as being the court donated with jurisdiction to hear and determine matters pertaining to adverse possession of land. The effect of this interpretation is that, it is only the Environment and Land Court established under Article 162(2)(b) that is mandated to hear these cases. So that, notwithstanding the expansion of the jurisdiction of environment and land usage to Magistrates Courts, it is distinctive that under section 9(a) of the Magistrates Courts Act, various matters are specified for determination, but claims for adverse possession are not included.”

25. The Court of Appeal reached its conclusion after analysing previous decisions by various courts on this matter. There can be no doubt therefore that the said court was well aware of the prevailing jurisprudence at the time, and that there were matters pending before the magistrates’ courts touching on adverse possession. Nevertheless, it still went ahead to clarify its position as far as the jurisdiction of magistrates’ courts is concerned, through its said decision.

26. I agree with Counsel for the Applicant that the Court of Appeal could not have intended to cause any difficulty or injustice on the parties in any adverse possession dispute pending in court. However, it is clear that the Court of Appeal also wanted to clarify the position on the jurisdiction of magistrates’ courts to avoid a situation where the said courts undertook proceedings and rendered decisions in matters where they have no authority to act. It is well understood that such proceedings and any decision made therein would be invalid, and allowing any court to proceed on a nullity knowing it has no jurisdiction is itself a waste of judicial resources.

27. It goes without saying that the *Limitation of Actions Act* has always been clear with regards to the court in which matters of adverse possession ought to be filed. There is no statute conferring jurisdiction on the Magistrates gazetted by the Chief Justice to entertain adverse possession disputes. It is of no significance that courts have flouted the said provisions and allowed subordinate courts to determine matters of adverse possession contrary to the law. What is clear, is that the Court of Appeal in its decision set out to resolve this mischief by clarifying the law that was already in existence.

28. Evidently, therefore, the Court of Appeal did not divest the Magistrates’ court of jurisdiction to handle adverse possession claims as alleged. What the superior court is saying is that the Magistrates’ court never had such jurisdiction to begin with. The issue of jurisdiction did not thus arise out of the Court of Appeal decision as alleged by the Applicants.

29. As a result, the argument that the decision can only inform future adverse possession cases is misguided. In the celebrated case of *Owners of Motor vessel Lillian ‘S’ vs Caltex Kenya Limited* (1989) KLR, Nyarangi J.A held that:-

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that 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.”

30. In line with the above authority and pursuant to the decision of the Court of Appeal in Nairobi Civil Appeal E141 of 2022, any Magistrates court handling an adverse possession claim ought to down its tools. There can be no retrospective application where matters of jurisdiction are concerned. To hold so would amount to allowing Magistrates’ courts to proceed and hear matters which they had no jurisdiction to entertain, contrary to statute and the doctrine of stare decisis to which Kenyan courts are bound.
31. The Applicants argued that the Magistrates’ Court Act does not expressly bar Magistrates courts from hearing and determining disputes relating to adverse possession. That might be so. However, the fact that the Magistrate’s Court Act does not expressly bar the Magistrate’s Court from handling adverse possession claims does not automatically confer them with jurisdiction to entertain the said disputes. It has been held before that jurisdiction cannot be inferred, and neither can it be conferred to a court through judicial craftsmanship nor based on sympathy.
32. The Applicants also sought to rely on Sections 1A, 1B and 3A of the *Civil Procedure Act*. However, it is trite that lack of jurisdiction cannot be categorised as a procedural technicality, capable of being solved by the application of the overriding objectives. In *Macharia & Another vs Kenya Commercial Bank Limited & 2 others (Supra)*, the Supreme Court was clear that:-

“We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”
33. The bottom-line is that the Chief Magistrates’ court at Eldoret where CMELC No. E012 of 2023 was filed had no jurisdiction to entertain that suit at the time it was commenced.

Whether this court has the power to transfer the suit from the subordinate court to the ELC

34. Having determined the issue of the jurisdiction of the subordinate court, I now turn to the question of whether this court should allow the transfer of suit to the ELC for hearing and determination. On transfer of suits, Section 18(1) of the *Civil Procedure Act* provides that:
 18. Power of High Court to withdraw and transfer case instituted in subordinate court
 - (1) On the application of any of the parties and after notice to 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-
 - (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - (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 from which it was withdrawn.

35. Under Section 18(1) of the *Civil Procedure Act*, this Court may exercise its supervisory jurisdiction, to withdraw or transfer suits for trial and final disposal by itself or other courts subordinate to it. This law also gives the court the general power to transfer suits, which power may be exercised at any stage of the proceedings. A court may do so either on application by a party or suo moto.

36. It is a well-established principle of law that, when the transfer is at the instance of a party then the burden lies on the applicant to make out a strong case for the transfer. In *Equity Bank Limited vs Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR, the Court of Appeal held as follows:

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the *Civil Procedure Act* to transfer a 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 a court to transfer an incompetent suit for want of jurisdiction to a competent Court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where the Court lacks jurisdiction parties cannot even seek refuge under the O2 principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of *the Constitution* to remedy the same...”

37. Some of the matters to be taken into consideration are the 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.

38. Additionally, the power under Section 18 of the *Civil Procedure Act* refers to competent suits filed in courts seized with the requisite jurisdiction to entertain them. The general power of the court to transfer suits under section 18 of the *Civil Procedure Act* cannot therefore be exercised in a matter where the suit was filed in a court without jurisdiction.

39. The Supreme Court case of *Albert Chaurembo Mumba and 7 Others vs Maurice Munyao & 148 Others* (2019) eKLR held that:-

“However, as it was well elucidated in the case of *Kagenyi vs Musiramo & Another* (1968) EALR 43, an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it. It’s therefore irrelevant as parties cannot consent to confer jurisdiction to a Court or tribunal where it is not provided by law.”

40. This court has already determined that the Chief Magistrates’ Court had no jurisdiction to entertain the suit before it. That determination arises not from a newly enacted statute, but from an interpretation of existing statutes by a superior court. For this reason, the only logical conclusion to be made is that the instant application fails to meet the threshold for an order to have the subordinate court case transferred for hearing and determination before the ELC.

41. It was the Applicants’ contention that courts did not dispute the Magistrate’s jurisdiction over claims of adverse possession prior to the Court of Appeal decision. This is however not true. The Court of Appeal in *Nairobi Civil Appeal E141 of 2022* undertook a detailed analysis showing that there



are several decisions in which courts held that subordinate courts had no jurisdiction to entertain adverse possession matters. This court is now duty bound to uphold the current prevailing law and its interpretation thereto by the superior court.

42. The court's duty does not extend to upholding an illegality by legitimising an incompetent suit. Lord Denning in the case of *Macfoy vs United Africa Co Ltd* (1961)3 All ER, 1169 stated that:-

“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. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...”

43. In any event, the matter has not been heard and determined, thus the only action the Magistrate's Court can do is strike it out, leaving the Applicants with the option to file it afresh in the appropriate court for hearing and determination without triggering the doctrine of *res judicata*. In the same breadth, the Applicants are also at liberty to withdraw the suit and file it afresh in this court.

44. The Court of Appeal in the case of *Phoenix of E.A. Assurance Company Limited vs S. M. Thiga t/a Newspaper Service* [2019] eKLR stated that;

“We are not persuaded that that 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. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer Jurisdiction to itself...it is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was nullity ab initio and was not transferable to another court...”

45. For reason that the Applicants seek to transfer the suit on the basis of lack of jurisdiction by the subordinate Court, I hereby find that the Application is not merited. The suit before the Chief Magistrate's Court it is not only an incompetent suit, but also a nullity in law. As a result, there is nothing to transfer. The Applicants have not satisfied this Court that they are entitled to the orders sought.

Orders:

46. Consequently, the application dated 17th January, 2025 is devoid of merit and the same is dismissed with costs to the Respondent.

47. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 24TH DAY OF APRIL, 2025 VIDE MICROSOFT TEAMS.

HON. C. K. YANO

ELC, JUDGE

In the presence of;

Ms. Wahome holding brief for Ms. Odwa for Respondent.

No appearance for the Applicants.



No appearance for the Interested party.

Court Assistant - Laban.

