



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT SIAYA**

**ELC MISC APPLICATION NO. 7 OF 2021**

**JUSTO ODYMAH NGONGA..... APPLICANT**

**VERSUS**

**AMONDI ODYMAH OLUOKO.....RESPONDENT**

**RULING**

**Applicant's case**

1. Within the provisions of **Section 3A, 17 and 18 of the Civil Procedure Act** and **Order 51 of the Civil Procedure Rules**, the applicant by a motion dated 25/02/2021 sought the following main relief;

***a) That the honourable court be pleased to transfer Siaya SPMC ELC No.104 of 2018 Amondi Odyamah vs Justo Odyamah Ngonga to this honourable court for hearing and determination.***

2. The motion is supported by grounds on the face of the motion and a supporting affidavit sworn by the applicant dated 9/3/2021. The main ground proffered is that the lower court does not have jurisdiction to hear and determine a claim of adverse possession which claim, he had raised in his amended defence and counterclaim which was filed on 14/3/2019.

**Respondent's case**

3. The applicant neither put in a response nor filed written submissions. However, even if the motion is unopposed, this court has to determine the motion on its own merits.

**Applicant's submissions**

4. The applicant filed written submissions dated 24/11/2021 in which he contended that the **Section 18 of the Civil Procedure Act** donates powers to this court to transfer a suit from the lower court to this court. He submitted that by virtue of **Section 38 of the Limitation of Actions Act**, the lower court did not have jurisdiction to hear and determine claims of adverse possession.

**Analysis and determination**

5. I have considered the application, the supporting affidavit and written submissions. I have also considered the relevant legal framework and jurisprudence. The single question falling for determination is whether the magistrates court has jurisdiction to hear and determine matters relating to adverse possession.

6. **Section 9(a) of the Magistrate's Court's Act** and **Section 26 of the Environment and Land Court Act** provides that gazetted magistrates have jurisdiction to have hear and determine cases on land and environment. **The Limitation of Actions Act** was enacted well before the promulgation of the **2010 Constitution** and within **Section 38** it provides that claims of adverse possession must be filed in the High Court vide Originating Summons.

7. Despite the enactment of the **Environment and Land Court Act, 2011** and the **Magistrates' Courts Act, 2015** which grant certain courts jurisdiction to hear and determine cases on land and environment, **Section 38 of the Limitation of Actions Act** has not been amended to reflect the changes that were promulgated in our Constitution.

8. In view of this lacuna, the ELC courts have interpreted **Section 38 (1) of the Limitation of Actions Act** with alterations, adaptations, qualifications and exceptions so as to put it in conformity with **Section 26 (3) and (4) of the Environment and Land Court Act**,

**2011 and Section 9 (a) of the Magistrates' Courts Act, 2015.** This adaptation has been guided by the provisions of **Section 7 (1)** of the **Sixth Schedule** of the Constitution which provides:

*“All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution”.*