



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndiso alias Mutuku Matheka v Mutiso (Environment and Land Miscellaneous Application E003 of 2023) [2025] KEELC 1467 (KLR) (12 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1467 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E003 OF 2023**  
**TW MURIGI, J**  
**MARCH 12, 2025**

**BETWEEN**  
**MUTUKU NDISO ALIAS MUTUKU MATHEKA ..... RESPONDENT**  
**AND**  
**JOEL MAUNDU MUTISO ..... APPLICANT**

**RULING**

1. Before me for determination is the Notice of Motion dated 24<sup>th</sup> October, 2023 brought under Sections 17 and 18 of the [Civil Procedure Act](#) in which the Applicant seeks the following orders:
  1. Spent.
  2. That the Applicant/Defendant has been in possession and use of the disputed land since time immemorial hence resulted him to filing a counterclaim on adverse possession.
  3. That this Honourable Court be pleased to order that Makindu ELC No. 39 Of 2022 – Mutuku Ndiso v Joel Maundu Mutiso Be Transferred To Makueni Elc High Court for hearing and determination.
  4. That the costs of this application be in the cause.
2. The application is premised on grounds appearing on its face together with the supporting affidavit of Samuel Kasyoka Advocate sworn on even date.

**The Applicant's Case.**

3. The deponent averred that the Defendant filed a counterclaim in Makindu SPMELC No. 39 of 2022 claiming for adverse possession since he has been in possession of the disputed land since time immemorial.



4. He further averred that the dispute in the suit before the lower court relates to a claim for adverse possession. He added that the Plaintiff/Respondent has filed a preliminary objection challenging the jurisdiction of the court to hear and determine the suit. He urged the court to allow the application as prayed.

#### **The Respondent's Case.**

5. The Respondent opposed the application through a replying affidavit of Christine Wanza Gitonga Advocate sworn on 17<sup>th</sup> January, 2024. She averred that the application is misconceived, bad in law, untenable and an abuse of the court process. She further averred that the Respondent is the registered proprietor of Title No. Nzaui/Matiliku/127. She contended that the application herein offends the provisions of Section 6 of the Civil Procedure Rules.
6. She further contended that the application is sub judice and amounts to forum shopping since the Respondent has raised a preliminary objection challenging the jurisdiction of the court to hear and determine the Applicant's counterclaim. She further contended that this court lacks jurisdiction to transfer the suit because the counterclaim is a nullity.
7. The deponent contended that the Respondent who is elderly and ailing, will be highly prejudiced if the suit is transferred to this court as he will have to incur unnecessary travel expenses. She further contended that the instant application is meant to delay the finalization of the case pending before the magistrate's court. In conclusion, the deponent urged the court to dismiss the application with costs.
8. The application was canvassed by way of written submissions.

#### **The Applicant's Submissions.**

9. The Applicant's filed his submissions dated 6<sup>th</sup> October, 2024. In his submissions, Counsel reiterated the contents of the supporting affidavit. Counsel submitted that it is unsafe for the lower court to hear and determine a claim for adverse possession as there are conflicting decisions on the jurisdiction of the lower court to determine the same. Counsel further submitted that no prejudice will be occasioned to the parties if the application is allowed.

#### **The Respondent's Submissions**

10. The Respondent filed his submissions dated 8<sup>th</sup> October, 2024. On his behalf, Counsel identified the following issues for the court's determination: -
  1. Whether Makindu ELC No. 30 of 2022 Mutiso Ndiso v Joel Maundu Mutiso ought to be transferred to the ELC Court?
  2. Whether the substantive issue herein is sub judice?
  3. Who should bear the costs?
11. Counsel submitted that the Respondent has raised a preliminary objection challenging the court's jurisdiction to hear and determine the Applicant's counterclaim. Counsel further submitted that the instant application is an abuse of the court process and is meant to defeat the preliminary objection before it is heard and determined.
12. Counsel further submitted that the subordinate court lacks jurisdiction to determine the matter before it and hence this court cannot transfer the suit. To buttress this point, Counsel relied on the case of



Kagenyi v Musiramo & Another [1968] EA 43 and Hangzhon Agrochemicals Industries Ltd v Panda Flowers Ltd [2012] eKLR.

13. Counsel relied on the provisions of Section 6 of the *Civil Procedure Act* to submit that the instant application is sub judice since the issue of jurisdiction raised in the preliminary objection is yet to be heard and determined. Relying on the case of Kenya National Commission on Human Rights v Attorney General, IEBC and 16 others [2020] eKLR. Counsel submitted that the Supreme Court cautioned against filing of multiple suits on the same subject matter in different courts since it undermines judicial efficiency and proper administration of justice.
14. Counsel argued that the preliminary objection challenging the jurisdiction of the lower court to hear and determine the counterclaim will be defeated if the court allows the application herein. Counsel submitted that the balance of convenience demands that the suit be heard in the subordinate court since all the parties and their witnesses reside within the jurisdiction of the court.
15. On the third issue, Counsel submitted that the application is an abuse of the court process and should be dismissed with costs.

### **Analysis And Determination**

16. Having considered the application, the respective affidavits and the rival submissions, the only issue that arises for determination is whether Makindu ELC No. 39 of 2022 should be withdrawn from the lower court and transferred to this court for hearing and determination.
17. The power to transfer suits is governed by Section 18 of the *Civil Procedure Act* which provides that:
  - “(1) On the application of any of the parties and after notice to the parties and after hearing each 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.
  - (2) where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”
18. It is the Applicant’s case that the lower court lacks jurisdiction to hear and determine a claim for adverse possession. The Respondent on the other hand contended that that the instant application offends the



provisions of Section 6 of the Civil Procedure Rules as there exists a preliminary objection challenging the jurisdiction of the court to hear and determine the Applicant's counterclaim.

19. Section 6 of the *Civil Procedure Act* provides that: -

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

20. It is not in dispute that the Respondent has raised a preliminary objection challenging the jurisdiction of the subordinate court to hear and determine the Applicant's counterclaim.

21. At paragraph 4 of the supporting affidavit, the Applicant contended that the instant application was prompted by the Respondent's preliminary objection.

22. The issue of jurisdiction raised in the preliminary objection is yet to be determined. To seek transfer of the suit before the issue of jurisdiction is heard and determined would amount to jumping the gun.

23. In the case of *Lund-Henriksen & another v Kabara* (Environment & Land Case E320 of 2021) [2022] KEELC 14694 (KLR) the court held as follows: -

“If indeed the matter in the lower court exceeds the pecuniary jurisdiction of the lower court, the parties herein should move the lower court to have the suit struck out. Indeed, the lower court on its own motion can strike out the suit for want of jurisdiction. Alternatively, the plaintiff should withdraw the suit in the lower court. These are the only remedies that are available in a situation where a party files a matter in a court which did not have jurisdiction in the first place.”

24. Further in *Boniface Waweru Mbiyu v Mary Njeri & Another* [2005] eKLR the court had held that:

“Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the Court, the matter thus filed is so defective as to be a nullity. It is incompetent and void in law; and therefore it is not a motion or suit that can be transferred to any other Court. It is the duty of the Court or tribunal before which such matter is first brought to declare its status as a nullity; and it follows that such matter has no capacity to be transferred to any other Court”.

25. 23. From the foregoing, it is clear that the counterclaim filed in Makindu ELC No. 39 of 2022 is incompetent and therefore this court lacks jurisdiction to effect a transfer. The court can only transfer a cause whose existence is recognized by law.

26. The upshot of the foregoing is that the application dated October 24, 2023, is devoid merit and the same is hereby dismissed with costs to the Respondent.

**RULING DATED, SIGNED & DELIVERED VIA MICROSOFT TEAMS THIS 12TH DAY OF MARCH 2025**

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**T. MURIGI**



## **JUDGE**

In the presence:

In the absence of the parties

Ahmed – Court Assistant

