



REPUBLIC OF KENYA



KENYA LAW
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Catholic Diocese of Homa Bay v Aganyo (Environment and Land Miscellaneous Application E003 of 2025) [2025] KEELC 5048 (KLR) (11 June 2025) (Ruling)

Neutral citation: [2025] KEELC 5048 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E003 OF 2025
FO NYAGAKA, J
JUNE 11, 2025

BETWEEN

THE CATHOLIC DIOCESE OF HOMA BAY APPLICANT

AND

JOSEPH ROBBINS RHEINS AGANYO RESPONDENT

RULING

1. By a Notice of Motion dated 30/01/2025, the Applicant moved this court under Articles 48 and 50 of *the Constitution* of Kenya 2010; Sections 3 (1 & 3); 13 and 19 (1 & 2) of the Environment & Land Court Act; Sections 18 & 3 of the *Civil Procedure Act* and “all other enabling provisions of the law.” He prayed:
 1. Spent
 2. Spent
 3. That upon hearing the instant Application inter-partes, the Honourable Court be pleased to make orders for the transfer of the Oyugis SPMC ELC OS No. 75 of 2021 from Oyugis Law Courts to the Environment & Land Court at Homa Bay, for determination and final disposal.
 4. That costs of this Application be in the cause.
2. The Application is based on 4 grounds which were, in a nutshell, that Oyugis SPMC ELC (O.S) 75 of 2021 was instituted and prosecuted before the Senior Principal Magistrate’s Court at Oyugis, at a time when Magistrates ordinarily had jurisdiction and were authorized to preside over, hear and determine claims for Adverse Possession. Further, that in October, 2024, the Court of Appeal at Nairobi rendered a decision in Pauline Chemuge Sugawara vs Naikuro Ene Mutarakwa Kiruti & 4 Others, divesting Magistrates of Jurisdiction to try and determine claims for Adverse Possession.



3. The Application was supported by the affidavit of Rev Fr. Tom Nicholas Mboya sworn on 30/01/2025. In it, he stated that he was the priest in charge of Oyugis Parish-Catholic Diocese of Homa Bay at the time Oyugis SPMC ELC OS No. 75 of 2021 was instituted at Oyugis Law Courts and during the proceedings, he was also PW1 for the Catholic Diocese of Homa-Bay. He further deposed that Oyugis SPMC ELC (O.S) 75 of 2021 was instituted and prosecuted before the Senior Principal Magistrate's Court at Oyugis, at a time when Magistrates ordinarily had jurisdiction and were authorized to preside over, hear and determine claims for Adverse Possession. He reiterated the grounds on the face of the application and deposed that pursuant to the cited provisions of the law therein, this Court is empowered by the Laws of this land to rise to the occasion and save the Applicant from the imminent danger of the striking out of the suit, which was instituted in good faith before a court which at that time had jurisdiction to deal.
4. The Respondent opposed the application vide a Grounds of opposition dated 07/02/2025 on the following grounds;
 1. The instant notice of motion is superfluous, deficient and bad in law.
 2. The instant notice of motion does not meet the threshold for grant of the orders sought therein.
 3. The instant notice of motion cannot be granted in terms of the orders sought therein because the suit ELC (O.S) No.75 of 2021 at Oyugis Law Courts was filed before a court which does not have jurisdiction.
 4. The instant notice of motion does not capture any reasonable cause of action.
 5. The instant notice of motion is devoid of merits whatsoever.
 6. The instant notice of motion lacks merit and it should be dismissed with costs.

The submissions

5. The parties argued the application by way of written submissions. The applicant filed submissions dated 11/02/2025.
6. The Applicant submitted that Section 9(a) of the Magistrate's Court Act confers jurisdiction upon the magistrate and reproduced the provisions of the same. Further, he argued that it is evident that section 26 of the *Environment and Land Court Act* gives Magistrates court jurisdiction to handle environment and land related disputes. The Applicant placed reliance on the case of Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & another [2020] eKLR and reiterated that Oyugis SPMC ELC OS No. 75 OF 2021 was properly instituted before the Senior Principal Magistrate's Court at Oyugis.
7. The applicant submitted that in light of the decision in Pauline Chemuge Sugawara vs Naikuro Ene Mutarakwa Kiruti & 4 Others (Supra) the court be pleased allow the Application dated 30th January 2025 as prayed.
8. The Respondent, on his part, submitted that the law on originating summons has never been changed or amended to grant magistrates the capacity to determine disputes related to originating summons. He placed reliance on section 38 of the *Limitation of Actions Act* and argued that reference is to the "High Court" as the court to which such cases are heard, and given the dictates of *the constitution*, this should be construed to mean the "Environment and Land Court", as being the court with jurisdiction to hear and determine matters pertaining to adverse possession of land. He further submitted that 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.

9. The Respondent argued that notwithstanding the expansion of the jurisdiction of environment and land usage to magistrate's 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. He relied on the finding in ELCA Civil Appeal No. E141 of 2022 *Pauline Chemuge Sugawara versus Nairuko Ene Mutarakwa Kiruti* in this regard.
10. The Respondent pointed out that the Applicant filed the said suit at Oyugis Law Courts when the said magistrate court did not have legal capacity or jurisdiction to determine the instant suit. Further, that the request by the applicant is unwarranted, irregular and unlawful. He stated that this court has no jurisdiction to transfer a suit filed in a court which has no jurisdiction, placing reliance on Nairobi High Court Petition No. E088 of 2024 *Kennedy Mongare Okongo vs Loibex Limited & others* and Nairobi Miscellaneous Civil Suit No. 136 of 2012 *Abraham Mwangi Wa Migwi v Simon Mbiriri Wanjiku & Another*.
11. The Respondent maintained that the Application lacks merit and amounts to an abuse of the due process of the court and therefore, the court should dismiss it.

Analysis and Determination

12. The issue that arises for determination is; Whether the court should transfer the Oyugis SPMC ELC OS No. 75 of 2021 from Oyugis Law Courts to the Environment & Land Court at Homa Bay, for determination and final disposal.
13. At the heart of this application is the pertinent issue of jurisdiction. The Applicant, on its part, contends that the magistrates court had the jurisdiction to determine adverse possession claims which jurisdiction was divested vide the Court of Appeal decision in *Sugawara v 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).
14. Before determining whether the application should be transferred to the Environment and land Court, this court must first establish whether the magistrate's court had jurisdiction to entertain the same at any point in time. There have been varying positions on this particular issue as some courts have held that the magistrates' courts have the jurisdiction to handle adverse possession cases. One example of this is the case of *Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & another* [2020] eKLR where D. O. Ohungo, J. held:
15. Based on the express provisions of Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 and Section 9 (a) of the *Magistrates' Courts Act*, 2015, the principles of interpretation of *the Constitution* as well as the principles of *the Constitution* such as devolution, access to services and access to justice for all persons, to find as I hereby do, that so long as presided over by a magistrate who is duly gazetted under Section 26 (3) of the *Environment and Land Court Act*, 2011 and who has the requisite pecuniary jurisdiction, magistrates' courts have jurisdiction and power to handle cases involving claims of adverse possession."
16. On the contrary, in some decisions such as the case of *Michael Chebii Toroitich v Peter Mogin Yatich Chebii* [2013] eKLR, the courts have held that the magistrate's courts do not have jurisdiction to determine claims of adverse possession. In that case M. Sila, J. held:
17. The matters in issue in Iten RMCC No 9 of 1994 and in the land disputes tribunal, in my view, were whether the defendant holds a half share of the land in trust for the plaintiff. The question whether



- the plaintiff is entitled to the suit land by way of adverse possession never arose in those proceedings. Indeed, they could not have arisen, as the Magistrate's court does not have jurisdiction to entertain a claim of adverse possession. Neither could adverse possession have been made a ground of attack or defence in those two proceedings. The issue of adverse possession could not have been raised and was never raised in those proceedings.”
18. The jurisdiction to handle adverse possession claims emanates from the provisions of sections 37 and 38 of the [Limitation of Actions Act](#) where it is specifically provided that such claims are to be heard by the “High Court”.
 19. Section 38 of the [Limitation of Actions Act](#) provides:
 - (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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.
 - (2) ...
 - (3) ...
 - (4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.
 - (5) ...”
 20. The issue of jurisdiction of Magistrates Courts with regards to adverse possession claims has never changed. Without overemphasizing this Court observes that the law on adverse possession was only conclusively restated by the Court of Appeal, recently, in [Pauline Chemuge Sugawara vs Nairuko Ene Mutarakwa Kirut](#) (2024) KECA 1417 (KLR), where the learned justices expressed themselves as follows;
 21. In the circumstances, in view of the express provisions of section 38 of the [Limitation of Actions Act](#), as did the Environment and Land Court, we find that Magistrates’ Courts do not have jurisdiction to determine the claims of adverse possession. As a consequence, the trial magistrate in the instant case rightly disregarded hearing and determining it. In the result, this ground is without merit and is accordingly dismissed.
 22. The reasoning behind this determination was aptly explained by the court as follows;
 23. We come to this conclusion also bearing in mind that the jurisdiction of Magistrates’ Courts is largely determined by the pecuniary interest designated for determination by each level of the Magistracy specified in the hierarchy of courts, in terms of section 7 of the Magistrates Courts Act. In claims for adverse possession where the value of the land in question may be unknown, as in the instant case, it could be that by the time of filing, the value of the land subject of determination may be far in excess of the particular Magistrates’ Court’s pecuniary jurisdiction, which for all intents and purposes was not what was intended by the Act.
 24. The point is that if claims were, in times past, prosecuted and concluded in the said subordinate courts it was due to a misconception that prevailed then. The law on adverse possession has never been changed. It was only restated from time to time. Divergent views on a provision of law does not of itself change the law. The upshot of this is that at no point in time did the Magistrates’ Court have the jurisdiction to determine adverse possession claims.



25. Having determined that the Magistrates' Court did not have jurisdiction to determine the claim, the main issue for determination now arises being; Whether this court can transfer the suit. It is settled law that a court cannot sanctify an incompetent suit through transfer, especially where there was no jurisdiction to entertain the same. I am bound by the decision of the Court of Appeal in *Phoenix of E.A Assurance Company Limited vs. S. M. Thiga t/a Newspaper Service* [2019] eKLR where the Court of Appeal stated as follows, in respect to suits filed before Courts which have no requisite jurisdiction:-

"We are not persuaded that the proposition by the Respondent is correct in law. Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a 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 to itself. The Subordinate Court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction..."

26. Additionally, the Supreme Court of Kenya in *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) & Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs)*. Petition No. 3 of 2016 reached the conclusion that suits filed before Courts without jurisdiction, the courts have no powers to transfer the same to courts of competent jurisdiction.

27. The upshot is that the application lacks merit as the Magistrates Court lacked the jurisdiction to entertain the suit at first instance. This Court cannot be party to immortalizing an illegality and nullity in law. The application is hereby dismissed with costs to the Respondent.

28. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 11TH DAY OF JUNE 2025.

HON. DR. IUR NYAGAKA,

JUDGE

In the presence of,

Jack Otieno Advocate for Applicant

Ochwang Advocate for the Respondent

