



Isili v Ndiwa & another (Environment & Land Miscellaneous Case E003 of 2025) [2025] KEELC 4465 (KLR) (11 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4465 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND MISCELLANEOUS CASE E003 OF 2025**

**CK NZILI, J
JUNE 11, 2025**

BETWEEN

TITUS ALFRED OMUDANGI ISILI PLAINTIFF

AND

BENARD KORIR NDIWA 1ST DEFENDANT

THE CO-OPERATIVE BANK OF KENYA LIMITED 2ND DEFENDANT

RULING

1. The court is asked to withdraw Kitale MELC. No. 122 of 2022 (O.S) pending in the Chief Magistrates Court for trial before this court. The reasons as contained on the face of the application and in the supporting affidavit of Titus Alfred Omudangi Isili, are that at the time of filing the suit, counsel had advised that the subordinate court had jurisdiction to hear and determine the suit, but since the decision of Sugawara -vs- Kiruti (Sued in her capacity as the Administratrix of the Estate of Mutarakwa Kiruti Lepaso alias Mutaragwa Kirati Lepaso and in her own capacity) & 3 Others (Civil Appeal E0141 of 2022) [2024] KECA 1417 [KLR], in Pauline Chemuge Sugawara and Nairuko Ene Mutarakwa Kiruti (Civil Appeal No. E141 of 2022), by the Court of Appeal delivered on 11/10/2024, such jurisdiction does not exist, hence the application for the transfer of the suit.
2. The application is opposed through a Preliminary Objection and Grounds of Opposition dated 19/3/2025, filed by the 2nd respondent, that:
 - (1) The court lacks jurisdiction to transfer a null suit.
 - (2) The suit having been filed before a court without jurisdiction, it is incapable of being transferred.
 - (3) It is bad in law, incompetent, abuse of the court process.
 - (4) The Miscellaneous Application is unprocedural, fatally defective and the court cannot grant the orders sought.



- (5) The application is inconsistent with Section 18 of the *Civil Procedure Act*.
 - (6) Under Section 18 of the *Civil Procedure Act*, the suit cannot be transferred where it had been instituted in the wrong court.
 - (7) The court can only transfer a cause whose existence is recognized by law.
 - (8) It is not legally tenable.
3. The general power of this court to transfer a suit are contained in Section 18 of the *Civil Procedure Act*. The power may be exercised at any stage of the proceedings, even suo moto by the court. The burden rests with the applicants to make a strong case for the transfer. In Abraham Mwangi Wamigwi -vs- Simon Mbiriri Wanjiku & Another [2012] KEHC 5479 (KLR) the court cited Kagenyi -vs- Musiramoo and Another [1968] EA 43 where Sir Udo Udoma, CJ, observed that the transfer of a suit from one court to another court cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it.
 4. Jurisdiction is what gives a court power to hear the suit. It is a creature of either *the Constitution* or a statute. Parties cannot confer jurisdiction on a court as held in S.K. Macharia & Another -vs- KCB & Others [2012] eKLR. In Equity Bank Ltd -vs- Bruce Muite Mutuku T/A Diani Tours & Travel [2016] eKLR, the court said that it would be illegal for the High Court in exercise of its jurisdiction 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, since no competent suit exists that is capable of being transferred. The court said that jurisdiction cannot be conferred by consent and where it lacks, parties cannot seek refuge under the oxygen rule or the overriding objectives under the *Civil Procedure Act* or Article 159 of the Constitutions. In Abraham Mwangi Wamigwi (supra), the court held that where a suit is instituted before a tribunal without jurisdiction, such a suit cannot be transferred under Section 18 of *Civil Procedure Act* to a tribunal where it ought to have been properly instituted; reason being such a suit is a nullity in law and as such in the eyes of the law, it amounts to nothing capable of being moulded into something through a procedure known as transfer.
 5. In Honey Creepers Investment Limited -vs- Cab Investments Company Ltd & 4 others [2020] eKLR, the court said the decision in Daniel N. Mugendi -vs- Kenyatta University & 3 others [2013] eKLR was a stop gap measure. In Phoenix of E.A. Assurance Company Limited -vs- S. M. Thiga t/a Newspaper Service [2019] KECA 767 (KLR), the court said that jurisdiction is primordial in every suit and has to be there when the suit is filed in the first instance and if it is not there the only remedy is to withdraw it and file afresh suit before a competent court, and that a suit filed in a court lacking jurisdiction is dead on arrival which cannot be remedied. In Albert Chaurembo Mumba -vs- Dama Thoya Kiti & 2 others [2022] eKLR, the court said that courts have no powers to transfer the same to courts competent to hear the same.
 6. The applicant says he filed the suit out of advice from his counsel, who at the time took the view that the court had jurisdiction, but now the law has been interpreted by the Court of Appeal to mean that lower courts have no jurisdiction to entertain claims on adverse possession. The law relating to adverse possession and the competent court to hear the suit was not changed in 2024. It has always been there. It was upon the parties to follow it with regard to their suits. It is the applicant who chose to file the suit before the lower court. The Court of Appeal has issued the pronouncement, which the Supreme Court has not overturned the ruling in Sugawara -vs- Kivuti (Application E038 of 2024 KESC [2025] KLR (21/3/2025) (Ruling). The ruling of the Court of Appeal still stands.
 7. The 2nd respondent urges the court to find that there is nothing to transfer to this court. In Macjoy -vs- United Africa Co. Ltd (1969) 3. All E. R. 1169, the court observed that a nullity is a nullity and



one cannot expect to put something on nothing and get something. Sections 6, 7, 8 and 10 of the Magistrates Court Act 2015 relates to the jurisdiction generally. The court is conferred with jurisdiction under Article 162(2) of *the Constitution*. Section 9 thereof relates to jurisdiction on Environment and Land Court matters. Section 12 of the *Civil Procedure Act* provides on jurisdiction for suits on recovery of immovable property. It does not include claims based on adverse possession which are exclusively governed by the *Limitation of Actions Act*, Section 28 (h) of the *Land Registration Act* and Order 37 of the Civil Procedure Rules.

8. In my considered view, the court cannot under the circumstances accede to the request to transfer a suit which was filed in the wrong court, where the law was clear at the time of filing it. The applicant has an option of withdrawing the suit and filing it before this court. The application is dismissed with costs.
9. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 11TH DAY OF JUNE 2025.

HON. C.K. NZILI

JUDGE, ELC KITALE.

In the presence of:

Court Assistant - Dennis

Mr. Kraido for the Applicant present

Mr. Kiarie for Songole for Respondent present

