



REPUBLIC OF KENYA



**Bunyila & 3 others v Anyonga & 4 others (Environment and Land Miscellaneous Application E003 of 2024) [2025] KEELC 5295 (KLR) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5295 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E003 OF 2024  
EC CHERONO, J  
JULY 10, 2025**

**BETWEEN**

**MORRIS BUNYILA ..... 1<sup>ST</sup> APPLICANT  
MARK MWAMBU ..... 2<sup>ND</sup> APPLICANT  
RICHARD WANYONYI ..... 3<sup>RD</sup> APPLICANT  
ROBERT WAFULA BUNYILA ..... 4<sup>TH</sup> APPLICANT**

**AND**

**JOHN K ANYONGA ..... 1<sup>ST</sup> RESPONDENT  
MARGARET MMBONE ..... 2<sup>ND</sup> RESPONDENT  
JOHN MAYENDE ..... 3<sup>RD</sup> RESPONDENT  
DAVID NALIANYA BANDA ..... 4<sup>TH</sup> RESPONDENT  
KENNEDY WAFULA ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion application dated 29/01/2025 seeking the following orders;
  - a. That Kimilili SPM'S Court ELC Case No. E013 OF 2020 be withdrawn and transferred to the Environment and Land Court Bungoma to be heard alongside Bungoma ELC. O.S NO E001OF 2024, Bungoma ELC O.S NO. E002 OF 2024, Bungoma ELC. O.S NO. E003 OF 2024 and Bungoma ELC O.S NO. E016 OF 2024.
  - b. Costs of the application be in the cause.



2. The application is premised on the grounds apparent on the face of the application supported by the affidavit of Morris Bunyila, the 1<sup>st</sup> Applicant herein sworn on an even date.
3. The deponent deposed that both Kimilili SPM-ELC Case No.13. OF 2020, Bungoma ELC. O.S NO E001OF 2024, Bungoma ELC O.S NO. E002 OF 2024, Bungoma ELC. O.S NO. E003 OF 2024 and Bungoma ELC O.S NO. E016 OF 2024 concern the same parties and relate to the same subject matter. That in the case at Kimilili Law Courts, the Respondents herein seek for an order of eviction against the Applicants herein while in Bungoma ELC. O.S NO E001OF 2024, Bungoma ELC O.S NO. E002 OF 2024, Bungoma ELC. O.S NO. E003 OF 2024 and Bungoma ELC O.S NO. E016 OF 2024, the Applicants herein seek for orders of adverse possession against the Respondents. That it is in the interest of justice that this application is allowed as prayed. It is also deposed that in a claim for adverse possession, the lower court is bereft of jurisdiction. The Applicants further stated that they had earlier filed Misc. Application NO E006 OF 2024 before this court and that the same was dismissed for non-attendance on grounds that during the hearing of the said application, their advocate on record had network challenges and was not able to connect with the court. That the said Misc. Application NO. E006 OF 2024 could not be said to have been determined on merit.
4. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents filed a replying affidavit in opposition to the said application sworn on 28/02/2025 where they deposed that on 16/09/2024, a similar application was made before this court vide ELC Misc No. E006/2024 which application was dismissed for non-attendance. That again on 14/10/2024, the Applicants herein filed an application to reinstate the application dismissed on 16/09/2024 which application was again dismissed on 29/01/2024. They argued that the instant application is an abuse of the court process and aimed at delaying the hearing and determination of Kimilili SPM'S ELC Case No.13. OF 2020. They urged the court not to allow the Applicant's application.
5. The Applicants in further support of the application filed a supplementary affidavit sworn on 06/05/2025 where it was deposed that both the Misc. Application No. E006 of 2024 and the application dated 14/10/2024 were dismissed for non-attendance and the issues raised in the applications were not canvassed and a decision made on merit and therefore, there is nothing that prevents the present application from being heard and determined on merit.
6. When the application came up for directions, the parties agreed that the same be canvassed by way of written submissions.
7. The Applicants filed submissions dated 06/05/2025 and submitted that the Respondents instituted a suit against them in Kimilili SPM's Court vide Land Case No. E013/2020 over LR. No. Kimilili/Kamukuywa 3040,3041,3042,3043,3044,3045,3046 and 3047 (initially LR. No. Kimilili/Kamukuywa 952). That they instituted various originating summons before this Court for a claim of adverse possession and that it is only fair that the suits are consolidated, heard and determined together as one in a proper forum which is this Court. That the claim for adverse possession cannot be entertained in the lower court and that is the basis upon which the Applicants instituted the numerous originating summon in this court for adverse possession. The Applicants relied in the case of Sugawara =vs= Kiruti (sued in her capacity as the administratrix of the Estate of Mutarakwa Kiroti Lepaso and on her own) and 3 others (petition(application E038 OF 2024) (2025) KESC 9 (KLR)).
8. Lastly, it was Applicants submission that Misc. Application No. E006 of 2024 had been filed in this Court and that the same was dismissed for non-attendance. They submitted that a dismissal for non-attendance is not res-judicata since no decision was made on merit concerning the issues raised therein.



9. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents filed submissions dated 30/03/2025 where they submitted that a similar application was made before this Court and dismissed for non-attendance and a further application to reinstate the dismissed application was equally dismissed for non-attendance. They contend that the Applicants only seek to delay justice and urged the court not to entertain the Applicants' misconduct. They cited the provisions of Article 159(2) of *the Constitution*, Section 1A & 1B of the *Civil Procedure Act* and the case of Bilha Ngonyo Isaac -vs- Kembu Farm Ltd and another (2018) eKLR, and asked the court to draw an inference that there is a pattern to deliberately or otherwise delay the expeditious disposal of the suit. They urged the court to dismiss the application with costs as it would prejudice them.

### **Analysis and Determination.**

10. I have considered the application, the affidavits in support, the Replying affidavit and the rival submissions and the applicable law. In my view, the singular issue for determination in this application is whether the orders sought by the Applicants ought to be granted.
11. The Applicants in the application under review seek to withdraw Kimilili SPM-ELC case No. E013 of 2020 and have it transferred to this court for purposes of consolidation, hearing and determination with Bungoma ELC. O.S NO E001 OF 2024, Bungoma ELC O.S NO. E002 OF 2024, Bungoma ELC. O.S NO. E003 OF 2024 and Bungoma ELC O.S NO. E016 OF 2024.
12. On the prayer for withdrawal of Kimilili SPM-ELC NO. E013 of 2020, it is important to note that the power to withdraw a suit rests solely with the party who instituted it who in this case is the plaintiff. Order 25 Rule 1 of the Civil Procedure Rules, 2010, provides thus;

“the plaintiff may at any time before the hearing begins withdraw the suit by notice in writing.”

It is clear that the Civil Procedure Rules does not confer such right upon the defendant or any other party. In the case of Kenya Power & Lighting Co. Ltd v Benzene Holdings Limited t/a Wyco Paints [2016] eKLR, the Court of Appeal emphasized that withdrawal of a suit is a prerogative of the plaintiff and cannot be initiated by a defendant who instead may move the court for dismissal of the suit under appropriate provisions. Accordingly, the Applicants, being the defendants in the lower court, lack the legal standing to seek withdrawal of the suit and can only initiate dismissal where appropriate.

13. As for the prayer to have the suit before the lower court transferred to this court for consolidation with the various originating summons filed in this court, I refer to the provisions of Section 18 (1) (b) of the *Civil Procedure Act* which gives the High Court the general power to transfer suits from one subordinate Court to another or to itself and this power may be exercised at any stage of the proceedings even suo moto by the court without an application by any party. The burden lies on the Applicant to make out a strong case for the transfer. But for the court to grant an order for the transfer, the Applicant must satisfy the court as to the reasons for such orders.
14. The Applicant's main reason is that the subordinate Court lacks jurisdiction to hear and determine claims of adverse possession. However, this court has had a chance to peruse through the pleadings in Kimilili SPM-ELC Case No. E013 of 2020, Bungoma ELC. O.S NO E001 OF 2024, Bungoma ELC O.S NO. E002 OF 2024, Bungoma ELC. O.S NO. E003 OF 2024 and Bungoma ELC O.S NO. E016 OF 2024. Notably, the parties in the various cases vary significantly. Further, I note from the defence filed by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Applicants in Kimilili SPM's Court vide Case No. E013 of 2020 also varies from the claim for adverse possession that the Applicants herein claim in their Originating Summons.



15. In their statement of defence in Kimilili SPM-ELC Case No. E013/2020, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Applicants averred that the existing survey map should be revised to reflect a road that is said to exist on the ground which they claim would realign the boundaries of land parcels Kimilili/Kamakuywa/951, 952, 962, and 947. From their pleadings, it appears they believe this adjustment would resolve the dispute therein. There is no hint for a claim of adverse possession in the said defence. Therefore, the subsequent filing of numerous originating summons by the Applicants claiming adverse possession appears ill-intentioned. The Applicants' position lacks clarity, both in material facts and in legal argument.
16. Further, the sequence and timing of the subsequent Originating summons raises serious concerns of forum shopping. The Applicants' conduct of instituting new proceedings in different forums long after the issues in the lower court had crystallized amounts, in my view, to an attempt to shift goalposts midstream, thereby undermining the principles of orderly litigation and finality, which are central to the proper application of transfer and consolidation of suits. This concern is compounded by the Applicants' litigation history where they had previously filed a similar application which was dismissed for non-attendance, and thereafter filed an application to reinstate the dismissed application which was again dismissed on similar grounds. These repeated procedural missteps, coupled with the belated invocation of adverse possession, point to an effort to circumvent the procedural posture of the suit in the lower court which I must state was filed way back in the year 2020, about four years later.
17. Such conduct appears deliberately calculated to delay the just and expeditious determination of the dispute between the parties. It is not only procedurally improper but also distasteful. Courts must firmly discourage such tactics, which serve only to defeat the ends of justice and waste judicial resources. This Court will not lend its hand to a party that seeks to forum-shop opportunistically, rather than litigate its claims diligently and within the confines of the law.
18. In the end, I find that the application dated 29<sup>th</sup> January, 2025 lacks merit and the same is hereby dismissed with costs to the Respondents.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 10<sup>TH</sup> DAY OF JULY, 2025.**

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**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

Mr. Nyamu for the Applicants.

Respondents/Advocate-absent.

Bett C/A.

