



REPUBLIC OF KENYA



KENYA LAW
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**Kwamboka v Abdirahman (Environmental and Land Originating Summons
E012 of 2025) [2025] KEELC 5102 (KLR) (9 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5102 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E012 OF 2025**

CG MBOGO, J

JULY 9, 2025

BETWEEN

GRACE KWAMBOKA APPLICANT

AND

ABDULBARI BARRE ABDIRAHMAN RESPONDENT

RULING

1. Before this court for determination is the notice of motion dated 24th February, 2025 filed by the applicant herein, and it is expressed to be brought under Section 1A, 1B, 3A and 18 of the Civil Procedure Act, Section 13 of the Environment and Land Court Act and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders: -
 1. Spent.
 2. That this honourable court be pleased to stay the proceedings in Milimani CMCELC No. E209 of 2021 (Abdulbari Barre Abdirahman v Grace Kwamboka) (hereinafter the lower court suit) pending the hearing and determination of this application.
 3. That the honourable court be pleased to call for and direct that the said matter be heard together with the instant suit.
 4. That the costs of this application be provided for.
 5. That this honourable court be pleased to grant further and/or other orders as it shall deem fit in the interest of justice.
2. The application is premised on the grounds inter alia that the respondent filed the suit in the magistrates' court in CMCELC No. E209 of 2021 seeking amongst other orders an order for permanent injunction against the application with respect to the property known as LR. No. 209/10966 and now Nairobi/Block 263/2763.



3. The application is supported by the affidavit of the applicant sworn on even date. The applicant deposed that prior to the filing of the suit by the respondent, she has been in occupation of the suit property since the year 2003 having acquired it from Moto Moto Multipurpose Cooperative Society. She deposed that subsequently on 11th October 2024, the Court of Appeal in *Pauline Chemuge Sugawara v Nairuko Ene Mutarakwa & others* [2024] eKLR, made a finding that the magistrates' court does not have the jurisdiction to hear land matters founded on adverse possession. She deposed that the matter in the lower court and this suit are intertwined as they relate to the occupation and ownership of the same property and that a determination in the lower court has a direct bearing on the instant suit.
4. The applicant deposed that having been in possession of the suit property for almost 18 years, it is in the interest of justice that the application is allowed and that the respondent shall suffer no prejudice.
5. The application was opposed by the replying affidavit of the respondent sworn on 17th March, 2025. He deposed that as an afterthought to the pleadings filed before the lower court, the applicant made a claim relating to adverse possession in relation to purchase of plot no. 125 and not land reference number 209/ 10966 now referred to as Nairobi/ Block/ 263/ 2763. He deposed that he has been in occupation of his property, and that the applicant entered into the property as a tenant where she has been conducting religious activities. He deposed to the evidence tendered during the hearing of the case before the lower court, and that he denied that the issues in both matters are intertwined as the properties alleged are different.
6. The respondent reiterated that the magistrates' court has jurisdiction to determine the matter based on the value of the property, and that based on the pleadings filed in this matter, the claim for adverse possession cannot be construed to refer to the same property claimed by the applicant. That even though the applicant confirms to have filed a counterclaim in a court without jurisdiction, it is improper for the applicant to move to transfer the suit to this court under the guise of a new claim. The respondent deposed that the proper cause of action is for the applicant to withdraw her counter claim. Further, that the application is designed to prevent him from prosecuting the preliminary objection before the lower court, and as such it ought to be dismissed.
7. The applicant filed a further affidavit in response thereto sworn on 28th April, 2025. While reiterating the averments of her supporting affidavit, she asserted her occupation on the suit property, and deposed that when the respondent sued her, the magistrates' court had jurisdiction to entertain claims for adverse possession as it was held in the case of *Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi and another* [2020] eKLR. Further, that the respondent while admitting the jurisdiction of the lower court to handle her matter, did not seek to have her counter claim struck out for want of jurisdiction. She deposed that the two suits are related as the subject matter is the same parcel of land that has been under her peaceful occupation since 2003 when she acquired it.
8. The application was canvassed by way of written submissions. The applicant filed her written submissions dated 28th April, 2025 where she raised three issues for determination as listed below:-
 - i. Whether the applicant has made out a case for grant of stay of proceedings orders with respect of MCELC No. E209 of 2021.
 - ii. Whether the applicant has made out a case for consolidation of the lower court matter and the instant suit.
 - iii. Who bears the costs of the suit.
9. On the first issue, the applicant submitted that her defence in the lower court is premised on adverse possession as evidenced in her counterclaim dated 22nd July, 2021 where the question of jurisdiction



has never been raised, and that it was on the basis of the court of appeal judgment that the respondent filed the notice of preliminary objection dated 26th January, 2025 which has the effect of locking her out of the seat of justice. The applicant relied on the cases of *Habiba Ali Mursai and 3 others v Mariam Noor Abdi*, (Civil Application No. E276 of 2024) (Nairobi), and *Co-operative Bank of Kenya Limited v Kennedy Wanjohi Mwangi* (Civil Application No. E087 of 2023).

10. On the second issue, the applicant submitted that this court has jurisdiction to determine both matters pursuant to the provisions of Section 18 (1) (b) of the *Civil Procedure Act*. Reliance was placed in the case of *Symon Nyamu Muthigani v Charity Wangui Munene* [2015] eKLR.
11. The respondent filed his written submissions dated 18th June, 2025. While relying on the cases of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR and *David Kabungu v Zikarenga and 4 others*, Kampala HCCS No. 36 of 1995, the respondent submitted that the basis of transfer of the suit from the lower court is by dint of a counterclaim filed by the applicant on grounds of adverse possession and the notice of preliminary objection, and that she is now facilitating and exercising judicial craftmanship to sanctify an incompetent suit. To buttress further on this issue, the respondent relied on the cases of *Kenya Commercial Bank Limited v James Karanja* [1981] eKLR, *Equity Bank Limited v Bruce Mutie Mutuku T/A Diani Tour & Travel* [2016] eKLR, *Abraham Mwangi Wamigwi v Simon Mbiriri Wanjiku & Another* [2012] eKLR, *Phoenix of E.A Assurance Company Limited v S.M Thiga t/a Newspaper Service* [2019] eKLR and *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.
12. The respondent submitted that there are no exceptional circumstances that have been demonstrated by the applicant to warrant the stay of proceedings, and that neither has the application sought for a consolidation of the suit.
13. I have considered the application, the replying affidavit and the written submissions filed by both parties. I am of the view that the issue for determination is whether this court ought to recall the matter filed in *Milimani CMCELC No. E209 of 2021-Abdulbari Barre Abdirahman v Grace Kwamboka* for disposal in this court.
14. Section 18 of the *Civil Procedure Act* stipulates:-
 - “(1) On the application of any of the parties and after notice to the parties and after hearing such 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 may, 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”.

15. From the above provision, this court retains the discretion to transfer a suit or proceedings for disposal to a court that it competent to try it. However, certain factors have to be considered in exercising such discretion. In the case of Hangzhou Agrochemicals Industries Ltd. v Panda Flowers Ltd [2012] eKLR, Odunga, J (as he then was) held that:-

“In my view, which view I gather from authorities and from the law, the court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and marinating witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. If the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case”

16. The Court of Appeal in the case of Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tours & Travel [2016] eKLR stated as follows:-

“In numerous decided cases, courts, including this court have held it would be illegal for the high court in exercise of its powers 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. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court with jurisdiction would be to muddle up the waters and allow confusion to reign. A court of law cannot through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.”

17. The applicant in this case is a defendant in CMCELC E209 of 2021, in a matter that is pending before the magistrates’ court in Milimani. In bringing forth this application, she deposed that she filed a defence and a counter claim and following 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), the magistrates’ court has no jurisdiction to determine a claim for adverse possession. Both parties vehemently argued on the claims of occupation and ownership of the suit property. However, this court refrains from making any comments on the same.

18. For this court to exercise its discretion, the applicant needed to demonstrate the balance of convenience, bring out any questions of expense, the interest of justice and possibilities of undue hardship that she is facing as a result of the suit being before the magistrates’ court. None of that was demonstrated. Instead, what has come out clearly is the motive behind the application which shows a party who has already preempted the mind of the lower court, and in a bid to escape any unfavourable outcome,



seeks refuge in this court. As it has been discussed in numerous decisions, want of jurisdiction is not a ground for transfer of suit. The possible option for the applicant would be to perhaps withdraw the counterclaim if she needed to.

19. In *Baru & another (Suing as the Personal Representatives of the Estate of George Muriithi Gitahi) v Gitahi & 3 others* [2025] KEELC 3405 (KLR), the court observed as follows: -

“It is clear to my mind from the reading of the application and the response thereto that the filing of the application before me was prompted by the filing of a preliminary objection challenging the jurisdiction of the trial court to entertain the suit before it. It is obviously an attempt to pre-empt the ruling of the trial court on the preliminary objection. Clearly, from the above cited decisions, the ground of lack of jurisdiction of the court cannot be the basis of transfer under Section 18 of the *Civil Procedure Act*.”

20. While I place reliance on the above cited authority, it is my finding that the applicant has failed to demonstrate to this court the need for transfer of the suit from the magistrates’ court to this court.
21. The notice of motion dated 24th February, 2025 therefore fails, and it is dismissed with costs to the respondent.

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 9TH DAY OF JULY, 2025.

HON. MBOGO C.G.

JUDGE

09/07/2025.

In the presence of:

Mr. Benson Agunga - Court assistant

Mr. Manyonge for the Applicant

Mr. Muyove for the Respondent – absent

