



**Songoi v Muhunzu (Environment and Land Miscellaneous Application
E007 of 2024) [2025] KEELC 5310 (KLR) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5310 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E007 OF 2024
EC CHERONO, J
JULY 10, 2025**

BETWEEN

SAMSON KUNDU SONGOI APPLICANT

AND

JOSEPHINE MUHUNZU RESPONDENT

RULING

1. Before me for determination is the application dated 06/05/2024 seeking the following orders;
 - a. That *Bungoma Chief Magistrate Court ELC Case No. 87 OF 2021* be withdrawn and transferred to the Environment And Land Court At Bungoma to be heard alongside *Bungoma ELC O.S No. E 007 OF 2024*.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 the Applicant sworn on even date.
3. In his supporting affidavit, the Applicant deposed that both Bungoma Chief Magistrate's ELC Case No. 87 OF 2021 together with *Bungoma ELC O.S No. E 007 OF 2024* concern the same parties and relate to the same subject matter. That in the case before Bungoma Chief Magistrate's Court, the Respondent herein seeks an order for eviction against the applicant while the Appellant in the Bungoma O.S ELC NO. E007 OF 2024 is seeking an orders for adverse possession against the Respondent. That it is in the interest of justice that this application be allowed as prayed. Lastly, he stated that the lower Court is bereft of jurisdiction to hear and determine disputes relating to adverse possession.
4. In her response, the Respondent filed a replying affidavit sworn on 20/03/2025 in which she averred that the Applicant submitted himself to the jurisdiction of the court in ELC. Case no. 87 of 2021 by



filing defence, witness statements & list of documents in the process of defending himself. That the Applicant now seeks to withdraw a suit where he is the Defendant and not the Plaintiff. She stated that the Applicant who now seeks to pursue a defence of adverse possession does not own the land in issue and neither does he occupy it. That the application is fatally defective for lacking a substantive prayer. Lastly, she stated that she shall be prejudiced if the orders sought are granted.

5. The Applicant filed a supplementary affidavit sworn on 07/05/2025 where he stated that both Bungoma Chief Magistrate ELC Case No. 87 OF 2021 together with *Bungoma ELC O.S NO. E007 OF 2024*. concern the same parties and relate to the same subject matter. That he wishes to raise a claim for adverse possession and the Lower Court lacks jurisdiction therefore, he seeks to have Bungoma Chief Magistrate Court ELC NO. 87 OF 2021 be withdrawn and transferred to the Environment and Land Court at Bungoma to be heard alongside *Bungoma ELC O.S NO. E007 OF 2024*.
6. Directions were taken that the application to be canvassed by way of written submissions.
7. The Applicant filed submissions amended on 08/05/2025 where he placed reliance in the case of *Sugawara v 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) where the court stated that notwithstanding the jurisdiction of Environment and Land usage to the Magistrate court, it is instructive that under Section 9(a) of the Magistrate Court Act, various matters are specified for determination but claims for adverse possession are not included in that section. And that it is only the Environment and Land court which has jurisdiction to hear and determine claims for adverse possession. Based on the above authority, he prays that this application be allowed.
8. The Applicant filed submissions dated 14/05/2025 where she submitted on three issues. The first issue is whether the application before the court is competent. She reiterated the facts deposed in the replying affidavit. The second issue is whether the Applicant had the capacity to withdraw the suit before the lower court. On that issue, it was submitted that the orders sought were unfounded. Reliance was placed in the case of *Parkie v. Parkie* (Environment and Land Court Misc Appln. E042 of 2022(2023) KEELC 20851 (KLR). Lastly, she urged the court to dismiss the application with costs.

Analysis and Determination.

9. I have perused the application both the supporting affidavit, the supplementary affidavit, the replying affidavit and the rival submissions and in my view, the issue for determination in this application is whether the orders sought by the Applicant are deserving.
10. The Applicant has sought to have *Bungoma Chief Magistrate Court Elc Case No. 87 OF 2021* withdrawn and transferred to this Honourable court to be heard alongside *Bungoma ELC O.S No. E 007 OF 2024*. He argues that the two suits concern the same parties and relate to the same subject matter i.e Land Parcel No. Kimilili/Sikhendu/3573. That his claim regarding the land is one for adverse possession which claim can only be heard before this court. The application is opposed by the Respondent on the grounds that the Applicant cannot purport to withdraw a suit in which he is not the mover and that the Applicant herein has already submitted himself to the court's jurisdiction in *Bungoma Chief Magistrate Court Elc Case No. 87 OF 2021* by entering appearance and filing relevant documents in defence thereto.
11. The Applicant in the first limb of prayer (a) in the application seeks to have *Bungoma Chief Magistrate Court Elc Case No. 87 OF 2021* withdrawn. However, it is trite law that the power to withdraw a suit rests solely with the party who instituted it, that is, the plaintiff. Pursuant to Order 25 Rule 1 of the Civil Procedure Rules, 2010, "the plaintiff may at any time before the hearing begins withdraw the suit by notice in writing." The rule 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 applicant, having been the defendant in the lower court, lacks the legal standing to seek withdrawal of the suit and can only pursue dismissal where applicable.

12. The second limb of the said application is for transfer of *Bungoma Chief Magistrate Court Elc Case No. 87 OF 2021* to this court for purposes of consolidation, hearing and determination alongside *Bungoma ELC O.S No. E 007 OF 2024*. Section 18 (1) (b) of the [Civil Procedure Act](#) gives the High Court the general power to transfer suits from one subordinate Court to another or from the subordinate court to itself and this power may be exercised at any stage of the proceedings even suo moto by the court without a formal Application by any party. The burden lies on the Applicant to make out a strong case for the transfer. Before this court can grant an order for the transfer of a suit from the subordinate court to itself, the Applicant must give sufficient reasons before such an order is granted.
13. In this case, the Applicant argues that whilst the Respondent has sued him before the subordinate court seeking a permanent injunction and eviction orders against him, he has also filed a suit against the Respondent before this court claiming adverse possession over the same subject matter. He states that this is a defence he would not raise in the subordinate court since it lacks jurisdiction.
14. It is imperative to note that indeed the subordinate court lacks the requisite jurisdiction to hear and determine a claim for adverse possession following the judgment of the Court of Appeal in the case of [Sugawara v 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) where the court stated that “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.”
15. The Applicant’s focal point is jurisdiction of the Chief Magistrate’s court to determine claims of adverse possession. Flowing from the foregoing and the order sought being a discretionary power dependent largely on the facts and circumstances of a particular case, it is my considered view that the Applicant has established sufficient cause for his request to transfer *Bungoma Chief Magistrate Court Elc Case No. 87 OF 2021* to this court for the purpose of consolidation, hearing and determination alongside *Bungoma ELC O.S No. E 007 OF 2024*. This will promote efficient determination of the dispute and prevent multiplicity of proceedings and conflicting decisions. Further, I find that no prejudice would be occasioned to the Respondent by such transfer, consolidation, hearing and determination of the two suits. On the contrary, transfer, consolidation hearing and determination of both cases will serve the ends of justice.
16. In the upshot, I find the application dated 6/05/2025 merited and do hereby order that *Bungoma Chief Magistrate Court Elc Case No. 87 OF 2021* shall forthwith be transferred to the ELC Court for consolidation with *Bungoma ELC O.S No. E 007 OF 2024* which shall be treated as the lead/running file. Costs shall abide the outcome of the consolidated suit.
17. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 10TH DAY OF JULY, 2025.

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HON.E.C CHERONO
ELC JUDGE



In the presence of;

1. Mr. Nyamu for the Applicant.
2. Mr. Wangila H/B for Wotia for the Respondent.
3. Bett C/A.

