



REPUBLIC OF KENYA



**Kazungu v Katana & 13 others (Environment and Land Miscellaneous
Case E010 of 2025) [2025] KEELC 6757 (KLR) (8 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6757 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND MISCELLANEOUS CASE E010 OF 2025
FM NJOROGE, J
OCTOBER 8, 2025**

BETWEEN

MARTIN MWAROGO KAZUNGU APPLICANT

AND

RACHAEL BAHATI KATANA 1ST RESPONDENT

SAMINI FESTUS NGUMBAO 2ND RESPONDENT

ZAWADI IHA NGUMBAO 3RD RESPONDENT

CONSTANCE FUKIRI IHA 4TH RESPONDENT

PATIENCE AMINA IKA 5TH RESPONDENT

AGNES MAPENZI IHA 6TH RESPONDENT

IMELDA MUNYAZI CHIMBE IHA 7TH RESPONDENT

DANIEL THOYA IHA 8TH RESPONDENT

MATHIAS THOYA IHA 9TH RESPONDENT

SAMUEL IHA KATANA 10TH RESPONDENT

EMMANUEL MVERA 11TH RESPONDENT

EMMANUEL FURAHA 12TH RESPONDENT

EVERLYN MAONI 13TH RESPONDENT

STELLA CHINYAVU 14TH RESPONDENT



RULING

1. The Notice of Motion dated 15/4/2025 is brought under Sections 1A, 1B, and 3A of the Civil Procedure Act, and Order 1 Rule 1 of the Civil Procedure Rules. The Applicants seek the following orders:
 1. That this Honourable Court be pleased to withdraw to itself and order that Malindi Chief Magistrate Court Land Case No. E145 Of 2023 pending before the lower court be transferred to this Honourable Court for trial and determination;
 2. That costs of this application be in the cause.
2. The application is supported by the grounds on its face and the affidavit sworn by the 1st Applicant on the same date. The Applicants contend that the suit filed by the Respondents in the Chief Magistrate's Court on 7/12/2023 gave rise to a defence raising, inter alia, a claim for cancellation of title and adverse possession, remedies which fall outside the jurisdiction of the subordinate court and can only be granted by this Court.
3. On 16/6/2025, this Court directed the Respondents to file their reply within fourteen (14) days, and granted the Applicants leave to file a supplementary affidavit and submissions within fourteen (14) days of service of the intended reply. To date, there is no reply by the Respondents.
4. The Applicants filed written submissions on 13/8/2025. They submitted that their application seeks the withdrawal of Malindi CM ELC Case No. E145 of 2023 from the Chief Magistrates' Court to the Environment and Land Court for hearing and determination. They argued that while the Plaintiffs' claim for ownership and possession of MALINDI/PUMWANI PHASE 1/8 was properly filed in the subordinate court, the Applicants' Counterclaim raises substantive issues including cancellation of registered title, declarations on the validity of title, and recognition of rights by adverse possession.
5. They contended that these remedies fall within the original jurisdiction of the Environment and Land Court under Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act, and are beyond the jurisdiction of the Chief Magistrates' Court whose powers are limited by statute. Reliance was placed on Section 18 of the Civil Procedure Act which empowers this Court to withdraw proceedings from a subordinate court where there are compelling reasons, as well as the decision in *Mubichi v Mworira* [2023] KEELC 20791 on the discretionary nature of such transfers.
6. The Applicants submitted that retention of the matter before the Chief Magistrates' Court would result in delay, multiplicity of proceedings, and a risk of conflicting judgments, contrary to the overriding objective under Sections 1A and 1B of the Civil Procedure Act. They urged the Court to allow the application, withdraw Malindi CM ELC Case No. E145 of 2023, and assume jurisdiction for its hearing and final determination.

Analysis And Determination

7. I have carefully considered the Notice of Motion dated 15/4/2025, the affidavit in support, and the written submissions filed by the Applicants. The Respondents, though duly served, did not file any reply or submissions in opposition to the application. The issues that arise for determination are:
 - a) Whether this Court has jurisdiction to withdraw Malindi CM ELC Case No. E145 of 2023 from the Chief Magistrates' Court for its hearing and determination;



- b) Whether the application is merited.
8. Section 18 of the *Civil Procedure Act* empowers the High Court, at any stage of the proceedings, to withdraw any suit from a subordinate court and try or dispose of it. The Environment and Land Court, being of the same status as the High Court under Article 162(2)(b) of *the Constitution*, is similarly clothed with this discretion. The section reads: -
- (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. (emphasis mine)
 - (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.
9. In the present case, the Plaintiffs’ claim before the Chief Magistrates’ Court is for ownership and possession of MALINDI/PUMWANI PHASE 1/8, which, in isolation, falls within the pecuniary jurisdiction of that court. However, the Applicants’ Counterclaim seeks substantive reliefs including cancellation of registered title, declarations on the validity of the Respondents’ title, and recognition of rights by way of adverse possession.
10. In my view, these remedies go to the root of ownership and title to the land. Under Section 13 of the *Environment and Land Court Act* and Article 162(2)(b) of *the Constitution*, this Court has original jurisdiction to hear and determine disputes relating to title to land, cancellation of titles, rectification of the register, and claims founded on adverse possession.
11. Important to note is that a claim for adverse possession is ordinarily commenced by way of an Originating Summons under Section 38 of the *Limitation of Actions Act*. However, courts have recognized that such a claim may also be competently raised in a counterclaim. (See the Court of Appeal in *Kuria Kiarie & 2 others v Sammy Magera* [2018] KECA 467 (KLR)).
12. That said, such jurisdiction is reposed exclusively in the Environment and Land Court. 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 (Civil Appeal E141 of 2022) [2024] KECA 1417 (KLR), the Court of Appeal held as follows: -
- “48. It is our view that, if it was intended that claims for adverse possession be determined by the Magistrates’ Court, nothing would have been easier than for Parliament to have expressly enacted such a provision. So that in view of the express provisions of the law, a strict interpretation of section 38 would



mean that hearing and determination of such matters is specifically limited to the Environment and Land Court to the exclusion of Magistrates' Court.

49. 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.

50. 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."

13. Accordingly, while the Applicants were entitled to raise adverse possession by way of a counterclaim, the forum for its determination is this Court and not the Chief Magistrates' Court.
14. I am therefore persuaded that retaining the suit in the Chief Magistrates' Court would risk multiplicity of proceedings and potentially conflicting judgments. Such an outcome would offend the overriding objectives under Sections 1A and 1B of the *Civil Procedure Act* which require the just, expeditious, and cost-effective resolution of disputes.
15. In view of the foregoing, I am satisfied that the Applicants have demonstrated sufficient cause to warrant exercise of this Court's discretion under Section 18 of the *Civil Procedure Act*. The Notice of Motion dated 15/4/2025 is therefore merited and it is hereby granted in terms of prayers no 1 and 2 thereof.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 8TH DAY OF OCTOBER, 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

