

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELCLOS CASE NO. E015 OF 2025

- 1) **JULIUS KAHINDI MWANGO**
- 2) **BENSON KATANA UNDA**
- 3) **JOSHUA JEFWA WILSON**
- 4) **DANSON MBOGO KONDE**
- 5) **TATU SALIM MAHBUB**
- 6) **ANDERSON CHILANGO PLAINTIFFS/APPLICANTS**

VERSUS

- 1) **ADAN ATHMAN MARO**
- 2) **OMAR ALI ATHMAN DEFENDANTS/RESPONDENTS**

RULING

1. By the Notice of Motion dated 25th March 2025, the six (6) Plaintiffs pray for an order that the Defendants/Respondents, their servants and/or agents be restrained by an order of temporary injunction from evicting them, demolishing their houses or interfering in any manner with the Plaintiffs' occupation of Plot No. 177/III/MN/CR No. 7172 in Mtwapa, Majengo Kanamai within Kilifi County pending the hearing of the main suit.

2. The application is supported by an Affidavit sworn by Julius Kahindi Mwango (the 1st Plaintiff) and is premised on the grounds:

- i. That the Plaintiffs have stayed over the said parcel of land for over 30 years;**
- ii. That the Defendants are not the true owners of the plot but on the 8th March, 2025 they descended on the Plaintiffs' homes using bulldozers and demolished some of the Plaintiffs' structures;**
- iii. That the Defendants are also threatening to evict the Plaintiffs from the suit premises without a lawful Court order; and**
- iv. That the chronology of ownership of the said plot by the Defendants is in doubt.**

3. Adam Athumani Mzee and Omar Ali Athman (the Defendants) are opposed to the application. In their joint Replying Affidavit sworn on 14th April, 2025, the Defendants aver that they are familiar with Plot No. CR 4224 where they reside and not CR 7172 as the Plaintiffs claim. The Defendants further aver that

the Plaintiffs are part of a group of thirty (30) people who had invaded the suit property sometimes in the year 2023 with the intention of grabbing the same. The Defendants assert that the suit property belongs to their late grandfather and that all their loved ones are buried therein.

4. In addition, the Defendants have filed a Notice of Preliminary Objection dated 1st April 2025 wherein they object to the suit on the grounds:

a) That the ELC Court at Mombasa has no territorial jurisdiction to hear and determine this suit, since the property is located at Majengo Kanamai in Kilifi County;

b) That section 12 of the Civil Procedure Act Cap 21 Laws of Kenya prescribes that suits should be instituted where the subject matter of the dispute is situated. The subject matter of the suit is a property situated at Majengo-Kanamai which falls within the jurisdiction of Malindi Court;

c) That the persons on the Official Search dated 28th March, 2025 are the current registered owners of the suit property and have all since died and the Court

can therefore not litigate on a suit whose property belonged to the deceased persons (sic);

d)That the CR Number quoted on the Applicants pleadings is CR 7172 yet the Respondents resides and live in CR 4224 different from the one related to the Applicants.

5. On 23rd April 2025, directions were given herein that both the Plaintiffs' Motion as well as the Defendants' Preliminary Objection be disposed off together. I have accordingly carefully considered both the application as well as the objection thereto.

6. As was stated in ***Mukisa Biscuits Ltd -vs- West End Distributors Ltd (1969) EA 696:***

“... a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

7. In *Oraro -vs- Mbaja (2005) 1 KLR, 141*, the Court held as follows; **“A ‘Preliminary Objection’, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection and yet it bears factual aspects calling for proof, or seek to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.”**
8. That being the case, I did not therefore consider grounds 3, 4 and 5 of the Defendants Preliminary Objection as proper grounds to object to the suit. At grounds 1 and 2 of the objection however, the Defendants raise the issue of the jurisdiction of this court to hear and determine this matter. It is the Defendants’ case that the ELC at Mombasa has no territorial jurisdiction to hear and determine this suit as the suit property is located at Majengo Kanamai in Kilifi County.
9. Article 162 (2) (b) of the Constitution of Kenya mandated Parliament to create a superior court with the status of the High Court to hear and determine disputes relating to the

environment and the use and occupation of and title to land. That provision led to the enactment of the Environment and Land Court Act, No. 19 of 2011. Section 4 on the establishment of the Court provides as follows:

“(1) There is established the Environment and Land Court.

(2) The Court shall be a superior court of record with the status of the High Court.

(3) The Court shall have and exercise jurisdiction throughout Kenya.”

10. That being the case, it was clear to me that the Environment and Land Court has unlimited territorial jurisdiction relating to the environment and the use and occupation of, and title to land from anywhere in the country.

11. It is however not in dispute that as to the place of suing, Section 12 of the Civil Procedure Act provides as follows:

“12. Suit to be instituted where subject matter situate

Subject to the pecuniary or other limitations prescribed by any law, suits—

- (a) for the recovery of immovable property, with or without rent or profits;**
- (b) for the partition of immovable property;**
- (c) for the foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property;**
- (d) for the determination of any other right to or interest in immovable property;**
- (e) for compensation for wrong to immovable property;**
- (f) for the recovery of movable property actually under distraint or attachment, where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate:**

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through

his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business, or personally works for gain.”

12. In my considered view, while the said section provides for a guide on the place of filing a suit, the same is only applicable to courts whose territorial jurisdiction is defined and cannot override the Constitutional provisions regarding the jurisdiction of the Environment and Land Court
13. Considering a similar situation in ***Selina Vukinu Ambe -vs- Ketan Shashikant Khatri (2020) eKLR***, the court held as follows:
“The High Court’s jurisdiction being a creature of the Constitution which is the supreme law of the land cannot be limited or fettered by any other written law including the *Civil Procedure Act*. In my view, any statute that would purport to limit the High Court’s jurisdiction as conferred by *Article 165 (3)* would to

that extent be unconstitutional by virtue of *Article 2 (4) of the Constitution.*”

14. Similarly, in *Swiss Deli Trade (Panama) Inc -vs- Privamnuts EPZ Kenya Limited (2020) eKLR*, the court held as follows:

“Amongst the objectives for the provisions on place of suing is to ensure that suits are filed in as much as possible where the cause of action arose or where the subject matter is situate or in some instances where the Defendant arises. Suits should not be instituted in places that cause unnecessary hardship to the Defendant and which may hinder access to justice. Again suits should not be lumped in one station when they could be heard elsewhere as this may lead to clogging up of some courts in a way that flies in the face of equitable access to justice. The provisions of Section 15 which restricts the institution of suits within the local limits of High Court stations should be viewed in that light. So that “territory Jurisdiction” placed by Section 15 does not mean that the “wrong” High Court

does not have substantive jurisdiction in respect to the matter.”

15. Taking the rationale for the provisions for the place of suing to be as discussed above, then this court has power to simply transfer this suit to the place it should have been filed in the first place for the convenience of the Defendants. To be clear, this court is not bereft of substantive jurisdiction to hear and determine the matter but must pay homage to the noble objectives of the provisions of Section 12 and 15 of the Civil Procedure Act in ordering the place of suit as they do.
16. In the premises, this court partially upholds the Preliminary Objection but the suit shall not stand dismissed. Instead the court orders that the suit be transferred to the Environment and Land Court at Malindi for hearing and disposal.
17. The Defendants shall have the costs of the Preliminary Objection.

Ruling dated, signed and delivered in open court and virtually at Mombasa this 16th day of October, 2025

.....
J.O. OLOLA

JUDGE

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) Ms. Barayan Advocate for the Plaintiffs/Applicants
- c) No appearance for the Defendants/Respondents

Copy