

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NYERI**  
**MISCELLANEOUS APPLICATION NO. E018 OF 2025**

**GODFREY GACHIHI NJOGU.....APPLICANT**

**-VERSUS-**

**DICKSON WACHIRA MATHUI.....1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR-NYERI.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY LAND SURVEYOR-NYERI COUNTY...3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before the Court is an application under Notice of Motion dated 12<sup>th</sup> March 2025 seeking the following orders:

1) **Spent.**

2) **THAT this Honourable Court be pleased to call into this Court for hearing and disposal Nyeri M.C.L. & E028 of 2024.**

3) **THAT costs to abide the outcome of the transferred suit.**

2. The Application is supported by the affidavit of the Applicant and the grounds on the face of the application. The Applicant stated that before the Magistrates' Court in **Nyeri, M.C.L. & E028 of 2024** is a counterclaim under adverse possession, which by dint of authority of **Pauline Chemuge Sugawana & Another vs Moses Orikae Mutarakwa Appeal No. E141 of 2024**, the lower court lacks jurisdiction to deal with. The Applicant states that it is mete that the suit be transferred to this court for hearing and determination of all the issues raised holistically. The Applicant deposed that

he was sued by the 1<sup>st</sup> Respondent before the Chief Magistrate's court at Nyeri as per the pleadings before the said court. He filed a defence in which he raised the issue of adverse possession as he has been in occupation of the suit land since 2004.

3. The 1<sup>st</sup> Respondent raised a preliminary objection to the Magistrate's Court's jurisdiction to determine a claim of adverse possession, and the Applicant has been advised by his Advocate on record that this is the most appropriate court to hear and determine the said claim holistically.

**The 1<sup>st</sup> Respondent's replying affidavit.**

4. Counsel on record for the 1<sup>st</sup> Respondent herein, E.M Ndichu, filed an affidavit in response to the instant application, deposing that it is their preliminary objection that triggered the filing of this instant application.
5. It is the 1<sup>st</sup> Respondent Counsel's deposition that the instant application is unsustainable, as allowing a boundary dispute whose jurisdiction is the exclusive preserve of the Magistrate's Court under Section 9(a) (i) of the Magistrate's Court Act, 2015 and a claim of adverse possession would amount to a misjoinder of causes of action.
6. Further, under the doctrine of the predominant purpose test, the essential character of the suit in the lower court is one of a boundary dispute, and the court should not transfer it to this court over an ancillary cause of action that has been raised by the Applicant after filing the suit.
7. Therefore, Counsel expressed that the only available remedy would be for the Applicant to file a separate suit to be determined by the Court with the appropriate jurisdiction and that this instant application should be dismissed with costs to the 1<sup>st</sup> Respondent.

**Applicant's written submissions.**

8. Counsel for the Applicant herein submitted that his client has been in occupation of the suit land since 2004 and has pleaded prescriptive rights in adverse possession. This makes adverse possession an issue for determination, notwithstanding the issue of the boundary fixing by the Land Registrar.
9. According to the Applicant, the High Court enjoys an original unfettered jurisdiction which is granted under Article 165(3) of the Constitution. The High Court has supervisory jurisdiction over subordinate courts, with the power to call for all such proceedings under Article 165(6) and(7), submitting that the Magistrate's Court jurisdiction does not divest the High Court of its constitutional jurisdiction.
10. It is the Applicant's submission that the defence as filed and counterclaim as pleaded are enmeshed and that, as a cardinal rule in pleadings, all matters that form a cause of action or defence must be pleaded at the earliest opportunity for the court to make a holistic determination. This makes transfer of the suit imperative.
11. The Applicant therefore prays that their instant application be allowed as prayed.

**1<sup>st</sup> Respondent's written submissions**

12. The 1<sup>st</sup> Respondent's counsel submitted in the affirmative on the issue of whether the application constitutes an improper misjoinder of distinct causes of action in one suit, stating that the boundary issue and adverse possession claim represent separate legal causes requiring different forums.
13. On this point, Counsel cited the cases of **George Kamau Macharia v.Dexxa Limited (2019)KEELC 4596(KLR)** and **Mwangi v. Kaboro(Environment**

**and Land Appeal E004 of 2023)(2024)KEELC 6546(KLR 9 October 2024)(Judgment).**

14. The second issue that Counsel submitted on is whether the Magistrate's Court retains proper jurisdiction over the boundary dispute under statutory provisions, referring to Section 9(a)(i) of the Magistrate's Court Act, 2015, that assigns boundary disputes to the Magistrate's Court. On this issue, Counsel cited and relied upon the cases of **Sugawara v Kiruti (Sued in her Capacity as the Administratrix of the Estate of Mutarakwa Kiruti Lepaso, alias Mutarakwa Kiroti Lepaso and on her Own) & 3 others(Civil Appeal E141 of 2022)(2024KECA 1417(KLR)(11<sup>th</sup> October 2024)(Judgment)** as well as the case of **Kimeto v Omwomo (Environment and Land Appeal E004 of 2024) [2024] KEELC 13848 (KLR) (18 December 2024) (Judgment)**
15. Third, the 1<sup>st</sup> Respondent submitted on whether the predominant purpose test precludes transfer based on ancillary claims raised defensively in the negative. Submitting that the Plaintiff discloses a boundary dispute that is squarely within the Magistrate's Court jurisdiction, and that the counterclaim for adverse possession does not alter the predominant purpose of this suit. To support this position, Counsel cited and relied on the cases of **Rotich v Bii (Environment & Land Case 8B of 2023) [2025] KEELC 3826 (KLR) (12 May 2025) (Ruling), Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel [2016] KECA 250 (KLR), Salim v Co -operative Bank of Kenya Ltd & 2 others; Co-operative Bank of Kenya (Plaintiff); Mage & another (Defendant) (Environment & Land Case 193 of 2021) [2024] KEELC 852 (KLR) (13 February 2024) (Judgment)**

16. The 1<sup>st</sup> Respondent's submission therefore, is that the chronology of events reveals a clear pattern of procedural impropriety and forum shopping and that the Applicant is attempting to circumvent established jurisdictional principle rather than following the proper legal procedure of filing separate suits in appropriate forums, thereby undermining the statutory framework for jurisdictional allocation as they pray for the instant application to be dismissed with costs.

### **Analysis and Determination**

17. The court has considered the application herein, the replying affidavit and submissions by Counsel for the parties. Transfer of **Nyeri M.C.L. & E028 of 2024** is sought on the ground of lack of jurisdiction by the subordinate court to hear and determine a claim for adverse possession following the Court of Appeal Judgment in **Sugawara v Kiruti & 3 others** (supra).
18. Counsel for the Applicant submitted that the defence as filed and counterclaim as pleaded are enmeshed together and that, as a cardinal rule in pleadings, all matters that form a cause of action or defence must be pleaded at the earliest opportunity for the court to make a holistic determination and that this makes transfer of the suit imperative.
19. Counsel for the Applicant relied on the provisions of **Section 18(1) (b)** of the **Civil Procedure Act, CAP 21**. The entire section provides this court with the power to withdraw and transfer suits instituted in subordinate courts and states that:
- (a) 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—*

***(b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—***

***(i) try or dispose of the same;***

***(ii) or 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.***

20. The Applicant relied on the Court of Appeal **Sugawara v Kiruti & 3 others** (**supra**) in its finding that the hearing and determination of matters of adverse possession was specifically limited to the Environment and Land Court to the exclusion of the Magistrates' Court. The Court stated as follows;

***“The controversial question of jurisdiction of the Magistrates' Courts in claims for adverse possession emanated from sections 37 and 38 of the Limitation of Actions Act, where it was specifically provided that such claims were to be heard by the High Court. Reference was to the "High Court" as the court to which such cases were heard, and given the dictates of the Constitution, that should be construed to mean the Environment and Land Court, as being the court donated with jurisdiction to hear and determine matters pertaining to adverse possession of land. The effect of that interpretation was that it was only the Environment and Land Court established under article 162(2)(b) that was mandated to hear those cases. So that, notwithstanding the expansion of the jurisdiction of environment and land usage to Magistrates Courts, it was distinctive that under section 9(a) of the***

*Magistrates Courts Act, various matters were specified for determination, but claims for adverse possession were not included.*

*A court's jurisdiction flowed from either the Constitution or legislation or both. Thus, a court could only exercise jurisdiction as conferred by the Constitution or other written law. It could not arrogate to itself jurisdiction exceeding that which was conferred upon it by law.*

*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 of the Limitation of Actions Act would mean that hearing and determination of such matters was specifically limited to the Environment and Land Court to the exclusion of Magistrates' Court.*

21. The Applicant, being aware of the above decision of the Court of Appeal, still filed the counterclaim before the Magistrates' Court. The question of the court's competence to transfer a suit filed in a court without jurisdiction has been the subject of numerous decisions of the Court of Appeal. In the case of **Phoenix of E.A. Assurance Company Limited vs. S. M. Thiga t/a Newspaper Service [2019] eKLR**, the Court of Appeal held that:

*“...Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot*

*confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction”*

22. Further, the Court of Appeal in the case of Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel [2016] eKLR stated that:

*“In numerous decided cases, courts, including this Court have held that 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 the court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the "O2" principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the situation.”*

23. The Court in the case of Abraham Mwangi Wamigwi V Simon Mbiriri Wanjiku & Another[2012]eKLR also looked at several authorities on this same issue and stated as follows:

*“The law relating to transfer of suits from subordinate Courts to the High Court or any transfer for that matter is very clear. In Kagenyi vs. Musiramo (supra), Sir Udo Udoma, CJ made it clear that an order for*

*the transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it. In Ali Abdi Sheikh vs. Edward Nderitu Wainaina & Others (supra), Koome, J (as she then was) found that since the plaintiff had filed a suit in respect of a claim to land whose value exceeded Kshs. 500,000.00 in the subordinate court the suit could not be transferred since the general powers of the court to transfer suits under section 18 of the Civil Procedure Act cannot be exercised in a matter where the suit was filed in a court without jurisdiction. A similar view was taken by the same Judge in Rainbow Manufacturers Limited vs. National Bank of Kenya (supra).*

*Dealing with the same issue of jurisdiction, J B Ojwang, J (as he then was) in the Boniface Waweru Mbiyu vs. Mary Njeri & Another expressed himself as follows: "Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the Court, the matter thus filed is so defective as to be a nullity. It is incompetent and void in law, and therefore it is not a motion or suit that can be transferred to any other Court. It is the duty of the Court or tribunal before which such matter is first brought to declare its status as a nullity, and it follows that such matter has no capacity to be transferred to any other Court".*

*It is therefore trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under section 18 aforesaid to a tribunal where it ought to have been properly instituted. The reason for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing and therefore the court cannot purport to transfer nothing and mould it into something through a procedure known as “transfer”. In other words, courts can only transfer a cause whose existence is recognized by law. It is now settled law that where a Court finds that it has no jurisdiction, it must immediately down its tools and proceed no further.”*

24. It is trite law that a counterclaim is a cross-claim which a defendant has against a plaintiff, but in respect of which the defendant can bring a separate action against the plaintiff if he wishes to do so. To all intents and purposes, a counterclaim is a separate and independent action by the defendant, which the law allows to be joined to the plaintiff's action to avoid multiplicity of suits. Consequently, a counterclaim still stands even if the principal action is discontinued by the Plaintiff(s) or the principal action is dismissed by the Court.
25. It is also settled law that a counterclaim cannot be maintained unless it is shown that the relief claimed is sufficiently connected with or allied to the subject matter of the principal claim as to make it necessary in the interest of justice that it should be dealt with along with the claim. In the case of **Koringura v Tingauoko (Environment & Land Case 13 of 2023) [2025] KEELC 2889 (KLR) (26 March 2025) (Ruling)**, the Court stated that:

*“In KCB Ltd -vs- James Karanja [1981] eKLR, the court observed that a counterclaim is a fresh suit only that the defendant becomes the plaintiff for all intents and purposes and that a counterclaim is combined in the plaintiff’s proceedings for convenience to enable the court to pronounce a final judgment in one set of proceedings both on the original and on the cross-claim”.*

26. However, the court is of the view that where the court where the primary suit is filed lacks jurisdiction to hear and determine the counterclaim, the Defendant would be better advised to file a separate suit.
27. In the Court’s further view, the fact that the Magistrate’s Court lacks jurisdiction to hear and determine the claim for adverse possession does not preclude the Defendant from raising the defence of limitation of actions under Section 7 of the Limitation of Actions Act which provides that *“an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”* The person claiming to be in adverse possession can use the Act as a defence to argue that the claim is time-barred.
28. For the foregoing reasons, the court finds that the Notice of Motion application dated 12<sup>th</sup> March 2025 lacks merit and it is hereby dismissed with costs to the 1<sup>st</sup> Respondent.

Dated, Signed and Delivered at Nyeri this 9<sup>th</sup> day of October 2025

**HON. LADY JUSTICE L.G. KIMANI**

**JUDGE**

In the Presence of:-

C. Kendi: Court Assistant

M/S Kimani for the Applicant

Waweru Macharia holding brief for the 1<sup>st</sup> Respondent

No attendance for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Original Ruling