



REPUBLIC OF KENYA



Mbunguni Phase II Community v Kwale Land Adjudication Officer & 3 others (Environment and Land Petition E003 of 2025) [2025] KEELC 7668 (KLR) (28 October 2025) (Ruling)

Neutral citation: [2025] KEELC 7668 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND PETITION E003 OF 2025
LL NAIKUNI, J
OCTOBER 28, 2025**

BETWEEN

MBUNGUNI PHASE II COMMUNITY PETITIONER

AND

KWALE LAND ADJUDICATION OFFICER 1ST RESPONDENT

KWALE LAND REGISTRAR 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

THE NATIONAL LAND COMMISSION 4TH RESPONDENT

RULING

I. Introduction.

1. The Honourable Court herein has proceeded on its on motion “Suo Moto” to render direction on whether it bears jurisdiction to handle the matter herein having been filed in High Court and then transferred to this Court.
2. Prior to proceeding further, it is imperative that the Honourable Court provides some brief background of the case. From the filed pleadings, initially, the Petitioner instituted the suit before the High Court at Kwale, being - under “High Court Constitutional Petition Reference Numbers E004 of 2025 – Mbunguni Phase II Community – Versus – Kwale Land Adjudication Officer & 3 Others”. It was brought vide the Petition dated 17th June 2025 under the dint of the provisions of Articles 19 (1), (2) & (3); 20 (1), (2) & (3); 21 ((1); 23, 27, (1), (2), (3), (4) & (5); 28, 40 and 47 (1) of *the Constitution* of Kenya 2010.
3. The Petition was premised on the grounds, testimonial facts and averments made out under an 18 Paragraphed Supporting Affidavit of Juma Matano Kakala sworn and dated even date together with two (2) marked annexures annexed thereto being Annexures “JMK - 1 & 2” annexed thereto.



II. The proceedings before the High Court.

4. From the pleadings, the Petitioner sought to have the High Court issue them with the following reliefs that:-
 - a. A declaration that the land Adjudication process conducted at Mbunguni Phase II Settlement Scheme was fraudulent, illegal, null and void ab initio;
 - b. A declaration that the fraudulent Land Adjudication process conducted at Mbunguni Phase II Settlement Scheme was an infringement of the Petitioner's rights under the provision of Articles 27, 40 and 47 of *the Constitution* of Kenya, 2010.
 - c. An order that the judicial review by way of an order of Mandamus to compel the 2nd Respondent to recall all the title Deeds issued to Mbunguni Phase II Settlement Scheme and thereby revoke or cancel the same.
 - d. An order for Judicial review by way of an order of Mandamus to compel the Respondents to conduct a fresh and proper land adjudication process in Mbunguni Phase II Settlement Scheme which process should include identifying the true local residents and their actual occupation of land and thereafter issue fresh title deeds to the true local residents as per their land occupation and the remaining area could be allocated to the non – locals.
 - e. Costs to be awarded to the Petitioners.
5. Upon keen perusal of the pleadings herein and particularly taking notice that the suit herein was first filed in Kwale High Court, on 22nd January, 2025 when the parties appeared before my brother Hon. Justice Andayi W.F, he gave the following directions that:-
 - a. This is a matter concerning land adjudication and I should think it should be properly be placed before the ELC.
 - b. Thus, the matter should be transferred to the Environment and Land Court.
 - c. The matter to be taken up by the ELC for the necessary action and thus it be mentioned before the said CELC on 5th February, 2025.
6. Subsequently, the matter as HCCHPET/E004/2025 was placed before the ELC at Kwale on several diverse dates being the 5th February, 2025 and 19th March, 2025. During these Court sessions, the ELC did pose the following queries:-
 - a. Does the High Court have powers to transfer a suit wrongfully filed before it due to lack of jurisdiction in view of the existing precedents by the Supreme Court?
 - b. Were the 5th, 6th & 7th Respondents properly joined in the matter/
 - c. Was the current Petition valid as it was or it needed to be amended?
 - d. How does the matter proceed on in the given circumstances form now onwards?
7. Therefore, it is from this brief background that the ELC offered to render its direction herein.

III. The Direction.

8. The main issue herein is whether this Court may continue hearing of a suit that was initially filed at High Court but then transferred to this Court. For a while now, there has been diverse legal opinion



onto the said fundamental issue. Nonetheless, guided by the principles of “Stare Decisis” and not to fall in the danger of re – inventing the wheel, the Court will proceed to re – produce the said cases herein below.

9. From the very onset, it is significant to lay down the legal parameters that establish the High Court in Kenya and the Environment & Land Court being one of equal status. The provisions of Article 165 of *the Constitution* of Kenya, 2010 provides:-

165. High Court

- (1) There is established the High Court, which—
 - (a) shall consist of the number of judges prescribed by an Act of Parliament; and
 - (b) shall be organised and administered in the manner prescribed by an Act of Parliament.
- (2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.
- (3) Subject to clause (5), the High Court shall have—
 - (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.
- (4) Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.
- (5) The High Court shall not have jurisdiction in respect of matters—
 - (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or



- (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).
(emphasis added)

10. While the provision of Article 162 of *the Constitution* of Kenya 2010 provides:-

162. System of courts

- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - (a) employment and labour relations; and
 - (b) the environment and the use and occupation of, and title to, land.
- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
- (4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.

11. The Honourable Court will cite several of the cases in relation to the matter. The Supreme Court in the case of: “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) – Versus - Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) (Petition 3 of 2016) [2019] KESC 83 (KLR) (8th November 2019) (Judgment) highlighted that:-

“ 154. However, as it was well elucidated in the case of Kagenyi – Versus - Musirambo & Another (1968) EALR 43, an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it. It is therefore irrelevant as parties cannot consent to confer jurisdiction to a Court/tribunal where it is not provided by law. (emphasis added)

12. Additionally, the Court of Appeal in the case of:- “Equity Bank Limited - Versus - 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 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. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.



Similarly, in the case of: “Abraham Mwangi Wamigwi – Versus - Simon Mbiriri Wanjiku & Another [2012] eKLR, it was held as follows:-

“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 recognised by law.”

In saying all these, I seek refuge from the now famous case of: “Macfoy – Versus - United Africa Company Limited [1961] 3 All ER, 1169”, it was held thus:-

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...”

13. FROM the above decisions a suit can only be transferred from one court to another if the court from which it is being transferred had jurisdiction over the subject matter. In the case of: “Wamathu Gichoya – Versus - Mary Wainoi Magu [2015] eKLR”, the Court held that: -

“Furthermore, according to Kagenyi – Versus - Musiramo and Another, supra, the power to transfer a case to the High Court for hearing may only be exercised if the court before which it is led is a court vested with competent jurisdiction to try and dispose of the matter. In other words, if the suit led is incompetent, the High Court lacks jurisdiction to effect a transfer”.

14. And in the case of:- “Nickson M. Chanda – Versus - Angela Kamwaria [2009] eKLR”, it was stated that failure to institute a suit in a competent court renders it incurably defective and as good as a non-existent and that where a suit is as good as non-existent, there would be nothing to be transferred.

Conclusion

15. Therefore, based on the above legal rationale, the Civil suit - HCCHRPET/E004/2025 - Vincent Endekwa Mahasi – Versus - Bamburi Cement PLC and Bamburi Cement PLC, Group Managing Director and 51 others - is a nullity ab initio and cannot be cured by invoking the overriding objective under the provisions of Sections 1A and 1B of the *Civil Procedure Act*, Cap. 21 or Article 159 (2) (d) of *the Constitution* of Kenya, 2010 and cannot be transferred to Environment and Land Court Kwale but be struck out or withdrawn in the High Court at Kwale then file a fresh suit in the Environment and Land Court at Kwale.
16. Ultimately, I now proceed to issue the following directions:-
- a. That Elc No. Petition E003 Of 2025 – Mbunguni Phase Ii Community – Versus – Kwale Land Adjudication Officer & 3 Others Be And Is Hereby Referred Back To The High Court At Kwale As Hchrrpet/e004/2025 – Mbunguni Phase Ii Community – Versus – Kwale Land Adjudication Officer & 3 OtherS whereby the High Court can strike out the suit for lack of jurisdiction or issue appropriate orders or directions.



- b. THAT the matter to be mentioned on 12th November, 2025 before the High Court for the direction to be provided by the Judge.
- c. THAT thereafter, the Petitioner to undertake the appropriate steps by filing afresh Petition before the Environment and Land Court Kwale.
- d. THAT each party to bear their own costs.

IT IS SO ORDERED ACCORDINGLY

DIRECTION GIVEN ON THIS 28TH DAY OF OCTOBER 2025.

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**HON. MR. JUSTICE LL NAIKUNI,
ENVIRONMENT & LAND COURT
AT
KWALE**

Direction issued in the presence of:-

- a. Mr. Disii, the Court Assistant.
- b. Mr. Gichana Advocate for the Petitioner.
- c. M/s. Kiti Advocate for the 1st, 2nd & 3rd Respondents.
- d. Mr. Kariuki Advocate for the 5th, 6th & 7th Respondents.
- e. No appearance for the 4th Respondent.

