

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT ELDORET

ELC MISCELLANEOUS APPLICATION No. E042 OF 2025

AFRICAN DEVINE CHURCH APPLICANT

VERSUS

ROBERT KIMAIYO KOECH 1ST RESPONDENT

ROSALINE JEMELI KOECH 2ND RESPONDENT

YUSUF KIPTUM KOECH 3RD RESPONDENT

RULING

1. This miscellaneous suit was commenced by way of a Notice of Motion application dated 29th August, 2025 through which the Applicant is seeking the following orders:-

(a) THAT the Honourable Court be pleased to grant an order transferring **CHIEF MAGISTRATE ENVIRONMENT AND LAND CASE No. 125 OF 2021 AFRICAN DEVINE CHURCH VERSUS ROBERT KIMAYO KOECH AND 2 OTHERS** from the Magistrate Court in Eldoret to this Honourable Court for hearing and determination.

(b) THAT the costs of the Application be provided for.

2. The application is premised on the grounds on its face and on the supporting affidavit sworn on 29th August, 2025 by James Mulupi Iyadi, the Applicant's Pastor. He deponed that they instituted a suit against the Respondents before the Chief Magistrates Court at Eldoret against the Respondents herein vide Plaint dated 14th June, 2021. That in the said suit they sought among other reliefs, to be declared the legal owners of a 1/8 of an acre portion of a parcel of land known as Eldoret Municipality Block 21(King'ong'o)/444 (the suit property herein) by

way of constructive trust and adverse possession. They also sought an order directing the Land Registrar to register the Plaintiff as the owner of the aforementioned portion.

3. He deponed that at time of filing the suit, the Magistrate's Court had jurisdiction to handle adverse possession claims pursuant to the decision by D.O. Ohunjo J. at the Nakuru Environment and Land Court, in ***Patrick Ndegwa Munyua vs Benjamin Kiiru Mwangu & Another (2020) eKLR***. He deponed that in ***Sugawara vs Kiruti (Sued in her Capacity as the Administratrix of the Estate of Mutarakwa Kiruti Lepaso alias Mutaraqwa 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 that only the High Court has jurisdiction to handle adverse possession suits.
4. In the circumstances, he has asked this court to issue an order transferring Chief Magistrates Environment and Land Case No. E125 of 2021, African Devine Church versus Robert Kimaiyo Koech and 2 Others from the Magistrate's Court to this Court. He deponed that it is in the interest of justice that the suit is transferred to this court and allowed to proceed on merit to its just conclusion. He averred that the Respondents will not suffer any prejudice if the instant application is allowed. He also urged that the Application was made without unreasonable and/or inordinate delay, and should be allowed in the interests of equity and justice.
5. In further support of the Application, the Applicant filed a Supplementary Affidavit also sworn by its pastor, James Mulupi Iyadi, on 1st October, 2025. He deponed that the Respondents herein had filed their respective defences in opposition to the Applicant's suit in the Magistrate's Court being Eldoret

CM&L Case No. 125 of 2021. Further that the 1st Respondent then filed a Preliminary Objection dated 8th August, 2023 challenging jurisdiction. That the Preliminary Objection was dismissed. That based on the prayers that were sought, the trial court was seized with jurisdiction.

6. The Application was served upon the firm of Betty Koech & Company Advocates as well as the firm of Kosgey & Company Advocates as demonstrated in the Affidavit of Service sworn by Sammy M. Maina, an advocate of the High Court of Kenya, on 11th September, 2025. Pursuant to service, the firm of Betty Koech filed a Notice of Appointment on behalf of the 1st Respondent herein, but did not file a response to the Motion. The 2nd Respondent did not appear or file any response to the Application.

Analysis and Determination

7. I have considered the Application herein, the Supporting Affidavit and the Supplementary Affidavit as well as the annexures thereto. The following two issues arise for determination by this court:-
 - i. *Whether the Magistrate's Court has jurisdiction to hear adverse possession claims*
 - ii. *Whether this court can transfer the proceedings known as Eldoret CM EL Case No. 125 of 2021 to the ELC for hearing and determination*

(a) Whether the Magistrate's Court has jurisdiction to hear adverse possession claims

8. In the instant case, the Applicant herein is the Plaintiff in the proceedings known as Chief Magistrate Environment & Land Case No. 125 of 2021, African Devine Church vs Robert Kimayo Koech & 2 Others. The suit was commenced by way of a Plaint dated 14th June, 2021. From the copy of the Plaint annexed to the Applicant's Supplementary Affidavit dated 1st October, 2025 the Plaintiff in the

said suit seeks to be declared the owner of the suit property by way of adverse possession and constructive trust.

9. It appears from the Plaintiff and witness statements, also annexed to the aforementioned Supplementary Affidavit, that the Plaintiff purchased the land from the 1st Defendant at a consideration on 5th February 1996. At paragraph 12 of the Plaintiff, the Plaintiff averred that, they took possession immediately on 5th February, 1996, and that ***“their occupation was non-permissive, non-consensual, actual, open, notorious, exclusive and adverse use against the Defendants without interruption from the Defendants”***. The Plaintiff claims that they remained on the land until 3rd May, 2021 when the Defendants trespassed into the land and demolished the church among other structures.
10. The Applicant claims that the suit was filed in the Magistrates court following the decision of the ELC in *Patrick Ndegwa Munyua vs Benjamin Kiiru Mwangi & Another (2020) eKLR*, in which it was held that where the matter was within the pecuniary jurisdiction of the Magistrates Court, then the said court could handle the matter.
11. However, during the pendency of the suit, the Court of Appeal delivered its judgment in *Sugawara vs 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)* on 11th October, 2024. In the said judgment, the court of appeal held that the hearing and determination of matters touching on adverse possession are specifically limited to the Environment and Land Court to the exclusion of Magistrates’ Court. The Court expressly stated that:-

“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. In the result, this ground is without merit and is accordingly dismissed.”

12. Arising out of this landmark decision, the Chief Magistrates Court now lacks jurisdiction to hear and determine the Applicant’s claim on adverse possession. It is for this reason that the Applicant filed this Motion to have the suit transferred to this court which has the exclusive jurisdiction on such claims.

13. In *Owners of the Motor Vessel ‘Lillian S’ vs Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989) [1989] KECA 48 (KLR)*, the Court of Appeal relied on an excerpt from *Words and Phrases Legally defined - Volume 3: I - N Page 113*, where the term jurisdiction was defined as follows:-

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in

order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

14. As has been held before, a court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or any other written law, and is precluded from arrogating to itself jurisdiction exceeding that which is by law donated to it. (See *Republic vs Karisa Chengo & 2 others (2017) eKLR*). The issue of jurisdiction is so central that when a court finds it has no jurisdiction, it ought not proceed with the case. On the importance of a court’s jurisdiction, the Court of Appeal in *Owners of Motor Vessel Lillian S (Supra)*, went on to explain that:-

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

15. The jurisdiction of courts to hear matters of adverse possession is found in the Limitation of Actions Act. In particular, Section 38 of the Limitation of Actions Act expressly provides that such claims are to be heard by the High Court. For the record, Section 38 of the Limitation of Actions Act provides:

“38. Registration of title to land or easement acquired under Act

(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the

proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) ...

(3) A proprietor of land who has acquired a right to an easement under section 32 of this Act may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.

(4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.”

16. As to the fact that Limitation of Actions Act still makes reference to the High Court, the Court of Appeal in *Sugawara vs Kiruti (Supra)* explained that:-

“In other words, reference is to the “High Court” as the court to which such cases are heard, and given the dictates of the Constitution set out above, this 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 this interpretation is that, it is only the Environment and Land Court established under article 162(2)(b) that is mandated to hear these cases. So that, notwithstanding the expansion of the jurisdiction of environment and land usage to Magistrates Courts, it is distinctive that under section 9(a) of the Magistrates Courts Act, various matters are specified for determination, but claims for adverse possession are not included.”

17. The provisions of the Limitation of Actions Act have remained constant even with the advent of the ELC and the onset of section 26(3) and (4) of the Environment and Land Court Act which empowered the Chief Justice to appoint certain magistrates by Gazette Notice to preside over cases involving environment and land matters of any area of the country. This was then replicated at Section 9(a) of the Magistrates' Courts Act, 2015, which gives the Magistrate's Court's jurisdiction over environment and land matters, yet the provisions of Section 38 on which court a party should approach were left intact.
18. It should also be noted that even before the ELC was established, Magistrate's Court existed, yet the power to handle adverse possession claims was never donated to them and remained the exclusive preserve of the High Court. Indeed, as noted by the Court of Appeal, if there was an intention to have magistrates courts determine adverse possession claims, then Parliament could have easily enacted an express provision to that effect.
19. The Applicant cannot therefore claim to have been misled by the decision in the *Patrick Ndegwa Munyua Case (supra)*. As noted by the Court of Appeal in *Sugawara vs Kiruti (Supra)*, there are numerous other decisions from the ELC that held steadfast to the provisions of Section 38 of the Limitation of Actions Act and have held time and again that the magistrate's court do not have the jurisdiction to determine adverse possession claims. In the case of *Reuben vs Mwangangi & 7 others (Environment & Land Case E011 of 2023) [2023] KEELC 21899 (KLR)* for instance, this court sitting at Tharaka-Nithi expressed as follows: -

“I am aware that there exists within the magistrate’s court, duly gazetted magistrates who are granted jurisdiction and power to handle cases involving occupation of and title to land. I am however, not persuaded that the magistrates courts have jurisdiction to adjudicate title on

account of adverse possession. It is therefore my finding that the learned trial magistrate rightly declined jurisdiction over the respondents' claim of adverse possession."

20. The Court also referred to the case of *Michael Chebii Toroitich vs Peter Mogin Yatich Chebii (2013) eKLR*, where Sila, J sitting at the Eldoret ELC held that:-

"The matters in issue in Iten RMCC No 9 of 1994 and in the land disputes tribunal, in my view, were whether the defendant holds a half share of the land in trust for the plaintiff. The question whether the plaintiff is entitled to the suit land by way of adverse possession never arose in those proceedings. Indeed, they could not have arisen, as the Magistrate's court does not have jurisdiction to entertain a claim of adverse possession. Neither could adverse possession have been made a ground of attack or defence in those two proceedings. The issue of adverse possession could not have been raised and was never raised in those proceedings."

21. The Applicant could have complied with the Limitation of Actions Act, or have chosen to be guided by any of the decisions that strictly applied the Act, but it did not. I note that the Applicant deponed in their Supplementary Affidavit that the Respondents raised a Preliminary Objection on the issue of jurisdiction in the lower court, but the same was dismissed. I am not in a position to comment on the said PO since the Applicant neither attached a copy thereof nor availed a copy of the ruling on the same. Furthermore, this matter is not an appeal on the dismissal of the PO.

22. It was also deponed in the Applicant's Supplementary Affidavit that based on the prayers sought, the trial court was seized with jurisdiction. I disagree with

this contention. As appears from the summary of the pleadings set out herein, it is clear that the Applicant's suit in the lower court contained a claim of adverse possession. Since the law has not changed, and going by the determination of the Court of Appeal in *Sugawara vs Kiruti (Supra)* to which both this court and the magistrate's court are bound pursuant to the doctrine of stare decisis, it remains that the Magistrates' Court has no jurisdiction to handle the claim of adverse possession.

23. For this reason, whereas the lower court may hear the Applicant herein on the issue of constructive trust, there should be no doubt that the lower court has no jurisdiction to entertain the adverse possession claim as contained in Chief Magistrates Environment and Land Case No. E125 of 2021, African Devine Church versus Robert Kimaiyo Koech and 2 Others.

(b) Whether this court can transfer the proceedings known as Eldoret CM EL Case No. 125 of 2021 to the ELC for hearing and determination

24. The power of this court to transfer suits instituted in a subordinate court is provided under Section 18 of the Civil Procedure Act, which provides that:-

18. Power of High Court to withdraw and transfer case instituted in subordinate court

(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.

25. From the above provision, this Court may exercise its supervisory jurisdiction, either of its own motion or on application by a party, to withdraw or transfer suits for trial and final disposal by itself or other courts subordinate to it. It is trite however, that when the transfer is at the instance of a party then the burden lies on the applicant to make out a strong case for the transfer.
26. In this case, the Applicant herein is aware that it filed CM ELC No. 125 of 2021 in the lower court and included therein a claim for adverse possession. In the wake of the Court of Appeal decision in *Sugawara vs Kiruti (Supra)*, that set the record straight that the Magistrates' Courts have no jurisdiction to entertain adverse possession claims, the Applicant approached this court seeking to transfer the suit from the subordinate court to the ELC, which is clothed with the requisite jurisdiction.
27. There is no doubt that this court has power to transfer a suit from the subordinate court to itself for determination. The Applicant conceded that its claim in the subordinate court includes a claim for adverse possession, and this court has already found that the lower court has no jurisdiction to entertain adverse possession claims. In light of this finding, the central question under this issue therefore, is whether, the court can transfer the suit on the basis that it was filed in court that had no jurisdiction, to this court for hearing and determination.

28. The answer to this question is to be found in *Equity Bank Limited vs Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR*, where the Court of Appeal held as follows: -

“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 a 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. ...”

29. Similarly, the Supreme Court in the case of *Albert Chaurembo Mumba and 7 Others vs Maurice Munyao & 148 Others (2019) eKLR*, held that: -

“However, as it was well elucidated in the case of *Kagenyi vs Musiramo & 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’s therefore irrelevant as parties cannot consent to confer jurisdiction to a Court or tribunal where it is not provided by law.”

30. From the above authorities, it is evident that an order for transfer of a suit from one court to another cannot be made unless the suit was in the first place filed in a court which has jurisdiction to try it. Therefore, while this court has power under Section 18(1) of the Civil Procedure Act to transfer a suit from one court to the other, that jurisdiction is limited by the requirement that the court can only transfer a suit from a court with competent jurisdiction to another court of competent jurisdiction.
31. From the Motion herein, the only ground that the Applicant relied on in seeking the transfer was the lack of jurisdiction of the lower court to determine an adverse possession claim. No other substantive reason was given to establish the need for the transfer sought. That being the case, and the court having found that the subordinate court had no jurisdiction, then this Court cannot exercise its discretion to transfer the Applicant's suit. In my opinion, the Applicant's recourse it appears, is to withdraw the adverse possession claim and file it afresh in this court, or proceed only with the constructive trust for which the Magistrates court has jurisdiction to entertain.

Orders:

32. Accordingly, I find that the Applicant's Notice of Motion dated 29th August, 2025 is without merit. The same is dismissed with costs to the Respondents.
33. Orders accordingly.

DATED, SIGNED and DELIVERED virtually at **ELDORET** on this **6TH** day of **NOVEMBER, 2025** vide Microsoft Teams.

HON. C. K. YANO

ELC, JUDGE

In the presence of;

Mr. Mathai for the Applicant.

No appearance for Advocates for the Respondents.

Court Assistant - Laban.

ORIGINAL