

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**  
**ELCLC NO. E007 OF 2025**

**JUSTUS MUTUA *alias* KISOWE MUTUA .....PLAINTIFF/APPLICANT**

**-VERSUS-**

**MWIKALI KIMATU .....DEFENDANT/RESPONDENT**

**RULING**

1. Before this court for determination is the application dated 12<sup>th</sup> March, 2025 filed by the Plaintiff. The following orders have been sought: -
  - 1) **[SPENT]**
  - 2) **THAT this Honourable Court order for withdrawal and transfer from the Chief Magistrate's Case ELC E037 of 2024 (hereinafter CM ELC E037 of 2024) to this court.**
  - 3) **THAT CM ELC E037 of 2024 be consolidated with this ELC case for purposes of consistent and efficient finality.**
  - 4) **Costs be provided for.**
2. The application is premised on the grounds appearing on its face. It is also supported by the affidavit of Justus Mutua *alias* Kisowe Mutua sworn on even date. The Applicant averred that the Defendant herein filed CM ELC E037 of 2024 in the subordinate court seeking the Plaintiff's eviction from the suit property known as LR NZAUI/KAWALA/514. The Applicant added that he subsequently filed CM ELC E044 of 2024 (OS) against the Defendant claiming ownership of the suit property via adverse possession.
3. The deponent averred that after he sought for consolidation of the two suits, the subordinate court declined to issue the orders sought and proceeded to strike out CM ELC E044 of 2024 (OS) for want of jurisdiction vide a ruling

delivered on 6<sup>th</sup> March, 2025. He further averred that the Defendant has always been aware of his peaceful and continuous occupation of the suit property since the year 2001 up to sometimes in 2024 when the Defendant started asserting her claim thereof upon being issued with a grant of representation for the Estate of Mutinda Mua (Deceased). The Applicant contended that there is no suit for eviction which survived the Deceased.

4. The Defendant/Respondent filed a replying affidavit opposing the application on 26<sup>th</sup> May, 2025. She averred that the present suit is brought by way of originating summons whereas CM ELC E037 of 2024 was brought by way of a plaint. She added that the present suit is on a claim for adverse possession whereas CM ELC E037 of 2024 is seeking injunctive orders against the Plaintiff/Applicant herein and thus the two causes of action cannot be consolidated
5. The Defendant contended that a consolidation of the two suits will delay CM ELC E037 to her prejudice. She further contended that prayers 1 and 2 are seeking to direct the lower court on how it should operate and that the prayers should be disallowed because the lower court has competent jurisdiction to determine CM ELC E037 of 2024. She urged the court to dismiss the application with costs.
6. The application was canvassed by way of written submissions.
7. In the Applicant's submissions dated 3<sup>rd</sup> June, 2025, Counsel identified the following issues for determination: -
  - a) *Whether or not Makueni MC ELC E037 of 2024 should be withdrawn and transferred to this court; and*
  - b) *Whether or not Makueni MC ELC E037 of 2024 should be consolidated with ELC E007 of 2025.*

8. Counsel submitted that this court is vested with the power to withdraw and transfer a case from the lower court as per the provisions of Section 18 of the Civil Procedure Act. Counsel further submitted that the Applicant has demonstrated merit in the application for withdrawal, transfer and consolidation of the two suits as the main claim is on ownership of the suit property.
9. In the Respondent's submissions dated 20<sup>th</sup> June, 2025, Counsel submitted that consolidation of the two suits would be inappropriate because the factual and legal basis for the two suits are wholly distinct. It was further contended that the combining of proceedings commenced through different modes would compromise on the procedural safeguards and deny the Respondent a fair trial.
10. Submitting on why an order for transfer of Makueni MC ELC E037 of 2024 should not issue, Counsel contended that the lower court has jurisdiction to hear the suit and that the Applicant had not demonstrated otherwise. Counsel urged the court to dismiss the application with costs.
11. The two apparent issues for determination are as follows: -
  - a) *Whether the Applicant has demonstrated merit in the application for withdrawal of Makueni MC ELC E037 of 2024 from the subordinate court; and*
  - b) *Whether the Applicant has demonstrated merit in the application for consolidation of with the present suit.*
12. The law governing the withdrawal of a suit from the subordinate court to the Environment and Land Court is outlined under Section 18 (1) of the Civil Procedure Act which provides as follows: -
  - (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.*

13. In the instant application, the Applicant admittedly pointed out that he filed Makueni CM ELC E044 of 2024 (OS) because he aimed at advancing a claim of adverse possession against the Respondent's title to the suit property. He averred that the subordinate court struck out his suit for want of jurisdiction.

14. It is not in doubt that the Respondent herein has filed a plaint in Makueni CM ELC E037 of 2024 seeking eviction orders as well as orders of permanent injunction against the Applicant. It is also not in doubt that the subordinate court has competent jurisdiction to hear and determine the suit on the private rights of the parties over the suit property. Nonetheless, the subordinate court is bereft of the jurisdiction to hear and determine claims of adverse possession, which the Applicant herein intends to raise as his defence against the Respondent's claim, with reference to the Court of Appeal decision 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 [2024] KECA 1417 (KLR)*.

15. For that reason, the Applicant filed the present suit vide an originating summons claiming adverse possession to the suit property together with the present application.
16. In the case of Kithita Ngeana v Mwaniki Kisume [2018] eKLR, L. N. Mutende J. observed as follows: -

*“Circumstances that would move a court to grant the order sought were considered in the David Kabungu Case (Supra) where Okello J stated that; “Section 18 (1) (b) of the Civil Procedure Act gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. The burden lies on the applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is a relevant consideration. As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice. What the court has to consider is whether the applicant has made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction... it is well established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. There are also authorities that the principal matters to be taken into consideration are, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship, and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused... Want of jurisdiction of the court from which the transfer is*

*sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer would be refused...”*

17. Again, in the case of Abraham Mwangi Wamigwi vs Simon Mbiriri Wanjiku & Another [2012] eKLR, the court held 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.”*

18. As the Applicant has filed an originating summons in the proper court with jurisdiction to entertain it, there is no need of withdrawing CM ELC E037 of 2024 to bring it before this court. Let the matter before the lower court be heard before the lower court and originating summons be heard before this court.

19. The second issue for determination is whether the suit herein ought to be consolidated with Makueni CM ELC E037 of 2024. In the case of JAN BOLDEN NIELSEN v HERMAN PHILIPUS STEYN & 2 others [2012]

**eKLR** the Court discussed purpose of consolidation at length in the following terms: -

***“Consolidation of suits is done under the inherent powers of the Court and for purposes of achieving the overriding objective of the Civil Procedure Act; that is for expeditious and proportionate disposal of civil disputes. Therefore, the main purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. Consolidation of suits is ordered for meeting the ends of justice as it saves the parties from multiplicity of proceedings, delay and expenses. However, such consolidation can only be ordered within known parameter of the law.”***

20. The principles to consider in an application for consolidation of suits were set out in the case **Nyati Security Guards & Services Ltd v Municipal Council of Mombasa [2004] eKLR** wherein the following factors were enumerated: -

***“The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where:-***

- a. Some common question of law or fact arises in both or all of them; or***
- b. The rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or***
- c. For some other reason it is desirable to make an order for consolidating them.”***

21. The Respondent raised an opposition that the two suits were initiated through distinct legal procedures. The evidence to be adduced in the two suits is different and requires different thresholds. Consolidation is therefore not possible.

22. I therefore find no merit in the Applicant’s application which is dismissed with costs to the Respondent.

It is so ordered.

.....  
**HON. E. O. OBAGA**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS  
THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**IN THE PRESENT OF:**

Mr. Mutiso for Plaintiff/Applicant.

Mr. Nyingi for Defendant/Respondent.

Court assistant – Steve Musyoki.