



Oduor & 3 others v Okech & 3 others (Environment and Land Miscellaneous Application 12 of 2025) [2025] KEELC 18477 (KLR) (18 December 2025) (Ruling)

Neutral citation: [2025] KEELC 18477 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 12 OF 2025
AE DENA, J
DECEMBER 18, 2025**

BETWEEN

**DAVID OKOTH ODUOR 1ST APPLICANT
TOM JUMA ODUOR 2ND APPLICANT
LAND REGISTRAR SIAYA 3RD APPLICANT
THE HONOURABLE ATTORNEY GENERAL 4TH APPLICANT**

AND

**SIMON NGONGA OKECH 1ST RESPONDENT
JOSEPH ALINGO AMIMO 2ND RESPONDENT
ARIANDA AMIMO 3RD RESPONDENT
ANTHONY OWITI OLOO 4TH RESPONDENT**

RULING

1. The applicants commenced these proceedings on 12/3/2025 by way of a Notice of Motion application dated 28/02/2025 filed under certificate of urgency.
2. The applicants pray for an order staying the proceedings in SIAYA MCELC NO.32 OF 2019 SIMON NGONGA OKECH & 3 Others Vs DAVID OKOTH ODUOR & 3 Others pending the determination of the present application; The transfer of the same from the Chief Magistrates Court at Siaya to the ELC at Siaya.
3. The application is premised on the grounds on its face and the supported by the depositions in the affidavit sworn in by DAVID OKOTH ODUOR. Briefly it is deponed that he commenced the suit proceeding in the lower court by way of plaint. The defendants responded to the suit by raising a counterclaim. The matter has been heard awaiting filing of submissions by the parties. However in the



intervening period the Court of Appeal in the case of Sugawara Vs Nairuko Ene Mutarakwa Kiruti (sued in her capacity as administrator of the estate of Mutarakwa Kirui Lopas alias) Civil appeal E141 of 2022 (2024) held that the Magistrates court lacked jurisdiction to hear matters where a question of adverse possession is raised.

4. It is averred that while the trial court could competently deal with the issues of indefeasibility of title as raised in the plaint, they cannot deal with the counterclaim that raises the issue of adverse possession. That it would not be cost effective to separate the two cases and there was the danger of contradicting decisions. It is stated that no prejudice will be suffered should the application be allowed.

Replying Affidavit

5. The application is opposed through the depositions in the affidavit sworn by Simon Ng'ong'a Okech the 1st respondent. It stated that section 37 and 38 of the *Limitation of Actions Act* existed at the time of filing the counterclaim dated 12/04/2019. That the law stipulates claims on adverse possession should be commenced by way of Originating summons at the High Court. That there are several court decisions that have held Magistrates Court lack jurisdiction to hear adverse possession claims and which were delivered during the pendency of the suit. The same are cited.
6. That had counsel exercise due diligence they would have known about the above. That applicants only raised the issue after the close of their case. That their pleadings do not disclose the issue of adverse possession. It is also averred that the applicants' pleadings arise out of a sale agreement purportedly entered by their father and some of the respondents. That a purchaser cannot claim adverse possession due to the non-permissive nature of adverse possession. That the counterclaim is a separate and distinct suit which the applicants can file separately whichever way the trial court decides. The application is termed premature designed to pre-empting and delaying the decision of the trial court.

Submissions

7. The application was canvassed by way of written submissions. The applicants' submissions are dated 11/06/2025 and the respondents 4/07/2025.

ANalysis And Determination

8. I have read the affidavits sworn in support of the application and in reply thereto. I have also given due consideration to the submissions of the learned counsels appearing.
9. The main issue for determination is whether the orders sought in the application dated 28/02/2025 should be granted.
10. I think the first contention I must resolve is whether the counterclaim raises the plea of adverse possession. This is fundamental because adverse possession is the main reason why the applicants have filed the present application. The respondents have averred that the counterclaim is based on a sale agreement. A copy of the plaint in and the counterclaim raised have been annexed to the affidavits filed.
11. The court has been invited to stay the proceedings in SIAYA MCELC NO.32 OF 2019 SIMON NGONGA OKECH & 3 Others Vs DAVID OKOTH ODUOR & 3 Others pending the determination of the present application which in my view has now been overtaken by events. In any event a determination on this prayer is dependent upon the outcome on the prayer for transfer of the suit.
12. I will therefore consider whether the application for transfer of the suit is merited.



13. The power of the High Court and courts of equal status to transfer and withdraw cases instituted in the Subordinate Courts is provided for in section 18(1) of the [Civil Procedure Act](#) which provides as follows:
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
14. The application has been filed at the instance of the defendants in the trial court proceedings who become plaintiffs in the counterclaim. The burden of proof is on them to show sufficient cause why the court should exercise its power in favor of a transfer.
15. The main reason advanced for the transfer is based on jurisdiction. It is contended that the counterclaim has raised issues on adverse possession and therefore the Magistrates court lacks jurisdiction to hear and determine the matter.
16. A party's claim is derived from the pleadings and more so the prayers sought. I have carefully perused the pleadings filed in the trial court and specifically the counterclaim which is stated to have raised issues of adverse possession.
17. My review of the counterclaim does not reveal any plea of adverse possession. I have also looked at the prayers sought and nowhere in the prayers raised in the counterclaim is the court invited to make a declaration that the plaintiffs in the counterclaim be declared owners of the suit property having acquired it by dint of adverse possession as provided for under the provisions of section 37 and 38 of the Limitations of Actions Act.
18. Moreover, it is trite that a counterclaim is a suit on its own and there is no legal doubt about it. Indeed, the Court Appeal in the case of *Sugawara Vs Nairuko Ene Mutarakwa Kiruti* (sued in her capacity as administrator of the estate of Mutarakwa Kirui Lopas alias) Civil appeal E141 of 2022 (2024) delivered on 11/10/2024 held that the Magistrates court lacked jurisdiction to hear matters under the provisions of section 37 and 38 of the [Limitation of Actions Act](#). This decision is binding on this court.
19. The applicant seems to be admitting that the trial court lacks jurisdiction to entertain the counterclaim. Assuming that the counterclaim raised a claim of adverse possession can it be cured by transfer to a court seized with jurisdiction. My answer is in the negative as the counterclaim would be a nullity abinitio and consequently nothing comes out of nullity.
20. In arriving at the above conclusion the court is guided by the Court of Appeal decision in the case of *Equity Bank Limited Vs Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR, where the court 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 the Court lacks jurisdiction 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 same...”

21. In any case I have already made a finding that the applicants pleadings do not raise any issue of adverse possession. It is also wrong to assume that the Magistrates court cannot pronounce itself on a defence of limitation. It has such jurisdiction except where it is being called upon to invoke the provisions of sections 37 and 38 of the Limitation of Actions Act then its hands would be tied in this regard.
22. The upshot of the foregoing therefore is that I find no merit in the Notice of Motion application dated 28/02/2025. It is hereby dismissed with costs to the respondents who have participated in the application.

DELIVERED AND DATED AT SIAYA THIS 18TH DAY OF DECEMBER 2025

HON. LADY JUSTICE A.E. DENA

JUDGE

18/12/2025

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Omondi for the Applicants

No appearance for the Respondent

Court Assistant: Ishmael Orwa

