



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

ELC LAND MISC APPLICATION NO. E011 OF 2025

DELIC GITARI NJOKA.....

.....APPLICANT

=VERSUS=

**BEDFORD KATHUNI MUTUA (Sued as the Legal
Representative of M'NABEA
M'ARINGAI).....RESPONDENT**

RULING

1. Falling for determination in this ruling is a notice of motion dated 4/7/2025, brought by **Delic Gitari Njoka** (*hereinafter referred to as "the applicant"*). Through it, the applicant seeks an order transferring **Chuka CMC E & L Case No 55B of 2019** to the **Environment and Land Court at Chuka** for hearing and determination. The application is vehemently opposed by the respondent.
2. The application was premised on the grounds outlined in the motion and in the applicant's supporting affidavit dated 4/7/2025. It was canvassed through written submissions dated 24/11/2025, filed by **M/s I.C Mugo & Co Advocates**. The case of the applicant is that, the respondent instituted the suit in the lower court against him seeking, *inter alia*, a

permanent injunction restraining him against trespassing on, encroaching onto or in any other manner interfering with the respondent's peaceful occupation of land parcel number **Karingani/ Mugirirwa/190**. In response to the respondent's suit, he (*the applicant*) filed a defence and counterclaim in which he pleaded that the respondent's suit was statute-barred under the Limitation of Actions Act and that, together with one **Jane Nyamu Njoka**, they had acquired and were entitled to 4 acres out of the suit land through adverse possession. He further contends that he pleaded that, together with **Jane Nyamu Njoka**, they had been in adverse possession of the 4 acres for more than 12 years, and that their occupation of the 4 acres had been open and continuous.

3. The applicant adds that, based on the emerging jurisprudence from the Court of Appeal, subordinate courts do not have jurisdiction to hear and determine disputes relating to adverse possession. It is for this reason that he invites this court to exercise jurisdiction under **Section 18** of the **Civil Procedure Act** and transfer the suit from the subordinate court to the Environment and Land Court at Chuka.
4. The respondent opposed the application through his replying affidavit dated 27/10/2025 and written submissions dated 3/11/2025, filed by **M/s Muthomi Gitari LLP**. The case of the respondent is that, a suit filed in a court without jurisdiction is a nullity in law and cannot be transferred to a court properly seized of jurisdiction to hear and determine it. The respondent contends that there is no competent suit in

existence and capable of being transferred to this court. The respondent argues that jurisdiction is a fundamental and threshold issue, adding that to allow transfer of an incompetent suit to this court would be to muddle up the waters and allow confusion to reign.

5. Both parties relied on the 2024 Court of Appeal decision in ***Sugawara v Kiruti & 3 others (2024) KECA 1417 KLR.***
6. The court has considered the application, the response to the application and the parties' respective submissions. The court has also considered the relevant legal frameworks and jurisprudence. The single question to be determined in this ruling is whether **Chuka CMC E & L Case No. 55B of 2019** can be transferred to this court on account of lack of jurisdiction by the lower court to entertain the issue of adverse possession which was introduced in the cause through a defence and a counterclaim. I will be brief in my analysis.
7. The general jurisdiction of this court to transfer a suit from a subordinate court is donated by **Section 18** 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.

(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

- 8.** In the application under consideration, it does emerge that the original claim in the subordinate court was filed by the respondent. The respondent sought a permanent injunction restraining the applicant against trespassing on, encroaching onto or interfering with his possession of the suit land. In answer to the claim, the applicant pleaded the defence of limitation, which in essence, is what constitutes the doctrine of adverse possession. Besides the defence of limitation, the applicant pleaded a counterclaim anchored on the doctrine

of adverse possession. The respondent filed a defence to the counterclaim.

9. It is clear from the foregoing that the cause in the subordinate court has two sets of claims, namely: (i) the original claim by the respondent and; (ii) the applicant's counterclaim. Were the court to accept the respondent's argument, it would imply that both the original claim and the counterclaim are in a court bereft of jurisdiction. I do not think that is the correct position in law.
10. My understanding of **Sections 7, 17 and 38** of the **Limitation of Actions Act** is that, adverse possession has two facets. First adverse possession is a cause of action that culminates in the grant of orders of adverse possession. Secondly, adverse possession (*or limitation of action*) is a defence to a claim for recovery of land or for injunctive reliefs relating to land. From the materials before court, the issue of jurisdiction arose when the defence of limitation was pleaded by the applicant. Put differently, the respondent's suit was competent and there was no contestation about jurisdiction until the applicant filed a defence pleading limitation and a counterclaim seeking adverse possession orders. The applicant was entitled to present his defence of limitation and subsequently move this court to transfer the case to the Environment and Land Court. Failure to tender his defence would have culminated in the disposal of the suit as an undefended cause. Upon transfer of the case to the Environment and Land Court, the applicant would be entitled to apply for leave to bring his counterclaim of adverse possession.

- 11.** Does the counterclaim render the entire cause incompetent? The plaintiff's primary claim remains competent. The applicant's defence of limitation, which in essence is an answer to a claim brought against him by the respondent, is similarly competent but can only be heard and determined by this court because it relates to adverse possession. What is outrightly incompetent is the counterclaim which, in itself, is an independent claim that was lodged in the subordinate court that did not have jurisdiction.
- 12.** For the above reasons, I do not agree with the respondent's contention that the entire cause in the subordinate court is incompetent. Secondly, I do not think the Court of Appeal intended to create a scenario where a defendant who considers himself to have a crystalized adverse possession title would be completely shut out of the seat of justice because a land owner has elected to file a claim for recovery of the land or for an injunction in a subordinate court. My interpretation of the law is that the adverse possessor is entitled to plead the defence of limitation (adverse possession) under **Sections 7 and 17** of the **Limitation of Actions Act** and upon filing his defence, he is expected to move the Environment and Land Court for a transfer order.
- 13.** It is also not lost to this court that, prior to the 2024 pronouncement by the Court of Appeal, there were two schools of jurisprudence from the Environment and Land Court. One school was that questions of adverse possession were questions relating to title to land and that under **Section 9 (a) (i)** of the **Magistrates Court Act**, magistrate courts had jurisdiction to entertain adverse possession

disputes. This properly explains the delay in bringing the application for transfer.

- 14.** Taking the foregoing into account, I would allow transfer of the primary suit together with the corresponding defence and reply to defence in **Chuka CMC E&L Case No 55B of 2019**. Because the counterclaim is an independent cause of action that was lodged in a court that did not have jurisdiction, it is incompetent and cannot be transferred. Further, because the said counterclaim is in the same cause that is to be transferred, it will be marked “struck out” for want of jurisdiction prior to the transfer. The applicant will be at liberty to move the Environment and Land Court for leave to bring a fresh counterclaim once the cause is transferred and registered in the Environment and Land Court.
- 15.** Lastly, because this confusion was caused by the then prevailing jurisprudence from the Environment and Land Court, parties will bear their respective costs of the ill-fated counterclaim and the present application.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 27TH DAY OF JANUARY, 2026.

B M EBOSO [MR]

ELC JUDGE

In the Presence of:

Mr. I. C Mugo for the Applicant

Mr. Bedford Mutua – Respondent – Present in person

Court Assistant - Nelly

ORIGINAL