

REPUBLIC OF KENYA

**IN THE ENVIRONMENT AND LAND COURT AT
KAKAMEGA**

ELC MISC. CASE NO. E061 OF 2025

**ANTONINAH
APPLICANT**

KHASOA.....

VERSUS

**SHOBHNAH NAVNIT LALJI ANEK SHAH.....
RESPONDENT**

RULING

1. Before court is a Notice of Motion dated 23rd September 2025 filed by the applicant seeking the following orders;

a) That court be pleased to call for and cause the subject file being KAKAMEGA CMELC NO. 109 OF 2018 SHOBHNA NAVNIT LALJ ANEK SHAH V KIZITO AURA and ANTONINA KHASOA

b) That the suit be transferred to the Environment and Land Court Kakamega for hearing and determination.

c) That costs of this application be in the cause.

2. The application is premised on the supporting affidavit of the applicant sworn on 23rd September 2025. The applicant's case is that the respondent filed a case against her being Kakamega CMELC CASE NO. 109 OF 2018 seeking eviction orders wherein she has filed a defence and counterclaim on the basis of adverse possession, which claim the trial court has no jurisdiction to hear and determine.

3. The application was opposed. The respondent filed undated replying affidavit opposing the application. He stated that the application was an abuse of the due process as the Magistrates court has no jurisdiction to hear and determine the counterclaim. Further that the Magistrates court can hear his claim for eviction. That the applicant's claim of adverse possession was conclusively determined in other matters including Kakamega High Court Civil Case No. 147 of 2010 (OS) and Kakamega Rent Restriction Case No. 8 of 2010. That the applicant's husband having conceded in the Rent Tribunal that he was a tenant, a claim for adverse possession cannot stand. That on 18th December 2012, in

Kakamega High Court Civil Case No. 147 of 2010 (OS) the court held that the applicant being a tenant could not claim adverse possession against the landlord. That therefore the applicants claim for adverse possession is frivolous, misconceived and meant to defeat the respondent's claim for eviction.

4. Further that before transfer is ordered there must exist a competent and subsisting suit. That his suit is competent before the Magistrate but the counterclaim is not. That the counterclaim before the lower court, is a nullity. He cited the decision in the case **of Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 Others**. That Kakamega CMELC Case No. 109 of 2018 has been pending for 8 years hence the application herein is meant to delay the hearing of that case.
5. Parties were directed to file their respective written submissions in regard to the application. The respondent did not file and submissions. The applicant filed submissions dated 5th February 2026, which the court has duly considered.

6. Having considered the application, response thereto and submissions, the only issue for this court's determination is whether the applicant deserves the orders sought.
7. This court has the jurisdiction to transfer a matter from the lower court to this court, as provided for in section 18 (1) (b) (i) of the Civil Procedure Act.
8. Section 38 (1) of the Limitation of Actions Act grants the Environment and Land Court the jurisdiction to hear and determine claims of adverse possession. In a 2020 decision in the case of **Patrick Ndegwa Munyua v Benjamin Kiiru & Another [2020] KEELC 3911 (KLR)**, the ELC held that Magistrates courts had jurisdiction to hear and determine claims of adverse possession. This had been the position until the Court of Appeal in the case of **Pauline Chemuge Sugawara v Nairuko Ene Mutarakwa Kiritu & 4 Others Civil Appeal No. E141 of 2022**, delivered in October 2024, held that Magistrates Courts have no jurisdiction to hear and determine claims based on adverse possession.

9. I therefore take the view that as there was a Superior Court's pronouncement in 2022 when the applicant's counterclaim was filed that the Magistrates Court had jurisdiction to hear and determine adverse possession claims, the applicant herein lawfully filed her claim in the subordinate court as that court then had jurisdiction. That position having changed in 2024, the applicant's prayer to bring the suit to this court for hearing and determination is proper. Besides, the counterclaim being a defence to the suit before the trial court, cannot be split from the respondent's claim for eviction. To hear and determine the respondents claim in the lower court and the counterclaim to be heard by this court will not only likely create confusion as the two court pronouncements may conflict, but splitting the suit to be heard by the lower court and this court will not be an efficient use of precious judicial time.

10. On whether the applicants claim of adverse possession is *res judicata* in view of decisions including Kakamega High Court Civil Case No. 147 of 2010 (OS) and Kakamega Rent Restriction Case No. 8 of

2010, I am of the view that while the respondent is within his right to raise the argument that the applicant's counterclaim in Kakamega CMC ELC CASE NO. 109 OF 2018 is *res judicata*, that argument can only be entertained in that suit and not in the instant application. If indeed Kakamega CMC ELC CASE NO. 109 OF 2018 is *res judicata* as alleged by the respondent, then the court that has jurisdiction to pronounce as much, is the trial court in respect of that suit. This court has no jurisdiction in an application for transfer of the suit from the Magistrates court to this court, to determine whether the suit to be transferred is *res judicata*.

11. In the premises, I am satisfied that the application dated 23rd September 2025 is merited and the same is hereby allowed. In the result, Kakamega CM ELC CASE NO. 109 OF 2018 is hereby transferred to this court for hearing and determination. I make no order as to costs.

12. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA
IN OPEN COURT/VIRTUALLY THROUGH
MICROSOFT TEAMS VIDEO CONFERENCING
PLATFORM THIS 9TH DAY OF FEBRUARY, 2026**

**A. NYUKURI
JUDGE**

In the presence of

Ms Olucheli for the applicant

No appearance for the respondent

Court Assistant: Delphine