



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL APPLICATION NO. E063 OF 2025**

**DIAMOND**

**HOUSING**

**LIMITED.....APPLICANT**

**-VERSUS-**

**SHARIF MOHAMAD AHMED OMAR. ....1ST**

**RESPONDENT**

**CHIEF MAGISTRATE'S COURT AT KILIFI... ....2ND**

**RESPONDENT**

**RULING**

**1.** The Notice of Motion dated 19th November 2025, seeks orders for the withdrawal of **MCELC Case No. E072 of 2021** from the Kilifi Magistrate's Court and have it transferred to this Court for disposal.

2. The same is supported by the annexed affidavit of the applicant's director, one Osman Erdinc Elsek, deposed on 17th November 2025.
3. In the supporting affidavit, the applicant deposes that it intends to amend its plaint to set forth its claim against the 1st respondent properly, attach and mark "OEE- 4" as a copy of the intended amended plaint
4. The applicant asserts that, based on the contents of the intended amended plaint and the prayers sought, if the plaintiff prevails in its case, the award requested in the counter-claim would fall outside the pecuniary jurisdiction of the Kilifi Magistrates Court.
5. In response, the 1st respondent, Sharif Mohamad Ahmed Omar, deposed in an affidavit dated December 3, 2025, that, in the absence of any amendment to the pleadings as indicated by the applicant, this court cannot be moved, swayed, or involved. It is further stated that it is procedurally improper for the applicant to amend the pleadings in an ongoing suit before the Magistrate's Court and simultaneously seek to withdraw and transfer the case to the High Court. Such action violates the hierarchy of courts. It is

also stated that, under Section 18 of the Civil Procedure Act, the High Court cannot be approached by way of a miscellaneous application to withdraw and transfer an active matter from the Magistrate's Court. The correct procedure is to file a new suit in the High Court, rather than engage in forum shopping.

**6.** The issues I frame for the court's determination are whether the court has jurisdiction to withdraw and transfer a matter pending before the Magistrate's Court, and who should be responsible for the costs of the application.

**7.** In Kenya, the transfer of suits from a Magistrate's Court to the High Court is predominantly governed by Sections 18 and 19 of the Civil Procedure Act (Cap 21). These provisions authorize the High Court to withdraw and transfer suits at any procedural stage, either upon application or *suo moto*. Such transfers are exercised under the High Court's supervisory jurisdiction, which extends to cases where it is imperative to ensure efficiency or convenience, or when the initial court is found to lack jurisdiction.

**8.** Section 18(1) of the Civil Procedure Act 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.**

**9.** Under Section 18(1) of the Civil Procedure Act, this Court has the authority to withdraw or transfer cases for trial and final resolution, either on its own initiative or when requested by a party. The Act also grants the court broad power to transfer cases at any point during proceedings, whether initiated by a party's application or *suo moto*.

**10.** The power under Section 18 of the Civil Procedure Act applies to competent suits filed in courts with the requisite

jurisdiction to entertain them. The general power of the court to transfer suits under Section 18 of the Civil Procedure Act cannot therefore be exercised in a matter where the suit was filed in a court without jurisdiction.

- 11.** The Supreme Court case of **Albert Chaurembo Mumba and 7 Others v 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.”*

- 12.** The court notes that the applicant requests the transfer of the matter on the basis that the proposed amendment will supersede the jurisdiction of the Magistrates' Court, as the intended amended plaint will introduce a claim exceeding the pecuniary jurisdiction of Kshs. 20,000,000/- of the Chief Magistrate.

**13.** With that amendment pending, it will mean that the Magistrates' Court will have no jurisdiction to hear the matter, rendering it a nullity.

**14.** The Court of Appeal, in the case of **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR**, stated that:

*“We are not persuaded that that proposition by the respondent is correct in law. Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer Jurisdiction to itself...it is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was nullity ab initio and was not transferable to another court...”*

**15.** To my mind, the intended amendment will oust the jurisdiction of the Magistrates' Court, rendering it without jurisdiction. Hence, this court lacks jurisdiction to transfer a matter that will be rendered a nullity.

**16.** The best course of action is to have the suit withdrawn from the Magistrates Court and filed in the appropriate forum.

**17.** The Notice of Motion dated 19th November 2025 is hereby dismissed with costs.

**Dated, signed, and delivered electronically in Nyeri on this 11th day of March, 2026.**

**E. K. MAKORI**

**JUDGE**

**In the presence of:**

**Dr. Khaminwa for the Applicant**

**Mr. Matheka for the Respondent**

**Kendi: Court Assistant**