

**REPUBLIC OF KENYA**

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

**ELCLC MISC. APPLICATION NO. E018 OF 2025.**

HELLEN OTENGO OTANDO ..... APPLICANT

VERSUS

ALOICE OWILLA HONGO ..... RESPONDENT

**RULING**

1. The Notice of Motion application dated 25<sup>th</sup> March, 2025, seeks for an order that the honourable court be pleased to re-transfer KISUMU CM ELC NO.61 OF 2018 back to the Environment and Land Court for hearing and determination.

The grounds upon which the application was brought are that the suit was originally filed in the Environment and Land Court at Kisumu as KISUMU ELC CASE NO 60 OF 2013, in which the applicant entered appearance and filed a defence and raised a counterclaim based on adverse possession. That later on 21/1/2018, the suit was transferred to the Magistrate's court for hearing and disposal. That following the recent decision of the Court of Appeal that the Magistrate's court lacks jurisdiction to handle adverse possession claims, it has become necessary to have the suit

re-transferred back to the Environment and Land Court for hearing and determination.

2. The application was opposed vide the contents of the Replying Affidavit sworn by the Respondent on 5<sup>th</sup> May, 2025. The case of the Respondent is that the application is misconceived because the proper forum for hearing the suit is the court below.

That the Plaintiff closed his case on 9<sup>th</sup> November, 2022 but that the defence has never been heard because the Applicant has been applying for adjournment hence delaying the matter.

That as at the time the suit was transferred to the court below, the claim on adverse possession had been made, and the Applicant did not oppose the transfer.

3. I have considered the application. There is no denial that there is a claim of adverse possession involved in the suit. Under the provisions of section 38 of the Limitation of Actions Act, it is clear that the Magistrate's court lacks jurisdiction. The recent decision of the Court of Appeal referred to by the applicant must be the decision in the case of Sugawara vs Kiruti (sued in her capacity as the Administratrix of the Estate of

Mutorakwa kiruti lepasso alias Mutaragwa Kiruti Lepaso alias Mutaragwa Kiroti Leopso and in her own capacity and 3 others [2024] KECA 1417 (KLR) where it was held, inter alia, that in view of the express provisions of section 38 of the Limitation of Actions Act, the Magistrate's courts do not have jurisdiction to determine claims of adverse possession.

4. I have considered that the suit was originally filed in this court and that the counterclaim was raised before the matter was transferred to the lower court. The applicant, having filed her counterclaim in the court that had jurisdiction, cannot be faulted for the transfer of the case to the lower court. I have also considered that this court has power under section 18 1 (b) of the Civil Procedure Act to withdraw any suit or other proceeding pending in any court subordinate to it and thereafter retransfer the suit for trial and disposal to any court from which it was withdrawn

I find that the application has merit, and to give the Applicant the chance to ventilate her claim, the application is hereby allowed as follows;

- i. KISUMU CMCELC NO 61 OF 2018 is retransferred to the Environment and Land Court, Kisumu, for hearing and disposal.**
- ii. The suit shall be mentioned before the Environment and Land Court, Kisumu, on 18<sup>th</sup> May 2026 for directions on disposal.**
- iii. Costs of the application to the Respondent.**

Orders accordingly.

**Ruling dated and signed at Kisumu, delivered virtually this 19<sup>th</sup> day of March 2026.**

**E. ASATI,  
JUDGE.**

**In the presence of:**

Maureen - Court Assistant.

Rono for the Applicant.

N/A for the Respondent.