

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT SIAYA**

**ELC (O.S) NO. E039 OF 2025**

WILLIAM ONYANGO MUTHACH (Suing on his behalf as legal representative of ALEX ONYANGO.....1<sup>ST</sup>  
APPLICANT

WILMINA NEKESA.....2<sup>ND</sup>  
APPLICANT

**VERSUS**

AMOS OMONDI MBALA.....1<sup>ST</sup>  
RESPONDENT

PHILIP BARAZA OKUMU.....2<sup>ND</sup>  
RESPONDENT

**RULING**

- 1 This court is tasked to determine the Notice of Motion dated 29/10/2025 seeking the following reliefs; -
  - a) THAT the suit existing in the Lower Court over the same subject matter being UKWALA SRM ELC NO. 47 OF 2019 be transferred to the Environment and Land Court at Siaya for hearing and disposal.
  - b) THAT costs of this supplication be provided for.
- 2 The application is premised on the grounds on its face and the depositions in the supporting affidavit of William Onyango Muthach with permission of the 2<sup>nd</sup> applicant. It is deponed that the 1<sup>st</sup> respondent filed UKWALA SRM ELC NO.

47 OF 2019 seeking eviction from land parcel No. NORTH UGENYA/UYUNGO/296 which is the same subject matter in the present proceedings. That the Lower Court cannot decide on the issue of adverse possession. The applicants have thus decided to approach the Superior Court for a determination thereon.

- 3 That it is necessary that the Lower Court case be transferred and heard at this Court to avoid conflicting decisions at the end of both cases. That there shall be no prejudice if the application is allowed.
- 4 The application is opposed through the replying affidavit sworn by Amos Omondi Mbala and Philip Baraza Okumu in February 2026. It is deponed William Onyango Muthach the 1<sup>st</sup> respondent filed UKWALA ELC No. 47 of 2019 against Wilmina Nekesa and William Onyango Muthach. A copy of the plaint is attached. That upon service they entered appearance and filed Statement of Defence and Counterclaim dated 21/10/2019.
- 5 It is deponed that in September 2020 when the matter was about to proceed, they filed an application to stay the proceedings in Ukwala Court pending the hearing of a citation they had filed in Ukwala Succession Cause No. 39/2020 for Philip Barasa Okumu to take out grant of letters of administration in the estate of his grandfather Omala Oter. That the stay orders were granted and the proceedings halted during the period 2020 to 2024 when the said application for citation was dismissed on 30/10/2024.

- 6 It is averred that the applicants caused the matter to delay by causing numerous adjournments whose particulars are given in paragraph 8 of the replying affidavit. The respondents also failed to comply with orders of the court to comply with Order 11 of the Civil Procedure Rules by 9/05/2025. That again in 29/10/2025 the respondents filed application seeking that the proceedings in Ukwala be stayed pending the hearing and determination of the present suit which was heard and dismissed on 15/12/2025. It urged that the same application having been heard by a competent jurisdiction is now re judicata and this court lacks jurisdiction to hear it. The application is termed as an abuse of court process and should be dismissed.
- 7 The deponent outlines the history of ownership of the suit property culminating in his taking possession and use of the same after the death of his father Joseph Okumu Omala, that he later sold and transferred the same to the 1st Respondent in the year 2018 who took possession and occupied the same to date.
- 8 It is averred that the applicants are not occupying the subject land as alleged as they have their own land where they reside with their families, being land parcel No. NORTH UGENYA/UYUNDO/295. Further that the applicants entered parcel no. NORTH UGENYA/UYUNDO/296 sometimes in 2018 when the deponent was away in Nairobi who then filed UKWALA ELC No. 47 of 2019 against the applicants which case is still pending before that court.

## **SUBMISSIONS**

9 Despite this court issuing directions on filing of submissions no submissions were on record as at 10/3/2026.

## **ANALYSIS AND DETERMINATION**

10 The Court has noted the application and the depositions of the parties in support and against the application.

11 The plaintiffs in the present application seeks that UKWALA SRM ELC NO. 47 OF 2019 be transferred to the Environment and Land Court at Siaya for hearing and disposal.

12 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**

- 13 Arising from the above and the ELC being a court of equal status with High Court and by dint of Article 162(2) (b) of the Constitution is conferred with powers to withdraw and transfer cases instituted in subordinate court to it for hearing and determination.
- 14 From the material placed before court, it is not in dispute that there exists ELC Case No. 47 of 2019 filed at Senior Residents Magistrates Court in Ukwala pitting Amos Omondi Mbala as Plaintiff and Wilmina Nekesa and William Onyango.
- 15 The main ground for the application has been attributed in my view to the Court of Appeal decision in Pauline Chemuge Sugawara Vs Nairuko Ene Mutarakwa Kiruti urging that while the trial court is seized of the suit for eviction it would not satisfactorily decide on the issues of adverse possession.
- 16 I think the first contention the court must resolve is whether the counterclaim raises the plea of adverse possession. While I note that the applicant filed a Further supporting affidavit sworn on 6/11/2025 indicating that he

inadvertently had not annexed the pleadings and annexes copies of the plaint and the statement of defence and counterclaim. However, the same are not attached both on the physical file and the judiciary e-filing system (CTS). But the respondent does not deny a counterclaim was raised on the basis of adverse possession.

- 17 The plaint in the trial court is however available as attached to the defendants/respondent replying affidavit sworn on 2/12/2025. It shows that it relates to parcel North Ugenya/Uyundo/296. The plaintiff seeks a declaration that he is the rightful registered owner of the parcel and an order of eviction of the defendants and a permanent injunction.
- 18 Assuming the counterclaim raised is for adverse possession I will proceed to review the present application against the decision of the Court of appeal.
- 19 The Court Appeal in **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)** clarifying the law on the jurisdiction of the Magistrates court to entertain cases of adverse possession held that notwithstanding the expansion of the jurisdiction of environment and land usage to the Magistrates Courts, it is instructive that under Section 9 (a) of the Magistrates Court Act, various matters are specified for determination, but claims for adverse possession are not included in that

section. And that, it is only the Environment and Land Court which has jurisdiction to hear and determine claims for adverse possession.

20 Essentially the Court Appeal in the above judgement delivered on 11/10/2024 reiterated 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.

21 It is trite that a counterclaim is a suit on its own and there is no legal doubt about it. What then would be its fate in view of the above binding decision of the Court of Appeal? 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. 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...”*

- 22 As long as the counterclaim sought orders that the counterclaimants be declared the owners of the suit property by way of adverse possession, the trial court was not seized of the requisite jurisdiction.
- 23 I think the Defendant seems to have appreciated the above conclusion and decided to file the present claim of adverse possession with the result that the court is now faced with two suits since the Plaint in the trial court still survives and therefore the current application to transfer the same to this court.
- 24 I have noted the objections raised against the application and imputing lack of bonafides on the part of the applicant. However, I think as a court I must consider the right of the applicant to be heard in defence of the suit for eviction and which indeed he had filed defence and counterclaim.

- 25 As noted hereinbefore there exists two suits which in my view cannot be severed and heard separately. Why do I say so? Firstly, it is because the subject of the proceedings revolves around the same parcel of land and parties. This court is clothed with jurisdiction to handle the plaintiffs claim and the adverse claim suit under one roof. The later could still be safely treated as a response to the plaint.
- 26 Moreover I pondered over what if the suit in Ukwala were to proceed, of course either of the parties if aggrieved have a right of appeal before this court. The court would then find itself in an embarrassing situation where it would be sitting on appeal on the suit property while at the same time faced with the suit commenced before it by the OS. This would be a very unpleasant scenario indeed.
- 27 In my view the approach of transferring the suit commenced by way of plaint to this court is the most reasonable and efficient way of resolving the matter. This way none of the parties will be driven away from the seat of justice and including meeting the overriding objectives of the court.
- 28 The Notice of Motion application dated 29/10/2025 is therefore disposed in the following terms;
1. Invoking the courts inherent jurisdiction and the powers conferred under section 18 of the Civil Procedure Act an order hereby issues withdrawing and transferring the case **UKWALA SRM ELC NO. 47 OF 2019 AMOS OMONDI MBALA Vs WILMINA NEKESA & WILLIAM ONYANGO MUTHACH** to this court for hearing and determination.

2. That upon the above, UKWALA SRM ELC NO. 47 OF 2019 shall be given a new number in this court
3. The above file and the file in the present suit shall be placed for Mention before this court for further directions.
4. The costs of this application are awarded to the Respondents in the present application.

**Dated at Siaya this 15<sup>th</sup> Day of April, 2026**

**HON. JUSTICE A. E. DENA**

**JUDGE**

**15/04/2026**

**Ruling delivered virtually through Microsoft Teams  
Video Conferencing Platform in the Presence of:**

No appearance for Plaintiff Applicant

No appearance for the Respondent

Amos Omondi Mbala Respondent

Court assistant: Doroth Awuor