

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELCL MISCELLANEOUS APPN NO. E008 OF 2025
JAMES PIUS MUYANGAPLAINTIFF/RESPONDENT
-VERSUS-
PAUL MUTUKU KITAKA1ST DEFENDANT/APPLICANT
PHILIP MULI KITAKA2ND DEFENDANT/APPLICANT
JOHN KIMEU KITAKA3RD
DEFENDANT/APPLICANT

RULING

1. Vide the Notice of Motion dated 14th March, 2025 brought under the provisions of Section 18 (b)(ii) of the Civil Procedure Act, the Defendants/Applicants seek the following orders: -
 - 1) **THAT this Honourable Court be pleased to withdraw SPM ELC 7 of 2020 pending before the Senior Principal Magistrates Court at Tawa and transfer the same for trial or disposal to this court.**
 - 2) **Costs of this application be in the cause.**
2. The application is premised on grounds appearing on its face. It is also supported by the affidavit of Paul Mutuku Kitaka sworn on even date on his behalf and that of his Co-applicants. The deponent averred that he is the 1st Defendant in Tawa SPMELC No. 7 of 2020 whereas the Respondent is the Plaintiff. It is the Applicants' case that as part of their defence, they wish to raise a counterclaim for adverse possession of the suit property land Parcel No. MBOONI/ITETANI/141. That the Senior Principal Magistrates Court does not have jurisdiction to entertain a claim for adverse possession by virtue of Section 38 of the Limitation of Actions Act which donates such powers to this Court.
3. The deponent averred that in order to determine all the issues in Tawa SPMELC No. 7/2020 and to save on judicial time, it is imperative that the suit be transferred to this court. He urged the court to allow the application as sought.

4. Opposing the application, the Respondent filed the replying affidavit sworn by himself on 20th March, 2025. He averred that the case is properly before the Tawa Law Courts pending hearing. That the Applicant has not sought an order for adverse possession and therefore the application is misleading. The deponent insisted that the application is bad in law, an abuse of court process and an attempt to delay finalization of the matter.
5. The application was canvassed by way of written submissions.
6. In the Applicants' submissions dated 6th October 2025, Counsel submitted that the jurisdiction to determine claims of adverse possession is exclusively vested with the Environment and Land Court. Counsel cited the case of **Sugawara v Kiruti (Sued in her capacity as the administratrix of the Estate of Mutarakwa Kiruti Lepaso alias Mutaragwa Kiruti Lepaso alias Mutaragwa Kiroti Leposo and in her own Capacity) & 3 others [2024] KECA 1417 (KLR)** in support of the above submission.
7. The Respondent filed his submissions dated 4th August 2025. On his behalf, Counsel contended that the Applicant has not annexed any pleading to demonstrate the status and existence of the matter pending in the lower court. That the court cannot assume the allegations that a claim has been made for adverse possession without verification.
8. The only issue for determination is whether the Applicant has demonstrated merit in the application for withdrawal of the suit in Tawa SPMELC No. 7 of 2020 and transfer of the suit for hearing and determination in this court.
9. The law governing the transfer of a suit upon an application being made to this Court is outlined under Section 18 (1) 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.*

10. In the case of John Kirimana Ekabu v Stephen M' Ikiamba & 6 others [2020] eKLR, Lady Justice Lucy N. Mbugua held as follows:-

“The question of application of section 18 1(b) of the Uganda Civil Procedure Act which provisions are equivalent to our own Civil Procedure Act 2010 was dealt with in the case of DAVID KABUNGA VS. ZIKARENGA & 4 OTHERS (Kampala HCC No. 36 of 1995), where Okello J stated as follows:

“Section 18 1(b) of the Civil Procedure Act gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. The burden lies on the applicant to make out a strong case for the transfer....What the court has to consider is whether the applicant has made out a case to justify it in closing the doors of the court in which the suit is brought by the plaintiff and hearing him to seek his remedy in another jurisdiction.....”

11. In the instant application, the Applicant averred that he is unable to counterclaim the Respondent’s suit in the subordinate court because the

jurisdiction to hear and determine a claim for adverse possession is vested only with the Environment and Land Court.

12. Nonetheless, the Applicant did not annex his statement of defence as an exhibit in order for the court to fully examine his allegations. The Respondent challenged the application on the basis that it is fatally defective and that the application is misleading.

13. Indeed, it is noted that the Applicant did not annex to his supporting affidavit his pleading before the lower court in Tawa SPMELC No. 7 of 2020. Section 108 of the Evidence Act outlines as follows: -

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

14. Section 109 of the Evidence Act goes on to set out as follows: -

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

15. In the case of Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR, the Court of Appeal observed as follows: -

“The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of

the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.”

16. The Court of Appeal went on to aptly find as follows: -

“In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondents’ case. The documents did not become exhibits before the trial court; they had simply been marked for identification and they have no evidential weight.”

17. In the instant case, the Applicant did not annex his statement of defence and counterclaim before the lower court as part of his application. His averments are therefore unfounded and this court cannot make a sound determination on the basis of an assumption. This court is unable to verify the Applicant’s allegations without the benefit of his pleadings before the lower court.

18. In the end, the instant application is fatally defective and is hereby dismissed with costs.

It is so ordered.

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HON. E. O. OBAGA
JUDGE

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS
THIS 23RD DAY OF APRIL, 2026.**

In the absence of parties who were aware of the date of ruling.

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