

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ELC LAND APPEAL NO. E010 OF 2025

JOSHUA

NDOLO

OMBEWA.....APPELLANT

=VERSUS=

**RICHARD OKETCH OLOO.....
RESPONDENT**

(Being an appeal from the Judgment of the Chief Magistrate's Court at Siaya Hon. B.B. Limo (PM), delivered on 26/02/2025 in Siaya MC ELC case no. E080 of 2023)

JUDGEMENT

1 JOSHUA NDOLO OMBEWA, the appellant herein being aggrieved by the Ruling of the Chief Magistrate's Court at Siaya Hon. B.B. Limo (PM), delivered on 26/02/2025 read together with the orders made on 6/03/2025 in Siaya MC ELC case no. E080 of 2023 preferred this appeal seeking the following reliefs; -

- 1) The Ruling and Order of the Honourable trial Magistrate be set aside and be substituted with a finding that the Magistrates' courts lack jurisdiction only as relates to the Respondent's Counterclaim for adverse possession.
- 2) In the alternative, the Ruling and Order of the Honourable trial Magistrate be set aside and/or be substituted and/or varied with orders appropriate to the circumstances of this Appeal.

- 3) The costs of the Appeal be awarded to the Appellant.
- 2 The appellant through the firm of Otieno & Amisi Advocates penned 5 grounds of appeal in his memorandum of appeal dated 19/03/2025. The grounds of appeal as here follows; -
- 1) THAT the learned trial Magistrate erred in law and fact by finding and holding that he had no jurisdiction to hear and determine the Appellant's suit for injunction against the Respondent in relation to Property Title No. **EAST ALEGO/MASUMBI/543** as per the Plaint dated 25/09/2023.
 - 2) THAT the learned trial Magistrate erred in law and fact by constructively combining and treating the Appellant's suit for injunction against the Respondent and the Respondent's Counterclaim for adverse possession dated 22/03/2024 as one suit thereby downing his tools on the entire proceedings.
 - 3) THAT the learned trial Magistrate erred in law and fact by failing to create a distinction between the Appellant's suit for injunction against the Respondent and the Respondent's Counterclaim for adverse to **ALEGO/MASUMBI/543** thereby finding that he had no jurisdiction over the entire proceedings.
 - 4) THAT the learned trial Magistrate acted in error of law by disregarding and/or failing to pay fidelity to the doctrine of precedence, and more particularly by disregarding the decision by the East Africa Court of

Appeal **in Kibona vs. Tanscan Timber Co. Ltd Mbeya HCCC No. 8 of 1999 [1995- 1998] 1 EA 121,** endorsed by the Court of Appeal in **County Government of Kwale & 2 Others vs. Rahimkhan & 5 Others (Civil Appeal 75 of 2020) [2023] KECA 308 (KLR)** and by the High Court in **Michael Muuthoka Makau (Suing as Personal Representative of the Estate of Ernest Daudi (Deceased) vs. Simon Nganga Mbugua, Stephen Ndirangu & Kevin Njoroge and Monarch Insurance Company Ltd (Interested Party) (Civil Suit 5 of 2015) [2018] KEHC 2003 (KLR)** on the principle that a Counterclaim is completely different from the plaintiff's case and it will fall or succeed on its own merits.

5) THAT the learned trial Magistrate erred in law and fact by finding and holding that the Appellant's Notice of Motion Application dated 05/03/2025 had been overtaken by events thereby failing to rectify the accidental slips and/or error apparent in the Ruling dated 26/02/2025.

3 Upon admission of the Appeal the court gave directions for its disposal by way of written submissions which are summarised as here follows: -

APPELLANTS SUBMISSIONS

4 The Appellant framed and submitted on 4 issues for determination to wit; -

- 1) Whether the Appellant's suit for injunction as per the Plaintiff dated 25/09/2023 and the Respondent's Counterclaim for adverse possession as per the Defence and Counterclaim dated 22/03/2024 ought to have been treated as one and the same suit for purposes of determining jurisdiction (grounds 2 and 3).
 - 2) Whether the trial Court was clothed with jurisdiction to hear and determine the Appellant's suit for injunction against the Respondent in relation to Property Title No. **EAST ALEGO/MASUMBI/543** as per the Plaintiff dated 25/09/2023 (grounds 1 and 4).
 - 3) Whether the proceedings may be transferred to the Environment and Land Court for trial and determination.
 - 4) What are the appropriate orders in the circumstances of this appeal?
- 5 On issue No.1) Counsel on record for the appellant cited several decisions of the court to the effect that a counterclaim is a separate claim on its own right and “will fall or succeed on its own merits. It was submitted that save for convenience, there would exist no nexus between a Counterclaim and the Plaintiff's suit. That if the court determines that it has no jurisdiction over a counterclaim, that determination ought to be restricted to, and only apply to, and/or only affect the counterclaim, and not the Plaintiff's suit.
- 6 It is submitted that the trial magistrate ought to have separated the counterclaim from the Appellant's suit when

determining the question whether it had jurisdiction over any of the two claims.

- 7 On issue No. 2) it was urged that at no point in the proceedings did the question of the court's jurisdiction to hear and determine the Appellant's suit for injunction ever arise. It was submitted that the jurisdiction of magistrates' courts to handle land matters is founded under section 26 of the Environment and Land Court Act. That Hon Benjamin Limo, PM, was appointed to handle environment and land matters on 28th February 2019, by virtue of Gazette Notice No. 2575.
- 8 It was submitted that by dint of section 7(1)(c) of the Magistrates Courts Act, pegging the pecuniary jurisdiction of principal magistrates at a maximum of Kenya Shillings Ten Million (Kes. 10,000,000/-) vis a vis the size of the suit property and prevailing market rates in rural areas the trial court was seized of the pecuniary jurisdiction as there was no way the suit property would exceed the designated amount.
- 9 It was concluded there was therefore no doubt that the trial magistrate was clothed with jurisdiction to handle the Appellant's claim for a permanent injunction against the Respondent.
- 10 On the 3rd issue counsel recalled that during the taking of directions, Counsel for the Respondent attempted to advance the argument that the ELC court ought to transfer the proceedings to itself for determination.

Relying on the Court of Appeal's rendition in **Equity Bank Limited vs. Bruce Mutie Mutuku T/A Diani Tours & Travel** it was submitted that that a claim filed in a court or tribunal without jurisdiction is a nullity and the High Court (and by extension the ELC Court) cannot exercise its powers under section 18 of the Civil Procedure Act to transfer the same to a court with jurisdiction.

- 11 On what orders would be appropriate it was urged that by arriving at the erroneous finding that he had no jurisdiction to determine the Appellant's suit against the Respondent, the trial court effectively drove the Appellant from the seat of justice without lawful grounds thereby denying him access to justice contrary to the dictates of article 48 of the constitution of Kenya, 2010. That the most appropriate orders in the circumstances of this appeal would be to overturn the orders issued by the trial magistrate and order that the Appellant's suit to proceed to trial before the magistrates' courts.

RESPONDENTS SUBMISSIONS

- 12 As at the time of preparing this judgement on 17/04/2026 the respondents' submissions were not on record.

ANALYSIS AND DETERMINATION

- 13 Having read the Record of Appeal and the foregoing I think the issues identified and condensed by Counsel for the

Appellant will suffice for purposes of analysis and determination of this appeal. I will therefore adopt the same however it is my view issue number 1 and 2 can safely be canvassed together as they address the issue of jurisdiction of the trial court. Issue number 2 & 4 can also be handled together as they are interrelated will also overlap with issue. I have also noted that ground number 5 has been abandoned.

14 The history precipitating this appeal has been well summarized in the appellants submissions and are apparent in this judgement.

15 This is a first appeal. Section 78 of the Civil Procedure Act Chapter 21 of the Laws of Kenya makes provision on the duties of an appellate court and reads; -

Powers of appellate court

1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require the evidence to be taken;

(e) to order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

Whether the Appellant's suit and the Respondent's Counterclaim for adverse possession ought to have been treated as one and the same suit for purposes of determining jurisdiction & whether the trial Court was clothed with jurisdiction to hear and determine the Appellant's suit against the Respondent in relation to Property Title No. EAST ALEGO/MASUMBI/543.

- 16 The suit in the trial court was commenced by way of plaint dated 25/09/2023 seeking judgement against the defendant for permanent injunction restraining the defendant and his agents from interalia accessing, encroaching, trespassing, occupying, tilling and dealing with or interfering with the plaintiffs (herein appellant) ownership and or quiet possession of **Title No. EAST ALEGO/MASUMBI/543** (suit property). The appellant also sought general damages for trespass on the suit property as the owner and registered proprietor.
- 17 The Defendant in response filed a Statement of Defence & Counterclaim dated 22/3/2024 where he sought orders that the plaintiffs' rights to the suit property had been extinguished by dint of adverse possession by the defendant. The defendant sought for a declaration in that regard and for the title to be registered in his name.
- 18 The ruling the subject of the appeal was delivered on 26/2/2025. The trial court noted that the parties had

stated to the court that the defendant had filed a claim that bordered on adverse possession and proceeded to down its tools for want of jurisdiction to handle the matter. There was an error on the face of the record where the word 'no' was missing but has since been resolved and which explains the abandonment of ground 5 of this appeal.

- 19 The jurisdiction of the Magistrates Court to handle claims of adverse possession was clarified by the Court of Appeal in the case of Pauline **Chemuge Sugawara v Nairuko Ene Mutarakwa Kiruti (Sued in her capacity as the administrator of the estate of Mutarakwa Kirui Lepas alias Mutaragwa Kiruti Lepas alias Mutarakwa Kiroti Lepas Civil Appeal E141 of 2022 (2024 KECA 1417 (KLR)).**
- 20 In the judgement delivered on 11/10/2024 the court of appeal discussed various decisions of the ELC court on the Jurisdiction of the Magistrates Court to handle claims of adverse possession. These covered those in support of the proposition that the Magistrates Court is vested with Jurisdiction and decisions against, but with more recent decisions in the year 2023 taking the position that the Magistrates Courts are not seized with jurisdiction to adjudicate upon claims founded on adverse possession on the face of explicit provisions contained in section 37 & 38 of the Limitation of Actions Act cap 22 of the Laws of Kenya.

- 21 The Court of Appeal held that the Magistrates court lacked jurisdiction to hear matters under the provisions of section 37 and 38 of the Limitation of Actions Act.
- 22 In clarifying the law, the learned Judges held thus; -
‘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.’
- 23 The Court of Appeal simply restated the law as it had been since inception.
- 24 It has been urged on behalf of the appellant that the court was seized of jurisdiction to hear the Plaintiffs claim which I have already noted was based on trespass where the plaintiff sought an order of permanent injunction. I have already summarised the prayers sought in the Plaint. There is no doubt that the suit as filed by way of plaint was properly before the trial court in all respects. I therefore respectfully agree with the submission that the trial court had jurisdiction to this extent.
- 25 The defendant plaintiff in the counterclaim sought that the title be cancelled and replaced with his name as the registered owner by dint of his acquisition of the suit by way of adverse possession. This IS where the complication

arose precipitating the trial court finding that he was not seized of jurisdiction to determine the entire suit meaning both the suit as commenced by way of plaint and the counterclaim.

26 In view of the decision of the Court of Appeal it is my view that 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 would not be clothed of the requisite jurisdiction to handle the counterclaim.

27 According to Counsel on record for Appellant the trial court only lacked jurisdiction over the Counterclaim which is ordinarily treated in law as a suit of its own. That consequently the court erred considering the suit as one in making a determination on jurisdiction. This court was referred to numerous decisions where the courts have been unanimous on the position that a counterclaim is a stand alone suit key among them **Kibona Vs. Tanscan Timber Co. Limited Mbeya HCCC No. 8 of 1999 (1995-1998) 1EA 121; County Government of Kwale & 2 Others Vs Rahimkhan & 5 Others (Civil Appeal 75 of 2020) (2023) KECA 308 (KLR).**

28 And indeed I have no qualms and I fully agree that a counterclaim is a separate suit.

29 But was the trial court right to wash its hands off both the suit as commenced by way of plaint for which I have found it had jurisdiction. My understanding of the Appellants

argument is that upon its finding the trial court should have proceeded to hear and determine the suit commenced by way of plaint.

30 The question that arises is what implications would the above approach have on the defendant? To me it would be a denial of the defendant's right to be heard on its defence which includes a counterclaim. Both claims were pegged on the same suit property albeit it is urged the defendant counterclaimant was craving only a portion of the suit property. There was no way the trial court would make a finding on adverse possession on the portion assuming the defendant proved that he was indeed entitled to the portion by dint of his long stay of over 12 years and satisfied all the requirements of adverse possession without going against the law on jurisdiction of the Magistrates Court on claims of adverse possession as clarified by the Court of Appeal.

31 This court has been invited to make a determination on whether proceedings may be transferred to the Environment and Land Court for trial and determination.

32 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

33 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.

34 The counterclaim cannot be salvaged by transferring it to this court as nothing comes out of a nullity having been filed before a court that is divested of jurisdiction. 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...”

- 35 Against the foregoing backdrop what then would be a trajectory that would ensure access to justice for both parties without causing any prejudice.
- 36 This court is clothed with jurisdiction to handle both the plaintiffs claim which is hinged on trespass and a claim based on the doctrine of adverse possession. It is unfortunate that the counterclaim is null and void and

there would be nothing to transfer to this court as far as the counterclaim would be concerned.

37 In my view transferring the suit commenced by way of plaint to this court would make sense. Upon such transfer the defendant would then be afforded an opportunity to respond in the same terms as they did in the trial court with condition that he will not depart from the content of the defence and counterclaim as filed in the trial court while relating the same documents filed under the provisions of Order 11 of the Civil Procedure rules. This would ensure no prejudice will be suffered by the Appellant.

38 Moreover Section 13 (5) of this court's Act empowers me to make any order and grant any relief as the court deems fit and just. The circumstances of this case is a perfect opportunity to invoke this discretion for the ends of justice to be met. Additionally, the overriding objective provided for under Sections 1A and 1B and the inherent power of the court under Section 3A are meant for the attainment of justice to the parties who come to court.

39 The upshot of the foregoing is that this appeal is disposed of in the following terms; -

- 1) The ruling delivered in the Chief Magistrate's Court at Siaya by Hon. B.B. Limo (PM), on 26/02/2025 in Siaya MC ELC case no. E080 of 2023 be and is hereby upheld.
- 2) The Counterclaim filed in the trial court is null and void.
- 3) Invoking this courts inherent jurisdiction and the powers conferred under section 18 of the Civil Procedure Act an

order hereby issues withdrawing and transferring the case Siaya **MC ELC CASE NO. E080 OF 2023 JOSHUA NDOLO OMBEWA VS RICHARD OKETCH OLOO** as commenced by way of plaint to this court for hearing and determination.

- 4) That upon 3) above, Siaya **MC ELC CASE NO. E080 OF 2023 JOSHUA NDOLO OMBEWA VS RICHARD OKETCH OLOO** shall be given a new number in this court.
- 5) The Defendant shall upon 4) above enter appearance and respond to the suit provided that he will not depart from the content of the defence and counterclaim as filed in the trial court.
- 6) Let each party bear its own costs of this appeal.

DATED at SIAYA this 23rd Day of April 2026

HON. JUSTICE A. E. DENA
JUDGE
23/04/2026

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

Mr. B. Otieno for the Appellant

No appearance for Respondent

Court assistant: Dorothy Awuor