

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISCELLANEOUS APPLICATION CASE NO. E074 OF 2025

FRANCISCAH NDAKITHI MUSYOKI ... PLAINTIFF/APPLICANT

VERSUS

OSMAN AHMED KAHIA DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated 24th June 2025, Franciscah Ndakithi Musyoki (the Plaintiff/Applicant) prays for the following orders:
 - a) **That the Honourable Court be pleased to withdraw and transfer Civil Suit No. MCELC No. E040 of 2021, from the Lower Court to the Environment and Land Court for hearing and final determination;**
 - b) **That this Honourable Court does consolidate the aforementioned case with ELC No. 071 of 2024; Peter Gicira & Others Vs Osman Ahmed Kahia; and**
 - c) **That costs of this application be in the cause.**

2. The application is supported by an affidavit sworn by the Applicant and is premised on the grounds:

a) That the Plaintiff filed this suit against the Defendant claiming for inter alia a right over the property measuring 40 by 100 feet on Plot No. 3661/VI/MN/CR NO. 19580;

b) That after amendment and introduction of new documents to the suit by the Defendant herein, the plot subject matter in MCELC NO. E040 of 2021 has changed from No. 3661/VI/MN CR No. 19580 to No. 5139/VI/MN CR NO. 68924 and its value has also changed;

c) That the Applicant has discovered that another suit touching on the entire property CR No.5139/VI/MN CR No. 68924 now the subject matter in MCELC No. E040 of 2021 namely ELCLC No. E071 of 2024 has been filed by occupiers of neighbouring plots to hers against the Defendant/Respondent and would like her case to be consolidated and heard jointly with the one filed by the other occupants of the property subject matter hereof;

d) That it is therefore necessary for the orders sought to be granted so as to facilitate a just, expeditious, proportionate and affordable resolution of the dispute between the parties herein and to avoid conflicting decisions on the same subject matter and between the same parties; and

e) That no party to this matter will suffer any prejudice if the said case is transferred, consolidated and listed for hearing at the Environment and Land Court.

3. Osman Ahmed Kahia (the Defendant/Respondent) is opposed to the application. In his Replying Affidavit sworn on 19th August 2025, the Respondents avers that he was the Defendant in MCELC No. E040 of 2021 and that the Court affirmed that it had no jurisdiction to hear the matter and the file was closed.
4. I have carefully perused and considered the application and the response thereto. I have similarly perused and considered the submissions placed before me by the Learned Advocates representing the parties.

5. By her application before the Court the Applicant prays for an order transferring Mombasa MCELC No. E040 of 2021 from the Lower Court and consolidating the said suit with ELCLC No. 071 of 2024. It is the Applicant's position that she has discovered that this other suit touches on the entire property claimed by the Respondent and that the same has been instituted by her neighbors who occupy plots adjacent to her own. The Applicant asserts that she would like her case to be consolidated and heard jointly with the one filed by the other occupants.

6. Section 18 of the Civil Procedure Act provides that:

“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.”

7. In the matter herein, the Respondent did not deny the existence of the said Mombasa MCELC No. E040 of 2021 wherein he had been sued as a Defendant. It was however his case that the said matter was no longer available for transfer and consolidation as the trial Court had made a determination that it had no jurisdiction to hear the matter and had proceeded to close the same.
8. The Applicant did not contest the fact that the Lower Court had made that determination. It was however her case that

the Court had only done so after the Respondent herein had amended his pleadings thereby depriving the Lower Court of jurisdiction to hear and determine the matter. According to the Applicant now that the value of the subject matter had risen beyond the jurisdiction of the Subordinate Court, the only solution was for the matter to be transferred to this Court for hearing and determination.

9. The issue in dispute in this application was considered by Ringera J., (as he then was) in the case of ***Omwoyo -vs- African Highlands & Produce Co. Ltd (2002) 1KLR 698*** where the Court stated as follows:

“That being the case, the sole issue for determination is whether this Court has jurisdiction to transfer a suit from a Court which is seized of it but has no jurisdiction to determine it to a court vested with jurisdiction. (In) Kagenyi -vs- Musiramo & Another (1968) EA 48, Sir Udo Udoma CJ held in relation to Section 18 of the Uganda Civil Procedure Act - a provision which is in Pari materia with Section 18 of our Code that an order for the transfer of a suit from one Court to another cannot be made unless the suit has been

in the first place brought to a court which has jurisdiction to try it. In that case the appellant had sought to transfer a suit from the Magistrate's Court to the High Court on the basis that the claim exceeded the pecuniary jurisdiction of the Lower Court. And in the very early case of Mendonca -vs- Rodrigues (1906-1908) 2 KLR 51, Hamilton J. held that the High Court did not have power to order a transfer of a suit on the ground of want of jurisdiction only. The case involved a dispute which was outside the local jurisdiction of the Lower Court in which it had been filed. The principle of law to be gleaned from these authorities is that the High Court cannot exercise its discretion to transfer a suit if the suit is filed in the first place in a Court which does not have pecuniary and/or territorial jurisdiction to try it."

10. I am in agreement with the reasoning of the Court in the above case. The trial Court having come to the conclusion that it had no jurisdiction to handle the matter, this Court cannot transfer the same to itself for trial and disposal. The Applicant cannot purport to cure a mistake which she made when she filed the suit in a Court which lacked jurisdiction by

applying to have it transferred and consolidated with another case filed in the right forum.

11. In the premises, the Motion dated 24th June 2025 is misconceived and lacking in merit. The same is dismissed with costs to the Respondent.

Ruling dated, signed and delivered in open court and virtually at Mombasa this 30th day of April, 2026.

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J.O. OLOLA
JUDGE

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) No Appearance for the Plaintiff/Applicant
- c) Mr. Asige Advocate for the Defendant/Respondent