



Full Gospel Church of Kenya, Bethsaida Kang’au Branch (Suing through its registered officials Bishop Fredrick Kiogora M’Nkanatha and Rev Pius Kimathi) v Theuri (Environment and Land Miscellaneous Application E003 of 2025) [2025] KEELC 906 (KLR) (18 February 2025) (Ruling)

Neutral citation: [2025] KEELC 906 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E003 OF 2025
JO MBOYA, J
FEBRUARY 18, 2025**

BETWEEN

**FULL GOSPEL CHURCH OF KENYA, BETHSAIDA KANG’AU BRANCH
(SUING THROUGH ITS REGISTERED OFFICIALS BISHOP FREDRICK
KIOGORA M’NKANATHA AND REV PIUS KIMATHI) PLAINTIFF**

AND

JOHN THEURI DEFENDANT

RULING

1. The Applicants [who are the registered officials of the Full Gospel Church of Kenya Bethsaida Kangau Branch] have approached the court vide the application dated 5th February 2025; and in respect of which same [Applicants] have sought for the following reliefs;
 - i. That this matter be certified as urgent and be heard ex-parte in the first instance.
 - ii. That this Honourable court be pleased to issue an order transferring ELC Case No. E019 of 2024 from the chief magistrate’s court at Meru to the environmental and land court at Meru for hearing and determination.
 - iii. That the costs of this application be in the cause.
2. The instant application is premised on the various/diverse grounds which have been enumerated in the body thereof. In addition, the application is supported by the affidavit of D.M Maranya, Advocates and to which the deponent has annexed inter alia a copy of the Judgment of the Court of Appeal in the case of Pauline Chemuge Sugawara vs Nairuko Ene Mutarakwa Kirut (2024) KECA 1417 (KLR), wherein the Court of Appeal highlighted the fact that the subordinate courts [Chief Magistrates’ Courts] are not seized of jurisdiction to entertain claims based on adverse possession.



3. Upon being served with the subject application, the Respondent herein filed a Replying affidavit sworn on the 17th of February 2025; and wherein the Respondent has contended that the application beforehand is premature and misconceived. Furthermore, the Respondent has also contended that the suit before the subordinate court was filed in a court without the requisite jurisdiction and hence same [suit] cannot [sic] be transferred.
4. The subject application came up for hearing on the 18th of February 2025; whereupon the advocate for the parties covenanted to canvass and dispose of the application vide oral submissions. Instructively, the application proceeded for hearing and the submissions on behalf of the parties are duly captured in the body of the record of the court.
5. Having reviewed the Notice of Motion application; the Replying affidavit and the submissions by the parties, the determination of the instant application turns on two [2] salient issues, namely; whether the suit which is sought to be transferred was filed in a court with the requisite jurisdiction in the first place; and whether this court is seized of jurisdiction to transfer a suit which was filed in a court without jurisdiction or otherwise.
6. To start with, there is no gainsaying that the applicant herein filed a suit, namely, Meru CMCC ELC No. E019 of 2024; before the Chief Magistrate's court and wherein the Applicants sought inter alia declaration that same [Applicants] had acquired ownership of the suit property vide adverse possession.
7. It was contended by and on behalf of the learned counsel for the Applicant[s] that by the time the suit before the Chief Magistrate's court was filed, the Chief Magistrate's court was seized of the requisite jurisdiction to entertain and adjudicate upon a claim based on adverse possession.
8. Nevertheless, learned counsel for the Applicants submitted that the question of whether or not the subordinate court had jurisdiction to entertain and adjudicate upon a claim for adverse possession was subsequently clarified by the Court of Appeal in the Pauline Chemuge Sugawara case [supra].
9. The critical question that merits determination is whether or not the suit before the Chief Magistrates' court was filed in a court seized of the requisite jurisdiction. To my mind, the determination of whether or not the Chief Magistrates court had jurisdiction to entertain a claim for adverse possession rests with the construction/interpretation of section 38 of the *Limitation of Actions Act* Cap 22 Laws of Kenya. For good measure, the said section stipulates that the court seized of jurisdiction to entertain and adjudicate upon a claim for adverse possession is the High Court.
10. Suffice it to point out that by the time the *Limitation of Actions Act*, Chapter 22, Laws of Kenya; was being enacted, the Magistrates' courts were in existence. Nevertheless, there is no gainsaying that Parliament in its wisdom did not clothe and or bestow the magistrates court with jurisdiction to entertain and adjudicate upon claims touching on adverse possession.
11. Furthermore, it is not lost on this court that the *Environment and Land Court Act* [2011] and the Magistrates Court Act [2015], did not endeavor to and or repeal the provisions of Section 38 of the *Limitation of Actions Act*. In this regard, there can be no debate as to whether the magistrates court had jurisdiction to entertain and adjudicate upon claims based on adverse possession.
12. Moreover, it is common ground that the decision of the Court of Appeal in Pauline Chemuge Sugawara [supra] which was rendered on the 11th of October 2024; did not create new law. Simply put, the said decision merely espoused and expounded the position as pertains to section 38 of the *limitation of Actions Act* Cap 22 Laws of Kenya, which section has been part of our Law since its enactment.



13. Flowing from the foregoing discourse, it is my humble albeit considered position that by the time the suit was being filed in the subordinate court, the subordinate court, the chief magistrate's court – Meru not excepted, did not have the requisite jurisdiction to entertain the claim for adverse possession.
14. In the premises, it is evident and apparent that the suit which was filed before the Chief Magistrate's court was filed before a court devoid and divested of the requisite jurisdiction. To my mind, the suit before the Chief Magistrates' court was void ab initio. [see the decision in *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169].
15. Next is the question of whether this court has the power and or mandate to withdraw and transfer a suit that was filed in a court without jurisdiction. Suffice it to state that this court is seized of the jurisdiction to withdraw and transfer a suit filed from the subordinate court [Chief Magistrates court] unto itself and vice versa pursuant to Section 18 of the *Civil Procedure Act*, Cap 21 Laws of Kenya.
16. Nevertheless, it is worth stating that the provisions of section 18 of the *Civil Procedure Act* [supra] only envisage the transfer of the suit from the subordinate court to this court and only if, the suit was filed in a subordinate court seized of the requisite jurisdiction. For good measure, jurisdiction must exist from the onset [ab initio] and not otherwise.
17. It is instructive to state that where a suit was filed in a court devoid and divested of jurisdiction, then a party the applicant herein excepted, cannot invoke and deploy Section 18 of the *Civil Procedure Act*; and or the inherent jurisdiction of the court to transfer a suit which, [in my humble view], was dead before arrival. Such a suit is a nullity ab initio and no amount of endeavor[s] can breathe oxygen into it.
18. Pertinently, the issue as to whether a court can transfer a suit that was filed in a court without jurisdiction has been highlighted in various decisions. In particular, the Supreme Court of Kenya [the apex Court] spoke to the issue in the case of *Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* (Petition 3 of 2016) [2019] KESC 83 (KLR) (8 November 2019) (Judgment) where the court stated thus;
 - “154. However, as it was well elucidated in the case of *Kagenyi v Musiramo & Another* (1968) EALR 43, an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it. It is therefore irrelevant as parties cannot consent to confer jurisdiction to a Court/tribunal where it is not provided by law. As already found that this dispute does not fall within the scope of the Employment and Labour Relations Court despite the transfer, we now look at the jurisdiction of the High Court under the repealed Constitution.
19. Other than the Supreme Court of Kenya, the legal position that a suit filed in a court without jurisdiction cannot be transferred to a court [sic] seized of jurisdiction was also adverted to by the Court



of Appeal in the case of Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR where the court stated as hereunder;

“These words were echoed by this Court in Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR in the following words:

“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 S.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 it lacks 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.

...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.” (Emphasis ours)

Decided cases on this issue are legion and we cannot cite all of them. The case of Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another (2013) eKLR is however on all fours and addresses the issue raised by Ms. Wambua as to whether the subordinate court could still hear the suit but only allow the maximum damages allowable within its pecuniary jurisdiction. The Court succinctly settled this point in the following words:-

“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being Kagenyi v. Musirambo (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court’s pecuniary jurisdiction.

We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.

20. It is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was a nullity ab initio and was not transferable to another court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void.

20. The doctrine of stare decisis, is now a constitutional imperative. See Article 163 (7) of the Constitution. [see also the decision of the Supreme Court of Kenya in Geoffrey Makana Asanyo and Wakam Enterprises vs AG (2018) eKLR; See also Dodhia v National & Grindlays Bank [1970] EA 195. 7.



21. I beg to state that in determining whether or not to allow the application, this court is called upon to apply the law and the established principles, which have been espoused by the higher cadre Superior Courts. Moreover, it is apposite to state that discretion cannot be predicated on the basis of sympathy and or empathy. In as much as I may sympathize with the Applicants, but the law is blind. In addition, it is common knowledge that ignorance of the law cannot find a basis for the exercise of discretion.
22. In a nutshell, I come to the conclusion that the application beforehand is devoid of merits and same is a candidate for dismissal. Consequently, and in this regard, the Application dated February 5, 2025; be and is hereby dismissed with costs to the Respondent.
23. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 18TH DAY OF FEBRUARY, 2025

OGUTTU MBOYA

JUDGE

In the presence of

Mr. Mutuma– Court Assistant.

Mr. Kaba holding brief for Mr. D.M Maranya for the Applicants.

Mr. Kirimi D. for the Respondent.

