

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELCMISC No. E002 OF 2025

KCB BANK GROUP KENYA LIMITED 1ST APPLICANT

JOSRICK MERCHANTS AUCTIONEERS 2ND APPLICANT

VERSUS

JOSEPHAT ORINA GETONDO RESPONDENT

RULING

1. The application before me is one dated 3 September 2024. It is filed by the defendants in the suits Kisii CMCC/ELC No. E113 of 2023 and Kakamega CMCC/ELC No. E249 of 2023. What the applicants want is to have the suit Kisii CMCC/ELC No. E113 of 2023 transferred to the Chief Magistrates' Court at Kakamega and consolidated with the suit Kakamega CMCC/ELC No. E249 of 2023 for hearing and determination.
2. The background is that the respondent filed the two suits above on 8 November 2023 in the two different courts respectively in respect of the land parcels West Kitutu/Bogeka/7040 and Butsoto/Indagalasia/3078. The precursor to the suits is that the respondent was offered some financial facility in the sum of Kshs.3,000,000/= which was secured by a legal charge over the land parcel Butsotso/Indagalasia/3078. Subsequently, a further facility for the sum of Kshs. 6,000,000/= was granted and secured by a further legal charge over the same property and a legal charge over the land parcel West Kitutu/Bogeka/7040. There may have been default in repayment, for the 1st applicant moved to exercise her statutory power of sale, and appointed the 2nd applicant to sell the two properties by way of a public auction which was scheduled for 9 November 2023. It is this development that moved the respondent to file the two suits in the two courts, seeking orders inter alia that the actions of the applicants are illegal, and for a declaration that he has a right to sell the properties by private treaty.
3. In this application, the applicants contend that the two suits relate to the same parties; and that they emanate from the same cause of action, and seek similar reliefs, thus the need to have them heard in one court. The applicants further aver that consolidation will prevent

the likelihood of contradictory decisions which may plunge the administration of justice into confusion.

4. The respondent filed a replying affidavit to oppose the motion. His main contention is that the land parcel West Kitutu/Bogeka/7040 is located in Kisii and therefore the court at Kakamega lacks territorial jurisdiction to hear the dispute relating to this parcel of land.
5. I invited counsel to file their submissions and I have taken into account the submissions made by Ms. Onyango, learned counsel for the applicants, and Mr. Wesonga, learned counsel for the respondent, before arriving at my decision.
6. The power of this court to transfer a suit filed in the subordinate court is contained in Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, 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

(iii) retransfer the same for trial or disposal to the court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

7. From the foregoing, particularly Section 18 (1) (b) (ii) it will be seen that this court (for the description High Court has to be read to also include the courts of equal status) has power to order the withdrawal of a suit pending in a subordinate court, and thereafter transfer it to any court subordinate to it, and competent to try and dispose the same.

8. The contention of the respondent is that the court in Kakamega does not have the jurisdiction to try the suit relating to the property in Kisii. In his submissions, Mr. Wesonga, learned counsel for the respondent, referred to Section 12 of the Civil Procedure Act, and pointed out that it provides that a suit for immovable property is to be instituted in the court where the property is located. Section 12 is drawn as follows :

12. Suit to be instituted where subject matter situate

Subject to the pecuniary or other limitations prescribed by any law, suits—

(a) for the recovery of immovable property, with or without rent or profits;

(b) for the partition of immovable property;

(c) for the foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property;

(d) for the determination of any other right to or interest in immovable property;

(e) for compensation for wrong to immovable property;

(f) for the recovery of movable property actually under distraint or attachment, where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate:

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business, or personally works for gain.

9. Whereas I agree that a suit over immovable property is generally required to be filed in the locality of the property, Section 12 does not cover a situation where the cause of action relates to two or more immovable properties in different localities and the cause of action relates to one transaction. I would think that where there are two or more immovable properties, the case may be heard in any court where the properties are located but taking into account other factors recognised in the Civil Procedure Act on the place of suing. I will mention but two. One is pecuniary value, for you could have one court not having the requisite pecuniary jurisdiction to handle the value of the subject matter, in which instance the court where the other property is located, which is armed

with the requisite pecuniary value, ought to take precedence. The second is the place of contract, which is covered in Section 15 of the Civil Procedure Act which provides as follows :

15. Other suits to be instituted where defendant resides or cause of action arises

Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—

(a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or

(b) any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

Explanation (1)—Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

Explanation (2)—A corporation shall be deemed to carry on business at its sole or principal office in Kenya, or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Explanation.(3)—In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely—

- (i) the place where the contract was made;*
- (ii) the place where the contract was to be performed or the performance thereof completed;*
- (iii) the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable.*

Illustration.—(a) A is a tradesman in Nairobi. B carries on business in Mombasa.

B by his agent at Nairobi buys goods of A and requests A to deliver them to Mombasa by rail. A may sue B for the price of the goods either in Nairobi, where the cause of action has arisen, or in Mombasa, where B carries on business.

Illustration.—(b) A resides at Kisumu, B at Nairobi, and C at Mombasa. A, B, and C being together at Nakuru, B and C make a joint promissory note payable on demand and deliver it to A. A may sue B and C at Nakuru, where the cause of action arose. He may also sue them at Nairobi, where B resides, or at Mombasa, where C resides; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the court.

10. From the foregoing, in respect of contracts, explanation (3) of Section 15 provides that the cause of action arises inter alia where the contract was made.
11. In our case, it is not disputed that the contract was made in Kakamega. It is also not disputed that the two different suits give rise to similar questions of law and fact, and arise out of the one contract which was made in Kakamega. In my opinion, given that the contract covers two immovable properties in two different localities, then it is prudent that the suits be heard where the contract was made, and that is in Kakamega.
12. Whatever the case, what needs to be avoided is two different suits in two different courts over the same cause of action, for this may not only embarrass the administration of justice, but also lead to delay and unnecessary costs, in the litigation, which will go against the overriding objectives set out in Section 1A of the Civil Procedure Act which provides as follows :

1A. Objective of Act

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

13. I therefore agree with the submissions of Ms. Onyango, that having two different suits in two different courts, over the same cause of action, may not be prudent. In any case, the respondent has not said what prejudice he stands to suffer if the cases are heard in Kakamega court. In fact, I would think that it is going to save him time and expense which is an issue in his favour. Indeed, he could very well have filed one suit, given that the cause of action is joint, despite being in respect of two properties.
14. For the above reasons, I am persuaded to allow the subject application. I order the transfer of the suit Kisii CMCC/ELC No. E113 of 2023 to the Chief Magistrates' Court at Kakamega. Upon transfer the said case be given a new number in the Chief Magistrates' Court at Kakamega. Thereafter that case be consolidated with the suit Kakamega CMCC/ELC No. E249 of 2023 and the two suits be heard together to their logical conclusion.
15. There will be no orders as to the costs of this application.
16. Orders accordingly.

DATED AND DELIVERED THIS 12 DAY OF FEBRUARY 2026

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Ms. Onyango instructed by M/s Mukele Moni & Company Advocates for the applicant

No appearance on part of Mr. Wesonga for the respondent

Court Assistant – Michael Oyuko