



**Mohammed & another (t/a SWS Aculaser Weight Loss Institute) v PBM Nominees Limited
(Environment & Land Case 463 of 2018) [2023] KEELC 19296 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19296 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 463 OF 2018
OA ANGOTE, J
JULY 27, 2023**

BETWEEN

PROF DR AMINMOHAMMED AH MOHAMMED 1ST PLAINTIFF

PROF DR KARIMMOHAMED AH MOHAMED 2ND PLAINTIFF

T/A SWS ACULASER WEIGHT LOSS INSTITUTE

AND

PBM NOMINEES LIMITED DEFENDANT

RULING

1. In the Notice of Motion dated October 19, 2020, brought pursuant to the provisions of Sections 1A, 1B and 18 of the *Civil Procedure Act*, Section 13 of the *Environment and Land Court Act*, Section 12(1) (a) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* and Article 159 of the *Constitution*, the Plaintiffs have sought for the following reliefs;
 - i. That this Honourable Court be pleased to transfer this matter and all proceedings herein from the Environment and Land Court, Nairobi to the Business Premises Rent Tribunal for hearing and determination.
 - ii. That there be no order as to costs.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Cain Mingo, the Advocate with the conduct of the matter on behalf of the Plaintiffs, who deposed that on August 7, 2013, the Plaintiffs and the Defendant entered into a Sublease Agreement in respect of the premises situate at L.R No 180/ix/159(Original No 88-95), Sarit Centre, Westlands, Nairobi (the suit property).
3. The Plaintiffs counsel deposed that the aforesaid the sublease that was executed by the parties was for a period of 5 years, 6 months and expired on January 31, 2017; that vide a letter of January 9, 2017, the



Defendant sent to the Plaintiffs an Agreement for renewal of the sublease together with the sublease, both of which the Applicant signed.

4. It was deponed that upon receipt of the documents, the Defendant illegally altered the date of the sublease to April 3, 2018 and fraudulently attempted to pass the same to the Plaintiffs; that the date of the agreement is a material change impacting the entirety of a contract and that the sublease has been rendered null and void.
5. It is the contention of the Plaintiffs' advocate that in the circumstances, there is no contract between the parties; that the court lacks the jurisdiction to entertain the same pursuant to Section 3(3) of the [Law of Contract Act](#); that the Defendant's action reduced the tenancy to a controlled tenancy pursuant to the Landlord and Tenant (Shop, Hotel and Catering Establishments) Act and that the jurisdiction to deal with the same is vested in the Business Premises Rent Tribunal.
6. In response, the Defendant filed Grounds of Opposition which were to the effect that the Plaintiffs have admitted to have voluntarily entered into an Agreement for Lease dated January 9, 2017 for a term of 5 years and 6 months commencing on February 1, 2017 and expiring on July 31, 2022 and that based on the terms of the Agreement for Lease aforesaid, a sublease agreement dated April 3, 2018 was prepared and submitted for registration.
7. According to the Defendant, the Agreement for Lease dated January 9, 2017 is a binding contract; that an unregistered Lease or Agreement for Lease which is statutorily required to be registered is not so registered, it does not confer any legal or equitable estate and that the unregistered Lease nonetheless remains enforceable as a contract for the period stated in the documents and can be used to show the terms of the contract.
8. The Defendant averred that pursuant to the Agreement of January 9, 2017, the Plaintiffs were bound to a Lease term exceeding 5 years thus removing it from the ambit of Cap 301; that Section 18 of the [Civil Procedure Act](#) prohibits the transfer of a matter from a Court with jurisdiction to a Court without jurisdiction; that to allow the application would violate the Defendant's rights and that the application is misconceived and ought to be dismissed.

Submissions

9. The Plaintiffs' advocate submitted that Section 18 of the [Civil Procedure Act](#) gives this Court the authority to transfer a matter to a subordinate court or tribunal; that the main consideration for the transfer of a suit include balance of convenience, questions of expenses, interests of justice and possibilities of undue hardship and that the Court has to dispense substantive justice without undue regard to procedural technicalities under Article 159(2)(d) of the [Constitution](#) while taking into account Sections 1A and 1B of the [Civil Procedure Act](#).
10. The Defendant's counsel submitted that this Court derives its jurisdiction from Article 162(2)(b) of the [Constitution](#) and the ELC Act, 2011 and that as expressed by the Court in [Cotton Roots Fashion Limited vs Veeral Shab & Another\[2021\]eKLR](#) citing the Supreme Court decision in [Samuel Kamau Macharia vs Kenya Commercial Bank & Anor\[2012\]eKLR](#), jurisdiction goes to the heart of proceedings.
11. It was submitted that both parties are in agreement that the dispute arises out of an existing landlord-tenant relationship created by the Lease Agreements; that the Plaintiffs admitted to executing an Agreement for Lease dated January 9, 2017 and that the question of the validity of the Sublease can only be determined on merits.



12. According to Counsel, notwithstanding the non-registration of the Agreement for Lease, the same is enforceable as a contract; that the Lease adduced before this Court runs for 5 years 6 months and that its termination is on account of breach of covenant both of which remove it from the ambit of the Business Premises Rent Tribunal whose jurisdiction was extensively discussed by the Court in [*Republic vs Business Premises Rent Tribunal and Another vs Ex-parte Albert Kigera & Another*](#)[2015]eKLR

Analysis and Determination

13. The Plaintiffs are seeking to have this matter transferred to the Business Premises Rent Tribunal pursuant to Section 18 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 of 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.”
14. In discussing the threshold to be met in transferring a suit pursuant to Section 18, the Court in *Oceanic Towers Limited vs Husseini Builders Limited* [2021] eKLR, cited with approval the Ugandan case of *David Kabungu vs Zikarenga & 4 Others Kampala HCCS No. 36 of 1995*, where it was held 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. A mere balance of convenience in favour of the proceedings in another Court is not sufficient ground though it is a relevant consideration. As a general rule, the Court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice. 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 to the Plaintiff and leaving him to seek his remedy in another jurisdiction... It is well established principle of law that the onus is upon the party applying for a case to be transferred from one Court to another for due trial to make out a strong case to the satisfaction of the Court that the application ought to be granted. There are also authorities that the principal matters to be taken into consideration are, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship, and if the Court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused... Want of jurisdiction of the Court from which the transfer is sought is no ground for ordering



transfer because where the Court from which transfer is sought has no jurisdiction to try the case, transfer would be refused...”

15. In discussing whether lack of jurisdiction is one of the circumstances in which a suit can be transferred under Section 18, the Court of Appeal in *Equity Bank Limited vs Bruce Mutie Mutuku t/a Diani Tour & Travel* [2016] eKLR stated thus;

“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. Jurisdiction is a weighty fundamental matter and to allow 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 situation. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.”

16. From the cited authorities, it is clear that for an application for the transfer of a suit to succeed, the court from which the suit is being transferred must in the first place have jurisdiction to try that matter. It follows therefore that the application for transfer of a suit pursuant to Section 18 of the *Civil Procedure Act* on account of want of jurisdiction is a non-starter as the Court, on a successful finding, would be obligated to strike out such a suit rather than transfer the same.
17. If the Plaintiff is acknowledging that he filed a suit in a court without jurisdiction, and that this suit should have been filed in the Business Premises Rent Tribunal, then he should withdraw the suit and file a fresh one before the Tribunal.
18. In any event, the Defendant has taken the position that there exists an Agreement to Lease for more than 5 years, which issue can only be determined after trial.
19. For those reasons, I find the application dated October 19, 2020 to be unmeritorious. The application is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF JULY, 2023

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Gakuyu for Defendant/Respondent

Ms Letunya holding brief for Mugo for Plaintiff

Court Assistant - Tracy

