



REPUBLIC OF KENYA



**KENYA LAW**  
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**Smoothers Limited v Njogu & 3 others (Civil Case E231 of 2020)  
[2021] KEHC 220 (KLR) (Commercial and Tax) (28 October 2021) (Ruling)**

Neutral citation: [2021] KEHC 220 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E231 OF 2020  
WA OKWANY, J  
OCTOBER 28, 2021**

**BETWEEN**

**SMOOTHERS LIMITED ..... APPLICANT**

**AND**

**FELICITY NJERU NJOGU ..... 1<sup>ST</sup> DEFENDANT**

**GRACE GETRUDE MILLER ..... 2<sup>ND</sup> DEFENDANT**

**PURITY WAMBUI NJOGU ..... 3<sup>RD</sup> DEFENDANT**

**RENJOEFAM LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The applicants in the application dated 12<sup>th</sup> March 2021 seek orders to transfer the suit herein to the Chief Magistrates Court at Nairobi for hearing and disposal.
2. The application is supported by the 3<sup>rd</sup> Applicant's affidavit and is premised on the grounds that: -
  - 1) THAT the parties herein entered into a six-year Lease agreement dated 26<sup>th</sup> September 2017 in respect of the premises on the ground floor and lower ground floor of Land Reference Number 209/4400 Nairobi.
  - 2) THAT the respondent began defaulting on its rent obligations in the year 2019 and this prompted the applicant to send several demand notices to the respondent which went unanswered. Ultimately the applicants levied distress of rent through Petrified Auctioneers but did not recover the full sum.
  - 3) THAT the respondent still owes the applicants rental arrears plus interest amounting to 16,921,148.29/= and has to date refused to settle the same.



- 4) THAT the value of the subject matter is below Kshs. 20,000,000/=.
  - 5) THAT as a result of the foregoing the chief magistrates Court has the requisite pecuniary jurisdiction of this matter.
  - 6) THAT the respondent shall suffer no prejudice if the transfer is allowed.
3. The respondent opposed the application through Grounds of Opposition dated 3<sup>rd</sup> May 2021 and the replying affidavit of Dorcas Maruthu Njuguna who states that the plaintiff's claim is for the total sum of Kshs. 29,029,190/= thus falling within the pecuniary jurisdiction of this court.
  4. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the applicant is entitled to the orders sought. The applicants seek to transfer this suit to the Chief Magistrate's Court on the basis that it falls under the said court's pecuniary jurisdiction. The applicant invoked Section 18 of the Civil Procedure Act which stipulates 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 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.

5. In opposing the application, the respondent submitted that the High Court has unlimited original jurisdiction in Civil and Criminal matters. The respondent's case is that the value of the subject matter exceeds the Lower Court's pecuniary jurisdiction.
6. In *David Kabungu vs Zikarenga & 4 others Kampala* HCCS No. 36 of 1995 the Court held as follows on a request for transfer of suit in circumstances similar to the provisions of our Civil Procedure Act: -

“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 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 led to injustice. What the Court has to consider is whether, the applicant has made 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 principle matters to be taken into consideration are: balance of countenance, questions of expense, interest of justice and possibilities of conduct 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.”

7. Section 11 of the *Civil Procedure Act* provides as follows: -

“Every suit shall be instituted in the Court of the lowest grade competent to try it, except that where there are more subordinate Courts than one with jurisdiction in the same district competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any of such subordinate Court Provided that:

- i. If a suit is instituted in a Court other than a Court of the lowest grade competent to try it, the magistrate holding such Court shall return the plaint for presentation in the Court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in this Court, and
- ii. nothing in this section shall limit or affect the power of the High Court to direct the distribution of business where there is more than one subordinate Court in the same district”

8. I have perused the pleadings filed in this matter, specifically the plaint and I note that there is no prayer for a liquidated sum so as to indicate if the amount claimed brings the case within the purview of this court’s jurisdiction. The lease agreement in question shows that only the rent deposit would be refundable at the end of the lease. I am, in the circumstances of this case, unable to find that the subject matter of the case exceeds the Lower Court’s jurisdiction.

9. In sum, I find that the application is merited and I therefore allow it with orders that costs shall abide the outcome of the case in the lower court.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17<sup>TH</sup> APRIL 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Mwangi for the Applicant/Defendant

No appearance for Plaintiff.

Court Assistant: Margaret

