



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 453 of 2006**

**SCHOOL EQUIPMENT CENTRE.....APPELLANT**  
**VERSUS**  
**BOARD OF GOVERNORS**  
**KYUSOSECONDARY SCHOOL.....RESPONDENT**

*(Being an appeal against the ruling and orders of the honourable Miss E.N. Maina )PM) delivered on 5<sup>th</sup> July, 2006 in Milimani Chief Magistrate's Court Case No.2345 of 2006)*

**J U D G M E N T**

1. This appeal arises from a suit which was filed by the appellant, School Equipment Centre Ltd against the respondent, the Board of Governors, KyusoSecondary School. The claim was for Kshs.833,051/95 arising from goods allegedly sold and delivered by the appellant to the respondent, and which the respondent had failed, neglected or refused to pay. The respondent filed a defence to the appellant's claim denying being indebted to the appellant for the amount claimed or that demand was ever made.

2. By a notice of motion dated 2<sup>nd</sup> May, 2006, the appellant sought judgment on admission against the respondent under Order XIII Rule 6, Order L Rules 1 & 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The respondent did not file any reply to the motion, however, at the hearing of the motion the respondent's counsel raised a preliminary objection on a point of law contending that the court had no jurisdiction to hear the suit. It was argued that since the respondent is based in Mwingi District the suit should have been filed in Mwingi. It was further contended that the suit was based on a contract between the parties and that the cause of action arose in Kyuso.

3. For the appellant it was submitted that the issues raised were issues of fact which were not pleaded in the defence. It was further submitted that although the defendant was a school based in Mwingi, the goods were sold and collected in Nairobi and that the cheques issued were dishonoured at Prime Bank in Nairobi.

4. In her ruling the trial magistrate found that the appellant's claim was in respect of sale and delivery of goods which occurred in Kyuso in Mwingi District. She therefore found that the filing of the suit in Nairobi offended the provisions of Section 13 of the Civil Procedure Act. She therefore ordered that the suit be struck out.

5. Being aggrieved by that ruling, the appellant has lodged this appeal raising 7 grounds as follows:

- (i) The learned magistrate erred in law and in fact in striking out the plaintiff's suit in Milimani CMCC No.2345 of 2006.
- (ii) The learned magistrate failed to apply the relevant legal principles governing preliminary objections.
- (iii) The learned magistrate erred in law in finding that the preliminary objection was merited

notwithstanding that it was based on contested issues of fact.

- (iv) The learned magistrate erred in law and in fact in making a finding of a fact without any properly adduced evidence.
- (v) The learned magistrate erred in law and in fact in holding that the plaintiff's suit offended the provisions of Section 15 of the Civil Procedure Act.
- (vi) The learned magistrate erred in law and in holding that the plaintiff's cause of action arose in Mwingi and that the Chief Magistrate's Court in Milimani did not have jurisdiction.
- (vii) The learned magistrate erred in law in failing to find that the preliminary objection was not based on pure points of law.

6. In arguing the appeal before me both counsels have reiterated the same arguments made before the trial magistrate. Counsel for the appellant relying on ***Mukisa Biscuit Manufacturing Company vs West End Distributors Ltd [1969] EA 696*** argued that a preliminary objection cannot lie where the court is required to make a finding on facts which are in dispute. Counsel argued that the issue of where the cause of action arose was an issue in dispute and that the court had no material before it to make a finding as it did, that the cause of action arose in Kyuso. For the respondent it was reiterated that the issue of jurisdiction was one of pure point of law which did not need to be supported by facts. It was argued that in any case, the notice of motion which was before the court had sufficient information.

7. I have carefully considered the arguments which were made before the trial magistrate and before me. I have also considered the ruling of the trial magistrate and the pleadings. A preliminary objection has been appropriately described in ***Mukisa Biscuit Company vs West End Distributors [1969] EA 696*** by Law, JA as:

***“a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit”.***

8. The description is further amplified by Sir Charles Newbold, P in the same suit as follows:  
***“It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.***

9. Applying the above description, it is evident that generally the issue of jurisdiction is one of mixed law and fact, and that an objection on jurisdiction if upheld is one capable of disposing of the suit. Nevertheless, Section 15 which provides for where suits are to be instituted states as follows:

***“15. 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.***

10. The application of the above provision requires facts relating to where the defendant resides or carries on business and where the cause of action arose in part or wholly. Where the issue of jurisdiction is being raised as a preliminary issue such facts must be clear and the preliminary objection argued on the assumption that the facts are correct. In this case, neither the plaintiff nor the defence was specific on where the respondent carries on business or where

the cause of action arose.

11. The supporting affidavit which was sworn in support of the notice of motion dated 2<sup>nd</sup> May, 2006 also made no mention of where the respondent resides or where the cause of action arose. It is evident that the facts relating to where the respondent carries on business and where the cause of action arose were contentious facts and that the trial magistrate's finding that the defendant is a school in Kyuso in Mwingi District and that the claim arose from a sale and delivery of goods transaction which occurred in Kyuso were conclusion drawn from the contending arguments made by counsel from the Bar. It is clear that there were facts to be ascertained by the court and therefore the issue of jurisdiction could not be determined as a preliminary issue.

12. I find therefore that the trial magistrate erred in upholding the preliminary objection and striking out the appellant's suit. I therefore allow this appeal and set aside the ruling and order of the trial magistrate striking out the appellant's suit. I direct that the appellant's suit shall be reinstated and the preliminary objection overruled.

13. The file shall be remitted back to the lower court for the appellant's notice of motion dated 2<sup>nd</sup> May 2006 to be heard. I award costs of the appeal to the appellant

**Dated and delivered this 19<sup>th</sup> day of April, 2010**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Nzioka H/B for Njuguna for the appellant

Advocate for the respondent absent

Eric - Court clerk