



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Case 293 of 2006**

**BRUNSWICK BOWLING (K) LTD & 2 OTHERS.....PLAINTIFF**

**VERSUS**

**SHILOAH INVESTMENTS LTD.....DEFENDANT**

**RULING**

By a Sale Agreement dated 6<sup>th</sup> July 2006 the plaintiff offered and the defendant accepted to purchase a bowling Equipment at purchase price of Ksh.4,000,000/= plus 10% VAT.

The contract was entered into in Nairobi but was to be performed in Kisumu City. Clause 2 of the Sale Agreement provided:

2 (a) The sum of Shs.3,712,000/= to be paid before commencement of removal and loading of goods at the vendors premises.

(b) The balance of shs.464,000/=

Upon completion of the installation at the purchaser's premises.

The equipment was loaded and transported to Kisumu City and installed at the respondent's premises situated at Mega Bowl on Mega City Shopping Mall constructed on KISUMU MUNICIPALITY/BLOCK 9/134 and 9/135.

The sum of Shs.464,000/= was payable upon the applicant's fulfilling their part of the construction to complete the installation of the contracted items at the respondent's premises in Kisumu. The equipment was loaded and transported to Kisumu City and was installed at the respondent's premises as per the terms of agreement. But as stated in paragraph 8 of the Plaint, what triggered this suit was the events of 7<sup>th</sup> March 2006:

'8' On or about the 7<sup>th</sup> March 2006 the defendant without any colour of right entered the plaintiff's premises situated on Mega City Shopping Mall constructed on KISUMU MUNICIPALITY/9/134 and 9/135 and allegedly interfered and tampered with the plaintiff's bowling equipment by blocking the computer program which operates the entire plaintiff's bowling operations rendering it useless and in operational."

This action of blocking the computer programme and rendering the installed equipment in operational forced the respondent to rush to Winam Senior Resident Magistrate's court and file this suit being Civil Case Number 123 of 2006 against the applicant seeking declaratory and injunctive orders.

The defendant on being served with the summons filed the instant application by way of Notice of motion seeking orders that the suit be transferred from Winam Senior Magistrate's court to Milimani Commercial Courts Nairobi for trial and disposal. The application is expressed to be brought under Section 15, 17, 18 and 3A of the Civil Procedure Act and Order L Rule 1 of the Civil procedure Rules.

The application is premised on two main grounds:-

Namely:

- (i) that the cause of action arose in Nairobi and
- (ii) that the value of the subject matter is beyond the trial magistrate's pecuniary jurisdiction.

Mr. Macharia learned counsel for the applicant submitted that since the Sale Agreement was entered in Nairobi the suit ought to have been filed in Nairobi where the cause of action arose.

Further Mr. Macharia submitted that the value of the subject matter of the suit is beyond the trial magistrate's pecuniary jurisdiction.

Mr. Shah learned counsel for the respondent concedes that the Sale Agreement was indeed entered into in Nairobi but submitted that the contract was to be performed in Kisumu City where the equipment was installed. He submitted that Section 15 Explanation 3(1) of the Civil Procedure Act is to the point in this matter which states:

'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) .....
- (ii) The place where the contract was to be performed or the performance thereof completed”.

In the instance suit the equipment was to be and was installed in Kisumu.

Mr. Shah also referred the court to Mulla on the Code of Civil Procedure Act V of 1908 which provides at page 207:

**Place of suing:**

**“In a suit for damages for breach of contract the cause of action consists of the making of a contract and its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed.”**

Thus if a contract is made in Poona to be performed in Poona the whole cause of action arises in Poona and the suit for breach can only be filed in Poona Court. But if the contract is made in Poona to be performed in Belgium the suit for its breach can be filed either in Poona or the Belgium Court.

In the instant suit, although the Sale Agreement was entered into in Nairobi, the contract was to be performed in Kisumu and therefore the plaintiff had an option either to file it in Nairobi or in Winam and opted to file the same in Winam. On his second ground Mr. Macharia submitted that trial magistrate lacked pecuniary jurisdiction to entertain the suit. He submitted that the defendant intended to file a defence and a counter claim which is well beyond the pecuniary jurisdiction of the trial magistrate.

Mr. Shah submitted that if Winam Court had not jurisdiction then this court cannot transfer a non-jurisdictional suit to another Court. On this point counsel referred the court to the case of **NYANDUNDO PRIMARY SCHOOL AND ANOTHER VS. STEPHEN WAWERU CIVIL APPEAL NUMBER 179 OF 1999** where the Court of Appeal said this:

Section 18 of the Civil Procedure Act is in pari material with Section 24 of the Indian Procedure Code and the learned Editor of Mulla on the Code of Civil Procedure (Act V of 1908) 13<sup>th</sup> Edition says as follows:-

**“4” Jurisdiction: An Order for the transfer of a suit from one court to another cannot be made under this section unless the suit has been in the first instance brought in a court that has jurisdiction to try it.”**

And in KAGANYINYI V. MISIRAMO 1968 EA 48, the court held in relation to Section 18 of the Civil Procedure Act:

**“An order of a transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it.”**

In that case the appellant had sought to transfer a suit on the basis that the claim exceeded the pecuniary jurisdiction of the Lower Court.

The principle to be gleaned from those authorities is that the High Court cannot exercise its discretion to transfer a suit from one court to another if the suit is filed in the first instance which does not have the pecuniary and/or territorial jurisdiction to try it.

For all those reasons the applicant’s application is dismissed with costs to the plaintiff.

Dated and delivered at Nairobi this 9<sup>th</sup> day of February 2007.

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**J.L.A. OSIEMO**

**JUDGE**