



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**

**AT BUNGOMA**

**MISC. CIVIL APPLICATION NO.137 OF 2009**

**PRICILLA JEMAIYO OMWENGA.....APPLICANT**

~VRS~

**THE AGAKHAN HOSPITAL.....RESPONDENT**

**RULING**

This is a ruling on an application dated 1st July 2009 brought under section 18 (1) (b), 3 and 3A of the Civil Procedure Act. It seeks for the transfer of Bungoma CMCC No.732 of 2008 to Kisumu Law Courts.

Mr. Areba argued the application for the Applicant and set forth two reasons. He submitted that the Kisumu Law Courts is seized of the jurisdiction to hear the suit and that the Defendant resides in Kisumu.

The application was opposed by the Respondent. Mr. Samba argued that the suit was filed in the wrong court in contravention of section 15 of the Civil Procedure Act. The section requires that the suit be filed within the local limits. The Bungoma court had no territorial jurisdiction from the beginning. For that reason, the suit is a nullity and the court cannot transfer a nullity.

Each of the parties referred this court to authorities cases in support of their arguments. I have perused the said authorities and the relevant provisions of the law and made some observations.

Section 15 of the Civil Procedure Act (CPA) calls for filing of a suit within the local limits of where the defendant resides or where the cause of action arose. The annexed plaint shows that the Defendant who is a corporate entity registered as a medical institution carries on business in Kisumu. The hospital is sued for negligence in treating the Plaintiff which means that the cause of action arose at Kisumu although the plaint does not include the relevant statement.

Section 3 (2) of the Magistrates Courts Act provides:

“the Resident Magistrates Court shall have jurisdiction throughout Kenya.”

Section 3 (1) which creates the court states that the Resident Magistrate Court shall be fully constituted when held by a Chief Magistrate, Senior Principal Magistrate, Principal Magistrate and a Senior Resident Magistrate.

This suit was filed in Bungoma Chief Magistrate court which is a Resident Magistrate’s Court. The Civil Procedure Act (s.15) does not qualify which court it refers to in its provision on where suits should be filed. Section 3 (2) of the Magistrates Courts Act is specific that it refers to all magistrates courts except the District Magistrate’s Court. The provisions of section 15 of the CPA as it is could only be binding on the District Magistrates Court. The Chief Magistrate Court, Bungoma has jurisdiction throughout Kenya. The legislature had a good reason to enact section 15 of the CPA because it controlled the filling of suits and restricted them to where the Defendant resides or to where the cause of action arose. The Magistrates Court Act was enacted after the Civil Procedure Act. Its section 3 (2) specifically applies to Resident Magistrate’s Court thus removing them from the restriction imposed by section 15 of the CPA. However the convenience of the parties must always be taken into consideration when filing suits.

The Respondents authority of CHARISTERS KYALO MUSAU & 13 OTHERS –VRS- UNITED INSURANCE CO. LTD MISC. APPLICATION NO.131 OF 2003 Machakos High Court has different

facts from the case before me. It sought to transfer some 14 suits from Kitui to Machakos Law Courts which was meant for the convenience of the Plaintiff and their advocate who resided in Machakos. The Defendant and their advocate lived in Nairobi. I do not agree with the decision made by Justice R. Wendo that the suits became a nullity by being filed in Kitui. Similarly, I disagree with the ruling of my sister Ang'awa, J which was based on similar facts.

In the Applicant's authorities of MOHAMMED SHABAN –VRS- GEORGE KAROKI BUNGOMA MISC. CIVIL APPLICATION NO.13 OF 2003 AND IN BUNGOMA HIGH COURT CIVIL APPEAL NO.50 OF 2001. I agree with both Justices Ringera and Serгон that section 3 (2) of the Magistrates Courts Act prevails where the Resident Magistrates courts are concerned on the issue of jurisdiction. It was held in both cases that a Resident Magistrate had jurisdiction throughout Kenya and that territorial jurisdiction was not applicable therein.

It will be convenient to the Defendant to have the suit heard and determined in Kisumu. Filing the suit in Bungoma Chief Magistrate Court does not make it a nullity because the court had jurisdiction. I find the application meritorious and I allow it as prayed. Costs will be in the cause.

**F. N. MUCHEMI**  
**JUDGE**

Ruling dated and delivered on the 1st day of December, 2010 in the presence of Mr. Areba for the Applicant and Mrs. Njalale for Menezes for the Respondent.

**F. N. MUCHEMI**  
**JUDGE**