



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**MISC. CIVIL APPL. NO. 154 OF 2018**

**ESTHER ANYANGO MATETE.....APPLICANT**

**VERSUS**

**EUNICE SHIKUKU AMWAYI.....RESPONDENT**

**RULING**

This is an application by the defendant, **ESTHER ANYANGO MATETE**. I have described her as a defendant although in the application before me there is only an Applicant and a Respondent.

1. The Applicant is a defendant in the case of **EUNICE SHIKUKU AMWAYI Vs ESTHER ANYANGO MATETE, BUNGOMA CMCC NO. 417 OF 2017.**
2. She has asked this court to order that the case at the Bungoma Chief Magistrate's Court be transferred to the Chief Magistrate's Court Kisumu.
3. The primary reason for seeking the transfer is that the cause of action accrued in Kisumu.
4. It is common ground that the Plaintiff was the owner of a shop which is based in Kisumu. The Plaintiff was the employer of the Defendant at the said shop.
5. The claim made against the Defendant arose from the operations at the shop in Kisumu, when the Defendant is alleged to have converted to his own benefit, the assets, (including cash), which was the property of the Plaintiff.
6. The claim was for a sum of Kshs.194,279/=.
7. Arising from the same set of facts which gave rise to the claim herein, the Plaintiff lodged a complaint with the Kenya Police.
8. After the police had conducted their investigations, they arrested the Defendant and had him charged with the offence of **STEALING BY SERVANT CONTRARY TO SECTION 281 OF THE PENAL CODE.**
9. The particulars of the offence, as set out in the Charge Sheet, essentially asserted that the Defendant stole Kshs.194,279/= at the **KISUMU BUS PARK AREA**, during a time when she was an employee of the Plaintiff.
10. The criminal case against the Defendant was ongoing within Kisumu.
11. As the Defendant was resident in Kisumu, and because the witnesses in the criminal case and also in the civil case were based in Kisumu, the Defendant submitted that there was no reason why the civil case should be proceeding in Bungoma.
12. It was for those reasons that the Defendant asked the court to transfer the civil case from Bungoma to Kisumu.
13. In answer to the application, the Plaintiff submitted that the said application was nothing more than a ploy to delay the case filed in Bungoma.
14. She pointed out that the Defendant had previously lodged a Notice of Preliminary Objection at the Bungoma Court, where she argued that that court lacked jurisdiction.

15. The learned Resident Magistrate, Hon. C.L. Adisa dismissed the preliminary objection, holding that the Chief Magistrate's Court at Bungoma had the requisite jurisdiction to hear and determine the case.
16. Following the dismissal of the preliminary objection, the defendant had not lodged any challenge to the said decision.
17. The Plaintiff also informed the court that whenever the case was scheduled to proceed at Bungoma, the Defendant's advocate always sought adjournments.
18. The Respondent, therefore, believes that the application was just another way of causing further delays in the hearing of the civil case, in Bungoma.
19. In any event, the Plaintiff is a resident of Bungoma. Secondly, she recently gave birth to a child, who now requires her close attention, as the child had developed complications.
20. Finally, the Plaintiff submitted that the Chief Magistrate's Court at Bungoma has the requisite jurisdiction to handle the case.
21. In the case of **MOHAMED SHABAN Vs GEORGE MWANGI KAROKI, CIVIL APPEAL NO. 13 OF 2002**, Ringera J. (as he then was) stated as follows, when discussing the perceived conflict between **Section 3(2)** of the **Magistrate's Courts Act** and **Section 15** of the **Civil Procedure Act**;

*“Section 3(2) of the Magistrate's Courts Act provides that a court of the Resident Magistrate (which is defined to include a Senior Principal Magistrate's Court) has jurisdiction throughout Kenya.*

*Such a court is not the subject of the local jurisdiction contemplated by Section 15 of the Civil Procedure Act. In my opinion, Section 15 of the Civil Procedure Act applied only to courts lower than the Resident Magistrate's Court.”*

22. In the case of **RUTH GATHIGIA KAMUNYA & ANOTHER Vs GEORGE KIMANI, NAIROBI MISC. APPLICATION NO. 18 OF 2015**, Lady Justice R. Aburili expressed a view that is in complete agreement with what Justice Ringera stated above.

23. The learned Judge went on to hold as follows;

*“And whereas I hold the position that in cases where a suit is instituted in a court that lacks jurisdiction to entertain the claim, the suit therefore is a nullity and incapable of being transferred to a court of competent jurisdiction, I disagree with both Miss Muhanda and M. Ngecho Advocate's submissions and contentions that the suit in question, as filed in Thika Chief Magistrate's Court, was filed in a court that lacked the geographical jurisdiction to hear and determine the same.”*

24. I share the same view as expressed by my learned colleagues in the decisions cited above.

25. I also share the following view as was spelt out by Ringera J. in the case of **MOHAMED SHABAN** (above cited);

*“There may be good sound administrative reasons for filing suits in the administrative Districts in which the defendant resides or where the cause of action arose, but those reasons cannot oust a statutory jurisdiction.”*

26. Although the learned Judge held that the Senior Principal Magistrate's Court, Bungoma, had jurisdiction to entertain the claim, he transferred the case to the High Court. He did so because he held the view that the transfer was in the interest of justice.

27. Similarly, Lady Justice Aburili, (in **RUTH G. KAMUNYA V. George Kimani Misc. Application No. 18 of 2015**), transferred the case from Thika Chief Magistrate's Court to the Milimani Commercial Chief Magistrate's Court, Nairobi.

28. In my considered opinion, the Resident Magistrate at Bungoma was right to have held that that court had jurisdiction to hear and determine the claim.

29. Nonetheless, I find that there are sound administrative reasons that militate against the filing of cases in courts which were located in places that were outside the geographical regions where the causes of action accrued.

30. My considered view is that if Plaintiffs were completely at liberty to make choices of the courts where to institute cases, unscrupulous Plaintiffs would feel justified to go “forum shopping.”

31. When Plaintiffs are free to go shopping around for such courts as they consider appropriate for their cases, there would be a real danger of real or perceived corruption.

32. When the Plaintiffs are discouraged from instituting suits in areas that were away from the geographical location where the cause of action accrued, or alternatively where the Defendant was resident, an objective foundation would have been laid to govern the choice of the court at which claims should be filed.

33. The fact that the Plaintiff was resident in a particular location, was never considered as being the basis for filing a suit in the Magistrate's Court located within that geographical area.

34. In my considered view, although the Chief Magistrate's Court at Bungoma has jurisdiction to handle the case, justice demands that the case be transferred to the Chief Magistrate's Court, Kisumu.

35. This decision is not an appeal or a review arising from the decision of the Resident Magistrate at the Bungoma Court.

36. The decision, first, confirms the correctness of the finding that the Chief Magistrate's Court, Bungoma, has jurisdiction.

37. If that court had lacked jurisdiction, the case could not be transferred; it could only have been struck out.

38. In the result, the **BUNGOMA CMCC NO. 417 OF 2017** is to be transferred, forthwith, to the Chief Magistrate's Court Kisumu, for hearing and determination.

39. The costs of the application dated 30<sup>th</sup> July 2016 shall abide the outcome of the suit. If the Plaintiff is successful, she will also be awarded the costs of the application.

40. On the other hand, if the suit is not successful, the Defendant will be awarded the costs of the application.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 16<sup>TH</sup> DAY OF OCTOBER 2018**

**FRED A. OCHIENG**

**JUDGE**