



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

MISCELLANEOUS CONSTITUTIONAL PETITION NO. 9 OF 2019

HEZRON PHEREZ OTIENO.....PETITIONER

VERSUS

NYATIKE SUB COUNTY DIRECTOR OF EDUCATION....RESPONDENT

RULING

1. The petitioner moved the court by way of Notice of Motion dated 2nd September, 2019. It was brought under sections 1A, 1B, 3A, 63(e) of the Civil Procedure Act, CAP. 21 Laws of Kenya and under Articles 22, 23 (1) & (3) 35 (b), 47 (i) and 48 of the Constitution of Kenya. The petitioner is seeking the following orders:

a. That the respondent be ordered, compelled and/or commanded to attend the Senior Resident Magistrate's Court at Ndhiwa on the 30th day of October, 2019 on behalf of the petitioner to furnish or produce the original registration documents from his/her office pertaining to the registration of Sori Sunrise Academy.

b. That costs be in the cause.

2. The application was premised on grounds that can be summarized as follows:

a. That there is a matter pending at Senior Resident Magistrate's Court at Ndhiwa involving the registration of Sori Sunrise Academy.

b. That the evidence of the respondent will assist the court in reaching a fair judgment.

c. That the respondent has been summoned severally and has failed to turn up in court without reasons.

3. The respondent opposed the petition giving various reasons which can be summarized as follows:

a. That the respondent is not in possession of the said documents.

b. That the respondent had genuine reasons for the failure to attend court.

4. After perusing the application and the submissions by both parties, I find that this is a matter which the trial court ought to have been invited to deal with. The petition was unnecessary and per chance the pending civil suit could probably be finalized by now.

5. Whether the respondent has the custody of the documents sought or not, his duty was to attend court and inform the trial magistrate what he knew about the matter. This cannot be the subject of this petition.

6. If indeed the respondent failed to attend court due to ill health, then he can proceed to testify since he is no longer in bad health.

7. Though I have observed that this is a matter that the trial court could have been in a position to deal with, in interest of justice, I will make an order that the respondent to avail himself/herself to court once served with the witness summons. In case of failure without good reasons, then the trial court may be at liberty to deal with the issue as mandated by the law.

8. Costs be in the cause.

DELIVERED AND SIGNED AT HOMA BAY THIS 27TH DAY OF JULY, 2021

KIARIE WAWERU KIARIE

JUDGE