



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

Misc Appli 1222 of 2007

PORTIA MUTEMA ROBINSON.....PETITIONER

Versus

SENIOR RESIDENT MAGISTRATE

CHILDREN'S COURT, NAIROBI.....RESPONDENT

RULING

By a Notice of Motion of dated 16th November 2007 the applicant, John Harrison Kinyanjui, seeks the following orders;

- 1) That John Harrison Kinyanjui be forthwith enjoined in these proceedings as an Interested Party or as the 2nd Respondent as the court may determine appropriate in the circumstances obtainig;
- 2) That the Applicant's petition and Chamber Summons dated 14th November 2007 be struck out and dismissed with costs to the Interested Party/Respondent;
- 3) The costs of this Motion and the petition be awarded to the Interested Party/Respondent as the court may determine.

The Motion is brought pursuant to Rule 32 of the Constitution of Kenya (Supervisory jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 and the inherent power of the court. The Application is based on grounds found in the body of the Motion, a supporting Affidavit of the Applicant dated 16th November 2007 and skeleton arguments dated the same date.

The Petitioner, Portia Mutema Robinson swore an Affidavit dated 4th December 2007 in opposing the Notice of Motion and in addition Counsel for the Petitioner, Mr. Kiage filed a Notice of Preliminary Objection dated 5th December 2007. The Respondent did not appear or file any papers in reply to the Application.

It is the Petitioner Portia Mutema who moved this court by way of the Petition dated 14th November 2007, brought pursuant to S.84(1) and S.77 of the Constitution of Kenya. The Petition was brought against the Senior Resident Magistrate Children's Court Nairobi. The Petitioner was sought orders as hereunder:-

- (a) A declaration do issue that the conduct of the Respondent Hon. Mrs. Ngugi in Children's case No. 433/05 is oppressive and unfair and in contravention of the Petitioner's right to secure protection of the law under S.77 (9) of the Constitution;
- (b) That the Respondent be restrained, barred prohibited or otherwise stopped from further proceeding with Children's Case No. 433/05 as long as the Petitioner remains the Defendant therein;
- (c) That a declaration do issue that the Petitioner cannot in law be visited with Penal consequences or Civil liabilities on account of the acts and omissions of her daughter, Malone Mukoli Robinson who is an adult of sound mind.

Filed contemporaneously with the Petition was the Chamber Summons dated 14th November 2007 in which the Applicant sought a conservatory order to issue barring Hon. T. Ngugi (Senior Resident Magistrate) children's Magistrate from conducting any further proceedings in Children's Case No. 433/05 wherein the Petitioner is a Defendant. The Petitioner is the mother of one Malone Mukoli Robinson who has sired a child with the intended Interested Party/Respondent, Mr. Kinyanjui. Mr. Kinyanjui has filed a suit in the Children's Court No. 433/05 seeking access to the child who is about 3 years old. The Petitioner alleges that during the hearing of that case before the Children's Court, the Magistrate has been partial, has allowed interlocutory applications that have defeated and frustrated the timely hearing of the substantive suit, has been unfair in her conduct towards the Petitioner and her advocates, that the Respondent has been hostile and belligerent, towards the Petitioner and her Advocates which was in the form of direct insults and threats and that her rights to a fair hearing envisaged under S.77 (9) of the Constitution are likely to be infringed.

That is why the Petitioner preferred this Petition. Though the intended Interested Party/Respondent was the Plaintiff in the Children's Court, he was not made party to these proceedings (the Petition) and that provoked the filing of this Notice of Motion that is the subject of this ruling.

The grounds upon which the Notice of Motion is premised are inter alia;

"5. By operation of Rule 26 of the Constitution Rules, and as a mandatory condition precedent, the Petitioner was obliged to make an informal Application before the same learned Magistrate. She has jumped the gun to now sue, for the said magistrate to first inquire into the veracity of the alleged violations, and upon satisfaction that the claim is neither frivolous nor vexatious, to make a reference in 'Form F' before this court;

6) There having been no informal complaint of alleged violations of her constitutional rights under Section 77(9) of the Constitution by the Applicant before the Respondent Magistrate, while presiding in Nairobi Children's Case No. 433/05, and in light of the Nairobi Children's Court Case 433/05 being the pending subordinate Court proceedings envisaged in Rule 25 of the Constitution Rules, the purported petition has been brought in violation of Section 84 (1) of the Constitution which subjugates any such claim of breach to Section 84 (6) of the Constitution;

11) This Hon. Court has no power to make the conservatory order sought under rule 20 of Legal Notice 6/06 and the petition cannot be cured in light of its fatal omissions and in light of express provisions of Rule 30 of the Constitution Rules;

13) The Petitioner cannot in her incompetent petition, falter the Children's Court in the hearing and determination of urgent matters affecting the rights and welfare of a growing child when she has a right of appeal not only to this court but ultimately to the Court of Appeal.

14) It was against known judicial policy for the Petitioner to subsume the rights of the Child subject of the Children's Case No. 433/05 and elevate her alleged contravened rights, cutting off the child from all judicial help. Yet the court is confined to protect and preserve the welfare of a 3 year old such as the affected child;

15) the matters forming the Petitioner's alleged violation of her rights are res judicata having been dealt with exactly as now presented before this court before the Respondent Hon. Magistrate who dismissed them as unfounded and unwarranted and this court cannot sanction a party's failure to appeal where leave to appeal has been sought and granted but not acted upon."

In addition to the above grounds, it is the Applicants case that the Applicant/Respondent being the Plaintiff in Children's Case 433/07, he stands directly affected by the orders that may be issued in these proceedings yet he has not been enjoined as a party and would stand condemned unheard. Further it was the Applicants contention that the Petitioner is guilty of material non disclosure in that she failed to produce any part of the proceedings before the Children's Court, so that that the court could have a chance to see the court record that is challenged by the Petitioner, that the Petitioner has not disclosed that they had disobeyed the Children's Court's orders to grant the Applicant access to the child as a result of which contempt proceedings had been commenced by the Applicant in Misc Cause 53/07 pursuant to Section 5 of the Judicature Act. (JCRD 3) in the Family Division. The Applicant relied on the following authorities;

- 1. IN THE MATTER OF ANTI-CORRUPTION CASE NO. 22/03, PROF JULIUS MEME V REP** in which the court held that all interested parties should be allowed to participate in constitutional litigation and should not be kept under the restriction of technical rules. In that case the Kenya Anti-Corruption Authority which had not been enjoined to the proceedings yet it would have been directly affected by the orders sought to be enjoined and was allowed into the proceedings.
- 2. PETER NGANGA V DANIEL GICHANGA KARIUKI MISC HCC 40/03** – where Justice Ochieng observed that when a judge errs in his decision, it does not necessarily amount to a violation of ones constitutional rights of any one of the parties.
- 3. UHURU HIGHWAY DEVELOPMENT LTD. V CENTRAL BANK OF KENYA CA 36/1991 and BOOTHS IRRIGATION V MOMBASA IRRIGATION PRODUCTS LTD. HCC 1052/04** where the courts held that Res judicata does apply to constitutional applications and also includes interlocutory applications. Also see **BENJOH AMALGAMATED LTD V KCB PET 352/07**
- 4. ABDUL KADER ABDU KHALIQ SAID V NATIONAL BANK OF KENYA MISC HCC 527/04** - Justice Emukule held that concealing information from the court renders the Affidavit defective and it amounts to a perjury.
- 5. RODGERS MUEMA NZIOKA V HON. A.G. PET 613/06** where the court held that the Applicant was trivializing the constitutional jurisdiction as the party had deliberately avoided to pursue the statutory remedies of compensation available to them and that amounts to an abuse of the court process.

Mr. Kiage raised three points in the Preliminary Objection in reply to the Applicant's Notice of Motion which are as follows:-

- 1) That the application is fatally defective or otherwise incompetent by reason of being omnibus and seeking both procedural prayers of joinder and substantive prayers of striking out;
- 2) That the main thrust of the said Application is prima facie premature, presumptive and pre-emptive as the Applicant is not yet a party to the proceedings;
- 3) That the Respondent in the Petition having failed to appear, respond or otherwise resist the interlocutory Application dated 14th November 2007, the same is, unopposed.

In addition to the Affidavit of the petitioner filed in opposition to the Application, Mr. Kiage submitted that the Application is incompetent in that it is omnibus and seeks prayers of joinder and striking out of the Petition which should have been made separately. That the Applicant being a stranger to the Application, cannot seek to strike out the petition. Secondly, Counsel submitted that the Application is

not properly grounded as the only procedural law cited is Rule 32 which deals with expedition of constitutional matters and does not deal with joinder of parties and that since there are clear provisions of the law under Order I of the Civil Procedure Rules on joinder of parties to a suit, the Applicant cannot invoke the inherent jurisdiction of the court.

The third ground is that under Rule 16, the Respondent is required to file a reply to the Petition within 14 days and there is no such response filed by the Respondent and therefore, there is no opposition to the Chamber Summons seeking to stop the Respondent from hearing CRC 433/05 and that prayer should be granted.

Further that the Application was supposed to be heard *ex parte* and if any party was aggrieved, then they would seek to set aside the orders that may be made. That the Applicant could only move the court once he is affected and that the fact of this being a constitutional matter does not give a blanket permission to join anybody to this Application or Petition. Counsel relied on the **KENYA BANKERS ASSOCIATION V MINISTER FOR FINANCE (2002) 11 KLR 45 CASE** where Justice Aluoch held that for one to be enjoined as an interested party, the court had to establish the reason why the person wants to be enjoined and the person has to comply with procedure which in this case, is under Order I Rule IV Civil Procedure Rules. Counsel also relied on the case of **RICHARD BUSIENEI V TRANSNATIONAL BANK (2002) 1 KLR 785** where the court declined to enjoin a party that was found to have no interest in the matter. That the present case involves the two parties – the Petitioner and the Respondent, and the conduct of the proceedings before the lower court which has nothing to do with the Applicant. That the issues before the Children’s Court are different from the instant case. Counsel also cited **KINGORI V CHEGE & OTHERS (2002) KLR 243** where the court again said that an Interested Party must demonstrate that he is a necessary party to the proceedings to enable the court effectively determine the matter. That a relief flows from the defendant to the Applicant. That in this case there is no prayer against the Applicant in the Petition and that it is not that the Petitioner wants the case not to be heard but that the Magistrate should not hear it.

In response to the submission that the Petition is incompetent, Mr. Kiage urged that the same is properly before the court under Rule 11 of the Legal Notice 6/06, which gives a party who is aggrieved direct access to the High Court.

Counsel also argued that the Applicant contradicts himself by urging that the issues were never raised before the Magistrate and in another breathe he argues that the matter is *res judicata*. He admits that the issues regarding disqualification of the magistrate from the case had been raised before the magistrate and that this matter is not *Res judicata* because the Constitution was never cited in the lower court. It is only in the Petition that they raise Constitutional issues, that the right to a fair hearing guaranteed under S. 77 (9) of the constitution is likely to be infringed. He said that though the courts decision in **PETER NGANGA’S CASE** is correct, in the instant case, the Magistrate did not err but went beyond her mandate.

Counsel submitted that there has been no material non disclosure, that this is not an Application for a review and there was therefore no need for proceedings to be produced before the court. Counsel concluded that it is a draconian measure for this court to strike out proceedings where there are substantial issues for determination and that in any event the issues raised in the objection can be raised within the Petition. He urged that the law has evolved and even an individual can be a violator of ones rights eg where a Magistrate did not act impartially.

I have now considered the Notice of Motion, the Affidavits both in support and in opposition to the Notice of Motion, the Petition and Chamber summons and all the rival arguments by Counsel. The first issue that I will dispose of is the joinder of the Applicant as an Interested Party or Respondent to this Application because that will determine whether the second leg of the Application seeking to strike out the Petition will be sustained is predicated on that issue. The question to consider is whether the Applicant is a necessary party to the Petition and whether the Orders that are likely to be made in the Petition would affect the Applicant.

I have already set out the factual background of this matter. The Applicant is the Plaintiff in CC 433/05 before the children's Court where the Applicant sued the Petitioner and her daughter Malone. The dispute relates to the custody and access to a child born between the Applicant and Malone the 1st Defendant in CC 433/05. It is notable that none of the parties exhibited the pleadings/proceedings, in that case save for the Applicant who exhibited the court's order in Children's Case 433/05 dated 7th November 2006 and of course the ruling of the Magistrate dated 18th October 2007, in which the Petitioner sought the disqualification of the Magistrate from the case on allegations of undue and improper interest in the case, for showing open hostility to the defendant and their Advocates, for showing open bias by inter alia refusing Applications for adjournment by the defendants Advocates and contempt of the defence Counsel.

In the Petition before the court, the Petitioner, who is the 2nd Defendant in CC 433/05, wants the court to declare that the conduct of the case before the Children's Court by the Magistrate (Respondent) is unfair and oppressive and contravenes her right to a fair hearing under S.77(9) of the Constitution and that the said Magistrate be barred from hearing the matter. This court is satisfied that the Applicant being the Plaintiff in that case who seeks orders relating to a minor child in that case would be directly affected by the orders sought in the Petition. The case involves a minor of about 3 years and the case was supposed to be heard expeditiously as the court considers the welfare of the child as being of paramount importance. The last prayer of the Petition is that the Petitioner cannot in law be visited with Penal and civil consequences on account of acts and omissions of her daughter who is a mature person 1st Respondent in CC 433/05. If the court were to grant the above prayer, the Applicants case against the Petitioner in the Children Court 433/05 would be struck out or dismissed. Such an order would directly affect the interest of the Applicant herein as his case would be struck out or dismissed without being given a chance to be heard on that case thus breaching the 'audi alterum partem rule', a rule of natural justice that no person should be condemned unheard.

Such prayers would directly affect the Applicants interest in Children Case 433/05 and I find and hold that the Applicant has a genuine and direct interest in this petition and should only have been served as an interested party to these proceedings. The Applicant's interest is in the custody and access to the minor child who is allegedly under the custody of the Petitioner and her daughter. At the time the Petition was filed, the subject child had not been availed to court as directed by the court as a result of which contempt proceedings had been commenced by the Applicant against the Petitioner and her daughter the defendant in Children Case 433/05. The Applicant's rights as relates to the subject child would be affected yet he would not have a chance to respond to the allegations made by the Petitioner herein. In the present case the Applicant has a direct interest in the outcome of the Petition and satisfies what the courts held in the **KINGORI CASE (supra)** that he is a necessary party to the proceedings to enable the court to effectively adjudicate on the questions before the court.

The next question is whether the Applicant has properly moved this court under the courts' inherent jurisdiction. It is the Petitioner's contention that the Notice of Motion is an omnibus and that there should have been an Application for joinder of the Interested Party first before an application for striking out of the Petition could be made. I do agree that ideally the Applicant should have sought to come on board the Petition first before seeking to strike out the Petition. As to bringing this Application under the inherent powers of the court, I would like to echo what the court observed in the **MEME CASE** that there is a lacuna in the rules for either joinder of parties or striking out of pleadings under the constitutional provisions. Unlike this case, the **MEME CASE** was heard when Legal Notice No. 133/2001 was instill force and the court allowed the joinder of a party by virtue of Order 1 Rule 10(2) of the Civil Procedure Rules. Under that Legal Notice, Rules 10 & 11, invoked the provisions of the Civil Procedure Rules and specifically Order 36 and 56 of the Civil Procedure Rules whereby Applications under Chapter V of the Constitution could be brought by Originating Summons. That is unlike the current law in force in Legal Notice 6/06 which does not provide for invocation of the Civil Procedure Rules in Constitutional Applications. Parties cannot be locked out of the seat of justice just because of such lacuna in the law. The court has an inherent jurisdiction to do justice in situations that call for it where the law is silent and like the **MEME CASE (supra)** I do agree that the constitution is a vital framework of governance that any litigation upon it ought to involve any Interested Party and the participation of Interested Parties in

constitutional litigation cannot be kept under the restrictions of any technical rules. In this case, the matter was filed under certificate of urgency, a child is at the centre of the controversy whose rights may be infringed in the process of this litigation if there were delay that the Applicant first apply to be enjoined as a party before filing the Notice of Motion when it is really the other party causing that scenario. The court would allow the joinder of the Applicant to these proceedings even if he came to court without a formal Application as he has a genuine interest in the matter and due to the urgency of the matter.

In the above case, the court observed as follows; **“as constitutional interpretation and litigation are important matters embraced by the High Court’s jurisdiction, we hold that this court must retain a broad discretion for entertaining Applications, such as the one that has been brought by the Kenya Anti-Corruption Commission, by way of Chamber Summons.”** In exercise of its inherent jurisdiction this court finds that it has properly been moved as this court has a broad discretion to do justice to all parties and the court will allow the Applicant to be enjoined to the Petition as well as seek the striking out of the Petition in the same Application. The circumstances are such that if the Applicant were locked out, he would suffer injustice but there is no evidence of any prejudice that may be suffered by the Petitioner. It is true that the striking out of a suit is a drastic and draconian measure because the party who had filed the suit is not accorded a chance to present his case. However, the courts have struck out Constitutional Applications if the matters raised therein are res judicata; where there is material non disclosure; where the Petition or Application does not disclose any cause of action or the petition is generally an abuse of the court process. In **KBS LTD V AG MISC CC 413/05**, Justice Nyamu discussed several of the above grounds; In **BENJOH AMALGAMATED LTD (supra)** Justice Emukule observed that a Petition can be struck out for being res judicata, where it is barred by statute or if it is scandalous, frivolous or vexatious. In **BOOTH IRRIGATION V MOMBASA WATER PRODUCT MISC APPLICATION 1052/04** the court struck out the suit for being res judicata.

The 1st question I wish to consider is the effect of the non joinder of the Attorney General to these proceedings. This is a Petition brought pursuant to Chapter V of the Constitution, specifically S.77(9). The Respondent is a Magistrate, an agent of the State and cannot be sued in her own capacity as a Magistrate. S. 6 of the Judicature Act gives the courts immunity against Civil acts done during the cause of duty and if done in good faith that the court had jurisdiction to grant the order or order the particular act. It is the Attorney General who should have been sued on behalf of the Magistrate or at least both parties should have been named as Respondents with the Magistrate has been sued during the execution of her duties. It is trite and the courts have held that it is the State which guarantees the rights of the individual and the state is the right party to be sued. In the Pacific Island of Kiribati, (former Virgin Islands) the court declined to grant a declaration that the Defendants, members of a village, had violated the Plaintiffs right to freedom of movement guaranteed under the constitution. The declarations were denied because the duties imposed under the fundamental rights provisions of the constitution are owed by the Government to the governed, and no individual owes such right to another. Maxwell CJ had this to say in the said case **TEITIWNANG V ARIONG (1987) LRC CONST 517** at page 599;

“Dealing now with the question can a private individual maintain an action for declaration against another private individual or individuals for breach of the fundamental rights provisions of the constitution. The rights and duties of individuals and between individuals are regulated by private law. The Constitution on the other hand is an instrument of Government. It contains rules about the Government of the country. It is my view therefore that the duties imposed by the constitution under the fundamental rights provisions are owed by the Government of the day to the governed. I am of the opinion that an individual or a group of individuals as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or a group of individuals or a group of individuals to another individual under the fundamental rights provisions of the constitution, no action for a declaration that there has been a breach of duty under the provision can be or be maintained in the case before me, and I so hold.”

The above case has summarized the position in Kenya as it is today and the court has adopted with approval, the above decision in several cases like **KBS CASE (supra) MARTHA KARUA V RADIO AFRICA (supra)** and many others. Even if the Petition were to succeed, these orders cannot be enforced

against the Magistrate (Respondent). Failure to enjoin the Attorney General to these proceedings is fatal to the Petition and the same has to be struck out.

Did the petitioner move this court appropriately? It is the Applicant's position that the allegations of violation of fundamental rights having arisen during the court proceedings before the Magistrate, then the Petitioner should have made an informal Application to the presiding officer alleging the said contraventions pursuant to Rule 25 of Legal Notice 6/06. Mr. Kiage on the other hand contends that Rule 11 of the same legal Notice gives the Petitioner direct access to the High court by way of Petition which the Petitioner opted to take. Rules 25 & 26 of Legal Notice 6/06 state as follows;

“ R 25 Where a party to proceedings in a subordinate court alleges contravention of his fundamental rights or freedoms under Sections 70 to 83 (inclusive) of the constitution in relation to himself he shall apply informally to the presiding officer during the pending of the proceedings that a reference be made to the High Court to determine the question of the alleged violation.

(26) if the presiding officer is satisfied that there is merit in the allegation made under rule 24, and that it has not been made frivolously or vexatiously, he shall grant the Application where upon the court shall frame the question to be determined by the High Court in Form F set out in the schedule to these Rules.”

Rule 25 and 26 set out an elaborate procedure to be adopted by any application arising out of proceedings already before the subordinate court in which one alleges breach or threatened violence of their fundamental rights. In fact Rule 23 also provides for procedure to be adopted if such an issue arose out of proceedings pending before the High Court. However, Rule 11 is general in nature and I believe it applies to situations where the allegations of contravention of fundamental rights arise in situations other than during proceedings before the High Court (R 23) or the subordinate court (R 24, 25,& 26). Rule 25 is couched in mandatory terms and must be conformed with. In the instant case, the allegation is that the Petitioner has not been given a fair trial by the trial Magistrate and the allegations relate directly to the proceedings of the court. The record of this court should be part of the pleadings placed before the High Court if indeed the subordinate court found that indeed there was merit in the Application. The Petitioner approached this court as this were a fresh matter and failed to exhibit the proceedings of the Respondent. The said proceedings are under contention as it was alleged that the Magistrate was failing to record, it was pertinent that the court record be exhibited before this court for this court to fairly consider and determine this matter as to the partiality of the Respondent. Procedure has been provided by Rule 23 – 26 of Legal Notice 6/06 on how to approach this court in such an Application and the same must be adhered to. There is no reason why the Petitioner would have come under Rule 11 unless it was to avoid making the Application before the subordinate court by way of an informal application under Rule 25. I do agree with the Applicant that the Petitioner did not approach this court appropriately and the Petition is incompetent to that extent.

The Petitioner's Counsel had sought the disqualification of the Magistrate from CC 433/05 for the various reasons captured in the Magistrate's ruling dated 18th October 2007. Among the allegations leveled against the Magistrate were hostility of the magistrate towards the defendant, undue and improper interest by the trial Magistrate in the case, bias, contempt of the petitioner's Counsel by the court etc. In sum, the petitioner was alleging that she was not getting a fair hearing before that court. What the Petitioner did not do is proceed under Rule 25 of Legal Notice 6/06 and never alleged contravention of her fundamental rights under S.77 (9) of the Constitution. In her petition, the Petitioner alleges that the trial Magistrate is oppressive, unfair and the same allegations leveled against the Respondent and which were determined in the ruling of 18th October 2007 are similar to those raised in the petition – see para 12-16 of the Petition. The issues determined in the ruling are similar to those raised in this Petition. The question is whether the determination of the issues in the ruling makes the Petition res judicata. A matter is res judicata when the issue directly and substantially in issue in a former suit between the same parties or parties who claim through them or under the same title and which issue has been raised, heard and finally determined by a competent court. The issues raised before the Magistrate were determined by the said Magistrate in her ruling and are not alive in that matter. The issues are res judicata and res judicata does apply to interlocutory matters too. The Court of Appeal in **UHURU HIGHWAY DEVELOPMENT LTD.**

CBK CA 36/96 held that the doctrine of res judicata applied to interlocutory applications so that an Application on the same issues which has been heard and determined cannot be brought again based on the same facts. What is before this court is the same application that was made before the Respondent on which the Respondent made a determination on 18th October 2007 and is now is now camouflaged like a petition under S. 84 of the Constitution. Since the Petitioner did not proceed pursuant to Rule 25 of Legal Notice 6/06 and opted to apply for disqualification, the Petitioner's remedy lies in an appeal to the High Court against the ruling of the Respondent but should not have come to the court by way of Petition.

Is the Petitioner guilty of material non disclosure? In my view the Petitioner has not discharged her duty of candour and full and frank disclosure of material facts to this court. As earlier noted in this ruling, the Petitioner failed to exhibit the very proceedings of the Respondents which are under attack. The ruling of the Magistrate of 18th October 2007 was material to the Chamber Summons application because the issues raised in the Chamber Summons and Petition are the same issues determined by the Respondent in the Ruling and this court may not find it necessary to revisit them. Further to the above, the Petitioner never disclosed to this court the existence of an application for Notice to show cause for her failure to obey the courts order dated 7th November 2006 in CC 433/05, giving the Applicant right of access to the minor and that even an Application seeking to cite the Petitioner for contempt had been filed by the Applicant in the Family Division in CC 53/07. All these facts needed to be placed before this court by the Petitioner who was seeking urgent interim orders. Disclosure is to enable the court reach a fair determination and decide whether or not to grant interim orders. Withholding these facts was lack of candour by the Petitioner and amounts to non disclosure of material facts.

In the Chamber Summons Application, the Petitioner seeks an interim order barring the Respondent from hearing CC 433/02 and seeks final orders in the Petition that the Respondent should be stopped from presiding over the matter. There is no alternative prayer that any other Magistrate deals with the Petition. I doubt that the prayer as sought would be granted in the circumstances so that proceedings are halted in the middle with direction that another magistrate takes it over to hear and determine it. The same cannot be granted.

Prayer 3 of the Petition seeks a declaration that the Petitioner cannot be visited with penal consequences or civil liabilities on account of her daughter the 1st Defendant in CC 433/05. That is an issue that should ideally be resolved in CC 433/05 after hearing of evidence without necessarily making it a constitutional issue. A party who is wrongly sued would be entitled to costs to be borne by the person who dragged them to court and the Petitioner should seek the same in CC 433/05.

It was the Petitioner's case that this Application to strike out the Petition is made prematurely since the Respondent had not complied with Rule 16 of Legal Notice 6/06 by filing their reply within 14 days upon service of the petition. An Application to strike out the Petition or any pleadings I believe, should be made at the earliest time possible. The Petition was filed on 14th November 2007 and the applicant seeks to have got wind of the filing of the Petition and filed this Motion the next day on 16th November 2007. The Rules under Legal Notice 6/06 do not provide for procedure for striking out of Petitions and I believe it can be done at any stage. If the court refused to grant the prayer to strike out, that is when the issue of a reply to the Petition under R. 16 would arise.

There was no need to go on to hear the Chamber Summons and wait for an application to set aside the orders if the Applicant was dissatisfied with the Petition as it is. Applications under the Constitution have been struck out for various reasons like some of these raised in this Application ie if the matter is res judicata; if there is material non disclosure, where there is an abuse of court process or if an Application is brought in violation of fundamental principles of law. If the court finds that no cause of action is disclosed, there would be no good reason to sustain such an action but have it struck out at the earliest possible opportunity.

This is one case where, for reasons given in the ruling, the Petition is incompetent, fatally defective and cannot see the light of day. It is hereby struck out with each party bearing their own costs.

Dated and delivered this 17th day of March 2007.

R.P.V. WENDOH

JUDGE