REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

DIVORCE CAUSE NO. 3 OF 2017

MAROTTA MAURA.....APPLICANT/PETITIONER

VERSUS

JOSEPH KARISA MWAMBIRE.....RESPONDENT/RESPONDENT

RULING

[PETITIONER'S NOTICE OF MOTION DATED 15TH MAY, 2018]

1. The Petitioner/Applicant has brought the notice of motion dated 15th May, 2018 under Order 40 Rule 3 of the Civil Procedure Rules, 2010; sections 1A, 1B, 3 and 3A of the Civil Procedure Act; and all other enabling provisions of the law. She seeks orders against Joseph Karisa Mwambire, the Respondent as follows:

> **"1. Spent**
>
> **2. A warrant of arrest be issued to arrest the Respondent and he be brought to court to show cause why his property should not be attached or why he should not be committed to civil jail for a term not exceeding six months for disobeying the court orders of 10th April, 2017; despite the Penal Notice on the said Court Order.**
>
> **3. The Respondent be subsequently committed to civil jail for a term not exceeding six months for disobeying the said court orders of 10th April, 2017 or his property be attached as the Honourable Court shall find fit.**
>
> **4. An Order of Mandatory Injunction be issued directing the Respondent either by himself, servants and/or agents and any person or persons acting under him to deliver vacant possession of the house erected within the Petitioner's father-in-law's compound at Jacaranda Watamu in Plot No. Kilifi/Chembe Kibabamche/428 to the Applicant and to return all the furniture and fittings disposed off the suit property in compliance with the orders of 10th April, 2017.**
>
> **5. This Honourable Court be pleased to visit the Suit Property to substantiate the Applicant's merits of this case.**
>
> **6. That costs be in the cause."**

2. From a perusal of the application and the Applicant's supporting affidavit the Applicant's case is that on 10th April, 2017 this Court (Chitembwe, J) issued an order restraining the Respondent, his servants and or agents from molesting, harassing or annoying the Applicant or in any manner interfering with her quiet possession of the suit premises pending the hearing and determination of the Applicant's petition for divorce. Not only was the order issued by the consent of the advocates for the parties but the same was extracted and served upon the Respondent.

3. It is the Applicant's case that contrary to the injunction order, the Respondent on 24th April, 2018 at about 2.30 p.m. prevented the Applicant's employee by the name Sylvester Haro from accessing the suit premises prompting the Applicant's advocate to write a letter to the Respondent's advocate asking them to advise their client not to continue interfering with the Applicant's quiet possession of the suit premises as the order of injunction had not been vacated nor had the petition been finally determined in the absence of the issuance of a decree absolute. According to the Applicant, the letter was not responded to.

4. Further, the Applicant avers that on 3rd May, 2018 while she was away from Kenya she received information from the said Sylvester Haro

that the Respondent had broken into the suit property and taken possession of it claiming that it belonged to him and that he was going to reside in it with his wife and children.

5. The Applicant returned to Kenya from Italy on 7th May, 2018 and on 8th May, 2018 she visited the house in the company of police officers from Watamu Police Station and confirmed that the Respondent, his wife and two children had moved into the house and were residing therein. She also noticed that the Respondent had disposed off from the suit property some furniture and fittings inclusive of a bed, coffee table, sofa set, chairs and beddings.

6. It is the Applicant's assertion that the Respondent has not only disobeyed the court order but is also determined not to abide by the same. She urges the court to order the arrest of the Respondent so that he is brought before the court to show cause why he should not be detained or his property attached for disobedience of court orders.

7. The Respondent opposed the application by swearing an affidavit on 21st May, 2018. The Respondent denies being served with the order dated 10th April, 2017 saying that he was only served with a copy of the same at the time he was served with the instant application. He avers that his advocate has advised him that the order ought to be served personally for compliance.

8. The Respondent states that the Applicant has never occupied the house from the date she filed the petition for divorce. He denies removing any items from the house stating that while the Applicant was away in Italy, her daughter who was in occupation of the house removed some items and he reported the matter at Watamu Police Station. He concurs with the Applicant that the court should visit the suit premises so as to ascertain for itself the real situation on the ground.

9. The Respondent discloses that the house in question is constructed on his father's land and there is animosity between the members of his family and the Applicant. He avers that the Applicant has vowed to have him jailed and has instituted several criminal cases against him with the sole intention of unlawfully punishing him. He urges the court to restrain the Applicant from harassing and intimidating him through judicial and administrative processes.

10. The Respondent concludes by averring that the petition for divorce has already been heard and determined and the issuance of a decree absolute is a procedural matter which will not change the judgement already delivered by the court.

11. Although the advocates for the parties agreed to prosecute the application through written submissions, counsel for the Respondent did not file any submissions.

12. As correctly submitted by counsel for the Applicant, there are certain parameters that must be met before one can be found guilty of civil contempt. Those parameters were stated by M. Mativo, J in **Katsuri Limited v Kapurchand Depar Shah [2016] eKLR** when he cited the authors of the book titled **IP36 Contempt in Modern Newzealand, ip36. publications.lawcom.govt.nz** where it is stated that:-

> **"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-**
>
> **a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;**
>
> **b) the defendant had knowledge of or proper notice of the terms of the order;**
>
> **c) the defendant acted in breach of the terms of the order; and**
>
> **d) the defendant's conduct was deliberate."**

I must add that all the four elements must be proved for one to be found to have acted in contempt of court orders.

13. It is important to always remember that the standard of prove in civil contempt is higher than the standard of prove in civil cases. Justice Mativo explained that:

> **"Although the proceedings are civil in nature, it is well established that an applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases. The fact that the liberty of the defendant could be affected means that the standard of prove is higher than the standard in civil cases. It is incumbent on the applicant to prove that the defendant's conduct was deliberate in the sense that he or she deliberately or wilfully acted in a manner that breached the order."**

14. The Respondent contends that he was not served with the order he is alleged to have breached but only came to know of the same when he was served with the instant application.

15. The Applicant's position is that the order was extracted and served upon the Respondent's advocates and that the Respondent has indeed acknowledged such service.

16. The Respondent's averment that personal service is essential in contempt cases is without merit. The applicable law was explained at length by D.A. Onyancha, J in **James H. Gitau Mwara v Attorney General & another [2015] eKLR** thus:

"It can now also be said that the old stiff requirement that the person facing the contempt of court proceedings must be strictly proved to have been personally served with the order and penal notice is no longer the law both in Kenya and in England. We have moved on and in my opinion, for the better. What is logically important is for the court to satisfy itself "*without any shadow of doubt*" as the Court of Appeal put it in Shimmers Plaza Limited Vs National Bank of Kenya Limited" Civil Appeal No. 33 of 2012, that the person before the court for contempt had full knowledge or notice of the existence of the order of the court alleged to have been breached. Lenaola, J put the position as follows in Basil Criticos Vs Attorney-General and 8 Others [2012] eKLR.

"… the law had changed and as it stands today knowledge supersedes personal service… where a party clearly acts and shows that he had knowledge of a court order; the strict requirement that personal service must be proved is rendered unnecessary."

It is now trite law, therefore, that service of the judgment or order alleged to have been breached and the penal notice served upon the advocate representing the person being charged with the contempt of court is sufficient service unless it can be proved that the advocate did not notify his client. As the Court of Appeal put it in Shimmers Plaza Ltd Case.

"There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case. This is the position in other jurisdictions within and outside the commonwealth."

The Supreme Court of Canada in the case of Bhatnager Vs Canada (Minister of Employment and Immigration) [1990] 2 S.C.R 217 at p. 226 put the principles as follows: -

"…. a finding of knowledge on the part of the client may in some circumstances be inferred from the fact that the solicitor was informed. Indeed, in the ordinary case in which a party is involved in isolated pieces of litigation, the inference may readily be drawn ….. On other cases there can be no doubt that the common law has always required personal service or actual personal knowledge of a court order as a precondition to liability in contempt. … knowledge is in most cases (including criminal cases) proved circumstantially, and in contempt cases, inference of knowledge will always be available where facts capable of supporting the inference are proved.""

17. In the case at hand, the order that the Respondent is said to have disobeyed was entered by consent of the advocates for the parties on record in the petition. The Respondent cannot now turn around and claim that he was not aware of the order. If he was indeed serious in that averment then he ought to have sacked his advocate and taken him through the disciplinary process for entering a consent without his instructions. I find that the Respondent was indeed fully aware of the order.

18. As submitted by counsel for the Applicant, the order clearly restrained the Respondent or any person acting under him from interfering with the Applicant's quiet enjoyment of the suit property. The Applicant is also correct that the Respondent has not averred that he never understood the order. I find that the order was therefore clear and unambiguous and binding on the Respondent.

19. The remaining question is whether the Respondent deliberately breached the terms of the order. This is a question that will be answered by looking at the facts of this case.

20. The Applicant avers that the Respondent broke into the house in question and moved in with his wife and two children. She witnessed this for herself when she visited the house in the company of police officers. The only question is whether the Respondent's action was in breach of the court order.

21. The Applicant agrees that the order issued by this court was a temporary one which was meant to operate pending the hearing and determination of the petition for divorce. Judgement was delivered in the petition on 19th April, 2018 dissolving the marriage between the Applicant and the Respondent. According to the Applicant, the first act of disobedience occurred on 24th April, 2018. By that time there was no longer any order in force as the petition had been heard and determined.

22. The fact that the decree nisi had not been made absolute does not make any difference. The matter was determined the moment the judgement was delivered. There was therefore no order in force which the Respondent can be accused of breaching. In the circumstances, the Respondent is found not to have breached any order. The Applicant's application is therefore without any merit. It is dismissed with costs to the Respondent.

Dated, signed and delivered at Malindi this 17th day of December, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT