



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**DIVORCE CAUSE 154 OF 2008**

**R. P. M.....PETITIONER**

**VERSUS**

**P. K. M..... RESPONDENT**

**RULING**

On 16<sup>th</sup> February 2012, this court issued a warrant for the arrest and detention of the Respondent in civil jail for 30 days for failure to pay the maintenance he owes the Petitioner in this cause. The warrant was issued following the Petitioner's application dated 12<sup>th</sup> September 2011. I did point out in my ruling on 16<sup>th</sup> February 2012 while making the order for issuance of the warrant that I hold the view that no one should be sent to prison for inability to pay a debt and that it would be wrong to do so because it would arguably amount to discrimination against those who do not have. At any rate, it would make no sense, I said, to send to civil jail a person who is unable to pay for the simple reason that it would amount to throwing away good money after bad. Jail, I said, is for those who can pay but refuse to pay. It is used as a matter of final resort.

I held in the ruling that the Respondent is not unable to pay as he is not a man of straw. I pointed out that the analysis in the ruling delivered on 24.5.2010 by The Honourable Lady Justice Nambuye shows that the Respondent possesses resources from which he could, if he so wished, pay the money demanded as arrears of maintenance. However, the Petitioner was unable to identify any property in the name of the Respondent which she could attach. I did also point out that the object of civil jail is to deprive the debtor of freedom in the hope that he will pay so as to eschew jail or regain freedom.

On 30.3.2012, the Respondent went before the vacation Judge with an application dated 29.3.2012 and obtained ex parte orders in which the warrant of arrest and detention of the Respondent for 30 days was temporarily stayed.

The Respondent's application came up for inter partes hearing before me on 25.5.2012. He was represented by a new **advocate, Mr. Alloys Kwengu**, while the Petitioner was represented by **Advocate Judy Thongori (Mrs)**. Mr. Kwengu pursued orders in terms of prayers 4 and 5 of the Respondent's application seeking review of the orders of 16.2.2012 and an *order "to discharge, set aside and or vary the orders made on 16<sup>th</sup> February 2012."* The application was premised on the grounds therein stated and was supported by the affidavit sworn on 29.3.2012 by the Respondent. In brief, the Respondent contended that the money demanded had been paid in full, a fact that was not disclosed to the court, and further that *"under the Constitution parties to a marriage are equal and there was no requirement for a party in a*

*marriage to seek maintenance from the other.”*

It was Mr. Alloys Kwengu’s submission that no decree had been extracted or served before the order for committal to civil jail was made and that this was a requirement under Rule 59(2) of the Matrimonial Causes Rules, and that the Hon. Justice Nambuye required a decree to be served. Mr. Kwengu referred to the case of **Ganatra [2007] EA 76** to buttress the point that service of a decree is a pre-requisite.

As the Petitioner had filed an application dated 10.4.2012 seeking to discharge the ex parte order made by the vacation Judge, the Honourable Mr. Justice Ombija, Mr. Kwengu submitted that the application had no merit and should be dismissed. He pointed out that personal service of a decree on the Respondent was mandatory. He emphasized the mandatoriness of service and relied on **George Masinde’s case (2009) EKLR** in which Justice Florence Muchemi ordered the Respondent to be committed to civil jail for a period of three (3) months for disobeying court orders served on him. In doing so, the Judge relied on the case of **Stallion Ins. Co. Ltd. (No.694 of 1998** at Nairobi Milimani Commercial Courts) in which it was held that the Applicant must establish that personal service has been effected on the party in breach. In the case, the Hon. Mr. Justice Onyango Otieno set aside an order committing the applicant to civil jail for disobedience of a court order on the ground that personal service was not effected. The case of **Loise Margaret Waweru v. Stephen Njuguna Nairobi C.A. Civil Appeal No.198/1998** was also relied on by Mr. Kwengu to reinforce the point that without personal service, a party cannot be committed for contempt of court. In the case of **Godfrey K. Kitutu & 6 others)** the Hon. Justice William Ouko observed that:

*“For the plaintiffs, it was conceded that apart from one contemnor, the rest were personally served. It was alleged that this particular contemnor could not be served because he was hostile and evasive. Such a contemnor, according to learned counsel for the plaintiffs, is estopped from raising an objection on service*

*It is trite that the breach of an injunction will not be punished **unless the party alleged to be in contempt knew that the order had been made.** In other words, in all cases of contempt, with the exception of contempt on the face of the court, the party in breach can only be punished upon an application made to the court for that purpose, after due notice thereof. Rule 3(3) of Order 52 of the Rules of the Supreme Court makes specific provision in mandatory terms that the notice of motion together with a copy of the statement and affidavit in support must be served personally on the person sought to be committed. It is only with leave of the court that this requirement can be waived. Not even the evasive or hostile character of the contemnor can excuse the failure to effect personal service.*

The Judge went on to state:

*“By their very nature, contempt proceedings are criminal and entail loss of personal liberty, if proved. The rules built in the process are intended to provide safeguards to ensure compliance with due process of the law. These rules must be construed strictly. The plaintiffs took only one step which conformed to these requirements, namely, they obtained leave. They failed to comply with the rest of the rules, rendering the application incompetent. I so find. The objection raised is sustained. The plaintiffs’ application dated 19<sup>th</sup> May 2005 is dismissed with costs to all the contemnors. Orders accordingly.*

Mr. Okwengu concluded by submitting that the order of committal was for this reason a nullity.

On her part, Mrs. Judy Thongori opposed the Respondent’s application and relied on the Petitioner’s replying affidavit sworn on 10.4.2012 and on the latter’s further affidavit sworn on 17.4.2012. She also relied on the affidavit sworn by the Petitioner in support of the Petitioner’s application dated 10.4.2012 seeking to discharge the order for temporary stay made by the vacation Judge.

It was Mrs. Thongori’s submission that the Respondent’s application to the vacation Judge was made in bad faith and should be set aside. She submitted that the vacation Judge gave an order for temporary stay because he was led to believe that the Respondent had made full payment which was not the case. This, she said, amounted to non-disclosure of material facts. This non-disclosure, said Mrs. Thongori, led to the

orders for temporary stay.

It was Mrs. Thongori's contention that the Respondent also failed to inform the vacation Judge that there were other proceedings such as the Court of Appeal application No.50 of 2012 filed after this court's decision on 16.2.2012 which challenged the issuance of the warrant and sought stay which the Court of Appeal declined to give. There was also Petition No.65 of 2012, she said, made to the constitutional court by the Respondent seeking stay of the warrants. It was dismissed for want of merit. It was Mrs. Thongori's submission that the vacation Judge was not given the whole truth and that the Respondent did not disclose that he had not paid all the money he owed by way of accumulated arrears of maintenance which is said to be in excess of Shs. 7 million. It was pointed out by Mrs. Thongori that contrary to Mr. Kwengu's submission, the Respondent was served with an order of the court and in her view, the order was as good as a decree and she referred to **Black's Law Dictionary** (9<sup>th</sup> edn) which defines a decree as including a court order. Moreover, she said, Justice Nambuye at page 36 of her ruling referred to the order as decree and the order served should be read as the ruling of the court. It was further submitted by Mrs. Thongori that the Respondent had not shown that he had suffered any prejudice as a result of service on him of a certified copy of the order as opposed to a decree.

I have perused the Respondent's application seeking to review and discharge the orders made by this court on 16.2.2012 together with all the affidavits by both parties. I have also perused the Petitioner's application dated 10.4.2012 seeking to discharge the interim orders made by the vacation Judge. Both advocates made elaborate submissions before me and relied case-law. I commend them for their thoroughness and industry.

I have considered the submissions made by both counsel and have given this matter due consideration. In reaching my decision, I am guided by the evidence on record and the law. Should the court review, discharge and/or set aside the order made on 16<sup>th</sup> February 2012 as prayed for by the Respondent? And should the court discharge the temporary orders made by the vacation Judge on 30.4.2012 as prayed by the Petitioner? If I find that the Respondent was not served and was unaware of the decree or order prior to the making of the orders on 16.2.2012, I shall set aside the orders of 16.2.2012. And if I find that the ex parte temporary orders of stay were obtained in circumstances in which the Respondent failed to disclose material facts from the court, I shall dismiss the application.

For starters, what should have been served? A decree or an order? Does it make any difference if an order as opposed to a decree was served? "Decree" is defined by Black's Law Dictionary, 9<sup>th</sup> Edn pg 471 as "*any court order, but especially one in a matrimonial case.....*" while an order is defined at pg 1206 as "*embracing final decrees as well as interlocutory directions or commands-*" In general, a decree connotes an order of the court that finally determines the rights of parties while an order may or may not finally determine the rights of the parties or the dispute in a litigation. Under Rule 59(1) of the Matrimonial Causes Rules, the court has jurisdiction to make such order as to attachment of the person or of the property of the person failing to pay any sum of money at the time appointed for payment. Under subsection (2) of Section 59 of the Rules, "*a decree and/or order requiring a person to do an act thereby ordered have the same effect.*" In compelling parties to pay in Matrimonial matters, courts issue orders which must be obeyed. An argument to the effect that because an order of the court which must be obeyed was not described as a decree but rather as an order, it need not be obeyed does not hold good. In litigation under the Civil Procedure Act and the Civil Procedure Rules, as opposed to litigation under the Matrimonial Causes Act and the Matrimonial Causes Rules, "**order**" is defined as the formal expression of any decision of a court which is not a decree and includes a Rule nisi while **decree** is defined as "*the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit .....*"

In my view, in the context of this case, it is immaterial that the court decision requiring the Respondent to pay arrears of maintenance was an order and not a decree. The order required obedience. It would be preposterous to suggest that unless the court issues a decree as opposed to an order, it cannot compel a litigant to pay maintenance. Both an order and a decree require obedience. The only issue in this case in my view is with regard to service of the court order on the Respondent. Was it served on the

Respondent?

Mr. Kwengu contended that there was no proper service while Mrs. Thongori contended that the order was served. The application in which the committal orders were made was dated 12.9.2011. It alluded to the order made on 24.5.2010 by the Hon. Justice Nambuye. A copy of it was extracted and was attached as an annexure or exhibit No.1 to the application dated 12.9.2011. The affidavit in support of the application dated 12.9.2011 also annexed as exhibit No.2 a copy of the affidavit of service of the order. It is important to note that a vacation Judge had previously varied the amount ordered by Justice Nambuye but subsequently the figure of Shs.250,000/= originally ordered by Justice Nambuye was restored. The affidavit of service of the order was sworn by Mr. Willy Mwendwa Velle who was in company of the Respondent at the time of service. Service was by affixing the order on the main gate of the Respondent's house at Muthaiga on 9.8.2011 in the presence of the security guard, one Aggrey Wafula, the house help, one Esther Yasmin Kipkoech and the Petitioner and the parties' daughter, Tallisa Moi. The service of the order on the Respondent has never been disputed or denied by the Respondent and it was not until the application made on 29.3.2012 that the issue of service was first raised. The Respondent had made an application on 22.9.2011 seeking to vary or set aside what he called the court order issued on 21.9.2011 committing him to civil jail." He did not deny service upon him of the court order on 9.8.2011, nor did he deny in any of the subsequent applications that he was served on 9.8.2011 with the order made by the Hon. Justice Nambuye requiring him to pay Shs.250,000/= p.m. (except during the school term when the figure would fall to Shs.150,000/= as the child would be in boarding school). The fact that the Respondent did not raise the issue of service before his application dated 29.3.2012 yet he had opportunity to do so, must raise questions as to the bona fides of the claim that service was not effected. His advocate on record then was fully aware of the orders. Was service bad because the Respondent was not personally served? If service could not be personally effected, was service by affixing on the gate in the manner in which it was done good service? To begin with, the Respondent had knowledge of the orders and had taken steps to seek their variation or setting aside. The Process Server followed the procedure laid down in Rule 14 of Order 5 of the Civil Procedure Rules which states:

*Where the serving officer, after using all due and reasonable diligence, cannot find the defendant, or any person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, together with an affidavit of service.*

It was emphasized by Mr. Kwengu that it is imperative that service must be personal but all that Rule 59(2) of the Matrimonial Causes Rules does state is that the order is to be served on the person required to obey it. The Rule does not specify that service of the order must be personal. It requires service of the order on the person required to obey it but it does not specify how service is to effected nor does it prohibit service in the manner prescribed by Rule 14 of Order 5 of the Civil Procedure Rules. While the sentiments expressed by the Honourable Mr. Justice William Ouko in the case of Godfrey K. Kitutu & 6 others are, with respect, correct, **in circumstances where there is evidence that the Respondent is fully aware of the orders as is the case here, service in the manner stipulated in Rule 14 of Order 5 of the Civil Procedure Rules is good service and the court can, on the basis of such service give orders for enforcement of the order in the event of its disobedience. I so hold.** In the instant case, the Respondent's advocate new of the orders requiring the respondent to pay per month Shs.250,000/= and the Respondent was also served with the order in pursuance with Rule 14 of Order 5 of the Civil Procedure Rules. Although the Respondent had knowledge of the order, it was imperative that he be served with the order as he was. The order was endorsed with a penal notice. It is my finding in this application that the Respondent was duly served with the order that gave rise to the committal orders made on 16.2.2012

Turning to the Petitioner's application dated 10.4.2012, Mrs. Thongori charged that the Respondent failed to disclose the whole truth to the vacation Judge when he was seeking ex parte orders. I have carefully considered the evidence placed before the court and the submissions of both counsel. The attention of the court was drawn by Mrs. Thongori to the decision of the Court of Appeal in the **M.V. Lilian S versus Caltex Oil Kenya Ltd (1989) KLR pg 1** in which the court in holdings 6 and 7 stated:

6. It is axiomatic that in *ex parte* proceedings there should be full and frank disclosure to the court of facts known to the applicant.

7. Failure to make disclosure may result in the discharge of any order made upon *ex parte* application.

At page 40 of the decision in *M.V. Lilian S* (supra) the court referred to the Judgement of Balcombe LJ in the case of **Brink's Mat Ltd v Elcombe** [1988]3 All ER 188 where the learned Judge had this to say regarding orders obtained in an *ex parte* application.

*"...On any ex parte application, the fact that the court is asked to grant relief without the person against whom the relief is sought having the opportunity to be heard makes it imperative that the applicant should make full and frank disclosure of all facts known to him or which should have been known to him had he made all such inquiries as were reasonable and proper in the circumstances.*

*The Rule that an ex parte injunction will be discharged if it was obtained without full disclosure has a twofold purpose. It will deprive the wrong doer of an advantage improperly obtained. .... But it also serves as a deterrent to ensure that persons who make ex parte applications realize that they have this duty of disclosure and of the consequences (which may include a liability in costs) if they fail in that duty. Nevertheless, this Judge-made rule cannot be allowed to become an instrument of injustice. It is for this reason that there must be a discretion in the court to continue the injunction, or to grant a fresh injunction in its place, notwithstanding that there may have been non disclosure when the original ex parte injunction was obtained.*

In the same case, Warrington LJ in his judgement at page 509 stated:

*It is perfectly well settled that a person who makes an ex parte application to the court..... is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceeding, he will be deprived of any advantage he may have already obtained ... that is perfectly plain and requires no authority to justify it.*

From the material before me, which include pleadings filed in the Bankruptcy Petition No.13 of 2012 which both counsel placed before the court, it is crystal clear that the Respondent through his counsel did not make full disclosure to the vacation Judge during the hearing of the *ex parte* application in which *ex parte* orders were obtained. He told the court that the Respondent had made full payment. No court would fail to suspend a warrant issued in execution for non-payment if the court was informed that payment had in fact been made. The Respondent misled the court. He led the court to believe that the debt owing was Shs.540,000/= as of 17<sup>th</sup> January 2012 and that he had paid it in full. The truth of the matter was that the sum of accumulated arrears of maintenance was in excess of Ksh.7 million. And he knew it. In the **Statement of Affairs** which the Respondent signed on 25.5.2012, and submitted to the Bankruptcy Court in Milimani Commercial and Admiralty Division in Bankruptcy Cause No.13 of 2012, the Respondent filled in respect of unsecured creditors the name of the Petitioner and showed the amount of debt he owes the Petitioner to be Ksh.7.5 million. He also indicated that it was due by dint of court judgment. This is the same Respondent, who, in the instant application, has submitted that the amount due by him to the Respondent cannot be ascertained. He has made statements which are not true. Quite clearly, if the Respondent had not misled the vacation Judge as to the amount owing by him to the Petitioner, he would certainly not have managed to obtain the *ex parte* orders. He did not deserve the orders he obtained through non-disclosure. He cannot be allowed to retain the advantage of the orders which he procured in an unfair if not fraudulent circumstances. It is patent that the Respondent has trivialized the litigation and showed scant respect for the truth and the court process. My concern is to do justice to the parties and to ensure that the dignity of the court is not undermined.

On 20.6.2012 when this ruling was pending delivery, both counsel for the parties appeared in court and drew the court's attention to the fact that the Respondent had moved to the Bankruptcy Court and filed Bankruptcy Petition in Cause No.13 of 2012 seeking to be declared bankrupt ostensibly so as to eschew

payment of the money he owes the Petitioner. In doing so, the Respondent did not use his correct name, namely Philip Kipchirchir Moi which is used in these proceedings. Instead, he used the name **P. M. Kipchirchir** without disclosing what the letters **P M** stand for and in spite of the fact that **Moi**, and not Kipchirchir, is his surname. Anybody looking at the bankruptcy Petition would be unlikely to know for sure whether it relates to the Respondent or to another person known as P.M. Kipchirchir. His counsel was at pains to explain why the Respondent resorted to this.

The argument pegged in Article 45(3) of the Constitution by Mr. Kwengu that the Respondent is not liable to pay maintenance to the Petitioner because parties to a marriage are entitled to equal rights at the time of the marriage, during marriage and at the dissolution of the marriage does not hold good. This constitutional provision does not bear the meaning ascribed to it by Mr. Kwengu. A party to a marriage is not relieved from his obligation to maintain the other spouse merely because they have equal rights. The equality referred to in the Article does not relate to wherewithal. It relates to personal rights. It is about equality of rights of parties as individuals in a marriage. Neither spouse is superior to the other. It does not relieve the Respondent of his obligation to maintain the Petitioner.

I am told by both counsel that the receiving order made in the bankruptcy cause was stayed and that it is no longer in place following the Petitioner's application to that court.

In view of what I have stated above, I find no merit in the Respondent's notice of motion dated 29.3.2012. I dismiss it with costs to the Petitioner. I find merit in the Petitioner's Notice of Motion dated 10.4.2012. I allow it with orders in terms of prayer 4 of the motion. The Respondent shall bear the costs of the motion. In effect, the warrant as previously ordered is resuscitated. I make orders accordingly.

**Dated at Milimani Law Courts, Nairobi, this 26<sup>th</sup> day of June 2012.**

**G.B.M. KARIUKI, SC**

**JUDGE**

**COUNSEL APPEARING**

*Mrs. J. Thongori, Advocate for Applicant*

*Mr Kwengu, Advocate for the Respondent*

*Mr. Kugwa, Court Clerk*