



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**FAMILY DIVISION**  
**DIVORCE CAUSE NO. 178 OF 2014**

**A.D.C.....PETITIONER/RESPONDENT**

**VERSUS**

**D.P.N.....RESPONDENT/APPLICANT**

**RULING**

1. In the Scottish case of **Steward Robertson –v- Her Majesty’s Advocate, 2007 HCAC 63**, (which has been cited in various Kenyan cases including **Sam Nyamweya & Others –v- Kenya Premier League Ltd and Others [2015] eKLR**) Lord Justice Clerk stated that:-

**“contempt of court is constituted by conduct that denotes wilful defiance of or disrespect towards the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”**

2. Black’s Law Dictionary (Ninth Edition) defines contempt of court as:-

**“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable by fine or imprisonment.”**

The power to punish for contempt is held by every judge or magistrate. It is inherent in our system of administration of justice. The power does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is being protected by the power to punish for contempt. In **Board of Governors Moi High School Kabarak –v- Malcom Bell & Another (Supreme Court Petition Nos. 6 and 7 of 2013)**, the Supreme Court described the power to punish for contempt as a power of the court –

**“to safeguard itself against contemptuous or disruptive intrusion from elsewhere.”**

It stated that this was a power without which the protection of citizens’ rights and freedoms would be virtually impossible; the courts of law would be reduced to futile institutions spewing orders in vain.

3. In the English case of **Hadkinson –v- Hadkinson ER [1952]PD 285** it was observed that it is the unqualified obligation of every person against, or in respect of whom an order has been made by a court of competent jurisdiction, to obey it unless and until that order is discharged. It would not matter that the

person in contempt is an advocate. The case of **Mititika –v- Baharini Farm Ltd [1985] KLR 227** in addition to setting out what constitutes contempt of court also set out the standard of proof in contempt of court proceedings. The court also observed that the jurisdiction to convict for contempt should be carefully exercised with the greatest reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor. This is because a contempt of court is an offence of a criminal character in which the contemnor may be sent to prison. This is why the standard of proof is higher than what is required in a civil case. However, it is lower than what is required to prove a criminal case.

4. What are the facts of this case? On 13<sup>th</sup> February 2015 this court delivered a judgment allowing undefended petition for divorce on the grounds of desertion. A parental responsibility agreement dated 11<sup>th</sup> June 2014 entered into between the parties was adopted as part of the judgment. In it the respondent agreed to pay school fees and 50% of the ancillary expenses for the two children of the marriage until the children had completed their tertiary education. Further, the respondent agreed to pay to the petitioner with effect from 1<sup>st</sup> June 2014 Kshs.200,000/= payable on or before the 15<sup>th</sup> of each month, for the maintenance and upkeep of the children. The parties also agreed that the Kshs.200,000/= shall be increased every two years by 6% per annum effective the second anniversary of the date of signing of the agreement. It was the petitioner's case that the respondent refused, failed and neglected to comply with the agreement despite various demands. This is why she filed an application dated 14<sup>th</sup> December 2015 seeking to have the respondent committed to civil jail for 6 months for being in contempt of the court orders. The application came for *interparte* hearing on 25<sup>th</sup> February 2016. In the meantime, on 20<sup>th</sup> January 2016 the respondent had filed an application dated the same date seeking to have the judgment above reviewed. In the application for contempt the petitioner was ordered to personally serve the respondent. M/s Githinji was acting for the respondent. She undertook to present her client for the purpose of service. When the petitioner could not get the respondent for service, she filed an application dated 9<sup>th</sup> March 2016 seeking that she be allowed to serve the application dated 14<sup>th</sup> December 2015 and the orders issued on 22<sup>nd</sup> December 2015 by advertisement in the daily newspaper. The application for service was allowed on 22<sup>nd</sup> March 2016. A hearing date was taken for 14<sup>th</sup> April 2016. On 31<sup>st</sup> March 2016 there was an advert in the Daily Nation at page 66 addressed to the respondent by name. The advert read in part as follows:-

**“TAKE NOTICE that an application dated 14<sup>th</sup> December 2015 has been filed in the High court of Kenya at Nairobi, being divorce case No. 178 of 2014, for which orders are that, you, the respondent, be held in contempt of the orders of court dated 9<sup>th</sup> April 2015 and that you be committed to civil jail for a period of six (6) months. Service of the Application upon you has been ordered by way of advertisement. A copy of the application and order dated 14<sup>th</sup> December may be obtained from the High Court of Kenya at Nairobi or at the Petitioner's Advocates office.**

**AND FURTHER take notice that, unless you file a response within the next seven days, this matter will proceed to hearing on 14<sup>th</sup> April 2016 and judgment made your presence notwithstanding.....”**

The advert was placed by Kosgey & Masese Advocates for the petitioner. Mr Kosgey acts for the petitioner in this matter.

5. On 7<sup>th</sup> April 2016 the respondent filed the application dated the same day seeking that the court does commit Mr. Kosgey to prison for up to 6 months for deliberately eroding the authority and dignity of the court. The application was made under **section 5 of the Judicature Act (Cap.8), Contempt of Court Act 1981, Part 81 of the Civil Procedure (Amendment) Rules 2012 section 3A of the Civil Procedure Act** and all enabling provisions of the law. The application was based on several grounds, but the significant complaint by the respondent was that the petitioner knew that there was an order for personal service and yet without leave of the court and there having been no order for substituted service, the advocate proceeded to place in the Daily Nation the advert. Further that, in the advert, he alluded to a

non-existent order that the court had allegedly issued; and that the advert was intended to harass, embarrass and blackmail the respondent into paying maintenance.

6. In response, Mr. Kosgey swore a replying affidavit to state that he had not committed any act of contempt and that every action he took was on the instructions of his client. He stated that the order for service by advertisement was made on 23<sup>rd</sup> February 2016 (in fact, the order was made on 11<sup>th</sup> March 2015) following application dated 9<sup>th</sup> March 2016. Secondly, the orders of contempt referred to in the advert were the ones sought in the application dated 14<sup>th</sup> December 2015 in respect of which the service was sought.

7. The counsel filed written submissions and addressed me on this application or contempt by the respondent. I have considered these.

8. It is clear from the record that an application dated 9<sup>th</sup> March 2016 seeking service by advertisement was filed by the petitioner. It is also clear that the order was allowed on 11<sup>th</sup> March 2016. Therefore the complaint by the respondent that the advertisement was not based on any application or order is without basis.

9. On the issue that the advertisement stated that there was an order already made by the court to jail the respondent for six (6) months for contempt, when no such order had been made, the response by Mr. Kosgey was that what in fact the advertisement said was that the order for jail for six months was the one sought in the application dated 14<sup>th</sup> December 2015; and that the application was the one in respect of which the order for substituted service was sought, and which application was coming for hearing on 14<sup>th</sup> April 2016. In the understanding of the respondent, the advertisement was saying that he had already been jailed for six months for contempt of court which was not true.

10. I have carefully looked at, and considered, the advertisement. It is evident the advert was a notice that an application dated 14<sup>th</sup> December 2015 had been filed against the respondent, and that his response was sought within seven days. The application was listed for hearing on 14<sup>th</sup> April 2016, and that if there was no response the application would be heard and decision given against him. There is no dispute that the application dated 14<sup>th</sup> December 2015 by the petitioner sought that the respondent be committed to civil jail for six months for being in contempt of court by not honouring the agreement they had signed. The advertisement read that:

**“TAKE NOTICE that an application dated 14<sup>th</sup> December, 2015 has been filed in the High Court of Kenya at Nairobi, being Divorce case No. 178 of 2014, for which orders are that, you, the Respondent, be held in contempt of the Orders of court .....”**

The advertisement, read as a whole, shows that the application that sought orders of jail for six months for contempt was coming for hearing on 14<sup>th</sup> April 2016, and that the respondent was being notified so that he could respond to it within 7 days. I find that no other meaning can be reasonably attached to the advertisement.

11. The result is that there is no proof that the petitioner’s advocate (Mr. Kosgey) was in any way guilty of contempt of court. It follows that the respondent’s application dated 7<sup>th</sup> April 2017 has no merit and is dismissed with costs.

**DATED and DELIVERED at NAIROBI this 16<sup>TH</sup> day of MARCH 2017.**

**A.O. MUCHELULE**

**JUDGE**