



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
DIVORCE CAUSE NO. 107 OF 1997

W K W III.....PETITIONER

VERSUS

V O D E A

WOOD.....RESPONDENT/APPLICANT

NIZAM SALYANI.....CO-RESPONDENT

R U L I N G

The petitioner is said to have breached the consent order reached on 5th November, 1997 which provided, inter alia, that he shall pay the respondent's house rent, water and electricity bills and house help salary.

There is now before me an application by way of Notice of Motion under section 5 of the Judicature Act, Order 52 of Supreme Court (practice) of England and section 3A for an order that the petitioner be committed to six months in prison for contempt of court.

The application is supported by affidavits sworn by the learned counsel for the respondent and the respondent herself. the learned counsel for the petitioner has field grounds of opposition to the application. Both learned counsel have made their respective submissions which I have on record.

The respondent applied for and obtained leave to file the contempt proceedings. There is no doubt that the petitioner is aware of the court order of 5th November, 1997. In fact he complied therewith until the breach complained of.

Before any proceedings can be taken leading to committal of a party it must be established beyond doubt that the person sought to be committed has been served with the order duly endorsed with the Penal Notice setting out the consequences of non-compliance.

As committal is a penal procedure involving the liberty of a subject, the applicant must strictly establish his or her right to use it. (See Raydon on Divorce 12th Edn. pg. 871) service of the order and the penal notice must be personal and if there is any doubt as to service, then the benefit of doubt should be accorded to the subject. (See H.C.C.C. NO. 450 of 1995 Isaac J. Wanjohi & Another -v- Rosaline Macharia.)

I have seen the return of service filed herein and with respect find that the same was not served

personally on the petitioner. (emphasis added). That being the case a committal order would be misplaced.

It is true that the petitioner is in breach. This has not been denied. Committal orders may be made in matrimonial matters but sufficient material has been provided on behalf of the petitioner to show that such an order may not be made to enforce an order to pay money.

I have also been referred to the case of Marshall -v- Marshall (1966) 110 Sol6 JO 112 C.A. Whereas I agree that committal proceedings should not be treated by the parties as a weapon in the course of domestic warfare, with respect, there is no evidence that the respondent/applicant is bent on doing so. She is simply enforcing a consent order executed with the petitioners knowledge and authority. She has all the right to do so but the avenue chosen does not have the support of established principles.

And so, whereas the respondent applicant has the sympathy of this court, her application must fail for two basic reasons, lack of personal service upon the petitioner and that committal to enforce an order to pay money is not appropriate.

The application is therefore dismissed. Each party shall pay own costs of the application. Orders accordingly.

Dated and delivered at Nairobi this 11th day of December, 1998.

MBOGHOLI MSAGHA

JUDGE