



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILINMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 40 OF 2011

REPUBLIC.....APPLICANT

VERSUS

PRINCIPAL SECRETARY, MINISTRY OF INTERIOR AND

CO-ORDINATION OF NATIONAL GOVERNMENT.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

SIMON WAINAINA MWAURA.....EX PARTE APPLICANT

RULING

Introduction

1. The background information relevant to the determination of this application is that on 17th June 2010 judgment was entered in favour of the ex parte applicant for the sum of **Ksh. 127,330/=** in Nairobi Chief Magistrates Civil Case Number **11358 "A"** of 2005. A Certificate of Order against the Government for **Ksh. 244,245.40** was served upon the Respondents herein on 7th August 2013.

2. The Respondent failed to satisfy the said decree prompting the ex parte applicant to apply for leave to apply for an order of Mandamus on 2nd March 2011 which was granted on 29th October 2012, paving way for the ex parte applicant to file the substantive application. On 7th August 2013, the Court granted an order of Mandamus directed to the Honorable Attorney General and the Permanent Secretary, Ministry of State for Provincial Administration and Internal Security compelling them to satisfy the decree then standing at **Ksh. 244,245/=** plus interests a **12% p.a.** until payment in full. The order was served upon the Respondents on 2nd October 2013, but no payment was forthcoming.

3. A notice to show cause why execution should not issue against the Respondents for failure to pay the amount then standing at **Ksh. 624,268.60** was issued on 2nd June 2016. The notice was served upon the Hon. Attorney General to attend on 20th June 2016, but the Respondent did not attend. The applicant states that the Respondents despite notice, have not only failed to attend Court, but have failed to pay, which failure has persisted for **8** years.

4. The *ex parte* applicants application the subject of this ruling is expressed under Section **30** of the Contempt of Court Act,[\[1\]](#) Section **70** of the Public Finance Management Act[\[2\]](#) and Order **51** of the Civil Procedure Rules 2010. It seeks orders that this Court holds and declares that the Respondents are in Contempt of Court and Commit them Civil Jail for a term of **six (6)** months and or be ordered to purge the contempt on terms this court will deem just. The ex parte applicant also seeks an order that this Court summons the Respondent to appear before the Court to show cause why they should not be committed to civil jail for such term as the Court may deem just.

5. The Respondents did not attend hearing despite being served with the application. At the hearing, counsel for the applicant adopted the grounds on the face of the application and the supporting affidavit which I have carefully considered.

Determination

6. Section 30 of the Contempt of Court Act provides that:-

1. Where a State organ, government department, ministry or corporation is guilty of contempt of court in respect of any undertaking given to a court by the State organ, government department, ministry or corporation, the court shall serve a notice of not less than thirty days on the accounting officer, requiring the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.

2. No contempt of court proceedings shall be commenced against the accounting officer of a State organ, government department, ministry or corporation, unless the court has issued a notice of not less than thirty days to the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.

3. A notice issued under subsection (1) shall be served on the accounting officer and the Attorney-General.

4. If the accounting officer does not respond to the notice to show cause issued under subsection (1) within thirty days of the receipt of the notice, the court shall proceed and commence contempt of court proceedings against the accounting officer.

5. Where the contempt of court is committed by a State organ, government department, ministry or corporation, and it is proved to the satisfaction of the court that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of any accounting officer, such accounting officer shall be deemed to be guilty of the contempt and may with the leave of the court be liable to a fine not exceeding two hundred thousand shillings.

6. No State officer or public officer shall be convicted of contempt of court for the execution of his duties in good faith.

7. Sub-section (1) requires the Court to serve a notice of not less than 30 days. Sub-Section (2) provides that no contempt proceedings shall be commenced against the accounting officer of a State organ, government department, ministry or corporation unless the court has issued a notice of not less than 30 days to the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer. The notice to show cause annexed to the applicants affidavit is dated 2nd June 2016. The affidavit of service shows that it was served upon the Office of the Attorney General on 6th June 2016 requiring him to attend Court on 20th June 2016. A simple calculation shows that the notice served upon the A.G. was for 14 days as opposed to the 30 days stipulated in the above provision.

8. Sub-section (3) provides that "A notice issued under subsection (1) shall be served on the accounting officer and the Attorney-General." There is no evidence that Principal Secretary was served as required under this sub-section. Only the Honorable Attorney General was served, yet the law requires that the accounting officer be served. More significant is the fact that the applicant invites this Court to hold that both the Attorney General and the Principal Secretary are in Contempt and commit them to six months Prison.

9. It is important to mention the word *shall* is used in the above provisions. According to *Black's Law Dictionary*, the term "*shall*" is defined as follows:-

"As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary significance, the term "*shall*" is a word of command, and one which has always or which must be given a compulsory meaning: denoting obligation. It has a peremptory meaning, and is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears."

10. The definition goes on to say "*but it may be construed as merely permissive or directory (as equivalent to "may"), to carry out the legislative intention and in cases where no right or benefits to any one depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense.*" So "*shall*" does not always mean "*shall*." "*Shall* sometimes means "*may*."

11. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions.^[3] But it must be kept in mind in what sense the terms are used. There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.^[4] The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance. No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience.

12. It is the duty of courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be considered. The Supreme Court of India has pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

13. A provision in a statute is mandatory if the omission to follow it renders the proceeding to which it relates illegal and void, while a provision is directory if its observance is not necessary to the validity of the proceeding, and a statute may be mandatory in some respects and directory in others.^[5] One of the important tests that must always be employed in order to determine whether a provision is mandatory or directory in character is to consider whether the non-compliance of a particular provision causes inconvenience or injustice and, if it does, then the court would say that, the provision must be complied with and that it is obligatory in its character.^[6]

14. The word "shall" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[7] The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory.[8]

15. Regard must be had to the long established principles of statutory interpretation. At common law, there is a vast body of case law which deals with the distinction between statutory requirements that are peremptory or directory and, if peremptory, the consequences of non-compliance. Discussing the use of the word shall in statutory provision, Wessels JA laid down certain guidelines:-

"... Without pretending to make an exhaustive list I would suggest the following tests, not as comprehensive but as useful guides. The word 'shall' when used in a statute is rather to be construed as peremptory than as directory unless there are other circumstances which negative this construction...[9] - Standard Bank Ltd v Van Rhy (1925 AD 266).

16. It is important to bear in mind that exercise of judicial authority is now entrenched in the Constitution. In particular, Article 159 commands Courts to be guided by the principles guided therein among them the purpose and principles of the Constitution are to be protected and promoted. On the face our transformative constitution with an expanded Bill of Rights, a pertinent question warrants consideration. Do constitutional values permit a person to be put in prison to enforce compliance with a civil order when the requisites are established only preponderantly, and not conclusively? Put differently, can this Court turn a blind high on the explicit requirements of Section 30 of the Contempt of Court Act[10] and allow an application that has the potential of taking away the liberty of a citizen under circumstances where the *ex parte* applicant has not complied with such clear statutory requirements. My reading of the above provisions is that the requirement for a thirty day notice is mandatory and must be complied with. In my view, a high standard of proof applies whenever committal to prison for contempt is sought because contempt of Court is quasi-criminal in nature. As stated above, one of the important tests that must always be employed in order to determine whether a provision is mandatory or directory in character is to consider whether the non-compliance of a particular provision causes inconvenience or injustice and, if it does, then the court would say that, the provision must be complied with and that it is obligatory in its character.[11]

17. Two principals emerge. The *first* is liberty:- it is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order, if reasonable doubt exists about the essentials. The essentials here include prove that a person has committed contempt and that the applicant has complied with all the statutory requirements governing the application including serving the prescribed notice to the alleged contemnor. Service of the prescribed notice is mandatory in cases of this nature. It is not directory. Parliament in its wisdom prescribed a thirty days notice and used the word "shall." which is mandatory. The *second* reason is coherence:- it is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted: in the end, whatever the applicant's motive, the court commits a contempt respondent to jail for rule of law reasons; and this high public purpose should be pursued only in the absence of reasonable doubt.

18. Accordingly, it is impermissible to find an alleged contemnor guilty of contempt in the absence of proper service of the notice as the law demands and conclusive proof of the essential elements. The requisite elements must be established beyond reasonable doubt. In such a prosecution the alleged contemnor is plainly an 'accused person' and is entitled to due process and protection of the law. As O'Regan J pointed out, the power to imprison for coercive and non-punitive purposes is 'an extraordinary one':-

'The power to order summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far-reaching. There can be no doubt that indefinite detention for coercive purposes may involve a significant inroad upon personal liberty. Clearly it will constitute a breach of... the Constitution unless both the coercive purposes are valid and the procedures followed are fair. In this case there seems no doubt that the purpose is a legitimate one. It also seems necessary and proper, however, for the exercise of the power to be accompanied by a high standard of procedural fairness.'[12]

19. It is clear that contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.[13]

20. Applying the above principles to the facts of this case, I am not persuaded that Respondents in this Case were properly served as the law demands. In view of the above clear provisions of the law, and the clear evidence that a thirty day notice was not served upon the A.G., and in absence of evidence of service of the mandatory notice upon the Principle Secretary, Ministry of Interior and Co-ordination of National Government, I find that this application offends Section 30 of the Contempt of Court Act.[14]

21. The conclusion becomes irresistible that the application dated 14th March 2018 does not comply with the mandatory provisions of the law. Accordingly, I dismiss it. Since the Respondents did not attend court or defend the Application, I make no orders as to costs.

Orders accordingly. Right of appeal.

Signed, Dated and Delivered at Nairobi this 28th day of May 2018

JOHN M. MATIVO

JUDGE

[1] Act No. 46 of 2016.

[2] Act No. 18 of 2012.

[3] *Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions*. International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).

[4] Ibid.

[5] *Subrata vs Union of India* AIR 1986 Cal 198.

[6] See *DA Koregaonkar vs State of Bombay*, AIR 1958 Bom 167.

[7] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[8] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[9] *Sutter vs Scheepers* [1932 AD 165](#), at 173 - 174.

[10] Supra.

[11] Supra note 6 above.

[12] In *De Lange vs Smuts* [\[1998\] ZACC 6; 1998 \(3\) SA 785](#) (CC) para 147.

[13] *Fakie NO vs CCII Systems (Pty) Ltd* (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (31 March 2006).

[14] Supra