



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI,

MILINMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 177 OF 2015

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA,

ARTICLES NOS. 2, 3, 10, 22 (1), 27, 40, 47, 48, 60, 67, 93 (2), 159, 160,

249, 258, 259 OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF THE ENVIRONMENT AND LAND

COURT (CHAPTER 12 A) LAWS OF KENYA

AND

THE MATTER OF THE NATIONAL LAND COMMISSION ACT, 2012 (ACT NO. 5 OF 2012)

AND

IN THE MATTER OF THE LAND ACT, 2012 (ACT NO. 6 OF 2012)

AND

IN THE MATTER OF THE INDEPENDENCE OF THE NATIONAL LAND COMMISSION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

(PROTECTION OF RIGHTS AND FUNDAMENTAL

FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF

FUNDAMENTAL RIGHTS AND PROPERTY AND LAND

BETWEEN

MOMBASA CEMENT LIMITED.....PETITIONER

VERSUS

RULING

Introduction.

1. On 23rd January 2017, **Mr. Mwendwa**, counsel for the first Respondent intimidated to the Court that the Petitioner herein had not paid the requisite Court filing fees for the amended Petition. I nevertheless directed that hearing shall proceed on 13th March 2017 without making any finding on the issue of the failure to pay the Court fees.
2. On 13th March 2017, I pointed out that the amended Petition and the Petitioner's Advocate's submissions were was not in the Court file. **Mr. Mwendwa** once again raised the question of nonpayment of Court fees. He stated that he wrote to the Court Registry sometimes last year objecting to the admission of the Petitioner's amended Petition without payment of Court fees. He stated that he had personally perused the Court file and there was no Court receipt. He further stated that he never received a response to the his letter from the Court Registry. He objected to the case proceeding unless the original Court receipt was availed. On her part, Counsel for the Honorable Attorney General **Miss Chibole** stated that the case ought to proceed only when all the missing documents are availed.
3. **Mr. Muyuri** appearing for the Petitioner requested for time to avail the original Court receipt and the amended Petition. I allowed the request and directed that the matter be mentioned on 15th May 2017 to enable him to avail the said documents. However, on the said date, he had not complied. I directed him to comply.
4. On 17th July 2017, **Mr. Muyuri** informed the Court that he had the original receipt, and wished to show it to the Court. He stated that the Petition was filed on 8th June 2016 and that the receipt number was 7530737. I directed him to show the receipt to the advocates for the Respondent's, which he did. The receipt was handed over to the Court assistant to file in the Court file. I further directed that hearing proceeds on 9th October 2017 by way of highlighting the submissions. Highlighting proceeded on 9th October 2017, 6th November 2017 and 19th February 2018 and judgment was reserved for 3rd April 2018.
5. Upon retiring to write the judgment, I carefully perused the Court file and noted that the amended Petition was not in the Court file despite my earlier orders. I also noted that the Court receipt that **Mr. Muyuri** provided to the Court bore a totally different case number, that is case No. 167 of 2015. It also bore a totally different receipt number being number 6714280 and a different date, that is 30th April 2015. The date of filing and the receipt number given by **Mr. Muyuri** referred to above a totally different from the ones in the above receipt. He had informed the Court that the amended Petition was filed on 8th June 2016.
6. More disturbing is the fact that the only document filed by the Petitioner on 8th June 2016 is n amended Notice of Motion dated 7th June 2016 supported by an affidavit dated the same date and a bundle of anextures.
7. These evidently conflicting dates and absence of the amended Petition and the discovery that the receipt submitted by Mr. Muyuri to the Court bore a totally different date nd number different from what he gave to the Court raised serious queries in the mind of the Court which warranted a further explanation. Accordingly, I declined to write the judgment and Instead I directed that all the parties be summoned to attend Court on 19th April 2018. Upon attending, I notified the parties about the above developments and accorded **Mr. Muyuri** the opportunity to explain the disparities in the information he had supplied and the inconsistencies enumerated above.
8. **Mr. Muyuri** stated that he supplied the amended Petition to the Court, specifically, he stated that he gave it to a Court clerk . He stated that he had the original receipt in his office and that had not carried his file. He requested for a mention date to avail the documents and I granted him time and fixed the matter for mention on 15th May 2015. However, on the said date **Mr. Muyuri** contrary to his earlier request to avail the receipt which he had severally stated was in their offices, stated that he brought the receipt to Court. I reminded him that he had promised to avail the correct receipt and the amended Petition because the one he had availed bore the wrong case number. I directed that he produces the documents on 13th June 2018.
9. On 13th June 2018, **Mr. Muyuri** despite his several statements from the bar that the receipt was in their offices, stated that he had filed an affidavit explaining the issue of the receipt. The affidavit is dated 12th June 2018. The relevant parts of the affidavit are reproduced later in this ruling. He also gave to the Court what he referred to as the "amended Petition."
10. **Mr. Mwendwa** argued that receipt number 7530737 dated 8th June 2016 was for payment of an application and not the amended petition and in any event it was for a different case. He also pointed out that if there was a disparity in the receipts, the proper person to explain would have been the Deputy Registrar of this Court and not **Mr. Muyuri**. He argued that both the amended Petition and the original Petition cannot stand.

Determination.

11. Several crucial truths are evident from the Court record. *First*, the original Petition was filed on 30th April 2015. It comprises of a bundle of documents among them a certificate of urgency dated the same day, a Notice of Motion, the affidavit of **Hasmukh Patel** in support of the motion, the Petition, affidavit in support of the Petition and annexures thereto. All these foregoing documents are dated 30th April 2015. *Second*, the receipt number 6714280 dated 30th April 2015 for Ksh. 9,915/= produced by **Mr. Muyuri** allegedly in support of the payment

for the amended Petition bears the case number **167 of 2015**. This receipt is dated **30th** April 2015. It cannot have been the "receipt for the amended Petition as alleged for two reasons, one, the bears a different case number. Two, it bears a different serial number different from what **Mr. Muyuri** gave in Court. Three, the application for leave to amend was filed on 19 April 2016, hence if the amended Petition was filed, it could have been after the leave was granted and not before, hence the said receipt cannot have been issued upon payment of the amended Petition. *Third*, even if we were to accept the said receipt as the correct one for the amended Petition as **Mr. Muyuri** desperately attempted to insist, then it means that the original Petition was not paid for at all since there is no receipt showing that it was paid for.

12. The position is further complicated by the fact after several requests by the Court to avail a copy of the amended Petition, **Mr. Muyuri** handed a bound document. Upon perusal, I noted that it is the Notice of Motion dated **19th** April 2016 and filed in Court the same day seeking leave to amend the Petition. Annexed to the affidavit in support of the application is the draft amended Petition. The Court record also shows that this application seeking leave to amend was paid for as per the Court receipt on record dated the same day for **Ksh. 1,545/=** (receipt number **7422146**). The application was allowed on **23rd** March 2016 and the Court ordered that the amended Petition be filed within 10 days from the said date. One would have expected the amended Petition to have been filed on or before the expiry of the **10** days as ordered by the Court. From the Court file, there is no evidence that the amended Petition was filed as ordered. What is before the Court is the proposed draft amended Petition annexed to the application seeking leave to amend. Curiously, when the Court insisted on being supplied with a copy of the amended Petition, this is the bundle that was given to the Court by **Mr. Muyuri**.

13. The procedure as I understand it is that once leave is granted to amend or re-amend a pleading, the pleading must be filed within the time prescribed by the Court and if the order allowing the amendment was that the draft annexed to the application seeking leave be deemed as duly filed, a party granted the leave had to first of all pay the Court filing fees. In this case leave to amend was granted. It was necessary to file the amended Petition within the time prescribed and pay the requisite Court filing fees. This was not done. The amended Petition was not filed as ordered.

14. The above scenario boils to one issue, namely, the amended Petition was never filed as ordered by the Court. This leaves us with the original Petition filed on **30th** April 2015 which was not paid for as explained above. The receipt relied upon bears a totally different case number.

15. Rule **34** of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides that *"There shall be paid in respect of all proceedings under these Rules the same court fees as are payable in respect of civil proceedings in the High Court in so far as the same are applicable."*

16. The use of the word *shall* in the above rule is worth noting. 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.^[1] There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.^[2] 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.

17. It is the duty of courts of justice to try to get at the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or a 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.

18. 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.^[3]

19. 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.^[4] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.^[5] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory. The word *"shall"* used in the rule under consideration is mandatory.

20. A proper construction of the above rule leads to the conclusion that there is no action filed unless the Court fees has been paid. Where no Court fees is paid, there is an irregularity on the part of the Registry staff admitting the Court papers and also on the part of the party filing the case. Such an irregularity can be cured. This is clearly provided for under Section **96** of the Civil Procedure Act^[6] which provides for power to power to make up deficiency of court fees. It reads:-

"Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person by whom such fee is payable to pay the whole or part, as the case may be, of the fee; and upon such payment the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance."

21. Whereas Rule **34** cited above is couched in mandatory terms, Section **96** of the Civil Procedure Act grants this Court power to exercise discretion. In my opinion the Rules cannot override the clear provisions of a Statute and have to be read in consonance with the act, otherwise they will be *ultra vires*. Thus, in view of the settled legal proposition that the Rules cannot override the provisions of an Act of Parliament, it is my view that this Court has in discretion to allow the person affected to pay the whole or part of the Court fees if not paid.

22. Payment of Court filing fees is a jurisdictional prerequisite to the commencement of an action. While on the face value it appears that

such a jurisdictional prerequisite or defect cannot be waived, the Court in its inherent jurisdiction may make such orders as may be reasonable and necessary to ensure payment and also give the affected party an opportunity to remedy the situation.

23. The discretionary powers of this Court will 'not be exercised where the applicant's own conduct has been unmeritorious or unreasonable, or where the applicant has not acted in good faith. Examples include where (i) the failure to pay the Court fees or part thereof is willful or fraudulent aimed at denying the government revenue, (ii) where no sufficient explanation is given for the failure, (iii) or where it is evident that a party is not candid in the explanation given or there is willful concealment of material information, (iv) where there is evidence of fraud or collusion in failing to pay the Court fees, obtaining the judgment (v) where allowing the party to pay is prejudicial to the administration taking into account the time when the failure to pay was brought to the attention of the defaulting party and has failed to remedy the situation.

24. As enumerated, above this Court granted counsel for the Petitioner numerous opportunities to remedy the situation. The explanation offered by **Mr. Muyuri** remained constant that the 'Court receipt was in their offices and would be availed at the next mention date.' But in a dramatic shift, **Mr. Muyuri** instead of availing the receipt filed the affidavit mentioned above stating:-

- i. **THAT** the Petitioner herein was filed on the **30th April, 2015**, and the court filing fee duly paid for on behalf of the Petitioner.
- ii. **THAT** during the proceedings hereof it was raised, as point of query, that the original receipt bore different petition number from that which the petition had progressed with.
- iii. **THAT** consequently, upon the Honorable Court directing that clarification be made on this item, counsel on behalf of the petitioner undertook to verify this incongruity where it transpired as follows;
- iv. **THAT** upon inquiry and perusal of the pertinent file recording and/or opening register it emerged that the incongruence was occasioned by clerical error wherein the receipt was issued with erroneous file number whilst it was recorded correctly therein.
- v. **THAT** it also emerged that there is no file that is disclosed therein as that which possesses the file number **Petition Number 167 of 2015** vitiating allude of mischief, thus.
- vi. **THAT** upon advice from the registry staff, which advice I verify believe to be true, it is distinct that the incongruence arose only from clerical error.
- vii. **THAT** this error ought not to stand against dispensation of justice and determination of this petition on its merits.
- viii. **THAT** further, upon formal request to the Deputy Registrar, I was allowed opportunity to generate copies of the relevant pages of the register to adduce, before this Honorable Court, as probative material in support of my averments. **(Attached hereto and marked as "DMM-1" is a copy of the relevant correspondence)**
- ix. **THAT** there from, I obtained a copy of the relevant page wherein it is disclosed that there is no entry for **Petition 167 of 2015** and that the petition herein is properly recorded as **Petition No. 177 of 2015** and the amount paid as filing fee, which tallies with that which is contained in the erroneous numbered payment receipt. **(Attached hereto and marked as "DMM-2 (a-d)" are copies of the relevant pages of the register)**
- x. **THAT** it is apparent, from perusal of the exhibits attached hereto, and there was, in fact, error on the part of the author of the receipt and this act and/ or omission ought not to be placed to the prejudice and peril of the Petitioner.
- xi. **THAT** in the alternative and without prejudice to the foregoing clerical error(s) falls within the ambit of procedural technicality of which **the Constitution of Kenya, 2010, under Article 159(2) (d)** provides in the exercise of judicial authority justice shall be administered without undue regard to procedural technicalities.
- xii. **THAT** further in the alternative, the Honorable Court may, by its discretion and authority, call for the pertinent register for review thereof.

25. In addition to the inconsistencies highlighted above, **Mr. Muyuri's** affidavit served to deepen the confusion and rendered no help at all to the Court. *First*, the contents of the affidavit sharply differ from the several assertions made by **Mr. Muyuri** in Court from the bar that the receipt was in their offices. *Second*, the affidavit contradicts what **Mr. Muyuri** told the Court on **17th July 2017**, that he had the original receipt, and he wished to show it to the Court. *Third*, on the same day he stated that the Petition was filed on **8th June 2016** and that the receipt number was **7530737**. This is misleading. The Petition was filed on **30th April 2015**. The receipt number he gave is different from the receipt mentioned in his affidavit which bears different case number *Fourth*, if at all the receipt is genuine but the wrong details were entered as alleged, then there is no explanation why **Mr. Muyuri** did not obtain a certified duplicate copy of the receipt from the Court Cash offices. *Fifth*, Court fees is deposited directly in the Judiciary Bank account. There is no explanation as to why **Mr. Muyuri** did not avail the relevant Bank deposit slip or evidence that the amount was deposited in the Judiciary account. Assuming the receipt was wrongfully written, there is no way the Banking slip would bear the wrong information. A Banking slip could have settled the issue in *toto*. *Sixth*, no attempt was made to obtain an affidavit from the Deputy Registrar of this Court or the Executive Officer or an officer from the finance office to verify the receipt bearing the "wrong case number" if at all it emanated from them as alleged. Instead, **Mr. Muyuri** consistently gave different versions maintaining that payment was made, but creating doubts on the candor of his assertions due to the evident inconsistencies highlighted herein above. *Seventh*, the alleged excerpts from the register do not in any way help in resolving the above questions nor do they add value to the arguments before me.

26. The filing of a civil case requires the payment of filing fees. It follows that failure to pay Court fees renders the suit incompetent because there is no competent suit filed before the Court. Whereas the Court has inherent powers to allow a party who has not paid fees time to remedy the situation, where a party as in this case is afforded the opportunity to remedy the situation or demonstrate that he paid, and fails to remedy the situation or offers out rightly conflicting explanations as happened in this case which culminated in the above affidavit. In such circumstances as has happened in this case, the Court is left with no option but to declare the suit incompetent and strike it off as I am compelled to in this case.

27. Consequently, I find and hold that failure to pay the requisite Court filing fees, which is a prerequisite for instituting suits renders this Petition incompetent. Further, in view of the inconsistencies highlighted above, I find and hold that this is not a proper case for this Court to exercise its discretion in favor of the Petition as provided under Section 96 of the Civil Procedure Act. Consequently I strike it off this Petition with no orders as to costs.

Orders accordingly.

Signed, Delivered, Dated at Nairobi this 31st day of July 2018

JOHN M. MATIVO

JUDGE

[1] *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).

[2] Ibid.

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

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

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

[6] Cap 21, Laws of Kenya.