REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILINMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 55 OF 2017

In the matter of Sections 8 & 9 of the Law Reform Act, Cap 26, Laws of Kenya

and

In the matter of section 21 (3) of The Government Proceedings Act, Cap 40, Laws of Kenya

and

In the matter of Article 48 of The Constitution of Kenya, 2010

and

In the matter of Article 47 (1) of The Constitution of Kenya, 2010

and

In the matter of Order 29 of the Civil Procedure Rules, 2010

and

In the matter of an application for Judicial Review Order of *Mandamus*

and

In the matter of enforcement of decree passed by High Court on 2nd December 2011 in High Court of Kenya at Nairobi (Commercial & Tax Division) Civil Case No. 159 of 2006-Equip Agencies Ltd vs The Hon. Attorney General

Between

Republic.....Applicant

versus

The Principal Secretary, Ministry of Health.....1stRespondent

The Attorney General.....2nd Respondent

and

Equip Agencies Limited.....*Ex parte* Applicant

RULING

*1. Before me for determination is the ex parte applicant's Notice of Motion dated **5th**April 2018 expressed under Articles 10, 48, 159 (1) and (2) (a) (b) (d) of the Constitution, Section 30 of the Contempt of Court Act*[1] *seeking the following orders:-*

a. Spent.

*b. **That** the Honorable court do issue summons against the first Respondent one Julius Korir, to appear before this court and show cause why contempt of court proceedings should not be instituted against him for failure to comply with orders issued by Lady Justice Hon. R.E. Aburili on 18th December, 2017.*

*c. **That** the first Respondent be cited for contempt of court and be committed to civil jail for a term of six (6) months and/or be ordered to purge the contempt of court by paying by paying the decretal sum as ordered by Lady Justice Hon. R.E. Aburili on 18 December, 2017 in the event the first Respondent does not cause why contempt of court proceedings should not be commenced against him.*

*d. **That** the costs of this application be provided for.*

2. The application is premised on the grounds that:-

*a. **That** the ex parte applicant obtained a judgment against the first Respondent on 2nd December, 2011 for Ksh. 1,862,302,792/= with interests thereon from 1st March 1999, which judgment has never been appealed against, and, that the Respondents refused/neglected to pay the decretal sum prompting the ex parte applicant to move to court seeking to compel the first Respondent, as the accounting officer of the first Respondent to satisfy the judgment.*

*b. **That** on **18th** December 2017, the Court issued an order of Mandamus compelling the first Respondent to pay the ex parte applicant the decretal sum of **Ksh. 1,862,302,792/=** together with interests at the rate of 18 % per annum from **1st** March 1999 until payment in full and taxed costs of Ksh. 446,073,972.70. That no appeal was preferred against the said orders and that the decretal sum now stands at Kh. 43,232,309,173 billion inclusive of accrued interests. Further, the Respondents have refused to engage in negotiations to agree on suitable repayment installments.*

*c. **That** the Respondent's actions put the dignity and ability of this court to uphold the Rule of Law into disrepute and that the refusal is deliberate.*

*3. In support of the application is the affidavit of **Diveyesh Indubhai Patel**, the ex parte applicant's managing director dated 5th April 2018. He avers that judgment was rendered in favour of the ex pare applicant on 2nd December 2011, and, no appeal has ever been preferred against the judgment. He also avers that the ex parte applicant obtained a decree, certificate of order against the government and served the same upon the first Respondent to satisfy the decree.*

4. He adds that an order of Mandamus was made in the presence of the advocates for the parties on 18th December 2017 compelling the Respondents to pay the decretal amount, but, the said amount is still outstanding and no appeal has ever been preferred against the said order or the decree. He also avers that the Hon. Attorney General has been supplied with all the supporting documents.

Respondent's Replying Affidavit.

*5. **Peter Tum**, the Principal Secretary and the accounting Officer, Ministry of Health swore the Replying Affidavit dated 4th May 2018. He averred that notice of appeal was filed on 15th December 2011 against both the judgment and the Ruling awarding compound interest to the applicant.*

6. He also averred that immediately after delivery of the said ruling on 2nd December 2012, Attorney General's Office file disappeared prompting them to write to the Deputy Registrar of this court requesting for copies of the proceedings to reconstruct their file and to compile a record of appeal, but, to their astonishment, they were notified by the Deputy Registrar that the court file was missing. However, at the same time a Bill of Costs was taxed for Kh. 446,073.792. Further, he averred that an application for extension of time to file a reference out of time is pending determination in court. He also averred that the judgment in question is subject to an intended appeal as confirmed by the notice of appeal. He also averred that the intended appeal has been frustrated by the unavailability of the court file (i.e. HCCC No. 159 of 2006), and that the matter has been reported to the Judiciary Ombudsman for intervention. Also he averred that there is also a pending application for stay in the Court of Appeal being Civil Application number 273 of 2017.

*7. **Mr. Tum** also averred that there is a pending reference in the High Court challenging the taxation, and, a pending application in the Court of Appeal seeking to stay the judgment. He also averred that the applicant seeks to commit him personally for failing to pay a government debt in excess of Ksh. 40 Million and that he has not disobeyed the court order. He also averred that as at May 2018 he had served in the office for less than two months.*

Ex parte Applicant's Further Affidavit.

*8. **Mr. Diveyesh Indubhai Patel** swore a further Affidavit dated **31st** May 2018. He averred that these proceedings arise from orders of Mandamus issued in this case compelling the Respondents to settle the decretal amount, which decision has not been appealed against. He also averred that the issues raised herein were considered by the court in this case in the judgment rendered on 18th December 2017 and no appeal has been preferred against the said judgment. Further, he averred that an appeal or intention to appeal or notice of appeal does not operate as stay, and in any event, the Respondents' application for stay filed on 2nd March 2017 is still pending before the High Court and no reasonable explanation has been given as to why the orders have not been complied with.*

Courts' directions.

9. On 8th May 2018, the court granted leave to the ex parte applicant to file a supplementary Affidavit within 14 days together with submissions and also directed the Respondents' counsel to file their submissions within fourteen days and fixed the matter for highlighting of submissions on 12th June 2018. On the said date, the Respondents' counsel asked for a further period of fourteen days to file his submissions. The court granted the request and fixed the matter for highlighting on 24th July 2018, but, on the said date, the Respondents had not filed

submissions as directed. The court ordered that the Respondents to file their submissions within fourteen days from the said date in default the court would proceed to render the ruling their failure to comply notwithstanding. The court directed that the said order be extracted and served upon the Respondents. As at the expiry of the fourteen days from the said date, no submissions had been filed, hence, the court embarked on writing this ruling.

10. Upon considering the application before me and the relevant law as discussed above, I find that a serious issue warrants consideration before addressing the merits of the application. The issue is whether the ex parte applicant's application dated 5th April 2018 is competent. Despite the fact that this a fairly dispositive issue, the applicant did not address it all in their submissions.

11. The applicant seeks two substantive orders, namely, ***(i)*** *an order that a Notice to Show Cause be issued to the first Respondent to show cause why contempt of court proceedings should not be commenced against him for failure to comply with orders issued by Lady Justice Hon. Aburili on 18th December 2017; and,* ***(ii)*** *an order that the first Respondent be cited for contempt of court and be committed to civil jail for a term of six months and or be ordered to purge the contempt of court by paying the decretal sum as ordered by Lady Justice Hon. Aburili on 18th December 2017 in the event the first Respondent does not show cause why contempt of court proceedings should not be commenced against him.*

12. The fundamental question that warrants an answer is whether the two prayers can conveniently be sought in one application. To address this question, it is necessary to examine Section ***30*** *of the Contempt of Court Act*[2] *which provides as follows:-*

> *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.*

13. Sub-section ***(1)*** *requires the Court to serve a notice of not less than* ***30*** *days. Sub-Section* ***(2)*** *is even more explicit. It 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.*

14. *My understanding of the above provisions is that* there is a requirement to 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. It is also a requirement under section **30 (3)** that the notice be served on the accounting officer and the Attorney-General.

15. Section **30 (4)** is even more explicit. It provides that 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. The pertinent question that follows is whether it is competent for the applicant to combine the two prayers in one application, effectively, commencing contempt court proceedings.

16. *First, it is evident that the applicant failed to comply with section* ***30 (1) & (3)*** *of the Contempt of Court Act.*[3]*Second, the applicant combined the two prayers in one application, that is, the prayer asking for the notice to issue and the prayer for contempt. In effect, the applicant instituted the proceedings for contempt and the notice at the same time. This offends section* ***30 (2)*** *of the Contempt of Court Act*[4] *which reads "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."*

17. The applicant now invites this Court to grant the two prayers in one application, that is, to issue the notice to show cause and at the same time, cite the first Respondent for contempt. As the law stands, the notice is a prerequisite to the commencement of contempt proceedings. Since the notice is a prerequisite, can the two prayers be conveniently sought in the same application as has happened in this case. I do not think so.

18. It is important to point out that 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."*

19. The definition continues as follows:-*"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*."

20. 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[5] keeping 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.[6] 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.

21. The Court has a duty 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.

22. It is important to point out that 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.[7] 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.[8]

23. In a previous decision of this Court,[9] I opined that 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.[10] The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory.[11]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. The following guidelines laid down by Wessels JA. are useful:-

> *"…. 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…**[12]** - Standard Bank Ltd v Van Rhyn (1925 AD 266).*

24. A pertinent question arises, namely, whether our transformative constitution with an expanded Bill of Rights, can permit the Court to imprison a citizen to enforce compliance of a civil order when the requisites are established only preponderantly, and not conclusively? Differently put, can this court ignore express provisions of Section **30** of the Contempt of Court Act[13] and allow an application that has the potential of taking away the liberty of a citizen under circumstances where an applicant has not complied with the statutory requirements? My understanding of Section **30** is that the requirement for a thirty day notice is mandatory and must be complied with. The notice must be served and a period of thirty days must lapse before the contempt proceedings are commenced. It was fatally wrong for the applicant to seek the two prayers in the same application, effectively commencing contempt proceedings before the notice is issued and served as required contrary to section **30 (2) & (3)** of the act. The word *shall* as used in the two provisions is mandatory.

25. 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.[14] A high standard of proof applies whenever committal to prison for contempt is sought because contempt of Court is quasi-criminal in nature and the orders sought have the potential of taking away the liberty of a citizen.

26. From my analysis herein above, 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 notices as required under the law. Service of the prescribed notices 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.

27. With regard to prayer two, it is impermissible to commit an alleged contemnor to jail 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.'**[15]***

28. 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, is importantly acting as a guardian of the public interest.[16] Therefore, it is clear that contempt of court is not merely a mechanism for the enforcement of court orders.

29. Guided by the above principles, I am not persuaded that the application before me complies with the law. *First*, contempt of Court proceedings can only be commenced after a thirty days notice has been served. Hence, it is not competent to combine the prayers in one application. *Second*, prayer two suggests that contempt of court proceedings were commenced prior to issuance and service of the notice contrary to section **30 (2)** of the Contempt of Court Act.[17] Differently put, it was fatally wrong for the applicant to combine the two prayers in one application. Further, the issuance of a notice is a prerequisite commencement of contempt proceedings.The two prayers cannot be conveniently sought in one application because the notice must be served and thirty days must lapse before the substantive contempt proceedings are commenced.

30. Its true Article **159 (2) (d)** of the Constitution of Kenya 2010 enjoins Courts to determine cases without undue regard to technicalities. However, Article **159** of the Constitution is not a panacea for all problems. That the provisions of section **30** of the Contempt of Court Act[18] are very clear and are couched in mandatory terms. Article **159 (2) (d)** of the Constitution cannot help under the circumstances because the above statutory provision which prescribe the procedure are couched in mandatory and express terms. Where the law is clear and couched in mandatory terms, the procedure prescribed must be complied with.

31. In view of my analysis and the findings enumerated herein above, the conclusion becomes irresistible that the application dated **5th** April 2018 does not comply with the mandatory provisions of the law, hence, the it is incompetent, incurably defective and fit for dismissal. In view of my finding, I see no reason to delve into the merits or otherwise of the application. Accordingly, I dismiss the Notice of Motion dated **5th** April 2018 with leave to the *ex parte* applicant to file a fresh application (if it so desires), but in conformity with the provisions of section **30** of the Contempt of Court Act.[19] I make no orders as to costs.

Orders accordingly. Right of appeal.

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

John M. Mativo

Judge

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[1] Act No. 46 of 2016.

[2] Act No.46 of 2016.

[3] Ibid.

[4] Ibid.

[5] *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).

[6] Ibid.

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

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

[9] Republic vs Principal Secretary, Ministry of Interior and Others Ex parte Simon Wainaina Mwaura Miscellaneous Application NO. 40 OF 2011.

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

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

[12] *Sutter vs Scheepers* 1932 AD 165, at 173 - 174.

[13] Supra.

[14] Supra note 6 above.

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

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

[17] Supra.

[18] Ibid.

[19] Supra.