REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 20 OF 2015

IN THE MATTER OF APPLICATION FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF AN APPLICATION BY MOLLY WAMBUI KIRAGU, THE APPLICANT, FOR CONTEMPT AGAINST THE GOVERNOR AND THE COUNTY SECRETARY OF NAIROBI CITY COUNTY.

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE CONTEMPT OF COURT ACT, 2016

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT

MOLLY WAMBUI KIRAGU

(SUING AS ADMINISTRATOR OF THE ESTATE

OF THE LATE SAMUEL KIRAGU MICHUKI.....APPLICANT

VERSUS

THE GOVERNOR, NAIROBI CITY COUNTY....1ST RESPONDENT/CONTEMNOR

THE COUNTY SECRETARY, NAIROBI CITY COUNTY.....2ND RESPONDENT

RULING

1. By a Notice of Motion dated **15th** November 2017, the applicant herein seeks the following orders:-

> ***a.*** ***That*** *a Notice to Show Cause does issue to the first and second Respondents/Contemnors to show cause why contempt of Court proceedings should not be commenced against them for disobedience of orders of this Honourable Court issued on 20 November 2015.*
>
> ***b.*** ***That*** *Contempt of Court proceedings be commenced against the first and second Respondent/Contemnors and they be deemed to be guilty of the contempt of the orders of this Honourable Court issued on* ***20th*** *November 2015 and they be liable to imprisonment for a term not exceeding six (6) months or to a fine not exceeding Two Hundred Thousand Shillings* ***(Ksh. 200,000/=)*** *or to both.*

c. ***That*** *this Honourable Court does issue such orders as it may deem fit to grant in the interests of justice.*

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

2. The application is premised on the grounds that (a) **That** this Honourable Court on **20th** November 2015 issued an order of Mandamus in this suit compelling the Nairobi City County (County Government of Nairobi) to satisfy the decree issued on **8th** September 2009 in High Court Civil Case No. **1239** of 1995 and, (b) **That** the Respondents herein were on **12th** January 2017 served with a letter dated **11th** January 2017 demanding that they comply with the said decree which letter they acknowledged receipt. Despite written reminders, the Respondents have failed and totally disregarded the said orders.

3. The application is opposed. On record is the Respondents grounds of opposition filed on **8th** June 2018 stating that:- (a) **That** the application is vexatious, bad in law and abuse of the Court process; (b) **That** the orders sought cannot be enforced against the parties cited; (c) **That** the application offends the provisions of the government proceedings act in regard to execution against the government; and, (d) **That** Respondents have never been parties in these proceedings.

4. Concurrent with the above grounds, the Respondents filed a notice of a preliminary objection stating that the application offends the provisions of the Government Proceedings Act,[1]that the Respondents have never been parties in this case, and, that the applicant has filed two identical applications dated **2nd** May 2017 and **15th** November 2017.

Issues for determination.

5. Upon considering the above facts and the submissions by both parties, I find that the following issues fall for determination, namely:-

a. Whether the applicant has two identical applications pending before this court.

b. Whether the applicants application dated 15th November 2017 is incurably defective and incompetent.

c. Whether the applicant has established that the Respondents are guilty of contempt.

d. Whether the County Governor and the County Secretary are properly enjoined in this application.

a. Whether the applicant has two pending applications before this court.

6. The Respondent's Counsel argued that the applicant has filed two identical applications, the present application dated **15th** November 2017 and the application dated **2nd** May 2017. However, the applicant's counsel stated that the application dated **2nd** May 2017 was withdrawn on **14th** June 2017. Indeed, I have perused the Court record and it shows that the application dated **2nd** May 2017 was marked as withdrawn with no orders as to costs on **14th** June 2017. This disposes the said argument.

b. Whether the application dated 15th November 2017 is incurably defective and incompetent.

7. The application under consideration was filed on **15th** November 2017. The applicant seeks two substantive orders, namely, an order that a Notice to Show Cause be issued to show cause why contempt of court proceedings should not be commenced against the respondents for disobeying the court order, and, an order that contempt of court proceedings be commenced against the respondents and they be deemed to be guilty of the contempt and liable to imprisonment for a term not exceeding six months or to a fine not exceeding **Ksh. 200,000/=.**

8. As pointed out above, the applicant seeks two substantive prayers in one application. None of the advocates deemed it fit to address the question whether the two orders can conveniently be sought in one application. I will shortly address the implication and suitability or otherwise of seeking the two prayers in one application.

9. The Respondent's counsel argued that no notice to show cause why contempt proceedings should not be instituted was served as the law requires, hence, the application is premature. In response, the applicant's counsel argued that the notice was indeed issued as the law requires. Citing Republic vs County Chief Officer, Finance & Economic Planning, Nairobi City County ex parte David Mugo Mwangi[2] counsel submitted that Article **159 (2) (d)** of the Constitution enjoins this Court to administer justice without undue regard to technicalities of procedure.

10. The Court record shows that on **13th** December, 2017, the Court ordered that "let the notice to show cause be issued as sought in the application dated **15th** November 2017 and the notice be served upon the Attorney General."

11. But the fundamental question posed above is whether the two prayers can conveniently be sought in one application. To effectively address the question, I propose to examine Section **30** of the Contempt of Court Act[3] which 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.

12. 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.

13. The application before me was filed on **15th** November 2017. The Court granted prayer one of the application on **13th** December, 2017, thus, granting the notice to show cause to issue as prayed and specifically ordered that the notice be served upon the Attorney General as provided under section **30 (3)** of the Contempt of Court Act.[4] The Affidavit of service filed on **5th** February 2018 shows that the Notice to show cause was served upon the offices of the Respondents BUT not upon the Attorney General.

14. First, it is evident that the applicant failed to comply with section **30 (3)** of the Contempt of Court Act[5] because the Attorney General was not served. Second, the applicant combined the two prayers in one application, that is, the prayer asking for the notice to issue and the order for contempt. In effect, the applicant instituted the proceedings for contempt and the notice at the same time. In my view, this offends section **30 (2)** of the Contempt of Court Act[6] 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."

15. The applicant now invites this Court to grant prayer two of the application, that is, to cite the Respondents for contempt. It is paramount that before granting the orders sought, the Court must be satisfied that the notice served conforms to the law because as the law stands, the notice is a prerequisite to the application before me. 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. This warrants a close examination of Section **30** of the contempt of Court Act[7] reproduced above. 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."

16. 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*."

17. 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[8] 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.[9] 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.

18. 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.

19. 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.[10] 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]

20. In a recent decision of this Court I observed[12] 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.[13] The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory.[14]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…**[15]** - Standard Bank Ltd v Van Rhyn (1925 AD 266).*

21. Exercise of judicial authority is now entrenched in the Constitution. Article **159** commands Courts to be guided by the principles stipulated therein. Can our transformative constitution with an expanded Bill of Rights, permit the Court to imprison a citizen to enforce compliance of 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[16] 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 such clear statutory requirements? My reading of Section **30** reproduced above 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. This offended section **30 (2)** cited above. Further, failure to serve the Attorney General as provided under section **30 (3)** is also a fatal omission. The word *shall* as used in the two provisions is mandatory.

22. 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. 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.[17]

23. From the above observations, 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 and serving the Attorney General. 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.

24. 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.'**[18]***

25. 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.[19] Therefore, it is clear that contempt of court is not merely a mechanism for the enforcement of Court orders.

26. Guided by the above principles, I am not persuaded that Respondents in this Case were properly served as the law demands. *First*, the omission to serve the Attorney General offends section **30 (3)** cited above. *Second*, contempt of Court proceedings cn only be commenced after a third days notice has been served. These proceedings were commenced prior to issuance and service of the notice contrary to section **30 (2)** of the Contempt of Court Act.[20] It is evident that a **thirty day notice** was not served as required. Accordingly, I find that this application was filed pre-maturely, and that it offends the mandatory provisions of Section **30** of the Contempt of Court Act.[21] 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 to commencing 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.

27. Article **159 (2) (d)** of the constitution of Kenya 2010 enjoins Courts to determine cases without undue regard to technicalities. I must however point out that Article **159** of the Constitution is not a panacea for all problems. It is not lost to this court that the provisions of section **30** of the Contempt of Court Act is very clear and it is couched in mandatory terms. The applicant cannot seek refuge under Article **159 (2) (d)** of the constitution under the present circumstances in view of the mandatory and express provisions cited above.

28. Having so found as herein above stated, I find that this is not a proper case for this court to exercise its discretion in favour of the

applicant. In view of my analysis and answers to the above issues herein above, the conclusion becomes irresistible that the application dated **15th** November 2017 does not comply with the mandatory provisions of the law, hence, the application is incompetent, incurably defective and fit for dismissal.

c. Whether the applicant has established that the Respondents are guilty of contempt.

29. The applicant's counsel argued that the Respondent's did not file an affidavit to show cause why they should not be committed for contempt. The applicant seems to ride on the assumption that they have already proved the essential elements of contempt.

30. The Respondent's counsel argued that the parties were until recently negotiating with the applicant on an alternative plot as ordered by the Court. Also, he argued that the Respondents have been experiencing financial flow constraints and changes in the city county and lastly, there was no consent or connivance attributable to any neglect on the part of any accounting officer or the governor.

31. Two key issues flow from the above argument. *First*, is the wording of section **30 (5)** and **(6)** of the Contempt of Court Act[22] which sets out ingredients that must be satisfied before contempt orders are issued. These provisions are worth reproducing below. They read as follows:-

> 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.*

32. It is an accepted cannon of statutory interpretation that provisions of a statute ought to be construed in a holistic manner so as to get the real intention of the legislature. It is my view that section **30** sub-sections **(1), (2), (3), (4), (5) and (6)** ought to be read together so as to get the real intention of the legislature. It is not sufficient to premise an application on subsections (1) & (2) and ignore the rest.

33. The touchstone of interpretation is the intention of the legislature. The language of the text of the statute should serve as the starting point for any inquiry into its meaning.[23] Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean.[24] If the words of a statute are clear and unambiguous, the Court need not inquire any further into the meaning of the statute. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation. In other words as was appreciated by the Court of Appeal in *Kimutai vs. Lenyongopeta & 2 Others****[25]*** citing Lord Denning:-[26]

> "*The grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the "purposive approach". In all cases now in the interpretation of statutes such a construction as will "promote the general legislative purpose" underlying the provision is to be adopted. It is no longer necessary for the judges to wring their hands and say, "There is nothing we can do about it". Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind."(Emphasis added).*

34. The *first* requirement under subsection (5) is that the Court must be satisfied that that the contempt was committed with the *consent* or *connivance* of or is *attributable* to any *neglect* on the part of any accounting officer. A proper construction of the above provision leaves no doubt that an applicant is required to establish *consent* or *connivance* or demonstrate that the consent is attributable to any neglect on the part of the accounting officer. *Second*, sub-section **(6)** provides that no state officer or public officer shall be convicted of contempt of Court for the execution of his duties in good faith. No evidence or argument was presented before me to demonstrate the above requirements.

35. The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed '*deliberately* and *mala fide*.'[27] A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. [28] Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).[29]

36. These requirements – that is the refusal to obey should be both *wilful* and *mala fides*, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces.[30] Honest belief that non-compliance is justified or proper is incompatible with that intent. The Constitutional Court of South Africa,***[31]*** underlined the importance to the rule of law, of compliance with court orders in the following terms:-

> "*Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law."*

37. The High Court of South Africa[32] held that in order to succeed in civil contempt proceedings, the applicant has to prove ***(i)*** *the terms of*

the order, ***(ii)*** *Knowledge of these terms by the Respondent*, ***(iii).*** *Failure by the Respondent to comply with the terms of the order.* Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.[33]

38. Writing on proving the elements of civil contempt, learned authors of the book *Contempt in Modern New Zealand****[34]*** authoritatively stated:-

> *"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-*
>
> *(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;*
>
> *(b) the defendant had knowledge of or proper notice of the terms of the order;*
>
> *(c) the defendant has acted in breach of the terms of the order; and*
>
> *(d) the defendant's conduct was deliberate.*

39. It was incumbent upon the applicant to address the above ingredients. In particular, it was necessary to demonstrate that the refusal s deliberate. In fact, none of the above essentials were addressed before me or in the affidavits or submissions. An applicant must demonstrate *willful* and *flagrant* disobedience of a Court order. I am afraid, the applicant did not attempt to address or establish any of the above ingredients to establish willful and flagrant breach of the Court order. Further, there was no attempt to address the provisions of subsections (5) and (6) discussed above. On this ground alone, this application fails.

d. Whether the County Governor and the County Secretary are properly enjoined in this application.

40. The other bone of contention is whether the Respondents are properly named in this application. The decree being enforced was issued against the County Government of Nairobi. The Respondents in the application before me are the Governor of the County of Nairobi and the County Secretary. The applicants counsel arg

ued that the prayers are sought against the Respondents as the accounting officers of the Nairobi City County for failing to comply with the court decree. He argued that the Governor is enjoined pursuant to section **30 (3) (f)** of the Contempt of Court Act while the Country secretary is enjoined pursuant to section **44 (3) (a)** of the County Government Act as the accounting officers of the County Government.

41. The applicant's counsel cited section **30 (3) (f)** of the County Governments Act and argued the Governor is the accountable for the management and use of the County resources. He also cited section **44 (3) (a)** of the County Governments Act in support of his argument that the Count Secretary is the head of the County Public Service. The Respondent's counsel's position is that the Respondent's have been wrongfully sued.

42. Section **30 (1)** of the Contempt of Court Act provides that *"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."* Who is the accounting officer for the purposes of this section?

43. Section **2(1)** of the Public Finance Management Act[35] provides as follows:-

> *2 (1) In this Act, unless the context otherwise requires----"accounting officer" means---*
>
> *a. an accounting officer of a national government entity referred to in section 67;*
>
> *b. an accounting officer of a county government entity referred to in section 148;*
>
> *c. in the case of the Judiciary, the Chief Registrar of the Judiciary; or*
>
> *d. in the case of the Parliamentary Service Commission, the Clerk of the Senate in respect of the Senate and the Clerk of the National Assembly in respect of the National Assembly;*

44. Section **148** of the act provides as follows:-

> *i. A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.*
>
> *ii. Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.*
>
> *iii. A County Executive Committee member for finance shall ensure that each county government entity has an accounting officer in*

accordance with Article 226 of the Constitution.

iv. The Clerk to the county assembly shall be the accounting officer of the county assembly.

v. A county government may, in order to promote efficient use of the county resources, adopt, subject to approval by the county assembly, a centralised county financial management service.

45. The act defines "County Government Entity" means any department of a county government, and any authority, body or other entity declared to be a County Government entity under section **5 (1)** of the act. My reading of the above provisions and in particular section **148** reproduced above is that is that the *accounting officer for the Nairobi County Government is the accounting officer responsible for managing the finances of the entity.* My construction of the above provisions is that the accounting officer is the County finance officer who is responsible for the finances.

Final orders.

46. In view of my analysis of the issues discussed above, it is my finding that:- **(a)** the *applicant's application dated **15th** November 2017 is incurably defective and incompetent; **(b)** the applicant has not established that the Respondents are guilty of contempt; (c) the County Governor and the County Secretary are properly enjoined in this application. Consequently, the* applicants application dated ***15th*** *November 2017 fails. I hereby dismiss the said application with no orders as to costs.*

Orders accordingly. Right of appeal.

Signed, Dated and Delivered at Nairobi this **24th** day of **September** 2018

John M. Mativo

Judge

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[1] Cap 40, Laws of Kenya.

[2] {2018}eKLR.

[3] Act No.46 of 2016.

[4] Act No.46 of 2016.

[5] Ibid.

[6] Ibid.

[7] Ibid.

[8] *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).

[9] Ibid.

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

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

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

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

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

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

[16] Supra.

[17] Supra note 6 above.

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

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

[20] Supra.

[21] Supra

[22] Supra.

[23]Katharine Clark and Matthew Connolly, Senior Writing Fellows, April 2006, *"A guide to reading, interpreting and applying statutes"* https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf.

[24] Plain meaning should not be confused with the "literal meaning" of a statute or the "strict construction" of a statute both of which imply a "narrow" understanding of the words used as opposed to their common, everyday meaning. Supra note 1.

[25] Civil Appeal No. 273 of 2003 {2005} 2 KLR 317; {2008} 3 KLR (EP) 72

[26] Lord Denning, *The Discipline of Law* ,1979 London Butterworth, at page 12.

[27] Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc **[1996] ZASCA 21**; **1996 (3) SA 355** (A) 367H-I; Jayiya v Member of the Executive Council for Welfare, Eastern Cape **2004 (2) SA 602**(SCA) paras 18 and 19.

[28]Consolidated Fish (Pty) Ltd v Zive **1968 (2) SA 517** (C) 524D, applied in Noel Lancaster Sands (Edms) Bpk v Theron **1974 (3) SA 688** (T) 691C.

[29] Noel Lancaster Sands (Edms) Bpk v Theron **1974 (3) SA 688** (T) 692E-G per Botha J, rejecting the contrary view on this point expressed Consolidated Fish v Zive (above). This court referred to Botha J's approach with seeming approval in Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc **[1996] ZASCA 21**; **1996 (3) SA 355** (A) 368C-D.

[30] See the formulation in *S v Beyers* **1968 (3) SA 70** (A) at 76E and 76F-G and the definitions in Jonathan Burchell *Principles of Criminal Law* (3ed, 2005) page 945 ('Contempt of court consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it') and CR Snyman *Strafreg* (4ed, 1999) page 329 ('Minagting van die hof is die wederregtelike en opsetlike (a) aantasting van die waardigheid, aansien of gesag van 'n regterlike amptenaar in sy regterlike hoedanigheid, of van 'n regsprekende liggaam, of (b) publikasie van inligting of kommentaar aangaande 'n aanhangige regsgeding wat die strekking het om die uitstlag van die regsgeding te beïnvloed of om in te meng met die regsadministrasie in daardie regsgeding').

[31]Burchell v. Burchell, Case No 364/2005

[32] In the case of Kristen Carla Burchell vs Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005

[33] Ibid, at page 4

[34] Available at *ip36.publications.lawcom.govt.nz*

[35] Act No. 18 of 2012.