REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILINMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JR ELC NO. 11 OF 2010

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF THE REGISTERED LAND ACT, CAP 300, LAWS OF KENYA

AND

IN THE MATTER OF NAIROBI/ BLOCK 94/78 AND NAIROBI/ BLOCK 94/77

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF LAND REGISTRAR.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. Before addressing the merits or otherwise of this application, I find it pertinent to address the implication of Article **162(2)(b)** and **165(b)** of the Constitution to these proceedings. The relevant background is that the *ex parte* applicant filed the Notice to the Registrar pursuant to order **L111** Rule **1(3)** of the Civil Procedure Rules on **26th** February 2010. On **1st** March 2010 he filed the application seeking leave to apply for an order of *Mandamus* directing the Respondent, namely, the District Land Registrar, Nairobi to hear and determine a *boundary dispute* between the applicant and a one **Hon. Patrick Muiruri** touching on properties known as **Nairobi/Block 94/78** and **Nairobi/Block 94/77**.

2. During the pendency of the application seeking leave, there was a fundamental shake up in the legal landscape in this country. On **27th** August 2010, Kenyans overwhelmingly voted for a new Constitution, a, charter that admittedly ushered in a new set of national values, a new Bill of rights and a new system of government. It reset the relationship between the citizen and the state and reconfigured both the ethos and the architecture of governance.[1]The judiciary was not spared either. Article **162(2)(a)&(b)** of the Constitution provided that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and environment and the use and occupation of, and title to land. Article **162(3)** of the Constitution provided that Parliament shall determine the jurisdiction of the courts contemplated in clause (2).

3. Barely one month and two days after the promulgation of the 2010 Constitution, that is, on **29th** September 2010, the High Court differently constituted granted the *ex parte* applicant leave to institute these proceedings. Pursuant to the said leave, the *ex parte* applicant filed the substantive application on **11th** September 2010. More significant is the fact that during the pendency of the substantive application, Parliament enacted the Environment and Land Court Act[2] to give effect to Article **162(2)(b)** of the Constitution. The preamble to the act

reads:- "to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes." The act received presidential assent on **27st** August 2011 and its commencement date was **30st** August 2011.

4. Curiously, no one took cognizance of these fundamental legal changes. Notwithstanding these fundamental changes, this case proceeded in this court and on **17th** May 2013, almost three years after the promulgation the Constitution, and approximately two years after the above act came into effect, the court ruled in favour of the *ex parte* applicant and decreed as follows:-

> *a.* ***That*** *an order of mandamus be and is hereby issued directing the District Land Registrar, Nairobi, ("the Respondent") to hear and determine a boundary dispute between the applicant and one Hon. Patrick Muiruri ("the Interested Party") herein touching on properties known as* ***Nairobi/Block 94/78*** *and* ***Nairobi/Block 94/77*** *respectively.*
>
> *b.* ***That*** *the said determination be made within 30 days from the date upon which the applicant will comply with the necessary requirements for the said exercise to be conducted.*
>
> *c.* ***That*** *the costs of these proceedings are awarded to the applicant.*

5. I am fully conscious that I am not sitting on an appeal against a decision of a court of coordinate jurisdiction and I have no jurisdiction to do so nor can I attempt to do so. However, the narrow but pertinent and highly dispositive question which I cannot ignore is the implication of Articles **162(2)(b)** and **165(b)** of the Constitution to these proceedings, and, whether, this court has the jurisdiction to grant the orders sought in the present application. The orders sought to be enforced were obtained under the above circumstances.

6. It is an established jurisprudence that jurisdiction is the very basis on which any Tribunal or court tries a case; it is the lifeline of all trials. Differently stated, for this court to entertain the application under consideration, it must be satisfied that it has the requisite jurisdiction. It is an established position that a trial without jurisdiction is a nullity. The importance of jurisdiction is the reason why it can be raised at any stage of a case, be it at the trial, on appeal to court of appeal or to this court or during the hearing of a suit or of an application such as the one under consideration; *afortiori* the Court *can suo motu* raise it at any stage. It is desirable that questions relating to jurisdiction be raised at the earliest opportunity possible. Unfortunately, no one raised it at all at the hearing despite the fundamental legal shake up brought by the 2010 Constitution. But once it is apparent to any party or to the court that the court may not have jurisdiction, it can be raised even *viva voce* by either party or by the court. It is always in the interest of justice to raise issues of jurisdiction so as to save time and costs and to avoid a trial in nullity.[3]

7. The *locus classicus* decision in Kenya on jurisdiction is the celebrated case of *Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd*[4] where the late **Justice Nyarangi** of the Court of Appeal held as follows:-

> *"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

8. **John Beecroft**[5] put it bluntly when he addressed the question of jurisdiction in the following words:-

> *"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and maters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the fact exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"*

9. In general a court is bound to entertain proceedings that fall within its jurisdiction. Put differently, a court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the fact exist. Perhaps I should add that where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.[6]A court's jurisdiction flows from either the Constitution, legislation or both or by principles laid out in judicial precedent.[7]

10. A court of law can only exercise jurisdiction as conferred by the Constitution or other written laws.[8] **Article 165(1)** of the Constitution vests vast powers in the High Court including the power to *determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and the jurisdiction 'to hear any question respecting the interpretation of the Constitution.* The limitation of this courts vast powers conferred under Article **165** is to be found in Sub-Article **(5)** which states in mandatory terms that the high court **shall not** have jurisdiction in respect of matters:- ***(a)*** *reserved for the exclusive jurisdiction of the Supreme Court under the Constitution; or* ***(b)*** *falling within the jurisdiction of the courts contemplated in Article* ***162 (2) (a) & (b).*** It is a constitution edict that this court has no jurisdiction to determine matters falling under Article **162(2)(a)&(b).** But what are these matters? The

answer to this question is found in the provisions of Section **13** of the Environment and Court Act,[9]an Act of Parliament enacted to give effect to Article **162(2)(b)** of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.

11. The use of the word *shall* in the Article **162(2)(b)** is worth noting. As stated later in this ruling the use of the word shall is mandatory as opposed to directory.[10]

12. Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. *The South African Constitutional Court*[11]had this to say:-

> *"Jurisdiction is determined on the basis of the pleadings,**[12]**… and not the substantive merits of the case… In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim …, one that is to be determined exclusively by…..{another court}, the High Court would lack jurisdiction…"*

13. To me, the reliefs sought in the substantive application and the decree obtained from the court reveal *a land dispute.* Section **13** of the Environment and Land Court Act[13] provides that:-

> *(1) The Court **shall** have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.*
>
> *(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—*
>
> *(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*
>
> *(b) relating to compulsory acquisition of land;*
>
> *(c) relating to land administration and management;*
>
> *(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*
>
> *(e) any other dispute relating to environment and land.*
>
> *(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.*
>
> *(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.*
>
> *(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—*
>
> *(a) interim or permanent preservation orders including injunctions;*
>
> *(b) prerogative orders;*
>
> *(c) award of damages;*
>
> *(d) compensation;*
>
> *(e) specific performance;*
>
> *(g) restitution;*
>
> *(h) declaration; or*
>
> (i) costs

14. The jurisdiction of the Environment and Land Court is limited to the disputes contemplated under **Article 162(2)(b)** of the Constitution and **Section 13** of the Environment and Land Court Act.[14] In this regard, my view is that the intention of the Constitution is that if an issue arises touching on land in respect of its use, possession, control, **title,** compulsory acquisition or **any other dispute touching on land,** then this Court has no jurisdiction. My strong view is that this suit ought to have been transferred to the proper court the moment the Constitution of Kenya 2010 divested this court the jurisdiction to hear the case. Buttressed by the provisions of the Constitution and section **13** of the Environment and Land Court Act,[15] I am clear in my mind that this court cannot properly entertain the application before me.

15. It is beyond argument that a High Court may not determine matters falling squarely under the jurisdiction of the Employment and Labour Relations Court and the Land and Environment Court, whether it is a substantive hearing or an application such as the instant application.

16. Even with that clear-cut jurisdictional demarcation on paper, sometimes matters camouflaged in what may on the surface appear to be a serious constitutional issues or Judicial Review applications or other matters falling in other High Court divisions may, on a closer scrutiny reveal otherwise- that the germane of the application is actually a labour dispute or land issue falling squarely in the forbidden sphere of the specialized courts! Such is the nature of the application before me. A boundary dispute or enforcing an order relating to a boundary dispute falls squarely in the forbidden sphere of the specialized courts, namely, the Environment and Labour Court. The drafters of the Constitution were very clear on the limits of this court's jurisdiction and the jurisdiction of the courts of equal status.

17. Where the constitution and legislation expressly confers jurisdiction to a court as in the present case invoking this courts vast jurisdiction is inappropriate. The jurisdictional boundaries of the High Court are clearly spelt out under the Constitution. On this ground, I dismiss the Application dated **26th** February 2018

18. However, not withstanding my finding on jurisdiction, I will proceed to examine the merits of the case.

(a) Whether the Notice to Show Cause dated 9th November 2017 is incompetent.

19. The Respondent's though served did not attend court nor did they file any responses to the application. Counsel for the *ex parte* applicant relied on the grounds stated on the face of the application and the supporting affidavit and urged the court to grant the orders.

20. I am aware of a recent High Court decision rendered in *Kenya Human Rights Commission vs Hon. Attorney General & Another**[16]*** rendered on **9th** November 2018 declaring sections **30** and **35** of the Contempt of court Act[17] to be inconsistent with the Constitution and are therefore null void and also declaring the entire act invalid for lack of public participation as required by Articles **10** and **118(b)** of the constitution and for encroaching on the independence of the Judiciary. However, this application was filed on **27th** February 2017 prior to the said determination, hence, the provisions of the act apply, hence I will address the question whether or not the application under consideration conforms with the provisions of the said act. Secondly, I will also address the merits of the application (if any).

21. In ground **3** of the application, the *ex parte* applicant states *that "upon issuance of the Notice to Show Cause, the applicant proceeded to serve the same on the Respondents. However, the Respondent did not respond to the same."* The same averment is reiterated at paragraph **6** of the supporting Affidavit. However, the evidence of service has not been exhibited to the Affidavit.

22. On record there is an Affidavit of Service by **John M. Mburu**, Advocate in which he avers that he served the Notice to Show Cause on **17th** November 2017 upon the secretary at Legal Department at Ardhi House. The duly served Notice to Show Cause is annexed to the Affidavit. It bears an official stamp of the Ministry of Lands, Legal Department. But more fundamental is the fact that it was served on **17th** November 2017 and it required the first Respondent to attend court on **20th** November 2017 to show cause. This raises the question of the competence of the Notice.

23. To effectively address the question whether the Notice served is competent, I propose to examine Section **30** of the Contempt of Court Act[18] 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.*

*24. 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.*

25. *As stated above, the Notice served in this case was for three days as opposed to **30** days. Also, the applicant failed to comply with section **30 (3)** of the Contempt of Court Act*[19] *because the Attorney General was not served. In my view, this offends section **30 (2)** of the Contempt of Court Act*[20] *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."*

26. The applicant invites this court to commit the first Respondent for contempt. It is paramount that before granting such an order, 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. This warrants a close examination of Section **30** of the contempt of Court Act[21] 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."*

27. 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*."

28. 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[22] 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.[23] 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.

29. 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.

30. 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.[24] 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.[25]

31. In a recent decision of this Court I observed[26] 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.[27] The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory.[28]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…**[29]** - Standard Bank Ltd v Van Rhyn (1925 AD 266).*

32. 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[30] 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 serve a Notice of **three** days as opposed to **30** days. 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.

33. 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.[31]

34. 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.

35. Additionally, 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.'**[32]***

36. 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.[33] Therefore, it is clear that contempt of court is not merely a mechanism for the enforcement of court orders.

37. 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 can only be commenced after a third days notice has been served. These proceedings were commenced prior to issuance and service of a thirty days notice contrary to section **30 (2)** of the Contempt of Court Act.[34] Accordingly, I find that this application offends the mandatory provisions of Section **30** of the Contempt of Court Act.[35]

38. 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[36] is very clear and are 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.

39. In view of my analysis and answers to the issues herein above, the conclusion becomes irresistible that the application dated **26th** February 2018 does not comply with the mandatory provisions of the law, hence, it is incompetent, incurably defective and fit for dismissal.

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

40. The core ground relied upon is that "despite the first Respondent having been served with the decree, he failed to comply, as a consequence of which the court directed the Notice to Show Cause to be issued." I have already held herein above that the Notice served did not conform with the law.

41. Additionally, two key issues flow from the wording of section **30** of the act. *First*, is the wording of section **30 (5)** and **(6)** of the Contempt of Court Act[37] 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.*

42. 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) (6)** ought to be read together so as to get the real intention of the legislature. It is not and sufficient to premise an application on subsections **(1)** & **(2)** and ignore the rest.

43. 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.[38] Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean.[39] 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**[40]*** citing Lord Denning:-[41]

> *"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).*

44. 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.

45. 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*.'[42] 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. [43] Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).[44]

46. 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.[45] Honest belief that non-compliance is justified or proper is incompatible with that intent. The Constitutional Court of South Africa,***[46]*** 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."*

47. The High Court of South Africa[47] 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.[48]

48. Writing on proving the elements of civil contempt, learned authors of the book *Contempt in Modern New Zealand****[49]*** 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.*

49. It was incumbent upon the applicant to address the above ingredients. In particular, it was necessary to demonstrate that the refusal is deliberate. In fact, none of the above essentials were addressed before me or in the affidavits. 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. The duty to discharge the burden establish the foregoing tests applies even where the application proceeds *ex parte*. In fact, there was no attempt to address the provisions of subsections **(5)** and **(6)** discussed above. On this ground alone, this application fails.

50. In view of my analysis, determination and conclusions arrived in the three issues discussed above, the conclusion becomes irresistible that the *ex parte* applicant's application dated **26th** February 2018 must fail. I hereby dismiss the said application with no orders as to costs.

Orders accordingly.

Dated, signed and delivered at Nairobi this 17th day of January 2019.

John M. Mativo

Judge

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[1]**Njeri Githang'a, Law Reporter, June 2013, http://kenyalaw.org/kenyalawblog/a-compilation-of-summaries-of-selected-cases-on-the-interpretation-of-the-constitution-of-kenya-2010/. Accessed on 24th November 2017**

[2] Act .No. 11 of 2011

[3] Belgore J.S.C. See *Petrojessica Enterprises Ltd v. Leventis Technical Co. Ltd*, (1992) 5 NWLR (Pt. 244) 675 at 693

[4] {1989} KLR 1

[5] In a treatise headed *"Words and Phrases Legally Defined"* Volume 3:1-N, at Page 113.

[6] John Beecroft, *Words and Phrases Legally Defined*, Volume 3:1-N, at Page 113.

[7] The Supreme Court *in the matter of the Interim Independent Electoral Commission*, Constitutional Application No. 2 of 2011 (unreported).

[8] *Samuel Kamau Macharia vs. Kenya Commercial Bank and Two others*, Civ. Appl. No. 2 of 2011.

[9] Act No. 19 of 2011.

[10]*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).

[11] *In* the matter between *Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others* Case CCT 64/08 [2009] ZACC 26.

[12] *Fraser vs ABSA Bank Ltd* {2006} ZACC 24; 2007 (3) BCLR 219 (CC); 2007 (3) SA 484 (CC) at para 40.

[13]Act No. 19 of 2011.

[14] Act No. 19 of 2011.

[15] Ibid.

[16] Constitutional Petition No 87 of 2017.

[17]Act No. 46 of 2016.

[18] Act No.46 of 2016.

[19] Ibid.

[20] Ibid.

[21] Ibid.

[22] *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).

[23] Ibid.

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

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

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

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

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

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

[30] Supra.

[31] Supra note 6 above.

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

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

[34] Supra.

[35] Supra

[36] Supra.

[37] Supra.

[38]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.

[39] 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.

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

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

[42] *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.

[43]*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.

[44] *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.

[45] 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').

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

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

[48] Ibid, at page 4

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