REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 180 OF 2018

IN THE MATTER OF AN APPLICATION FOR ORDERS OF *CERTIORARI, MANDAMUS* AND *PROHIBITION.*

AND

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, NO. 33 OF 2015

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD APPLICATION NO. 41 OF 2018

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD....1ST RESPONDENT

KENYA POWER & LIGHTING COMPANY LIMITED.....2ND RESPONDENT

AND

MER SECURITY & COMMUNICATIONS SYSTEM LTD/

MEGASON ELECTRONICS & CONTROL 1978 (JV).....1STINTERESTED PARTY

M/S ORAD LIMITED/ARCHELIS KENYA LTD/

GLOSEC SOLUTIONS LIMITED (JV).....2ND INTERESTED PARTY

AND

MAGAL SECURITY SYSTEMS LTD/

FIREFOX KENYA LIMITED (JV).....*EX PARTE* APPLICANT

RULING

Introduction.

1. By way of an *ex parte* Chamber Summons dated **3rd** May 2018, the *ex parte* sought leave to institute Judicial Review proceedings seeking orders of *certiorari* to quash the first Respondent's decision rendered in Public Procurement Administrative Review Board Application No. **41** of 2018 dismissing its application and to quash the decision directing second Respondent to proceed with the procurement process in respect of Tender Number **KPI/9A.2/RT/SS/17-18.**

2. Additionally, the *ex parte* applicant sought leave to apply for an order of *prohibition* prohibiting the second Respondent from entering or signing any contract with the second Interested Party or any other third party concerning said tender.

3. The *ex parte* applicant also sought to apply for an order of *Mandamus* to compel the second Respondent to carry out a fresh evaluation of the tenders submitted to it in the said tender.

4. Lastly, the *ex parte* applicant sought an order that the leave so granted operates as stay of the decision in PPARB Case No. **108** of 2017, *Crane AB vs Central Bank of Kenya, De La Rue International Limited, De La Rue Currency and Security Print Limited and De La Rue Kenya Limited, De La Rue Currency and Security Print Limited and Dela Rue Kenya EPZ Limited* directing the second Respondent to proceed with the procurement process, pending the hearing and determination of the substantive Judicial Review Application.

5. Ironically, the prayer for stay referred to above is totally confusing. It refers to case No. PPARB Case No. **108** of 2017 which a totally different from the No. **41** of 2018 cited in the prayers seeking leave for *Certiorari, Mandamus* and *Prohibition*. More confusing is the fact that the parties in the prayer seeking stay are totally different from the parties in these proceedings and in the first four prayers of the application.

6. To me, the Tender No. **KP1/9A.2/RT/SS/17-18** referred to in the first four prayers of the application is for *design, supply, installation, integration, testing and commissioning of an Integrated Security System for KPLC Pilot Project (ISS*), a fact supported by the documents in support of the application. It has absolutely nothing to do with case referred to in the prayer for stay or currency printing or any of the parties in the prayer for stay.

7. Despite this glaring and evident confusion none of the parties raised it at all. But of great concern is the fact that the *ex parte* applicant's advocates never made any attempt to explain the disparity. Equally disturbing is the fact that as a result of the said confusion, at the *ex parte* stage, the court granted the orders as prayed in paragraphs **1,2,3,4,5** & **6** of the *ex parte* applicant's Chamber Summons dated **3rd** May 2018.

8. Flowing from the above confusion, the orders extracted on **7th** May 2018 at paragraph **6** thereof ordered that the leave granted at the *ex parte* stage operates as stay of the execution/implementation of the order of the Public Procurement Administrative Review Board dated **19th** day of April 2018 in Public Procurement Review Board Case No. **108** of 2017, *Crane AB vs Central Bank of Kenya & Others* pending the hearing and determination of the substantive Judicial Review Application.

9. It is evident that no competent order of stay was obtained in this case since the above order is totally misdirected and has absolutely nothing to do with this case.

10. The above confusion notwithstanding, the court ordered the *ex parte* applicant to file the substantive Notice of Motion within **21** days from the date of the order and serve the Respondents with a Hearing Notice for *inter partes* hearing on **20th** June 2018. However, the *ex parte* applicant did not file the substantive Notice of Motion as ordered. Instead it filed it on **30th** May 2018, five days after the expiry of the **21** days.

The Second Interested Party's Notice of Preliminary Objection.

11. On **11th** June 2018, the second Interested Party filed a Notice of Preliminary Objection dated **8th** June 2018 seeking to have this suit struck off on grounds that it offends the provisions of Order **53** Rule **3 (1)** of the Civil Procedure Rules, 2010, and, the court order issued on **4th** May 2018. Additionally, the second Interested Party stated that this suit and the *ex parte* applicant's application is an abuse of process, is frivolous, vexatious and a waste of judicial time and should be struck off with costs.

The *ex parte* applicant's application.

12. On the same day the Preliminary objection was filed, that is **11th** June 2018, the *ex parte* applicant's counsel filed a Notice of Motion also dated **8th** June 2018 seeking enlargement of time within which to file its substantive application or in the alternative its application dated **22nd** May 2018 and filed on **30th** May 2018 be deemed to have been properly filed and properly on record.

Courts directions.

13. On **30th** May 2018 after hearing arguments from all the parties, I declined to extent the *ex parte* order directing that the leave granted do operate as stay because the said order had lapsed since the substantive application had not been filed within the **21** days. Additionally, flowing from my earlier observation that the order as sought and as granted had nothing to do with this case, there was actually no order strictly speaking in these proceedings worth extending even if there were grounds to do so.

14. Further, I directed that the Notice of Preliminary Objection be heard on **12th** November 2018. However, on the said date I varied the directions and directed that the Notice of Preliminary Objection be treated as grounds of opposition to the *ex parte* applicant's application dated **8th** June 2018, thus, effectively ordering that both the Notice of Preliminary Objection and the said application be heard and

determined together. Thus, this ruling disposes the said objection and the *ex parte* applicant's aforesaid application .

The arguments.

15. At the hearing of both the application and the Preliminary Objection, **Mr. Ayisi** for the *ex parte* applicant argued that the application was prepared within time but the advocates registry staff failed to file it within the time directed by the court. Instead, he stated, they filed it five days late. He submitted that the said failure was an inadvertent error on the part of the advocate and should not be visited upon the *ex parte* applicant.

16. **Mr. Ayisi** also argued that this court has the jurisdiction to extent time which has lapsed due to an innocent error, and, that, the Respondent and the Interested Party will suffer no harm if the extension is allowed. On the contrary, he argued that the refusal will occasion hardship to the *ex parte* applicant since its case will have been determined on a technicality. Further, he argued that the application has been brought without delay. **Mr. Ayisi** also argued that Order **50** Rule **6** of the Civil Procedure Rules, 2010, allows extension of time. He also relied on Article **48** of the Constitution on Access to Justice and urged the court to base its determination on the basis of the 2010 Constitution.

17. **Mr. Ayisi** relied on the High Court decision in *Republic v Speaker of Nairobi City County Assembly & Another ex parte Evans Kidero*. [1] He also placed reliance on *Republic v Public Procurement Administrative Review Board Ex parte Syner Chemie Limited*[2] in which the High Court allowed extension of time in a Judicial Review proceeding. **Mr. Ayisi** urged the court to dismiss the Preliminary Objection. Additionally, he submitted that the Judgment rendered in JR No. **178** of 2018 does not extinguish this suit.

18. Counsel for the first Respondent **Mr. Odhiambo** supporting the Preliminary Objection submitted that all the provisions cited by the *ex parte* applicant's counsel are not applicable in Judicial Review proceedings which are governed by sections **8** and **9** of the Law Reform Act[3] and Order **53** of the Civil Procedure Rules, 2010. He argued that there is no room for extension of time in Judicial Review proceedings and that this court has no discretion to grant the extension.

19. **Mr. Odhiambo** argued that extension of time is discretionary and a powerful tool which should be used judiciously. He cited the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* ***[4]*** and referred the court to the principles laid down in the said decision and argued that the *ex parte* applicant has not met the threshold as laid down in the said case which is as follows:-

> *"This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:*
>
> *i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;*
>
> *ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court*
>
> *iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
>
> *iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
>
> *v. Whether there will be any prejudice suffered by the respondents if the extension is granted;*
>
> *vi. Whether the application has been brought without undue delay; and*
>
> *vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."*

20. **Mr. Odhiambo** further submitted that this is a procurement matter governed by Article **227** of the Constitution and must be determined within a set time frame, and, that, it is not enough to say a clerk delayed the filing. Further, he argued that a party cannot decide to disobey a court order and approach the court seeking extension. He submitted that non compliance of a court order is not a mere technicality. He urged the court to dismiss the *ex parte* applicant's application with costs.

21. **Mr. Manduku,** counsel for the second Respondent opposed the application for extension of time and supported the Preliminary Objection. He relied on the Replying Affidavit filed on **11th** September 2018 by the second Respondent and the annextures thereto.(which was filed in response to the *ex parte* applicant's application dated **22nd** May 2018). He argued the alleged mistake of a clerk is not sufficient to warrant court's discretion. He also argued that the procurement process was concluded and a contract signed.

22. **Mr. Manduku** also argued that sections **8** and **9** of the Law Reform Act[5] does not provide for extension of time. He submitted that Civil Procedure Rules cannot be imported to Judicial Review proceedings. He relied on *Wilson Osolo v John Ojiambo Ochola & Another*[6] whereby the Court of Appeal held that *"it was a mandatory requirement of order 53 Rule 3(1) of the Civil Procedure Rules then (and it is now again so) that the notice of motion must be filed within 21 days of grant of such leave. No such notice of motion having been apparently filed within 21 days ...there was no proper application before the Superior Court."*

23. Counsel also relied on *Republic v Linda Wanjiku & 2 Others ex parte E.N. (Applying as father and next of friend of SK(Minor)* ***[7]*** in which the court observed that "*..failure to comply with the order for leave on the time lines the substantive motion as filed is incompetent."* Further, in the said case the court citing the Court of Appeal decision in *United Housing Estate Limited v Nyals (Kenya) Ltd*[8] stated that

"what emerges from the decision of the Court of Appeal is that a party cannot unilaterally decide not to comply with the conditions attached to the exercise of discretion of the court in his or her favour on the ground that or she ought to have access to justice....Non compliance with court order cannot be a procedural technicality curable by application of Article 159 of the Constitution."

24. **Mr. Manduku** also relied on *Republic v Medical Laboratory Technologists Board ex parte Anastacia Ngithi Wahu & 177 Others*[9] in which the court held that the words *"shall be made"* in orders **53** Rule **3(1)** of the Civil Procedure Rules 2010 demonstrate that the time lines are mandatory rules of procedure that ought to be strictly adhered to. He also relied on *Republic v Cabinet Secretary, Information Communication & Technology & Another ex parte Celestine Okuta & Others*[10] in which the court addressing a similar situation remarked that *"the applicants expect the court to ignore directions of the court and treat their failure to comply with the courts directions as inconsequential."*

25. **Mr. Wandabwa** the second Interested Party's counsel opposed the *ex parte* applicant's application on grounds that it lacks merits. He argued that the delay has not been explained. He argued that the Fair Administrative Action Act[11] which was enacted to operationalize Article **47** of the Constitution did not repeal the provisions governing Judicial Review Applications.

26. **Mr. Wandabwa** also relied on *R v Chairman, Amangoro Land Disputes Tribunal & Another ex parte Alfred Ididi Eketon Ididi & Another*[12] where the court held that it had no discretion to extent time in Judicial Review proceedings. Additionally, he relied on *Republic v Medical Laboratory Technicians and Technologists Board ex parte Edna Mwende Kavindu*[13] where the court found that there was no competent application before it and struck it off for being filed out of time.

27. Lastly, **Mr. Wandabwa** argued that the issues raised in this case were determined in JR No. **178** of 2018 in which the *ex parte* applicant was an interested party, hence, it is worthless to extent time in a matter whose subject has been spent.

Determination

28. Order **53** Rule **3 (1)** of the Civil Procedure Rules, 2010 in the following words:-

> *" When leave has been granted to apply for an order of Mandamus, prohibition or Certiorari, the application shall be made within twenty-one days by notice of motion to the high court, and there shall, unless the judge granting leave otherwise directed , be at least eight clear days between service of the notice of motion and the day named therein for the hearing."*

29. In construing a statutory provision the first and the foremost rule of construction is that of literal construction. All that the Court has to see at the very outset is, what does the provision say? If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. They are called into aid only when the legislative intention is not clear. But the courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning which cannot be warranted by the words employed by the Legislature. In interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it.

30. The operative word in the above provisions is ***"shall."*** The Black's Law Dictionary, defines the word **"shall"** 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."*

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

32. 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.[14] But it must be kept in mind in what sense the terms are used. There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[15] 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.

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

34. 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.[16] 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]

35. 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.[18] The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory.[19]

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

> *"…. Without pretending to make an exhaustive list I would suggest the following tests, not as comprehensive but as useful guides. The word 'shall' when used in a statute is rather to be construed as peremptory than as directory unless there are other circumstances which negative this construction…**[20]** - Standard Bank Ltd vs Van Rhyn (1925 AD 266).*

37. The above being the clear prescriptions of the meaning of the word ***shall,*** Parliament in its wisdom prescribed a period of **21** months within which applications for *Mandamus, prohibition or Certiorari* may be brought. Time starts running from the date of the order granting leave. I find and hold that the above provisions are couched in mandatory terms and must be complied with. The question now is whether the court can in exercise of its discretion extent the mandatory timelines prescribed in order **53** of the Civil Procedure Rules, 2010.

38. The provisions of order **53** of the Civil Procedure Rules, 2010 have been the subject of numerous judicial determinations in this county. In *Ako vs Special District Commissioner, Kisumu & Another*[21] the Court of Appeal was emphatic that *"it is plain that under sub-section **(3)** of section **9** of the Law Reform Act*[22] *leave shall not be granted unless application for leave is made inside six months after the date of the judgment."* The Court of Appeal proceeded to hold that the prohibition is statutory and is not therefore challengeable under procedural provisions of the Civil Procedure Rules, which permits for enlargement of time.

39. Similarly, the Court of Appeal in *Wilson* ***Osolo -Vs- John Ojiambo Ochola & Another**[23]* the Court of Appeal expressed itself thus:-

> ***"It can readily be seen that Order 53 Rule 2 (as it then stood) is derived verbatim from Section 9(3) of the Law Reform Act. Whilst the time limited for doing something under the civil Procedure Rules can be extended by an application under order 49 of the Civil Procedure Rules that procedure cannot be availed of for the extension of time limited by statute, in this case, the Law Reform Act". There is no provision for extension of time to apply for such leave in the Limitation of Actions Act (cap 22, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a limitation period. But this Act has no relevance here.''***

40. It is also important to point out that the provisions of order **50** Rule **6** of the Civil Procedure Rules, 2010 which grant the court power to enlarge time cannot override the express provisions the Statute, namely, section **9 (3)** of the Law Reform Act.[24] In this regard, I find useful guidance in *Re an application by Gideon Waweru Githunguri**[25]*** whereby the colonial Supreme Court held that the said section imposes an absolute period of limitation and *Raila Odinga & Others vs Nairobi City Council*[26] in which it was held that:- ***(i)*** *the Rules under the Act cannot override the clear provisions of Section **9 (2)** of the Act;* ***(ii)*** *an act of Parliament cannot be amended by subsidiary legislation;* ***(iii)*** *Parliament in its wisdom has imposed this absolute period of six months and it is the Parliament alone which can amend it.*

41. In *Republic vs Public Procurement Administrative Review Board ex parte Syner-Chemie*[27] cited by **Mr. Ayisi,** the court correctly observed that there are two schools of thought on the issue whether the court can extent time in Judicial Review proceedings. The first, the court observed is the school which propagates that no such enlargement of time for filing of a substantive motion is envisaged in Order **53** of the Civil Procedure Rules. The court added that the same proponents argue that owing to the special procedure adopted in Judicial Review proceedings, a party, other than invoking Order **53** of the Civil Procedure Rules cannot invoke the provisions of the Civil Procedure Act[28] and the Rules made there under.[29]

42. The court proceeded to hold that there is the second school of thought which supports the applicant's position that although the court has no jurisdiction to enlarge the six months period given by the Law Reform Act[30](and by extension time in Judicial Review proceedings an applications such as the one under consideration) the learned Judge proceeded to state:-

> *" From the rival positions presented to this court, the question is whether this court, in the present constitutional framework should still let the former intricacies and obscurities hamper the provision of effective redress to facilitate access to justice for all or should it adopt a flexible approach, which is not necessarily crafting or innovating its jurisdiction, but bearing in mind that much of the old case law on the reach of the Judicial Review remedies may not be of such practical relevance today. But because the Legislature has given no explicit direction on the issue, the Court must adopt the interpretation of the silent provisions that best effectuates the legislative intent.*
>
> *In arriving at such a view, this court appreciates that Judicial Review has its origin in common law which is still applicable in our statutes today (see section 12 of the Fair Administrative Action Act, 2015), and which is judge made law, law made by judges in the absence of relevant constitutional or statutory provisions* ***(see Kenneth Culp Davis, Administrative Law Treatise 2:18 at 140 2 ed 1978****.*

43. After analysing the law and comparable jurisprudence, the court proceeded as follows:-

> **97.** *With the enactment of Fair Administrative Action Act, 2015 which Act implements Article 47 of the Constitution to give effect to the right to fair administrative action, the above Act effectively modifies the Law Reform Act and Order 53 of the Civil procedure Rules on flexibility in the application of the law to the circumstances of a particular case, with the sole intention of achieving substantive justice for the parties and especially where no prejudice is shown to be occasioned to the respondents or interested parties herein.*

> ***98***. *In my modest view, no statute can be enacted with the sole intention of doing an injustice to parties. Article 47 of the constitution elevates fair administrative action from a common law action to a constitutional right under the Bill of rights. The same position applies to Article 48 of the Constitution which commands the state to ensure that all persons are facilitated to access justice without any impediments.*
>
> ***99.*** *Further, Article 20(3) (a) of the Constitution commands that in applying a provision of the Bill of Rights like in this case Article 47 of the Constitution on the right to fair administrative action which is invoked by the exparte applicant in this case, a court should* ***'develop the law to the extent that it does not give effect to a right or fundamental freedom', and to 'adopt the interpretation that most favours the enforcement of a right or fundamental freedom." [****Emphasis added].in my view, it would hamper the enforcement of the right to administrative action if the law Reform Act and Order 53 of the Civil Procedure Rules were strictly interpreted to exclude any room for enlargement of time where there is sufficient cause shown by the party applying for such enlargement of time.*

44. The court proceeded to allow the application but not before citing yet another illuminating court of Appeal decision in ***Gateway Insurance Company Ltd vs Avies Auto Sprays[31]*** where the Court of Appeal citing with approval several cases including the Indian case of ***Periagami Asari v Illupur Penchayert Board[32]*** dealing with the rule identical to Order **50** Rule **6** of the Civil Procedure Rules held that:-

> *"The principle that when the effect of the order granting time in the event of non compliance has to operate automatically the court has no power to extend time as it becomes functus officio, will apply when the suit is finally disposed of. If the order is not final and the court retains control over it and seized of the matter, it will have power to extend time." (Emphasis added)*

45. Our courts which have adopted a strict interpretation of the above rule have based their determination on the interpretation of the word *shall* in the above provisions which they held bestows a mandatory obligation. The Court Appeal in *Ako vs Special District Commissioner, Kisumu & Another*[33] held that the prohibition is absolute and any other interpretation or view of the particular provision would be doing violence to the very clear provisions of sub-section **(3)** of Section **9** of the Law Reform Act.[34] In *Re an application by Gideon Waweru Gthunguri**[35]*** the colonial Supreme Court held that the said section imposes an absolute period of limitation.

46. Further, in *Republic vs Kenya School of Law & Council of Legal Education ex parte Daniel Mwaura Marai*[36]it was held that the provisions of a subsidiary legislation can under no circumstances override or be inconsistent with any act of Parliament be it the one under which they are made or otherwise. Also relevant is Section **31 (b)** of the *Interpretation and General Provisions Act*[37] which provides that no subsidiary legislation shall be inconsistent with the provisions of an Act of Parliament.

47. In *Republic v Council of Legal Education & Another ex parte Sabiha Kassamia & Another**[38]*** this court, on 18th July 2018 dismissed an application which had been filed outside the six months provided under the law. Unlike in the instant case, there was application before the court for extension of time. Apparently recognizing the difficulty caused by the above provisions which imposes a stringent limitation, **Odunga J**. by way of obiter in *Republic v Mwangi Nguyai & **3** Others*[39] observed that it was high time section **9** of the Law Reform Act[40] was amended to provide for extension of time in cases where a strict adherence to the limitations manifests a miscarriage of justice and gave the example of situations whereby a decision is made and for some reasons the same is not made public with the result that the persons affected thereby are not aware of the decision until after the expiry of the limitation period.

48. Some of the above decisions which adopted a rigid construction of the above provisions were rendered before the promulgation of the 2010 Constitution. It should be recalled that sections **8** and **9** of the Law Reform Act[41] are borrowed from common law principles which traditionally governed exercise of Judicial Review jurisdiction. Order **53** of the Civil Procedure Rules, 2010 is borrowed from these provision. Section **12** of the Fair Administrative Action Act[42] (which was enacted pursuant to Article 47 of the Constitution) expressly imports common law Judicial Review principles, hence, they still apply).

49. I am alive to the fact that provisions limiting access to courts must be read with caution. I am also aware that it is well settled that whenever the court is invested with the discretion to do certain act as mandated by the statute, the same has to be exercised judiciously and not in an arbitrary manner and capricious manner. The classic definition of `discretion' by Lord Mansfield in *R. vs. Wilkes**[43]*** that `discretion' when applied to courts of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, `but legal and regular'. In exercise of discretion, the court cannot ignore the provisions of the law. In fact. discretion follows the law. The King's Bench in *Rookey's Case*[44] stated as follows:-

> *"Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with."*

50. In addition, the discretionary powers of the court are constrained by the objectives of the Constitution to grant access to justice. Access to justice is both ways. A party cannot disobey a court order as in this case, and claim right to access justice after flouting both an express statutory provision and a binding court order. 'Discretion' signifies a number of different legal concepts. Here the order is discretionary because it depends on the application of a very general standard— what is 'just and equitable' — which calls for an overall assessment in the light of the factors mentioned in the Constitution or a statutory provision, each of which in turn calls for an assessment of circumstances. [45] Because these assessments call for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the order involves the exercise of a judicial discretion. The contrast is with an order the making of which is dictated by the application of a fixed rule to the facts on which its operation depends. [46] There is nothing arbitrary or capricious about exercising a discretion in order to give effect to an express statutory provision and more so, when the provision is couched in mandatory terms as in the present case.

51. The *ex parte* applicant was not candid. He was an interested party in JR No. 178 of 2010 in which the first interest party herein was the ex parte applicant. The Respondents herein were the Respondents in the said case. The second Interested Party in this case was the first Interested Party in the said case. In a nut shell, the parties in this case atre the same as in this the said case. More significant is the fact that the said case challenged the same Tender under assault in this case.

52. The *ex parte* applicant herein participated in the said proceedings. It filed Response in opposition to the said case. That was an earlier case having been filed first. This suit was filed during the pendency of the said case and as stated earlier, an interim order was obtained *ex parte*. But the wheels of justice do not stop. JR N. **178** of 2018 was heard and determined on **25th** July 2018.

53. The above scenario raises a fundamental issue which this court cannot ignore, that is whether the *ex parte* applicant is guilty of material non-disclosure. As pointed out above as at the time this suit was filed, there existed a similar suit. As at the time the ex parte order was obtained, JR No. **178** of 2018 was in existence touching on the same dispute. Had the ex parte applicant brought to the attention of the court the existence of the earlier suit at that *ex parte* state, the court could have hesitated to grant the *ex parte* order.

54. It is settled law that a person who approaches the court or a Tribunal for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose at the earliest opportunity possible all the material/important facts/documents which have a bearing on the adjudication of the issues raised in the case. In other words, he/it owes a duty to the court or the Tribunal to bring out all the facts and refrain from concealing/suppressing any material facts within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence. If he is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person. This position was well captured in one of the earliest decisions on the subject rendered in 1917 in *R. v. Kensington Income Tax Commissioner.**[47]***

55. A party is under a duty to disclose to the court or tribunal all relevant information even if it is not to his or her advantage. [48]The suit in question involves the same parties and challenged the same tender the subject of this suit. In my view, the *ex parte* applicant was under a solemn duty to bring to the attention of this court the existence of the said suit at the earliest opportunity possible and leave it to the court to determine the relevancy if any to the instant suit.

56. The duty of a litigant is to make a full and fair disclosure of the material facts. The material facts are those which it is material for the court or Tribunal to know in dealing with the issues before the court or Tribunal. The duty of disclosure therefore applies not only to material facts known to the *ex parte* applicant, but also to any additional facts which it would have known if it had made inquiries. I find no difficulty in concluding that the *ex parte* applicant was under a duty to disclose to the court the existence of the said case at the earliest opportunity possible.

Conclusion

57. In conclusion, it is my finding that the provisions discussed above are couched in mandatory terms and must be complied with. Further, Order **50** Rule **6** which permits for extension of time being a subsidiary legislation cannot override the provisions of sections **8** and **9** of the Law Reform Act.[49]

58. 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 Order **53** Rule **3 (1)** of the Civil Procedure Rules, 2010 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.

59. Additionally, the *ex parte* applicant disobeyed an express court order. Article **48** of the Constitution cannot be used as a shield where a party flouts a court order. Above all, Access to Justice cuts both sides. The Respondents and the Interested Parties are equally entitled to access justice. Access to Justice is equally flouted when a Respondent is drugged to court unnecessarily. In the instant case, the ex parte applicant is not only moving the court out of time, but also there existed a similar dispute in court.

60. Further, filing multiplicity of suits is an abuse of court process. Failure to disclose the existence of the other suit at the time of obtaining the *ex parte* order is also an abuse of court process. Had the two suits proceeded for determination there was a danger of the High court rendering conflicting decision on the same Tender process. Perhaps I should add that the reason given for failure to file the motion is totally unconvincing.

61. In view of my conclusions herein above, and my finding that section **9 (3)** of the Law Reform Act[50] and Order **53** Rule **3(1)** of the Civil Procedure Rules, 2010 are couched in mandatory terms, and, also, my finding that Article **159 (2) (d)** of the Constitution cannot be of help to the *ex parte* applicant under the circumstances of this suit, I find and hold that the preliminary objection succeeds.

62. Further, the grant of the extension of time is discretionary. The court is entitled to take into account the nature of the process against which the extension is sought and satisfy itself that there is reasonable basis to justify the orders sought. In this regard, it is important to mention that a serious issue arises, namely, that there is an element of abuse of process in this case. The *ex parte* applicant failed to disclose the existence of the other suit at the time of obtaining the ex parte order. Secondly, the dispute relating to the tender in question was resolved in JR **178** of 2018. By seeking leave to institute fresh proceedings relating to the same Tender, the *ex parte* applicant seeks to *"appeal"* against the said decision in which it was a party. The court cannot and should never exercise its discretion in favour of an applicant under such circumstances.

63. Consequently, the *ex parte* applicant's Chamber summons dated **8th** June 2018 is hereby dismissed. Further, the *ex parte* applicant's Notice of Motion dated **22nd** May 2018 is struck off for being incompetent and or for being improperly on record and for having been filed out of time.

64. Further, the Notice of Preliminary Objection filed by the second Interested Party dated **8th** June 2018 is hereby allowed.

65. The *ex parte* applicant is ordered to pay the costs of these proceedings to the Respondents and the Interested Parties.

Orders accordingly

Signed, Dated and Delivered at **Nairobi** this **1st** day of **February** 2019

John M. Mativo

Judge

---

[1] {2017}eKLR.

[2] {2016}eKLR.

[3] Cap 26, Laws of Kenya.

[4] {2014} eKLR.

[5] Cap 26, Laws of Kenya.

[6] {1996} eKLR.

[7] {2017}eKLR.

[8] Civil Application No. Nairobi 84 of 1996.

[9]{2017}eKLR.

[10] {2016}eKLR.

[11] Act No. 4 of 2015.

[12] {2015}eKLR.

[13]{2017}eKLR.

[14] *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).

[15] Ibid.

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

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

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

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

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

[21] Civil Appeal No. 27 of 1989, Nyarangi JA., Gachuhi JA., Kwach Ag. JA.

[22] Cap 26, Laws of Kenya.

[23] **{1995} eKLR.**

[24] Ibid.

[25] {1962} 1 EA 520.

[26] {1990- 1994} 1 E.A 482.

[27] *Republic vs Public Procurement Administrative Review Board ex parte Syner-Chemie* {2016} eKLR.

[28] Ibid.

[29] Citing See ***Republic Vs Kahindi Nyafula & 3 Others Exparte kilifi South East Farmers Co- Operative Society*** **[2014] e KLR** by Angote J, applying ***Welamudi vs The Chairman Electoral Commission of Kenya*** **[2002] KLR 285 and *Republic V Kenya Bureau of Standards & Others [2006] EA 345.***

[30] Cap 26, Laws of Kenya.

[31] **{2011}eKLR**

[32] **AIR 1973 Mad 250**

[33] Civil Appeal No. 27 of 1989, Nyarangi JA., Gachuhi JA., Kwach Ag. JA.

[34] Supra.

[35] {1962} 1 EA 520.

[36] {2017} eKLR.

[37] Cap 2, Laws of Kenya.

[38] JR APP No. 703 of 2017.

[39] High Court Constitutional Petition No. 89 of 2008.

[40] Cap 26, Laws of Kenya.

[41] Ibid.

[42] Act No. 4 of 2015.

[43] 1770 (98) ER 327

[44] [77 ER 209; (1597) 5 Co.Rep.99].

[45] *Norbis v Norbis* [1986] HCA 17; 161 CLR 513; 60 ALJR 335; 65 ALR 12.

[46] Ibid.

[47] {1917} 1 KB 486, by Viscount Reading, Chief Justice of the Divisional Court.

[48] *Brinks-Mat Ltd vs Elcombe* {1988} 3 ALL ER 188

[49] Cap 26, Laws of Kenya.

[50] Cap 26, Laws of Kenya.