



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 164 OF 2015

IN THE MATTER OF APPLICATION FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF SECTION 59 OF URBAN AREAS AND CITIES ACT NO.13 OF 2011 AND SECTION 44 (10 OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012 AND ALL OTHER ENABLING PROVISIONS OF THE LAW

REPUBLIC.....APPLICANT

VERSUS

COUNTY SECRETARY, NAIROBI CITY COUNTY.....1ST RESPONDENT

COUNTY TREASURER, NAIROBI CITY COUNTY....2ND RESPONDENT

EX PARTE APPLICANT.....WILLESDEN INVESTMENT LIMITED

RULING

Introduction

1. On 1st November 2012 judgment was entered in favour of the applicant in Civil Case No. 24 of 2008 as follows:-

a. *That the plaintiff herein is the registered proprietor of all the parcel of land known as L.R. No. 209/12748.*

b. *That judgment be and is hereby entered against the defendant in favour of the Plaintiff being mesne profits in the sum of in the sum of Kenya Shillings Eighty Five Million Only (Ksh. 85,000,000/=) all inclusive payable within sixty (60) days of the date of the judgment failing which the amount shall attract interest at Court rates of 12 % per annum.*

c. *That the defendant shall immediately upon judgment deliver to the plaintiff vacant possession of the property known as L.R.No. 209/12748 and shall henceforth not interfere with the plaintiffs quiet possession of the said property otherwise than in the performance o its statutory duties.*

d. *That each party shall bear its costs.*

2. The decree was served upon the Respondents on 1st November 2012, but no payment was made. As at 9th November 2015, the decretal sum stood at **Ksh. 112,740,600/=**, and continues to attract interests at court rates until payment in full. On 9th November 2015, a consent order was recorded as follows:-

a. *That the Respondent do pay the applicant the amount in the decree of 1st November 2012 by way of installments.*

b. *That the first installment in the sum of Ksh.5,000,000/= be paid on or before 13th November 2015.*

c. That the second installment in the sum of **Ksh. 5,000,000/=** be paid on or before **4th** December 2015.

d. That mention to confirm payment and the review on **7th** December 2015.

3. On **16th** August 2017, the applicant applied for a notice to show cause why contempt proceedings should not be commenced against the Respondent. Despite being served, the Respondents did not attend court. However, the orders were granted. **Kennedy Okall Aroko**, a process server of this Honourable in his affidavit of service dated **6th** March 2018 avers:-

Paragraph 2

That on **5th** March 2018, I received triplicate copies of Notice to show cause dated **28th** February 2018 from the firm of Oyatta & Associates Advocates, Prudential Building, 5 Floor, Left Wing Wabera Street, P.O. Box 73706-00200, Nairobi with instructions to serve the same upon the County Secretary, County Treasurer, Nairobi City County and the Attorney General.

Paragraph 3

That on the same day I proceeded to the offices of the County Secretary Nairobi City County, **1st** Floor Room **112A** and on arrival I met a secretary whom I introduced myself to and explained the purpose of my visit and asked if I may see the County Secretary.

Paragraph 4

That the said Secretary then ushered me into the County Secretary office to one M/s Leboo whereupon I introduced myself to him and explained to him the purpose of my visit and the nature of the documents in my possession and upon perusing through the notices he summoned the County Treasurer one M/s Ekaya to his office.

Paragraph 5

That after some deliberations with the County Treasurer he insisted I serve the same upon the director legal one M/s Violet at the **12th** Floor, City Hall Annex since both are on an acting capacity and are not vested with the proceedings herein.

Paragraph 6

That I explained to them that the Notice to show cause is addressed to them jointly as the accounting officers but they could hear none of that and insisted that they have communicated the same to the director legal. I then left a photocopy in their custody as unsigned.

Paragraph 7

That I then proceeded to the director legal office situated at the **12th** Floor City Hall annexe and tendered a copy of the said notice upon M/s Violet who then directed her personal assistant M/s Tumbo to acknowledge receipt of the notices and prepare an internal memo forwarding the notices to the County Secretary and Treasurer.

Paragraph 9

That on the same day at 2.30 pm I then proceeded to the Attorney General's Chambers and on arrival at their registry situated as Sheria House, **7th** Floor, I met an officer whom I tendered to copy of the notice to show cause requiring his acknowledgement.

4. I have enumerated the above paragraphs because as demonstrated later, under Section **30** of the Contempt of Court Act, [\[1\]](#) service of notice is a mandatory legal requirement.

5. The application before me was filed in court on **16th** March 2018. It was served upon the Respondent on **22nd** March 2018. The Notice was served on **5th** March 2018, eleven days before this application was filed. A fundamental issue arises, does the said notice conform to the law?

Determination

6. To address the above question, I propose to examine Section **30** of the Contempt of Court Act [\[2\]](#) 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.

7. Clearly, 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. The notice to show cause in this case was served on 5th March 2018. The application under consideration was filed on 16th March 2018. A simple calculation shows that the notice was for 11 days as opposed to the 30 days stipulated under the law.

8. The applicant now invites this Court to cite the Respondents for contempt. 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. This warrants a close examination of Section 30 of the contempt of Court Act^[3] 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."

9. 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*."

10. It is established jurisprudence that 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^[4] 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.^[5] 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.

11. 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. Useful guidance can be obtained from the Supreme Court of India which 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.

12. 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.^[6] 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.^[7]

13. In a recent decision of this Court I observed^[8] 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.^[9] The Longman Dictionary of the English Language states that "*shall*" is used to express a command or exhortation or what is legally mandatory.^[10] 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... [11] - Standard Bank Ltd v Van Rhyn (1925 AD 266).

14. 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^[12] 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. 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.^[13]

15. 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. Service of the prescribed notice 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.

16. Accordingly, 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.'^[14]

17. 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.^[15] Therefore, it is clear that contempt of court is not merely a mechanism for the enforcement of court orders.

18. Guided by the above principles, I am not persuaded that Respondents in this Case were properly served as the law demands. In view of the above clear provisions of the law, and the clear evidence that a **thirty day notice** was not served as required, 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.^[16]

19. The conclusion becomes irresistible that the application dated 16th March 2018 does not comply with the mandatory provisions of the law, hence, the application is incompetent. I hereby dismiss it. Since the Respondents did not attend court or file any papers in opposition to the Application, I make no orders as to costs.

Orders accordingly. Right of appeal.

Signed, Dated and Delivered at Nairobi this 4th day of June 2018

JOHN M. MATIVO

JUDGE

^[1] Act No.46 of 2016.

^[2] Act No.46 of 2016.

^[3] Ibid.

^[4] *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).

^[5] Ibid.

^[6] *Subrata vs Union of India AIR 1986 Cal 198.*

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

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

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

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

[11] *Sutter vs Scheepers* [1932 AD 165](#), at 173 - 174.

[12] Supra.

[13] Supra note 6 above.

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

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

[16] Supra