REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 502 OF 2016

In the matter of application by Kenya Shield Security Limited for orders of Certiorari, Prohibition and Mandamus pursuant to Order 53 of the Civil Procedure Rules, 2010 and Section 8 of the Law Reform Act, Cap 26,Laws of Kenya

and

In the matter of the decision of the Public Procurement Administrative Review Board made on 4 October 2016 in Review No.74 of 2016

Between

REPUBLIC.....APPLICANT

VERSUS

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

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

***EX PARTE* APPLICANT.....KENYA SHIELD SECURITY LIMITED**

CONSOLIDATED WITH

JUDICIAL REVIEW APPLICATION NO. 503 OF 2016

REPUBLIC.....APPLICANT

VERSUS

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

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

***EX PARTE* APPLICANT.....KLEEN HOMES SECURITY SERVICES LIMITED**

RULING

Introduction.

1. This Ruling disposes two applications dated **6th** October 2017 filed by the ex parte applicants in these consolidated Judicial Review Applications, namely J.R. No. **502** of 2016 and J.R. No. **503** of 2016. The applications are expressed under similar provisions, namely, Sections **4 (1) (a), 5 (b), 28** and **29** of the Contempt of Court Act,[1] Article **165 (3)** of the Constitution of Kenya, the inherent Jurisdiction of the Court and all enabling provisions of the law. Both applications seek similar orders, namely:-

> *a. That this Honourable Court do cite the Second Respondent for Contempt of the Order of this Honorable Court made on **18th** October 2016 and impose such fine as the Court may deem fit to determine.*
>
> *b. That **Dr. Ken Tarus, Mr. Bernard Ngugi, Mr. Geofrey K. Kigen** and **Mr. Lincoln Kagundu** as Managing Director, General Manager Supply Chain, Manager Security Services and Supply Chain Officer respectively of the Second Respondent be deemed to be guilty of contempt of Court and do stand committed to civil jail with leave of Court for such period as this Honorable Court may determine for Contempt of the Order of this Honorable Court made on **18th** October 2016.*
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> *c. That the costs of and incidental to this application be provided for.*

2. Similar grounds are relied upon in both applications, namely:-

*a. that the second Respondent has willfully, flagrantly and deliberately disobeyed the order of this Honorable Court made on **18th** October 2016.*

*b. The Director, Managers and or officers of the second Respondent aforesaid being aware of the order made by this Honorable Court on **18th** October 2016 knowingly and willfully violated/disobeyed/disregarded/undermined the effect and purpose of the said order and or knowingly and willfully failed to take reasonable steps to ensure that the said order was obeyed by the second Respondent.*

c. That the contempt was committed with the consent, connivance of or is attributable to neglect on the part of the said director, managers and or officer of the second Respondent.

3. In support of the applications are identical affidavits sworn by **Peter Omuya Maina** in J.R. No. **503** of 2016 and **Moses Kaniaru Kamau** in J.R. No. **502** of 2016 directors of the ex parte applicants in the two files respectively. The core averments are that on **18th** October 2016, this Honorable Court granted leave to the applicant to apply for orders of Certiorari, Madamus and Prohibition and the Court ordered the leave so granted do operate as stay of implementation of the first Respondent's decision and or proceedings related to Tender No. **KPI/9AA2/OT/02/SS/16-17** and evaluation, award, notification of award, the signing of any contract and or completion, award, notification of award, the signing of any contract and or completion of the procurement process in respect of Tender No. **KPI/9AA2/OT/02/SS/16-17** for provision of Security Guarding Services by the second Respondent vide Review Case No. **74** of 2016 until these Judicial Review proceedings are heard and determined. It is averred that the said order was duly served upon the second Respondent.

4. It is also averred that in flagrant and willful disobedience of the said order, the second Respondent proceeded with evaluation, award, notification of award, completion of the procurement process and signed contract on or about **30th** March 2017 with various bidders for provision of Security Guarding Services for a period of six months and forcefully evicted the ex parte applicants from its premises.

5. Further, it is averred that the second Respondent's security Manager, Mr. Geofrey K. Kigen proceeded with the implementation of the first Respondent's decision despite having full knowledge of the said order, and that the said contempt was committed with the full knowledge, consent, connivance and or is attributed to the neglect on the part of the director, manager, and or officers named in the two applications under consideration, which actions, it is averred are calculated to embarrass the Court, hence, to uphold the dignity and judicial authority, it is necessary that they be deemed to be guilty of contempt of Court and stand committed to civil jail for such period as this Court may determine.

Second Respondents' Replying Affidavit.

Jude Ochieng, the Second Respondent's Chief Legal Officer-Litigation & Prosecution swore the Replying Affidavits in the two files. He avers that:- **(i)** the Second Respondent has obeyed the Court order; **(ii)** Tender No.KPI/9AA2/OT/02/SS/16-17 has not been awarded to any entity; **(iii)** In JR. No. **502** of 2016, the ex parte applicant's contract lapsed on **31st** December 2016, and was extended for three months, and; **(iii)** prior to the expiry of the three months, there was need to plan how to secure the Second Respondent's general infrastructure and assets at the end of the three months period.

7. In reply to the application in J.R. No. **502** of 2016, he averred that the temporary direct procurement was necessary and permitted under Section **103 (2)** of the Act. Further, he averred since there was a stay, the second Respondent did not proceed with the tender, and, continued provision of security guarding services is an inseparable incident of its functions, hence, it was necessary to procure short term security services for **6** months as the second Respondents awaited the outcome of this case.

8. Further, he averred the applicants contract in J.R. No. **503** of 2016 expired on **31st** December 2016, hence, it was terminated by effluxion of time. Further, he averred that the said contract was not subject to the Court proceedings. Also, he averred that the Court order did not extent to the ex parte applicant's contract in the said case, hence, upon its expiry, the second Respond was under legal duty to seek alternative security services, and that the tender was substantially and materially different in scope and specifications,

9. He also averred that both applications have not complied with the mandatory requirements of Section **30 (1)** of the Contempt of Court Act,[2] hence, the applications are incompetent.

Ex parte applicants further Affidavits.

10. On record are two identical further affidavits both dated **9th** November 2017 sworn by **Moses Kaniaru Kamau**, filed in JR No. **502** of 2016 and by **Peter Omuya Maina** filed in J R. No. **503** of 2016 respectively. They aver that the Second Respondent proceeded with the evaluation, award and completion of the procurement process and exhibited a professional opinion in support of the said averment, and that the impugned tender was awarded to **24** bidders for a period of **2** years at a total cost of **Ksh. 1,897,623,781.44** effective from **1st** October 2017 to **31st** December 2019. Further, they averred that the contempt was committed by the second Respondent with the consent or connivance of the cited persons.

Second Respondent's further Affidavit.

11. **Justus Ododa,** the second Respondent's Legal Assistant swore the further Replying Affidavit dated on **17th** November 2017. He denies the existence of the annextures attached to the above Replying Affidavits and avers that if at all they are genuine, they must have been procured unlawfully and ought to be struck off. The Second Respondent also filed a notice of a preliminary objection objecting to the aforesaid annextures on grounds that they are 'illegally" obtained evidence.[3]

Issues for determination.

12. One fairly dispositive issue warrants an early consideration. This is the competence or otherwise of the two applications, namely, whether the applications are competent for want of a notice as required under Section **30 (1)** of the Contempt of Court Act.[4]

13. The ex parte applicants counsel insisted that they complied with Section **30** of the Contempt of Court Act[5] in that they served the Second Respondent with a letter dated **23rd** November 2016. To letters have been exhibited in support of this contention. One is dated 31 March 2017 addressed by the ex parte applicants Advocates to the second Respondents Advocates giving notice that unless their client complies with the Court order by close of business the same day, they will commence contempt proceedings against their client. The second letter which this Court is being invited to construe as a notice under the above section is dated 23 November 2016. It is addressed to the Managing Director, Kenya Power and Lighting Company warning them that unless they comply with the Court Order within **7** days from the date of the letter, "we have strict and irrevocable instructions to file contempt proceedings against you without any further notice…." Counsels cited several authorities and invited this Court to allow the applications [6]

14. Counsels for the second Respondents argued that the applicants did not comply with Section **30** of the Contempt of Court Act[7] and that a letter is not a notice as contemplated in the said section.

Determination

15. Section **30** of the Contempt of Court Act[8] 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.
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> 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.
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> 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.

16. The above section has been the subject of Court interpretation by our Superior Courts in this Country. In Republic vs Principal Secretary, Ministry of Defence Ex-Parte George Kariuki Waithaka**[9]**

> 14. "It is therefore clear that before any civil contempt of court proceedings are instituted in disobedience of a judgement, decree or order, the applicant must first move the Court to issue a notice to show cause against the accounting officer of the State organ, government department, ministry or corporation concerned. Such notice is to be served on both the accounting officer and the Attorney General. If no response to the notice is received, the Court may then at the expiry of the said thirty days' notice period proceed to commence contempt of court proceedings against the concerned accounting officer. In my view the thirty days' period is meant to enable the Attorney General to give legal advice to the entity concerned and thus avoid the necessity of contempt proceedings. Where however the entity believes that contempt of court proceedings ought not to be commenced, the entity is required to within the said period show cause, in my view preferably by way of an affidavit why the said proceedings ought not to be commenced. The Court will then determine whether cause has been shown or not based on the material before it. Without the rules of procedure having been promulgated it is therefore my view that an application for notice ought to be accompanied by an affidavit and that application may be heard ex parte since the merits thereon may be dealt with when the cause is shown by the entity or public officer concerned."(Emphasid added)

17. The above excerpt correctly summarizes the correct interpretation of the above provision. The ex parte applicant's advocates' argue that the above letter constitutes a notice under the above provision. Clearly, Section **30 (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. It is my view that the ex parte applicants advocates ought to have applied to the Court for the notice to be issued. Their letter cannot be construed to be a notice under the said section. Worse still, the letter gives a 30 days notice as opposed to the 30 days notice.

18. In Republic vs County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi)[10] interpreting the same provision, the Court held that under Section **30** thereof before any civil contempt of court proceedings are instituted in disobedience of a judgment, decree or order, the applicant must first move the Court to issue a notice to show cause against the accounting officer of the State organ, government department, ministry or corporation concerned. Such notice is to be served on both the accounting

officer and the Attorney General.

19. The letter this Court is being asked to treat as a notice is not addressed to any of the persons this Court is being invited to find guilty of contempt. It was not served upon the Honorable Attorney General as the law requires. It was in my view an incompetent notice.

20. Before committing an alleged contemnor for contempt, 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 applications before me. 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."

21. 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."

22. 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[11] 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.[12] 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.

23. The Courts duty is 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.

24. A provision in a statute is mandatory if the omission to follow it renders the proceeding to which it relates illegal and void. A provision is directory if its observance is not necessary to the validity of the proceeding. A statute may be mandatory in some respects and directory in others.[13] One of the important tests that must always be employed in order to determine whether a provision is mandatory or directory in character is to consider whether the non-compliance of a particular provision causes inconvenience or injustice and, if it does, then the court would say that, the provision must be complied with and that it is obligatory in its character.[14]

25. In a recent decision of this Court I observed[15] 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.[16] The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory.[17]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…**[18]** - Standard Bank Ltd vs Van Rhyn (1925 AD 266).*

26. Contempt proceedings are quasi-criminal. The liberty of the alleged contemnor is at stake. Exercise of judicial authority is now entrenched in the Constitution. Article **159** commands Courts to be guided by the principles stipulated therein. We have a transformative Constitution with an expanded Bill of Rights. Can our Constitution 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[19] 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.[20]

27. 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.

28. Accordingly, it is impermissible to find an alleged contemnor guilty of contempt and commit him 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.'* ***[21]***

29. 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.[22] Therefore, it is clear that contempt of court is not merely a mechanism for the enforcement of court orders.

30. I am not persuaded that the Respondents in this Case were properly served as the law demands. I find and hold that the two applications are incompetent. They offend the mandatory provisions of Section **30** of the Contempt of Court Act,[23] hence, the applications are incompetent and fatally defective. I hereby dismiss the two applications with costs to the Respondents.

Orders accordingly.

Signed, Dated and Delivered at Nairobi this 9th day of July 2018

John M. Mativo

Judge.

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[1] Act No.46 of 2016.

[2] Ibid.

[3] *Citing Article **50 (4)** of the Constitution.*

[4] Act No.46 of 2016.

[5] Ibid.

[6]Counsel cited several cases, namely, *Kemu-Salt Packers Ltd vs Dubai Bank Kenya Lit & Another,* Malindi HCCC No. 28 of 2016, *County Government of Nairobi & Another ex parte Kepha O. Maobe & 365 Others,* Misc Civil App No. 368 of 2016, *Nicholas Randa Ombija vs Judges and Magistrates Vetting Board* {2015} eKLR, *R vs Kenya Revenue Authotity & 4 Others Ex parte Nairobi City County Government* {2017}eKLR, *R vs Governor Nairobi County Government & 2 Others Ex parte Salima Enterprises Ltd.* {2017}eKLR *and Juan Torres & Another vs Michael Njai*{2017}eKLR.

[7] Act No.46 of 2016.

[8] Act No.46 of 2016.

[9] {2018} eKLR.

[10]{2018} eKLR.

[11] *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).

[12] Ibid.

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

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

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

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

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

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

[19] Supra.

[20] Supra note 6 above.

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

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

[23] Supra