Case Number:	Judicial Review Application 703 of 2017
Date Delivered:	18 Jul 2018
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
Case Action:	Ruling
Judge:	John Muting'a Mativo
Citation:	Republic v Council of Legal Education & another Ex parte Sabiha Kassamia & another [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Judicial Review
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 703 OF 2017

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION.

AND

IN THE MATTER OF SECTIONS 16, 17, 29 OF THE KENYA SCHOOL OF LAW ACT, 2012 (LAWS OF KENYA), SECTION 3, 4, 7, 8, 10, 11, 12 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015, AND THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE LEGAL EDUCATION ACT, 2012

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COUNCIL OF LEGAL EDUCATION.....1ST RESPONDENT

KENYA SCHOOL OF LAW.....2ND RESPONDENT

AND

SABIHA KASSAMIA.....1ST EX PARTE APPLICANT

NTELE JAMES KIPAMBI.....2ND EX PARTE APPLICANT

RULING

1. This ruling disposes a preliminary objection filed by the first Respondent on **9th** April 2018 stating that Sections **8** and **9** of the Law Reform Act[1] and Order **53 (2)** of the Civil Procedure Rules, 2010, have no provision for extension of time with regard to filing Judicial Review proceedings, and that, such an extension if allowed would be un procedural and contrary to the statute.

2. The preliminary objection is premised on the fact that on **21st** December 2017, the *ex parte* applicants moved this Court seeking *inter alia* an order that they be granted leave to institute Judicial Review proceedings out of time. The objection is that the impugned decision was made on **7th** March 2017, while the applicant moved the Court on **21st** December 2017, outside the six months provided under the law.

3. Counsel for the *ex parte* applicants and the first Respondent filed written submissions and also addressed the Court orally. The second Respondent did not participate in these proceedings even though they is no evidence of service upon them.

4. **Mr. Oduor** for the first Respondent cited Section **9 (3)** of the Law reform Act[2] which provides as follows:-

*"In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave **shall** not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."*

5. He also argued that the above provision is replicated in Order **53** Rule **2** of the Civil Procedure Rules, 2010 in the following words:-

[Order 53, rule 2.] Time for applying for certiorari certain cases.

*"Leave **shall** not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."*

6. **Mr. Oduor** argued that the word *shall* in the above provisions bestows a mandatory obligation. He relied on the Court Appeal decision in *Ako vs Special District Commissioner, Kisumu & Another*[3] where it was 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.[4] He also cited *Re an application by Gideon Waweru Gthunguri***[5]** whereby the colonial Supreme Court held that the said section imposes an absolute period of limitation.

7. Further, he argued that that the provisions of Order **50** Rule **6** of the Civil Procedure Rules, 2010 have severally be held by the Courts to be inconsistent with the provisions of Section **9 (3)** of the Law Reform Act.[6]He cited the above two decisionsto reinforce his argument. He also cited *Raila Odinga & Others vs Nairobi City Council*[7] 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.*

8. To buttress his argument, **Mr. Oduor** also cited *Republic vs Kenya School of Law & Council of Legal Education ex parte Daniel Mwaura Marai*[8] whereby 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. He also cited Section **31 (b)** of the *Interpretation and General Provisions Act*[9] which provides that no subsidiary legislation shall be inconsistent with the provisions of an Act of Parliament. He also argued that in any event, the application does not disclose any grounds for extension of time.

9. **Mr. Malinzi** for the *ex parte* applicant, apparently recognizing the difficulty caused by the above provision which imposes a stringent limitation, cited an obiter by **Odunga J**. in *Republic vs Mwangi Nguyai & **3** Others*[10] in which the learned judge observed that it was high time section **9** of the Law Reform Act[11] 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.

10. He argued that the first Respondent engaged the *ex parte* applicants in several correspondences leading them to think that their applications were being considered. He also argued that since the decision being challenged is not a judgement, order, decree, conviction, or other proceedings, the provisions do not apply to this case. He also argued that civil procedure rules do not apply to Judicial Review proceedings since in Judicial Review proceedings the court exercises generis jurisdiction.[12] Counsel urged the court to adopt a purposive approach while construing the above provisions[13]and argued that the grounds upon which Judicial

Review jurisdiction can be exercised are incapable of being exhausted.[14]He cited Section **11 (1) (i)** of the Fair Administrative Action Act[15] and argued that the Court has powers to grant any order that is just and equitable and insisted that this Court has the discretion to grant extension of time. He also urged the Court to be guided by the spirit and letter of the Constitution

Determination

11. The above provisions have been the subject of numerous judicial determinations in this county. In *Ako vs Special District Commissioner, Kisumu & Another*[16] cited by **Mr. Oduor,** the Court of Appeal was emphatic that "it is plain that under sub-section **(3)** of section **9** of the Law Reform Act[17] 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.

12. Similarly, the Court of Appeal in *Wilson* ***Osolo -Vs- John Ojiambo Ochola & Another***[18] 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.''

13. The above decisions were rendered by the Court of Appeal. They are binding to this Court. I find no reason to depart from them. My finding is reinforced by the clear language of the above provisions.

14. 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.

15. 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."

16. 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*."

17. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions.[19] 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.[20] The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

18. 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.

19. 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.[21] 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.[22]

20. 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.[23] The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory.[24]

21. 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.…***[25]** *- Standard Bank Ltd vs Van Rhyn (1925 AD 266).*

22. The above being the clear prescriptions of the meaning of the word ***shall,*** Parliament in its wisdom prescribed a period of six months within which applications for *Certiorari*, may be brought. Time starts running from the date of the challenged decision. I find and hold that the above provisions are couched in mandatory terms and must be complied with.

23. The Respondents' counsel argued that the *ex parte* applicants are not challenging a *judgment, order, decree, conviction or other proceeding,* hence the decision they are challenging herein is none of the foregoing. This argument ignores the fact that Judicial Review is a process by which the courts review the lawfulness of a decision made (or sometimes lack of a decision made) or action taken (or sometimes failure to act) by a public body. A judge considers whether a public body has acted in accordance with its legal obligations and if not, can quash the decision. The Court's role is supervisory. Public bodies can have their decisions and policies challenged by Judicial Review. Such bodies include Government ministries/government departments, Local authorities, public administrators, and Statutory bodies. Thus, a citizen who considers a decision has been taken by a public body that is outrageous, unfair, biased, disproportionate or unreasonable, has a right to Judicial Review remedies. Such a decision need not be a Court judgment, a Court decree, a Court order or Court proceedings as counsel for the *ex parte* applicant submits. It can be an administrative decision or a decision rendered by a statutory body.

24. Section **2** of the Fair Administrative Action Act[26] defines an **"administrative action"** to include— the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

25. Judicial Review is about the decision making process, not the decision itself. Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

26. Judicial Review is a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the Courts is to uphold the fundamental and enduring values that constitute the Rule of Law. As with any other form of governmental authority, discretionary exercise of public power is subject to the Courts supervision in order to ensure the

paramountcy of the law.

27. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. Broadly, in order to succeed, the applicant will need to show either:-

a. the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or

b. a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.

28. An administrative decision is flawed if it is illegal. A decision is illegal if it: - ***(a)*** *contravenes or exceeds the terms of the power which authorizes the making of the decision;* ***(b)*** *pursues an objective other than that for which the power to make the decision was conferred;* ***(c)*** *is not authorized by any power;* ***(d)*** *contravenes or fails to implement a public duty.*

29. The *ex parte* applicants invoked sections **8** and **9** of the Law Reform Act[27] in their application, and the provisions of the Civil Procedure Rules. They cannot now turn around and claim that the same provisions they seek to invoke are not applicable in the circumstances of their case. Further, the application before me is governed by the same provisions of the law. It is not a matter of discretion. Discretion does not apply where the statute is clear. In any event, even if the law had granted a discretion in the matter before me, the applicants have not demonstrated any basis for the Court to exercise its discretion in their favour. Delay, no matter how short must be accounted for.

30. 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.[28] In this regard, I find useful guidance in the authorities cited by **Mr. Oduor,** namely, *Re an application by Gideon Waweru Githunguri***[29]** whereby the colonial Supreme Court held that the said section imposes an absolute period of limitation and *Raila Odinga & Others vs Nairobi City Council*[30] 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.*

31. In view of my conclusions herein above, and my finding that section **9 (3)** of the Law Reform Act[31] and Order **53** Rule **2** of the Civil Procedure Rules, 2010 are couched in mandatory terms, I find and hold that the preliminary objection succeeds. Consequently, the *ex parte* applicants' Chamber summons dated **19th** December 2017 is hereby dismissed with no orders as to costs.

Orders accordingly

Signed, Dated and Delivered at **Nairobi** this **18th** day of **July** 2018

John M. Mativo

Judge

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[1] Cap 26, Laws of Kenya.

[2] Ibid.

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

[4] Supra.

[5] {1962} 1 EA 520.

[6] Supra.

[7] {1990- 1994} 1 E.A 482.

[8] {2017} eKLR.

[9] Cap 2, Laws of Kenya.

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

[11] Cap 26, Laws of Kenya.

[12] Counsel cited *Republic vs Principal Magistrate Court, Muranga & 4 Others ex pate Milka Nyambura Wanderi & Another* {2013} eKLR.

[13]Counsel cited *Republic vs Public Procurement Administrative Review Board & Another ex parte Selex Sistemi Integrat*i Nairobi HCMA No. 1260 of 2007, {2008}KLR 728.

[14] Counsel cited *Republic vs National Social Security Fund Board of Trustees & Another ex parte Town Council of Kikuyu* {2014} eKLR & *Republic vs The Commissioner of Lands ex parte Lake Flowers Limited* Nairobi HCMisc App No. 1235 of 1998.

[15] Act No. 4 of 2015.

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

[17] Cap 26, Laws of Kenya.

[18] **{1995} eKLR.**

[19] *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).

[20] Ibid.

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

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

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

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

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

[26] Act No. 4 of 2015.

[27] Cap 26, Laws of Kenya.

[28] Ibid.

[29] {1962} 1 EA 520.

[30] {1990- 1994} 1 E.A 482.

[31] Cap 26, Laws of Kenya.