STATUTORY INTERPRETATION OF THE WORD "SHALL": INSPIRATION FROM JUDICIAL DECISIONS

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Abstract
This article delves into the realm of statutory interpretation, focusing particularly on how courts interpret the term "shall." Despite its frequent usage in legal texts, the interpretation of the word shall remain a subject of debate amongst members of the legal profession, leading to inconsistencies and uncertainties in legal outcomes. Through an examination of judicial decisions, legislative history and scholarly views, this article elucidates the multifaceted nature of the word "shall" and provides clarity and guidance for its interpretation in legal contexts.

By dissecting various judicial decisions and scrutinizing the applied approaches, the article offers insights into how courts can navigate the complexities of "shall" to ensure consistent and equitable application of the laws interpreted. The findings underscore the importance of context, and legislative intent, in mitigating the ambiguity inherent in the word "shall", thereby enhancing the efficacy and integrity of statutory interpretation practices in the process of justice delivery.

Keywords: *Discretionary, directory, guidance, interpretation, justice, mandatory, shall, statutory.*

1.0 Introduction

It is rational to say that, cases are won or lost based on the correct or incorrect interpretation of the applicable laws.[1] This is not to say that, other legal factors are insignificant in influencing courts' decisions.[2] This article focuses on the interpretation of laws in the administration of justice, with a particular emphasis on the use of the word "shall". Thus, interpretation is the core of the dispensation of justice a constitutional duty bestowed to the judicial arm of the state as per Article 107A of the Constitution of Tanzania (1977).[3]

To achieve delivery of justice decision makers are expected to animate the applicable laws by offering correct interpretation through the invocation of their trained legal minds and acquired professional experience. When this is done, the ultimate goal of such bodies will be achieved for societal good. It is on this

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1 The supra words align with the wisest words of Henrietta Newton Martin stated in his book General Laws and Interpretation-Sultanate of Oman-Part I (BookRix GmbH & Co. KG, 2014) that; '*Interpretation of laws ... in its true spirit is the bedrock of any judicial mechanism and a legal system.*'

2 Legal factors such as; failure to discharge a burden of proof, failure to meet the requisite standard of proof, failure to prosecute one's case *et cetera.*

3 Constitution of the United Republic of Tanzania of 1977 as amended from time to time.

premise that the author tries to pen this article to demonstrate how courts of law may deploy different approaches in interpreting the laws when administering justice. The fulfilment of analysis is made feasible through the hypothesis upon which this work anchors. Such hypothesis reads: *"in statutory interpretation SHALL always mean mandatory*.
The hypothesis has been largely tested by looking at the cases decided for or against. Support has been garnered from other scholarly works in justifying the proper approach to interpretation of the word "shall" which constitutes the core of the discussion.

2.0 The Concept of the Word Shall in Statutory Provisions
Undeniably, most lawyers comprehend the word shall as mandatory. This narrative is passionately uttered especially when the when the lawyer wishes to obtain legal collaboration on a certain legal action or wants to show how a particular legal requirement has not been complied with so that the defaulter may face the fate of his defiance or inadvertence. Be it as it may, the prudent question to be raised, "could be "does the word "shall" bear an imperative meaning whenever applied'?

On a quick note, it is agreeable that in the ordinary state of legal affairs, the word "shall" is understood to impose imperative effect which must be adhered to. It is equally correct to say, such a word imports a form of command or mandate. It is not permissive, it is mandatory. In its ordinary signification, shall is a word of command. It is a word which should normally be given a compulsory meaning because it is intended to denote an obligation.[4] The auxiliary verb "shall" should be used only where a person is commanded to do something.[5] Shall has the ability to exclude the idea of discretion and gain the significance of imposing a duty, an obligation which would be enforced, particularly if it is in the public interest to do so.[6]

When one is arguing on the use of shall as mandatory, reference is normally made to the provision of section 53 (2) of the Law of Interpretation Act[7]. Such dependence on the Act is made while linking the same with the specific provision of the relevant law applicable to the matter for determination. The section provides:
"Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."

4 V.C.R.A.C, Crabbe, Understanding Statutes, (London: Cavendish Publishing Limited, the Glass House, Wharton Street, London WC1X 9PX).
5 E. Driedger, the Composition of Legislation: Legislative Forms and Precedents, 2nd edn (Ottawa: Department of Justice, Printing and Pub Supply Services, 1976), pp.9-12.
6 *Op.cit* fn 4.
7 [Cap. 1 R.E. 2019].

When the above section is construed without subjecting it to other sections of the Act[8] or other written laws, one is entitled to maintain the spirit behind lawmakers, which was to make the provision peremptory. It is on this ground majority of lawyers rely on the section when they want the court to make a finding that the alleged act ought to be treated as imperative. This understanding of the word is also what is provided under some scholarly works but in a view which is more of a layperson than legal. In support of this, a look can be made on what the word entails according to the Longman Dictionary of the English Language which states that "shall" is used to express a command or exhortation or what is legally mandatory. In the *Black's Law Dictionary*, the term "shall" is extensively 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.

The above definition shows that in normal circumstances the word shall is intended to mean something mandatory without affording room for the exercise of discretion. However, the same Dictionary also provides for another possible meaning of the word in the following words:

> […] 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 anyone 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."

The supra dictionary position rhymes together with the explanations offered in a book entitled *Understanding Statutes* by the learned author Crabbe when clarifying on circumstances when gear may be switched to treat the word shall as permissive as opposed to the ordinary treatment of it being imperative.
He stated:

> Shall, however, is sometimes intended to be directory only. In that case, it is the equivalent of *may*, and will be construed as being merely permissive in order to carry out the legislative intention. This usually applies in cases

8 For instance, what is provided under section 2(2) (a), (b) and (c) of the same Act.

> where no right or benefit accrues to anyone, or where no public or private right is impaired by its interpretation as being directory.[9]

There are various legal provisions which accommodate the word shall in their phraseology. A few examples may be displayed for easy follow-up. For instance, in making an application before the Court of Appeal of Tanzania the governing provision which is Rule 48 (1) of the Court of Appeal Rules[10] uses the word shall in addressing the manner through which one may apply to the court which is by notice of motion supported by an affidavit for all the applications made before the Court of Appeal of Tanzania (CAT) unless otherwise provided by the Rules like the circumstances under sub-rule (3) of the same Rules.

The law also uses the word shall when establishing the requirement of assessors to form part of the Tribunals' composition for trying land disputes triable by the District Land and Housing Tribunal as per the dictate of section 23 of the Courts (Land Disputes Settlements) Act,[11].

A similar provision can be seen in the Criminal Procedure Act whereas, upon closure of a prosecution case in a criminal case, the court is enjoined by the law under section 293 (2) to inform the accused person found to have a case to answer on his right to defend himself and to call witnesses to give evidence on his defence. The statutory language under the relevant section is accompanied by the word shall.[12]

3.0 Directory and Mandatory Nature of the Word Shall In Statutory Provisions

Depending on what the lawmakers intended, in any statutory provision, the use of the word shall may either be directory or mandatory depending on the circumstance upon which it is applied. Before addressing the essence of each category in relation to the interpretation of the word shall, it is prudent to acknowledge the categorization provided in the Kenyan case of *Martin Oluoch & 3 Others v. The Minister for Health & Another* by quoting the actual words deployed by the court as shown below:

> For, as it is well known, the various meanings of the word "shall" may range under two general classes according as it is used:

9 *Op. cit* fn 4 at p. 30.
10 Tanzania Court of Appeal Rules, 2009 GN No. 368 of 2009 (as amended severally).
11 Courts (Land Disputes Settlements) Act, (Act No. 2 of 2002).
12 Criminal Procedure Act [Cap. 20 R.E. 2022].

1) as implying futurity; or
2) as implying a mandate, or giving permission or direction[13]

The opening words on the intention of the lawmakers used in this part are of immense importance in the sense that, no law can be enacted for the sake of it. Thus, the purpose intended by the makers has to be taken on board while giving an interpretation of the statutory provision to give effect to the object upon which the law was made instead of stultifying the same. Interpretation of a statutory provision while giving total respect to the intention of the lawmaking body is of crucial importance than a lot of burning energy to see if there is a mandatory or directory requirement and in case of disobedience to sanction the defaulter. Admission to be made is that there is no rigid rule of thumb to ascertain the permissive or imperative character of the provision but what is prudent is the application of legal mind to the wholeness of the Act to achieve an ideal intent of the legislature. Supportive words can be found in the statement of Lord Campbell in *Liverpool Borough Bank v. Turner*[14] in the following phraseology:

> No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. […] 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 construed.

On the one hand, a statutory provision is said to be mandatory when the same must be followed as it is so provided failure of which it may cause injustice or inconvenience as opposed to what was intended by the maker. On the other hand, the directory character of the word shall in the statutory provision give an option for the court not to treat it with strict sense provided that, such flexibility will not attract prejudice to any of the parties.

The most critical task is the ability to comprehend statutory provisions subject to interpretation where there is a deployment of the word shall if such provision has to be treated as permissive or mandatory. Lack of know-how of this may lead to improper interpretation to the extent that, what is mandatory may be construed to mean directory or vice versa and hence lead to miscarriage of justice. It is fortunate that there is a test for the determination of the mandatory or directory nature of the statutory provision. In the Indian case of *DA Koregaonkar v. State of Bombay*[15] the following test was developed:

13 The classification may also be referred as absolute enactments and mandatory enactments.
14 (1861) 30 LJ Ch.379 at p.380.
15 AIR 1958 Bom 167.

> 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.

A test quite in resemblance with the above was formulated by Paul Daly[16] who authored that; a court addressing this issue will have to ask two questions. First, was the provision mandatory or directory? Second, should the violation of the provision be tolerated or not? The first question is essentially an exercise in discerning legislative intent; the second is more a matter of judicial policy as applied to the facts of particular cases. In general, the stronger the legislative intent and the more serious the consequences of the violation, the more compelling the argument will be to invalidate the impugned decision. Conversely, where legislative intent is weaker and the consequences of non-compliance are relatively harmless, the party arguing that non-compliance should be excused will ordinarily carry the day.
A distinction is often drawn between absolute enactments and directory enactments. An absolute enactment must be obeyed or fulfilled exactly as expressed by the Act, otherwise what is done will be treated as unlawful and therefore invalid. A directory enactment need only to be obeyed substantially.[17]

From a look at the above judicial innovations and scholarly work, the treatment of a statutory provision whether it is mandatory or directory depends on the outcome of failure to comply with it. If there is noncompliance which causes injustice or inconvenience the plausible conclusion is that such a provision is mandatory. In case it happens that, despite omission to adhere to it there is no injustice to be experienced by any such provision remains to be permissive. This view squarely tallies with the holding of Lord Penzance in *Howard v. Bodington*[18] when he stated:

> I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter, consider the importance of the provision and the relation of the provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory.

The test was further cemented by the court in the same jurisdiction (India) by showing that it is possible for a statutory provision to be mandatory in one way

16 P. Daly, Distinguishing Mandatory and Directory Provisions, accessed online through https://www.administrativelawmatters.com/blog/2017/08/09/distinguishing-mandatory-and-directory-provisions/#_ftn1 on 7th November, 2022.
17 *Woodward v. Sarsons (1875) LR 10 CP 733* at p.746.
18 (1877) 2 PD 203 at p. 211.

and a directory in the other. It is imperative if failure to comply vitiates the proceedings on the court and directory when there is no need to invalidate the proceedings because of noncompliance with it. This assertion was amplified in the case of *Subrata v. Union of India*[19] as follows:

> 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.

A somehow similar approach to the interpretation of the word shall was given in the Kenyan case of *Martin Oluoch & 3 Others v. The Minister for Health & Another*.[20]

In essence, the court was trying to propound that while interpreting the meaning of the word shall in the statute judicial mind has to be directed inter alia, on the injustice to be suffered by a person when the provision is regarded as mandatory or directory. My reading from the decision the eagerness of the court is more on the preservation of justice than the boldness of maintaining that the provision is imperative or directory.
It was observed in the following words:

> In looking for the meaning of the word "shall" and give it its proper construction, a judicial mind must take into account the purpose for which the relevant provision is made and its nature, considered in its setting, the connected provisions and other similar matters, *the serious general inconvenience or injustice to person resulting from reading the provisions as directory or mandatory,* where the cause of justice is promoted or retarded as a consequence of construing the provision one way or the other." (Emphasis supplied).

In the same case, the court insisted on the injustice test by addressing on what will transpire if the provision is mandatory and what to do if the section is rather a directory. Henceforth stated:

> Never lose sight of the intended consequence of the failure to comply with the provision being interpreted. Where a requirement is held to be mandatory, a failure to comply with it will invalidate what is done in contravention of the provision; but if the requirement is held to be merely permissive (directory), failure to comply with it does not invalidate what is done, and the law will be applied as nearly as may be as if the requirement had been complied with.

19 AIR 1986 Cal 198.
20 [2002] eKLR.

3.1 Critiques on Distinction Between Mandatory and Directory Categories of Statutory Provisions

In the common law world, the focus has shifted from the classification of statutory provisions on a mandatory/directory basis when it comes to the interpretation of the word shall. The approach cherished and practiced is to stick by the intent of the legislature, public interest and avoidance of hardship to the parties. In a nutshell, courts are more serious about maintaining the object of the law subject for interpretation.

At this juncture, wisdom demands justification of the contention through the use of tangible examples. The best way to discharge this intellectual duty is to call into play some of the decided cases from the common law countries. In doing the needful, the following are examples:

In *Project Blue Sky Inc v. Australian Broadcasting Authority*[21] the Australian High Court addressed such concern in the following fashion:

> In our opinion, the Court of Appeal of New South Wales was correct in *Tasker v. Fullwood* in criticising the continued use of the 'elusive distinction between directory and mandatory requirements' and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid.

The court in *Blue Sky Inc*. continued to say:

> The classification is the end of the inquiry, not the beginning… A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute.

A similar approach is applied in New Zealand by discouraging the art of labeling the requirement whether a statutory provision is mandatory or otherwise instead of focusing on the context of the Act itself as well as the extent of non-compliance together with its effect.

In the New Zealand case of *New Zealand Institute of Agriculture Science Inc v. Ellesmere County*[22], Cooke J. said, at p 636:

21 (1998) 194 CLR 355.
22 [1976] 1 NZLR 630.

> Whether non-compliance with a procedural requirement is fatal turns less on attaching a perhaps indefinite label to that requirement than on considering its place in the scheme of the Act or regulations and the degree and seriousness of the non-compliance.

As shown in the preceding discussion, in jurisdictions where the distinction of mandatory/ directory requirement is understood to have lost relevance, there has to be an alternative approach. As held in the Australian case of *Attorney General's Reference*[23] the emphasis ought to be on the consequences of non-compliance, and the question of whether or not the Parliament can fairly be taken to have intended total invalidity.

4.0 Reflection on Court Cases with the Word "Shall" as Mandatory or Directory Prerequisite

This part focuses on judicial decisions mostly decided by the Tanzanian courts of records where the word "shall" was subject to interpretation. The primary object is to see different approaches used by the judiciary in construing statutory provisions with the word shall and the reasons attached to the courts' decisions. The conclusion of the discussion will shade light on the circumstances upon which the word "shall" may be construed as mandatory and when it can be regarded as permissive. The discussion begins with cases which regarded shall as mandatory requirement and then decisions with opposite interpretation.

4.1 Shall as Mandatory Requirement

Few cases in which a word "shall" was construed as mandatory may be cited and briefly discussed. One of the cases is that of *Tanganyika Cheap Store v National Insurance Corporation (T) Ltd.*[24] On hearing of this appeal case, the court asked the advocates for the respective parties to submit on the validity of the decree forming part of the records of appeal to have been signed by the Deputy Registrar. The court raised such issue because it perceived such a decree incompetent for it being signed by an unauthorized judicial officer. Submitting on the issue, the appellant's advocate conceded to that defect but directed the blame to the lower court and prayed for the leave of the court to rectify such error. The respondent's advocate submitted that since the appeal was not supported with a valid decree then it must be struck out.

On determination of the raised issue, the court first acknowledged the power vested in the Registrars and Deputy Registrars vide Order XLIII rule 1 (d) of the Civil Procedure Code[25] according to which they are authorized to sign decrees under order XX, rule 7. However, the court did not agree that such power extends to the Registrar or Deputy Registrar as per the wording of Order XX,

23 (No. 3 of 1999).
24 [2005] TLR. 338.
25 Cap. 33 R.E. 2019.

rule 7. It was the view of the court that the use of the word "shall" under Order XX, rule 7 makes it mandatory for the powers conferred by the provision to be exercised solely by the Judge and the Registrar or Deputy Registrar are not judges.

The court went further to maintain that the provisions of Order XLIII, rule 1(d) do not take away the specific power of a judge to sign a decree prepared in accordance with the judgment. The paraphrased stance of the court can be seen in the following quote:

> The Deputy Registrar had no competence to sign the decree under order XX, rule 7 as Deputy Registrar is not a judge; *the use of the word "shall" in the provision indicates that there is no room for any other person to sign the decree.* The provisions of Order XLIII, rule l(d) of the Civil Procedure Code do not abrogate the specific power of a judge to sign a decree upon satisfying himself that it has been drawn up in accordance with the judgment. (Emphasis supplied).

On that account, the court ordered for the re-institution of the appeal by the appellant if so desired after having rectified the decree by the lower court within fortnight after such rectification.

What can be gleaned from this case is that the finding of the court is based on the wording of Order XX, rule 7 and the definition of the word judge as provided under section 3 of the Interpretation of Laws Act. The court ruled that the use of the word "shall" gives no room for any other officer less than a judge to exercise the power conferred under the same provision. This is the construction of the provision by treating the word "shall" as imperative. The attached reason to support the decision of the court was taken from another case of *Ndway Philemon Ole Saibul v. Solomon Ole Saibul*[26] where the court stated:

> The requirement that a decree must be signed by the judge who made the decision is rooted in sound reason, namely, *that the judge who decided the case or appeal is in the best position to ensure that the decree has been drawn in accordance with the judgment.* (Emphasis supplied).

While the above-quoted phrase was made in reference to the decree drawn under Order XXXIX, rule 35(4), the court adopted the above reasoning on the ground that it also applies to decrees under Order XX, rule 7.

Another case in support of "shall" as a mandatory requirement when used in a statute is that of *Aloys Lyenga v. Inspector-General of Police and another.*[27] The gist

26 Civil Appeal No. 68 of 1998.
27 1997 TLR 101 (HC).

of the matter concerns the plaintiff's failure to send a copy of the claim to the Attorney General before filing a suit. Briefly, the suit was on tortious liability upon which the plaintiff sought damages for property vandalizing alleged to have been caused by the defendants while he was in detention. Prior to filing the suit, the plaintiff issued the required statutory notice but the same was never sent to the Attorney General. Such inaction met with a notice of preliminary objection raised by the defendants in their joint written statement of defence.

In support of the objection, it was argued that section 6(2) of the Government Proceedings Act[28] provides that any party who intends to sue the Government must give notice of not less than 90 days of such intention to the minister or department involved in the suit in question and a copy of the same be served to the Attorney General. The court while sustaining the objection maintained that no doubt that from the wording of this section, the prior issue of notice to the government institution or officer concerned and the Attorney General is a mandatory pre-requisite before one sues the government. It proceeded to sustain the objection for the plaintiff's failure to comply with the mandatory provision of section 6(2) of the Government Proceedings Act hence declaring the suit incompetent.

The court arrived at the above position after construing the provision which was not complied with to be an imperative requirement which must be complied with for a suit against the government to be properly instituted. Failure to comply with the provision so construed rendered the act of the plaintiff being legally improper. In this case, the court interpreted the provision by focusing on the inclination that when the word shall is deployed in the provision the same has to be treated as the word of command that denotes an obligation. As it is known in the legislative sentence "shall" has an ability to exclude the idea of discretion and gain the significance of imposing a duty, an obligation which must be enforced as the moral reason is that a duty should not be disguised as discretion.

4.2 Shall as Directory Requirement

One of the cases which touched in length on situations upon which the ordinary mandatory nature of the word shall may not be regarded as such is *Zahara Kitindi & Another v. Juma Swalehe & 9 Others*.[29] By recapitulation, the applicants lodged an application before the CAT seeking an order for extension of time to apply for stay of execution of the judgment and decree of the High Court made against them. The application was confronted with a notice of preliminary objection preferred by the respondent under the spectrum of rule 107(1) of the Court of Appeal Rules.

28 Cap. 5 R.E. 2019.
29 Civil Application No. 142/5 of 2018 CAT at Arusha (unreported).

The objection attacked the applicants' failure to file written submissions as so required by Rule 106 of the Court of Appeal Rules[30]. It was the contention of the counsel for the respondent that the provisions submitted are couched in mandatory terms and in the light of sub-rule (9) of the rule, he prayed for the dismissal of the application.

When the counsel of the applicant had to reply, she conceded to have not filed the written submissions in support of the application but treated such failure as insignificant for the reason that the same did not prejudice the respondents and prayed for dismissal of the objection. On rejoinder, counsel serviced for the respondents insisted that his clients would be prejudiced if the application is not dismissed under the provision of the preceding rule as the rule is coached in imperative terms.

In disposing of the objection, the court agreed on the spirit of Rule 106(1) which imposes among other things, a requirement on the applicant to file written submissions in support of an application within 60 days after filing such application. However, it did not accede to the submission by the respondents' counsel on the imperative character of the word shall as used in the relevant rule. The circumstances upon which the court relied on to differ from the ordinary interpretation of such a word were two-fold namely: the prevailing exceptional circumstances or the need to accelerate the hearing for justice's sake. In the court's utterance, it was plainly uttered:

> […] my reading of the foregoing provisions of the law, it is apparent that the Court will only waive compliance with the provisions of the rule upon consideration of one of the two conditions prescribed; one, existence of exceptional circumstances, and two, that the hearing of the matter must be accelerated in the interest of justice.

The two aspects are enshrined under sub-rule (19) of rule 106 which gives the court discretional power to dismiss the application in the event of failure by a party to file written submissions as required by the rule. The court tried to expound its position by appreciating the circumstance of the absence of prejudice against the respondents. It went further to decline dismissal of the application on the ground that the use of shall in the applicable rule does not attract imperativeness.

Construing the rule with mandatory effect was washed away because the court reasoned that to treat the provision as such was to turn a blind eye towards the discretional power bestowed to it by sub-rule (19). It articulated:

30 G.N. No. 368 of 2009 (as amended severally).

> […] I have serious doubts if the word "shall" used in the sub-rule imports imperativeness. I say so because if that was the case, the provisions of sub-rule (9) would not have given the court an option to dismiss or not to dismiss the application or appeal for its noncompliance.

The court believed that the leeway conferred by the law either to dismiss or not in case of noncompliance with the rule makes the word shall more of a directory than mandatory which in addition is subject to other provisions. It was maintained: 'In my considered view, the word "shall" used in sub-rule (1) of rule 106 of the Rules is not imperative but relative and is subject to the provisions of rules (9) and (19) of the same rule.'
While winding up, important lessons garnered from the ruling upon which "shall" may not be construed as a word with mandatory impact are simply, if the circumstance of the case allows doing so, the interest of justice demands as such and if the law permits the exercise of discretional powers by the court in line with the same provision. Henceforth, ordinarily, the word shall may be construed as mandatory phraseology when looked at casually, however, in the broader sense of interpretation it may not always be so.

Interpretation of the rule with the word "shall" regarding the need to file written submission in support of an appeal or application before the Court of Appeal of Tanzania particularly when such rule has not been complied with was also addressed in another case of *Khalid Mwisongo v. M/S Unitrans (T) Ltd.*[31] Following an objection raised by the respondent the court was put to task to construe if non-compliance with Rule 106 of the Court of Appeal Rules is fatal to warrant dismissal of an appeal.

In response to the call, the court overruled the preliminary objection which was raised against the appeal by confining itself to the nature of effect alleged to have been suffered by the respondent for such non-compliance by the appellant. Since there was none (as per the admission by the counsel for the respondent) the rule was interpreted as permissive thus, the objection did not live to witness the test of time.

The Court of Appeal of Tanzania also had a chance to address the directory nature of "shall" in a statutory provision in the case of *Bahati Makeja v. The Republic.*[32] This was a rather strange case based on what was at the heart and soul of the contention for the court to determine but more importantly, the benefit of what was decided by a Full Bench (i.e. five justices of the court) of the CAT for the development of the jurisprudence of the country's criminal justice

31 Civil Appeal No. 26 of 2011 CAT at Dar es Salaam (unreported). See also, *Richard Mlagala & 9 Others v Aikael Minja & 3 Others, Civil Application No. 160 of 2015 CAT at Dar es Salaam*.
32 Criminal Appeal No. 118 Of 2006 Court of Appeal of Tanzania, at Dar Es Salaam (Unreported).

system. To kick the ball rolling, the matter that warranted the court's determination was about the need imposed under section 293 (2) (a) and (b) of the CPA that requires the court to inform the accused person of his right to give evidence on his behalf and to call witnesses to support his defence when the accused is found to have a case to answer after the closure of the prosecution case.

Counsel for the appellant tried to impugn the trial judge for the defiance towards the pressing need of the above section. Such an attack on the judge was for the reason that the judge failed to address the accused (appellant) as prescribed by the section. To show how serious the omission claimed to have been made by the trial judge was, the learned officer of the court referred the court to another decision which held that the word shall which is used in section 293 (2) as defined in section 53 (2) of Cap. 1 is mandatory. It was prayed by the learned counsel for the court to quash the proceedings from when an order of case to answer was given and revert the case to the trial court for full compliance with section 293 (2) of the Act. The submission was supported without reservation by the learned State Attorney for the respondent.

The court embarked into the matter by tracing the history of Cap. 1 which was introduced vide GN No. 312 dated 3 September, 2004. According to the court, prior to that date, the decisions made in line with the word shall were construed to be discretionary while after that the same word took a different look of being regarded as mandatory. The court reflected on the essence of section 388 of the Criminal Procedure Act (CPA) for the administration of criminal justice. The touched provision restricts the alteration, or reversal of the finding, sentence or order issued by the court with competent jurisdiction on ground of error, omission or irregularity. The same provision empowers the court if it is satisfied that the omission, error or irregularity led to a failure of justice to order for retrial or to give any just and equitable order. In its wisdom, the court treated section 388 with absolute importance in the administration of justice under CPA. It was observed that there are numerous mistakes committed in the course of administering criminal justice.

Therefore, if the word shall is every time treated imperative many decisions will be nullified and reversed. The court regarded section 388 as a protective shield of the criminal law system without which the system would be utterly clippled. Hence, it was judiciously opined that the interpretation of the word shall under section 53 (2) of Cap. 1 must be subjected to the protection guaranteed under section 388 of the CPA. It was held as such on the ground that Cap. 1 is not a standalone Act as the same is applicable to other written laws enacted before or after it but such application may cease when there is express provision to the contrary from the other law or if there is inconsistent of application with the

desired intent and object of the Act or any other subject within the context of any other Act. These may be seen under section 2(2) (a) and (b) of Cap. 1.

The court concluded that the word "shall" under CPA is not mandatory. It also established a test that has to be called into scale in case there is non-compliance with the requirement under section 293 of the Act which is whether or not such omission has caused injustice. The two quotes below may suffice to appreciate the court's positions:

> It is our decided opinion that where an accused person is represented by an advocate then if a judge overlooks to address him/her in accordance with s. 293 of the CPA the paramount factor is whether or not injustice has been occasioned.

It was finally concluded that: 'It is our considered view that the word "shall" in the CPA is not imperative as provided by s. 53(2) of Cap 1 but is relative and is subject to s. 388 of the CPA.' There is a long list of cases which were decided on the same line of reasoning in as far as the impact of section 388 of the CPA is concerned when it comes to the use of the word shall.[33]

The significance of this case is on the interpretation of the word shall in matters of a criminal nature handled within the spectrum of the CPA. The court disregarded the word being treated as imperative and that it has to be subjected to another provision of the Act. The words may also not be regarded as mandatory by considering the reminding observation made by the court that the provision under Cap. 1 that makes shall mandatory cannot be applied as a detached Act thus when subjected to other laws and Cap. 1 appears to be contrary or inconsistent or contrary with any other Act, application of the Law of Interpretation Act will be disregarded.

Non-compliance with the word shall in relation to procedural law was also subject to the court's interpretation in *Mwalimu Paul John Mhozya v. Attorney General*.[34] In this case the applicant applied for an interlocutory injunctive order to restrain the respondent by then the President of the URT from continuing to exercise presidential powers pending disposal of the Civil Case No. 206 of 1993. The application was confronted by the notice of preliminary objections by the respondent with several points one among them being the competence of the applicant's affidavit.

33 See *Vuyo Jack v The Director of Public Prosecutions,* Criminal No. 334 of 2016 (unreported), *Goodluck Kyando v Republic* [2006] T.L.R. 363, *The Director of Public Prosecutions v Freeman Aikael Mbowe & Esther Nicholas Matiko*, Criminal Appeal No. 420 of 2018 (unreported.)

34 1996 TLR 130 (HC).

Substantively, the learned State Attorney faulted the competence of the applicant's affidavit in support of the application to the extent that the affidavit is fatally defective for non-compliance with the provisions of Order XIX rule 3(1) of the Civil Procedure Code. Rule 3(1) alleged to have been violated reads:

> Affidavits shall be confined to such facts as the deponent is able of his knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted.

Notwithstanding the fact that the provision claimed not to have been complied with by the applicant containing the word shall, the court opted for a route of dealing with substantial justice rather than focusing on the strict application of procedural rules. In doing so, a scale was on the possibility of remedying the defect without causing prejudice to the other party. A script from the court's judgment on this reasoning can suffice.

> It is the function of a court of justice to try to get to the bottom of the real dispute and to determine what the real issues in the matter are before it provided, of course, no party can be prejudiced. As already remarked, substance rather than form should be the courts' primary concern. If legal steps can be taken to cure any defects in a pleading or an affidavit, without substantially prejudicing with the opposite party, a court of justice should grant leave to the party to take these remedial steps, if he so wishes.

Fairly, it can be said that even when there is noncompliance with a certain statutory provision, if such apathy to adhere to the spirit and the letter of the law can be rectified without causing injustice to the adverse party the non-complied provision cannot be construed with an imperative notion to the extent of defeating substantial justice desired to be administered by the court.

There is no shortage of court decisions with regard to the construction of a word shall as a directory.
The case of *Fortunatus Masha v. William Shija and Another*[35] forms part of that long list. The case was an appeal before the Court of Appeal against the ruling of the High Court on a matter pertaining to an election petition. When the appeal was due for hearing learned counsel for the first respondent, advanced a preliminary objection in terms of Rule 100 of the Court of Appeal Rules. For the sake of relevance, only the first point of objection will be considered. In substance, that point was disputing that the notice of appeal was not in compliance with the requirements of Rule 76(3) of the Court of Appeal Rules and the format made under that Rule as set out in Form D of the First Schedule to the Court of Appeal Rules. The mentioned rule provides:

35 1997 TLR 41 (CA).

"Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision ..."

As a matter of fact, the lodged appellant's notice of appeal simply stated that the intended appeal was against the particular ruling of the High Court. Counsel for the respondent vigorously contended that failure to state whether the appeal was against the whole or part of that ruling was necessarily fatal. He drew the court's attention directly to the word shall as contained in the relevant rule and argued the same to have made the relevant requirement mandatory.

The advocate for the appellant did not find it hard to concede on the anomaly but with a different view on the fatality of the same. It was submitted that such non-compliance was not fatal. On its ruling to the objection, the court was not amused or rather convinced with the submissions by the counsel for the respondent and hence declined an invitation to sustain the objection and struck out the appeal on this ground. In its reasoned ruling, the court stated that: 'Failure by a party to state whether the intended appeal is against the whole or part only of the decision does not in any way prejudice the opposite side.'

Regarding the submissions that the word shall in the cited rule makes the requirement mandatory the court's view was to the contrary with the view of the respondent's counsel. While rejecting that line of reasoning the court pronounced itself in the following words:

> We think that the use of the word `shall' does not in every case make the provision mandatory. Whether the use of that word has such effect will depend on the circumstances of each case. For our part we think that the word "shall" in Rule 76(3) does not have the effect of making that provision mandatory, nor do we think that Parliament can have intended so.

The stance reached by the court of not regarding the word shall in that rule to be imperative based on the effect of failure to comply with it which according to the court such failure does not attract any serious fatality. In its own words, the court stated:

> For these reasons we think that the failure to comply strictly with the provisions of Rule 76(3) was not fatal, and if this was the only ground of objection to the appeal we would not sustain the objection, although of course we stress the importance of complying with the Rules.

5.0 Judicial Interpretation vis-a-vis General Principles of Statutory Interpretation

This part addresses the gist of general rules of statutory interpretation and how they have been applied in interpreting the word shall. Courts have resolutely applied established rules of interpretation as seen above. Generally, the rules used in statutory interpretation fall into three categories. The rules are; the literal rule, golden rule and mischief rule. Each rule has a specific role distinct from others.

The primary rule on the construction of statutory provisions is to stick to the literal / ordinary/plain meaning of the words of provision[36]. The rule referred to is commonly understood as the plain, dictionary or literal meaning of statutory interpretation[37]. Under this rule, as long as the words of the statute are clear, courts are enjoined to give literal meaning when construing them without examining other rules of statutory interpretation. The High Court of Kenya spoke louder on this in *Council of County Governors v. Hon. Attorney General & another*[38] through the following words:

> There are numerous rules of interpreting a statute, but in my view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive.

From the case above, the literal rule is preferred when construing the provision of a statute unless there is a clear intent of the lawmaker to the contrary. In the absence of such legislative intent, the words of a statute have to be taken as they are or in their ordinary sense. Importantly, for the rule to be preferred, the court must ensure that words interpreted are clear to the extent of not inviting ambiguities if they are interpreted literally.-In *Dupont Steel v. Sirs*[39] at 541, Lord Diplock emphasized that: 'Where the meaning of the statutory word is plain and unambiguous, it is not for the Judges to invent fancied ambiguities as an excuse for failing to give effect to that plain meaning.'

A similar trend of discouragement against overzealous ambiguities was addressed in another case of *IRC v. Rossminster Ltd.*[40] thus: 'Courts must not be over-zealous to search for ambiguities or obscurities in words which on the face of them are plain.'

36 It is said so because one of the cardinal rules of construction is that courts should give legislation its plain meaning.
37 It is sometimes referred as the dictionary meaning of statutory construction.
38 Constitutional Petition No. 56 of 2017, High Court of Kenya at Nairobi.
39 [1980] All ER.
40 119801 AC 952 at 1008.

The rule cannot be used blindly since there are conditions *sine qua non* for it to apply. To be viable, words subject to interpretation are supposed to be *clear, unambiguous, straightforward* and *direct*. Further to that, the provision to be construed must show a clear intent of the legislature for the rule to be used. Because in interpretation, courts are expected to give life to the intention of the lawmaker instead of stifling it.

When these conditions prevail, a court cannot shift focus to other rules of construction. A similar position was stated in the case of *Republic v. Council of Legal Education & Kenya School of Law & 2 Others*[41] as follows:

> 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.

Briefly, what the court has to focus on is what the provision says without further ado as to the technical import of the words of that provision. Courts have applied the rule in several cases as unveiled here. For instance, the Supreme Court of the US in the case of *Caminetti v. United States*[42] *(*was cited with approval by the Court of Appeal of Tanzania sitting in Bukoba in the case of the *Republic v Mwesige Godfrey & Another*[43], stated the following words regarding the literal rule:

> It is elementary that the meaning of a statute must in the first instance, be sought in the language in which the act is framed, and if it is plain ... the sole function of the courts is to enforce it according to its terms [...].

The other decision by the same foreign court which was also cited in Mwesige's case above is that of *Consumer Products Safety Commission et al. v. GTE Sylvania, Inc. & Others*,[44] where the court observed the following:

> […] the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absenting a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

The use of literal rule may be beneficial in several ways namely; it weeds out the decision maker's self-opinion, encourages parliamentary supremacy by

41 High Court of Kenya at Nairobi, Judicial Review Division, Judicial Review No. 703 of 2017.
42 242 U.S. 470 (1917).
43 Criminal Appeal No. 355 of 2014 CAT at Bukoba (unreported).
44 227 U.S. 102 (1980).

focusing on the will of the legislature[45], upholds the separation of power, encourages drafting precision and promotes certainty and reduces litigation[46].

On the flip side, there is a plethora of critics of the deployment of the rule in statutory interpretation. The criticisms given revolved around injustice that can be stirred up by the rule and the impossibility of absolute precision of legislative enactment. The disadvantages of the rule are as follows: strict application of literal meaning can lead to injustice, creation of loopholes in law due to regular change of meanings[47];it may also attract uncertainty since words can have diverse meanings and also, literalism is not always feasible since statutory provisions cannot be enacted free from any sense of ambiguity[48].

As it is known, the general proposition of law is not an absolute principle of law, thus despite the circumstances upon which it may be applicable there is an exception for sidelining the rule even when the words of a statute are plain. Such exception is if the words of the statute are not clear and the use of literal rule will lead to absurdity or injustice the court will be justified to resort to another canon of interpretation as long as the interest of justice requires so.

Additionally, the chief aim of statutory interpretation is to achieve the purpose of enactment. Thus, if such purpose will be defeated by applying the literal rule, using another rule is justifiable if it will give effect to the statute. Dr. Sanjeev Kumar Tiwari in his article on interpretation[49] made this crystal as follows: 'The ordinary meaning of language may be overruled to effectuate the purpose of the statute.'[50]

5.1 Golden Rule

In interpretation, the literal rule is not one-size-fits-all for the reasons stated above. Thus, if for such reason(s) the rule cannot be used another cannon of interpretation called the golden rule may be resorted to. In case the literal rule may lead to absurdity, inconsistency or repugnance, the golden rule may be used to avoid subverting the administration of justice. The rule is a result of the judicial initiative to have an alternative means of dealing with the futility of the

45 Because it is believed that words best declare the intention of the lawgiver.

46 'Critical Analysis of the Literal, Golden, and Mischief Rules' (Lawteacher.net, January 2023) <https://www.lawteacher.net/free-law-essays/administrative-law/critical-analysis-of-the-literal-golden-and-mischief-rule-law-essay.php?vref=1> accessed 9 January 2023.

47 Ibid.

48 'Advantages and Disadvantages of the Literal Rule' (Lawteacher.net, January 2023) <https://www.lawteacher.net/free-law-essays/constitutional-law/advantages-and-disadvantages-of-the-literal-rule-constitutional-law-essay.php?vref=1> accessed 9 January 2023.

50 S.K. Tiwari, 'Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions', 2 International Journal of Law and Legal Jurisprudence Studies 2.

literal rule and facilitate the administration of justice. It was defined by Lord Wensleydale in the case of *Grey v. Pearson*[51] as follows:

> The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no farther.

The use of this rule is worthwhile when the words of a statute are not clear such that, to apply them in a literal sense may occasion injustice. To ensure avoidance of repugnance, absurdity or inconsistency the court is expected to depart from the grammatical and ordinary sense of words and make necessary modifications to achieve the intended purpose of the lawmaker.

Because the rule is open for certain modifications to ensure interpretation free from absurdity or repugnancy, this approach is also called the modifying method of interpretation. The assumption under this rule is that lawmakers cannot intend to make a law to cause absurdity or inconsistency thus, when construing statutory provision possible occurrence of such absurdity or repugnancy must be avoided through necessary modification.
It should be understood that the primary aim of the golden rule is to achieve the purpose of the lawmaker[52]. This duty is regarded as the most important on the shoulders of the judiciary when giving effect to statutory provisions. Quite obviously, the duty cannot be discharged if repugnancies or absurdities are entertained because no parliament can embark on enactment to cause repugnancy. To achieve this duty the court is required to ascertain that purpose whether the same is express or implied. The reflecting words on this were stated by Tshewang Dema as follows:[53]

> The primary and foremost task of a court in interpreting a statute is to ascertain the intention of the legislature, actual or imputed. The words of the statute are to be construed to ascertain the mind of the legislature from the natural and grammatical meaning of the words which it has used.

Words with similar reflections were stated by another author of Indian origin called Geraj in his scholarly work regarding Interpretation of Statues. He said: 'The object of interpretation of statutes is to determine the intention of the legislature conveyed expressly or impliedly in the language used.'[54]

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51 (1857).

52 It is necessary to ensure the intent of the legislature is achieved through statutory interpretation because a statute is regarded as the will of the Legislature thus it is fundamental to ensure that it is expounded, according to the intent of them that made it.

53 T, Dema, Golden Rule of Interpretation accessed online via https://sociallawstoday.com/golden-rule-of-interpretation-and-cases/ on 15 February 2024.

54 G, V, Wilfer, Interpretation of Statutes, Study Material Submitted to School of Excellence in Law, at p.5.

Instead of just seeking to modify the words of a statute, the modern application of the rule goes far beyond by focusing on various factors such as; the context, the object of the statute and the circumstance in which the statute is used. This modern approach was summed up by Lord Atkinson in *Victoria (City) v. Bishop of Vancouver Island*.[55] The summation is coached with these words:

> In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense.

Like the previous rule, this rule has both benefits and challenges in its application. To start with the former, it gives the court a leeway to modify to avoid construing an enactment with avoidable absurdity. Such modification serves to purpose at a go namely, ensuring sound administration of justice and development of jurisprudence. Most importantly, the golden rule gives life to the object upon which the law was made. It, therefore, reflects on the reason why certain enactment exists and tries to construe the law to achieve that reason. Focusing on the spirit of the legislature signifies the importance of the law in question hence making the legislative role of the legislature useful.

On the other side, the golden rule may be perceived as a tool used by the judiciary to surpass the domain of the legislature by over-stretching statutory provisions beyond the desired spirit through a modification approach. This is because there is no exact test of what amounts to absurdity. Therefore, one judge may consider absurdity while another may not. Therefore, whilst the golden rule has the advantage of avoiding absurdities, it has the disadvantage that no test exists to determine what is absurdity.[56]

5.2 Mischief Rule

The meaning of this rule can be explained by referring to its name.[57] It focuses on interpretation by considering the mischief that led to the passage of the Act subject to the interpretation. The one construing the provision is required to be abreast about the mischief that existed before the enactment of the Act in question to give effect to the remedy provided by such Act to achieve its object. The underlying aspect of this rule focuses on the question of why the Act was enacted. Under this rule, the one bestowed with the power to interpret the law is required to focus on the historical circumstances under which a particular law was enacted. Through this wider view, the court can ascertain the existing injustice that led to the enactment of the law subject to interpretation.

55 [1921] AC 384 at p.387.
56 https://sociallawstoday.com/golden-rule-of-interpretation-and-cases/.
57 The rule is called mischief because the intent is to cure the mischief rather than to perpetuate the same.

By so doing, the court is required to construe the statutory provision in a manner that does not allow the injustice to persist. The case of *Republic v. Hon. Musikari Kombo for Local Government & Others*[58] supports this reasoning by the following words:

> The Mischief Rule is a rule of interpretation of statutes ... It lays down the proposition that before arriving at any particular interpretation of the statute, the court will consider and be aided by establishing what the law was before the statute was enacted or amended, the injustice or mischief which existed before the enactment of the statute, and would the interpretation of the statute in the matter before Court perpetuate that injustice or mischief which existed before the enactment of the law.

The landmark case towards the development of this rule is the case of *Heydon* decided in 1584. Due to the contribution of this case, the rule has come to be known as the Heydon's rule. It suffices to say that the case propounded four important things which are instrumental when applying the mischief rule to wit; what was the common law before making an Act, what was the mischief for which the present Statute was enacted, what remedy did the parliament sought or had resolved and appointed to cure the disease and the true reason of the remedy. If those aspects are considered, the court will be able to give the interpretation based on the purpose of the rule which is to suppress the mischief and advance the remedy.

In home jurisdiction, this rule had been in use on various occasions during justice delivery. For instance, in the celebrated case of *Bi Hawa Mohamed v. Ally Sefu* the Court of Appeal of Tanzania invoked the mischief rule in interpreting the provision of the Law of Marriage Act concerning the division of matrimonial property.

6.0 Integration between the Canons of Statutory Interpretation and the Word "shall"

A few things may be addressed about the use of common rules of statutory interpretation in line with the word "shall". The applicability of any rule of statutory interpretation may be faced with a word that "shall" forms part of a provision subject to interpretation. In such a case, the established principles (i.e. those covered above) for each cannon will prevail. Therefore, if the literal rule is to be used and the provision in question contains the word "shall", then the words of a statute must be clear and free from any form of ambiguity. The provision will then be construed as mandatory or directory based on how it was crafted. In the event such provision will attract absurdity, if the literal rule is used, the safe route to be taken will be the deployment of the golden rule by

58 Misc. Civil Application No. 1648 of 2005, HC of Kenya at Nairobi.

modifying the provision to achieve the object of the interpreted statute. Below are some of the cases showing how judicial decisions are made by using literal rule when the word "shall" forms part of the interpreted provision.

In *Board of Trustees of National Social Security Fund v. Multstruct Tanzania Limited*[59], the court was asked to determine a point of preliminary objection against the plaintiff for non-joinder of the Attorney General contrary to the requirement of section 10 of the Government Proceedings Act which reads as follows:

> Subject to the provisions of any other written law, civil proceedings by or against the Government *shall* be instituted by or against the Attorney-General […]. (Emphasis supplied)

In determining the matter, the court applied a literal rule by treating the requirement of joining the Attorney General as mandatory because there was a word shall in the provision in question. The plain rule was applied by treating shall as mandatory since the words in the relevant section were clear and unambiguous hence, the court found no reason to apply the rules other rules which could affect the word shall as applied in the cited provision. In so doing, the court maintained that to do otherwise would be diverting from the literal meaning of the law. Consequently, the objection was sustained and the suit got struct out for being incompetent for non-joinder of the necessary party.

Another case is that of *Boniventura s/o Samwel v. Michael & 2 Others,*[60] in this case, the applicant applied for an extension of time, seeking leave of the court to appeal out of statutory time. The application met with a notice of preliminary objection by the respondent. The gist of the objection based on non-compliance by the applicant to attach the petition of appeal or grounds of objection to the decision or order as required by rule 3 of the Civil Procedure (Appeal in Proceedings Origination in Primary Courts) Rules,1964.[61] The rule provides:

> An application for leave to appeal out of time to a district court from a decision or order of a primary court or to the High Court from a decision or order of a district court in the exercise of its appellate or revisional jurisdiction shall be in writing, shall set out the reasons why a petition of appeal was not or cannot be filed within thirty days after the date of the decision or order against which it is desired to appeal, and *shall be accompanied by the petition of appeal or shall set out the grounds of objection to the decision or order*. (Emphasis supplied).

59 Civil Case No. 197 of 2022, High Court of Tanzania, (Dar es Salaam Sub-Registry) at Dar es Salaam (unreported).

60 Miscellaneous Civil Application No. 2 of 2021, HCT Sumbawanga District Registry at Sumbawanga (unreported).

61 Government Notice No. 312 of 1964.

The court was persuaded by the argument of the respondent's counsel that the requirement of attaching the petition of appeal or grounds of objection is mandatory as per the law.

In making a ruling, the court applied the literal rule since the words in the said rule were clear and the same were treated as mandatory. On that account, the court struck out the application with costs for failure to abide by the law.[62] In the cited cases, the court applied the literal rule and construed the word "shall" as mandatory because the provisions subject to interpretation were clear and there was no absurdity or prejudice to be suffered by any of the parties involved. Whereas, suppose the statutory provision calling for judicial interpretation has a word "shall" and the rule to be used is mischief. In that case, the focus of the court will not be on the mandatory or otherwise of a word shall but rather, on the spirit behind the enactment of the law to ensure the intended mischief is cured through interpretation.

In another case of *Deodatus Rutagwerela v. Deograsia Ramadhan Mtego*[63] an appellant filed a matrimonial appeal before the High Court. The respondent through a notice of preliminary objection on point of law challenged the competence of the appeal on the basis of forum used saying that it offends section 80(2) of the Law of Marriage Act.[64] The said section provides:

> An Appeal to the High Court, *shall* be filed in the magistrate's court within forty five days of the decision or order against which the appeal is brought. (Emphasis supplied).

In disposing the objection, the court applied the literal rule (though it did not state it expressly) by construing the words shall to be mandatory. It maintained that the provision makes it mandatory that the appeal against any decision or order in a matrimonial proceeding must be filed in the court that tried it. The court added, there is no mischief that requires constructive interpretation, and or purposive interpretation of the provision of section 80(2).

The court has also applied the golden rule by looking into the intention of the legislature in making the law and construed the statutory provision with the word shall to be directory. In the criminal appeal of *Peter Michael Madeleka v. Republic*.[65] The appellant challenged the decision of the lower court, one of the grounds of appeal being failure, by the lower court, to consider the dictates of the law under rule 21 (3) (a) of the Plea Bargaining Rules (2021) where the rule reads:

63 Matrimonial Appeal No. 2 of 2020 High Court of Tanzania at Iringa (unreported).
64 Cap. 29 R.E. 2019.
65 Criminal Appeal No. 160 of 2022 High Court of Tanzania Arusha District Registry at Arusha (unreported).

> 21.- (3) Where the plea agreement involves compensation, the court shall ensure compensation is paid to
> (a) in the case of government or a government institution, the Treasury Registrar.

When submitting the said ground, the appellant argued that the words of the cited law are unambiguous and hence they have to be given plain meaning. Essentially, the appellant was faulting the court's failure to consider the mandatory provision on payment of compensation to the Treasury Registrar and not to the Director of Public Prosecution as it was a case in the impugned decision. In dealing with the above ground the court applied the golden rule by looking into the intent of the statute instead of focusing on the imperative nature of the word "shall" as used in the rule.[66] In doing so, the court stated that: 'I disagree with the appellant that the said rules are mandatory despite being prescriptive of what needs to be done in the circumstances presented in plea bargaining negotiation and arrangements.' Having disagreed with the appellant, the court construed the rule by focusing on what did the law intend to achieve. It stated: 'So, I would certainly construe that the intention of the statute is to have the money paid ultimately destined to the Government Consolidated Fund.'

Therefore, if the court applied the literal rule the appellant would be right that the compensation was paid to the DPP whilst the law makes mandatory (*i.e.*, because of the use of the word shall) for such compensation to be paid to the Treasury Registrar. However, the court invoked another rule of interpretation which consequently led to the ground of appeal to be rejected.

For the application of the mischief rule in line with the word shall a case of *Bestcom Company LTD v. Jacob Mtalitinya t/a IT Farm*[67] sheds light. In that case, the court raised an issue of jurisdiction *suo motu* to ascertain if it had jurisdiction to try the case. When an advocate for the plaintiff was given a right to address, he submitted that the court had jurisdiction because the case was of a commercial nature whose pecuniary value exceeded 30 million. He cited amendments to section 40 of the MCA through the Written Laws (Miscellaneous Amendments) (No. 2), Act (2004)[68] providing to the effect that:

> Notwithstanding subsection (2), the jurisdiction of the District Court *shall*, in relation to commercial cases, be limited-

66 The court stated further that; "While interpreting the question of whether a provision of law that contains the word 'may' or "shall" is mandatory or directory, the prime rule that should be followed for such interpretation is ascertaining the true intention of the legislature considering the entire statute."

67 Civil Case No. 160 of 2012, High Court of Tanzania (Dar es Salaam District Registry) at Dar es Salaam (unreported).

68 Act No. 4 of 2004.

(a) *Not relevant.*
(b) In the proceedings where the subject matter is capable of being estimated at a money value, to proceedings in which the value of the subject matter does not exceed thirty million shillings. (Emphasis supplied).

On account of the above provision, the advocate maintained that the court had jurisdiction to try the case. The court was not impressed by the submission and stated that if the provision is interpreted literally, it would show that the court has jurisdiction however, that interpretation could defeat the mischief intended to be cured by the amendments introduced by Act No. 4 of 2004 which was to rescue the Commercial Division of High Court from the threat of redundancy and reduced revenue that was encroaching upon it and not to completely remove the power of District Courts to entertain commercial cases whose value was beyond 30 million.

Hence, the court did not stick to the word shall and construed it differently to achieve the mischief intended to be cured by the Act and proceeded to strike out the suit for want of jurisdiction. Despite the provision having the word shall, it was not construed as mandatory hence the court said it did not have jurisdiction the trigger factor being the mischief and not compelling nature of the word shall. That is to say, if interpreting the statute as mandatory will enable dealing with the mischief it will be construed as such. Conversely, if the mischief may be handled by treating the provision as a directory, it cannot be construed otherwise. Regardless of the applicable rule, the bottom line when construing the provision with or without a word shall must always be, to achieve the intent of the maker of that law[69]. This implies, that if the use of one rule interferes with such object the interference amounts to a justification for the use of another rule to achieve the net effect which is the purpose of that law.

7.0 Suggested Guidance on Interpretation of the Word "Shall"

Having discussed the cases and various approaches deployed by the courts of law on the interpretation of the word shall deployed in various statutory provisions there is a pressing need to suggest guidance which may be adopted when dealing with the interpretation of such word in the course of administration of justice. It must be understood that the guidance to be provided under this part does stand as immutable rules of interpretation because it is believed that no universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. With that view in mind, the prospective guidance will only play a role of aid in interpretation and the same may vary

69 Because a statute is regarded as the will of the legislature.

depending on the context of each case as no single guidance can have the quality of one size fits all.

When a court of law or a quasi-judicial body is faced with a situation of determining a statutory provision on whether it has to be construed as imperative or permissive the main guidance towards the discharge of that duty must always be on what the legislature intended when enacted the relevant piece of legislation subject for interpretation. Reliance on this guidance will give the court the freedom of not being captive of rigidity in interpreting the law but instead focusing on the actual intent of those who made the law. A leaf on this guidance was taken from the finest words of Dr. Tiwari who narrated the following:

> In determination of the question, whether a provision of law is directory or mandatory, the prime object must be to ascertain the legislative intent from a consideration of the entire statute, its nature, its object and the consequences that would result from construing it in one way or the other, or in connection that with other related statutes, and the determination does not depend on the form of the statute.[70]

The question of legislative intent in relation with the mandatory and directory nature of statutory provisions was fortified by the Supreme Court of India in the case of *Hari Vishnu Kamath v Ahmad Ishaque*[71]

> *The various rules for determining when a statute might be construed as mandatory and when directory are only aids for ascertaining the true intention of the legislature which is the determining factor,* and that must ultimately depend upon the context. (Emphasis supplied).

While ascertaining if the provision is mandatory or permissive courts are urged to give interpretation while foreseeing the probable effect that may result from the outcome of whatever interpretation given to the interpreted statutory provision to serve substantial justice instead of sticking with the perceived rigid interpretation that occasion injustice.

No statutory provision can be treated as a standalone instrument particularly for interpretation purposes. In line with this principle, any provision with the word "shall", should also be construed in observance with other provisions of the same Statute or provisions from other legislations relevant for interpretation.

In respect of procedural laws, if the court is obliged to give interpretation of the provision of the law which caters for procedural rule consideration should not

70 *Op.cit* fn 50.
71 AIR 1955 SC 233.

heavily be directed on looking into mandatory or director criteria of the provision. Because doing so may lead to the defeat of the spirit of the rule instead of acting as a pivot for the administration of justice.

Thus, the suggested guidance under such a scenario is for the court to weigh out if the defect in the act done in pursuance of that provision can be cured by permitting appropriate rectification to be carried out at a subsequent stage unless according to such permission to rectify the error later on another rule would be contravened[72]. This guidance is given in a situation when a certain act has been done in disregard of a particular rule of procedure and therefore the court is called upon to decide as to the fate of that non-compliance.

However, if the rule of procedure which is subject to interpretation is followed by another rule providing to the effect that failure to comply with such rule will cause injustice or inconvenience that rule despite being of procedural nature must be treated as imperative for the sake of preserving justice.

It also guided the interpretation of a statute in relation to the determination of whether the provision is mandatory or directory must also consider the purpose upon which the statute in question was enacted. Here, the focus must be directed towards the object behind the enactment of the Act which has to be interpreted. It is because of this in the majority of legislations there are provisions catering for the objectives intended to be achieved.[73] In another Indian case of *Chandrika Prasad Yadav v. State of Biharwith*[74] useful persuasive contribution on this guidance it was observed:

> The question as to whether a statute is directory or mandatory would not depend upon the phraseology used therein. The principle as regards the nature of the statute must be determined having regard to the purpose and object the statute seeks to achieve.

The suggested guidance plays a crucial role in construing statutory provisions in the sense that if construing it as an imperative provision it will defeat the very object of the Act such construction may be disregarded. On the equal force, when regarding the provision as a mere directory it is the purpose of the Act that will affect the advisable interpretation is to treat the provision as mandatory. Further support for this guidance is sought from the wording of Dr. Tiwari in his preceding cited scholarly work[75] when he maintained the following:

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72 *Op.cit* fn 50.

73 See, for example, Section 3 of the Employment and Labour Relations Act [Cap. 366 R.E. 2022], section 5 of the Wildlife Conservation Act [Cap. 283 R.E. 2022] and section 4 of the Personal Data Protection Act [Cap. 44 of 2022].

74 2004 6 SCC 331.

75 *Op. cit* fn 50.

> If an object of the enactment is defeated by holding the same directory, it should be construed as mandatory; whereas if by holding it mandatory serious general inconvenience will be created for innocent persons of the general public without furthering the object of enactment, the same should be construed as directory but all the same, it would not mean that the language used would be ignored altogether.

8.0 Conclusion

In conclusion, delving into statutory interpretation using the term “shall” emphasizes the intricate nature and importance of judicial scrutiny in understanding legislative intent. Thoroughly analyzing various legal contexts and precedents reveals that interpreting "shall" requires a nuanced grasp of statutory language, legislative history, and judicial reasoning. The findings in this scholarly work underscore the dynamic interaction among language, law, and judicial decision-making, stressing the courts' need to balance textual faithfulness with broader legislative goals. As legal professionals and scholars navigate the complexities of statutory interpretation, studying "shall" vividly illustrates how language choices profoundly impact legal outcomes and showcase the ongoing evolution of interpretative approaches in the judicial realm.