African Gas and Oil Limited v Kahia Transporters Limited & 6 others; County Government of Mombasa & 2 others (Interested Parties) (Environment & Land Case E012 & E004 of 2023 (Consolidated)) [2025] KEELC 3139 (KLR) (4 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3139 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE E012 & E004 OF 2023 (CONSOLIDATED)

LL NAIKUNI, J

APRIL 4, 2025

BETWEEN

AFRICAN GAS AND OIL LIMITED ..... PLAINTIFF

AND

KAHIA TRANSPORTERS LIMITED ..... 1ST DEFENDANT

CABINET SECRETARY MINISTRY OF ENVIRONMENT AND FORESTRY ..... 2ND DEFENDANT

CABINET SECRETARY MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT ..... 3RD DEFENDANT

KENYA FOREST SERVICE ..... 4TH DEFENDANT

DISTRICT LAND REGISTRAR, MOMBASA ..... 5TH DEFENDANT

CHIEF LAND REGISTRAR ..... 6TH DEFENDANT

ATTORNEY GENERAL ..... 7TH DEFENDANT

AND

COUNTY GOVERNMENT OF MOMBASA ..... INTERESTED PARTY

NATIONAL LAND COMMISSION ..... INTERESTED PARTY

MKUPE BEACH MANAGEMENT UNIT [BMU] ..... INTERESTED PARTY

RULING

I. Introduction

1. This Honourable was tasked with the determination of two (2) Notice of Motion applications before it. The said applications were filed by the 1st Defendant/Applicant herein, Kahia Transporters Limited dated 4th October, 2024 and 30th October, 2024 respectively. Nonetheless, for good order the Court will first and fore – most deal with that of 30th October, 2024 and subsequently proceed with the other.

2. The application dated 30th October, 2024 was brought under the provision of Articles 10, 25 (d), 47, 48, 50 & 159 (2)(d) of *the Constitution* of Kenya, 2010, Sections 4 (1) and (2) *Fair Administrative Action Act*, 2015, Sections 1A, 1B, 3, 3A & 80 of the *Civil Procedure Act*, Cap. 21, Order 45 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling Provisions of the Law.

3. Upon service of the applications, while opposing it the Plaintiff/Respondent filed a Replying Affidavit dated 4th December, 2024. At the same time, the 1st, 2nd, 3rd, 4th, 5th , 6th & 7th Defendants/Respondents filed their replies dated 29th January, 2025 hereof. Further, the 3rd Interested party also filed Grounds of Opposition dated 29th January, 2025. The Honourable Court will be dealing with them at a later stage of this Ruling.

II. The 1st Defendant/Applicant's case

4. The 1st Defendant/Applicant sought for the following orders:-

    a. Spent.

    b. Spent.

    c. That the Honourable Court be pleased to stay its orders dated 22nd October 2024 and discharge its subsequent orders for mitigation and sentencing scheduled for 25th November 2024.

    d. That the Honourable Court be pleased to be review, vary and/or set aside its orders dated 22nd October 2024 and proceed to hear and determine the Respondent's Application dated 4th October 2024 on merit

    e. That the Applicant be granted leave to file its substantive response to the Respondent's Application dated 4th October 2024 and allow the Respondent's Application dated 4th October 2024 to be heard on merit.

    f. That the costs of this Application be provided for.

5. The application by the 1st Defendant/Applicant herein was premised on the grounds, testimonial facts and averments made out under the 35 Paragraphed Supporting Affidavit of Osman Ahmed Kahia, the director of the 1st Defendant/Applicant sworn and dated the same day as the Application averred that:

    a. The Honourable Court issued ex - parte orders dated 6th September 2023 in respect of the Respondent's Application dated 31st August 2023 allowing the Respondent unfettered access and use of the suit property, a property legally vested on the Applicant with absolute proprietary interests. The said ex parte orders were confirmed vide the Ruling of this Court dated 7th October 2024, where after, a subsequent Decree dated 15th October 2024 was extracted and served upon the Respondent. Annexed in the affidavit and marked as "OAK –

1" were copies of the Orders dated 6th September 2023 Ruling dated 7th October 2024 and 15th October 2024.

b. Upon the delivery of the said Ruling, the Respondent filed the Application dated 4th October 2024 seeking the Applicant herein to be cited for contempt for alleged disobedience of the Court orders issued on 6th September 2023.

c. When the said Application was filed, it did not receive any directions until 7th October 2024 when a Ruling in respect of the Respondent's Application dated 31st August 2023 and the Applicant's Application dated 18th September 2023 was being delivered, where the Court directed parties to file and exchange responses and scheduled the hearing of the said Application for 22nd October 2024. On 22nd October 2024, the Applicants Advocate inadvertently failed to attend the virtual Court due to mis-diarization of the date for 22nd November 2024 instead of 22nd October 2024. Further, the Applicant's Advocate failed to file and exchange responses because he wrongfully captured the window permitted for filing and exchange of responses as seventeen (17) days instead of seven (7) days.

d. The Applicant's Advocate was also overwhelmed with work schedule that he only realized the presence of the email serving the Hearing Notice issued by the Respondent's Advocate on 23rd October 2024. Owing to this regrettable omission and/or mistake on the side of the Applicant's Advocate, the Court proceeded to allow the Respondent's Application on the strength of the Affidavit of service filed by the Respondent's Advocate, thus, finding the Applicant in contempt of Court orders without hearing its side of the case.Annexed in the affidavit and marked as "OAK – 2" was a copy of the Orders dated 22nd October 2024.

e. The Respondent seemed to had misunderstood the import of the Court's order dated 6th September 2024 by thinking that it granted it the leeway to evict the Applicant and dump sewage and industrial waste on the suit property. This could be seen from the Respondent continued release of industrial refuse and sewage on the suit property which kept the suit property constantly soaked, contaminated and waterlogged.

f. The Respondent was adamant in this practice because owners of neighboring parcels of land under Vikobani South Community, are also complaining of the same occurrences of rampant pollution and contamination of water by the Respondent to the National Environmental Management Authority (NEMA) vide a letter dated 12th February 2024. The said letter reveals that the Respondent was actively polluting neighboring lands by releasing industrial refuse and sewage to neighboring lands thus making them constantly soaked and unfit for human use and contaminating water bodies. This Court as an environmental Court could not at least allow blatant degradation of the suit property and neighboring parcels. Annexed in the affidavit and marked as "OAK – 3" was a copy of the letter dated 12th February 2024.

g. It was not a surprise that all the suits filed by the Respondent against the Applicant all try to push one narrative that the suit parcel of land is a mangrove area, but failed to produce the beacon certificate that showed the beacons of the alleged gazetted mangrove area that show that the suit parcel of land was subsumed in whole or in part by the said gazetted mangrove area.

h. Of utmost absurdity was the flagrant degradation of environment by the Respondent by contaminating water streams within the suit property and the neighboring parcels of land by releasing industrial refuse and sewage on them. The children of the population living around the parcel of land swam on these contaminated streams as evident by the real time pictures taken on the suit property.

i. The Court could not at least allow blatant degradation of the suit property and neighboring parcels or the use of security apparatus to guard to eject people from their lawfully acquired parcels of land. Should the Court protect the Respondent's commercial interests at the expense of indefeasible ownership of parcels of land, public health and environmental degradation.

j. It was a fact that the Respondent had had constant undeterred presence at the suit property with or without security, with or without an order for access and use. Lately, they had been roaming the suit parcel of land under the security of hundreds of local security operatives, including the DCI, Police, and Kenya Forest Security enforcers, claiming to be undertaking repairs of the pipelines; this was after this Court's order dated 6th September 2023. They even wrote to the OCPD Makindani Police Station vide a letter dated 24th September 2024 seeking police assistance to maintain their gas pipes in a bid to cover up their activities and prevent public backlash.Annexed in the affidavit and marked as "OAK – 4" was a copy of the letter dated 24th September 2024).

k. After the Respondents and its agents were brought to the suit property in droves with security personal in the hundreds, with a of lot of Government vehicle presence, community members who came to witness what was happening and the guards of the Applicant were ejected and warned never to step foot on the suit property again. It seemed the Respondent mistook this Court's orders with eviction orders and they were now demanding and compelling vacant possession by using security operatives (See https://ahmednasirlaw:my.sharepoint.com/f:/g/personal/itahmednasirlaw/Et0xyL2xpx5JvEIKEGB3gNwB4PHhEltt Eiile QOyDSZlyA?e=QTyYiu). Annexed in the affidavit and marked as "OAK – 5" was copies of assorted photographs and videos saved in Alhua Flash disk Serial Number N8YM02D33040626).

l. With the continued release of the industrial refuse and sewage upon the suit parcel of land by the Respondent, the Applicant decided to bring upon the suit property heaped of soil and construction debris to redirect the industrial refuse and sewage from dry part of the land to the natural canals created by rain water to prevent continuous pollution, soaking and water locking of the suit parcel of land. These rain water canals about the Respondent's pipelines, when it rained, rain water always used these canals to run downstream, and have created canals through erosion which accosts the Respondents pipelines. The convenience was astonishing that rain water had never destroyed the Respondents pipelines while using the same canals their own industrial refuse and sewage was now using.

m. The orders alleged to have been disobeyed did not at any instance allow the Respondents to release their industrial waste upon the suit property and end up destroying, degrading and wasting away the suit property. There was no iota of sanity in destroying the suit parcel of land and then running to Court to sanitize one's misdoings. Justice demand that a party seeking redress of a dispute must come to Court with clean hands.

n. This Court deserved to take judicial notice that the Respondent is actively using criminal justice system as a pawn to these Civil proceedings to frustrate the Applicant and paint him as an immigrant, war load, Al-shabaab, MRC, land grabber, Wakali Kwanza, Wakali Wao, Drug peddler, Robber, Car breaker, ISIS terrorist and a goon hirer without any plausible reason or any iota of evidence. Through a letter dated 22nd October 2024, the Respondent had been named as the one who made these allegations while seeking police assistance to repair its pipes. The Respondent was seeking police assistance from General Duty Officers, Administrative Police Service, General Service Unit, National Youth Service, Kenya Forestry Service, County

inspectorate and National Intelligence Service to a tune of 60, 50, 50, 50, 50, 50 and 50 respectively. This force made up a total of 360 security forces. Annexed in the affidavit and marked as "OAK – 6" was a copy of the letter dated 22nd October 2024.

o. The Plan was orchestrated and well-coordinated that even DCI officers are continuously summoning the Applicant both in Mombasa branch and Headquarters vide the letters dated 27th February 2024 and 9th October 2024. Despite making a reply on the letter dated 27th February 2024 that there was need to investigate both the Respondent's and the Applicant's complains, they have all fallen on deaf ears and they continue to pursue the Applicant alone. How was the Respondent immune to investigations? Why should a matter be dealt with in peace meal? Annexed in the affidavit and marked as "OAK – 7" were copies of the letters dated 27th February 2024 and 9th October 2024.

p. Through the Respondent's unending complaints, security operatives were also yearning to deport the Applicant so he could abandon his properties. Were it not for Hon. Justice Mrima to halt such unconstitutional machination through a Judicial Review proceeding in the case of: "HCCHR Petition No.E413 of 2021: Osman Ahmed Kahia – Versus - The Inspector General of Police & 5 Others ex parte The Chief Licensing Officer, Firearms Licensing Board & another", the Applicant would have been forcefully been deported without trial. Even so, the attempt has not stopped at all, despite the Honourable Justice Mrima directing that it was the prerogative of the Investigative bodies to either investigate and recommend the prosecution of the Applicant or abandon it altogether, a Petitioner in a newly filed suit being "HCHRJR PET. No. E001 OF 2024-Julius Ogogoh Commission for Human Rights and Justice – Versus - CS. Ministry of Interior & Coordination of National Government. Principal Registrar of Persons". The Director of Immigration. The Ethics and Anti-Corruption Commission and the Honourable Attorney General ex - parte Osman Ahmed Kahia, Kahia Transporters Limited and Trade Lead Limited who was a henchman of the Respondent was seeking to press the Respondents therein to finish up investigations and deport the Applicant.

q. The bad faith portrayed by the law enforcement operatives, the Respondent, its Representatives should be brought to a speedy halt because the Respondent ultimate goal was to force the settlement of the civil disputes before court and other courts of competent jurisdictions including the Court of Appeal. It was trite that courts have time and again deprecated the initiation of false criminal proceedings in cases having the elements of a civil dispute. Despite several well entrenched Judgements and jurisprudence passed by apex courts against using criminal complaints as a weapon to settle civil disputes, there had been no change in the number of criminal complaints filed by the Respondent against the Applicant. It now became essential to not let such frivolous criminal complaints act as a bargaining weapon to attain a speedy settlement or to get the desired results in these civil proceedings and several others pitting the Respondent and the Applicant.

r. The corner stone of justice was never to use Criminal complaints as a means to intimidate people to achieve their goals of settling civil disputes became the duty of this Court to help uphold the principle of natural justice in the view of the Judgements passed by apex courts and make sure that civil disputes given the colour of criminal offence should be quashed. The conundrum facing the Applicant sits well within intimidation and misuse of criminal hospices.

s. It was within this Court's knowledge that the Applicant was awarded a whooping a sum of Kenya Shillings One Billion Four Hundred Million (Kshs.1,400,000,000/-) in respect of this suit parcel of land in respect of the compulsory acquisition by the National Land Commission for construction of SGR and Southern by-pass, what was the coincidence that now every

security operative in the country, immigration officers, Respondent, were more than willing to intimidate the Applicant, so that he can cower and never claim the fruits of the Judgement of this Court. The ultimate measure of bad faith was discernable without a struggle.

t. Justice demanded that parties to a claim must be heard unless it had become difficult to conduct a trial or dispose of an Application. Nothing in these proceedings suggest that the Applicant had ever made it impossible for the Respondent's Application to be heard on merit save for the Applicant's Advocate's inadvertence and honest mistakes. Such pitfalls ought not be the reason the Applicant's head was viciously being placed on a pike void of a meritorious trial

u. The Court ought to have extended the time for compliance by even seven (7) days. It was true that the matter was coming up for "inter parties" hearing for the first time, in order to facilitate the expeditious, judicious, effectual and impartial dispensation of justice, the Court ought to open its doors to the Applicant, so that it could champion its cause and reveal the very fact that the Respondent was insistently abusing this Honorable Court's orders by releasing industrial refuse on the suit property and seeking to evict it from its parcel of land without any plausible reason contrary to the edicts of the orders of this Court dated 15th October 2024.

v. The Contempt application had been filed to hoodwink the Court into punishing the Applicant yet the Respondent was the main cause of the problem. It could not be heard wailing the loudest yet it was the architect of its problem.

w. As rightly noted in the order dated 22nd October 2024 that contempt proceedings border criminality, and it is true that upon confirmation to the affirmative, it had ability to curtail the Applicant's freedom because of peripheral incarceration in civil jail attendant to the contempt proceedings. It was now a jurisprudential norm that incarceration ought to be an option of last resort.

x. It was instructive that this Honourable Court should be more inclined at administering substantive justice instead of procedural justice. Sentencing the Applicant without hearing it was akin to sacrificing justice at the altar of expedient disposal of the matter which would be contrary to the rule audi altarem partem, a key tenet of natural justice that guarantees and ensures every party to a suit was given the opportunity to state their case and further ensures that one was not condemn unheard void of which will be contrary to requirements of Articles 25 and 50 of *the Constitution*.

y. The Court ought to had extended the time for compliance by even seven (7) days. Doing so, would not had prejudiced the Respondent because in true sense they have taken over the suit property, they were dumping industrial refuse upon it and was indiscriminately using government operatives in the hundreds to lock out the Applicant from the suit property albeit the order dated 15th October 2024 granting access rights and not a right to evict the Applicant.

z. It was true that the matter was coming up for inter parties hearing for the first time, the inability of the Court not to extend the much-needed amnesty to the Applicant was a bit confusing yet the Applicant has not insistently failed to do as per the Court's directions.

aa. The Court ought not be used as pawn to settle parties' personal differences that exist in parties' private sphere. It was deserving of this Court as an impartial umpire to see through the procedural aspect of justice and accord the Applicant a chance to be heard on merit for without the much-needed fair hearing, serious miscarriage of justice would occur.

ab. In order to facilitate the expeditious, judicious, effectual and impartial dispensation of justice, the Court ought to open its doors to the Applicant, so that it could champion its cause and reveal the very fact that the Respondent was insistently abusing this Honorable Court's orders by seeking to evict the Applicant from his parcel of land without any plausible reason contrary to the edicts of the orders of this Court dated 15th October 2024.

ac. The Applicant believed that these were sufficient reasons to review, vary and or set aside the orders of this Court dated 22nd October, 2024 and stay the mitigation and sentencing and mitigation scheduled for 25th November 2024.

ad. Unless the orders of this Court dated 22nd October 2024 was reviewed and/or set aside, the Applicant's right to be heard and right to fair administrative action would have been trumped upon.

ae. Unless the orders of this Court dated 22nd October, 2024 were reviewed and/ or set aside, the Court would have turned a deaf ear to the Applicant.

af. It was in the interest of justice that the orders sought herein be granted as prayed.

III. Response by the Plaintiff/Respondent

6. The Plaintiff/Respondent through its Legal officer, JOSEPH MWELLA responded to the Application through a 27 Paragraphed Replying Affidavit sworn on 4th December, 2024 where he deposed that:-

a. TheApplication was frivolous, vexatious and an abuse of court process, which application ought to be dismissed at the first instance.

b. The Respondent obtained interim orders on 6th September 2023 which restrained the Applicant from blocking and/or denying the Respondent access over a portion of land registered as MV/VI/5169 which was encompassed in the Special Use Licence over the Kilindini Bay Mangrove Area.

c. The Applicant was served with the orders of the court and immediately moved the Court through its Notice of Motion Application dated 18th September 2023 seeking to set aside, vary and/or review the orders.

d. During the pendency of the inter parties hearing of the Respondent's Application dated 31st August 2023, the Applicant interfered with the Respondent's access to the suit property in contravention of the orders of the court.

e. Resultantly, the Respondent filed the Notice of Motion application dated 4th October, 2024 seeking to cite the Applicant's directors and one Osman Ahmed Kahia to be in contempt of the orders.

f. The Honourable Court issued directions on service and hearing of the Application. The Applicant and the contemnor were duly served as evidenced by the Affidavit of Service filed in court.

g. The Applicant's counsel was at all times aware of the scheduled hearing of the application but failed to attend court. Further, the contemnor Osman Ahmed Kahia despite being aware of the contempt proceedings has failed, to date, enter appearance and oppose the application.

h. The non - attendance on the part of an Advocate never constituted a sufficient reason and/or mistake which could be excused by the Honourable Court.

i. The Applicant's allegations against the Respondent as contained in Paragraphs 7 to 21 of the Supporting Affidavit were baseless and meant to hoodwink the Honourable Court and bring disrepute to the Respondent.

j. The Respondent had never evicted the Applicant from the suit property, but rather had been utilizing the portion of land as delineated in the Special Use Licenses granted by the Kenya Forest Service.

k. The Respondent denied the allegations of dumping any sewage or industrial refuse of the suit property and no evidence of such allegation had been tendered. Further, the allegations of Paragraph 8 of the Supporting Affidavit were false as the attached letter had never been received by NEMA.

l. Moreover had the Applicant obtained such adverse evidence of pollution of the suit property as alleged in Paragraphs 14 and 15 of the Supporting Affidavit, it had the liberty to move the court and bring such facts to light.

m. It was a plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt.

n. Had the Applicant faced any difficulty in obeying the orders of 6th September 2023 vis a vis the alleged dumping of sewage and industrial refused by the Respondent, then it was at liberty to apply to court for relief or discharge of the orders.

o. In response to Paragraph 12 of the Supporting Affidavit, the Respondent averred that it sought assistance from the security officers in an attempt to carry out maintenance on the affected area of works, which attempted had been interrupted by the Applicant and its hired goons.

p. In response to Paragraph 13 of the Supporting Affidavit, the Respondent denied the allegations of eviction against the Applicant that the Respondents workers and engineers attempted to access the suit property, which access was denied and resulted to injury of the Respondent's worker. Attached in the affidavit and marked as "JM – 1" was a copy of the OB Number and medical treatment chits.

q. The Allegations contained in Paragraph 16 of the supporting affidavit were baseless and had no bearing to the current suit herein. The Respondent denied being involved in such allegations as set out and denied the use of any criminal justice system as a pawn of civil proceedings.

r. In response to the allegations contained in Paragraphs 18 and 21 of the Supporting Affidavit, the same had no bearing to the proceedings herein as neither the Respondent nor the other Defendants were participants in the alleged proceedings.

s. In response to Paragraphs 23, 27 and 28 of the Supporting Affidavit, the Applicant ought to have attended Court and sought for extension of the time as it required. Neither the Respondent nor the Court were the representatives of the Applicant, for them to advance the Applicant's case in its absence.

t. The court should grant the Applicant and the contemnor a chance for mitigation prior to sentencing. The Applicant, therefore shall have an opportunity to be heard prior to his sentencing.

u. The Applicant had not set out any reasons or grounds for the Honourable Court to exercise its discretion and review the orders of 4th October 2024 as provided under the provision Section 80 of the *Civil Procedure Act*, Cap. and Order 45 of the Civil Procedure Rules 2010.

v. Further, the prayer seeking a stay of the orders of 22nd October, 2024 had no basis as the orders are incapable of being executed as against the Applicant and/or the contemnor.

w. The Affidavit was sworn in opposition of the Notice of Motion application dated 30th October, 2024 and he prayed that the same be dismissed.

IV. Response by the 3rd Interested Party

7. The 3rd Interested Party opposed the Application through 7 Paragraphed Grounds of Opposition dated 29th January, 2025 on the following grounds:-

a. The Application was a gross abuse of the process of the Court and a waste of precious Judicial time since the Applicant is seeking orders of review of the orders of this Court issued on 7th October 2024, whereas the Applicant had simultaneously filed a Notice of Appeal against the said order to the Court of Appeal.

b. Once the Applicant had filed the Notice of Appeal against the said order, he did not have the right to seek for review against the same orders.

c. The said application was riddled with blatant and obvious lies, misrepresentations and hearsay evidence as to the mis - diarising of the mentioned date to confirm the filing of responses by the Applicant to the Application dated 4th October 2024 and non - compliance with the directions issued by the Court on 7th October 2024 by the Applicant's Advocate whom the Applicant has neither disclosed his names nor had the alleged Advocate sworn an Affidavit to confirm the averments in his application.

d. Applications for Contempt of Court are personal against the Contemner thus the personal attendance of OSMAN AHMED KAHIA in Court on 22nd October 2024 was a mandatory requirement to explain why he has failed to comply with the directions of the Court issued on 7th October 2024, thus the lack of attendance of the Advocate on record was immaterial and is not a ground for reviewing the orders of the Court issued on 22nd October 2024.

e. The application dated 24th October 2024 was vexatious, frivolous and mischievous since it has failed to address the grounds upon which the orders issued on 22nd October 2024 should be set aside and it had instead dealt with extraneous and irrelevant issues.

f. The orders of review are a discretion of the Court and are only issued when the Applicant approached the Court with clean hands and the Applicant herein has approached this Court with dirty hands by non-disclosure of material facts that he has filed a Notice of Appeal against the orders being challenged herein and through misrepresentations as to the reasons for the in action of his Advocate.

g. The Application was null and void ab initio and should be dismissed with costs.

V. Submissions

8. On 16th December, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 30th October, 2024 be disposed of by way of written submissions. Pursuant to that a ruling date was reserved on 5th February, 2025 by Court accordingly.

A. The Written Submissions by the 1st Defendant/Applicant.

9. The 1st Defendant/Applicant through the Law firm of Messrs. Ahmednasir Abdullahi Advocates LLP filed their written submissions dated 1st April, 2025. Mr. Abdullahi Advocate commenced by stating that these Submissions were in respect of the 1st Defendant's Application dated 30th October 2024 seeking to review, vary and/or set aside the orders of 22nd October 2024 and further proceed to hear and determine the Respondent's Application dated 4th October 2024 on merit. Additionally, the Applicant prayed for stay of the orders issued by this Honorable Court on 22nd October 2024 and discharge of the order for mitigation and sentencing. Lastly, the Applicant sought leave to file its substantive Response to the Respondent's Application dated 4th October 2024 so as to have the said Application heard on merit.

10. The Learned Counsel averred that the Application was on predicated on Articles 25 and 50 of *the Constitution* as the Applicant was cited for contempt on 22nd October 2024 without hearing its side of the case. Thus, the Applicant emphatically called for fair hearing, beseeching the court to open its doors so that it could champion its cause and reveal the very fact that the Respondent was flagrantly abusing this Honourable Court's Orders by damaging the environment with industrial refuse and further using security operatives to evict it from its land.

11. The Application was responded to by the Respondent via its Replying Affidavit deponed 4th December 2024. According to him, the Replying Affidavit was incurably defective as the deponent averred at the first paragraph that he was swearing it in support of the Application. Contrastingly, the Respondent reprobated and opposed the Application at Paragraph 26 of the said Affidavit. The Replying Affidavit was rebutted by the Applicant vide a Further Affidavit deponed on 6th March 2025, wherein the Applicant refuted the allegations put forward by the Respondent.

12. The Learned Counsel provided Court with a brief background of the matter as follows. On 6th September 2023, this Honorable Court issued an ex - parte order in respect of the Respondent's Application dated 31st March, 2023 allowing the Respondent to access and use the suit property, a property legally vested on the Applicant with absolute proprietary interests. The said ex - parte order were confirmed vide the Ruling of this Court dated 7th October 2024 and a subsequent Decree dated 15th October 2024 was issued. On 4th October 2024, the Respondent filed an Application dated 4th October 2024 seeking the Applicant herein to be cited for contempt for alleged disobedience of the afore stated Court orders issued on 6th September 2023. The said Application received no directions until 7th October 2024 when a Ruling was delivered in respect of the Respondent's Application dated 31st August 2023 and the Applicant's Application dated 18th September 2023. On 7th October 2024, the Court directed the parties to file and exchange responses and slated the matter for hearing on 22nd October 2024.

13. The Learned Counsel posited that it was imperative to note that on 22nd October 2024, the Applicant's Counsel inadvertently failed to attend the virtual court due to mis-diarization of the date for 22nd November 2024 instead of 22nd October 2024. Further, the Applicant's Advocate failed to file and exchange responses because he wrongfully captured the window permitted for filing and serving

responses as seventeen (17) days instead of seven (7) days. Additionally, the Applicant's Advocates was extremely overwhelmed with work schedule and consequently he only realized the presence of the email serving the hearing notice issued by the Respondent on 23rd October 2024. Due to the aforesaid regrettable omission and/or mistake on the Applicant's Advocate part, the Court proceeded to allow the Respondent's Application dated 4th October 2024 on the strength of the affidavit of service filed by the Respondent's Advocates, thus citing the Applicant for contempt of court. In addition, this Honorable Court should take cognizance of the fact that the Respondent opted to abuse the Court order of 6th October 2024 by seeking to evict the Applicant herein from the suit property and even more perturbingly dumping sewage and industrial refuse on the suit property. This had caused serious environmental degradation as the suit property was constantly soaked and waterlogged. In effect, the Respondent's abuse of the said Court order extended to the neighboring parcels of land under the Vikobani South Community, whose residents complained of same occurrence of rampant pollution of water by the Respondent. Despite abusing the Court order of 6th September 2024, the Respondent wantonly used the criminal justice system as a pawn in this civil proceedings to frustrate the Applicant and paint him as immigrant, war Lord, Al-shabaab, MRC, Land grabber, Wakali Kwanza, Wakali Wao, Drug Peddler, Robber, Car breaker, ISIS Terrorist and Goon hirer. Further, the Applicant had been summoned by the Directorate of Criminal Investigation, and in particular officer drawn from the land fraud unit. Were it not for the decision of the Director of Public Prosecution, it was the Respondent's plan to have the Applicant arrested and prosecuted over ownership of its own land. It was on these facts that the Applicants wished to beseech this Honorable Court to allow the application.

14. In support of the application, the Learned Counsel relied on a single issue being whether the Application dated 30th October 2024 was merited for the Court to make its determination. The Learned Counsel held that the application essentially sought to set aside contempt orders issued against the Applicant on 22nd October 2024 when the Respondent's Application dated 4th October 2024 came for "inter – partes" hearing for the first time. He opined that, it must go unnoticed that the said Application was allowed "Ex – Parte" as the Applicant's Counsel failed to attend "the inter – partes" hearing due misdiarization of the date for 22nd November 2024 instead of 22nd October 2024. Further, the Applicant's Advocate failed to file and exchange responses because he wrongfully captured the window permitted for filing and serving responses as seventeen (17) days instead of seven (7) days.

15. It was the contention by the Learned Counsel that the threshold for contempt of court was quite high as it involved possible deprivation of a person's liberty. Thus, from the outset, he beseeched this Honourable Court to avoid temptation of condemning the Applicant herein unheard in contempt proceedings especially when non-attendance and failure to file Response was excusable. To buttress on this submission, the Counsel referred Court to a myriad of authorities, Theses were the finding of the Court in the case of:- "Lee G. Muthoga – Versus - Habib Zurich Finance (k) Ltd & Another, Civil Application No. Nai 236 of 2009, as was cited in with approval in the case of "Geoffrey Oguna & Another – Versus - Mohamed Yusuf Osman & 2 Others [2022] eKLR" where this Court held:

> "It's a widely accepted principle of law that a litigant should not suffer because of his Advocate's oversight."
>
> Similarly, in the case of "Joseph *Njuguna - Versus - Medicino Giovanni: Nairobi C.A. No. 216 of 1997* (UR)" the Court of Appeal allowed an appeal against an order refusing to set aside an Ex - Parte Judgment where an Advocate by mistake had not entered the hearing date in her diary. The Court of Appeal said at page 207 of the Judgment:-

"We know that administrative mistakes of this kind do occur in the offices of busy practicing advocates.... In our view the explanation given by Miss. Jan Mohammed was good enough to show why she failed to attend at the hearing of the suit."

16. Further, the Court in the case of:- "Civil Case No. 236 of 2005; Giro Commercial Bank Limited – Versus - Jasvinder Singh Dhadialla, the Court whilst citing Joseph Njuguna – Versus - Medicino Giovanni (Supra)" stated that:-

> "On this Court of Appeal authority and in the circumstances of this case I will not visit Counsel's mistake on his client. The Defendant has not demonstrated that he will suffer loss that cannot be adequately compensated by costs. In the result the Plaintiff's application dated 30.9.2005 is allowed in terms of prayer 3 thereof."

On this, he found solace in the Ugandan case of:- "Sodha – Versus – Hemrai (1952) - Uganda LR Vol.1 cited with approval in the case of "Stephen Ndichu – Versus - Monty's Wines and Spirits (2006) eKLR" in which it was held that to deny a party the right to be heard should be the last resort of a Court. Thus, in light of the explanation offered in the Applicant's Supporting Affidavit deponed on 30th October 2024 and subsequent Further Affidavit sworn on 6th March 2025, he urged this Honourable Court to exercise its discretion and vacate the ex parte Orders, so as to avoid injustice due to inadvertence or excusable mistake or error.

Moreover, in the case of:- "Philip Chemwolo & Anor. - Versus – Augustine

Kubende (Supra)" as per Apaloo JA (as he then was) as follows:

"I think a distinguished equity Judge has said:

'Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on the merits'.

I think the broad equity approach to this matter, is that unless there is fraud of intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.

17. The Learned Counsel submitted that the right to a fair hearing and due process of the law was enshrined under the provision of Article 50 of *the Constitution* of Kenya, 2010. Thus, in the case of:- "Thomas Edison Limited – Versus - Bathock 1912 15 C.L.R 679 as was cited with approval in the case of "St. Patricks Hill School Limited – Versus - Bank of Africa Kenya Limited (2018) eKLR held thus:-

> "There is a primary precept governing administration of justice that no man is to be condemned unheard and therefore ,as a general rule, no order should be made to the prejudice of a party unless he has the opportunity being heard in defence, but instance occur where justice could not be done unless the subject matter of the suit is preserved and, if that is in danger of destruction by one party or if irremediable by one party interim orders may issue to give room for the court to determine the dispute on the merits."

Under the provision of Article 50 (2) of *the Constitution* on the right to a fair trial imposed a duty on the court to guarantee the parties to contempt proceedings procedural justice by evaluating the evidence brought forth by all parties. This fundamental right was non-

derogable in nature and the Court was enjoined to afford a person an opportunity to be heard before making any decision affecting his/her interests.

He drew his aspirations from the ratio in the Supreme Court case of:- "Githiga & 5 Others – Versus - Kiru Tea Factory Company Limited (Petition No. 13 of 2019) [2023] KESC 41 (KLR) (16th June 2023) (Judgment) wherein the Court affirmed that:-

"It is our considered view that it is not enough for the appellate court to conclude that parties before it on November 15, 2018 understood and appreciated that the substance of the proceedings before it was contempt proceedings in terms of the contempt applications. The right to a fair hearing dictates that an individual shall not be penalized by a decision affecting his rights or legitimate expectations unless he has been given prior notice of the case against him, a fair opportunity to answer, and the opportunity to present his case."

18. The Learned Counsel, on the same issue referred Court to the decision of: "Evans Odhiambo Kidero & 4 Others – Versus - Ferdinand Ndungu Waititu & 4 Others SC Petition No. 18 of 2014 as consolidated with Petition no 20 of 2014 [2014] eKLR" expounded on the right to fair hearing as follows:

> "(257) Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem (hear the other side or no one is to be condemned unheard)and nemo judex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias. Peter Kaluma, Judicial Review: Law, Procedure and Practice 2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that "although the necessity of hearing is well established, its scope and contents remain unsettled."
>
> Also on the same point, the Supreme Court of India, in the case of:- "Indru Ramchand Bharvani & Others – Versus - Union of India & others, 1988 SCR supl (1) 544, 555" found that a fair hearing has two justiciable elements: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable (citing "Bal Kissen Kejriwal – Versus - Collector of Customs Calcutta & others AIR 1962 Cal 460).
>
> Additionally, the Learned Counsel cited case of:- "Mineral Development Ltd – Versus - State of Bihar,1960 AIR 468,160 SCR (2) 909 further observed that the concept of fair hearing is an elastic one and "is not susceptible of easy and precise definition."
>
> Thus, the Court in "Evans Odhiambo Kidero & 4 others (Supra) stated that:-
>
> "it is important to restate that a literal reading of the provisions of *the Constitution* show that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context. Comparative experience shows that the European Court has elaborated on the question regarding the scope of the right to fair trial applying the right in both civil and in criminal matters. The European Court of Human Rights (European Court) has severally explained

that: "it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court." (See Steel and Morris v United Kingdom, [2005] ECHR 103, paragraph 59)."

By the same token, Odunga J (as he then was) in the case of:- "Alfred Mutua – Versus - Boniface Mwangi [2022] eKLR where he held that:-

"In my view, considering the seriousness with which the Court takes contempt of court proceedings, every stage of the hearing must be expressly clear to the Defendant and any ambiguity must be resolved in favour of the Defendant since such proceedings are quasi-criminal in nature, otherwise, a benefit of doubt would inure to the benefit of the Defendant."

18. The Learned Counsel submitted that it was trite law that for an Application for contempt to sustain, four essential elements ought to be established. As was stated in the case of "Samuel M.N. Mweru & Others – Versus - National Land Commission & 2 Others [2020] eKLR" citing with authority the book "Contempt in Modern New Zealand" where it was stated that in a case of contempt it must be established that:-

a. The terms of the order were clear, unambiguous, and binding on the Defendant.

b. The Defendant had knowledge of or proper service of the terms of the order.

c. The Defendant acted in breach of the terms of the order.

d. The Defendant's conduct was deliberate.

These pointers were further expounded in the case of: "Sheila Cassatt Issenberg & Another – Versus - Antony Machatha Kinyanjul [2021] eKLR" referring to the jurisprudence by Cromwell J, writing for the Supreme of Canada in the case of:- "Carey – Versus - Laiken, 2015 SCC 17 (16th April, 2015), thus:

A. The order alleged to have been breached "must state clearly and unequivocally what should and should not be done." This ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies.

B. The party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the willful blindness doctrine.

C. The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.(emphasis)

In the instant case, the Respondent alleged that the Applicant herein through its employees attacked and injured the Respondent's workers who were trying to access the Applicant's suit property. The Respondent never specified who were the employees who allegedly injured the Respondent's workers and engineers. Further, there was no investigation report filed to show the Court who were the alleged workers of the Applicant against whom the Respondent's complained about.

20. Contrary to the Respondent's averments, the Applicant has adduced cogent evidence in the form of assorted photographs and videos saved in Alhua Flash Disk Serial Number N8YM02D33040626 clearly demonstrating the Respondent's gross abuse of the court order to eject the guards of the

Applicant using its agents backed by security personal in the hundreds. Simply put, the Respondent misconstrued the order of 6th September 2023 as if it was eviction order.

Be that as it may, he submitted that the Respondent had flagrantly abused the Court order of 6th September 2024 not only damaging the environment by dumping sewage and industrial refuse on the suit property but also evicting the Applicant's guards using its agents backed by security personal in the hundreds.

21. In conclusion, the Counsel held that the Respondent had abused the court order of 6th September 2024. As such, this Honourable Court should allow the application by setting aside and/or vacating the order of 6th September 2024.

VI. Analysis & Determination.

22. I have carefully read and considered the pleadings herein by the Plaintiff and the Defendant, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statures.

23. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has two (2) framed issues for its determination. These are:-

    a. Whether this Honourable Court will be pleased to review orders issued on 22nd October 2024 in accordance and as prayed for in the Notice of Motion application dated 30th October, 2024?

    b. Who will bear the Costs of Notice of Motion application dated 30th October, 2024.

Issue No. a). Whether this Honourable Court will be pleased to review orders issued on 22nd October 2024 in accordance and as prayed for in the Notice of Motion application dated 30th October, 2024?

23. Under this sub – title, the Honourable Court will discuss and examine the rules for review and the orders the Applicant seeks to review. Under the provision Section 80 of the *Civil Procedure Act*, Cap. 21 and Order 45 rule 1 of the Civil Procedure Rules, 2010 the court may review its decision, inter alia: - on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.

24. The provision of Section 80 of the *Civil Procedure Act* Cap 21 provides as follows: -

> " Any person who considers himself aggrieved—
>
> a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

25. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows:-

> " 1.
>
> (1) Any person considering himself aggrieved—
>
> a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

26. Briefly, and prior to proceeding further, the Honourable Court wishes to extrapolate on a few case law on this subject matter. In the case of:- "Republic – Versus - Public Procurement Administrative Review Board & 2 others [2018] eKLR" it was held: -

> " Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay."

27. Additionally, in the case of: "Sarder Mohamed – Versus - Charan Singh Nand Sing and Another (1959) EA 793" where the High Court held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate.

28. Broadly speaking, in the case of: "Republic – Versus - Public Procurement Administrative Review Board & 2 others [2018] e KLR" it was held: -

> " Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay."

29. From the stated provisions, it is quite clear that the powers to cause any review, variation or setting aside a Court's decision are discretionary in nature. Thus, the unfettered discretion must be exercised judiciously, not capriciously and reasonably. To qualify for being granted the orders for review, varying and/or setting aside a Court order under the above provisions to be fulfilled, the following ingredients, jurisdiction and scope are required.

a. There should be a person who considers himself aggrieved by a Decree or order;

b. The Decree or Order from which an appeal is allowed but from which no appeal has been preferred;

c. A decree or order from which no appeal is allowed by this Act;

d. There is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made; or

e. On account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order.

f. The review is by the Court which passed the decree or made the order without unreasonable delay.

30. I have previously stated in this Honourable Court in the case of "Sese (Suing as the *Administrator of the Estate of the Late Shali Sese) – Versus - Karezi & 8 others (Environment and Land Constitutional Petition 32 of 2020*) [2023] KEELC 17427 (KLR)" held that:-

> " The power of review is available only when there is an error apparent on the face of the record. Indeed, this Court emphasizes that a review is not an appeal. The review must be confined to error apparent on the face of the record and re – appraisal of the entire evidence or how the Judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is permissible."

31. In the case of:- "Republic – Versus - Public Procurement Administrative Review Board & 2 others [2018] e KLR" it was held: -

> " Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay."

32. In case of:- "Pancras T. Swai – Versus - Kenya Breweries Limited [2014] eKLR" the Court of Appeal held: -

> " Order 44 rule 1 (now Order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limps therein stated or "for any sufficient reason....."

33. Additionally, in the case of: "Sarder Mohamed – Versus - Charan Singh Nand Sing and Another (1959) EA 793" where the High Court held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate.

34. Discussing the scope of review, the Supreme Court of India in the case of "Ajit Kumar Rath – Versus - State of Orisa & Others, 9 Supreme Court Cases 596 at Page 608". had this to say:-

> " the power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" ..... means a reason sufficiently analogous to those specified in the rule"

35. In case of:- "Tokesi Mambili and others – Versus - Simion Litsanga" the Court held as follows: -

i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.

ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.

36. In the case of:- "Republic – Versus - Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR" High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 John M. Mativo Judge culled out the following principles from a number of authorities: -

i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/ judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/ tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.

37. In the instant case, from the filed pleading by the 1st Defendant/Applicant, the comprehensive submission and the plethora of cited authorities, the Applicant argues that Respondent filed the Application dated 4th October 2024 seeking the Applicant herein to be cited for contempt for alleged disobedience of the Court orders issued on 6th September 2023. When the said Application was filed, it did not receive any directions until 7th October 2024 when a Ruling in respect of the Respondent's Application dated 31st August 2023 and the Applicant's Application dated 18th September 2023 was being delivered, where the Court directed parties to file and exchange responses and scheduled the hearing of the said Application for 22nd October 2024. On 22nd October 2024, the Applicants Advocate inadvertently failed to attend the virtual Court due to mis-diarization of the date for 22nd November 2024 instead of 22nd October 2024. Further, the Applicant's Advocate failed to file and exchange responses because he wrongfully captured the window permitted for filing and exchange of responses as seventeen (17) days instead of seven (7) days.

38. The Applicant's Advocate was also overwhelmed with work schedule that he only realized the presence of the email serving the Hearing Notice issued by the Respondent's Advocate on 23rd October 2024. Owing to this regrettable omission and/or mistake on the side of the Applicant's Advocate, the Court proceeded to allow the Respondent's Application on the strength of the Affidavit of service filed by the Respondent's Advocate, thus, finding the Applicant in contempt of Court orders without hearing its side of the case. The Learned Counsel's contention was that the Applicant should not be caused to suffer for the mistake of an Advocate and further that he was entitled to be granted the right for fair hearing.

39. The question therefore is whether the said discovery of the new and important evidence could not have been made after the exercise of due diligence and whether the said evidence could not be produced by him at the time when the court made its orders. Notwithstanding the above observation, I find that even if this court was to determine that the evidence discovered by the Applicant was new and important evidence which was not within his knowledge and which could not have been found after the exercise of due diligence, so that it or could be produced by the Applicant before the order was delivered, it would not be possible to set aside or review the order. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out....would amount to an abuse of the liberty given to the tribunal under the Act to review its Judgement.

40. Applying the above principles to the instant application, this Courts makes a holding being fully satisfied that in indeed there were an error apparent on the face of the record while delivering the ruling and order of 22nd October, 2024 on the fact that contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily. It must be higher than proof

on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.

41. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge. Recourse ought not to be heard to process contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject applying the test that the standard of proof should be consistent with the gravity of the alleged contempt it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.

42. In this particular instant I find the reason tendered by the Learned Counsel sufficient enough to vacate the orders for Contempt of Court and hereby set the Applicant at free from any civil jail liability.

Issue No. b). Who will bear the Costs of Notice of Motion application dated 30th October, 2024.

43. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court "Jasbir Rai Singh – Versus Tarchalan Singh" eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).

44. In this case, this Honourable Court is of the view that there be no costs awarded for the application.

VI. Conclusion & Disposition

45. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below order:-

    a. That the Notice of Motion application by the Plaintiff dated 30th October, 2024 be and is hereby found to have merit thus hereby allowed in its entirety.

    b. That this Honourable Court be and hereby stays its orders dated 22nd October 2024 and discharge its subsequent orders for mitigation and sentencing scheduled for 25th November 2024.

    c. That this Honourable Court be and is pleased to review, vary and/or set aside its orders dated 22nd October 2024 and proceed to hear and determine the Respondent's Application dated 4th October 2024 on merit

    d. That the 1st Defendant/Applicant be granted 14 days leave to file its substantive responses to the Respondent's Application dated 4th October 2024 and allow the Respondent's Application dated 4th October 2024 to be heard on merit

    e. That for expediency sake the matter to be mentioned on 29th April, 2025 before Hon. Mr. Justice Olola for direction on how to dispose off the application dated 4th October, 2024.

f. That there are no orders as to costs.

It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 4TH DAY OF APRI 2025.

.....

HON. JUSTICE L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT

AT MOMBASA

Ruling delivered in the presence of:

M/s. Firdaus Advocate, the Court Assistant.

Mr. Marube Advocate holding brief for Dr. Nyaundi Advocate for the Plaintiff.

Mr. Mohammed Billow Advocate holding brief for Mr. Ahmed Nasser Abdullahi Advocate for the 1st Defendant/Applicant.

Mr. Kemei Advocate holding brief for M/s. Langat Advocate for the 1st, 2nd, 3rd, 4th, 5th, 6th & 7th Defendants.

Mr. Mungai Kamau Advocate for the 3rd Interested Party.

No appearance for the 1st & 2nd Interested Parties.