



**Lunga Lunga Energy Limited v Directors Acme Wanji Investment Limited & 4 others;
 Lunga Lunga Energy Limited (Plaintiff); Acme Wanji Investments Limited & another
 (Defendant); Energy & Petroleum Regulatory Authority (Interested Party) (Environment
 & Land Case E044 of 2024) [2025] KEELC 4021 (KLR) (27 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4021 (KLR)

**REPUBLIC OF KENYA
 IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
 ENVIRONMENT & LAND CASE E044 OF 2024**

**AY KOROSS, J
 MAY 27, 2025**

BETWEEN

LUNGA LUNGA ENERGY LIMITED APPLICANT

AND

**DIRECTORS ACME WANJI INVESTMENT LIMITED 1ST RESPONDENT
 OSWALD KILUNGYA 2ND RESPONDENT
 IRENE ADHIAMBO T/A ZASHA AUCTIONEERS 3RD RESPONDENT
 CHANG LIU 4TH RESPONDENT
 CHRISTOPHER PAUL 5TH RESPONDENT**

AND

LUNGA LUNGA ENERGY LIMITED PLAINTIFF

AND

**ACME WANJI INVESTMENTS LIMITED DEFENDANT
 IRENE ADHIAMBO T/A ZASHA AUCTIONEERS DEFENDANT**

AND

ENERGY & PETROLEUM REGULATORY AUTHORITY INTERESTED PARTY



RULING

Background

1. The subject of this ruling concerns 2 notices of motions that are respectively dated 16/09/2024 and 7/02/2025.

Notice of motion dated 16/09/2024.

2. In this motion, which was directed to the alleged contemnors, the applicant sought several reliefs from this court, some of which have been spent, and the remaining prayers are as follows;
 - a. That summons be issued to the OCS Athi River police station to present the arrested respondents before the court and give a detailed account of the execution of the court's orders that led to the arrest.
 - b. That the respondents be cited for contempt of court orders.
 - c. That the respondents be committed to jail for 6 months, and in the alternative, each respondent pays a fine not less than Kshs. 500,000 each for continuing with construction at the Gas plant despite this court's injunctive orders.
 - d. That the respondents be committed to jail for 6 months for failing and refusing to return all gas plant equipment despite this court's injunctive orders.
 - e. That subject to order (e) above, the respondents purge the contempt by returning all the gas plant equipment to the applicant within 3 days from the date of the court order; failure to which the order takes effect, and they forfeit to the applicant the security subject to order (a).
 - f. That for failure to honor any court orders herein and/ or any order subsisting in this matter, warrants of arrest be issued against the respondents and further, the County Police commander Machakos, Mavoko subcounty Police commander and/or OCS Athi river police station be directed to arrest the respondents their associates, assigns and or agents and present them before this court on the next available court sitting for committal to jail.
 - g. Costs of the motion be taxed and be paid to the applicant before the next court sitting; failure to which the same is to be deducted from the security deposited, subject to order (a).
3. The motion is premised on the grounds set out on its face and on the supporting affidavit of the applicant's managing director, Jama Hersi, sworn on the even date.
4. In a nutshell, it was asserted inter alia, the respondents had disobeyed the interim injunctive reliefs issued in the applicant's favour by this court on 12/07/2024 and extended on 26/07/2024.
5. Despite service and the respondents being present in court, the respondents failed, neglected and refused to obey the court's orders and continued with the construction on land parcel no. Mavoko Block 6/3 ("suit property") and/or by not returning all the gas plant equipment illegally removed from the suit property; and
6. That on 19/08/2024, the OCS Athi River, under the orders of the Mavoko subcounty police commander, moved and stopped any further construction on the suit property and subsequently closed the site as per the court orders;



7. That in disregard of the closure order by the OCS under the supervision of the Mavoko subcounty commander, the respondents on 4/09/2024 returned to the site and continued to do construction; that on receipt of the information of the activities on the said day, under the orders of the subcounty police commander, police officers moved into the site and arrested the 3rd- 5th respondents who are construction managers.
8. On consultation with the applicant by the police, the 3rd -5th respondents were released on police bond and cash bail pending presentation before this court for contempt of the court orders; the 3rd -5th respondents were privy to the court orders; and
9. The 2nd respondent, who is an auctioneer, had refused to return the gas plant equipment that it carted away and had refused and or neglected to return all the gas plant equipment; and lastly, the respondents had diffused almost 5 tons of LPG gas into the air without following due procedure, and broke seals placed by the interested party.
10. Although none of the other respondents responded to the motion, Johnson Ngori Shibayilu, who described himself as the 1st respondent's operation's manager, swore a lengthy affidavit that he deposed on 17/09/2024.
11. In essence, he stated, Acme Wanji Investment Limited ("Wanji") had never been the suit property's owner. Rather, Acme Dream Limited ("Dream") was at one time its registered owner before disposing of it and transferring it to Fanaka Aluminium Company Limited ("Fanaka"), which is its current registered owner; and
12. That as of March 2024, which was long before the suit herein was instituted by the applicant, Fanaka was already undertaking construction on the suit property and at the time of the institution of the suit upto the instant date, Wanji had never had any of its employees, servants, workers and/or agents physically present on the suit property.
13. The lease agreement towards the tenancy of the suit property between Wanji and the applicant expired as soon as the applicant defaulted in payment of rent and was equally terminated by lapse of the lease period, being 1/08/2024; and
14. The 3rd to 5th respondents were strangers to Wanji, and it was untenable for Wanji to return the gas plant, which was sold by public auction on 20/06/2024 pursuant to court orders issued in Mavoko Chief Magistrates Court MCCCmisc No. E037 of 2024 - Irene Adhiambo vs. Lunga Lunga Energy Limited; that the auction took place before the orders were issued by this court, and the plant was not in the 1st and 2nd respondent's control, use and/or possession; and
15. As such, at the time this honourable court was issuing the interim orders, there was no property of any kind or any description belonging to the applicant lying on the suit property and lastly, a similar tactic was applied to recover the gas plant in Mavoko Chief Magistrates Court, MCCCmisc No. E037 of 2024 - Irene Adhiambo vs. Lunga Lunga Energy Limited, but the same application was dismissed by the lower court.

Notice of motion dated 7/02/2025

16. This particular motion was directed by the plaintiff to the defendants to the main suit, and similar to the previous motion, some of the reliefs in this motion are spent, and the outstanding prayers for determination are: -



- a. That this honourable court be pleased to review and/set aside its orders issued in the ruling dated 18/09/2024.
 - b. That this honorable court be pleased to issue an injunction restraining the defendants whether by themselves, their agents, assignees, servants or any other person acting under their instructions from entering, accessing, evicting, demolishing, blocking or interfering with the plaintiff's possession of the suit property and or returning any property removed from the gas plant pending the hearing and determination of the substantive suit and the order be effected by the Inspector General of National Police Service, and or County Commander Machakos, OCDP Mavoko and or OCS Athi River Police Station and or interested party or any other police officer.
 - c. That costs be in the cause.
17. The motion is supported by the grounds thereon and the affidavit of Jama Hersi, sworn on the instant date.
 18. Relief (c) and the grounds and averments in support thereof are a regurgitation of the notice of motion dated 4/06/2024, which was dealt with in the impugned ruling rendered on 18/09/2024.
 19. Hence, as a preliminary issue, this court finds relief (c) is res judicata and an abuse of court process. As a consequence, this court will only summarise assertions in respect of prayers (a) and (b).
 20. It was maintained in the impugned ruling, the court made an error on the face of the record, as the plaintiff had never defaulted on his rent payment as alleged by the 1st defendant. Further, that he had diligently paid rent as agreed, and the receipts and bank statements to prove the same were in the court records and well accounted for.
 21. In response, the 1st defendant, through Johnson Ngori Shibayilu, filed a very lengthy replying affidavit, deposed on 14/02/2025.
 22. Briefly, he stated the plaintiff had made a habit of filing applications with the intent to dissuade this court; there was no discovery of new evidence, or was there a mistake or error apparent on the face of the record, and lastly, the motion had been filed with unexplained inordinate delay.

Parties' submissions

23. The court directed parties to file written submissions arguing their respective cases, but only some of them complied.
24. Accordingly, this court has considered the well-written submissions from the law firm of M/s. OG Makowade Advocates who are for the applicant and/or plaintiff. It is worth noting that they only filed submissions dated 4/03/2025 in respect of the motion dated 7/02/2025.
25. The law firm of M/s. Syphurine & Partners for the defendants and/or 1st and 2nd respondents filed written submissions on the 2 motions, and they were respectively dated 6/03/2025 and 15/03/2025.

Issues for determination

26. This court has carefully considered the motions, grounds in support thereof, and affidavits and rival submissions, and the issues arising for determination, which shall be dealt with separately are: -
 - a. Whether the respondents in the motion dated 16/09/2024 are in contempt of court.



- b. Whether the plaintiff has met the threshold to warrant the review of the orders issued on 18/09/2024.
- c. What orders should this court issue, including an order as to costs?

Analysis and Determination

Whether the respondents in the motion dated 16/09/2024 are in contempt of court.

- 27. It must be noted that Section 5 of the *Judicature Act* is bereft of the procedure for instituting contempt proceedings, and consequently, this court has to seek recourse in the procedure applicable in the High Court of Justice in England and Wales. These procedures were well considered in the Court of Appeal case of *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others* [2014] eKLR.
- 28. Accordingly, it is prudent for this court to stipulate the relevant law. Rule 81.4 of the England and Wales Civil Procedure Rules, which deals with the ingredients of contempt applications, provides thus: -
 - “(1) Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.
 - (2) A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable—
 - (a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);
 - (b) the date and terms of any order allegedly breached or disobeyed;
 - (c) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;
 - (d) if the court dispensed with personal service, the terms and date of the court’s order dispensing with personal service;
 - (e) whether a penal notice had been added to the front of any order allegedly breached or disobeyed included a penal notice;
 - (f) the date and terms of any undertaking allegedly breached;
 - (g) confirmation of the claimant’s belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;
 - (h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;
 - (i) that the defendant has the right to be legally represented in the contempt proceedings;
 - (j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;



- (k) that the defendant may be entitled to the services of an interpreter;
- (l) that the defendant is entitled to a reasonable time to prepare for the hearing;
- (m) that the defendant is entitled but not obliged to give written and oral evidence in their defence;
- (n) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;
- (o) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;
- (p) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;
- (q) that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;
- (r) that the court's findings will be provided in writing as soon as practicable after the hearing; and
- (s) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public."

29. Significantly, this court's authority to deal with contempt proceedings is derived from Section 29 of the *Environment and Land Court Act*.
30. As rightfully submitted by the 1st and 2nd respondents' counsel and as held in the Supreme Court of Kenya decision of Republic v Ahmad Abolfathi Mohammed & Sayeed Mansour Mousavi [2018] KESC 51 (KLR), contempt proceedings are quasi-criminal.
31. As stated in this decision, contempt proceedings must be exercised with utmost care and only as a last resort; an applicant must establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the court order.
32. Further, as stated in the decision of Aaron Gitonga Ringera & 3 Others vs. P. K. Muite & Others, Nairobi HCCC No. 1330 of 1991, which was cited with approval and summarized in KAR v JR [2023] KEHC 18588 (KLR), in contempt proceedings,
 - (a) there must be an existing court order capable of being disobeyed;
 - (b) the alleged contemnor must have been made aware of the existence of the court order; and
 - (c) there must be shown to be a breach (disobedience) of the said court order.



33. Usually and as stated in the decision of *Mutitika v. Baharini Farm Limited* [1985] KLR 229, 234 that was cited with approval in *Republic v Ahmad (Supra)*, the standard of proof in contempt proceedings is higher than proof on the balance of probabilities, almost but not exactly, beyond a reasonable doubt. Therefore, this is the measurement that will be meted against the motion.
34. Turning to this case, although in agreement with the applicant that the 1st and 2nd respondents were aware of the court orders as their counsel, Mr. Manyende was present when the injunctive orders were issued by the court on 11/07/2024 and extended on 25/07/2024, the same cannot be said of the other respondents.
35. The applicant has not rebutted the 1st respondent's assertions that the 3rd to 5th respondents are strangers and have even gone further to demonstrate this by availing an agreement for sale and title deed of the suit property, showing the suit property belongs to Fanaka.
36. These 3rd to 5th respondents may just as well be Fanaka's agents and or employees. Fanaka is not a party to the proceedings and it is unfortunate these 3rd to 5th respondents did not respond to the motion. Be that as it may, there is no evidence these 3rd to 5th respondents were ever served the orders.
37. In this court's view, they could not default on what they were not aware of. It therefore finds that the relief against these particular respondents fails.
38. As to the 1st and 2nd respondents, for starters, being a juristic person, Wanji is incapable of being subjected to the consequences of the contempt without lifting its corporate veil. Further, it is the humble view of this court that even after lifting the veil, it was necessary to effect personal service upon Wanji's directors with the motion, which was not. As a matter of fact, disclosures were never made as to who its directors were.
39. The 1st respondent has also maintained that the orders were incapable of execution as they had been overtaken by events, and they substantiated this by availing a plethora of evidence, including auction advertisements, title documents, agreements for sale, proclamation notice and court orders in Mavoko Chief Magistrates Court, MCCCmisc No. E037 of 2024 - Irene Adhiambo vs. Lunga Lunga Energy Limited.
40. Having considered these documents, there is without doubt that all these pieces of information show Wanji was never the suit property's owner and the applicant had been proclaimed for defaulting to pay rent.
41. From the title deed, Dreams became the registered owner of the suit property on 19/01/2015 and by an agreement for sale dated 13/03/2024, it sold it to Fanaka, and the registration was perfected when the title document was registered in Fanaka's name on 2/12/2024.
42. The public auction was advertised on 11/06/2024, and the proclamation was conducted by a court order and executed before the suit herein was filed. Put another way, the orders issued on 11/07/2024 and extended on 25/07/2024 had been overtaken by events and were incapable of enforcement. This court, therefore, finds the motion is not merited and it is dismissed with costs to the 1st respondent.



Whether the plaintiff has met the threshold to warrant the review of the orders issued on 18/09/2024.

43. The applicable provisions that govern the review of court decisions are encapsulated by Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 states that;

“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.”

44. Further, Order 45 Rule 1 (1) of the Civil Procedure Rules provides as follows: -

- “(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.”

45. The salient conditions brought out in Order 45 Rule 1 (1) of the Civil Procedure Rules, such as the discovery of new and important matter, mistake, and sufficient cause have to be proved by an applicant, and in dealing with such applications, the court has to exercise its judicious discretion.

46. In paragraph 32 of its decision in *Parliamentary Service Commission v Wambora & 36 others* [2018] KESC 74 (KLR), the apex court laid down the following non-exhaustive guiding principles in considering applications for review of court decisions as follows: -

- (i) A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court.
- (ii) Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
- (iii) An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
- (iv) In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.
- (v) During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.



- (vi) The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
- (a) as a result a wrong decision was arrived at; or
 - (b) it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.”
47. In the circumstances of this case, the plaintiff has pointed out that the basis of the motion was that there was an error apparent on the face of the impugned ruling and has directed the court to paragraph 35 thereof, which in part stated: -
- “Since the lease stood terminated in 2021 for failure to pay rent as agreed, there is no tenancy relationship between the parties herein and therefore there is no basis for the plaintiff’s continued stay on the suit property. At any rate, the lease agreement was to expire on 1st August 2024 if the same had not been breached by the plaintiff and therefore as of today, the plaintiff has no legal right to be on the suit property.”
48. When faced with an application for review, the court exercises judicious discretion which is anchored on law, evidence and reason. In its reasons as to why it believes there was an error on the face of the record, the plaintiff states that it had never defaulted on its rent payment as alleged, and it had receipts and bank records to back this.
49. In its submissions, its counsel directed the court to two documents which were considered by this court in paragraph 35 of the impugned ruling, whereby it stated that the plaintiff had breached the lease agreement as it had only tendered 3 cheques of Kshs. 300,000/- each and a bank statement dated 2/02/2021 for Kshs. 300,000/-.
50. It is this court’s humble opinion; the reason proffered for review falls far short of the threshold. To this court’s mind and with all due respect to the plaintiff, who seems hell on having a 2nd bite of the cherry using tactful means which this court will not entertain, is raising matters that are the preserve of an appellate court and not review.
51. The plaintiff failed to express itself of how this court erred or even abused its discretion in arriving at the decision it did. Looking at all the reliefs sought in the instant motion, it is undeniable, the motion herein is an attempt to re-litigate and is vexatious.
52. Yet, as has been found earlier, certain events have long been overtaken, and the suit property is in the hands of a 3rd party to these proceedings. The upshot is that this court finds the motion for review is for dismissal with costs to the defendants.
53. In the end, the court hereby issues the following final disposal orders;
- a. The notice of motion dated 16/09/2024 is hereby dismissed with costs to the 1st defendant.
 - b. The notice of motion dated 7/02/2025 is hereby dismissed with costs to the defendants.
 - c. Unless with leave of the court, there shall be no further filing of applications in this matter.
 - d. Parties to fully comply with Order 11 within 21 days.
 - e. A mention date shall be given for pretrial directions.

Orders accordingly.



DELIVERED AND DATED AT MACHAKOS THIS 27TH DAY OF MAY, 2025.

HON. A. Y. KOROSS

JUDGE

27. 05.2025

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

M/s Repela for Mr Muende for defendant

Mr Makowade for plaintiff

Ms Kanja- Court Assistant

