



**Spenomatic Kenya Limited v Osman, General Manager/CEO the East African Portland Plc & another (Judicial Review Application E196 of 2024) [2025] KEHC 18559 (KLR) (Judicial Review) (15 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 18559 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW APPLICATION E196 OF 2024  
RE ABURILI, J  
DECEMBER 15, 2025**

**BETWEEN**

**SPENOMATIC KENYA LIMITED ..... APPLICANT**

**AND**

**CPA MOHAMED OSMAN, THE GENERAL MANAGER/CEO THE EAST  
AFRICAN PORTLAND PLC ..... 1<sup>ST</sup> RESPONDENT**

**EAST AFRICAN PORTLAND CEMENT ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling determines the notice of motion dated 1<sup>st</sup> September 2025 which is brought under the provisions of Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 3A and 63 of the [Civil Procedure Act](#) and Articles 10 and 159 of [the Constitution](#).
2. The application prays that the 1<sup>st</sup> respondent General Manager. Chief executive Officer for the East African Portland PLC be committed to civil jail for a period of six (6) months for being in contempt of the court order of 7<sup>th</sup> May 2025 or in the alternative or in addition, that this Court orders the attachment of properties including those of the 1<sup>st</sup> respondent and for the same to be sold to penalize and punish the 1<sup>st</sup> respondent for deliberately disobeying court orders. The applicant also prays that costs be borne personally by the 1<sup>st</sup> respondent.
3. The Notice of motion is supported by the statement of facts dated 14<sup>th</sup> July 2025 and verifying affidavit sworn on 14<sup>th</sup> July 2025.



4. The applicant's case is that on 7<sup>th</sup> May 2025, this Court issued the following orders:
  - a. That, the Respondent is hereby directed to issue the Applicant with a letter of Notification Award to Tender Number RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and commissioning of a Grid Tied Solar PV Plant with 7 days from the date of the order (7<sup>th</sup> May 2025).
  - b. That, the Respondent is also directed to complete the Procurement process for Tender Number RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and commissioning of a Grid Tied Solar PV Plant in favour of the Applicant within 60 days of today's date (7/5/2025).
  - c. That in the event that the Respondent fails to comply with this court's orders the Applicant is a liberty to apply for appropriate penal orders as provided for in the law.
  - d. That, no orders as to costs. That, this file is closed save for enforcement of the Decree."
5. That on 13<sup>th</sup> May 2025, the decree was served upon the 1<sup>st</sup> respondent and counsel for the applicant is also said to have physically served the 1<sup>st</sup> respondent with a demand letter requiring him to comply with the said decree.
6. According to the Applicant, the respondents have not heeded or complied with the terms of the decree of this court, and that the 1<sup>st</sup> respondent's failure to obey the orders of this court demonstrates lack of respect and reverence, of this court's authority and power. The applicant also states that it continues to incur unnecessary and unreasonable expenses due to the arrogance and contempt of the 1<sup>st</sup> respondent.

#### **Replying Affidavit by the Respondents**

7. The respondents filed a replying affidavit sworn on 22<sup>nd</sup> September 2025 by the 1<sup>st</sup> respondent office holder. They concede that the 2<sup>nd</sup> respondent received a letter dated 22<sup>nd</sup> May 2025 addressed to the 1<sup>st</sup> respondent and referencing this court's decision of 7<sup>th</sup> May 2025 and a decree dated 9<sup>th</sup> May 2025. In the letter, it is deposed that the applicant demanded compliance with the order and threatened the institution of contempt of court proceedings.
8. It is deposed that it is only by this letter that the 1<sup>st</sup> respondent became aware that judgement had been entered against him and that he immediately sought the advice of counsel on the import of the decision to inform his next steps.
9. According to the deponent, the decree of 9<sup>th</sup> May 2025 directed the 1<sup>st</sup> respondent to Award Tender Number RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid Tied Solar PV Plant within 7 days from that date.
10. Further, that the 1<sup>st</sup> respondent was also directed to complete the procurement process for Tender Number RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid Tied Solar PV in favour of the applicant within 60 days of the judgment's date. It is also deposed that the court had also directed that if the respondent failed to comply with the orders, the applicant was at liberty to apply for appropriate penal orders as provided for in the law.
11. The respondents contend that at the time that the judgment of 7<sup>th</sup> May 2025 was delivered, the Annual Procurement Plan and the Budget Estimates for the relevant financial years had already been prepared



- and submitted through the corporate cycle and that they did not include a budget line or provision to lawfully implement the expenditure contemplated by the judgment.
12. Further, that under the corporate governance framework applicable to State Corporations, including Mwongozo and the Company's internal instruments, the 1<sup>st</sup> respondent cannot lawfully commit the Company to unplanned or unbudgeted expenditure or commence a procurement action without an approved plan and budget provision. It is also contended that it is the Board of Directors of the Company that approves the Annual Procurement Plan and the Budget and exercises finance oversight, while Management implements Board-approved plans and budgets.
  13. The respondents also state that immediate implementation of the judgment and decree would have required either an approved variation of the Annual Procurement Plan with a corresponding Board approved budget adjustment or an approved supplementary budget, none of which the 1<sup>st</sup> respondent can effect unilaterally.
  14. The respondents contend that civil contempt requires wilful and mala fide disobedience of a clear court order and that in the instant case, any non-compliance with the decree to date has arisen solely from the objective constraint that management cannot lawfully incur unplanned expenditure or issue an award without an approved plan and budget and corresponding Board authority.
  15. The respondents assert that in the event that lawful budgetary provision is not made, the procuring entity may, in accordance with the [\*Public Procurement and Asset Disposal Act\*](#) and the applicable Regulations, be constrained to terminate the procurement on account of inadequate budgetary provision. Further, that the audited financial statements for the year ended 30<sup>th</sup> June 2025 (FY 2024/2025), once released, will objectively evidence the position on available funding.
  16. The respondents contend that deprivation of liberty through committal to civil jail can only arise where contempt is proved to the requisite standard, and not where reasonable doubt exists as to the essential elements of contempt. They argue that the applicant has failed to demonstrate any wilful or deliberate disobedience of the court order and that unintentional or inadvertent non-compliance, if at all, does not meet the threshold for contempt.

### **The applicant's written Submissions**

17. The application was canvassed by way of written submissions.
18. The applicant filed written submissions dated 29<sup>th</sup> October 2025. It was submitted that on 22<sup>nd</sup> October 2024, the Hon Justice Jairus Ngaah was not sitting but that Mr. Kiprotich advocate was present holding brief for Mr. Ochola for the procuring entity who had been served with the application on 3<sup>rd</sup> September 2025 and an affidavit of service filed accordingly hence the respondents cannot claim that they were not aware of the proceedings culminating in the contempt of court application.
19. That the Court then directed that the application be mentioned on 4<sup>th</sup> February 2025, however that the matter was listed before this Court on 8<sup>th</sup> April 2025 for directions, and on the said date, Mr. Kiprotich, counsel for the respondents applied for leave to cease acting and leave was accordingly granted.
20. The applicant further submits that upon the advocates exiting from the matter, the court directed the applicant's counsel to effect direct service upon the respondents as had been done in all the subsequent proceedings and affidavits of service were filed into court to prove such service.
21. It is submitted that the court correctly made a finding that there was no evidence that the Public Procurement Administrative Review Board's decision of 29<sup>th</sup> July 2024 had been challenged and



- that the 2<sup>nd</sup> respondent had failed to comply with the express and binding decision of the Public Procurement Administrative Review Board aforesaid.
22. The applicant submits that the respondents' advertisement placed in the Daily Nation of 25<sup>th</sup> November 2022 is more than one financial year prior to the application dated 5<sup>th</sup> April 2024 seeking for extension of time to complete the Tendering process and further, that there could there have been no advertisement without a budget for the project the subject hereof.
  23. It is submitted that the respondents were still eager to proceed with the project in 2024, more than one financial year after the advertisement and that therefore, it is illegal and contrary to the provisions of the Public Procurement and Disposal Act for a public entity such as the 2<sup>nd</sup> respondent to advertise or procure any service without a budget. The applicant refers to section 53(8) and (9) of the Public Procurement and Disposal Act to support this position.
  24. According to the applicant, the respondents did not appeal against the decision of the Public Procurement Administrative Review Board rendered on 29<sup>th</sup> July 2024 and that neither did they appeal the judgment of this Court delivered on 7<sup>th</sup> May 2025.
  25. Additionally, it was submitted that it is not true that as at the time that this Court delivered its judgment on 7<sup>th</sup> May 2025, the annual procurement plan and budget estimates for the relevant financial year had already been finalized through the corporate cycle without incorporating a budget line or lawful provision to meet the expenditure arising from the judgment, as alleged at paragraph 9 of the replying affidavit. This, according to the applicant, is because the decision of the Public Procurement Administrative Review Board was rendered on 29<sup>th</sup> July 2024 and the procurement relating to RFP No. EACPLC/RFP/009/2023 for the Design, Supply, Installation and Commissioning of a Grid-Tied Solar PV system was initiated through an advertisement published in the Daily Nation on 25<sup>th</sup> January 2022. Consequently, that the budgetary allocations for the project had been made prior to the advertisement in compliance with section 44(2) as read together with section 53(8) of the *Public Procurement and Asset Disposal Act*.
  26. The applicant relies on the case of Econet Wireless Kenya Ltd vs Minister for Information and Communication of Kenya and Another [2005] KLR 828, where Ibrahim, J is said to have underscored the importance of obeying court orders. Further reliance is placed in the case of Teachers Service Commission vs Kenya Union of Teachers & 2 others [2013] eKLR where the court is said to have explained why it is important for courts to punish for contempt of court.
  27. The case of Shimmers Plaza Limited vs National Bank of Kenya Limited [2015] eKLR is also relied on where the Court is said to have addressed the issue of what amounts to being given notice in contempt proceedings.
  28. The applicant also relies on the case of Kiru Tea Factory Limited vs Stephen Maina Gathiga & 14 others Civil Application No.137 of 2017(UR 100/2017), where the Court of Appeal is said to have stated that Section 5 of the *Judicature Act* (Cap. 8) grants the Court of Appeal jurisdiction to punish for contempt.
  29. The case of Daniel K Mwaura t/a Karuru Mwaura & Company Advocates v County Secretary, Kiambu County & 2 others [2024] KEHC 2658 (KLR) is also cited, where the court it is said to have held that there being evidence of service of the order on the respondents and in the absence of evidence that the order had been complied, the respondents were in contempt of the court.
  30. The applicant submits that the respondents, despite being aware of and having been properly served with the court's decree, deliberately and continuously failed to comply with it, thereby meeting the



established threshold and ingredients for contempt of court. It is submitted in reiteration that the applicant has satisfied the requirements under Rule 81.4(1) of the Civil Procedure (Amendment No. 3) Rules, 2020 (England) and that on that basis this Court is urged to find that the 1<sup>st</sup> respondent is in contempt hence the application dated 3<sup>rd</sup> September 2025 should be allowed.

### **The Respondents' written submissions**

31. The respondents filed written submissions dated 11<sup>th</sup> November 2025. They rely on the case of *Katsuri Limited versus Kapurchand Depar Shah* [2016] KEHC 6447 (KLR) where the Court is said to have held that to establish civil contempt, an applicant must prove beyond the ordinary civil case standard that a clear and binding court order existed, the respondent had knowledge of it, deliberately breached its terms and that contempt proceedings given their penal consequences must be approached with great caution and used only as a last resort.
32. The respondents argue that although there is no dispute that a clear and unambiguous decree was issued by this Court, the applicant has failed to establish the essential elements of knowledge and deliberate breach, as the judgment of 7<sup>th</sup> May 2025 was directed at the 1<sup>st</sup> respondent yet the affidavit of service shows that service was effected via an email address belonging to the 2<sup>nd</sup> respondent, with no evidence of personal, office or proper electronic service upon the 1<sup>st</sup> respondent in accordance with the rules of service.
33. The respondents submit that even though it could be argued as was in the case of *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings, it is very clear that the respondents in this case had no knowledge of this Court's decree and that neither did they have knowledge that a judgment had been delivered.
34. The respondents submit that they did not participate in the proceedings prior to the judgment, having innocently instructed an advocate who later ceased acting without their knowledge, leaving them unaware of the case until they were notified of the judgment through the applicant's demand letter dated 22<sup>nd</sup> May 2025. They rely on the case of *Keengwe t/a Keengwe & Co Advocates v Mohamed* (Civil Appeal 1 of 2024) [2024] KEHC 10626 (KLR) (Civ) (7 August 2024) (Judgment), where the court is said to have held that mistake of counsel must not be visited upon the client.
35. The respondents contend in their submission that upon receiving the demand letter, they promptly took steps towards compliance, but that immediate implementation of the judgment was lawfully impossible since the relevant budgets and procurement plans had already been approved without provision for the expenditure. Further, that under the *Public Procurement and Asset Disposal Act* and the applicable corporate governance frameworks, the 1<sup>st</sup> respondent lacked unilateral authority to commit the company to unplanned expenditure absent Board approval.
36. The respondents further rely on the case of *Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party): Rhombus Construction Company Limited & another (Exparte); Mwangemi (Contemnor)* (Judicial Review E002 of 2021) [2021] KEHC 301 (KLR) (2 December 2021) (Ruling) where the court is said to have, in dismissing an application for contempt against the Accounting Officer of Kenya Ports Authority, observed that civil contempt arises only where non-compliance with a court order is deliberate and intentional and that the court may decline to punish a contemnor if, upon considering all the circumstances of the case, it is satisfied that the disobedience resulted from compelling circumstances rather than willful defiance.



37. It is further submitted on behalf of the respondents that contempt of court proceedings is quasi-criminal in nature and that the standard of proof required is higher than that in ordinary civil matters. The respondents argue that they have not acted in wilful or deliberate disobedience of any court order and thus the threshold for contempt has not been met.
38. They rely on Article 50(1) of *the Constitution* of Kenya, 2010 which guarantees every person the right to a fair hearing and Article 48 which assures access to justice. It is their submission that to punish the 1<sup>st</sup> respondent in the absence of proper service or knowledge would amount to a miscarriage of justice and an infringement of their constitutional rights.
39. On attachment of the 1<sup>st</sup> respondent's property, it is submitted that there exists no law in Kenya that provides for the attachment or confiscation of his property as a punishment for contempt of court and that the applicable remedies lie in personal sanctions or other judicial directions where contempt is proved and not in attachment of property.

### **Analysis and Determination**

40. I have carefully considered the Notice of Motion dated 1<sup>st</sup> September 2025, together with the affidavit in support and the response by the respondents and the written submissions by the respective parties' counsel as well as the applicable law. The main issue for determination is whether the applicant has established, to the requisite standard, that the 1<sup>st</sup> respondent is in contempt of the orders issued by this Court on 7<sup>th</sup> May 2025.
41. On 7<sup>th</sup> May 2025, this Court issued orders directing as follows:
  - “1. That the Respondent is hereby directed to issue the Applicant with a letter of Notification of to Award Tender Number RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid Tied Solar PV Plant within 7 days from today's date.
  2. That the Respondent is also directed to complete the procurement process for Tender Number RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid Tied Solar PV in favour of the Applicant within 60 days of today's date.
  3. That in the event that the Respondent fails to comply with this court's orders the Applicant is at liberty to apply for appropriate penal orders as provided for in the law.
  4. That no orders as to costs.
  5. That decree to issue.
  6. That this file is closed save for enforcement of the decree.”
42. The above order is clear and unambiguous. The question therefore is whether the 1<sup>st</sup> respondent had knowledge of the order and whether any non-compliance is deliberate and willful.
43. The Black's Law Dictionary (9<sup>th</sup> Edition) defines contempt as:

“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”



44. Principally, contempt encompasses conduct that threatens or compromises the proper administration of justice and extends beyond mere enforcement of court orders. Superior courts possess the authority to punish parties who disregard or defy court directives, a critical power necessary to preserve the Court's dignity, authority and integrity. When a Court is asked to sanction an alleged contemnor, it acts not only to vindicate the rights of the successful litigant but also to uphold the broader public interest in maintaining the rule of law, as illustrated in the case of Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR where the Court stated, inter alia:

- “ 31. A court without contempt power is not a court.[30] The contempt power (both in its civil and criminal form) is so innate in the concept of jurisdictional authority that a court that could not secure compliance with its own judgments and orders is a contradiction in terms, an “oxymoron.” Contempt power is something regarded as intrinsic to the notion of court; even obvious, I would say. In the common lawyer’s eye, the power of contempt “is inherent in courts, and automatically exists by its very nature.”[31]
33. It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of courts is upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.[32]
34. It is the duty of the court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with contemnors.[33] The court does not, and ought not be seen to make orders in vain; otherwise the court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.[34]
35. A court order is binding on the party against whom it is addressed and until set aside remain valid and is to be complied with. Article 159(1) of *the Constitution* provides that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under *the Constitution*. Under Article 10(1) of *the Constitution* the national values and principles of governance in the Article bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets *the Constitution*; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. Under clause (2) (a) of the same Article the national values and principles of governance include the Rule of Law.
36. It is a crime unlawfully and intentionally to disobey a court order.[35] This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court.[36] The offence has in general terms received a constitutional ‘stamp of approval,’[37] since the Rule of Law – a founding value of *the*



Constitution – ‘requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained.’[38]

37. In the hands of a private party, the application for committal for contempt is a peculiar amalgam,[39] for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.
38. The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide.’[40] A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. [41] Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).[42]
39. These requirements – that is the refusal to obey should be both wilful and mala fides, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority that this evinces.[43] Honest belief that non-compliance is justified or proper is incompatible with that intent. The Constitutional Court of South Africa, [44] underlined the importance to the Rule of Law, of compliance with court orders in the following terms:-

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

45. In *Stewart Robertson vs Her Majesty’s Advocate*, 2007 HCAC63 (Scotland), Lord Justice Clerk emphasized that:

“Contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”



46. Similarly, in *Kenya Tea Growers Association vs Francis Atwoli & 5 Others* [2012] eKLR, Lenaola J (as he then was) cited *Clarke and Others vs Chadburn & Others* [1985] 1 All E.R. (PC) 211, noting:
- “I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed, willful disobedience to an order of the court is punishable as a contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal....even if the Defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it.”
47. On the importance of contempt proceedings, the Court in *Econet Wireless Ltd vs Minister for Information & Communication of Kenya & Another* [2005] eKLR held that:
- “Where an application for committal for contempt of court orders is made the court will treat the same with a lot of seriousness and urgency and more often will suspend any other proceedings until the matter is dealt with and if the contempt is proven to punish the contemnor or demand that it is purged or both. For instance, an alleged contemnor will not be allowed to prosecute any application to set aside orders or take any other step until the application for contempt is heard. The reasons for this approach are obvious- a contemnor would have no right of audience in any court of law unless he is punished or purges the contempt.”
48. Contempt proceedings are subtle and quasi-criminal in nature because criminal sanctions may follow a conviction, the standard of proof is higher than the ordinary civil standard and approaches beyond reasonable doubt.
49. Before the enactment of the *Contempt of Court Act*, which was later declared unconstitutional, the procedure was restated in *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others* [2014] eKLR. The Court applied Rule 81.4 of the English Civil Procedure Rules, which governs breaches of judgment, order, or undertaking. Under section 5(1) of the *Judicature Act*, the High Court and Court of Appeal in Kenya have the jurisdiction to punish for contempt in the same manner as the High Court of Justice in England, ensuring the authority and dignity of subordinate courts are upheld.
50. Accordingly, the procedure under Order 52 of the Rules of the Supreme Court Judicature in England, as amended, provides that leave must be obtained from the High Court of England before an application for committal for contempt is made, and the application for leave is made ex parte to a judge in chambers and must include a statement setting out particulars of the applicant, the person to be committed, the grounds on which his committal is sought, and an affidavit verifying the facts relied on.
51. A notice of the application for leave must be given to the Crown Office no later than the preceding day and if leave is refused by a judge in chambers, the applicant may reapply to a divisional court within eight (8) days after the said refusal. The Rules also provide that upon granting of leave, the substantive application is made by motion to a divisional court, and the motion must be entered within fourteen (14) days of granting leave, or the leave lapses. The motion, statement, and affidavit must be served personally on the person sought to be committed unless the court directs otherwise.
52. However, in the above cited case of *Christine Wangari Gacheche*, the Court of Appeal correctly pointed out that leave, now called "permission" is not required where committal proceedings relate to a breach of a judgement, order, or undertaking. However, leave is still a requirement for applications under Rules 81.12 & 81.17 cited above.



53. In the instant case, the applicant filed a chamber summons dated 1<sup>st</sup> September 2025 seeking leave to commence contempt proceedings in respect of the orders issued on 7<sup>th</sup> May 2025, supported by a statement of facts and a verifying affidavit sworn by Berjeesh Dady Surty, both of even date. I am satisfied that the applicant substantially complied with the procedural requirements governing the institution of contempt proceedings, although this was not an issue.
54. Back to the issue raised by the respondents that the applicant has failed to show that the 1<sup>st</sup> respondent had knowledge of the order and whether any non-compliance was deliberate and willful, the applicant asserts that the decree and a demand letter were served on the 1<sup>st</sup> respondent. The respondents on their part contend that they only became aware of the judgment through the demand letter dated 22<sup>nd</sup> May 2025 and that service was effected via an email address associated with the 2<sup>nd</sup> respondent, with no evidence of personal or proper service on the 1<sup>st</sup> respondent.
55. Although personal service of a court order may be dispensed with where actual knowledge is demonstrated, the burden rests with the applicant to establish that the 1<sup>st</sup> respondent had timely notice of the order. In the present case, the Court record shows that on 4<sup>th</sup> February 2025 Mr. Kiprotich holding brief for Mr. Ochola sought leave to cease acting for the respondents herein.
56. The Court granted counsel leave to cease acting for the respondents and directed the applicant to serve the 1<sup>st</sup> respondent with a hearing notice for hearing of the application dated 3<sup>rd</sup> September 2024, on the 17<sup>th</sup> March 2025. The court also directed that any responses were to be filed within 10 days of the date of service.
57. When the matter came up for HEARING on 17<sup>th</sup> March 2025 for hearing as scheduled, the applicant informed the court that service had been effected upon the 1<sup>st</sup> respondent on 7<sup>th</sup> February 2025 and a return of service filed although no response had been filed. Mr. Mwaura counsel for the applicant went ahead and argued the application and the court reserved 7<sup>th</sup> May 2025 as the date for judgment. On the latter date, there was again no appearance on behalf of the 1<sup>st</sup> respondent and the court rendered its judgment which is the subject of the instant proceedings. The 1<sup>st</sup> respondent herein was in these contempt proceedings represented by Ms. Muchiri advocate.
58. Although the 1<sup>st</sup> respondent contends that he only became aware of the Court's judgment on 22<sup>nd</sup> May 2025, it is noteworthy that the contempt application was not filed until 2<sup>nd</sup> September 2025, well over three months later, affording the respondents sufficient time to take steps towards compliance with the orders issued by the Review Board on 29<sup>th</sup> July 2024 and as restated by this Court in its judgment of 7<sup>th</sup> May 2025.
59. It is important to note that once a court order is issued, compliance is not optional nor dependent on the initiation of enforcement proceedings. Rather, there is a duty to promptly set in motion measures to give effect to the order. Compliance cannot be treated as an afterthought triggered only when enforcement is threatened. In the circumstances, the defence of lack of knowledge is unpersuasive and must fail.
60. Furthermore, the 1<sup>st</sup> respondent has conceded that he became aware of the judgment on 22<sup>nd</sup> May 2025, which knowledge supersedes personal service, assuming there was no personal service. Mativo J in the above Samuel M.N.Mweru case restated the elements of contempt of court that must be established and stated that:

“40. It is an established principle of law that[45] in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order,



(ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.[46] Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand*[47] who succinctly stated:-

"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- (b) the defendant had knowledge of or proper notice of the terms of the order;
- (c) the defendant has acted in breach of the terms of the order; and
- (d) the defendant's conduct was deliberate.

61. Having found that the applicant has established beyond doubt and by the 1<sup>st</sup> respondent's own admission that he was aware of the order alleged to have been disobeyed, and there being no issue as to whether the order was clear and unambiguous, the next question is whether the order in issue was disobeyed and whether the non-compliance by the respondents was willful.
62. The respondents have admitted that indeed, they did not comply with the orders of this court for which the 1<sup>st</sup> respondent is sought to be cited to be in contempt. They however attribute their inability to comply, to corporate and statutory constraints, contending that the approved Annual Procurement Plan and budget for the 2<sup>nd</sup> respondent made no provision for the expenditure contemplated by the order. They further argue that under the *Public Procurement and Asset Disposal Act*, Mwongozo and the entity's internal governance instruments, the 1<sup>st</sup> respondent lacked authority to unilaterally commit the organisation to unplanned expenditure without prior Board approval.
63. In response, the applicant has contended that the tender was advertised in the Daily Nation on 25<sup>th</sup> November 2022 and that the respondents subsequently applied before the Public Procurement Administrative Review Board on 5<sup>th</sup> April 2024 for an extension of time to complete the tendering process. This evidence demonstrates that at the outset of the procurement cycle, the project was budgeted and planned for in accordance with section 53(8) and (9) of the PPADA, which requires accounting officers to ensure that funds are available before procurement.
64. The fact that the respondents themselves sought an extension in 2024 indicates that funds were available for the project and therefore their later assertions before this Court now, that implementation of the court's 7<sup>th</sup> May 2025 order was impossible due to lack of a budgetary allocation does not make any sense. Furthermore, the respondents have not in any way challenged the judgment of this Court delivered on 7<sup>th</sup> May 2025 or the decision of the Public Procurement Administrative Review Board, which the applicant sought to compel the respondents to implement.



65. Importantly, the Public Procurement Administrative Review Board also considered the issue of alleged budgetary constraints and found that no evidence had been adduced by the respondents to substantiate such claims. The Review Board further found that the respondents acted in contravention of the Review Board's orders by terminating the procurement process, which reinforces the inference that any non-compliance with the Court's order was not due to lawful budgetary limitations but a deliberate failure to act.
66. Additionally, the Public Procurement and Asset Disposal Review Board in PPARB Application No.61 of 2024 extensively addressed the issue of whether the procurement proceedings in Tender Number RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and commissioning of a Grid Tied Solar PV Plant had been terminated in accordance with the law and at paragraphs 90 all the way to 116 of the decision, the Review Board extensively discussed the events leading up to the termination of the said proceedings and also examined the actions of the 1<sup>st</sup> respondent against what the law provides.
67. In its findings the Review Board at paragraphs 113 to 116 held as follows:
- “ 113. In the circumstances, the Board finds and holds that the Respondent has failed to fulfill the substantive requirements for the termination of procurement proceedings in the subject tender as required by Section 63 (1)(b) of the Act and the aforesaid decisional laws since they have not provided sufficient evidence of inadequate budgetary allocation justifying termination of the subject tender.
114. From the confidential file, we note that all tenderers in the subject tender were notified of termination of the procurement proceedings in the subject tender vide letters dated 24<sup>th</sup> June 2024. However, the Board has not had sight of any written report addressed to or submitted to the Director General, Public Procurement Regulatory Authority ("the Authority") notifying it of termination of the subject tender and the reasons thereof in accordance with Section 63(2) & (3) of the Act. The letter of 24<sup>th</sup> June 2024 addressed to the Board Secretary, Public Procurement Administrative Review Board does not suffice as proof that the Authority was notified since it was addressed to the Board Secretary and not the Director General of the Authority as prescribed in law.
115. In the circumstances, the Respondent failed to satisfy the procedural statutory pre-conditions that must be satisfied before termination of procurement proceedings is deemed lawful pursuant to Section 63(2) & (3) of the Act.
116. In totality, the Respondent failed to satisfy both the substantive statutory pre-conditions of termination of procurement proceedings in accordance with Section 63 of the Act. As such the Board's jurisdiction has not been ousted by dint of Section 167(4)(b) of the Act.”
68. The Review Board in its final orders cancelled and set aside the Tender Termination Notice dated 24<sup>th</sup> June 2024 issued by the respondents claiming budgetary constraints, directed that a letter of Notification of Intention to award be issued to the applicant herein and it also extended the tender validity period for a further 30 days from 29<sup>th</sup> July 2024.
69. As earlier stated above, civil contempt proceedings are quasi-criminal in nature, and the standard of proof is high. The Court must be satisfied that non-compliance was deliberate and intentional. In



this case, the combination of prior advertisement, the 2024 extension request, the findings of the PPARB regarding lack of evidence of budgetary constraints, which finding has not been challenged by the respondents, judgment of this court rendered on 7<sup>th</sup> May 2025 which has never been challenged and absence of any evidence showing legitimate fiscal impediments, creates a strong inference that the 1<sup>st</sup> respondent could have lawfully complied with the Court order issued on 7<sup>th</sup> May, 2025, but deliberately elected not to comply. This conduct on the part of the 1<sup>st</sup> respondent dents the 1<sup>st</sup> respondents' defense of lawful constraint and confirms that the non-compliance was deliberate.

70. In the result, this Court is satisfied and finds that the applicant has proved beyond reasonable doubt all the elements of civil contempt. The 1<sup>st</sup> respondent office holder who is CPA Mohamed Osman Adan is hereby found to have willfully and deliberately disobeyed the orders of 7<sup>th</sup> May 2025. He is found guilty of contempt of court orders of 7/5/2025 and is convicted of contempt of court.
71. The 1<sup>st</sup> respondent who is the Accounting Officer for the East Africa Portland Cement PLC, CPA Mohamed Osman shall appear before this court for mitigation and appropriate orders shall be made in accordance with the law, regarding punishment for contempt of court orders.
72. Mention on 3/2/2026 for mitigation and the contemnor to appear in court, represented by counsel.
73. As the Court did not award any costs in the primary proceedings, I order each party to bear their own costs of the application for contempt of court orders.
74. I so order.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF DECEMBER, 2025**

**R.E. ABURILI**

**JUDGE**

