

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. E.049 OF 2025

WILKEN COMMUNICATIONS LIMITED.....APPLICANT

VERSUS

POST MASTER GENERAL.....1ST RESPONDENT

POSTAL CORPORATION OF KENYA.....2ND RESPONDENT

RULING ON MITIGATION

1. On 15th December, 2025, this court delivered a ruling in this matter finding the 1st respondent herein, Post Master General of the Postal Corporation of Kenya, guilty of contempt of Court for non-settlement of decree for mandamus issued pursuant to the judgment of this Court rendered on 28th May, 2025.
2. The decree for mandamus and therefore, these proceedings, arose from a primary decree issued in Milimani High Court Civil Suit No. 527 of 2011 and a judgment rendered in the said suit on 26th July, 2021 wherein the applicant herein, was awarded a liquidated sum of Kshs 6,411,784.50 plus interest and costs of the suit.

3. The defendant in the said suit, being the 2nd respondent herein, Postal Corporation of Kenya, then sought for indulgence to settle the decretal sum plus costs and interest by way of monthly instalment of Kshs 1,000,000 until payment in full. It was therefore at that time in 2021, expected that the decree would be settled within a period of six months.
4. Since section 25 of the Postal Corporation of Kenya does not permit execution of decree by way of attachment of the 2nd respondent's property, the applicant was compelled to approach this court to seek for the remedy of mandamus, which is the only remedy available to the applicant hence these proceedings.
5. The 2nd respondent did not honour the instalments payments as proposed after the judgment in the civil suit. Despite mandamus order being issued in this age-old matter, the respondents did not pay any of the promised instalment or any part of the decretal sum.
6. The applicant consequently sought orders to hold the accounting officer of the 2nd respondent herein, for being in contempt of court and this Court after hearing both parties, found the 1st respondent accounting officer to be in contempt of court, having failed to settle decree for mandamus.
7. No sooner had the contempt of court orders been issued than the 1st respondent engaged a different advocate who filed an application under

certificate of urgency, which is dated 19th December, 2025 seeking to stay execution of the order for contempt of court and the conviction entered on 18th December, 2025 and the scheduled sentencing proceedings set for 3rd February, 2026. The applicant also seeks the setting aside of the finding of contempt of court against the 1st respondent and that the applicant be granted leave to file and serve the replying affidavit to the application for contempt of court application dated 18th July 2025.

8. The grounds in support of the application are that the previous advocate was professionally negligent and committed an oversight leading to the 1st respondent being condemned unheard, and that his right to a fair hearing and fair administrative action under Article 50(1) and 47 of the Constitution were violated.
9. The 1st respondent further avers that he had a defence to the contempt application as failure to pay the decretal sum was not deliberate as it was occasioned by financial impossibility and not contumacious defiance. That therefore he should be granted leave to file a replying affidavit to the application for contempt of court out of time. further, that the respondents have demonstrated good faith by paying Kshs 1,602,946 despite facing financial challenges and that it is in the interest of justice that the Post Master General be heard before a penal sanction is imposed.

10. In the supporting affidavit sworn by the 1st respondent/applicant John Kipyegon Tonui, he deposes of financial distress of the 2nd respondent, the payment made following the contempt orders, the engagement with the national treasury to grant approval for a Cabinet memo to debtors to release the over 2 billion Kenya shillings owed to the 2nd respondent as per the attached list, the staff going on strike due to unpaid dues, including litigation and court orders, that the previous advocate did not file a replying affidavit that the 1st respondent had authorized leading to ex parte orders of contempt.
11. Annexed to the affidavit sworn by the 1st respondent are documents including evidence of payment after the contempt proceedings were commenced, request by the National Treasury to debtors to pay and advisory to accounting officers whose Ministries or state departments and agencies including constitutional commissions owe the 2nd respondent, to settle what they owe to the 2nd respondent including reallocations.
12. When the matter came up for mitigation and sentencing on 03/02/2026, the respondent's counsel urged the application dated 19/11/2025 seeking setting aside of contempt and conviction because the non-payment was outside the control of the Respondent. That there has since been part payment of the outstanding decretal sum. Further, that there are financial challenges which include Labour Relations matter before Radido J. He prayed that the

contempt be purged and the orders be stayed pending settlement of the balance.

13. Mr. John Tonui the Postmaster General who appeared in court virtually was allowed to address the Court and he stated that he agreed with what his advocate had submitted, while apologizing to the Court stating that the respondents are pushing for money injection from the National Government and once received, they will settle the balance in 90 days or earlier once they get the funds. That it was only until October 2025 that the National Treasury directed those owing to pay the Respondents and that the supplementary budget for February & March 2026 will enable them receive 2 billion and settle this and other liabilities.

14. The applicant's counsel submitted that the contempt should stand because the court order is for settlement of the whole amount. They acknowledged Kshs. **3.2 million** as the Respondents had stated but contended that this was a 2020 judgment wherein the respondents proposed to settle in instalments for 6 months but they never honored the undertaking. That they had paid money to their workers meaning they had money to pay to settle the decree.

Analysis and Determination

15. I have considered the application, combined with the mitigations by the 1st respondent and the oral submissions by all the parties' respective counsel.

The issue for determination is whether the court should set aside the order for contempt of court and if so, on what basis and if not, what orders should this court make in the circumstances of this case.

16. The application is brought under the provisions of sections A, 1B 3A of the Civil procedure Act, Order 51 Rule 15 of the Civil procedure Rules Order 42 Rule 6 Order 50 Rule 6 of the Civil procedure Rules and Article 50 of the Constitution.

17. The 1st respondent claims that the failure to file an affidavit in reply was occasioned by professional negligence of his advocate and that he had a defence to the contempt application to the effect that he did not deliberately refuse to settle decree. That the failure to settle decree was due to financial constraints experienced by the 2nd respondent who is also owed by many entities and that it was also facing staff strikes and litigation for unpaid salaries. That the National Treasury had intervened to have the debtors pay and that part of the decree had since been settled hence the application and a request for 90 days to pay the balance after supplementary budget is approved.

18. The ex parte applicant did not file any response to the application but acknowledged receiving part of the decretal sum after the contempt orders were issued while insisting that the whole amount ought to have been

settled. It was therefore submitted that the contempt orders should remain in force.

19. The 1st respondent also appeared in court virtually as directed by the court and apologized for the failure to settle the decree in time, while giving his undertaking on commitment by the respondents to settle the balance once the supplementary budget is approved.

20. From the onset, the respondents do not dispute the claim against them. They do not dispute the mandamus orders issued compelling the accounting officer to settle the decree. Neither is there any dispute as to the service or knowledge of the mandamus order. There is also no dispute as to the service or knowledge of the application for contempt of court which was considered inter partes and not ex parte as alleged.

21. There is also no allegation of an error apparent on the face of the record or that the contempt order was issued in deceit or misrepresentation or fraud or that the court was misled into issuing the order or that it ignored any evidence placed before it by the respondents. There is equally no evidence of settlement of the decree to warrant an order that contempt has been purged, for the 1st respondent to be discharged from the contempt proceedings.

22. It is additionally important to highlight that the respondents have at all times been represented by counsel in these proceedings and therefore the question

of exparte orders does not arise. Even when the advocate who represented the respondents in the primary suit intimated to court that he had no instructions in the matter, the court directed that the respondents be personally served and that was done before the hearing of the applications on record.

23. Moreover, on 08/04/2025 when the application for mandamus came up for hearing, the respondents were well represented in Court by Mr. Muriithi advocate whose response to the application for mandamus was ***“There was the problem of computation of the amount which my client wanted sorted then my client would settle.”***

24. Judgment on mandamus was delivered on 28/5/2025 on the application for mandamus and the court in its discretion exempted the respondents from paying costs.

25. On 22nd July 2025 when the matter came up for mention before the Deputy Registrar, to confirm if decree had been settled, as this Court was on leave, the respondents’ counsel was present, Mr. Kimathi who submitted that the court may give directions in the matter. By then, the applicant’s counsel had filed an application for contempt and the court gave directions on filing of responses.

26. As at 28/10/2025, the respondents' counsel was still saying that they had not received any directions on payment although they had been pursuing their client to settle.
27. This Court gave directions for the notice of motion dated 18/7/2025 to be heard by way of oral submissions on 13/11/2025. The Respondents were granted leave to file their response within 5 days since they had been served way back on 21/7/2025 as per the affidavit of service dated 21/7/2025.
28. On 13/11/2025, this Court allowed the application for contempt of court to proceed after it emerged that no response had been filed and the advocate for the respondents was now asking for 14 days to file a response, without giving any reasons for the failure to file a response to the application which had been served way back In July 2025 and time extended for them to file their response.
29. From the above detailed sequence leading to the ruling on contempt of court, there is no evidence that the 1st respondent could in any way have been shortchanged by counsel instructed to represent them in the matter. There is no letter of instructions on how their advocates were to draft any affidavit in reply to the contempt application or documents or an explanation send to the advocates in the form of a defence as to why the decree had not been settled.

30. I find no evidence capable of shifting blame to the advocate who was on record for the respondents. Additionally, the respondents' allegations of professional negligence of the advocate is not established in this case and is an afterthought and uncalled for and a distorted trick which this court refuses to buy in.

31. In the end, I find no merit in the application seeking to set aside the order for contempt of court and decline the invitation to allow for reopening of the application so that a replying affidavit giving reasons for non-settlement of decree is filed. In any event, the 1st respondent has appeared in court and explained himself and even filed documents showing the concerted efforts being made to settle decree, including partial settlement thereto, which forms part of his mitigation.

32. I now move onto the mitigation offered. The 1st respondent appeared in person represented by counsel and offered an apology for non-payment of the decretal sum explaining how it has been difficult for the Corporation to meet its financial obligations, occasioned by the many debtors who have also not settled their debts with the 2nd respondent. He gave a commitment supported by documentation that show the recent concerted efforts being made to settle decree and a part payment made in partial purging of the

contempt of court order, while requesting for 90 days within which to settle the balance once the supplementary budget is approved.

33. In my view, although the contempt has not been purged in full, and therefore contempt of court orders cannot be discharged, the contemnor has demonstrated that he is making every effort, though belatedly, to purge the contempt fully. He now understands the significance of court orders and consequences of not only noncompliance, but also, being non-responsive to court processes. He cannot however, be exonerated from blame as an office holder, noting that this matter is a 2011 case arising all the way from the Civil Division to execution process commenced herein.

34. In the premises, this Court exercises discretion and suspends the sentencing of the 1st respondent and grants him and the 2nd respondent 90 days of the date of this ruling as requested by the 1st respondent, to settle the balance of the decretal sum and in the event that the balance is not settled within that period, a report be filed into court on the reasons for not meeting the timelines give herein. In default thereof, the court will proceed as appropriate and make orders in accordance with the law.

35. I make no orders as to costs.

36. I so order.

Dated, signed and Delivered at Nairobi this 25th Day of February, 2026

**R.E. ABURILI
JUDGE**

ORIGINAL