REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 300 OF 2015

VIMALKUMAR BHIMJI DEPAR SHAH……..……1ST PLAINTIFF

BIDCO AFRICA LIMITED…….……2NDPLAINTIFF

VERSUS

STEPHEN JENNINGS..…….…..1ST DEFENDANT

RG AFRICA LAND LTD t/a RENDEAVOUR GROUP....2ND DEFENDANT

PRESTON MENDENHALL…….……3RD DEFENDANT

ARTEM GUREVICH…….……4TH DEFENDANT

ALY KHAN SATCHU……...….5TH DEFENDANT

CYPRIAN NYAKUNDI……...…...6TH DEFENDANT

JUDGMENT ON CONTEMPT OF COURT PROCEEDINGS

1. This judgment determines the plaintiffs'/applicants' application dated 29th September2015, which seeks from this court orders that:

    1. This application be certified urgent;

    2. Directions be given as to an early hearing date in respect of prayer 4 herein below

    3. The first and sixth defendants be committed to civil jail for a period not exceeding six months for their disobedience and contempt of the court order made on 31st August 2015 and the court order made on the 10th September, 2015 and for ridiculing and undermining the institution of the court.

    4. Costs of the application be provided for.

2. The application was brought under the provisions of sections 5 of the Judicature Act, sections 3, 3A and 63(e) of the Civil Procedure Act and Order 40 Rule 3 of the Civil Procedure Rules and Rules 81.4, 81.16 and 81.17 of the Civil Procedure Amendment No 2 Rules, 2012 of England.

3. The grounds upon which the application is premised are listed from Ground No. A to N which, basically provide that:

A. The defendants have had on various occasions maliciously published defamatory statements regarding the plaintiffs herein;

B. Being aggrieved by the aforesaid actions the plaintiffs filed this suit and obtained an interim order of injunction against the defendants restraining them from publishing or disseminating in any manner any defamatory words similar to, or of like effect to the offending statements earlier made and a mandatory injunction compelling the defendants to remove from all their websites, blogs or other social media platform the said offending statements;

C. The said order was duly served on the applicants by way of substituted service n the press on 3rd September, 2015 as ordered by court and by way of personal service, with a penal notice duly endorsed thereon;

D. The said order was issued in the presence of counsel for the 1stt, second, third, Fourth, fifth and sixth defendants;

E. The said order was subsequently personally served on the first defendant on the 16th September 2015;

F. Be it as it may, the 1st, 2nd and 6th defendants have in blatant disregard of the mandatory order requiring them to pull off the subject content from their respective media sites refused, and neglected to do so;

G. Other than pull down the said content from the second defendant's website, on 10th September, 2015 the first and second defendants have in blatant breach and defiance of the order of 31st august 2015 reposted on its website the said speech, the Q and A session and the One on One session;

H. Further the first and second defendants have continued to generate more of the defamatory statements. They have invited the business community to a forum at the National Museums of Kenya on the 17th September, 2015;

I. The said words as uttered by the 1st defendant meant, and were understood to mean, and had the effect of defaming the plaintiffs herein in similar manner as the words the defendants had been barred by way of an injunction from publishing;

J. The speech and Question and Answer Session have been disseminated widely and have been published on their website to wit http://www.rendeavour.com/nes/stephen -jennings-discusses-tatu-city-and kenyas-urban-future on the 17th September, 2015;

K. The sixth defendants has continued to tweet various messages in reference to the plaintiff herein in the same vein as defamatory statements in his previous posts that he was restrained from publishing;

L. In further contempt of court, the 1st, 2nd and 6th defendants have ridiculed the Kenyan courts by suggesting that they are being manipulated by the plaintiffs, or are open to manipulation.

4. The application is further supported by the affidavit of Vimalkumar Bhimji Depar Shah sworn on 29th September, 2015, echoing the grounds above stated and annexing evidence of the alleged breach of the impugned court orders and as contained in the oral submissions of the applicants' advocate.

5. The application for contempt of court was opposed by the respondents/alleged contemnors. The first

respondent filed grounds of opposition filed on 28th January, 2015 and replying affidavit sworn on 24th February 2016 contending that the impugned orders were defective and that he was never served with the said orders personally as required in the law of contempt; that the person allegedly served with the order had no authority from the 1st defendant to receive such order; that the application is incompetent as it fails to specify the statements that are alleged to be defamatory and as to what constitutes contempt; that this court cannot at this interlocutory stage make a finding as to what is defamatory, which would be a trial within a trial; and that the order of the court was too broad and ambiguous and lacked brevity on what was alleged to be defamatory of the plaintiffs and therefore overreaching in both scope and purport; that the contempt proceedings impede on the respondents' constitutional rights to freedom of speech which should not be curtailed by unreasonable demands

6. The 6th defendant/respondent filed a replying affidavit sworn on 15th March, 2015 deposing that the application for contempt was defective as it is premised on wrong provisions of the law as applied in England; that he had not been served with the orders personally; that the order does not have a penal notice; that the application seeks to abrogate and restrict fundamental rights on the freedom of expression under Article 33 of the Constitution hence it was fatally defective; he also denied being enlisted by the other defendants to write defamatory words about the plaintiffs; that the alleged publications had no defamatory connotation or meaning as alleged; that he has never created any website in collusion with the other defendants; that it's the plaintiffs who had created proxy accounts on twitter and paid publishers of online magazines to ridicule and embarrass him publicly on issues that he is not part of ; that the interim orders lapsed on 10th September, 2015 and cannot be a basis of any contempt proceedings.; that the injunction of 10th September 2015 only restricted the publication of defamatory statements of and concerning the plaintiffs and not publication of any content relating to the plaintiffs; that the tweets refer to matters trending then and not directed at the plaintiff and have no intention of defaming the plaintiffs but are matters of public consumption; and that he had not ridiculed court process.

7. The parties' advocates argued the application orally. The plaintiffs/applicants were represented by Mr Mmaitsi advocate; Senior Counsel Mr Ahmednassir represented the 1st and 2nd defendants/ respondents while Miss Mutua represented the 6th defendants.

8. The applicants' counsel submitted that this court did issue orders of injunction on 1st September 2015 restraining the defendants from publishing any defamatory words of and concerning the plaintiff. That the court also ordered for the removal, pulling down and or deletion of the defamatory words from the defendant's internet sources, websites, blogs and other social media platforms. That the said order was clear and unambiguous and it was certain as to what was being injuncted. That the said order was advertised in the Daily Newspapers twice and that it also bore a penal notice. That the 1-5th defendants' counsel also send a note from Senior counsel Ahmednassir asking for pleadings to enable him enter appearance for the 1st and 2nd defendants. That the order was duly served upon the defendants and that the 6th defendant personally picked the order and pleadings from Mr Mmaitsi's office. That the 6th defendant later wrote, posting the order "to cover up their criminal ways" and that he mentions the order and the ongoing case. That on 10th September 2015, a second order was issued extending the one of 1st September 2015 and on the 10th September 2015 all counsels for the parties were present in court and that the said order as extended was also served upon the defendants.

9. It was submitted that notwithstanding the knowledge and or service of the orders, the defendants had continued to publish defamatory words concerning the plaintiffs, contrary to the injunctive orders and that he 1st defendant had not controverted the facts deposed by the plaintiffs. Further, that the 6th defendant who is a blogger had continued writing and defaming the plaintiffs despite awareness of the order. That although the defendants deny personal service of the order, they do not deny being aware of the impugned order. That the republication of the defamatory matter is evidence of disobedience hence the court should punish them for contempt.

10. Counsel for the applicants submitted that Article 33 of the Constitution is not absolute and is subject to limitations that protect other people's reputation and that that power is given to the courts to injunct.

He relied on the cases of **Mwaniki Silas Ngari V John S. Akama & Another ELRC 1380/2013**; **John Kenneth Mugambi V City Council of Nairobi HCC 622/2008**; and **Justus Kariuki Mate & Another V Martin Nyaga Wambora & Another CA 24/2014** which all advance the principle that personal service is not necessary where knowledge of the order is proved, especially if the orders were made in the presence of counsel for the parties. Counsel prayed that all the defendants except the 5th defendant be cited for contempt.

11. In their opposing submissions, the 1st respondent through Mr Ahmednassir Senior Counsel submitted on behalf of the 1st and 2nd respondents, relying on the grounds of opposition dated 28th January 2016, replying affidavit of the first defendant filed on 10th March 2016 and stated that only the 1st and 6th defendants were affected by the application for contempt.

12. Counsel also submitted that the application is defective, incompetent and undeserving and a waste of the court's time and intended to vex, harass and intimidate the respondent. That the application for contempt seeks orders that were nonexistent in that there was no order on 31st August 2015 that was specific. That the only order in the records is the one of 1st September 2015. That contempt of court is a serious charge and therefore the court cannot rely on any other nonexistent court order to jail the alleged contemnors. Further, that there is no merit in the application since the letters of 20th May 2015 by Preston Mendenhall is not contemptuous of court order as the letter was written by the 3rd defendant who is not being cited for contempt. Further, that annextures 2 at pages 3 and 4 is a transcript of 9th July 2015 made before the alleged contempt order when there was no court orders prohibiting the 2nd defendant from making any statement. That as to what was defamatory in those letters is not disclosed.

13. Further, that assuming there was a court order of 31st August 2015, then it must have lapsed on 10th September 2016 because on that day, the plaintiffs' advocate made a fresh application seeking an injunction to subsist until the application is heard and determined; and that therefore if the alleged order existed then it lapsed on 10th September 2016 hence bringing an application for alleged contempt of the said court order must be accompanied by evidence that between 31st August 2015 and 10th September 2015, there was a breach of that court order.

14. On the allegation that the orders of 10th September 2015 were breached, it was submitted by Senior Counsel that as per paragraphs 27,28, 29 and 30 of the 1st plaintiff's affidavit, the said order of 31st August 2015 was not subsisting and was overtaken by the orders of 10th September 2015 which was clear at page 44 that the defendants were " not to publish any defamatory words of and concerning the plaintiff;" That the plaintiffs had not shown to the court what those defamatory words published from or after 10th September concerning the plaintiffs were. That the 2nd defendant's website as printed out does not show any defamatory words against the plaintiffs and that the complaint only confirms the big ego problem which the 1st plaintiff has. Further, that the plaintiffs' paragraph 32 of their affidavit shows that the 1st plaintiff has a thick skin and intolerant to any little criticism. That describing him as an "emperor without clothes is not defamatory." Further, that the affidavit of service shows that the order was not served on Mr Jennings.

15. On the Standard of proof required for one to be found in contempt Senior Counsel submitted that it is the beyond reasonable doubt standard that the alleged contemnor breached the court order flagrantly. Further, that in this case the applicant had failed to prove any breach of the court order to the required standard. He relied on **Bornie & Lowe on the law of contempt page 155 paragraph 6-9** that proper breach must be given, and proved beyond all reasonable doubt; and at page 156 that it must be shown that the contemnor specifically breached a court order; and at page 158 on the need to strictly comply with the rules of procedure. In this case, it was submitted that there is no order of 31st August 2015 therefore the order breached is not set out.

16. Senior Counsel also relied on **Aldridge Eady & Smith on contempt page 1641-171 (K)** to argue that ambiguous undertakings cannot be enforced by committal; the rule being analogous to interpretation

of statutes. Further, that the permutation of what is defamatory and what is not defamatory is so wide and that common English expression used cannot hold the defendants in contempt. It was also submitted that the undertaking and breach must be clear beyond all question; and that the court cannot read all statements to find out what is defamatory hence the application is defective, untenable, unmeritorious and based on imaginations and should be dismissed.

17. On her part, Miss Mutua on behalf of the 6th respondent opposed the application for contempt relying on her client's replying affidavit dated 10th March 2016 and a list of authorities filed on 10th March 2016 urging that the order of 31st August 2015 is nonexistent and that if at all it was there then it lapsed on 10th September 2015. Further, that there are no proceedings on record regarding the order of 31st August 2015 which is also nonexistent.

18. Further, that the orders of 10th September 2015 were not served on the 6th defendant/respondent, which service is a mandatory requirement. Further, that there must be proof of service or personal knowledge. counsel submitted that a mere allegation of knowledge cannot pass the test as was held in **Nyamogo & Nyamogo Vs Kenya Posts & Telecommunications case [1990-1994] EA 464** where the Court of Appeal emphasized service of the order. That in this case, the affidavit of service does not state that there was service of the order and that advocates for the parties being in the court is not sufficient proof of knowledge of the order.

19. Further, that Authority No. 3 filed by the plaintiff is clear at page 12 that the court may waive the requirement of personal service in the circumstances given. Further, it was submitted that in this case there was no evidence of awareness or service of the order upon the 6th defendant.

20. On the issue of whether there were defamatory statements made by the 6th defendant, it was submitted that most annextures refer to the 6th defendants tweets from page 81 which tweets do not relate to the plaintiffs and that some tweets were not made by the 6th defendant hence he cannot be held liable in contempt for the tweets that he never made. It was further submitted that any allegations of contempt must be precisely set out. That the affidavit of Vimal Shah does not make reference to the tweets hence there was nothing upon which this court can use to determine whether the contents of the tweets were defamatory. She relied on Christine **Wangari Gachege V Elizabeth Wanjiru Evans & 11 others [2014] e KLR.** Counsel also submitted that the allegations that the 6th defendant used proxies or proxy accounts or colluded with other defendants to defame the plaintiff was unfounded and that neither was it shown that the 6th defendant was hell bent to defame the plaintiffs but was merely exercising his rights under Article 33 of the Constitution. That the issue of the Tatu City was in the public domain and in the public interest and therefore the 6th defendant had not breached any court order issued by this court.

21. In a rejoinder, Mr Wandabwa counsel for the plaintiffs submitted that from the submissions and the filed replying affidavit, it is clear that the defendants were aware of the orders in issue. Further, that there is an error as to the order of 31st August 2015 which has no prejudice to the defendants, which order was overtly publicized in the newspapers and the 6th respondent personally picked it from the plaintiffs' advocates offices and signed for it. That to dismiss the application for contempt on the basis of a defect, the court will be offending Article 159 of the Constitution. That if the court finds that no prejudice will be occasioned to the defendants by the mistake in the order then it should proceed to convict the respondents/defendants for contempt of court.

22. Mr Wandabwa also submitted that the annexed letters were meant to explain the publication before the suit was instituted, for the court to appreciate what the injunction was intended to achieve. That the 6th defendant reposted the contents of exhibit 2 on 17th September 2015 which was in contempt of the court order. Mr Wandabwa also maintained that the orders are clear and not ambiguous and that the republished words were defamatory. Further, that despite the orders of 10th September 2015 prohibiting publication of defamatory words, the defendants went ahead to publish defamatory utterances. He denied that the permutations of the order is wide since the order of 1st September 2015 was specific and that it never lapsed and neither did the defendants pull from their sites the defamatory words which

they should have done by 10th September 2015.

23. It was submitted that the 6th defendant was served with the 1st order and his advocate was present in court on 10th September 2015. Counsel also submitted that the Nyamogo & Nyamogo case was not applicable since it was decided din 1994 and that the law regarding personal service of the order has since changed. Further, that there is no denial by the defendants that they were aware of the order. That the defamatory words allege the plaintiffs have corrupted the justice system which is defamatory hence the court should intervene by allowing this application for contempt and meet our appropriate punishment.

24. The rulings in both applications for contempt and injunction were supposed to be delivered on 11th May 2016 but the court was engaged in other official duties out of Nairobi station, which engagement had not been foreseen and so the parties were served for 14th July 2016 when the defendant's counsels wrote to the court requesting that the rulings be rescheduled to the 10th August 2016 when the alleged contemnors would be in a position to attend court.

25. I have carefully considered the twin applications argued separately and independently, with the first application seeking for injunctive orders in an alleged defamation of the plaintiffs by all the defendants and the second application seeking to cite the 1st and 2nd and 6th respondents/defendants for contempt of court orders allegedly issued on 31st August 2016.

26. The rule of law requires that orders of the court be obeyed in order to protect the dignity and authority of the court process. It is for that reason that the application for contempt shall in all instances be considered first before any other proceeding is taken. In the case of **African Management Communication International Limited –Vs- Joseph Mathenge Mugo & Another (2013) eKLR Civil Case No. 242 of 2013** the Court stated that according to Black's Law Dictionary (Ninth Edition) contempt of court is defined 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."***

27. As early as 1778, Chief Justice McKean of the United States, when dealing with a case of a party in Civil litigation who refused to answer interrogatories is noted to have stated:-

> ***"Since however, the question seems to resolve itself into this, whether you shall bend to the law, or the law shall bend to you, it is our duty to determine that the former shall be the case."***
>
> ***(The History of contempt of Court (1927) P 47)."***

28. In ***Johnson Vs Grant*** **(1923) SC 789 at 790 Clyde L J** noted:-

> ***"The phrase 'contempt of court' does not in the least describe the true nature of the class of offence with which we are here concerned.... The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice..... it is not the dignity of court which is offended – a petty and misleading view of the issues involved, it is the fundamental supremacy of the law which is challenged." (Emphasis mine).***

29. In the case of **TEACHERS SERVICE COMMISSION v KENYA NATIONAL UNION OF TEACHERS & 2 others [2013]** eKLR **Ndolo J** observed that:-

> ***"The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law."***

30. The Court further augments the above statement and concurs with it and says ***"I am of the same persuasion that the reason why power is vested in Courts to punish for contempt of Court is but to safeguard the rule of law which is fundamental in the administration of justice. The law of contempt has evolved over time in order to maintain the supremacy of the law and the respect for law and order. As it was in the time of Chief Justice McKean in 1778, so it is today that courts have a duty to ensure that citizens bend to the law and not vice versa. Indeed, if respect for law and order never existed, life in society would be but short, brutish and nasty. It is the supremacy of the law and the ultimate administration of justice that is usually under challenge when contempt of court is committed. This is so because, a party who obtains an order from Court must be certain that the order will be obeyed by those to whom it is directed. As such, the obedience of a court order is fundamental to the administration of justice and rule of law. A court order once issued binds all and sundry, the mighty and the lowly equally without exception. An order is meant to be obeyed and not otherwise."***

31. The statutory power to punish for contempt of court orders is vested on the High Court by application of Section 5 of the Judicature Act, Cap 8 of the Laws of Kenya which stipulates that:

> ***1. "The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.***
>
> ***2. An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary criminal jurisdiction of the High Court."iHigh***

32. From the above provision, it is clear that the law governing contempt of court proceedings is the English Law applicable in England at the time the alleged contempt was committed. In this regard, the applicable Law in England is 2012 Civil Procedure (Amendment) No. (2) Rules which came into force on 1st October 2012 with part 81 thereof effectively replacing Order 52 of the Rules of the Supreme Court of England that previously dealt with the procedure for seeking contempt of court orders in the High Court of Justice in England. Under Rule 81.4, the application for contempt is made in the same proceedings in which he order allegedly violated was made. The application must be set out fully the grounds upon which the committal application is made, identify separately and numerically each of the alleged acts of contempt and be supported by an affidavit (s) containing all the evidence relied upon. The said application and affidavit must be served personally on the respondent unless the court dispenses with such service if it considers it just to do so or authorizes alternative mode of service. In **Christine Wangari Gachege V Elizabeth Wanjiru Evans** (supra) the Court of Appeal held that leave to apply for contempt proceedings is no longer required in such proceedings relating to breach of a judgment or order of undertaking except in proceedings for committal for interference with the due administration of justice or on committal for making a false statement of truth or disclosure statement.

33. As earlier stated , the rule of law obliges that court orders must be obeyed, for , court orders are not made in vain and if for good reason a party finds it impossible to comply with court orders, then such party or person is expected to seek clarification from the court and unless vacated, set aside or varied, court orders must be obeyed .

34. In ***Margaret Wambogo Nyaga Vs Clerk To Embu County Council & 2 Others*** **[2010] eKLR Miscellaneous Civil Application 176 of 2006 wherein the Judge quoted with approval the case of *Hadkinson Vs Hadkinson* (1952) AER 567** in the following terms;

> ***"It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made against 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 even void." See the case of African Management Communication International Limited*** *Supra.*

35. **Lord Cottenham I.C. In Chuck Vs Cremer in 1846** stated that:

"A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it… It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must be obeyed,"

36. The Court of Appeal in **Refrigerator & Kitchen Utensils Ltd Vs Gulabchard Popat lal Shah & Others Civil Appeal Nairobi 39/1990** and in **Wildlife Lodges Ltd Vs County Council of Nairobi & Another [2005] EA 344** stated that :

" It was the 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 and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it…..it would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order null or valid…..whether it was regular or irregular. That they should come to court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed…..if there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this could have been lawful course….In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to be standard which is higher than proof on a balance of probabilities bit not as high as proof beyond reasonable doubt. The inherent social limitations afflicting most people in a developing county such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules s of law. Yet, this same judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing field for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice……justice dictates even handedness between the claims of parties ; and if it be the case that the plaintiff/applicant has not been accorded a level playing ground for the realization of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law , one of these being the law of contempt… An Exparte order by the court is a valid order like any other order and to obey orders of the court is to obey orders made both exparte and interpartes since the court by Section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make exparte orders, where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an exporter order, since such an order stands open to be set aside by simple application, before the very same court… where a party considers an exparte order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto, and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made exparte and this argument will not avail either the first or the said defendant."

37. Under Order 40 Rule 3 of the Civil Procedure Rules, the court granting an injunction is permitted to order the property of a person guilty of disobedience or breach of a court order to be attached and for the persons to be detained in prison for a term not exceeding 6 months. The purpose of the penal

consequences for breach of an injunction granted is to ensure compliance with or enforcement of an injunction granted under the provisions of Order 40 of the Civil Procedure Rules.

38. From the above decided cases and statutory provisions, it is clear that the law does not envisage a situation where the court orders are made in vain, hence, the provisions for contempt proceedings to penalize the contemnors. However, before the court can find one to be in contempt of court orders or to have breached the terms of an injunction, the person applying or seeking for citation orders must meet all the conditions necessary for an order of committal for contempt, which conditions are now well settled.

39. In the instant case, the orders allegedly breached or violated are the injunctive orders which the applicants' application states were issued on 31st August 2015. It is now trite law that where committal for breach of an injunction is sought, the applicant must clearly specify that which the respondent is alleged to have done or not done and what was a breach of the terms of the injunction. Thus, the application must state precisely what the alleged contemnor has done or omitted to do which constitutes a violation of the injunction order. Any slight ambiguity in the order will lead to watering down the standard of proof, which is a criminal standard not being achieved. The order allegedly disobeyed must be in existence it must be clear in its terms, it must have been served upon the respondent or the respondent must have actual or constructive knowledge of the order together with an endorsed penal notice warning of the consequences of disobedience.

40. In this case, the respondents contend that there is no order issued or made on 31st August 2015 capable of being disobeyed and therefore the whole application for contempt of court against them should be dismissed. The respondents also contend that in any event, the order that was issued on 1st September 2015 by Honourable Justice Sergon lapsed on 10th September 2015 and that therefore there was no order capable of enforcement or breach by them.

41. The applicants who never sought to amend the dated 31st August 2015 which they stated was the date of the order which was allegedly breached, submitted that the respondents were aware of and or were served with the orders issued on 1st September 2015 and that giving of a wrong date of the order was curable under Article 159 of the Constitution since such error is not prejudicial to the respondents.

42. I have examined the court record and I find that indeed there is no court order issued on 31st August 2015 and no such order of that date was ever served upon the respondents. However, there is a court order made on 1st September 2015 by Honourable Sergon J when this matter was first brought to his attention as the duty judge under certificate of urgency. The order was signed by the Deputy Registrar on 2nd September 2015. The question is would such an error of stating that the order was made on 31st August 2015 instead of 1st September 2015 deal a fatal blow to this application for contempt? In other words, would such an error occasion any prejudice to the respondents in these proceedings? In my humble view, the error of stating that there was an order of 31st August 2015 was by way of a statement made by the applicants in their application. It is not an error on the face of the order was issued by the court, which error would be capable of rendering a valid court order a nullity. The error complained of would, in my view, not, in any way render the orders of 1st September 2015 ambiguous or vague. It is what I would call clerical or **scrivener's error**, caused by a minor mistake or inadvertence and not one that occurs from judicial reasoning or determination. I reiterate that the error was not on the order. It was a mistake in the pleaded and deposed facts, and which the applicant's counsel acknowledged and sought to invoke Article 159 of the Constitution to cure. I do not find that such error in the applicant's documents to the effect that there was an order made on 31st August 2015 instead of 1st September, 2015 was made purposely and therefore the same can be amended with leave of court or on the court's own motion since the error does not vitiate the proceedings, and neither would its correction occasion any real or perceived prejudice to the respondents. I find that the error is a technicality which cannot be sacrificed at the altar of substantive justice. I accordingly correct the error where the date of the impugned order is said to be 31st August 2015, it shall read 1st September 2015. I am fortified by section 100 of the Civil Procedure Act which provides that:

" the court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding."

43. The next question is whether the orders of 1st September 2015 had lapsed by 10th September 2015. When Honourable Justice Sergon issued the interim orders No. 1-5 of the Notice of Motion dated 31st August 2015, he made it clear that those orders were to last up to 10th September 2015 when the notice of motion would be heard interpartes.

44. Accordingly, and indeed, those orders lasted only up to including 10th September 2015 when the parties' advocates appeared before me and argued the notice of motion at 2.30pm, upon which this court issued fresh orders specifically prohibiting the defendants from publishing any defamatory words of and concerning the plaintiffs until the hearing and determination of the application dated 31st August 2015.

45. The interim prohibitory injunction was thus renewed, but the mandatory injunction which had been granted on 1st September 2015 lapsed on that date of 10th September 2015 as it was not renewed.

46. It therefore follows that if there was any breach of the orders of 1st September 2015 , then the breach should have occurred between the date when those orders were served upon the respondents or when the respondents came to know of the injunctive orders and 10th September 2015. Similarly, I find that if there was any breach of the prohibitory injunction granted on 10th September 2015 by myself then the violation must have occurred between 1st September, 2015 when the order was first made by Hon Justice Sergon and 29th September 2015 when the application for contempt dated 29th September 2015 was lodged.

47. Having so found, the next question is, were the orders of 1st September 2015 and that of 10th September 2015 disobeyed by the first, second and 6th Defendants as alleged, thereby ridiculing and undermining the institution of the court?

48. The order of 1st September 2015 was in the following terms, as annexed to the affidavit of the 1st plaintiff applicant at page 439:

1. That the Notice of Motion dated 31st August 2015 be and is hereby certified as urgent and is admitted to hearing during the court's vacation.

2. That leave be and is hereby granted to the plaintiffs herein to last upto 10th September, 2015 to effect service on the second defendant R.G. Land Limited, Preston Mendenhall and Artem Gurevich by way of substituted service in daily newspaper of wide circulation.

3. That pending the hearing and determination of the application an interim injunction be and is hereby issued to last upto 10th September,2015 directed at each of the defendants restraining them by themselves, their agents, servants or otherwise howsoever from posting on any electronic media, or publishing or disseminating in any manner whatsoever the defamatory words, statements or content or any similar words or statement or content, of like effect, relating to the plaintiffs herein.

4. That pending the hearing and determination of the application a mandatory injunction be and is hereby issued to last upto 10th September 2015 directed at each of the defendants compelling them, by themselves, their agents, servants or otherwise howsoever to erase and remove from their various posts, websites, blogs or their other forms of electronic and social media of any form or nature whatsoever the said defamatory words, statements, or content or any similar words or statements or content, of like effect , relating to the plaintiffs herein.

5. That Google and twitter be and are hereby directed to assist in effecting the aforesaid order.

6. That the Notice of Motion be and is hereby fixed for interpartes hearing on 10th September 2015 before the vacation Duty Judge.

Given under my hand and seal of this Honourable court this 1st day of September 2015.

Issued at Nairobi this 2nd day of September 2015

Signed

Deputy Registrar

High Court of Kenya, Nairobi

49. The order of 10th September 2015 made by myself reads:

1. That a temporary interlocutory injunction be and is hereby issued restraining the defendants from publishing any defamatory words of and concerning the plaintiffs pending the ruling of this court on 8th October 2015.

Given under my hand and the seal of the court at Nairobi this 10th day of September 2015.

Issued at Nairobi this 14th day of September 2015.

Deputy Registrar

High Court of Kenya at Nairobi.

Penal Notice

TAKE NOTICE that any disobedience of the order of the court given on 10th September served herewith will result in penal consequences to you and any other person(s) so (sic) disobeying and not observing the same.

TAKE FURTHER NOTICE that if this order is snot obeyed, an application shall be made citing you and any other persons so disobeying for contempt of court, seeking therein detention for you and any other persons(s) so disobeying and any other punishment or remedy available in law:

50. As can be seen from the two separate orders, the first order made on 1st September, 2015 was made exparte and as extracted, it had no penal notice whereas the second order of 10th September, 2015 was made interpartes and had a penal notice spelling out the penal consequences in the event of disobedience thereof attached. The first order was published in the two dailies, Nation Newspapers and the Business Daily with penal Notices appended thereto. On the other hand, the second order was made in the presence of all parties advocates after the court heard arguments for and against any interim orders of injunction, following the lapsing of the orders of 1st September, 2015. The question is, were the above orders clear or ambiguous? In my humble view, the two orders were clear. I see no ambiguity in them.

51. The next question is whether the orders were served upon the defendants and or whether the defendants had knowledge of the impugned orders; and whether therefore the orders were brazenly disobeyed despite service/knowledge thereof.

52. The court notes that on 4th September 2015 in the Nation Newspapers page 9, the order of 1st September 2015 was served by way of substituted service by way of advertisement as per the leave

granted by Hon justice Sergon on 1st September, 2015 and a penal notice is appended thereto. The substituted service, as directed by the court granting leave on 1st September 2015 was for service upon the 2nd defendant, R.F Africa Land Ltd T/A Rendeavour Group, 3rd defendant Preston Mendenhall and the 4th defendant Artem Gurevich. The same order was also posted on the Business Daily Newspaper on 3rd September 2015.

53. According to the plaintiff/applicant's annextures VBDS-9, the 1st and 2nd defendant's counsels Ahmednassir Abdikadir after seeing the advert requested for a copy of summons and plaint on behalf of his clients as he was to appear for them in the matter. The note is dated 3rd September 2015. And by the affidavit of service of Eric O.Osingo sworn on 29th September 2015, it was deposed that on 2nd September 2014(sic) he received an order granted by Justice Sergon dated the same day from Wandabwa and Company Advocates for service and that he is the one who booked the space advertisement in the Daily Nation Newspapers at page 31 for 3rd September 2015 and also in the Business Daily on 4th September 2015. Further, that on the same day at 11.00am, the 6th defendant Mr Cyprian Nyakundi went to the offices of Wandabwa and co Advocates at ACK Garden House, identified himself using his National identity card and requested for his copies of the pleadings and orders pursuant to the advert he saw in the Daily Newspapers and the process server served him with all the pleadings and order which he acknowledged service by writing his names and signing on the copies indicating his National identity card number on it ; and that on the same day the process server served the said order and other pleadings upon the firm of Ahmednassir Abdikadir & Company Advocates after they requested on behalf of the 1st to 5th defendants.

54. From the above description of the manner in which service of the order of 1st September 2015 was served upon the 1st -6th defendants/respondents, and the unrebutted evidence on record that indeed the 6th defendant was personally served with the order at the plaintiffs' advocates' offices after he went there personally and asked for it, while the 1st- 5th Defendants became aware of the order from the advertisements in the Daily Newspapers and instructed their advocates now on record to receive court process and enter an appearance on their behalf , I am persuaded beyond doubt that the defendants were aware of the court order of 1st September 2015 and or were personally served in the case of the 6th defendant. The law has since changed. Although personal service is the best mode of notifying the party of a court order, but knowledge of a court order like in the instant case is sufficient. In the court of Appeal decision of **Justus Kariuki Mate & Another Vs Martin Nyaga Wambora & Another (CA 24/2014) Nyeri,** the CA per Visram, Koome and Odek JJA held that personal service of the order alleged to have been disobeyed is not mandatory. The court stated:

> *"**On the other hand, however, this court has slowly and gradually moved from the position that service of the order along with the Penal Notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under rule 81:8 (1) (Supra)."***

55. The Court of Appeal in the case of **Shimmers Plaza Ltd Vs NBK (2015)eKLR Karanja, Mwera, Mwilu JJA** also approved the growing jurisprudence right from the High Court that has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings. The Court of Appeal quoted **Lenaola J in Basil Criticos Vs Attorney General & 8 Others (2012) eKLR** where the learned Judge pronounced himself thus:-

> ***"….the law has changed and as it stands today knowledge supersedes, personal service…..where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary."***

56. The court in **Shimmers Plaza Ltd (Supra)** also affirmed the position in the **Martin Wambora case (Supra)** and emphasized that.

> *" **It is important however, that the court satisfies itself beyond any shadow of a doubt that the***

person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty. *This standard has not changed since the old celebrated case of* ***Ex parte Langley 1879, 13 Ch D. 110 (C.A), where Thesiger L.J*** *stated as follows. at p. 119:*

"…the question in each case, and depending upon the particular circumstance of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which has been made? And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt."

57. On what then amounts to "notice" ***Black's Law Dictionary, 9th Ed*** defines notice as follows:-

"A person has notice of a fact or condition if that person-

Has actual knowledge of it; Has received information about it; Has reason to know about it; Knows about a related fact; Is considered as having been able to ascertain it by checking an official filing or recording."

58. The court in the Shimmer Plaza case(suprs) posed a question thus: "***Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case. This is the position in other jurisdictions within and outside the commonwealth…."***

59. In addressing the issue whether service of a judgment or order on the solicitor for the Minister is sufficient knowledge of the order on their part to found liability in contempt; the Supreme Court of Canada in ***Bhatnager v. Canada (Minister of Employment and Immigration), [1990] 2 S.C.R. 217*** **at p. 226,** *LJ Sopinka, (cited with approval in the Shimmers Plaza case* held that:

"In my opinion, a finding of knowledge on the part of the client may in some circumstances be inferred from the fact that the solicitor was informed. Indeed, in the ordinary case in which a party is involved in isolated pieces of litigation, the inference may readily be drawn. In the case of Minister's of the Crown who administer large departments and are involved in a multiplicity of proceedings, it would be extraordinary if orders were brought, routinely to their knowledge, in such a case there must be circumstances which reveal a special reason for bringing the order to the attention of the Minister." (Emphasis added)

60. The Court went on to state that;

"On the cases, there can be no doubt that the common law has always required personal service or actual personal knowledge of a court order as a pre-condition to liability in contempt....Knowledge is in most cases (including criminal cases) proved circumstantially, and in contempt cases inference of knowledge will always be available where facts capable of supporting the inference are proved.(See Avery v. Andrews(1882) 51LJ Ch. 414) (Emphasis added).

61. In **United States v. Revie 834 F.2d 1198, 1203 (5th Cir. 1987)** cited with approval in the Shimmers Plaza case, the court held that the defendant had adequate notice of a show cause order because his attorney was on notice. Therefore, a client may be similarly "served" with a court's order by his attorney's communication of its contents and this communication is presumed if the attorney has knowledge of the

order.

62. On whether the plaintiffs/applicants' application for contempt satisfies the standard required for committal, in Justus **Kariuki Mate & Another V Martin Nyaga Wambora [2014] e KLR**, the court of Appeal discussed Rule 81.10 of the Civil Procedure (Amendment No. 2) Rules 2012 of England which states that:

> ***" (3) the Application notice must:***
>
> ***a) Set out in full the grounds on which the committal application is made and must identity separately and numerically each alleged out of contempt including, if known the date of each of the alleged acts and***
>
> ***b) Supported by one or more affidavits containing all the evidence relied upon.***
>
> ***4) subject to paragraph 5 the application notice and the evidence ion support must be served on the respondent.***
>
> ***5) The court may;***
>
> ***a) dispense with service under paragraph (4) if it considers it just to do so (5) make an order in respect of service by an alternative method or at an alternative place.***

63. In the Wambora's case, the court held, inter alia, concerning circumstances under which the court can dispense with personal service of an order:

> ***" In the case of a judgment or an order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with Rules 81.5 & 81.7 . If it is satisfied that the person had notice of it:***
>
> ***1. By being present when the judgment or order was given or made.***
>
> ***2. By being notified of its terms by telephone, email or otherwise"***

64. The Court of Appeal then concluded:

> ***"The trial court was correct in holding that the law as this was in contempt of court has since changed. The law as it stands today is that knowledge of the order is sufficient for purposes of contempt proceedings.***

65. The above position echoed the earlier position in **Mohamed V Bakari & 2 Others [2005] 2 KLR** where the Court of Appeal held, in a 7 judge Bench that:

> ***" If personal service is which is the best service in all areas of litigation is not possible, other forms may be resorted to….no man can be allowed to rely on his own wrong to defeat the otherwise valid claim of another man. The appellant could not be allowed to rely on his having successfully hidden himself from the attempts of the 1st respondent to personally serve him to defeat the 1st respondent's petition challenging the validity of his election. The efforts made by the first respondent to personally serve him amounted to personal service on him and the learned judge was right in holding that he had been served."***

66. The court in this case did grant leave for substituted service which is the alternative to personal service, of the order of 1st September 2015 by way of advertisement in the two dailies – Daily Nation and Business Daily which advertisements were carried out on 3rd and 4th September 2015. From the above analysis and decided cases, this court is satisfied that the orders of 1st September, 2015 were served upon

the defendants and or that they had full knowledge of the said orders through their advocates whom they instructed to appear on 10th September, 2015 when the second order was made by this court. There is more than sufficient evidence that indeed all the defendants accessed the order as advertised and they expeditiously entered appearances through their respective advocates before 10th September 2015 the date scheduled for interpartes hearing of the main application for injunction and to fortify the position that the 6th defendant/respondent herein was personally served after reading of the order in the dailies as advertised, he gave his identification on the received order and signed on it and he has not rebutted those facts.

67. Therefore, having found that all the defendants were aware of the orders of this court made on 1st September 2015 through substituted service in the dailies and of 10th September, 2015 as the same was made in open court in the presence of heir respective advocates on record, and the said defendants having either through their legal counsels for 1-5th defendants or personally in the case of the 6th defendant, requested to be served with the pleadings, the allegations and contentious in their grounds of opposition, and respective replying affidavits that they were not aware of the order or that they were not personally served with the order do not hold any water or at all.

68. The next and indeed the most important issue and question for determination is therefore whether there were any acts or omissions by the 1st and 2nd defendants and the 6th defendant, between the time of knowing of the existence of the order and or service of the order and the time of filing this application for contempt on 29th September, 2015 which, evidentially, amounts to contempt or disobedience of the above stated court order of 1st September 2015 and the order of 10th September, 2015.

69. A preliminary issue for consideration is that although in the grounds in support of the application and affidavits it is alleged that the 2nd plaintiff breached the orders in question, it is clear from the prayers sought that the plaintiffs/applicants have not asked this court to cite it for contempt of court. This court would therefore not grant what it has not been asked to grant against the 2nd defendant.

70. Ground s H of the application for contempt complains that the 1st, 2nd and 6th defendants had in blatant disregard of the mandatory order requiring them to pull off the subject content from their respective media sites refused, and or neglected to do so; that on 10th September 2015 the first and 2nd defendants have in blatant breach and defiance of the order reposted on its website the said speech, the question and answer session and the one on one session; J –first and second. Defendant invited the business community to a forum at the National Museums of Kenya on 17th September 2015;L- This speech and question and answer session have been disseminated widely and have been published on their website to wit http://www.rendeavour .com/news/Stephen –Jennings-discusses –tatu-city –and-kenyas-urban-future on the 17th September 2015; M- The 6th defendant has continued to tweet various messages in reference to the plaintiff herein in the same vein as defamatory statements in his previous posts that he was restrained from publishing; N- Further contempt of court, the 1st, 2nd and 6th defendants have ridiculed the Kenyan courts by suggesting that they are being manipulated by the plaintiffs, or are open to manipulation.

71. In the plaintiff's supporting affidavit sworn on 29th September 2015, he annexes what he considers to be evidence of blatant defiance or disobedience of the court orders of 1st September 2015 and 10th September 2015 respectively.

72. For avoidance of doubt, the order of 10th September 2015 was a prohibitive injunction restraining the defendants from publishing any defamatory words of and concerning the plaintiff whereas the orders of 1st September 2015 were both prohibitive and mandatory injunction compelling the defendants to pull down all the defamatory words/tweets from the social media/websites; and also directed twitter and Google to assist in effecting the orders.

73. Examining each exhibit as evidence of disobedience and commencing with the allegation of violation

of the mandatory injunction which indeed lapsed on 10th September 2015, it is not denied that none of the defendants pulled down or attempted to pull down or erase or remove from their alleged various posts, websites, blogs or their social media the alleged defamatory words, statements or content relating to the plaintiffs herein.

74. To get to know what was to be pulled down, one has to revisit the application dated 31st August 2015, the grounds, supporting affidavit and the annexed exhibits. The first complaint is that a letter written to the plaintiffs business associates including IBM East Africa falsely and maliciously, on 20th May 2015 VBDS-2, is also the annexture VBDS I to this application which does not in any way require pulling down, removing or erasing from any post. Annexture VBDS-1 in the application of 31st August 2015 too does not require pulling down, remove or erasure as it is a ruling in HCC 46/2015 delivered by E.K. Ogola J on 6th March 2015. Annexture VBDS-3 is a speech by Stephen Jennings – the 1st defendant as allegedly found on www.Rich .co.ke and Rendeavour Group and Youtube websites. It refers to a speech made on 9th June 2015 by the 1st defendant in a forum hosted by the 2nd defendant at Sankara Hotel, Westlands Nairobi. The annexed CD as transcripted shows that the words reproduced at paragraph 11 of the 1st plaintiff's affidavit constitute the 1st defendant's speech. Among the words that appear defamatory on the face of it since the 1st defendant has pleaded justification are

> "***.Moreover Mr Shah and Mr Nyagah and Mr Mwagiru have spent the last four years trying to sabotage Tatu City through spurious and fraudulent manipulation of the Kenyan judicial system. We view Mr Shah as a co- conspirator in Mr Nyagah's 100 million dollar theft because as mentioned above, he is fighting us in court to ensure Mr Nyagah, the fraudster remains chairman of Tatu city put simply Mr Shah is an enabler of Mr Nyagah's fraudulent actions and ….***"

75. Annexture VBDS -4 is the website for Satchu, an investor, wherein the speech by the 1st defendant was also allegedly posted at www.rich.co.ke. The speech was also allegedly posted on the 1st defendant's website www.rendeavour.com with a video link to Youtube. Exhibit VBDS-5 is evidence of emails from various people, reacting to the Youtube postings on Mind speak and Q&A subject matter being on Tatu City. The above annextures, in my view, show postings to websites and other social media platforms and therefore are capable of being pulled down, erased or removed. Annex 6 is a demand notice dated 1st July 2015 to the 1st defendant by Adere & Company Advocates Complaining of the defamatory statements uttered/published on 9th June 2015 against Mr Vimal Shah. This cannot be for pulling down/removal/erasure. Annexture at page 75 is a reply to the demand notice, similar to page 78 letter dated 14th July 2015. I find it not for pulling down from any site. Annexture VBDS-8 is a video digital recording of the persons cited allegedly captured on video dropping off bundles of leaflets in the Nakumat Store at Village Market whereas annexture VBDS-9 is what is described as Nyakundi-6th defendant's vile smear campaign against the plaintiffs. It contains emails and communications. The same too would fall in the category of being erased or removed, same as VBDS 10 blogs allegedly from Mr Nyakundi's website alleging land grabbing and violation of Human Rights by BIDCO in Uganda. Annex VBDS11 is an alleged press release by Uganda Government Press release repudiating allegations in annexture 10.

76. Annexture 12 is a website www.Badco Africa.com which the plaintiffs believe is a creation of the defendants using the Bidco logo on which the alleged false and malicious statements were allegedly posted as shown by the annexture 12 while annextures 13 and 14 are an alleged a recorded conversation involving the 6th defendant's agent, a Mr Xhan Dela trying to extort money from the plaintiff in order to delete malicious falsehoods and to state the truth as per certificate of voice recording signed by Pharis Kamau dated 31st August 2015.

77. From the above analysis, this court is persuaded that the order of 1st September 2015 is clear on what matters were to be pulled down, erased or removed from the various websites, blogs and or other electronic and social or digital media as shown by the various video and other digital links. Nonetheless, there must be evidence beyond the balance of probabilities that either the defendants/alleged contemnors

owned or operated those sites/websites/blogs or media platforms cited and that they brazenly ignored or failed to adhere to the court order to erase or remove them. The burden of proof entirely lies with he who alleges, whether the application for contempt of court order is defended by the alleged contemnors or not.

78. As earlier stated, any defect in the order subject of the contempt proceedings is likely to be interpreted in favour of the respondent's/alleged contemnors in view of the higher standard of proof required on contempt proceedings. Albeit I have already pronounced myself that the order is clear, I note that the court order clearly directed Google and twitter to assist in effecting the aforesaid orders. In my humble view, the fact of enlisting Google and twitter must have been in recognition of the difficult task of removing/erasing/pulling down the online publications by the alleged contemnors. However, there is no evidence that Google and twitter who were directed to assist in the implementation of the said orders were served with the court order made on 1st September, 2015 since they were not parties to this suit and neither are they government law enforcement agencies.

79. Further, the plaintiffs claim that some of the websites that are not owned by the defendants like Badcoafrica.com and that such websites were created by the defendants to perpetuate the malicious propaganda. That may be so. However, there is no evidence or at all that it was the 1st, 2nd or 6th defendants who created and or were using that website or platform which is similar to the 2nd plaintiff's website to spread malicious falsehoods of and concerning the plaintiffs. I therefore find that no evidence has been adduced, to the required standard to prove that the mandatory injunctive order made on 1st September 2015 directed at the defendants/alleged contemnors was brazenly breached or disobeyed between 3rd September 2015 and 10th September 2015 when the said mandatory order effectively lapsed.

80. On the question of whether the prohibitive injunction granted on 1st September 2015 and reissued by me on 10th September 2015 was or has been breached between 3rd September 2015 when the 1st order which was made exparte was served or made aware by the defendants and 29th September 2015 when this application for contempt was filed; the court must examine those two orders vis avis the allegations and the evidence in support of the allegations that the orders for injunction were breached by the alleged contemnors commencing with the order of 1st September 2015, which directed each of the defendants, and restrained them by themselves, their agents, servants or otherwise howsoever ***from posting on any electronic media, or publishing, or disseminating in any manner whatsoever the defamatory words, statements, or content or any similar words or statements or content of like effect , relating the to plaintiffs herein."***

81. On the other hand, the order of 10th September 2015 temporarily restrained the defendants from publishing any defamatory words of and concerning the plaintiffs pending the ruling of the court on 8th October 2015.

82. According to the defendant's counsels, there are no defamatory words published of and concerning the plaintiffs. They also submitted that to decide what is defamatory would be venturing into the trial without evidence and further, that the court was being asked to gag the defendant's freedom of speech which is protected under Article 33 of the Constitution.

83. It should be noted that as to what is defamatory depends on the circumstances of each case. Nonetheless, this court takes judicial notice that a defamatory publication or statement is one which is published of and concerning a plaintiff and which tends to lower the plaintiff's reputation or character in the estimation of right thinking members of the society generally and which cause them to shun or avoid him.

84. At paragraph 30 of the affidavit sworn by the 1st plaintiff, he deposes that the 1st and 2nd defendants had in blatant breach and defiance of the order (read 1st September 2015) reposted on its website the said speech the question and answer session and the one on one session as shown by VBDS-13 and the CD annexed. However, the video clips were never played in court in the presence of all the affected parties to

view and respond thereto. In addition, the manner of producing electronic and or digital records evidence is as stipulated in Sections 106 A to 106 I of the Evidence Act, Chapter 80 Laws of Kenya. In my humble view, it is not enough to annex CDs to an affidavit, in a case of this nature where you claim that you have been further defamed by the respondent's republication of the alleged defamatory words, since the standard of proof is beyond that of on a balance of probabilities. To hold that there was breach of the court injunction by reposting on its website the speech, question and answer session and the one on one session is to hear only one party's evidence without giving the adverse party who is an active participant in the proceedings an opportunity to challenge that evidence.

85. Further, the speech at paragraph 31 of the plaintiff's affidavit as reproduced is also in electronic form and there is no certificate of extraction/transcription from electronic to written form of exhibit VBDS 14. The same position applies to the question and answer session publication where the 1st defendant is said to have uttered defamatory words as per exhibit VBDS 15 whose innuendos is as per paragraph 33 of the affidavit. In addition, the plaintiffs never had the digital recordings of the said transcript played in court and in the presence of the adverse parties to confirm that the transcripts were accurate and not edited or created for purposes of this case. the digital recordings being electronic evidence, this court cannot not take judicial notice of.

86. It was also claimed that the speech and question and answer session had been disseminated widely and have been published on the defendants' website http:// www.rendeavour.com/newa/stephen-jennings -discusses-tatu-city- and -kenyas –urban future on 17th September 2015 as per VBDS 13. In my humble view, it was incumbent upon the plaintiffs/applicants to invoke the provisions of Sections 106 A to 106I of the Evidence Act on the production of electronic -digital evidence to facilitate the opening /access by the court to the respective CDs and websites, to establish whether the alleged defamatory publications are in situ or posted after the injunction in violation of the prohibitory orders.

87. Furthermore, what is printed at pages 48, 49, 50 VBDS 13 does not show the dates when the uploads were done. It is also not clear what the exhibits at page 50,51 were intended to show or demonstrate.

88. It is also claimed that the 6th defendant had continued to tweet various messages in reference to the plaintiffs in the same vein as the defamatory statements in his previous posts that he was restrained from publishing, as shown by exhibit VBDS-17 which is an online platform print out or transcript from page 81 to 105.

89. Again, to access the original tweets one has to go digital. There was no certificate of extraction annexed and neither did the plaintiffs seek to have that evidence adduced in the legally acceptable mode as stipulated in Sections 106A and 106 I of the Evidence Act Chapter 80 Laws of Kenya which preclude the court from presuming the digital or electronic records to be authentic.

90. From the above analysis, whereas this court indeed did issue both mandatory and prohibitory interlocutory injunctions against the defendants/respondents who are also the alleged contemnors in this application, and whereas this court is empowered to cite and punish any person who is found to have blatantly and or brazenly breached an injunction or order of the court, on the affidavit evidence adduced, I am unable to find that the plaintiffs/applicants have satisfied this court to the standard required to prove contempt of court, to enable this court cite and punish the 1st, 2nd and 6th defendants for contempt. The nature of the alleged publications was in electronic/digital forms which required that the transcriptions or extractions be accompanied by certificates authenticating the information printed out and the video recordings be viewed by the court in the presence of all the parties and or their legal counsels in order to avoid subjective conclusions being made by the court.

91. Further, whereas this court does appreciate that contempt or brazen disobedience of court orders is a serious issue, as was stated by **Wilmot, J in Rex V Almon, 97 E.R 94** at page 100:

> ***" That arraignment of the justice of the judges, in the arraigning the King's justice: It is an impeachment of his wisdom and goodness in the choice of his judge, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds***

to obey them; and whenever men's allegiance to the laws is so fundamentally shake. It is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever, not for the sake of judges, as private individuals; but because they are the channels by which the Kings justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open and uninterrupted current, which it has , for may ages found all over this kingdom, and which so eminently distinguishes s and exalts it above all nations upon the earth. In the moral estimation of the offence , and in every public consequences arising from it, what an infinite disproportion is there between speaking contumelious words of rules of the court, for which attachments are granted constantly, and cooly and deliberately printing the most virulent and malignant scandal which fancy could suggest upon the judges themselves. It seems to be material to fix the ideas of the words "authority" and contempt of the court" to spelt with precision upon the question.

By the word "court" I mean the judges who constitute it, and who are entrusted by the constitution with a portion of jurisdiction defined and marked out by the common law, or Act of Parliament.

Contempt " of court' involves s two ideas: Contempt of their power, and contempt of their authority. The word " authority" is frequently used to express both the right of declaring the law, which is properly called jurisdiction, and if enforcing obedience to it, in which sense it is equivalent to the word power; but by the word "authority". I do not mean that coercive power of the judges, but the deference and respect which is paid to them and their acts, from an opinion of their justice and integrity.

…….it is not the coercive power of the court; but it is homage and obedience rendered to the court, from the opinion of the qualities of the judges who compose it; it is a confidence in their wisdom and integrity , that the power they have applied to the purpose for which is as deposited in their hands: that authority acts as the great auxiliary of their power, and for that reason the constitution gives them this compendious mode of proceeding against all who shall endeavour to impair and abate it, and therefore every instance of an attachment for contumelious words spoken of a rule of the court (of which there are great many) is a case in point to warrant an attachment on the present case where a rule of court is the object of the defamation and it would be a very strange thing that judges acting in the King's Supreme Court of Justice in West Minister Hall, should not be under the same protection as a bailiff's follower, executing the process which those judges issue. It is not their own cause, but the cause of the public which they are vindicating , at the instance of the public; for I do not think that courts of justice are to take their complaints up themselves; it must be left to his majesty, who sustains the person of the public, to determine whether the offence merits a public notice and animadversion; and in this state of the proceedings , they are only putting the complaint into a mode of trial, where the party's own oath will acquit him; and in that respect it is certainly a more favourable trial than any other; for he cannot be convicted if he is innocent, which, by false evidence, he may be by a jury; and if he cannot acquit himself, he is but just in and same situation as he would be in, if he was convicted upon an indictment or an information; for the court must set the punishment in one case as well as the other: they do not try him in either case: he tries himself in one case, and the jury try him in the other."

92. Although it was alleged that the respondents had ridiculed the court by alleging that it was being manipulated to frustrate the Tatu City enterprise, tis court notes that those allegations were not shown to have been made for purposes of these proceedings.

93. I reiterate that there was no sufficient evidence of any contempt of court or breach of injunction committed by the 1st, 2nd and 6th defendants and it would be a traversity of justice for this court, being an umpire, to retire and write a judgment based on evidence that was not adduced in an acceptable manner, condemning the alleged contemnors for contempt of court, whose effect would deprive them of their liberty or property, yet the 'evidence' adduced in support of the contempt proceedings is wanting in

sufficiency to the standard required, as was held by Lord Diplock in **Attorney General V Times Newspaper Ltd [1974] A.C 273 at page 309 B** that:

> ***" The due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities ; secondly that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in the courts of law; and thirdly, that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court."***

94. Indeed, the law of contempt constitutes an interference with free speech which is guaranteed by the Constitution. That being the case, this court must tread cautiously to see that the rules of contempt do not inhibit that freedom of speech more than is reasonably necessarily to ensure that the administration of justice is not interfered with. This is not to say that court orders shall be disobeyed or courts scandalized. But the fact that the alleged defamatory publications which were allegedly repeated by the alleged contemnors, even after injunctive orders were issued were not made in newspaper publications means that the court must respect the rule of law and only accept evidence adduced in the manner permitted in law and not through some short cuts for that would undermine the fair administration of justice. In contempt of court proceedings, parties have nothing else remaining. It is a complete proceeding that determines the guilt or innocence of an alleged contemnor. The outcome of contempt proceedings is a judgment and therefore a court of law ought not to render a judgment condemning a person without sufficient evidence being adduced as to the guilt of that person. In **Linnet V Coles [1986] 3 ALL ER 652 page 656 to 657**, letters s J & Lawton LJ stated that:

> ***" Anyone accused of contempt of court is on trial for that misdeameanor and is entitled to a fair trial. If he does not get a fair trial because of the way the judge has behaved or because of material irregularities in the proceedings themselves, then there has been a mistrial, which is not trial at all. In such cases, in my judgment, an unlawful sentence cannot stand and must be quashed. It will depend on the facts of each case whether justice requires a new one to be substituted . If there had been no fairness or no material irregularity in the proceedings and nothing more than an irregularity in drawing up the committal order has occurred, I can see no reason why the irregularity should not be put right and the sentence varied, if necessary, so as to make it a just one."***

95. In the instant case, to find that there was breach of the terms of these interlocutory injunctions granted on 1st September 2015 and 10th September 2015 respectively in the absence of material evidence of breach thereof would be to irregularly disentitle the alleged contemnors a fair trial which is a right guaranteed under Article 50(1) of the Constitution and which right cannot be limited (See Article 25 of the Constitution).

96 Accordingly, I find that the application for contempt as against the 1st, 2nd 6th defendants/respondents/alleged contemnors respecting the mandatory and prohibitory injunctions granted by this court lacks merit and the same is dismissed and the respondents/alleged contemnors are hereby acquitted on all fours. Costs are in the discretion of the court. In the instant case, I order that each party bear its own costs of this proceeding.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 10th day of August 2016.

R.E. ABURILI

JUDGE.

In the presence of:

Miss Kamau h/b for Mr Wandabwa for the applicants/plaintiffs

Mr Issa and Mr Busaidy h/b for SC Ahmednassir for the 1st and 2nd respondents/alleged contemnors

Miss Mutua for the 6th respondent/ alleged contemnors

The 1st respondent present

The 6th respondent is absent

Court Assistant: Adline