REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 69 OF 2015

SAM NYAMWEYA(PRESIDENT)

ROBERT ASEMBO(VICE PRESIDENT)

MICHAEL ESAKWA(SECRETARY GENERAL)

FOOTBALL KENYA FEDERATION …….....PLAINTIFFS

VERSUS

KENYA PREMIER LEAGUE LIMITED…….....……1ST DEFENDANT

KENYA FOOTBAL REFEREES ASSOCIATION…....…..2ND DEFENDANT

SPORTS KENYA……...3RD DEFENDANT

R U L I N G ON CONTEMPT OF COURT

This Ruling is the product of an application by way of Notice of Motion dated 25th February, 2015 and filed in court the same day by the original initial Plaintiff/ applicant Football Kenya Federation (FKF). The application brought under the provisions of Order 40 Rule 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act (Cap 21 Laws of Kenya) seeks from this court **ORDERS:**

1. **JACK OGUDA, AMBROSE RACHIER, ALLAN KASAVULI, ROBERT DONALD MUNRO, JAMES MUSYOKI, COL. MUNYIKAI JUMA, ELIO LOLLI and ELLY KALEKWA** be committed to civil jail for a term of six months for contempt of court for having deliberately disobeyed orders of this court issued on 20th February, 2015.

2. Any other or further orders of the court geared towards protecting the dignity and authority of the court.

3. Costs of this application be provided for.

The application is premised on the **GROUNDS**:

i. The first Defendant and its directors deliberately disobeyed the orders of this court issued on 20th February 2015 despite having been served with the said orders;

ii. The dignity and authority of the court must be protected at all times;

iii. The culture of disobeying court orders and decision has reached very high levels in Kenya and the courts must now exercise their constitutional authority of punishing people for contempt of court.

The said application is further supported by the annexed sworn affidavit of Sam Nyamweya, the Chairman and President of Football Kenya Federation.

In his supporting affidavit, Mr. Sam Nyamweya deposes that on 20th February 2015 this court issued an order of injunction restraining the Defendants from proceeding with their Premier League fixtures which were scheduled to kick off from 21st February, 2015. A copy of the said order as extracted on 20th February 2015 was annexed. He further deposes that on the same day at 5.00 pm, he instructed their representative, Mr. Kiama to accompany a process server by the name Benson Mukokha Shichoro to the 1st Defendant's offices situated at Westlands and that he is informed that the said order was served at 5.15 upon one **JACK OGUDA,** the Managing Director of the First Defendant Kenya Premier League Limited (KPL).

It is further deposed that on 21st February, 2015 the said process server effected the same court order upon one James Kegoro of City Stadium at 9.00 am and at 10.00 am he served Mr. Pius Oyoo, a representative of the Second Defendant. A copy of affidavit of service sworn on 23rd February, 2015 by Benson Mukokha Shichoro was exhibited.

Mr. Nyamweya further deposes that other than the order being formally served upon the Respondents on the 20th February 2015, he also instructed his office to email copies of the order to the Defendants and all the Premier League Clubs. He annexed a copy of the said emails. It is further deposed that the said order was posted on social media where various comments were made by fans and other persons, and that on 20/2/2015 he personally spoke to Jack Oguda the MD of the 1st Defendant on mobile telephone number [...] informing him of the need to comply with the said court order.

The applicant avers that albeit the 1st Defendants were served with the said court order, they proceeded to host and manage Premier League matches on 21st February, 2015 and 22nd February, 2015. He annexed copies of newspaper reports and an extract of results from the website of the 1st Defendant to show the players for the affected 1st defendant's clubs in action. He further, annexed a copy of the letter from the Registrar of Companies confirming the directors of the 1st Defendant being the respondents in this application with Jack Oguda being the Managing Director thereof and Mr. Ambrose Rachier being its chairman.

The plaintiff/ applicant therefore urged this court to punish the cited directors for disobeying the court order issued on 20/2/2015.

The application by the plaintiff/ applicant is vigorously opposed by the 1st Defendant. On its behalf, three replying affidavits were filed on 5th March, 2015. The said affidavits were sworn by Mr. Ambrose Rachier, the chairperson of the 1st Defendant company and also the chairperson of Gor Mahia Football Club; Peter Barasa, an employee of Securex Company Ltd, employed to guard the 1st defendant's premises, and Mr. Jack Oguda the Managing Director of the 1st Defendant company.

In his replying affidavit, Mr. Jack Oguda deposes that they only received copy of the court order together with the pleadings in this matter on 23/2/2015 at 9.15 pm when an unknown person in motor vehicle registration No.[...] Toyota Prado dropped them into the 1st Defendant's compound, by which time the premier league matches had already been spent.

He denies ever receiving any order on 20/2/2015. He contends that there was no parallel Premier League

as the Kenyan Premier League has been in existence for over a decade, run, managed, and organized by the 1st Defendant.

That upon receipt of the said court order on 23/2/2015 they promptly stopped the football matches which were scheduled to be played on the weekend of 28th February and 1st March 2015. He annexed a copy of an article in the Daily Nation Newspaper for Tuesday 24th February 2015 titled "**KPL now suspends its fixtures as star player call for sanity".**

Mr. Oguda maintains that since being served with the court order, the 1st defendant had put on hold all Kenya Premier League matches organized and professionally run by the 1st Defendant for the past decade and which has been the country's top tier football league. He laments that the stoppage is nonetheless detrimental to the more than 500 football players and coaches not only from Kenya, but also from Uganda, Tanzania, Rwanda, Burundi, Democratic Republic of Congo, Nigeria, Ghana, Liberia, Sierra Leone, Scotland and Croatia, amongst other nations. He annexed a list containing names of footballers whose sporting careers are currently clamped.

The other relevant depositions by Mr. Jack Oguda are that the purported emails were not sent to him at his email address of [particulars withheld] nor to the 1st defendant at its email address of info@kpl.co.ke.

Further, Mr. Oguda contends that even the email in annexture SN 3 in the affidavit of Sam Nyamweya had no attachment of the purported court order as opposed to the email of 23/2/2015 addressed to [particulars withheld] where the attachment of the court order in a **pdf** format is boldly displayed.

Mr. Oguda further deposes that there is no evidence from the social media that he commented on the purported court order stopping the matches and that knowledge of the existence of a court order based on comments made on social media by members of the public does not meet the threshold required for service of a court order upon an alleged contemnor. He denies ever receiving a telephone call from Mr. Sam Nyamweya asking him to comply with the court order. He pointed out that there is a glaring inconsistency between the depositions of Sam Nyamweya that the 1st Defendant was served with court order at 5.15 pm whereas the process server Mr. Benard Mukokha Shichoro deposes that he served Mr. Jack Oguda at 5.30 pm.

Mr. Oguda also denies knowing or meeting the said process server who allegedly served him with the court order and further, that it is intriguing that the process server did not disclose whether he knew or had met Mr. Oguda before the time and date of the purported service of the court order. He states that the process server lied under oath since the normal working hours at the 1st Defendant is between 8.00 am and 5.00 pm when the gate gets locked after which no visitors are allowed into the premises by the 1st Defendant's security guard, Peter Barasa of Securex company Ltd, who has sworn an affidavit and who confirms to Mr. Oguda that he never received any visitor on 20/2/2015 at 5.30 pm. Further, that any visitor at the 1st Defendant's offices must go through Ms Jacky Muthoni the receptionist to explain the purpose of the visit and that the process server could not have accessed the Managing Director before being led into his office by Ms Jacky Muthoni the receptionist.

Mr. Ambrose Rachier, the Chairman of the 1st Defendant and Chairman of Gor Mahia Football Club too swore a replying affidavit to the effect that he was only served with the application for contempt on 24/3/2015 and that he was never been served with the order of 20/2/2015. That he first became aware of the court order on 24th/2/2015 in the morning when Mr. Ben Aketch the 1st Defendants advocate asked him to swear an affidavit in reply to an application for an injunction filed by the plaintiff.

That the email allegedly sent to him by the plaintiff did not attach any court order and it was sent at 7.11 pm after offices were closed. Further, Mr. Rachier deposes that the email allegedly used to dispatch the purported order was general for his law firm of Rachier & Amollo Advocates and is not personally accessed by him but by his secretary Tabitha Muma who only accesses it during working hours, and that the said secretary had left office at 5.30 pm by which time she had not received any email on the subject

matter hereof.

Mr. Rachier then concludes that in any event, on the 20/2/2015 when the order is alleged to have been served on his office through email, he had travelled early in the morning for the burial of his mother in law **A S (RIP)** who had passed on, on 13/2/2015, hence when the KPL matches kicked off on 21/2/2015 he was not aware of any developments whatsoever concerning the order of the court barring the commencement of the league matches.

Mr. Peter Barasa, an employee of Securex Security Co. Ltd and stationed as a security guard at the 1st Defendant premises in Westlands Nairobi swore an affidavit stating that he handles and screens visitors and clients at the 1st Defendant's office and no one would access the 1st defendant's offices without his knowledge. In addition, that on 20/2/2015 the 1st Defendants offices were closed by 5.30 pm and therefore he would not have allowed the process server Bernard Mukokha Shichoro to go past the gate at such time of the day. Mr. Bernard Barasa deposes that on 23/2/2015 at 9.15 pm an unknown person in a motor vehicle registration number [...] Toyota Prado dropped papers and a document into the 1st Defendant's compound, which papers he later learnt were a court order and pleadings to this suit.

In their oral submissions proposing and opposing this application for contempt of court, the advocates for the parties, Mr. Eric Mutua for the plaintiff and Mr. Obura advocate for the 1st Defendants argued their respective clients positions on 5/3/2015.

In his proposition for citing and committal of the respondents for contempt of this courts' order issued on 20th February, 2015, Mr. Mutua relied heavily on the supporting affidavit sworn by Mr. Sam Nyamweya, whose depositions I have replicated above.

Mr. Mutua submitted that being aware of the existence of a court order is sufficient to prove contempt where the order is disobeyed. He nonetheless maintained that, the affidavit of service by Bernard Mukokha Shichoro proved that service of the order of 20/2/2015 was effected upon the Respondents and even if they were not served personally, they were aware of its existence and its contents. He maintained that Jack Oguda was served with the court order but he declined to sign and or stamp on the original. Learned counsel added that on the following morning on 21st February, 2015 at 8.30 am the process server effected service of copy of the said order on the representatives of the 2nd and 3rd Defendants.

Mr. Mutua further submitted that Annexture SN3 which was an email was send to **all** the cited contemnors attaching the said order at 7.11 pm on 20/2/2015 on Friday. That therefore there was knowledge of the court order by the time the matches were being played on 21/2/2015 and 22/2/2015.

Counsel for the plaintiffs maintained that since even the social media was full of discussions on the pros and cons of the said order, and that it was apparent that the respondents hosted matches in breach of the court order and therefore deserve being punished for contempt. He challenged the 1st Defendant's directors to cross examine the process server who swore an affidavit confirming service of the said order, to test whether or not he indeed effected service as alleged hence, this court should believe what the process server stated on oath as it is not controverted. He relied on the case of **Mitu Bell Welfare Society vs AG and others HCC Petition No. 164 of 2011.** Mr. Mutua reiterated that it is critical for this country to strive to abide by court orders and protect the dignity and authority of the court of law which courts should jealously guard by being firm on any person who deliberately disobeys court orders or attempts to scuttle the court process. He urged the court to grant the orders sought in the application.

In response, Mr. Obura advocate for the 1st Defendant/Respondents equally relied on the replying affidavits whose depositions I have replicated in this ruling and cited several authorities, in opposing the application for contempt against his client's directors and chairman.

Mr. Obura submitted that contempt proceedings by their very nature are criminal hence the standard of proving such contempt is beyond reasonable doubt like in all other criminal cases.

In his view, the process server's affidavit of service that he was led to Mr. Oguda's office is wanting for reasons that the process server does not state that Mr. Kiama who accompanied him ever assisted him identify Mr. Oguda or that he knew the said Mr. Oguda and that there is no evidence of how Mr. Oguda was identified to the process server for purposes of serving him with the court order.

Further, that the purported service at City Stadium is not clear and there is no evidence connecting the emails to any of the cited contemnors.

Counsel for the 1st defendants further submitted that there are 2 procedures of dealing with contempt- under the Judicature Act which ties to the Supreme Court of England Rules requiring leave, notice and depositing of documents with the Director of Public Prosecutions.

The second procedure, it was submitted, is under order 40 Rule 3 of the Civil Procedure Rules where no notice or leave is required. However, Mr. Obura submitted that in both instances, the issue of service of the order on the cited contemnors is applicable, relying on the case of **OCHINO AND ANOTHER VS OKOMBO AND 4 OTHERS [1989] KLR** wherein the Court of Appeal R. Gachuhi , Masime and Kwach JJ.A held Inter alia that:

> ***1. "As a general rule, no order of court requiring a person to do or to abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.***
>
> ***2. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order he is liable to the process of execution to compel him to obey it.***
>
> ***3. The court will only punish as contempt a breach of injunction if it is satisfied that the terms of the injunction are clear unambiguous.***
>
> ***4. The defendants had proper notice of the terms and the breach of the injunction must be proved beyond reasonable doubt.***
>
> ***5. The proper procedure for bringing the application for contempt.***

Mr. Obura further submitted that the above 1-4 conditions were not met therefore; this court should reject the application as presented. Learned counsel added that there was no evidence by the process server Mr. Shichoro that he knew or was introduced to Mr. Oguda by somebody else; relying on the case of **M.B. Automobiles Vs Kampala Bus Service [1966] E A 480** where it was alleged that a clerk pointed out the manager of defendant firm to the process server, which fact was not disclosed in the affidavit of service. Further, that the said manager was not known to the process server. The court was faced with the issue of whether such non-disclosure rendered service defective and the onus on the defendant to satisfy the court that summons were not duly served.

The court in that case held that:-

> **i. The disclosure of the name and address of the person who identified and witnessed delivery of tender of the summons to the defendant at the material time is a statutory duty;**
>
> **ii. Failure to disclose the name of the clerk in the two affidavits sworn by Musa, the process server had the effect of rendering them defective for non- compliance with the provisions of order 5 rule 17 of the CPR (U);**
>
> **iii. It was wrong for the Registrar to have acted on such defective affidavit of service; and**
>
> **iv. The court was satisfied that the summons was never served on Shaban, the Manager and proprietor of the defendant firm.**

On the strength of the above case, Mr. Obura submitted that Mr. Oguda was never served as he was not in office at 5.30 pm as alleged by the process server and as evidenced by the affidavit of Ken Mbaya who deposed that he was the last person to leave office at 5.30 pm as well as Mr. Peter Barasa the security guard at the gate who never saw anybody asking for Mr. Oguda at the said time of 5.30 pm. Further, that there is no link between a Mr. Adero of City Stadium and the cited contemnors. He urged that failure to cross examine the process server should not be interpreted against the Respondents as it was the applicants to prove their case.

In addition, Mr. Obura submitted that in the absence of personal service and evidence of the authenticity of the email addresses to which the order was allegedly sent, social media cannot be relied on by this court as a source of knowledge. He also relied on the case of **NYAMOGO VS KENYA POSTS & TELECOMMUNICATIONS CORPORATION [1990-1994] E.A 464** to advance the argument that where there was no evidence of service of the court order and neither was there a penal notice endorsed of Penal consequences or obligation and therefore the court cannot punish for contempt.

On the issue that Mr. Nyamweya telephoned Mr. Oguda urging him on the necessity to obey the court order, Mr. Obura relied on the case of **Naftali Ruthi Kinyua Vs Patrick Thuita Gachire and Another [2012] eKLR** where the court held that:

> **"Proof of telephone call having been made is irrelevant, as it was not the means by which the personal service is alleged to have been affected."**

The above case also emphasized the requirements in Ochino (Supra) case for personal service of the order and the endorsement of a Penal notice of consequences of disobedience on the said order. Further reliance was made on the case of **Josephine Muthinja Vs Lilian Muthama & 2 Others [2014]** eKLR per J.A Makau where the learned Judge also emphasized the need for personal service and endorsement of a Penal notice on an order of injunction to inform the recipient of possible consequences of noncompliance with the order served.

On the condition that a court will only punish for contempt for breach of an injunction if it is satisfied that the order is clear and unambiguous, Mr. Obura submitted that the order of 20/2/2015 was not clear, as there is no parallel leagues since the 1st Defendant has been organizing league matches since 2003 which fact is not controverted.

On the requirement that contempt of court must be proved beyond reasonable doubt, Mr. Obura relied on the case of **Duncan Manuel Murigi Vs Kenya Railways Corporation (2008) eKLR** where the court, in emphasizing the need for personal service of such order, cited with approval the **case of Bramblevale Ltd [1970] CH 128 at P. 137 where Lord Denning Master of Rolls** stated:-

"A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him."

The above issue, Mr. Obura submitted, was replicated in the case of **Kasembeli Sanane Vs Manhu Muli alias Fredrick Saname & 4 Others[2013] Eklr** where Anne Omollo J held that ***"proof of contempt of court must be beyond reasonable doubt***", referring to Odunga's digest at page 275 paragraph 67 (1).

Mr. Obura concluded that there was no evidence that the emails were received, acknowledged and or ignored by his clients the respondents herein to constitute knowledge and contempt. He urged this court to dismiss the application.

In a rejoinder to Mr. Obura's submissions, Mr. Mutua advocate for the applicants submitted that

1. There was no requirement under the Supreme Court of England Rules, for leave to commence contempt proceedings as the said Rules were amended and leave of court is no longer acquired.

2. That the law relied upon by the Respondents did not accord with the current jurisprudence on contempt of court. That the Ochino case was decide in 1989 before the constitutional petition no. 164/2011 **MITU BELL WELFARE SOCIETY VS THE HON A.G. & 2 OTHERS** which case analyses all the issues raised in the Ochino case and makes a distinction.

3. On the claim that the order of 20th February, 2015 was ambiguous and unclear, Mr. Mutua charged that the order clearly barred any fixtures from going on and that introducing ambiguities in the order is trying to scuttle the obedience thereof. He also submitted that the replying affidavits of Peter Barasa and that of Jack Oguda on the time of service were contradictory.

Mr. Mutua concluded that these contempt proceedings were not meant to serve the plaintiff but the good order that this court deserves, and to reaffirm what the Rule of Law holds for this country and enrich the question of respect for decisions of the court of law. He urged the court to find that the cited persons were in contempt and therefore they should bear the consequences.

Findings and Determination

I have carefully considered the application before court, the able rival submissions by both counsels for the respective parties to this application and the relevant authorities cited before me. I have also considered the applicable law as it is in Kenyan statutes and the imported Law namely, the Supreme Court of England Rules, 2012 by application of Section 5 of the Judicature Act, all in the spirit of keeping in mind my solemn obligation to accord all the constitutional right to a fair hearing which right cannot be limited.

The applicable Law

Section 5 of the Judicature Act, Chapter 8 Laws of Kenya is the substantive law on contempt of court that confers this court with the power to punish for contempt of court. The said section provided 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 such 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 original criminal jurisdiction of the High Court".

The applicable procedural law is order 40 Rule 3(1) of the Civil Procedure Rules which enacts that:-

Order 40, Rule 3

Consequence of breach

3. (1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

(2).No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

(3) An application under this rule shall be made by notice of motion in the same suit.

Why do Courts Punish for Contempt of Court?

As emphasized by Mr. Mutua advocate for the applicants, the power to punish for contempt is an important and necessary power for protecting the cause of justice and the rule of law, and for protecting the authority of the court and the supremacy of the law. In the Scottish case of STEWART **ROBERTSON VS HER MAJESTY'S ADVOCATE, 2007 HCAC63, Lord Justice Clerk** stated that:

> **" contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings"**

The learned Judge further stated that:

> **"The power of the court to punish for contempt is inherent in a system of administration of justice and that power is held by every judge."**

In the case of **BOARD OF GOVERNORS MOI HIGH SCHOOL KABARAK VS MALCOLM BELL &ANOTHER, (Supreme Court PETITION NOS 6&7 OF 2013,** the Supreme Court of Kenya described the power to punish for contempt as a power of the **court "to safeguard itself against contemptuous or disruptive intrusion from elsewhere"** and identified that power as one of the indisputable attributes of the court's inherent power. "Without that power, protection of citizens' rights and freedoms would be virtually impossible. Courts of law would be reduced to futile institutions spewing forth orders in vain."

In ***HEELMORE VS SMITH,(2))1886)L.R. 35 C.D455, lord Bowen, LJ*** aptly stated the rationale for punishing for contempt as:-

> **"The object of the discipline enforced by the court in case of contempt of court is not to vindicate the dignity of the court or the person of the Judge, but to prevent undue interference with administration of justice."**

Black's Law Dictionary (Ninth Edition) defines contempt of court 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."***
>
> **Lord President Clyde's dictum in JOHNSON VS GRANT 1923 SC 789** at page 790 however cautioned that:
>
> **"The law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is being challenged."**

The above decisions speak to my mind that the power to punish for contempt has never been about protecting judges' feelings, egos or dignity. The reason why courts will punish for contempt of court 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. It is about assuring a party who walks through the justice door with a court order in his hands that the order will be obeyed by those to whom it is directed.

A court order requiring compliance is not a mere suggestion or an opinion or a point of view. It is a command that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance should never be an option.

In the case of **Kenya Tea Growers Association Vs Francis Atwoli and 5 Others [2012] eKLR** Lenaola

J cited with approval the case of **Clarke and Others Vs Chadburn & Others [1985] 1All E.R (PC), 211** in which the court observed that:

> ***"I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed, willful disobedience to an order of the court is punishable as a contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal....even if the Defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it."***

In the case of **ECONET WIRELSS LTD VS MINISTER FOR INFORMATION & COMMUNICATION OF KENYA & ANOTHER [2005] EKLR** it was held that:

> ***"Where an application for committal for contempt of court orders is made the court will treat the same with a lot of seriousness and urgency and more often will suspend any other proceedings until the matter is dealt with and if the contempt is proven to punish the contemnor or demand that it is purged or both. For instance an alleged contemnor will not be allowed to prosecute any application to set aside orders or take any other step until the application for contempt is heard. The reasons for this approach are obvious- a contemnor would have no right of audience in any court of law unless he is punished or purges the contempt."***

On the basis of the above holding in the ECONET case, this court directed that the contempt of court proceedings herein as commenced must be determined before the substantive motion and other preliminary objections raised, including objections as to jurisdiction of this court to hear and determine the dispute and or the locus standi or necessity of other parties to the suit could be determined.

From the foregoing, it is trite that contempt of court proceedings and applications are subtle and criminal in nature and would impose criminal sanctions if a conviction followed. In the instant case, the plaintiff/applicant's case is that the 1st respondents were served with the court order but disobeyed and disregarded the same willfully and deliberately. On the contrary, the respondents deny service or even knowledge thereof and therefore contend that they are not in contempt of court. They further submit that the application before court is incompetent and therefore not capable of effecting the orders of court sought.

From the affidavit evidence, submissions by the respective parties' counsels on record and the applicable law decided cases, the following issues stand out for determination:-

Issues for determination

1. **Whether there was any valid court order issued by this court on 20th February, 2015**

2. **Whether the contempt application is competently before the court.**

3. **Whether the order dated 20/2/2015 was clear and unambiguous.**

4. **Whether the order of 20/2/2015 was served upon the Respondents or Whether the Respondents were aware of the orders of 20/2/2015**

5. **Whether the respondents are guilty of contempt of court order issued on 20th February, 2015**

6. **What orders should this court make in relation to issue no. 5 above and in the circumstances**

On the first issue of whether there is a valid court order alleged to have been brazenly defied, there is no doubt that on 20/2/2015, this court Hon. Mbogoli Msagha J, presiding Judge of the High Court Civil Division and sitting as the duty Judge for purposes of examining matters brought in the Division under

Certificate of Urgency did issue an *exparte* interim order of injunction in terms of prayer no. 2 of the Plaintiff/applicant's application by way of notice of motion dated 20th February, 2015 and filed in court the same day. The said order, which was extracted and is attached to the affidavit of Mr. Sam Nyamweya in support of the application herein as annexture SNI is couched in the following terms:

> ***1. "That the application dated 20th February 2015 be is hereby certified as urgent.***
>
> ***2. That the Defendants/ Respondents be and are hereby restrained by way of an injunction from hosting, commencing, starting, running, managing or in any other way conducting a parallel Premier League in Kenya in the name of Kenya Premier League or in any other name for 14 days from today 20th February 2015.***
>
> ***3. That the application to be served upon the Respondent.***
>
> ***4. That hearing shall be on 3rd March 2015 before any Judge of the Civil Division.***

The applicant/Plaintiff is now before this court vide a Notice of Motion dated 25th February 2015, complaining that the above order as issued on 20th February, 2015 was served upon the 1st defendants on the same day at 5.15 PM but that the 1st defendant willfully disobeyed the said order and therefore the 1st defendants' directors must face the consequences of such disobedience.

The disobedience, it is alleged, is evidenced by the fact that the Defendant did on 21st and 22nd February 2015 proceed to host and manage Premier League matches as shown by copies of newspaper reports and an extract of results from the website of the First Defendant, showing a schedule of matches due for 21st and 22nd February 2015 to 7th March 2015, the teams involved and the relevant stadia where the matches would be played.

The persons cited who are the directors of the defendant company on the other hand deny the allegations that they disobeyed any court order as neither was it served on them nor were they made aware of its existence necessitating compliance thereof. They however admit that they hosted matches scheduled for 21st and 22nd February, 2015 innocently. They have also raised procedural and legal issues and objections which this court is enjoined to take cognizance of in determining whether or not to commit the Respondents/ citees for contempt of court.

In the end, I find that indeed there was a valid court order issued by this court upon which a complaint of disobedience has been raised by the applicants.

Issue no. 2

On the competency of the application, Mr. Obura submitted that the application had not complied with procedural requirements for commencement of such applications for contempt as no notice to the DPP was issued and that no leave of this court was obtained before filing this application in compliance with the provisions of section 5 of the Judicature Act as read with the Supreme Court of England Rules and Order 40 Rule 3 of the Civil Procedure Rules.

He also argued that as no penal notice was endorsed on the order, the same is incurably defective. On the other hand, Mr. Mutua advocate for the applicants submitted that the law of contempt in Kenya relies on the supreme court of England Rules which were amended in 2013 removing the requirements for notice and leave of court.

There are several authorities that settle this issue. In the matter of an **Application by Gurbaresh Singh & Sons Ltd Misc. C.A 50/1983.** The High Court expressed itself thus:

> "**The second aspect concerns the words of section 5-"for the time being', which appear to**

mean that this court should endeavor to ascertain the Law in England at the time of the trial, or application being made."

In **Christine Wangari Gachege Vs Elizabeth Wanjiru Evans and 11 Others C.A No. 233 of 2007** the court of Appeal stated that:-

"Following the implementation of the famous Lord Wolf Access to Justice Report, 1996, the Rules of the Supreme court of England are gradually being replaced with the Civil Procedure Rules, 1999. Recently on 1st October, 2012 the Civil Procedure Amendment No. 2 Rules, 2012, came into force and part 81 thereof effectively replaced order 52 of the Rules of the Supreme Court of England in its entirety. Part 81 (Application and proceedings in relation to contempt of court) provides different procedures for four different violations.

Rule 81:4 relates to committal for breach of a judgment, order or undertaking to do or abstain from doing an act.

Rule 81:11 relates to committal for interference with the due administration of justice (applicable only in criminal proceedings).

Rule 81:16 relates to committal for contempt in the face of the court and Rule 81:17 relates to committal for making false statement of truth or disclosure statement.

As per Rule 81:1 the amendment provides the procedure in contempt of court proceedings which applies in the court of Appeal, the High court and county courts in England. In this case Rule 81:4 is applicable. Rule 81:10 sets out the procedure for filing a contempt application is as follows:-

3. The application notice must-

a. Set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each alleged acts, and

b. Be supported by one or more affidavits containing all the evidence relied upon.

4. Subject to paragraph 5, the application notice and the evidence in support must be served personally on the respondent:

5. The court may-

a. Dispense with service under paragraph (4) if it considers it just to do so; or

b. Make an order in respect of the service by an alternative method or at an alternative place."

Coming back to our issue of whether notice to the Crown (DPP) was necessary, the aforementioned provisions left out the requirements of notice to the Crown office (read the Attorney General or DPP) prior to filing an application for contempt as was previously required under order 52 of the said Supreme Court of England Rules. It therefore follows that no such notice to the DPP was necessary in this case.

On the issue of penal notice, Rule 81:9 (1) provides that subject to paragraph (2), a judgment, or order to do or not do an act may not be enforced under Rule 81:4 unless there is prominently displayed, on the front of the copy of the judgment or order served in accordance with this section, **a warning to the person required to do or not do the act in question that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets.**

Under paragraph 2 of Rule 81.9, an undertaking to do or not do an act which is contained in a judgment or order may be enforced under rule 81:4 notwithstanding that the judgment or order does not contain the

warning described above in paragraph (1).

From the above provisions, it is trite clear that there must be a penal notice prominently displayed on the order, warning of the consequences of disobedience. In the instant case, the order as extracted and signed by the Deputy Registrar and as annexed to the supporting affidavit of Mr. Sam Nyamweya has no penal Notice. The rules mandate such penal notice being conspicuously displayed unless there is an undertaking by the respondent not to do the act which he is restrained from doing.

ISSUE NO. 3

Whether the order as sought and extracted is clear and unambiguous.

The impugned order was and is directed at the **defendants/ Respondents, restraining them from hosting commencing, starting, running, managing or in any other way conducting a parallel Premier League in Kenya in the name of Kenyan Premier League or in any other name…."**

Mr. Obura advocate contends that the order is unclear and ambiguous. He refers to paragraph 6 of Mr. Oguda's affidavit and paragraph 13,14 of Mr. Ambrose Rachier's affidavit to the effect that the 1st defendant has been organizing league matches since 2003 which fact is not controverted therefore there can be no parallel league as contained in the order of 20th February, 2015.

I have examined the 1st Defendant's Memorandum and Article of Association 2003. Among its objectives are (relevant to this application).

3 (a) promote and facilitate co-operation among football clubs and other relevant association for the improvement of Kenyan football;

c) To ensure proper management and fair play in Kenyan football competitions.

On the other hand, the FKF constitution Article 2 on the objectives provide:

a) To improve the game of football constantly and promote, regulate and control it throughout the territory of Kenya, in the spirit of fair play and it's unifying educational, cultural and humanitarian values, particularly through Youth development programmes.

b) To organize competitions in Association football in all its forms at a national level, by defining precisely, as required, the areas of authority conceded to the various Leagues of which it is composed.

g) To control and supervise all football matches and related activities throughout the territory of Kenya.

i) To host competition at International and other levels.

j) To be the sole organization in charge of the administration, management and running of football in Kenya as the only authorized affiliate FIFA, CAF and CECAFA respectively.

k) To approve Inter-Branch tournaments, International and any other matches and organized tours by members, individuals or clubs in Kenya. No football tournaments or other football activity shall be organized by anybody in Kenya without the express written authority of the Federation.

The membership of the 1st Defendant are 16 clubs/ subscribers, as well as the plaintiff Federation being non- director shareholders with a special share. However, the plaintiff did by a resolution withdraw its shareholding in the 1st defendant which is aprivate company.

From the above objectives (b,g,I and k), and especially objective k, of FKF constitution, it is clear that the 1st defendants could only host, commence, run, start or manage or conduct any match, leave alone the premier League in Kenya with the written authorization of the plaintiff which is the only body recognized by FIFA, CAF and CECAFA. No such written authorization was obtained from the plaintiff Federation as none was exhibited in court. It therefore follows that any such organized or scheduled Premier League match by the 1st defendant could only be described as parallel.

In my view, therefore, the order as issued, making reference to "parallel Premier League" was clear and unambiguous to that extent and I so find.

I must, however, not depart from this issue of whether or not the order was clear and unambiguous before I make some observations. Examining the said court order, it is addressed to the Defendants/ Respondents.

There are three Defendants to this suit namely, Kenya Premier League Ltd, Kenya Football Referees Association and Sports Kenya. When it came to citing the Defendants/ Respondents for contempt, it is clear from the applicant's application that only the chairman and Directors of the 1st Defendant are being cited for contempt.

The question that begs answers from this court is what criteria did the plaintiff use to seek the said directors to be cited for contempt of court, to the exclusion of officials of the other two defendants.

From the plaintiff's own pleadings, the second Defendant would be responsible for officiating the scheduled matches, as there can be no Football match without a referee and linesmen on the field. Equally true is that there can be no match or referee without a sports facility or stadia as managed and or controlled by the 3rd Defendant. It therefore puzzles this court that only the 1st Defendant is alleged to have disobeyed the court order issued against all defendants, and therefore only the 1st Defendants directors, who could not have organized the matches without the collaboration and or co-operation of the 2nd Defendants are said to have disobeyed the said court order by hosting, commencing, starting, running, managing or conducting a parallel Premier League. Yet it is also alleged that the representatives of the 2nd and 3rd defendants were also served with the said court order on 21st February 2015.

In the view of this court, the plaintiff's act of isolating the 1st Defendant's directors to face the wrath of this court for contempt is tantamount to selective justice and promoting discrimination. As exemplified in the case of Lord **JOHNSON vs GRANT 1923 SC 789 AT 790** that:

> ***"The law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is being challenged***

The provision of Article 2 of the Constitution of Kenya 2010 assert the supremacy of the Constitution which binds all persons and all state organs.

Article 2 (4) enacts that any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this constitution is invalid.

Under Article 3 (1) every person has an obligation to respect, uphold and defend this constitution.

The said constitution also guarantees the equality of all persons before the law and equal protection and equal benefit of the law, under Article 27 thereof. It is the said Article 27 (under the Bill of Rights) which binds all, and clause 4 of Article 27 enacts that:

> (4) The state shall not discriminate directly or indirectly against any person on any ground.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause 4.

This court is also constitutionally enjoined to apply the national values and principles of governance stated in Article 10 in the interpretation of the Constitution or application of any law.

In applying the law or interpreting the constitution or any law, I am enjoined, more specifically, and relevant to this suit, to apply the principles of equity, equality and non- discrimination.

And in the exercise of judicial authority, I am mandated under Article 159 (2) (a) of the Constitution to be guided by the Principle that justice **shall be done to all, irrespective of status and (e) to protect and promote the purposes and principles of the constitution**.

In the application for contempt before this court, and the submissions by counsels, the plaintiff did not attempt to explain whether the 2nd and 3rd Defendants were in any way liable for contempt and if so, the rationale for not citing them for contempt of court, taking into account the fact that the affidavit of service by the process server that he did effect service of the order of 20/2/2015 upon Pius Oyoo a representative of the second Defendant and a Mr. James Kegoro of City stadium. This is not to impute that the said defendants were guilty of disobeying the said court order, but then, could the 1st defendant have held the matches without the primary participation of the other two defendants who either officiate or open the doors and gates to the various stadia which the manage?

Acknowledging that the power of the court to punish for contempt is intended to protect the dignity and authority of the court, and not intended to be used as a weapon for parties to intimidate the adversary parties, I find an improper motive on the part of the applicant to single out only the 1st defendant's directors /respondents herein for citation without offering an explanation why the other defendants were not cited, yet the order was "generally addressed to the **Defendants/ Respondents without specifying which defendant or respondent**."

ISSUE NO. 4.

On the issue of service, the question I pose is, was there service upon the respondents of the said order alleged to have been disobeyed?

The applicant maintains that the affidavit of Bernard Mukokha proves personal service of the order upon Mr. Jack Oguda the Managing Director of the 1st Defendant and that if there was no personal service then there was proof that the citees had knowledge of the same through emails, telephone and social media. On the other hand the 1st Respondent/ Defendant denies that fact and contend that there was no person in the office at the person the order was allegedly served, no emails were addressed to them, received or acknowledged and that the social media platform was not meant to be a mode of service of the order. That they were only served with the said order on 23/2/2015 after the impugned matches had been played on 21st and 22nd February, 2015 as scheduled.

What is the legal position of service of the order of injunction?

Under Rule 81:8 of the Supreme Court of England Rules of England, (1), In the case of a judgment or 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 Rule 81:5 to 81:7 if it is satisfied that the person has had notice of it-

a) By being present when the judgment or order was given or made or

b) By being notified of its terms by telephone email or otherwise.

2. In the case of any judgment or order the court may-

a) Dispense with service under rules 81:5 to 81:7 if the court thinks just to do so or

b) Make an order in respect of service by an alternative method or at an alternative place.

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)."***

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 dispenses with personal service for the purposes of contempt proceedings. The Court of Appeal in the above Shimmers Plaza case cited with approval Hon **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."***

The CA 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 **EXPARTE LANGELY 1879, 13 Ch D/10 (CA)** where Thesiger L.Jstated at P. 119 as follows:-

> " ***….the question in each case, and depending upon the particular circumstances of each 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 infact 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."***

<u>This court poses a further question-What then amounts to "notice"?</u>

Black's Law Dictionary 9th **Edition** defines notice as:-

> ***"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."***

The court in the above **Shimmers Plaza Ltd case (Supra)** found that knowledge of the judgment or order by the advocate of the alleged contemnor sufficed it for contempt proceedings, particularly where the advocate was in court representing his client (alleged contemnor and the orders were made in his presence.).

The same issue of knowledge was also canvassed by the Canadian Supreme Court in the case of

Bhatnager Vs Canada (Minister of Employment and Immigration (1990) 2 S C R 217 Per L.J. Sopinka who held:-

> *"**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 Vs Andrews (1882) 51 L J Ch 414).***

The above case was also cited with approval by the CA in Shimmers Plaza Ltd case (Supra).

In the instant case, as I have stated, there was indeed, an order extracted on 20/2/2015. What is disputed is service and or knowledge of the said order.

I have carefully perused the affidavit of service by Bernard Mukokha Shichoro the process server who allegedly effected service of the order upon the MD of the 1st Defendant, Mr. Jack Oguda. I find it important to reiterate some paragraphs of that affidavit as deposed.

> **1. ……..**
>
> **2. That on the 20th day of February 2015 I received a court order issued by this Honorable court on 20th February 2015 from M/s E. K. Mutua & Co. Advocates with instructions to serve the same upon (sic)**
>
> ***3. That on the same day at about 5.30 pm, in company of Mr. Kiama a representative of the plaintiff I proceeded to Westlands where the offices of the First Defendant are situated where I served a Mr. Jack Oguda the Managing Director of the First Defendant. He accepted service but declined to sign at the back of my copy"***

My first observation is that the affidavit does not state upon whom the order was to be served.

Secondly, paragraph 2 is not clear as to whether the recipient received the order at 5.30 pm or the process server served the order at 5.30 pm. As a result, my appreciation of that paragraph as framed is that the process server received the order at 5.30 pm and in the company of Mr. Kiama he proceeded to Westlands.

Westlands is not far away from the plaintiff's advocates offices at View Park Towers, Uhuru Highway yes, but this court takes judicial notice of the fact that the City County of Nairobi is so flooded with snailing motor vehicles on the roads and that the road to Westlands is no exception, such that unless the process server had a hired chopper to airlift him from town to Westlands, right into the respondent's office premises,he could not have received the impugned order at 5.30 pm and served it at 5.30pm!

Third, even assuming that the order was served at 5.30 pm and not received at 5.30pm, the validity of that service is in question. Order 50 Rule 9 of the Civil Procedure Rules prohibits the service of orders outside the 5.00pm timeline. The said provisions enact as follows:

"9 . Service shall normally be effected on a weekday other than Saturday and before the hour of five in the afternoon

3) for purposes of computing any period of time subsequent to service outside the times specified in subrule 2-

> a) service effected after 5 In the afternoon on a weekday other than Friday or Saturday is deemed to have been effected on the following day
>
> b) service effected after five in the afternoon on Friday is deemed to have been effected on the

following Monday."

I have examined the calendar for 20th February 2015 and found that it was Friday. The question is, at what time did the order issue and why did it take the plaintiff/ applicant until 5.30 pm to give the process server the order upon Mr. Oguda? Could it be that the process server was held up in the jam or that he received the order late? No explanation came from the plaintiff.

Fourth, is that this was an urgent matter. The fixtures were scheduled to commence the following day on 21/2/2015. Yet, from the manner in which the affidavit of service was drawn, the process server casually handled the issue and simply stated he was in company of Mr. Kiama. The identity of Mr. Kiama is casually referred to as representative of the plaintiff and no more. He has no second name! Not even Mr. Nyamweya knows the Mr. Kiama's second name and his designation at the plaintiffs' organization. He is simply referred to as a representative. This kind of description invites a reasonable cloud of doubt in the mind of this court as to whether there was any such Mr. Kiama or not, who could not even swear an affidavit to corroborate the process server's averments on oath.

This is the applicant's case and the burden of proof lay on him, first, to prove service by way of a watertight affidavit of service evidence which is lacking and, whose deficiency I find the allegation that the respondents should have sought to cross examine the process server an exercise in futility. See sections 107, 108 and 109 of the Evidence Act Cap 81 Laws of Kenya.

Where service is denied, it was incumbent upon the plaintiff to procure an affidavit of the Mr. Kiama to corroborate the deposition of the process server. This was not done, and instead, the plaintiff shifts the burden of proof onto the Respondents to prove that service was not effected upon them by (calling for the cross examination of the process server).

I reiterate that contempt proceedings are of a criminal nature and involve, if proved, loss of liberty, the applicant must therefore endeavor to prove all facts relied on by way of evidence beyond reasonable doubt. It is not like in the case of any other ordinary matter like service of summons to enter appearance or hearing notice upon a party, where, even if service was regular, the courts have found that exparte proceedings or judgment made in default could still be set aside on terms in the discretion of the court.

In this case, the process server does not even mention that he passed through some form of security checks or even at the1st defendant's gate before accessing the said offices of the 1st defendant. He does not even state that he knew the said Mr. Oguda before or at that the time of the alleged service, or that any other person or even the mysterious Mr. Kiama a representative of the plaintiffs knew or introduced him to Mr. Oguda for purposes of service of the order.

The 1st defendant's Managing director has vehemently rebutted service of the order upon him or even the availability of any member of staff of the 1st defendant in their offices at the time he is alleged to have been served. The Security officer Mr. Peter Barasa has also sworn an affidavit stating that he was the one managing the gate and screening visitors and deny that he received any visitor at the mentioned time seeking to server the 1st defendant with some documents.

I find that there is no credible and or reliable description of how service of the impugned order was served upon the 1st defendant's MD to persuade this court to accept the process server's depositions. Albeit the applicant contends that there is a contradiction between the affidavit of the MD and the security officer on the time that the 1st defendant's offices are usually closed, I find that there is even more contradiction between the affidavit of Mr. Sam Nyamweya and his process server. Whereas the process server claims to have effected service of the order at 5.30 pm, Mr. Nyamweya deposed that the service was effected at 5.15 pm.

In my view, the alleged contradiction in the respondent's deposition is not material for the reason that the security officer was simply stating that as a norm, the 1st defendant's offices are usually closed by 5.30 pm and no visitors would have been expected in at that time or allowed in the premises or past the gate.

Comparing that deposition of the security officer with that of the process server, the latter does not even mention that he ever approached the 1st defendant's gate or security or that the gates were ajar and unmanned therefore he did not have to inquire to get in. He therefore must have just landed in the Managing Directors' office incognito. He does not even state that he served the MD while he was in his office or how he could have been ushered in that office.

This court believes Mr. Oguda's deposition that on the material day he left the offices at 4.30 pm as that evidence has not been controverted by any other credible independent evidence capable of belief.

The court further accepts as true Mr. Barasa's deposition that the said order was dropped by an unknown person driving in motor vehicle registration no. [...] Toyota Prado on 23rd February, 2015 at or about 9.15 pm. On the other hand, I do not believe the process servers depositions which are devoid of essential details and precision. For example, he makes no effort to describe the location of the 1st defendant's offices, even if he had been there before or was acquainted with the said office. It was not sufficient, to state that the 1st defendant's offices were in Westlands. Westlands is big enough just like saying 'I served the 1st defendant in Nairobi.' There is no description of road, building, house or even the neiborhood of the 1st defendant. Compared to the affidavit of service sworn by Charles Mwanzi on 4th March, 2015, which is part of this record, the latter, in my view, meets the requirements of a proper affidavit of service which if one doubted; there would be necessity to call the process server for cross-examination. Mr. Mukokha's affidavit of service was too barren, to say the least, too desolate and incapable of belief.

I reiterate that in my view, therefore, cross-examination of the process server on that kind of affidavit would not serve any useful purpose.

The upshot of all the above expositions is that I find that there was no personal service upon the 1st defendant's managing director Mr. Jack Oguda, of the order of 20th February, 2015 on 20th February 2015.

Having ruled out the issue of personal service as not having been proved, I now turn to the question of whether the respondents herein had knowledge of or were aware of the said order. The plaintiffs allege that they send emails to all the defendants and that the issue was being discussed in the social media so the defendants must have known of the order. Further, Mr. Nyamweya deposes in his affidavit that he personally called Mr. Oguda on 20th February and asked him to obey the order. The respondents/defendants on the other hand deny ever receiving the emails or getting information from the social media. Mr. Jack Oguda also swears that he never received any telephone call from the President of FKF as alleged.

Therefore, did the emails, social media and or alleged telephone call provide a source of information to the respondents of the order in question?

Rule 81.8 of the Supreme Court of England Rules provides that personal service of an order may be dispensed with if the court is satisfied that the person has notice of the order by:

a)..

b) being notified of its terms by telephone, email or otherwise.

In this case, Mr. Sam Nyamweya deposes that an email was send to all the citees at 7.11 pm, attaching copy of the order requiring them to stop conducting the fixed matches and that he personally telephoned Mr. Jack Oguda. Further, that the matter was being discussed in the social media. The respondents deny ever receiving those mails and further, that in any event, the order was not attached to the said mail.

I have carefully examined annexture SN3, an email allegedly send from info@footballkenya.org to several other email addresses. The respondents herein are alleged to own some of those email addresses. The mails contains, in part:

"Subject: Fw court order

Dear all,

Please be advised that there is a court order restraining KPL from starting a parallel league.

Find attached letter

Media Office –FKF"

The said mail regrettably has no attachment and it also refers to an attached letter, not order. It does not cite the case number for the said order and from which court the order was issued. Neither does the said mail attempt to reproduce the contents of the said order verbatim. There was even no mention in the said mail that the 1st defendants herein had already been served with the order at 5.30 pm and that this mail was only to serve as a reminder.

There is no evidence to show that the respondents herein received that mail send at 7.11 pm and which was equally devoid of any relevant material that would provoke an inquiry.

In addition, this court finds that since the matches fixed were scheduled to be played the following day on 21st February 2015, the plaintiff would have even attempted to serve the order on 21st February upon the defendants at whatever venue the matches were scheduled to kick off. There is no averment that some efforts were marshaled to achieve the purpose of stopping the scheduled parallel league. This court would expect the plaintiffs to have even called a press conference and make a public announcement of the injunction or even fax a copy thereof to the ever vigilant and curious media. No such effort to make the respondents have knowledge of the said order were made.

Reverting back to the issue of selective justice, if it is alleged that the 2nd and 3rd defendants were served the following morning of 21st February, 2015, the question is, why is the plaintiff shy of citing them for officiating or hosting the matches that had been stopped by a court order. All these circumstances raise serious suspicions that there was no service of the order and that the said order was never brought to the knowledge of the respondents.

Annexture SN4 of Mr. Nyamweya's affidavit on the other hand, upon critical examination, does not help the plaintiff's case either. It is a Daily Nation article on the matches played by some of the clubs on 21st and 22nd February, 2015. The article which was published on 24th February 2015, 3 days after the order was issued does not even mention that the clubs went ahead to play the matches notwithstanding the court order issued and or served upon the 1st defendant on 20th February, 2015 barring them from conducting any parallel league.

On the other hand, the allegation that the 1st defendant's CEO Mr. Jack Oguda had been telephoned by Mr. Nyamweya, in as much as the Rules recognize telephone conversations to be one of the ways in which a respondent can be made aware of the order, I find that averment a barren allegation as no evidence of any conversation from the quoted telephone number was adduced. This requirement was well captured in the case of **Naftali Ruthi Kinyua Vs Patrick Thuita Gachire and Another [2012] eKLR** where the court held that:

> **"Proof of telephone call having been made is irrelevant, as it was not the means by which the personal service is alleged to have been affected."**

The purported recipient having vehemently denied on oath that he ever received a telephone call, the burden of proving that there was communication and therefore knowledge of the order, ay on the party who alleges and in this case, the plaintiff Mr. Nyamweya. He failed to discharge that burden, even on a balance of probabilities leave alone beyond reasonable doubt.

It has also been alleged that the fixtures were uploaded on the 1st defendants' website as annexed to the affidavit of Mr. Nyamweya. That deposition would have moved this court if there was any denial by the 1st defendant of having had such fixtures or even having conducted the matches as scheduled on 21st and 22nd February 2015. The respondents contend that those matches had been organized and scheduled much earlier. They further state that upon being served with the order of injunction, they religiously halted all the planned matches and sought to challenge the orders herein.

From annexture SN4, this court is unable to see any evidence of any social media hype or conversation concerning the order herein stopping the scheduled matches. The said annexture at pages 6 and 7 of the bundle does not even have a date when the said website was accessed and by whom, to demonstrate that the hype if any on social media was before or during the time when the scheduled matches were being played.

Besides, this court has been left speculating whether there was systematized conspiracy by the plaintiff to let the media sleep on the information from 20th-23rd February 2015. Had the media both electronic and print been silenced or blacked out from reporting that KPL matches had been stopped by the court order? and by who? I ask that question because the only semblance of evidence of media reporting concerning the said order was on 24th February 2015 in the daily nation article annexture J-O1 attached to Jack Oguda' replying affidavit. The article is titled" KPL now suspends its fixtures as star players call for sanity" in the said article, it is reported that:

> **"The KPL has suspended all matches following a High Court order. FKF had on Friday secured an injunction from the High Court barring KPL from conducting any matches, but the league body went ahead with seven fixtures because it had not been served. This was done yesterday (read 23rd February, 2015).**
>
> **"We were served early in the morning and we are preparing documentation to challenge the court order. As it stands now, we cannot hold any league matches until the case is heard so we are hoping that it happens as soon as possible " KPL CEO Jack Oguda said. "** the article also went ahead to replicate the order .

From the above article published on 24th February, 2015 which was a Monday, and what Jack Oguda is quoted as saying concerning the order, its implications and the planned measures to challenge it, this court is unable to find that there was knowledge whether actual or perceived notice , between 20th February, 2015 and 23rd February, 2015 that a court order was in place banning the scheduled KPL fixtures. The court is also unable to discern any conduct on the part of any of the respondents, directors of the 1st defendant that show or would lead the court to believe and conclude that the respondents to this application had knowledge of the order and therefore must have brazenly disobeyed the court order by playing the seven fixtures over that weekend to warrant being cited for contempt of court, and more particularly, when the CEO for the 1st defendant Mr. Jack Oguda was quoted in the said daily Nation of 23rd February, 2015 saying**: " we cannot go against the law. I think we have a legitimate case against our challengers which we shall argue out on (sic) those same courts. Oguda said."** Those words were published on 24th February 2015 and on 25th February, 2015 which was a Tuesday. The applicants herein were before this court filing this application for contempt against the respondents directors for deliberately disobeying the court order.

In the end, I find that there is **no iota of evidence adduced by the applicants** to demonstrate even faintly that the directors of the 1st defendant respondent were served with any order of 20th February, 2015 before playing the scheduled fixtures on 21st and 22nd February, 2015 or that they had actual or circumstantial knowledge of the said court order barring them in any way from hosting the scheduled matches before the said matches were played.

On issue no 6 on what orders should this court make, this court having found that there was no service of the court order of 20th February, 2015 or knowledge of the same by the citees, and having further found

that there was selective justice in citing them for contempt, this court finds that the plaintiff /applicant has not proved to the standard required that the respondents as cited were in brazen disobedience of the court order issued by this court on 20th February, 2015 and declines to grant the order sought by the plaintiff applicant by their notice of motion dated 25th February 2015 seeking to have Mr. Jack Oguda, Ambrose Rachier, Allan Kasavuli, Robert Donald Munro, James Musyoki, Col Munyikai Juma, Elio Lolli, Elly Kalekwa committed to civil jail for a term of six months.

The said motion is accordingly dismissed and the respondents are acquitted of the charge of being in contempt of court.

I order that each party bears their own costs of this application for contempt of court.

But before I pen off, I must commend the advocates for the respective parties, Mr. Eric Mutua and Mr. Obura for their able submissions each in defence of their respective client's cause. They also displayed aptitude and maturity and conducted themselves in a very respectable manner during the hearing of this very type of application which on most occasions evokes hot springs. Their respectful conduct was conducive to a seamless hearing and enabled me to retire and write this ruling while emotionally bankrupt of and perfectly detached from the parties feelings.

And with Mr. Mutua's brief but useful closing remarks, it cannot be gainsaid that the duty to obey the laws by all individuals and institutions is paramount in the maintainance of the rule of law, good order and the due administration of justice. In addition, the dignity and authority of our courts which exercise judicial authority derived from the people of Kenya must be jealously guarded.

As stated by ROMER L.J in HADKINSON VS HADKINSON(1952) ALL ER 567:

> **"It is the plain and unqualified obligation of every person, against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void"**
>
> **For, 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 question. That the course of a party knowing of an order which was null and irregular, and who might be affected by it, was plain, he should apply to court that it might be discharged. As long as it exists, it should not be disobeyed." Per Lord Cottenhan L.C in Chuck Vs Cremer(1) 1 COOP TEMP COTT 342).**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MARCH, 2015

ROSELYNE EKIRAPA ABURILI

JUDGE OF THE HIGH COURT