



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISII**  
**CASE NO. 532 OF 2016**  
**(FORMERLY HCC NO. 235 OF 2011)**

**ALLOYS MATAYA MOSETI T/A**

**DIPLO GENERAL ENTERPRISES LIMITED.....PLAINTIFF**

**VERSUS**

**KISII HOTEL ..... 1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR, KISII CENTRAL.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

1. On 28<sup>th</sup> April 2016 the court granted the plaintiff's Notice of Motion dated 6<sup>th</sup> May 2015 in terms of prayers 4 and 5 on the basis that the 1<sup>st</sup> defendant against whom the orders were directed had been served with the application and had not appeared and/or objected to the application. The orders were in the following terms:-

**4. The Honourable Court be pleased to grant an order for maintenance of the status quo over and in respect of LR No. Kisii Town/Block III/6, more particularly, pertaining to the title, occupation and possession thereof pending the hearing and determination of the instant suit.**

**5. The Honourable Court be pleased to grant an inhibition directed to and/or against any dealings, transaction and/or disposition, relating and/or concerning transactions in respect of LR No. Kisii Town/Block III/6, to last pending the hearing and determination of the instant suit.**

2. The plaintiff by a further Notice of Motion dated 9<sup>th</sup> November 2016 brought under Order 40 Rule 3 of the Civil Procedure Rules and Sections 1A, B, 3A and 63(e) of the Civil Procedure Act which application is the subject of this ruling averred that the 1<sup>st</sup> defendant disobeyed the orders given on 28<sup>th</sup> April 2016 and seeks orders that the 1<sup>st</sup> defendant's directors be cited for contempt and be punished for disobeying orders of the court. Inter alia vide the application the plaintiff seeks the following orders:-

**1. That the Honourable Court be pleased to cite and punish the directors of the 1<sup>st</sup> defendant/respondent for disobeying and/or disregarding the lawful court orders issued and/or granted on the 28<sup>th</sup> April 2016 and served upon the 1<sup>st</sup> defendant/ respondent on 8<sup>th</sup> May 2016.**

**2. That the Honourable Court be pleased to issue warrants of arrest to bring the directors of the 1<sup>st</sup> defendant/respondent before this court for committal to civil jail for disobedience.**

**3. That the Honourable Court be pleased to commit the directors of the 1<sup>st</sup> defendant/respondent to jail for a duration not exceeding six months and/or such shorter period as the court may deem fit and expedient.**

**4. That the Honourable Court be pleased to order and/or direct the 1<sup>st</sup> defendant/respondent to demolish and/or bring down the structure and/or building constructed on LR No. Kisii Town/Block III/6, which was carried out and/or constructed in contravention of the orders of status quo and/or the plaintiff be permitted to demolish the structures and the cost thereof be borne by the 1<sup>st</sup> defendant.**

3. The application was supported on the grounds set out on the body of the application and on the supporting and supplementary affidavit sworn by **Alloys Mataya Moseti** on 9<sup>th</sup> November 2016 and 5<sup>th</sup> October 2017 respectively. The plaintiff's assertion is that the 1<sup>st</sup> defendant was served with the court order made on 28<sup>th</sup> April 2016 on 8<sup>th</sup> May 2016 and that the 1<sup>st</sup> defendant in defiance and disobedience of the court order went ahead to commence the construction of a permanent structure on the property in contravention of the order for maintenance and observance of the status quo. The plaintiff asserts that the 1<sup>st</sup> defendant had knowledge of the court order and that the acts of the 1<sup>st</sup> defendant to construct a permanent structure on the property constitutes breach or disobedience of the court order and the 1<sup>st</sup> defendant thus deserves to be punished in order to uphold the dignity and authority of the court.

4. The plaintiff's Notice of Motion was fixed for hearing on 1<sup>st</sup> December 2016 when the 1<sup>st</sup> defendant did not attend. The plaintiff urged the court to grant the orders sought in the application since the 1<sup>st</sup> defendant was continuing with construction in the face of the order directing the parties to maintain and observe the status quo. The court held such acts would constitute contempt of court and in the circumstances directed that the directors of the 1<sup>st</sup> defendant be personally served to attend court on 19<sup>th</sup> December 2016 to show cause, if at all, why they should not be held to be in contempt of court and therefore liable to be punished. On 19<sup>th</sup> December 2016 the directors had not been served to appear in court prompting the matter to be stood over to 9<sup>th</sup> March 2017 when again the directors had not been served. Once again the court directed the directors to be served to attend court on 8<sup>th</sup> May 2017 to show cause.

5. On 8<sup>th</sup> May 2017, George Nyamweya attended the court in response to the Notice to Show Cause served upon him as a director of the 1<sup>st</sup> defendant. He stated that other than the Notice to Show Cause he was served with, he was not aware of the order he was alleged to have disobeyed. The court directed that he be served with the Notice of Motions dated 31<sup>st</sup> July 2015 and 9<sup>th</sup> November 2016 which precipitated the order, the subject of the contempt proceedings so that he could file his response.

6. The 1<sup>st</sup> respondent/defendant filed a lengthy replying affidavit sworn by George Omari Nyamweya on 4<sup>th</sup> July 2017 through which he traced the history respecting the ownership of the suit property **LR Kisii Municipality/Block III/6** among other properties. The bulk of the response goes to the merits of the suit and does not dwell much on the application the subject of the ruling. What is evident from the response is that the ownership of the suit property is contested. The 1<sup>st</sup> respondent as per the affidavit by George Nyamweya was always the owner of the suit property as per documents annexed as "**G0N2**" and "**G0N3**" which show the 1<sup>st</sup> defendant was the registered owner of the property long before the plaintiff was allegedly allocated the property in 2008.

7. The 1<sup>st</sup> defendant has exhibited correspondences with the Kisii Municipal Council which illustrate that the 1<sup>st</sup> defendant was the rateable owner of the property prior to 2008 when the plaintiff is said to have been allocated the property. The 1<sup>st</sup> defendant avers that land parcel Kisii Township/Block III/6 was

transferred to Kisii Hotel Ltd on 23<sup>rd</sup> February 1972 and the shareholders and directors of the company were James Nyamweya and Robinson Okenye Nyamongo. Pursuant to orders made in HC Misc. Application No. 64 of 1993 (Kisii) on 2<sup>nd</sup> September 1994 in an application to wind up the partnership between James Nyamweya and Robinson Okenye Nyamongo order no. 2 was in the following terms:-

**2. That Kisii Town/Block III/6 be sold and the proceeds therefrom be utilized to offset existing liabilities and of dissolving the partnership.**

The 1<sup>st</sup> defendant asserts that by the time the plaintiff was allegedly being allocated the suit property, the 1<sup>st</sup> defendant was in the process of implementing the aforesaid court order issued in the said suit.

8. The 1<sup>st</sup> defendant further averred that the business trading as “**Kisii Hotel**” as opposed to “**Kisii Hotel Limited**” was managed and operated by one John Oigara and was the business of the late Robinson Okenye Nyamongo and family and service upon the general manager of the business could therefore not constitute service on the 1<sup>st</sup> defendant/respondent. The 1<sup>st</sup> defendant/respondent’s position is therefore that it has never been served with the Notice of Motion dated 9<sup>th</sup> November 2016 or any court orders prior to being served with the Notice to Show Cause.

9. The conservatory orders granted by Hon. Justice Okong’o on 13<sup>th</sup> May 2015 was in the following terms:

**“There be and is hereby granted an order of temporary maintenance of the status quo over and in respect of LR No. Kisii Town/Block III/6, more particularly, pertaining to the title, occupation and possession thereof, pending the hearing and determination of the instant suit.”**

On 28<sup>th</sup> April 2016, the above order was reaffirmed and additionally an order of inhibition barring any dealings or transactions in respect of the suit property pending the hearing and determination of the present suit. I have perused the plaintiff’s Notice of Motion dated 6<sup>th</sup> May 2015 which precipitated the subsequent applications dated 31<sup>st</sup> July 2015 and 9<sup>th</sup> November 2016 and it is clear that the Notice of Motion dated 6<sup>th</sup> May 2015 was intended to forestall any sale of the suit property by the 1<sup>st</sup> defendant to any third party pending the hearing of the suit. The plaintiff did not seek any order barring any construction on the property and none was granted. The plaintiff’s concern was that the 1<sup>st</sup> defendant was actively engaged in an attempt to sell the suit property. The order of status quo was specific that it pertained to the title, occupation and possession while the order of inhibition barred all dealings and transactions in respect of the title.

10. In the application dated 9<sup>th</sup> November 2016 the plaintiff’s principal complaint was that the 1<sup>st</sup> defendant had commenced to construct a permanent structure on a portion of the suit property and this he states was in breach of and in contravention of the order for status quo. **Did the order for status quo bar any construction on the suit property?** I would say it never did so in specific terms. For a court to punish for contempt of court, there has to be demonstration that the order a party is said to have disobeyed was explicit, clear and unequivocal and was not ambiguous. The plaintiff as per paragraphs 8, 9 and 10 of the affidavit sworn in support of Notice of Motion dated 6<sup>th</sup> May 2015 was uncertain whether it was the 1<sup>st</sup> defendant and/or the third party he claimed the 1<sup>st</sup> defendant had sold the property to who was carrying on the construction. The order ultimately granted did not specifically restrain the alleged ongoing construction and in my view, the order of status quo issued was not explicit, clear and unambiguous.

11. The 1<sup>st</sup> defendant has further stated in the replying affidavit by George Nyamweya that the 1<sup>st</sup> defendant was not served with any order. As per the affidavit of service sworn by David Okumu Ojill on 23<sup>rd</sup> June 2016 attached to the Notice of Motion dated 9<sup>th</sup> November 2016 as “**AMM4**” the court order given on 28<sup>th</sup> April 2016 and issued on 6<sup>th</sup> May 2016 by the court was served on a Mr. Wanga, a

Manager at Kisii Hotel. The 1<sup>st</sup> defendant has averred that “**Kisii Hotel**” is a business carried on the property owned by the 1<sup>st</sup> defendant by John Oigara who is a third party. Service of the order on the said Mr. Wangwa who is not an agent of the 1<sup>st</sup> defendant cannot constitute proper service on the 1<sup>st</sup> defendant.

12. Order 5 Rule 3 provides how service may be effected on a corporation such as the 1<sup>st</sup> defendant. Order 5 Rule 3(a) provides:-

**3. Subject to any other written law, where a suit is against a corporation the summons may be served-**

**(a) On the secretary, director or other principal officer of the corporation; or**

**(b) .....**

The service of the Order and the subsequent Notice of Motion dated 9<sup>th</sup> November 2016 on Mr. Wangwa, a Manager at Kisii Hotel was not proper service on the 1<sup>st</sup> defendant as he was neither a secretary, a director and/or a principal officer of the 1<sup>st</sup> defendant.

13. In consequence therefore, the plaintiff’s Notice of Motion dated 9<sup>th</sup> November 2016 fails on the twin grounds that the order of status quo was not explicit, clear and unequivocal and further that there was no appropriate and proper service of the order on the 1<sup>st</sup> defendant.

14. I accordingly set aside my ex parte order made on 1<sup>st</sup> December 2016 holding there was contempt and in place thereof make an order dismissing the plaintiff’s Notice of Motion dated 9<sup>th</sup> November 2016 with costs to the 1<sup>st</sup> defendant.

15. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED at KISII this 26<sup>TH</sup> DAY of JANUARY, 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Ayienda for Oguttu for the plaintiff

Mr. George Nyamweya for the 1<sup>st</sup> defendant

N/A for the 2<sup>nd</sup> defendant

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**