



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 606 of 2005**

ELIZABETH NJERI.....  
.....PLAINTIFF/APPLICANT

**VERSUS**

**HOUSING FINANCE COMPANY OF KENYA  
LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

The application before me is a Notice of Motion dated 7<sup>th</sup> September, 2007, it is expressed to be brought under Order XXXIX rule 3 and 4 of Civil Procedure Rules, Rules 3(1) and (2) of the High Court Practice and Procedure Rules Cap 8 Laws of Kenya and Section 63 of the Civil Procedure Act. It has four prayers. Prayer (i) and (ii) are moot. In prayers (iii) and (iv) the Applicant seeks orders:

**(iii) That the Honourable Court be pleased to discharge and/or set aside the order of 31<sup>st</sup> July, 2007 in so far as the same relates to the Applicant herein, Delta Haulage Services Limited and that it be set free from any order issued between the parties herein and be allowed to deal with the property as the lawful proprietor of the suit property.**

**(iv) That the Applicant to pay the cost of this application to be assessed by the court.**

Seven grounds are given on the face of the Application, as the basis of the application in the following terms:

**a) The Plaintiff made an application to enjoin the Applicant herein and the court when the said application came before it on 31<sup>st</sup> July 2007 declined to grant the said order at least on an ex-parte basis.**

**b) The court gave an order that the status quo as between the Plaintiff and the Defendant be maintained until the hearing of the application inter-parties.**

**c) The Plaintiff when she extracted the order of the court made it look like the court granted an order that the Applicant herein be enjoined as the 2<sup>nd</sup> Defendant when that was not the case as no order to that effect was granted.**

**d) The extracted order gives the false impression that the Applicant is party to the proceedings and that it should maintain a certain status quo that exists between the Plaintiff and the Defendant.**

- e) **It is trite law that no order can legitimately be given against a party who is not party to the proceedings before the court.**
- f) **The issues of whether or not the Plaintiff is entitled to the equitable remedy of an injunction had been conclusively dealt with as between the Plaintiff and the Defendant and the same in any event seems to be *res judicata*.**
- g) **The order given by the Honourable Court was without jurisdiction in any event.**

There is a supporting affidavit with annexures thereto, sworn by the Applicant.

The application has been opposed. The Plaintiff/Respondent has filed a replying affidavit in which the Plaintiff depones that on 31<sup>st</sup> July, 2007 after the parties agreed to maintain the status quo, in order to allow the Defendant then, Housing Finance Company of Kenya (HFCK) time to file a replying affidavit, the Court adopted the status quo order and set the hearing of the Application dated 26<sup>th</sup> July, 2007 for 31<sup>st</sup> October, 2007. The Plaintiff depones further that the Application dated 26<sup>th</sup> July, 2007 was seeking to amend the plaint in order to bring in new parties to the suit as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Since application had included the two parties as the intended 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, orders of status quo were extracted and served on both of them. The Plaintiff depones further that the Court however erred, and extracted the names of the Intended 2<sup>nd</sup> and 3<sup>rd</sup> Defendants but omitted to indicate that they were “Intended” parties to the suit. That error is the reason for the instant application.

The Plaintiff’s advocate has filed a notice of preliminary objection dated 14<sup>th</sup> September, 2007 in which he raises four grounds as follows:

- 1) **That the said application is fatally defective.**
- 2) **That the purported Applicant is a stranger to the proceedings and ought not be given audience.**
- 3) **That the jurisdiction of the Court has been wrongly invoked.**
- 4) **That the Application is otherwise an abuse of the court process.**

The application is argued by Mr. Ahmed Nasir for the

Applicant and Gichuki for the Plaintiff/Respondent. Mr. Ougo for the HFCK, through Mr. Thuo, stated that he had nothing to say in the matter and left it to the court to decide.

I must say that both Mr. Nasir and Mr. Gichuki traded accusations against each other as they argued the application and I failed to see what the hullabaloo was for. It was quite clear to all that the Plaintiff filed an application in court on 26<sup>th</sup> July, 2007 intending to join two new Defendants to the suit and have temporary injunction orders issued against them. On 31<sup>st</sup> July, 2007, when the application came up for hearing inter-parties, the Defendant then, HFCK, sought through Counsel to be granted time to file a replying affidavit. Mr. Gichuki applied to have prayer 4 of his application granted, to which Mr. Ougo stated that his client was willing to maintain the status quo until the matter was heard. The Court then made the order for the status quo to be maintained as understood between the two parties.

I understand that this court’s order for maintenance of status quo, was erroneously extracted and, instead of the order showing that the parties named as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant were “**Intended**” parties, it reflected them as if they were 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The Intended 2<sup>nd</sup> Defendant has now come to this court seeking to have the order served on them discharged and/or set aside in so far as it relates to it and that it be allowed to deal with the property as the lawful proprietor of the suit property.

I do not wish to pre-empt pending applications before this court and the matter before the Court of Appeal, as they relate to the suit property. However, let me just say that the suit property is the subject of the proceedings before this court and of an appeal before the Court of Appeal. It is important that the property be preserved pending those matters or until the Court decides otherwise. For the purposes of the application before me, it is true that on one hand Delta Haulage Services Limited is not yet a party to this suit, and therefore has not right of audience in this suit. On the other hand, the suit property is before this Court, and the order for status quo which HFCK agreed to maintain on 31<sup>st</sup> July, 2007, must be respected. If there was nothing to maintain, then HFCK should have indicated so on 31<sup>st</sup> July, 2007. If they did not say so then, all it means is that there was something to maintain and that any change to that position can only be interpreted to mean that there is a breach of the Court's order. Pending discovery of how that breach occurred, and whether it is a breach or not, the property must be preserved.

In that regard, it was not an error that the Intended 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were served with the order. The only error which occurred is that the two parties were wrongly described. That error was occasioned by the Court, not the parties. I therefore order that a correct order be extracted in terms of the courts order of 31<sup>st</sup> July, 2007, indicating **Delta Haulage Services Limited and Southern Credit Banking Corporation** as **intended** 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively.

No orders as to costs.

**Dated at Nairobi this 2<sup>nd</sup> day of November, 2007.**

**LESIIT, J.**

JUDGE

Read, signed and delivered in the presence of:

Mr. Ahmed Nasir for applicant

Mr. Simiyu for Respondent

Mr. Mwangi for intended 3<sup>rd</sup> Defendant

Mr. Mwangi for Mr. Ougo for Defendant

**LESIIT, J.**

JUDGE