



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA**

**AT MILIMANI COMMERCIAL COURTS, NAIROBI**

**CIVIL CASE 203 OF 2005**

**ANDREW MURIUKI.....PLAINTIFF**

**-V E R S U S**

**EQUITY BUILDING SOCIETY..... DEFENDANT**

**R U L I N G**

The application before the court seeks orders that the suit filed against the defendant herein be struck out and that the costs be provided for. It is brought by way of a chamber summons dated 9th May, 2005, under O.VIA rule 13 (1) (b)(c) and (d) of the Civil Procedure Rules, S.3A of the Civil Procedure Act, and all other enabling provisions of the law.

The application is supported by the annexed affidavit of DANIEL MUIRURI, a legal officer in the credit department of Equity Bank Limited, and is based on the grounds that-

1. The defendant herein has wrongly been sued as it does not exist in law or in fact
2. The suit as it stands is a nullity and cannot be sustained
3. The suit has no legal effect
4. In view of (a) (b) and (c) above the suit herein is otherwise an abuse of the process of the court, is frivolous and vexatious and should be struck out

On 23rd May, 2005, the plaintiff filed a Notice to the effect that he would oppose the above application on the grounds-

- (a) That the application is incurably bad in law, fatally defective and ought to be dismissed/struck out with costs.
- (b) That the orders sought are not available to the Applicant.
- (c) That no good reasons have been shown to warrant the orders sought.
- (d) That in the alternative, there is pending an application for amendment dated 6th May, 2005 which ought to be heard first.
- (e) That the application is misleading in that:

- (i) The contents of paragraph 4 of the supporting affidavit are misleading.
- (ii) The deed of assignment does not extinguish the existence of the defendant.
- (iii) Based on (ii) above, the Gazette Notice does not have the effect to dissolve the defendant.
- (iv) Equity Building Society did not cease to exist as at 31st December, 2004 and in law still exists as a registered entity.
- (f) That if prayer (a) of the application subsists, prayer (b) does not subsist.
- (g) That the application does not evince non-existence of the defendant.

The application was canvassed orally before me on 25th May, 2005. Mrs. Njoroge appeared for the applicant while Mr. Kithi appeared for the respondent. After hearing both counsel and considering their submissions, I note that by a deed of assignment and transfer dated 31st December, 2004, Equity Building Society, the defendant herein, agreed to sell, transfer, assign and convey to Equity Bank Limited all the business, assets and liabilities of Equity Building Society with effect from 31st December, 2004. It was the wish of Equity Building Society to transfer to Equity Bank Ltd. the business, assets, loan accounts and all securities in respect thereof, credit accounts, leases and the benefit of the contracts as defined in the agreement and all rights and claims of the assignor against third parties.

Pursuant to this deed, by Gazette Notice No.652 published on 28th January, 2005, notice was given that pursuant to the provisions of sections 55A and 55B of the Building Societies Act and with the approval of the Minister for Finance, Equity Building Society converted into a bank with effect from 31st December, 2004, referred to as “the transfer date”, by transferring all its business, assets and liabilities to Equity Bank Limited (“Equity Bank”). In particular, from the transfer date, among other things-

- (a) Equity Bank took over all the business and assets of Equity Building Society and assumed all liabilities incurred by Equity Building Society up to the transfer date.
- (b) All debts payable by or to Equity Building Society became debts payable by or to Equity Bank.
- (c) All charges, mortgages, guarantees, pledges, bonds and other security documents, contracts, agreements, instruments and transactions entered into by or made in favour of Equity Building Society remain and continue to be valid and in full force and shall at all times be deemed to be held by, issued to, entered into and binding on Equity Bank.
- (d) All accounts held in Equity Building Society are deemed to be accounts held with Equity Bank.

The notice concludes with the statement-

**“Equity Bank continues to fulfil, perform and discharge all the obligations and commitments of Equity Building Society and is ensuring uninterrupted banking operations and services to all its customers at all the former Equity Building Society branches countrywide.”**

Bearing these developments in mind, I note that the main issue is whether the defendant on record, Equity Building Society Limited still exists as a legal entity or it does not. If it still exists, even though it has transferred all its rights and liabilities, at least in legal theory, it can still be sued. But if it does not exist as a legal entity, no suit can be sustained against it.

The defendant/applicant in this matter contends that it is wrongly sued because it transferred all its assets and liabilities to Equity Bank Ltd, and that Equity Bank Limited is the proper defendant. Then I ask myself, if Equity Building Society is non-existent, who is this before the court, making this application? On the face of the record, this application is filed by the advocates for the defendant. The defendant on

record is Equity Building Society Ltd., and I don't think that Equity Building Society Ltd. can exist for the purpose of instructing their advocates to make an application that it be struck out when it is sued, and at the same time plead that it is non-existent and therefore it cannot be sued. Either it exists for both purposes, or it does not exist for any of them. And it cannot be that it exists and does not exist at the same time.

The Societies Act does not seem to provide for the mechanism by which a society can exist in such circumstances as are contained in Gazette Notice No.652 of 2005. In the absence of such a provision, I would agree with Mr. Kithi that, at least in legal theory, the society still exists. And if it exists, again, in that legal theory, it can be sued. In this fog of uncertainty as to the existence or otherwise of Equity Building Society Ltd., and given the contents of Gazette Notice No.652 of 2005 referred to herein above, prudence dictates that Equity Bank Ltd be made party to the suit. I say so without prejudice to the plaintiff's application for leave to amend its plaint. In **JANE MUTHONI MUNGAI & ANOR v. TEXCAL HOUSE SERVICE STATION.** Civil Appeal No.118 of 1999, the Court of Appeal emphasized our time honoured law that striking out is a drastic remedy which should only be allowed when the pleading is incontestably bad, and that when a pleading can be easily amended, such course should be preferred as opposed to striking out the pleading.

I wish to heed and adopt this wise counsel, especially as it is not certain from the statute, whether Equity Building Society still exists or not. In the circumstances, the application to strike out the suit fails, as some life can be breathed into it by appropriate amendment.

Each party will bear its costs of this application.

Dated and delivered at Nairobi this 13th day of June 2005

**L. NJAGI**

**JUDGE**