



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO.ELC 37 OF 2009

PETER K. KIPLAGAT1ST
PLAINTIFF/APPLICANT

PAMELA NJOKI KAGAU.....2ND
PLAINTIFF/APPLICANT

VERSUS

**TELPOSTA PENSIONS SCHEME TRUSTEES
REGISTERED.....DEFENDANT/RESPONDENT**

RULING

There are two applications on record. There is an application by the defendant dated 13th January, 2010 under Order VI Rule 13(1) (b) and (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking an order that the plaintiffs’ plaint dated 29th and filed on 30th January 2009 be struck out. The other application is by the plaintiffs under Order XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules seeking injunction orders.

The defendant’s application was listed for hearing before the plaintiffs’ application; but before then, the plaintiffs filed an application with called for the holding for the ruling in respect of the defendant’s application. On 21st October 2010 this court gave directions to the effect that both counsel having filed submissions in respect of the two applications the defendants’ application dated 17th December, 2009 and filed on 13th January, 2010 shall be resolved first. That is the basis of this ruling.

The grounds upon which the defendant seeks the striking out of the plaintiffs’ suits are that

- 1. The plaintiffs/respondents have failed to comply with the court order made on 16th September 2009.**
- 2. The continued subsistence of the suit herein amounts to an abuse of court process.**
- 3. It is in the interest of justice that the suit be struck out.**

In support of the application there is an affidavit sworn by Lucy Barno the defendant's legal advisor. She alludes to the ruling of Hon. Lady Justice Sitati made on 16th September, 2009 where the learned judge ordered the plaintiffs to deposit a sum of Kshs.1,665,000/= in a joint interest account to be operated by the plaintiffs' and defendant's advocates. That order has not been effected or complied with.

The application is opposed by the plaintiffs who submit that the order having not been extracted and agreed upon the plaintiffs cannot be accused of default. It is their case that, the terms of the order to be extracted from the said ruling must be settled between the parties and approved by the Deputy Registrar of the High Court, before service and compliance in accordance with the Civil Procedure Rules. I have related the said application to the plaint and the defence on record and observed that, there are many more issues for determination that go to the root of the dispute herein. The said ruling did not have a default clause and therefore cannot be the sole basis upon which to seek the striking out the plaint. I also agree, with respect, that an order must be drawn arising from the said ruling and if the terms are not agreed upon the, Deputy Registrar has the authority to approve the order that captures the spirit of the ruling. Neither the advocates for the plaintiffs or defendants have submitted any drafts to that effect.

Above all, the order sought by the defendant is a drastic one and can only be granted in very clear cases. The courts have approached such applications with the view to maintaining a suit rather than striking out the same, and therefore I am of the view that the application is misconceived and must be dismissed with costs.

Orders accordingly.

Dated, signed and delivered at Nairobi this 22nd day of November, 2010.

A. MBOGHOLI MSAGHA

JUDGE