



**REPUBLIC OF KENYA**  
**E HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 263 of 2004**

**HUMPHREY MAINA KARIUKI AND 4 OTHERS .....PLAINTIFF**

**VERSUS**

**TELEPOST INVESTMENT CO-OPERATIVE**

**SOCIETY AND ANOTHER.....DEFENDANT**

**RULING**

This Ruling is delivered in the Notice of Motion dated 3<sup>rd</sup> August, 2005 said to have been brought under Section 3A and 80 of the Civil Procedure Act and Order XLIV Rules 1, 2 and 3 of the Civil Procedure Rules.

The Notice of Motion is founded on 7 grounds said to be supported by the court record itself and a Replying Affidavit sworn by the 4<sup>th</sup> Applicant on his own behalf and that of the other Applicants. The main ground in my view and which ground would qualify the application as one capable of being heard and determined under Order XLIV is ground No.2 which has been framed as follows:

***“2. THAT there is an error apparent on the face of the record as the court seemingly ignored the grounds of opposition filed herein and has decided the suit without evidence, which by a mere reading of the plaint, it is clear such evidence exists and were triable issues that require a trial”.***

My above observation in fact forms the basis of the submissions by counsel for the applicants who asked the court to examine the other grounds and find that they do support the Applicants’ contention that there is indeed an error apparent on the face of the record. The Applicants are asking this court to review the Ruling of the Hon. Mr. Justice Ransley, now retired, delivered on 16<sup>th</sup> March 2006 in which he struck out the Plaintiffs’ plaint in so far as the same related to the 2<sup>nd</sup> Defendant/Respondent. The power to strike out pleadings is exercised in accordance with the judicial discretion of the court before whom the application to strike out is heard. As rightly submitted by the counsel for the Applicants, the same is to be exercised cautiously and only in clear and obvious cases. This requirement was taken into account by the learned judge as will be seen in paragraph 3 of his Lordships’ ruling of 19<sup>th</sup> May, 2005, which tells me that the learned judge in exercising his discretion to rule as he did cautioned himself as to the manner in which he would consider the application before him and how the exercise of that discretion would affect the parties to the suit.

The 2<sup>nd</sup> Respondent’s opposition to the application before me is founded on 5 grounds of opposition filed on 9<sup>th</sup> February, 2006 and supported by 3 authorities filed on 17<sup>th</sup> March, 2006 all of which I have considered, alongside the submissions made by counsel for the 2<sup>nd</sup> Respondents. I agree with the submission that the application herein is an abuse of the process of court and that it does not fall within the ambit of order XLIV as claimed because, for the applicants to say that the judge ignored certain facts as alluded to in the application they are claiming in fact that, the learned Mr. Justice Ransley exercised his discretion wrongly thereby arriving at an erroneous decision in the striking out of the plaint as he did.

That is not an error on the face of the record but a ground of appeal. As I have no jurisdiction to sit on appeal against an order made by another judge of equal jurisdiction, I cannot, and do refuse to, interfere with the Learned Justice Ransley's Ruling of 19<sup>th</sup> May, 2006 as requested by the Applicants herein.

I find this application incompetent and have no option therefore than to dismiss the same with costs to 2<sup>nd</sup> Defendant/Respondents.

Dated and delivered at Nairobi this 10<sup>th</sup> day January, 2007.

**M.G. MUGO**

**JUDGE**

RULING delivered in the presence of

**For the Plaintiff: No appearance**

**For the Defendant: Mr. Ngaru holding brief for Kipkorir**