



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL CASE NO. 235 OF 2010**

**D.J. LOWE & COMPANY LIMITED .....PLAINTIFF**

**VERSUS**

**CREDIT AGRICOLE INDOSUEZ .....1<sup>ST</sup> DEFENDANT**  
**BANK OF AFRICA KENYA LIMITED .....2<sup>ND</sup> DEFENDANT**  
**REGISTRAR OF TITLES, MOMBASA .....3<sup>RD</sup> DEFENDANT**

**RULING AND/OR DIRECTIONS**

A fundamental issue has arisen in respect of the application dated 30.10.2010 by the 1<sup>st</sup> Defendant and which all parties agree will have crucial consequences or ramifications depending on the findings of the court in the court record.

The question is whether H.C.C.C. No. 35 of 1997 (Mombasa) is still pending or whether it was ever withdrawn or discontinued.

In paragraph 16 of the plaint dated 7<sup>th</sup> July, 2010 the plaintiff states on oath (through Verifying Affidavit) H.C.C.C No. 35 of 1997 has been withdrawn by the plaintiff and therefore the plaintiff states there are no pending proceedings between the parties herein in connection with the same subject matter.

By a letter dated 20<sup>th</sup> October 2010 the Deputy Registrar of the High court at Mombasa in response to an inquiry by the 1<sup>st</sup> Defendant's advocate wrote:-

**“C.B. Gor & Gor**  
**Advocate**  
**MOMBASA**

**RE: HCCC No. 35 of 1997 D.J. LOWE & CO. LTD –V- BANQUE INDOSUEZ & ANOTHER**

**.....**  
**I have perused the entire above-mentioned court file but did not see any notice of withdrawal of suit.**

**DEPUTY REGISTRAR**  
**HIGH COURT – CIVIL**  
**MOMBASA”**

Upon adjournment at the last appearance of the matter in court, I carefully looked through the

voluminous court file but did not find any Notice of withdrawal or discontinuance of the above-mentioned suit.

In the circumstances, the burden of proof is upon the plaintiff to prove that it duly filed such a notice. Such a Notice must be stamped upon payment of requisite filing fee. After that, it must be served on the Defendants for it to be effective.

A discontinuance of a suit is termination of the entire suit while withdrawal usually refers to withdrawal of parts of a claim or suit. A withdrawal of the entire suit can be construed to be in effect a discontinuance.

In view of the foregoing and in the absence of any evidence of the alleged withdrawal of HCCC No. 35 of 1997, I find as a matter of fact that HCCC No. 35 of 1997 has not been withdrawn as alleged to date and the same is pending.

If the said suit related to the subject matter in this suit then it follows that some legal consequences/implications may arise and which the court may have to consider and address.

I will therefore invite counsel to give their views as to the way forward and the implications. In particular the court will have to be told the possible effect of this on the 3 pending applications and the entire suit.

**Dated at Mombasa this 16<sup>th</sup> day of December 2010.**

**M.K. IBRAHIM**  
**J U D G E**