



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 1203 of 2006**

**GEORGE GIKUBU MBUTHIA .....PLAINTIFF**

**VERSUS**

**HOUSING FINANCE COMPANY**

**OF KENYA LTD.....1<sup>ST</sup> DEFENDANT**

**HON. THE ATTORNEY GENERAL**

**(Representative of Registrar of Titles – Nairobi**

**& Senior Principal Magistrate Milimani NRB..2<sup>ND</sup> DEFENDANT**

**MUHAMUD SHEIKH HUSSEIN .....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

This matter has a very long history with several applications made and several amendments to the Plaintiff having been filed.

I shall not dwell on details of those pleadings. Suffice it shall be that as per the record the pleadings were closed when the statements defence were filed in response to all the amended plaintiffs.

Thereafter the Plaintiff, who appeared in person, filed a Withdrawal Notice dated 15<sup>th</sup> June, 2007 filed on 18<sup>th</sup> June, 2007. It was premised under Order XXIV Rule 2 of Civil Procedure Rules. It reads and I quote:

***“I wish to withdraw the amended plaintiff dated 1<sup>st</sup> December, 2006, re-amended plaintiff dated 22<sup>nd</sup> December, 2006 and re-amended plaintiff dated 9<sup>th</sup> March, 2006.”***

The Deputy Registrar made the order on the basis of this withdrawal Notice on 26<sup>th</sup> June, 2007.

While filing this notice of withdrawal the Plaintiff simultaneously filed on ‘***Amended Plaintiff***’ dated 15<sup>th</sup> June, 2007 and filed in the registry on 18<sup>th</sup> June, 2007.

After the order of the Deputy Registrar on his Notice of Withdrawal, the Plaintiff filed an Appeal in this court against the same. It was dated 2<sup>nd</sup> July, 2007.

The said Appeal was thereafter withdrawn vide Notice of withdrawal dated 27<sup>th</sup> July, 2007.

In the meantime on 27<sup>th</sup> June, 2007, the Plaintiff filed a Notice to withdraw Withdrawal Notice dated 15<sup>th</sup> June, 2007. He does not specify any statutory provisions under which this Notice was filed by him.

The Plaintiff has then filed a Chamber Summons dated 29<sup>th</sup> June, 2007 filed on 2<sup>nd</sup> July, 2002 seeking prayers to strike out the statement of Defence and two amended statements of Defence filed by the 3<sup>rd</sup> Defendant. This application is premised under section 3A of Civil Procedure Act and Order VI Rule 13(1) (d) of Civil Procedure Rules.

Mr. Ahmendnasir, the learned counsel for the 3<sup>rd</sup> Defendant, has filed a Notice of Preliminary Objection on point of law dated 9<sup>th</sup> August, 2007.

The points raised by him are:-

- “1. In light of the Plaintiff’s withdrawal notice under Order XXIV Rule 1 of the Civil Procedure Rules and dated 15<sup>th</sup> June 2007, the suit herein came to an end and no application of whatever nature can be filed in a suit brought to an end by the Plaintiff on his own motion.**
- 2. The Deputy Registrar made an Order on 26<sup>th</sup> June 2007 that the suit is withdrawn with costs.**
- 3. The Plaintiff filed a Memorandum of Appeal dated 2<sup>nd</sup> July 2007 and a Withdrawal Notice of the Memorandum of Appeal dated 27<sup>th</sup> May 2007.**
- 4. On 27<sup>th</sup> June 2007 the Plaintiff filed a Notice to withdraw the Withdrawal Notice.**
- 5. The Court in light of the above has no powers or Jurisdiction to hear any purported application.”**

Mr. Ahmednasir made very brief submissions by reiterating the facts of Notice of Withdrawal, Order of the Deputy Registrar, the filing of Appeal and its withdrawal as well as filing of Notice of withdrawal of the Withdrawal Notice and contending that this suit has come to an end by the Notice of withdrawal of the three amended complaints and that of Appeal. He stressed that there is no provision to withdraw the Notice of withdrawal in law and the filing of the Amended Complaint similarly is without basis of any law. He finally contended that the Plaintiff is at liberty to file a fresh suit and that is the only remedy he has.

He thus urged that the application filed by the Plaintiff is incompetent and must be dismissed with costs.

The Plaintiff vehemently opposed the objections.

He contended first that the Preliminary Objection is not competent as there must be an application under Order L Rule 1 of Civil Procedure Rule. He relied on the famous case of *Mukisa Biscuits* and stressed that there must be pleadings and the issues must be pleaded which issues are not in the pleadings.

It is trite law that Preliminary Objections should be allowed to be raised if it is a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. (See **Mukisa Biscuits Co. v West End Distributors 1969 (EACA) 696 at 700**).

The court in the *Mukisa’s* case (supra) was dealing with the court’s inherent powers to dismiss the suit for want of prosecution.

Before me is a pure point of law which raises the issue that there is no plaint in existence and this issue is raised in the notice after an application was filed by the Plaintiff after the actions by the Plaintiff which

I have already detailed hereinbefore.

In my humble view, the Preliminary Objections raised are pure points of law going to the root of the matter and which are capable of disposing the whole matter.

I thus reject that contention of the Plaintiff, I may add here that these issues could not have been raised in the earlier pleadings as evident from the circumstances of the case.

Then the Plaintiff raised the issues on merits of the case which I am not supposed to deal with while hearing these objections raised as Preliminary points of law.

The Plaintiff further argued very vehemently that the Order of the Deputy Registrar of 26<sup>th</sup> June, 2007 is a nullity as it was not filed with the consent of the parties as stipulated in Order XXIV Rule 2(1) of Civil Procedure Rules.

I may not go further in response to this contention except to say that the suit was not fixed for hearing and thus Notice of Withdrawal by the Plaintiff was in effect filed under Order XXIV Rule 1, which stipulates:—

***“1. At any time before setting down of the suit for hearing the Plaintiff may by notice in writing wholly discontinue his suit against all or any of the Defendants or may withdraw suit against all or any of the Defendants or may withdraw any part of his claim, and such discontinues or withdrawal shall not be a defence to any subsequent action.”***

The Plaintiffs contention that it was filed under Rule 2 of Order XXIV is also not thus competent. Citation of a wrong provision cannot be a ground to support his contention that that no consent was filed.

In the premises whereof, I also reject the said contention.

Finally, the Plaintiff contended that the suit is in existence as simultaneously with filing of the Notice of withdrawal, he filed an ‘Amended Plaint’ on 18<sup>th</sup> June, 2007.

I have indicated earlier that the pleadings in this suit were closed at the time the Notice of withdrawal dated 15<sup>th</sup> June, 2007 was filed.

Thus the Plaintiff cannot amend the pleadings without the leave of the court as provided in Order VI of Rule (3) of Civil Procedure Rules and which shall come into play. The Plaintiff is bound by the statutory provisions that he has to apply to the court for amendment of any pleadings. The support of the Amended Plaint, taken by the Plaintiff cannot come to his aid.

In view of the aforesaid observations, I uphold the Preliminary Objections and find that the suit is not in existence, as the subtraction of the suit is not on record.

I must add at the end that, I am and was aware that the Plaintiff was acting in person and, he was advised by the court to seek appropriate legal advice. I still proffer this advice to him. Due to this fact also I do not give Orders as to costs.

Orders accordingly.

**Dated, Delivered and Signed at Nairobi this 22<sup>nd</sup> October, 2007.**

**K.H. RAWAL**

**JUDGE**