



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

CIVIL CASE 325 OF 2007

FLEX AIR CARGO LIMITED..... PLAINTIFF

VERSUS

AERONAV LIMITED..... DEFENDANT

RULING

The defendant raised a Preliminary Objection against the plaintiff's suit on the following grounds:-

- 1) That the suit is incurably defective, bad in Law and cannot form the basis of an interlocutory application.
- 2) That there is no suit herein the initial suit filed by the plaintiff having been withdrawn by the plaintiff on 17.7.2007.
- 3) That the plaintiff's pleadings have been irregularly and illegally commenced without lawful authority.

The Locus classicus on when a Preliminary Objection may be raised is the case of **Mukisa Biscuit Co. –vs – West End Distributors [1969] EA 696**. Sir Charles Newbold P. held as follows at page 701:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of Law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

Ground 3 of the defendant's preliminary objection cannot be determined without investigating whether lawful authority was given to institute the suit, a fact upon which the plaintiff is not in agreement.

Ground 1 and 2 of the preliminary objection are premised on a Notice written by the plaintiff dated 16.7.2007 allegedly withdrawing the suit. The plaintiff argues that the notice was not adopted or acted upon by the court and was in any event filed in error which error it subsequently corrected by a letter addressed to the Deputy Registrar of this court. Having not been acted upon, the notice had no effect. For that proposition the plaintiff relied upon the case of **Theluji Dry Cleaners Ltd – vs – Muchiri & 3 others [2002] 2 KLR 764**. In that case, Etyang J, held that a Notice of withdrawal did not take effect from the date of filing but from the date it was adopted as an order of the court when it was endorsed by the Deputy Registrar.

The same position was taken by Onyancha J in **Fitswanga – vs – Environment Disaster Research**

Foundation [2002] 1 KLR 283. In that case, the Deputy Registrar had failed to record consent orders filed by the parties. The Learned Judge held that the result of the failure to record the consent orders was that there were no judicial orders of the court from which the Deputy Registrar could extract any order.

I respectively agree with my Learned Brothers and hold that the plaintiff's notice of withdrawal not having been acted upon by the Deputy Registrar, meant that he accepted the plaintiff's subsequent letter that the notice had been filed in error. Being of that view, I must reject the defendant's preliminary objection which is hereby overruled with costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER,
2007.

F. AZANGALALA

JUDGE

Read in the presence of:

Wangila for the plaintiff and Makori for the defendant.

F. AZANGALALA

JUDGE

29/11/07