**APPEAL NO. 164/2007**

**IN THE SUPREME COURT FOR ZAMBIA**

**HOLDEN AT LUSAKA**

*(****Civil Jurisdiction****)*

***B E T W E E N:***

**MUTECH (Z) LIMITED APPELLANT**

**AND**

**KENYA AIRWAYS LIMITED RESPONDENT**

**CORAM:** **Mumba, Ag/DCJ, Wanki and Muyovwe, JJS**

On 18th April, 2012 and 17th July, 2012

**For the Appellants**: N/A

**For the Respondent**: Mr. C. K. Bwalya of Messrs D.H. Kemp and Company

**RULING**

**Mumba, JS, delivered the Ruling of the Court.**

***Legislation Referred to:***

1. ***The Supreme Court Act, Chapter 25 of the Laws of Zambia.***

By Notice of Motion the respondent applied for costs under Rules 48 (7), 63 (3) and 77 of the Supreme Court Act Chapter 25 of the Laws of Zambia.

The record shows that the appellant appealed to this Court against the judgment of the High Court, the appeal was scheduled for hearing on 19th May, 2009. On that date the appellant applied for an adjournment which was granted and the appeal was rescheduled for hearing on 16th June, 2009. Before that date the appellant filed a Notice of Discontinuance of the appeal on 8th June 2009 by their advocates on record, Messrs Wilson and Cornhill. At no time had the respondent consented to the withdrawal of the appeal. The respondent had incurred costs responding to the appeal by filing written heads of argument and a list of authorities when the appeal was on record.

There was no agreement on costs between the parties. The Notice of Motion with supporting affidavit were duly served on the appellant and the same duly acknowledged by one C.B. Mwango on behalf of the appellant. For reasons not presented to court, the appellant did not appear at the hearing. Rule 63 reads as follows:-

**63.** (1) An appellant may at any time after lodging the appeal and

before the appeal is called on for hearing serve on the parties to the

appeal and file in the Registry a notice in form CIV/7 of the Third

Schedule to the effect that he does not intend further to prosecute the

said appeal.

(2 )If all parties to the appeal consent to the withdrawal of the

appeal without order of the Court, the appellant may file in the

Registry the document or documents signifying such consent and

signed by the parties or by their practitioners, and the appeal shall

thereupon be deemed to have been dismissed. In such event any sum

lodged in Court as security for the cost of the appeal shall be paid out

to the appellant.

(3) If all the parties do not consent to the withdrawal of the appeal

as aforesaid, the appeal shall remain on the list, and shall come on for

the hearing of any issue as to costs or otherwise remaining outstand-

ing between the parties, and for the making of an order as to the dis-

posal of any sum lodged in Court as security for the costs of the

appeal.

The evidence on record shows that Rule 63 (1) was not complied with by the appellant as there was no service of the Notice of Discontinuance on the respondent. Thus, the respondent had no opportunity to react to the said withdrawal of the appeal. Besides, the appellant has not challenged the Motion.

We have fully considered the Motion and affidavit evidence supported by exhibits on record. We are satisfied that the respondent did not consent to the withdrawal of the appeal and that the parties did not agree on costs at any stage of the appeal. We have noted that the exhibited Notice of Discontinuance dated 8th June, 2009 was not even addressed to the respondent.

The Motion for costs stands successful. Costs of the appeal inclusive of today’s hearing shall be for the respondent, to be taxed in default of agreement.

……………………………………

**F. N. M. Mumba**

**SUPREME COURT JUDGE**

**……………………………… …………………………..**

**M.E. WANKI E.C. MUYOVWE**

**SUPREME COURT JUGE SUPREME COURT JUDGE**