

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL CASE NO. 12 OF 2017(OS)

NDUNG’U ALEX KARANJA T/A

NDUNG’U KARANJA & CO ADVOCATES.....APPLICANT

VERSUS

OMUGA JOHN OTIENO MAURICE practicing in the name of OTIENO

OMUGA & OUMA ADVOCATES.....RESPONDENT

RULING

The applicant brought this suit by way of Originating Summons under Order 52 Rule 7 (1) (b) and 10 of the Civil Procedure Rules seeking an order that the respondent herein be compelled to honour his professional undertaking made to the applicant. There was also an order sought to the effect that time be fixed within which to surrender the completion documents by the respondent to the applicant.

In default the applicant be ordered to honour the said undertaking and surrender of the remaining complexion document. The reasons for seeking the said orders are set out on the face of the application alongside an affidavit sworn by Ndungu Alex Karanja, who is the applicant herein.

The application is opposed and there are grounds of opposition filed on behalf of the respondent alongside an affidavit sworn by John Morris Otieno Omuga, the respondent herein.

There is an application on record dated 13th June, 2017 and filed on 2nd August, 2017 under Order 37 Rule 16 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act seeking orders that directions do issue in this cause.

I note that this application was filed on behalf of the respondent herein. Going by the record that application has not been prosecuted to date. That notwithstanding, the applicant by way of Notice of Motion dated 1st March, 2018 under Sections 1A, 1B and 3A of the Civil Procedure Rules moved the court for leave to enforce the professional undertaking in relation to the Originating Summons cited above. The application was opposed and grounds of opposition filed on 26th March, 2018 are on record. Parties have filed submissions relating to the said application.

Going by the record and the pleadings so far, the undertaking forming the subject matter herein was not given in a suit in the High Court. If that were the case, the application to enforce the same would have been by way of Chamber Summons going by Order 52 Rule 7 (1) (a). That being the case, it was therefore proper for the applicant to have filed the Originating Summons as set out. In the circumstances, Order 37 of the Civil Procedure rules shall come into play.

By express provision of the said Order 37 Rule 16 thereof, the registrar was supposed within 30 days of filing of the Originating Summons to have given notice to the parties to list it for directions before a judge in chambers. Thereafter, other directions would be given. This was not done and it is clear at this point that the Notice of Motion dated 13th June, 2017 and filed on 2nd August, 2017 would have cured that omission.

It also follows that the Notice of Motion dated 1st of March, 2018 cannot determine the issues set out in the Originating Summons before the directions are given under Order 37 aforesaid. The shortcut elected by the applicant is not suitable under the law and circumstances of this case. I direct that directions herein shall first be taken before any other steps.

While parties are waiting to do so, the court is of the view that the parties should seriously consider submitting themselves to court annexed mediation to resolve the dispute. The Notice of Motion dated 1st March, 2018 is misplaced and therefore dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 28th Day of March, 2019.

A. MBOGHOLI MSAGHA

JUDGE