

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

On 28 March, 2019 this court delivered a ruling relating to an application dated 1st March, 2018 which is now a subject of the present application. The applicant herein, who was also the applicant in the earlier application, was aggrieved by the said ruling and now seeks to have the same reviewed for reasons set out on the face of the application and the supporting affidavit sworn by the advocate for the applicant.

The application is opposed and there is a notice of preliminary objection lodged in that regard alongside grounds of opposition filed by the respondent. Both counsel agreed that this application shall be decided on affidavit evidence and the grounds of opposition filed by the respondent.

The review application before me is brought under Sections 1A, 1B, 3A and 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. Before this application was filed, the applicant had filed a Notice of Appeal dated 16th April, 2019 both in the High Court Registry and the Court of Appeal Registry.

By the time this application came up for hearing on 10th September, 2019 the applicant had filed a notice of withdrawal of Notice of Appeal, which Notice is dated 5th and filed on 6th September, 2019. As at the time of writing this ruling therefore, there is no appeal pending relating to the ruling delivered on 28th March, 2019. In that regard therefore, the notice of preliminary objection relating to Section 80 of the Civil Procedure Act has been overtaken by events.

However, the respondent also had stated in the said notice of preliminary objection that the application offended the express provisions of Order 45 rule 1 of the Civil Procedure Rules. This would also be in line with ground 3 in the grounds of opposition filed by the respondent. The answer to the said objection is to be found in the withdrawal of the Notice of Appeal.

I must now consider whether the applicant has satisfied the conditions set out under Order 45 of the Civil Procedure Rules to justify review of the order sought to be reviewed. The substratum of the application under Order 45 is that the applicant should demonstrate **“the discovery of a new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason ...”**

The application leading to the ruling now sought to be reviewed, sought leave to enforce the professional undertaking by the current advocate for the applicant on behalf of an advocate who had passed on. For clarity, the leave was sought by Christopher Muguku Kabugu advocate, T/A Kabugu & Company Advocates on behalf of Ndungu Alex Karanja T/A Ndungu Karanja & Co. Advocates. The later advocate passed away on 31st August 2017 following a road traffic accident that took place on 16th April, 2017.

I must observe that the application was not drawn with sufficient clarity, which has now been explained in the present application. The counsel for the applicant ought to have specifically sought an order to come onto the record with a view to enforcing the said undertaking. I believe that is what clouded the proceedings leading to the ruling that is sought to be reviewed. In that regard therefore, there is an error apparent on the face of the record which ought to be corrected.

I have asked myself whether any prejudice would be occasioned to the respondent. I see none, and the respondent has not alleged any. In the interest of justice therefore, the said ruling qualifies for a review. Without vitiating the entire ruling, I hereby allow the firm of Kabugu & Company Advocates leave to take the place of Ndungu Karanja & Company advocates for purposes of advancing the issues raised in the Originating Summons aforesaid. I reiterate my observations relating to the compliance with Order 37 Rule 16 of the Civil Procedure Rules relating to directions which I note from the record, had been sought in an application dated 13th June, 2017 by counsel for the respondent. The costs of the earlier and this application shall in the cause.

Dated, signed and delivered at Nairobi this 25th Day of September, 2019.

A. MBOGHOLI MSAGHA

JUDGE