

EXPLANATORY NOTE

Originating Summons for Recovery of funds

This is a pleading filed to by a purchaser of a failed sale transaction to seek a refund of the paid deposit in instances where the transaction is not completed.

Legal Basis

Order 37 of the Civil Procedure Rules, 2010 sets out the circumstances under which a litigant can move court by way of an originating summons. **Rule 3 of Order 37** provides that a vendor or purchaser can take out summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or **any claim for compensation**; or any other question arising out of or connected with the contract of sale. Also, the subject matter being breach of a contract for sale, the claim is to be filed in the Environment and Land Court.

Legal Grounds/Threshold.

There is no cut out legal threshold for a claim for a refund under the said Order 37 Rule 3 and the same is dependent on the circumstances of each case. It is however a requirement that the validity and/or existence of the contract not be in question. The right of refund accrues in instances where the Vendor has failed to complete to transaction despite being issued with a completion notice in breach of the sale agreement. The same can also arise where the Purchaser is unable to continue with the transaction or withdraws from the transaction in which case the Vendor shall be entitled to retain a percentage of the paid deposit subject to the terms of the Sale Agreement.

Remedies/Relief Sought

The Remedies to be sought in an Originating Summons include the following;

- a) A declaratory order that the Respondent has breached the terms of the Sale Agreement the subject matter of the application;
- b) An Order directing for the immediate repayment of Outstanding Amount due to the Applicant.
- c) An Order directing for the immediate repayment of interest that has accrued on the Outstanding Amount;
- d) Costs of the Application

The Processes/Procedure involved

As a preliminary, the claim being premised on a contract for sale, the claim has to be filed within 6 years from the date which the cause of action arises in accordance to the Limitations of Actions Act, CAP 22. The Claim is filed by uploading the same in the E filing system and thereafter setting it down for hearing.