THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 0583 OF 2022

(Arising from Civil Suit No. 0464 of 2021)

1. SIMBAMANYO ESTATES LIMITED	**}**	**……**	**APPLICANTS**
2. PETER KAMYA	**}**		

VERSUS

1. EQUITY BANK UGANDA LIMITED	**}**		
2. MEERA INVESTMENTS LIMITED	**}**		
3. LUWALUWA INVESTMENTS LIMITED	**}**	**……**	**RESPONDENTS**
4. THE COMMISSIONER LAND REGISTRATION	**}**		
5. KATENDE, SSEMPEBWA & CO. ADVOCATES	**}**		

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The applicants sued the respondents jointly and severally seeking, inter alia, a declaration that the sale by mortgagee of their property comprised in LHR Volume 2220 Plot 2 Folio 33 Lumumba Avenue, otherwise known as "Simbamanyo House," and Kyadondo Block 243 Plots 95, 487, 957, 958 and 2794 at Mutungo, otherwise known as "Afrique Suites Hotel," was unlawful and fraudulent. The applicant's seek recovery of that property, general and aggravated damages, a permanent injunction and costs.

b. The application.

The application is made by Notice of Motion under the provisions of section 32 of *The Evidence Act*, section 5 and 6 of *The Evidence (Bankers' Books) Act*, section 33 of *The Judicature Act*, section 98 of *The Civil Procedure Act*, Regulation 7 of *The Advocates (Professional Conduct) Regulations*, Orders 10 rules 12 and14; and Order 52 rules l and 3 of *The Civil Procedure Rules*. The applicant seeks orders for inspection and taking certified copies of its dollar account statement for account number 1036200727349 operated by the 5th respondent with the 1st respondent bank,

for the period 1st August, 2020 to 30th August, 2020; the inspection and taking certified copies of the dollar account statement for account number 1002201586895 operated by the 3rd respondent with the 1st respondent bank, for the period from 25th September, 2020 to 10th October, 2020.

The applicant seeks further orders that the Managing Director of the 1st respondent / defendant Mr. Samuel Kirubi be directed to make discovery on oath of certified copies of email exchanges addressed to his email address samuel.kirubi@equitybank.co.ug on the subject entitled "Performance Based Guarantee" which related to the sale of the applicant's properties as follows; (i) email from Sim Katende (sim@kats.co.ug) sent on Friday 25th September, 2020 at 2:09 pm sent / copied to Sim Katende (simkatende@yahoo.com; walusimbi@walusimbiadvocates.com; sudhir@ruparelia.com), and Samuel Kirubi (samuel.kirubi@equitybank.co.ug); (ii) Email from Walusimbi Nelson walusimbi@walusimbiadvocates.com) sent / copied on Friday, 25th September,2020 at 2:57 pm to Sim Katende, sudhir@ruparelia.com, Samuel Kirubi and Gunn. Finally, that the Managing Director of the 1st respondent / defendant Mr Samuel Kirubi, makes discovery on oath of an executed copy of the "Performance Based Guarantee" referred to above between the 1st respondent, the 2nd respondent and the 5th respondent.

It is the applicant's case that entries in the Bankers' books for the 1st, 3rd and 5th respondents are necessary for the proper determination of matters arising in the underlying suit; documents in the possession of Mr. Samuel Kirubi, the Managing Director of the 1st respondent are necessary for the determination of matters arising in the underlying suit, and that it is in the interests of justice that this application is granted.

c. The affidavits in reply.

By an affidavit in reply sworn by its Head of Legal, the 1st respondent contends that the application is misconceived in so far as the applicant seeks to be availed copies of the 3rd and 5th respondent's dollar account bank statements, which would constitute a violation of the laws of evidence and the rules of advocates' professional conduct in Uganda. The discovery sought against the 1st respondent's Managing Director too would constitute a violation of the laws of evidence and the rules of advocates' professional conduct in Uganda.

By an affidavit in reply sworn by one of its directors, the 2nd respondent contends that in so far as the applicant has no valid claim against the 2nd respondent, the application is misconceived in law. Neither in the underlying suit nor the application are there any specific orders sought against the 2nd respondent. The 2nd respondent has no knowledge if the transactions allude to in the application. The 2nd respondent has never had transactions with Ronald Luwangula and neither is the named person its proxy. The application constitutes a mere fishing expedition. The 2nd respondent has never executed any "Performance Based Guarantee" with the 1st respondent. The application is an abuse of process.

By an affidavit in reply sworn by its Legal Manager, the 3rd respondent contends that the application is bad in law as it is based on unfounded, made-up allegations and hearsay evidence which is inadmissible in law. The applicant has no claim against the 3rd respondent who is not privy to and has no knowledge of the alleged transactions. The 3rd respondent validly purchased the property forming the subject matter of the suit and is not a proxy of the 2nd respondent. The 2nd respondent has never paid any money to the 3rd respondent to facilitate that purchase.

By an affidavit in reply sworn by a Principal Registrar of Titles, the 4th respondent contends that the application does not relate to and there are no orders sought against the 4th respondent. There are no averments of fact made in the application that relate to the 4th respondent that necessitated joining the 4th respondent as party to the application. The 4th respondent was not a party to and is not privy to any of the alleged emails or accounts neither does the 4th respondent have any knowledge of the allegations made by the applicants. The 4th respondent is therefore a wrong party to the application. The 4th respondent has no knowledge of and was not privy to any of the transactional documents referenced and neither do they relate to the 4th respondent. There are no orders sought or even capable of being granted against the 4th respondent. The application against the 4th respondent is barred, bad in law and untenable, an abuse of court process and intended to waste Court's and the 4th respondent's time and resources.

By an affidavit in reply sworn by one of its partners, the 5th respondent contends that the application is vexatious and bad in law as concerns the 5th respondent. The application is without

merit as its objective constitutes a violation of the rules of advocates' professional conduct in Uganda.

d. Submissions of counsel for the applicants.

M/s Byenkya, Kihika and Co. Advocates, on behalf of the applicants submitted that by virtue of section 32 of *The Evidence Act*, entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the court has to inquire, while under section 3 (1) of *The Evidence (Bankers' Books) Act* authorises Courts to receive in evidence copies of an entry in a banker's book once it is first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank. Section 6 thereof empowers Courts to order that the party applying be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of those proceedings. "Bankers' Books" includes ledgers, day books, cash books, account books and all other books used in the ordinary business of the bank.

The 2nd applicant is privy to credible information indicating that there are four transactions that occurred on 1st October, 2020 and 8th October, 2020 respectively on the 5th respondent's dollar account number 1036200727349 with the 1st respondent, that are relevant to the determination of the issue arising in the underlying suit. In the underlying suit, the applicants fault the 1st respondent for breach of its fiduciary duties owed to the applicants. Evidence contained in the said transactions will demonstrate that the sale of the applicant's mortgaged properties was done under collusion between the bank, its lawyers and the purchaser to unfairly and unlawfully defeat the interests of the applicants. The 1st, 3rd and 5th respondents have not denied being in possession of the said bank records. The documents will show the unlawful, fraudulent and illegal dealings that preceded the perfunctory public auction. The email correspondences and the executed performance guarantee sought to be discovered will show the dishonesty involved in the discussions that informed and preceded the perfunctory public auction. They demonstrate that the outcome of the sale was manipulated in advance and what is purported to have been a public auction was a sham.

e. Submissions of counsel for the 1st, 2nd, 3rd and 5th respondents.

M/s Katende, Ssempebwa and Co. Advocates, M/s Walusimbi and Co. Advocates, M/s OS Kagere Advocates together with M/s Magna Advocates on behalf of the 1st, 2nd 3rd and 5th respondents jointly submitted that once the affidavit supporting the notice of motion and its annexures was struck out, there is no evidence to support the application. In *Wadri Mathias and four others v. Dranilla Angella, H. C. Civil Revision No. 7 of 2019* where the Court observed that there was no prescribed procedure for bring an application for revision, it held that where a party opts for a particular procedure that is provided for under the law in bringing the application for revision, then that procedure must be fully and correctly complied with. Similarly in the instant case, the applicants having chosen to apply for discovery by Notice of Motion supported by affidavit, they ought to have complied with all the requirements of Order 19 of *The Civil Procedure Rules*, relating to affidavits. Having failed to do so resulting in the affidavit being struck out, the applicants have failed to discharge the burden of proving the existence of the requisitioned documents and that they are in the custody of the respondents. In *John Kato v. Muhlbauer AG and another, H.C. Misc. Application No. 175 of 2011* it was decided that in applications of this nature; (1) there must be evidence that the documents is in possession or custody of the respondent; (2) the document must be relevant to the issue to be tried; and (3) discovery should not be used as a fishing expedition by the applicant to try and build up a case which he is not sure of.

The court cannot support its decision with conjecture, speculation, attractive reasoning and fanciful theories based on documents that are not on record before it. Existence of a document is proved by affidavit or by production of a copy. The respondents have denied the existence of the documents. Discovery cannot be used as a fishing expedition. It is a fishing expedition where the applicant seeks disclosure in the hope that something will emerge which may form the basis of a claim. The application was filed before the pleadings were closed and before the scheduling conference. It is designed as a fishing expedition for evidence. In the alternative, the information sought constitutes privileged information between the 1st and 2nd respondents and their legal advisors and therefore is not discoverable. The application has no legal basis and is an abuse of process.

f. Submissions in rejoinder by counsel for the applicants.

The applicants are in actual possession of secondary evidence of the documents whose originals it seeks discovery of. The law of evidence does not require an applicant to produce the primary evidence of documents whose discovery it seeks. The law is not strict on procedural requirements and the court should not be seen to impose one. The 1st respondent neither denied the existence of the documents sought nor denied having their custody. The documents are not privileged. The respondents have not pleaded any specific privilege attaching to the documents. It relates to communications between advocates whose clients were only copied in for purpose of information not advice. The information being shared was not classified as confidential.

g. The decision.

By virtue of Order 10 rule 12 of *The Civil procedure Rules*, any party may, without filing any affidavit, apply to the court for an order directing any other party to the suit to make discovery on oath of the documents, which are or have been in his or her possession or power, relating to any matter in question in the suit. The court therefore may, at any time during the pendency of any suit, order the production by any party to the suit, upon oath, of such of the documents in his or her possession or power, relating to any matter in question in the suit, as the court may think right; and the court may deal with the documents, when produced, in such manner as may appear just.

Upon hearing such application the court may either refuse or adjourn the hearing, if satisfied that the discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit; except that discovery will not be ordered when and so far as the court is of opinion that it is not necessary either for disposing fairly of the suit or for saving costs (see Order 10 rules 12 and 14 of *The Civil procedure Rules*). An order for discovery is discretionary (see *Dresdner Bank Ag. v. Sango Bay Estates Ltd (No. 3) [1971] 1 EA 326* and *Dresdner Bank Ag. v. Sango Bay Estates Ltd (No. 4) [1971] 1 EA 409*).

In exercising that discretion, the Court will have regard to its proportionality to the needs of the case, considering the importance of the issues at stake in the suit, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Discovery covers any non-privileged document that is relevant to the issues involved in the trial, including the existence, description, nature, custody, condition, and location of such documents, which appear reasonably calculated to yield admissible evidence. Discovery is the process by which a party may obtain facts and information about its case from the adversary in order to assist its preparation in arguing the substance of the claims. It is designed to enable a party to obtain relevant information needed to prepare the party's case.

i. Relevance and materiality.

The application must reasonably be calculated to lead to the discovery of admissible evidence. For an order of discovery to be made, the document or information must first be shown to be relevant since evidence is inadmissible if it is not relevant. To be considered relevant, the document or information must have any tendency to make the existence of any fact of consequence to the suit more or less probable than it would be without the evidence. A document is "material" if it is being offered to prove an element of a claim or defence that needs to be established for one side or the other to prevail. The applicant must show a reasonable expectation that the material sought will aid in resolution of the suit. Discovery rules are given broad and liberal treatment such that even very weak material evidence will be deemed relevant if it has any tendency to prove or disprove a fact in issue. This helps explains why so often an order of discovery will be made in respect of even the very weakest of evidence, so long as it does not reach the speculative level. Such evidence is often ruled admissible at this stage "for whatever it is worth," since after all, it is for the Court ultimately to judge the sufficiency or weight of the relevant evidence.

Although virtually any bit of information that might have even a slight connection to the suit is fair game for discovery, this enormous latitude sometimes leads to abuse. Parties and their

advocates might try to pry into subjects that have no legitimate significance for the suit, or that are private and confidential, serving only to annoy or embarrass the adversaries. Therefore, there are some legal limits on this kind of probing, and some protections to keep private material from being disclosed to the public. The principle is that discovery must not be allowed to be used as a fishing expedition for the applicant to build up an unsure case (see *Dresdner Bank Ag. v. Sango Bay Estates Ltd (No. 4) [1971] 1 EA 409* and *John Kato v. Muhlbauer A.G and another H. C. Misc. Application No. 175 of 2011*). Vague and ambiguous requests will be deemed a fishing expedition. An application for discovery must be specific, must establish materiality, and must recite precisely what is wanted. It does not permit general inspection of the adversary's records.

For example in *Loftin v. Martin 776 S.W.2d 145 (1989),* three document requests were at issue, one of which drew a fishing expedition argument, stated that "all notes, records, memoranda, documents and communications made that the carrier contends support its allegations [that the award of the Industrial Accident Board was contrary to the undisputed evidence], it was held that the rule does not permit a general inspection of an adversary's records, sometimes referred to as a "fishing expedition." The Supreme Court of Texas noted that the request was so vague, ambiguous and overbroad that it did not identify any particular class or type of documents but rather a request to peruse everything in its adversary's files.

Where the application is driven by the hope that something will emerge which may form the basis of or support the applicant's claim, then it is a fishing expedition. It is also a fishing expedition when it goes beyond the allegations in the pleadings and attempts to randomly find additional evidence to support the claim. This is why after the close of pleadings, if the parties feel that proper facts were not disclosed in the suit, either of them can ask for the documents to obtain proper facts of the case. The information sought must be stated with reasonable particularity and it should be consistent with the applicant's case as pleaded in the suit. "Reasonable particularity" is not susceptible of a precise definition and depends on whether a reasonable person would know what documents are called for by the applicant, and the degree of specificity required depends on the applicant's knowledge about the documents as well as the stage in the proceedings when the application is made such that an application made early in the proceedings generally can be less precisely drafted than one served after substantial evidence has been taken.

It was argued by counsel for the respondents that the applicants having chosen to apply for discovery by Notice of Motion supported by affidavit, and they having failed to comply with the requirements of Order 19 of *The Civil Procedure Rules* relating to affidavits, resulting in the affidavit being struck out, the applicants have failed to discharge the burden of proving the existence of the requisitioned documents and that they are in the custody of the respondents. I respectfully find that the decision in *Wadri Mathias and four others v. Dranilla Angella, H. C. Civil Revision No. 7 of 2019* on this point should be restricted to its facts and is distinguishable. Contrary to that decision that dealt with a process not regulated by any specified procedure, Order 10 rule 12 of *The Procedure Rules* expressly permits any party, without filing any affidavit, to apply to the court for an order directing any other party to the suit to make discovery on oath of the documents, which are or have been in his or her possession or power, relating to any matter in question in the suit. The proper scope of discovery remains undefined courts are forced to determine what shall be disclosed on a case by case basis. The fact that discovery is a matter of discretion with the trial court rather than a matter of right renders the process inimical to strict procedural and evidential requirements.

This liberal system of procedure in discovery proceedings would be defeated by the insistence on the usual standard of proof in civil matters. While the civil standard of proof in a trial is proof on a balance of probabilities which weighs two competing cases against one another and decides which is stronger, in applications of this nature the court does not have to look at the facts as critically or as anxiously. Proving an event on the balance of probabilities involves a Court being satisfied that an event occurred if it believes that, on the evidence, the occurrence of the event is more likely than not (see *Re H (minors) [1996] AC 56*). It does not require a Court to be certain that the event did occur. While during the trial the plaintiff must demonstrate that on the evidence available it is "more probable than not" that the defendant is liable for the relief sought, in applications for discovery the standard is lower than that.

The applicant only needs to show that there is a sufficient *prima facie* basis for believing the evidence sought exists, it is material and relevant to the issues at the trial. The basis can be advanced by argument based on the facts contained in the pleadings filed in the suit, or by evidence supporting the application. The Court will grant the application even without affidavit evidence,

where it considers that it is based on a plausible view of the pleadings as filed by both parties. This is because ironically discovery permits a more complete later testing of hearsay during the trial, such that the lack of adversarial testing becomes less of a concern at this stage.

When disputed facts provide a basis for the exercise of discretion, those facts should be liberally construed in favour of discovery. The sufficient *prima facie* basis which must be shown should be such as will satisfy an impartial tribunal that the request may be granted without abuse of the inherent rights of the adversary. There will of course be cases where fairness requires that courts limit hearsay more carefully to protect parties with limited discovery rights, for example where discovery is sought late in the trial, where more cautious assessments of reliability are required. In such cases affidavit evidence will be required to support a discovery application. This does not happen to be such a case. In any event, if in doubt the court should impose partial limitations rather than outright denial of discovery. In the exercise of its discretion the court should weigh the relative importance of the information sought against the hardship which its production might entail, and it must weigh the relative ability of the parties to obtain the information before requiring the adversary to bear the burden or cost of production.

Discovery is intended to accomplish the following results: (1) to give greater assistance to the parties in ascertaining the truth and in checking and preventing perjury; (2) to provide an effective means of detecting and exposing false, fraudulent and sham claims and defences; (3) to make available, in a simple, convenient and inexpensive way, facts which otherwise could not be proved except with great difficulty; (4) to educate the parties in advance of trial as to the real value of their claims and defences, thereby encouraging settlements; (5) to expedite litigation; (6) to safeguard against surprise; (7) to prevent delay; (8) to simplify and narrow the issues; and, (9) to expedite and facilitate both preparation and trial. Discovery tends to make a trial less a game of tactics and surprise and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent. It is a tool so useful in guarding against the chance that a trial will be a lottery or mere game of wits and the result at the mercy of the mischiefs of surprise.

Having examined the applicants' pleadings in the suit and the defences thereto, I find that an application calling for inspection and taking certified copies of the dollar account statement for

account number 1036200727349 operated by the 5th respondent with the 1st respondent bank, for the period 1st August, 2020 to 30th August, 2020; the inspection and taking certified copies of the dollar account statement for account number 1002201586895 operated by the 3rd respondent with the 1st respondent bank, for the period from 25th September, 2020 to 10th October, 2020 is sufficiently explicit to enable the court determine their relevance and materiality. I find that the documents sought are consistent with the applicant's case as pleaded in the underlying suit and that there is a sufficient *prima facie* basis upon which the request may be granted without abuse of the inherent rights of the respondents.

Similarly, having examined the applicants' pleadings in the suit, I find that an application calling for discovery on oath of certified copies of email exchanges addressed to the 1st respondents. Managing Director's email address samuel.kirubi@equitybank.co.ug on the subject entitled "Performance Based Guarantee" which related to the sale of the applicant's properties as follows; (i) email from Sim Katende (sim@kats.co.ug) sent on Friday 25th September, 2020 at 2:09 pm sent / copied to Sim Katende (simkatende@yahoo.com; walusimbi@walusimbiadvocates.com; sudhir@ruparelia.com), and Samuel Kirubi (samuel.kirubi@equitybank.co.ug); (ii) Email from Walusimbi Nelson walusimbi@walusimbiadvocates.com) sent / copied on Friday, 25th September,2020 at 2:57 pm to Sim Katende, sudhir@ruparelia.com, Samuel Kirubi and Gunn, as well as the executed copy of the "Performance Based Guarantee" referred to in those email correspondences between the 1st respondent, the 2nd respondent and the 5th respondent, is sufficiently explicit to enable the court determine their relevance and materiality. I find that the documents sought are consistent with the applicant's case as pleaded in the underlying suit and that there is a sufficient *prima facie* basis upon which the request may be granted without abuse of the inherent rights of the respondents.

Both categories of information sought to be discovered are material and relevant to the extent that the applicants intend to use their content to advance their already pleaded case, which is that the said transactions will demonstrate that the sale of the applicants' mortgaged properties was done under a dishonest collusion between the bank, its lawyers and the purchaser to unfairly and unlawfully defeat the interests of the applicants.

ii. Not otherwise privileged or protected by law.

Any party who seeks to exclude documents from discovery on basis of exemption or immunity must specifically plead the particular privilege or immunity claimed and provide evidence supporting such claim. The court must then determine whether an in-camera inspection is necessary, and, if so, the party seeking protection must segregate and produce the documents to the court. According to Order 10 rule 19 (2) of *The Civil procedure Rules*, where, upon an application for an order for inspection, privilege is claimed for any document, the court may inspect the document for the purpose of deciding as to the validity of the claim of privilege.

When a party seeks to exclude documents from discovery and the basis for objection is undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights, rather than a specific immunity or exemption, it is not necessary for the court to conduct an inspection of the individual documents before ruling on the objection.

In the instant case, none of the respondents raised any issue of privilege or other legal protection in their respective affidavits in reply. It is only in the written submissions of counsel that protection is sought under the advocate-client privilege to prevent discovery of the email correspondences sought. It is contended that under section 128 of *The Evidence Act*, no one may be compelled to disclose to the court any confidential communication which has taken place between him or her and his or her legal professional adviser, unless he or she offers himself or herself as a witness, in which case he or she may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he or she has given, but no other.

The advocate-client privilege does not protect all manner of information communicated between an advocate and his or her client; it only protects communications made in order to obtain legal advice, and of a confidential nature. The client must have intended the communications to be private and acted accordingly. Communications made to and by and advocate in the presence of or copied to a third party may not be entitled to this privilege on grounds that they are not confidential. If a client seeks advice from an advocate to assist with the furtherance of a crime or

fraud or the post-commission concealment of the crime or fraud, then the communication is not privileged. If, however, the client has completed a crime or fraud and then seeks the advice of legal counsel, such communications are privileged unless the client considers covering up the crime or fraud. Advocates may not reveal oral or written communications with clients that clients reasonably expect to remain private. An advocate who has received a client's confidences cannot repeat them to anyone outside the legal team without the client's consent. In that sense, the privilege is the client's, not the advocate's; the client can decide to forfeit (or waive) the privilege, but the advocate cannot. Since the client, and not the advocate, holds the privilege, the client holds the ultimate authority to assert it or waive it.

Considering that apart from the 1st respondent's conclusory and ambiguous statement that discovery of the information sought would constitute a violation of the laws of evidence and the rules of advocates' professional conduct in Uganda, none of the respondents raised any issue of privilege or other legal protection in their respective affidavits in reply, that the information sought is not confidential in so far as it was *prima facie* shared or copied to third parties, and that none of the respondents provided evidence or asserted any objective facts supporting such claim, I find that none of the documents sought may be excluded from discovery on basis of exemption or immunity.

iii. <u>Documents in the respondents' possession, custody, control or power</u>.

To be subject to production or inspection, the documents sought must be within the respondent's possession, custody, or control. The expressions are in the disjunctive and therefore only one of the requirements must be met. Actual possession of the document is unnecessary if the party has control of it. All that is required is for the respondent to either have physical possession of the document, or have a right to possession of the document that is equal or superior to the person who has physical possession of the document. Mere access to documents does not constitute possession, custody, or control. Accordingly, when documents are owned by another, it is error to require a party with mere access to them to produce them. The respondent can only be ordered to produce documents within the respondent's possession, custody or control. A document that does not exist or no longer exists is not within a party's possession, custody, or control. An application for

discovery generally should be denied when the respondent asserts that the requested documents do not exist or are not in its possession, custody, or control unless there is evidence suggesting the contrary.

A respondent who has actual possession or custody of a document is required to produce it even if belongs to a non-party. In fact legal restrictions limiting a party's ability to obtain certain documents or to disclose them to others will not necessarily preclude a finding that the party has possession, custody, or control over those documents. Unless the court finds good cause to do otherwise, the respondent is responsible for the cost of producing the documents, and the applicant is responsible for the cost of inspecting, sampling, photographing, and copying them. Courts recognise the right to inspect and copy public records and documents. When the information sought through discovery can be derived or ascertained from public records, from records in the possession of a governmental agency or non-party, and the burden of deriving or ascertaining that information is substantially the same for the applicant as for the respondent, it is a sufficient answer to the application for the respondent to specify the records from which the information may be derived or ascertained.

The order of discovery of documents may ordinarily be made by the court against a person who is a party to the civil suit. Generally, discovery is not sought against third parties, and instead more specifically identified documents or types of documents are sought by notice to produce documents in court (see Order 13 rule 8 of *The Civil Procedure Rules*). Although the discovery obligations are intended to apply only to the parties to a proceeding, sometimes a party will struggle to articulate their claim or defend their position without having access to documents which are held by somebody who is not a party to the proceeding. Third parties may exceptionally (such as where they are the only remaining sources for the documentation sought), be ordered to give discovery (see R. *v. O'Connor [1995] 4 SCR 411; Pat O'Mahony, Leonard Hyde & Labardie Fisher Ltd v. Guardian News & Media Ltd [2020] IEHC 234* and *Edward Keating v. Radio Telefís Éireann and Others [2013] IESC 22*). The applicant must establish that: (i) the third party has or is likely to have in its possession or power of possession documents falling within the parameters of the type of documents sought; (ii) the documents are relevant to an issue or issues in the suit; (iii) an order

for discovery is necessary for disposing fairly of the cause or matter or for saving costs; and (iv) any order made, by reference to its scope, is not oppressive.

Where it appears to the court that a person who is not a party to proceedings may have or have had possession of a document that relates to any question in the proceedings, the court may order such person to give discovery to the applicant of all documents that are, or have been, in the person's possession and which relate to that question. In certain circumstances, non-party discovery may be obtained indirectly through the parties. For example, if a corporation is a party to a suit, and is served with notice to produce documents under Order 10 rule 8 under of *The Civil Procedure Rules*, it must produce all responsive documents within its control even if those documents are in the physical possession of affiliated companies or other third parties that are not parties to the underlying suit.

In the instant case, it is apparent that none of the documents sought are either public documents or form part of records in the possession of governmental agencies or non-parties. By their nature and on basis of the pleadings and submissions before court, both sets of documents are in the ostensible possession, custody, or control of the 1st respondent. Apart from its conclusory and ambiguous statement that discovery of the information would constitute a violation of the laws of evidence and the rules of advocates' professional conduct in Uganda, the 1st respondent did not assert that the requested documents do not exist or that they are not in its possession, custody, or control, yet the facts pleaded suggest to the contrary.

As regards the rest of the respondents, by pleading that they are not privy to the transactions relating to the documents sought, they obliquely deny the existence of the documents, as well as their being in possession, custody, and control of the said documents. Save for the 5th respondent, while the facts pleaded do not suggest to the contrary, Order 1 rule 10 (2) of *The Civil Procedure Rules* permits the joinder of any person who ought to have been joined, whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. In interlocutory applications, a person who is already a party and is subject to service of process should be joined if in his or her absence complete relief cannot be accorded among the rest of the parties. On the other hand, a person who is not a party

but claims an interest relating to the subject of the suit or the application and is so situated that the disposition of the suit or application in his or her absence may; (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest, ought to be joined in the application.

I find that in the instant application that the presence before the court of the 2nd, 3rd, and 4th respondents at the hearing of the application was necessary for the court to effectually and completely adjudicate upon and settle all questions involved in the application. In light of the right to a fair hearing, it is most undesirable to consider any interlocutory applications *ex-parte* as against any of the parties named in the suit. It is for the party so named and duly served to determine whether or not the interlocutory application at hand is one that may affect its trial rights or not, and thereafter act appropriately.

As regards the 5th respondent, being the account holder of one of the bank accounts win relation to which certain specified transactions are sought to be discovered, I find that it is so situated that the disposition of the application in its absence could as a practical matter have impaired or impeded its ability to protect that interest. Therefore joining the two categories of respondents was legally justifiable, even though the remedies sought are in fact recoverable only against the 1st respondent.

iv. <u>Attempts at voluntary cooperation.</u>

The court is unduly burdened by interlocutory applications of a procedural or evidential nature, to an extent that has rendered the disposal of the substantive disputes overly slow. In a judicial system clogged by applications almost to the point of suffocation, the interests of justice require that resort to the court be made only where other discovery methods available to obtain the same information have failed. Time has come to apply *The Civil Procedure Rules* in a way that eliminates the practice of interposing numerous interlocutory applications and objections in a manner that obfuscates the issues at trial or prevents a quick disposal of the main suits. The majority of such applications are amenable to resolution by the cooperation and consent of both parties. For the most part, such

applications should be resolved outside the courtroom. Parties are expected to start and complete pre-trial matters of procedural or evidential nature with a minimum of court's intervention. It is only if the parties cannot agree on a just outcome, that the court may have to resolve the dispute.

Discovery covers any document, not otherwise privileged or protected by law, which is directly relevant to the issues involved in the case. Discovery may be obtained by one or more of the methods provided under *The Civil procedure Rules*, including: written interrogatories (Order 10 rules 1 – 11), summons for production of documents (Order 16 rule 6), requests for inspection (Order 10 rule 16), notice to produce documents (Order 10 rule 8), and notice for admission of documents (Order 13 rule 2).

In light to the multiple options, whenever possible, a party seeking production of documents should attempt first to obtain the adversary's voluntary cooperation, by serving a notice to produce documents on the other party. Upon failure to obtain voluntary cooperation, discovery may then be sought by a written motion directed to the court. The motion in that case should be accompanied by: (i) a copy of the original request and a statement showing the relevance and materiality of the information sought; and (ii) a copy of the objections to discovery or, where appropriate, a statement with accompanying affidavit that no response has been received.

There are four proper responses to the substance of a notice to produce documents: (1) a response agreeing to produce the requested documents, (2) a response objecting to the request in its entirety, (3) a response objecting to the request in part, for example, because it is overly broad as to time, place, or subject matter, and (4) a response stating that no responsive documents have been located. An objection must be made in writing within the time allowed for the response. Sometimes, rather than responding about ability to produce the requested documents, the respondent may object to the request on legal grounds. Common objections to requests for production or inspection include: - the request is overly broad or unduly burdensome (where the information supplied by the applicant is insufficient to make the requested documents easily identifiable); the request is vague, ambiguous, or unintelligible (where the request makes no sense); and that the request is not reasonably calculated to lead to the discovery of relevant, admissible evidence.

If the respondent has not requested for an extension of time to provide discovery responses, or when the applicant receives incomplete or inadequate responses, the applicant is as well expected to contact the respondent further in order to address the incomplete or inadequate responses to the discovery requests, and notify the respondent that if complete responses to the discovery requests are not submitted promptly the applicant will file a motion in court to compel discovery.

The application will be denied where the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive, or the applicant has not exhausted options available for obtaining the information without involving the court. Where the respondent intentionally or as a result of conscious indifference, thwarts the applicant's legitimate discovery attempts, the Court will not hesitate to award the applicant the expenses and impose appropriate sanctions when the matter finally comes to court for consideration of a formal application for that purpose.

The Court should be invited to make the order only where the respondent has refused or failed to respond in full to the applicant's discovery requests. However exceptionally in this matter, considering the zeal with which the respondents have attempted to prevent the applicants from securing the order of discovery, I hold the view that their voluntary co-operation upon receipt of a notice to produce documents would be most unlikely. Making a discovery request would have been an exercise in futility.

In conclusion, I find that the applicant has made out a proper case for the grant of an order of discovery as against the 1st respondent. It is for that reason that the application is hereby allowed. Consequently, the 1st respondent is to furnish the applicants under oath of an appropriate officer, within fourteen (14) days of this order, for inspection and taking certified copies of the 5th respondent's dollar account statement for account number 1036200727349, for the period 1st August, 2020 to 30th August, 2020; for inspection and taking certified copies of the dollar account statement for account number 1002201586895 operated by the 3rd respondent for the period from 25th September, 2020 to 10th October, 2020; certified copies of email exchanges addressed to the 1st respondent's Managing Director's email address samuel.kirubi@equitybank.co.ug on the subject entitled "Performance Based Guarantee" which related to the sale of the applicant's

properties as follows; (i) email from Sim Katende (sim@kats.co.ug) sent on Friday 25th September, 2020 at 2:09 pm sent / copied to Sim Katende (simkatende@yahoo.com; walusimbi@walusimbiadvocates.com; sudhir@ruparelia.com), and Samuel Kirubi (samuel.kirubi@equitybank.co.ug); (ii) Email from Walusimbi Nelson walusimbi@walusimbiadvocates.com) sent / copied on Friday, 25th September,2020 at 2:57 pm to Sim Katende, sudhir@ruparelia.com, Samuel Kirubi and Gunn, as well as the executed copy of the "Performance Based Guarantee" referred to in those email correspondences between the 1st respondent, the 2nd respondent and the 5th respondent, The costs of the application are to abide the outcome of the suit.

Delivered electronically this 9th day of August, 2022

……Stephen Mubiru……

Stephen Mubiru
Judge,
9th August, 2022.