THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 0730 OF 2022

(Arising from Civil Suit No. 0198 of 2020)

SIMBAMANYO ESTATES LIMITED .... APPLICANT

VERSUS

1. **EQUITY BANK UGANDA LIMITED }**
2. **EQUITY BANK KENYA LIMITED } .... RESPONDENTS**
3. **BANK ONE LIMITED }**

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The applicant sued the respondents jointly and severally seeking, *inter alia*, a declaration that the 2nd and 3rd respondents are not licensed to conduct financial institution business in Uganda; that the tripartite agreement executed between the applicant, the 1st and 2nd respondents on 20th August, 2012 is accordingly unenforceable, illegal, null and void; that the mortgage over the applicant's property comprised in LHR Vol. 2220 Plot 2 Folio 3 Lumumba Avenue too is unenforceable, illegal, null and void; a declaration that the appointment by the 2nd respondent of the 1st respondent as an agent bank is illegal, null and void, and so on. These reliefs are premised on averments that the 2nd and 3rd respondents are financial institutions incorporated and carrying on banking business in Kenya and Mauritius respectively. Through the 1st respondent, the two respondents illegally engaged in financial institutions business in Uganda when they extended credit facilities to the applicant. The subsequent refinancing arrangement between the applicant and the respondents was executed under undue influence and fraudulent misrepresentation on the part of the respondents.

b. The application;

This application by Chamber Summons is made under the provisions of section 32 of *The Evidence Act*, section 33 of *The Judicature Act*, sections 98 of *The Civil Procedure Act*, and Order 10 rules 12, 14 and 24 of *The Civil Procedure Rules* seeking orders that the respondents make discovery

on oath of copies of; (a) the first ranking mortgage deed dated 20th August, 2012; (b) the mortgage deed securing the standby letter of credit in respect of the loan offered on 30th November, 2017 and property comprised in LRV 2220 Plot 2, Folio 3 Lumumba Avenue, and Kyadondo Block 237, Plot 95, Block 243 Plots 957,958 and 2794 at Mutungo; (c) the mortgage deed / loan
5 documents for facility II in the sum of US $ 10,000,000 disbursed on 3rd January, 2020; (d) copies of all notices and correspondence between Equity Bank Uganda Limited, Equity Bank Kenya Limited and Bank One Limited concerning the settlement of the Bank One Limited facility, calling in of the standby letter of credit and facility II; (e) stamp duty payments (with documents) made in respect of Facility I and Facility II under the letter dated 30th November, 2017.

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It is contended by the applicant that the documents sought to be discovered are relevant and material evidence necessary of the proper determination of the suit. The 1st respondent retained copies of the mortgage deeds / loan documents relating to the Standby Letter of Credit. The applicant's Managing Director has reason to believe that the rest of the documents are within the
15 custody or control of the respondents.

c. Affidavit in reply;

In their affidavit in reply sworn by the 1st respondent's Head of Credit, the 1st and 2nd respondents
20 contend that the applicant's Managing Director signed all documents relating to the loans and mortgages and he believes he retained copies of the same. The deeds executed during the year 2012 are irrelevant to the current suit. The 3rd respondent did not file an affidavit in reply.

d. Affidavit in rejoinder;

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The applicant contends that the respondents did not attach any of the documents required, onto their respective amended written statements of defence, although they made reference to those documents. The respondents' advocates were on 30th June, 2022 and 1st July, 2022 served with a notice to produce documents, which they are yet to comply with. After execution, the respondents
30 retained the documents sought, for purposes of registration, and the applicant was never provided with copies thereafter.

e. Submissions of counsel for the applicants.

M/s Byenkya, Kihika and Co. Advocates on behalf of the applicant submitted that the dispute arises out of a loan; mortgage document the original security, the one securing the standby letter of credit (facility I), mortgage deeds and loan documents or facility II which is the main transaction in the trial, correspondences between the 1st respondent and the alleged lender under facility II and Bank One. They are created by the bank and they have possession. The applicant was never given copies. It is not normal for the borrower to take copies at signing. They are in control of the 1st and / or the 2nd respondent. In the affidavit in reply they claim Mr. Kamya has copies but it is not stated when they were handed over. The first loan is not controversial. It was settled by Equity bank.

For two years, the applicant was indebted to one lender, Bank One. Facility I was simply a letter of credit, it was not a loan. A contingent loan, facility II would kick on upon default or when the security given to bank one was called in. The new loan is in issue. We need the inter-credit agreement because it was never signed by the applicant. They are mentioned in their defence. Under *The Mortgage Act*, there is no privilege protecting any of the documents. The respondents were served more than twelve days ago with a notice to produce documents but refused to comply. It is not a cooperative defendant who obstructs every step. They did not respond at all. The ideal is for the court to have all the information. Discovery is intended to establish the truth. It relates to obtaining necessary evidence. It is not a fishing expedition.

f. Submissions of counsel for the 1st and 2nd respondents.

M/s Katende, Ssempebwa and Co. Advocates together with AF Mpanga Advocates on behalf of the 1st and 2nd respondents submitted that the mortgage in (a) is not relevant since it is not issue. In paragraph (b) and (c) they can be accessed at the Land Registry. There is a notice to produce attached to the affidavit in reply. The application is an abuse of court process, as held in *Gerald Kauhanga v. Attorney General* at page 10. There is already a notice to produce documents and they now seek discovery under oath. Improper use of legal process is an abuse. They are trying to have their case argued by supporting their narrative. The discovery sought is a proper fishing expedition. They did not specify the documents. Stamp duty is paid on the TIN of the applicant.

The mortgage document in issue is attached to the defence. We should not be here for this application. Tax records are private to the applicant. There is always something new they come up with and occupy court in unnecessary applications. Before they could respond to the notice to produce documents they were served with the current application.

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g. Submissions of counsel for the 3rd respondent;

M/s ENSafrica Advocates on behalf of the 3rd respondent submitted that paragraph (d) of the Chamber Summons is vague and does not meet the criteria of discovery. No indication of the
10 relevance is disclosed. The application should be dismissed.

The decision.

The scheme of *The Civil Procedure Rules* is such that there are documents which; (i) must be
15 produced at the time of filing the suit (where a plaintiff sues upon a document in his or her possession or power (Order 7 rule 14 (1); (ii) those which should be entered in a list added or annexed to the plaint (other documents, whether in the plaintiff's possession or power or not, relied on as evidence in support of the claim (Order 7 rule 14 (2); (iii) documents liable to inspection (those referred to in the pleading or affidavit filed by the other side (Order 10 rule 15); and (iv)
20 documents liable for discovery (those relating to any matter in question in the suit (Order 10 rule 12 of *The Civil procedure Rules*).

The court 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
25 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. Any party may therefore, 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. Upon hearing such application the court may either
30 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.

5 As regards the first ranking mortgage deed dated 20th August, 2012, I find that in so far as it is common ground between the parties that all matters relating to that borrowing were finally settled, the document no longer has probative value to the suit. With regard to the mortgage deed securing the standby letter of credit in respect of the loan offered on 30th November, 2017 and property comprised in LRV 2220 Plot 2, Folio 3 Lumumba Avenue, and Kyadondo Block 237, Plot 95, 10 Block 243 Plots 957,958 and 2794 at Mutungo, and the mortgage deed / loan documents for facility II in the sum of US $ 10,000,000 disbursed on 3rd January, 2020, I find that these are proposed to be offered to prove elements of the claim that need to be established for the applicant to prevail. In addition, because of the important privacy interest that persons have in their tax returns, an applicant seeking to discover a respondent's tax returns must make a showing that the returns are 15 relevant to a determination of a fact in issue. They too are relevant and material in this case is so far as they relate to the validity of the impugned mortgages.

As regards copies of all notices and correspondence between Equity Bank Uganda Limited, Equity Bank Kenya Limited and Bank One Limited concerning the settlement of the Bank One Limited 20 facility, calling in of the standby letter of credit and facility II, due to lack of specificity the court is not in position to determine their relevance and materiality. The application does not identify any particular class or type of documents but it is merely a request that the applicant be allowed to generally peruse all notices and correspondences the respondents might have shared concerning the settlement of the Bank One Limited facility, calling in of the standby letter of credit and facility 25 II, yet discovery must be made of designated documents and therefore applications for discovery must be formulated with a certain degree of specificity to allow the respondents to comply. Specification in sufficient detail permits the respondent to locate and to identify the documents required. An application for discovery must specify the documents to be produced or inspected individually or by category and describe each item or category with reasonable particularity.

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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.

Similarly in this case it appears to me that this part of the application is driven by the hope that something will emerge which may form the basis of or support the plaintiff's claim. It is a fishing expedition when it goes beyond the allegations in the pleadings and attempts to randomly find additional evidence to support the claim. Although "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, I find that an application calling for every correspondence in the possession of adversaries relating to transactions between themselves

over a considerable period of time is too general and intended simply to explore the possibility of finding relevant evidence. It does not contain a sufficiently explicit designation of the documents intended to enable the court determine their relevance and materiality. This Court has the duty to determine what portions of these correspondences, if any, are relevant and material to the cause of action. This aspect of the application is so intrusive as to constitute a fishing expedition.

ii. <u>Not otherwise privileged or protected by law</u>.

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 has raised issue of privilege or other legal protection.

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
5 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
10 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.

15 Furthermore, 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
20 information may be derived or ascertained.

In the instant case, the mortgage deed securing the standby letter of credit in respect of the loan offered on 30th November, 2017 and property comprised in LRV 2220 Plot 2, Folio 3 Lumumba Avenue, and Kyadondo Block 237, Plot 95, Block 243 Plots 957,958 and 2794 at Mutungo, and
25 the mortgage deed / loan documents for facility II in the sum of US $ 10,000,000 disbursed on 3rd January, 2020, as well as the stamp duty payments (with documents) made in respect of Facility I and Facility II under the letter dated 30th November, 2017 are either public documents or form part of records in the possession of governmental agencies or non-parties. The burden of deriving them from those sources is substantially the same for the applicant as for the respondents.

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iv. Attempts at voluntary cooperation.

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 applicant filed this application on 23rd June, 2022 yet it served the respondents with a notice to produce documents on 30th June, 2022 and 1st July, 2022 respectively. Under Order 10 rule 17 (1) of *The Civil Procedure Rules*, the respondents had ten days within which to comply with that notice. That time elapsed on 10th and 11th July, 2022 respectively. At the hearing of an application for discovery, the applicant must show that he or she made a good faith effort to amicably obtain the documents required by contacting the respondent. 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. It was the respondent's averment that they were unable to provide responses to the applicant's notice to produce documents, on account of the fact that this application was fixed for hearing and they were served to appear in court, before that time had elapsed.

5 In conclusion, I find that the applicant did not make a good faith effort to amicably obtain the documents required, by contacting the respondents before filing this application. It has not been shown that the respondents were uncooperative in the discovery request made after the application was filed. The application itself is partly overbroad so as to be unduly burdensome, vague, and ambiguous. Some of the documents sought can be obtained from other sources that are more 10 convenient, less burdensome, or less expensive, especially in terms of court's time. Having issued notices to produce documents, the application is unreasonably cumulative or duplicative. It is for all those reasons that the application is hereby dismissed with costs to the respondents.

Delivered electronically this 19th day of July, 2022 ……Stephen Mubiru…………

15 Stephen Mubiru
Judge,
19th July, 2022.