

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA**  
**(COMMERCIAL DIVISION)**

**MISCELLANEOUS APPLICATION No. 0258 of 2022**

5 **(Arising from Civil Suit No. 0108 of 2022)**

- |    |                           |   |                  |
|----|---------------------------|---|------------------|
| 1. | KAWEESI SULAIMAN          | } |                  |
| 2. | YAHAYA MAYIGA             | } |                  |
| 3. | MUSTAFA MUTYABA           | } |                  |
| 4. | NSUBUGA AHMED             | } |                  |
| 10 | 5. HAJI ABBAS KANGAVE     | } |                  |
|    | 6. JUMA WALUSIMBI         | } |                  |
|    | 7. JAMADA LUTTA MUSOKE    | } |                  |
|    | 8. YOUNUS KAMULEGEYA      | } |                  |
|    | 9. ERIAS SSEVIRI          | } |                  |
| 15 | 10. ABBAS K. MAWANDA      | } |                  |
|    | 11. MASERUKA MOHAMMED     | } |                  |
|    | 12. IBRAHIM SEGUYA        | } |                  |
|    | 13. JUMBA MASAGAZI        | } | ..... APPLICANTS |
|    | 14. SULLY NAIGA MATOVU    | } |                  |
| 20 | 15. ABBAS LUYOMBO         | } |                  |
|    | 16. SAFIINA KIBIRIGE      | } |                  |
|    | 17. TWAHA ABU MU KASA     | } |                  |
|    | 18. FAIZAL JINGO KASUJJA  | } |                  |
|    | 19. HARUNA SSEBAGGALA     | } |                  |
| 25 | 20. ABDU OBED KAMULEGEYA  | } |                  |
|    | 21. KIWANUKA KASSIM       | } |                  |
|    | 22. SEREMBA SULAIMAN      | } |                  |
|    | 23. PROF. BADRU KATEREGGA | } |                  |
|    | 24. YUSUF NSIBAMBI        | } |                  |
| 30 | 25. SAKINA KAGGA          | } |                  |
|    | 26. SYDA BUMBA            | } |                  |
|    | 27. SULAIMAN WALUGEMBE    | } |                  |

**VERSUS**

- |    |  |   |                   |
|----|--|---|-------------------|
| 35 | 1. BANK OF UGANDA                          | } | ..... RESPONDENTS |
|    | 2. GREENLAND BANK LIMITED (IN LIQUIDATION) | } |                   |

**Before: Hon Justice Stephen Mubiru.**

**RULING**

a. Background.

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The 2<sup>nd</sup> respondent was incorporated on the 3<sup>rd</sup> August, 1990 and operated as a commercial bank up to 1<sup>st</sup> April, 1999 when the 1<sup>st</sup> respondent seized it and put it under liquidation. The applicants are shareholders of the 2<sup>nd</sup> respondent, M/s Greenland Bank Limited (in Liquidation), which is undergoing a process of liquidation by the 1<sup>st</sup> respondent. As part of that process, the 1<sup>st</sup> respondent caused the closure of companies commonly known as the “Greenland Group of Companies” that were associated with the 2<sup>nd</sup> respondent, which were established with the funds from the 2<sup>nd</sup> respondent and were directly under the control of the 2<sup>nd</sup> respondent. All the assets of those companies were consolidated into assets of the 2<sup>nd</sup> respondent. On 18<sup>th</sup> October, 1999 the 1<sup>st</sup> respondent appointed receivers and managers of M/s FIBA Uganda Limited, the majority shareholder of all those companies.

Concerned by the unduly prolonged and drawn out process of liquidation, the applicants on or about 10<sup>th</sup> February, 2022 filed a suit seeking a declaration that the continued liquidation of the 2<sup>nd</sup> respondent for more than twenty-one (21) years without accountability to the applicants is irregular, unreasonable and in bad faith; an order requiring the 1<sup>st</sup> respondent to fully account to the applicants for the entire period it has been liquidating the 2<sup>nd</sup> respondent which commenced on 1<sup>st</sup> April, 1999 to date; a declaration that the sale of secured and unsecured loans of the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent to M/s Nile River Acquisition Company, was unlawful, irregular, fraudulent and in bad faith; a declaration that the sale of loans of 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent at a discount of 93% was irregular, fraudulent and in bad faith; a declaration that the entire process of liquidation of the 2<sup>nd</sup> respondent is marred by massive fraudulent acts committed by officials of the 1<sup>st</sup> respondent; a declaration that properties belonging to the 2<sup>nd</sup> respondent, to wit Plot 30 on Kampala Road and Plot 66 William Street, were sold below the market value and that the sale was irregular and in bad faith; a declaration that the consolidation of all companies under the “Greenland Group of companies” and their assets was irregular and in bad faith.

As part of their claim the applicants further seek an order that the 1<sup>st</sup> respondent compensates the applicants for any loss occasioned to the applicants by commissions and omissions of the 1<sup>st</sup> respondent; a declaration that the liquidation of the 2<sup>nd</sup> respondent is redundant and an order that the same be put to an end by this Court; punitive damages; general damages; exemplary damages; interest at the existing bank rate, and the costs of the suit.

b. The application.

The application is made by Chamber Summons under the provisions of sections 64 (b), (c) and 98 of *The Civil Procedure Act*, Order 40 rule 5 (1) (a), 12; Order 52 Rule 7; Order 10 Rules 12, 14 and 24 of *The Civil Procedure Rules*; Order 11A rules 1, 2 ,7 , 14 (b), (e), (f), (h), (k) and (p), (vi) and (x) of *The Civil Procedure Amendment Rules, 2019*; and sections 6 and 7 of *The Evidence (Banker's Books) Act*. The applicant seeks orders for;- (i) attachment before judgment of cash shs, 14,091,238,475/= held by the 1<sup>st</sup> respondent; (ii) an order restraining the respondents from distributing the said shs, 14,091,238,475/= held by the 1<sup>st</sup> respondent to the contested\disputed creditors pending determination of the suit; (iii) alternatively, an order requiring the 1<sup>st</sup> respondent to deposit in Court the said shs, 14,091,238,475/= currently held by the 1<sup>st</sup> respondent on behalf of the 2<sup>nd</sup> respondent; (iv) an order directing the respondents to produce Bankers' Books and any entries thereof to show further and better particulars of statement of liquidation account where the shs, 14,091,238,475/= is currently held; (v) an order directing the respondents to produce the list of paid creditors, un paid creditors, verified and unverified Creditors; (vi) an order directing the respondents to produce the list of documents showing the utilization of the said shs, 14,091,238,475/=; (vii) an order directing the respondents to produce the documents showing the source, disbursement and or expenditure of US \$ 11,450,000 involved in the purchase of the 49 shares of the Uganda Commercial Banks limited; (viii) an order directing the respondents to produce the documents related to all transactions from bidding, granting exclusivity, to execution of the Debt Purchase and Transfer Agreements, final Reports submitted by JN Kirkland, Ms Octavian Advisors PLC, Nile River Acquisition Company and SIL investment Limited; (ix) an order directing the respondents to produce documents relating to the liquidation's costs of shs. 8,219,188,997/=; and (x) an order directing the respondents to produce documents related to the sale of Plot 30 Kampala Road and Plot 66 William Street.

It is the applicants' case that the sum of shs. 14,091,238,475/= is still held by the Liquidator and only the final distribution to the verified Creditors is pending and is to be effected shortly yet the suit is premised on the fact that there are fictitious Creditors. Whereas the Government of Uganda provided a liquidity support of shs. 91,200,000,000/= to enable the 1<sup>st</sup> respondent pay 5 depositors of the 2<sup>nd</sup> respondent, the respondents have never disclosed the list of depositors that were paid using that money. Whereas in their written statement of defence the respondents mentioned an amount of US \$11,450,000 as the sum used in the purchase of 49 shares in Uganda Commercial Bank Ltd, they never provided details of the source, disbursement and/or expenditure of that money. The respondents further mentioned in their written statement of 10 defence that there was a bidding process, granting exclusivity, the execution of the debt purchase and transfer Agreement, yet they did not attach the relevant documents and a final report of the activities they performed. All the documents relating to the recipients, expenditures and movement of money incurred as the costs of liquidation are with the respondents. All the documents sought for are necessary for the proper adjudication of this matter and are all in the 15 exclusive possession of the 1<sup>st</sup> respondent since they are liquidators of the 2<sup>nd</sup> respondent.

c. The affidavit in reply.

By an affidavit in reply sworn by Ms. Margaret K. Kasule, the 1<sup>st</sup> respondent's Legal Counsel, 20 the respondents contend that the application has no basis in law as it is being founded on a suit that cannot stand for being barred by limitation, not disclosing a cause of action, on account of *res judicata* and for being frivolous and vexatious. As indicated in the 2016 KPMG Audit Report (Annexure G to the WSD) as to 92.2% thereof to the 94 verified creditors listed in Note 7.1 of the Audit Report, as to 1.46% thereof to the 36 verified creditors listed in Note 7.4 of the Audit 25 Report and as to 6.34% thereof to the 7 creditors whose claims are still being verified listed in Note 7.3 of the Audit Report. The Respondents are not disposing of the whole or part of their property with the intent to obstruct or delay the execution of any decree. The applicants are not creditors in the liquidation process and as such have no claim whatsoever to the said shs.14,091,238,475/= as that sum is required by insolvency law to be paid out by the 1<sup>st</sup> 30 respondent as liquidator to the 2<sup>nd</sup> respondent's creditors. The negative net worth of the 2<sup>nd</sup> respondent even after the pay out of that sum will be shs. 97,830,000,000/= and thus the

applicants as shareholders/contributors have no monetary claim whatsoever in the 2<sup>nd</sup> respondent's insolvency. Further and in any event, the application must fail as a matter of law as no application to restrain the payment to the creditors can be lawfully considered without those creditors being joined as a party to the application which affects their interests, which has not  
5 been done in this case.

The respondents further contend that the 1<sup>st</sup> respondent is not a "bank" or "banker" within the meaning of section 1 (a) of *The Evidence (Banker's Books) Act*. Further, the Applicants not being lawful claimants to the monies held on the ledger have no locus standi under section 6 of the Act  
10 to an order for inspection or copies of the said ledger. The creditors' list indicating the paid, unpaid, verified and unverified creditors, has already been availed in the 2016 Klynveld Peat Marwick Goerdeler (KPMG) Report (Annexure G) to the WSD. The said report under Note 7.1 lists the 94 verified and paid creditors on the 1<sup>st</sup> and 2<sup>nd</sup> distribution whose unpaid claim on the pending distribution is 92.2% of the shs. 14,091,238,475.= held, in Note 7.4 it lists the 36  
15 verified and unpaid creditors with an unpaid claim on the pending distribution of 1.46% of the said sum held and in Note 7.3 lists the 7 unverified and unpaid creditors with an unpaid claim on the pending distribution of 6.34% of the said sum held. Utilization of the Government of Uganda liquidity support of shs. 91,200,000,000/= is disclosed under Note 5.1.15.3 and 5.1.16.5 of the 2005 KPMG Report (Annexure E to the WSD) as the claim by the Government of Uganda for  
20 repayment of the amount utilized for the 2<sup>nd</sup> respondent.

The sum of US \$11,450,000 was paid by Westmont Land Asia (BHD) with whom the 1<sup>st</sup> respondent as Statutory Manager of Uganda Commercial Bank Limited together with the Government of Uganda subsequently concluded a binding arbitration award in which the  
25 fraudulent share agreement was rescinded and the US \$ 11,450,000 was forfeited to the Government of Uganda and Uganda Commercial Bank Limited in partial settlement of the financial damage Westmont caused. The Statement of claim, the Statement of Defence and a copy of the arbitral award relating to the US \$ 11,450,000 were attached to the Written Statement of Defence as Annexure "I" thus the applicants have all the documents, they seek  
30 production of in this application. The liquidation costs of shs. 8,219,188,997/= are limited to the period ending 31<sup>st</sup> December, 2005 as indicated in Note 6.1.1 of the 2016 KPMG Report

(Annexure G to the WSD) and therefore have nothing to do with the extended liquidation as the subsequent recovery costs were costs of M/s Nile River Acquisition Company who purchased the portfolio. Prior binding court adjudication relating to the sale of Plot 30 Kampala Road and Plot 66 William Street concluded the matter which cannot now be re-opened.

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d. Affidavit in rejoinder.

At the time of hearing the summons for directions, the application for discovery of documents was on record and the respondents' Counsel while in Court before the Registrar indicated to court that they had received an application for discovery of documents and that they needed time to look for the documents. Counsel for the respondents informed Court that they needed at least six (6) weeks to look for the documents that the applicants had applied for which was granted by the Registrar before she gave the timelines for filing the affidavits in reply to the application for discovery and also filing of the application for the preliminary point of law. The time given elapsed without any documents being produced for inspection by the applicants and also the timelines given by court elapsed before any affidavit in reply were filed. The applicants contest all the alleged verified creditors as fictitious due to the fraud that was unearthed by the Auditor Generals' Report. The shs. 91,200,000,000/= was a one off *ex-gratia* payment by the Government of Uganda and not an advance to be paid back as is falsely alleged by the respondents. The sum of US \$11,450,000 belonged to the 2<sup>nd</sup> respondent and it was the 1<sup>st</sup> respondent's duty as Liquidator to recover it and account to the applicants since the 49% shares in UCB were resold by Government to Standard Bank Group. M/s Nile River Acquisition Company is non-existent yet it still has agents that operate on its behalf. All these anomalies have to be investigated thoroughly by court.

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e. Submissions of counsel for the applicants.

M/s Semuyaba, Iga & Co. Advocates, M/s Nyanzi Kiboneka Mbabazi and Co. Advocates together with M/s Kampala Associated Advocates, all on behalf of the applicants, jointly submitted that the applicants believe that the alleged verified creditors are fictitious and a manufacture of the respondents. The applicants contest the actions of the 1<sup>st</sup> respondent regarding

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the liquidation of their bank. The applicants dispute and contest all the alleged verified creditors by the respondents. It is therefore fair and just for this Court to grant the application and order the 1<sup>st</sup> respondent to deposit the shs. 14,091,238,475 with this Court and make it available for disposal once the main suit is determined by the Court. If this application is not granted, the respondents will quickly distribute the monies before the determination of the main Suit to contested and disputed creditors. This will only have one meaning that the defendants have successfully evaded the course of Justice. Alternatively, granting of a temporary injunction is an exercise of judicial discretion and the purpose of granting it is to preserve the matters in the *status quo* until the question to be investigated in the main suit is finally disposed of. The applicants filed Civil Suit No.108 of 2022 against both respondents challenging their commissions and omissions regarding the liquidator. It will be a great injustice to the applicants if the respondents distribute the money to contested/disputed creditors. The applicants will have suffered an irreparable loss/injury that could not be adequately compensated by an award of damages and the respondents will have succeeded in defeating the interests of justice. This case is based on fraudulent acts, done in bad faith, mismanagement of the liquidation process by respondents as elucidated in the plaint based on the findings of the Parliamentary Public Accounts Committee on Commissions, Statutory Authorities and State Enterprises (COSASE) report adopted later by the plenary, to the effect that during the Liquidation Process there were fictitious creditor claims that were not verified, such as that by M/s Nile River Acquisitions Company and M/s Octavian Advisors which were foreign companies that have since ceased to exist.

Counsel submitted further that there is sufficient evidence that the documents sought to be discovered exist, the respondent has not disclosed them, the documents relate to the matter in issue in the suit and there is sufficient evidence that the documents are in possession, custody, or power of the respondents. The Applicants therefore are seeking orders of discovery and production of documents against the 1<sup>st</sup> respondent as the agent and the official liquidator of the 2<sup>nd</sup> respondent. The applicants intend to rely on the specified documents which are in possession and custody of the 1<sup>st</sup> respondent, which documents will be important aid to this Court in the determination of the main suit. The applicants are at liberty to inspect the bankers' books for any of the purposes of those proceedings.

f. Submissions of counsel for the respondents.

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M/s MMAKS Advocates on behalf of the respondents submitted that the application seeks attachment before judgment for 14.2 billion shillings to be paid out to creditors at the last stage as per annexure “G” to the WSD, after two other payments made before. The application is under Order 40 CPR. The audit report as at 30<sup>th</sup> June, 2016 at page 6 of the report indicates cash at Bank of shs.14 billion. Page 15 - 17 and para 4 of the affidavit in reply, the creditors have been partly paid rateably. They will be paid 92%. The 2<sup>nd</sup> category is 1.46 at page 18 of the audit report. They are 36 creditors and lastly the creditor sin 7.3 who will take 6.34 at page 17. They are in a special category and have delayed the payment did to need of further verification. One of the creditors is UCBL which is money to go to government. There is never going to be a chance that contributors will have claim in insolvency. There is no intention to put out of reach. Injunction cannot be granted. It is a monetised claim and the amount can be recoverable.

Banker’s evidence applies to commercial bank and not the central bank which is not in business. The amount was disclosed by the Liquidator. The applicants are not customers of the bank. The general discovery prayer, the fifth order sought in the chambers summons is for lists of creditors. The list is part of the audit report so discovery is unnecessary. The sixth Order seeks documents of utilisation of the 91.2 billion. It was money from government put into the sector to stabilise it. Part of the money was recovered. The applicants maintain it was a donation. It was an advance to the Central Bank. It is in paragraph 6 (vi) of the plaint and respondent to in 6 (vi) of the WSD. It id disclosed in the KMPG report of 2005; annexure “E” to the defence. Note 5.1.15.3 of the report

By the seventh order they seek documents regarding purchase of 49% of the share of UCB. It followed the Malaysian Westmond which purportedly paid 11 million dollars. The matter went to arbitration following the raid of UCB that took out over 23 million dollars. Westmond admitted it was a cover and they ceded the amount to the state in exchange for the loss. The



applicants claim the money came from Greenland. The respondent contends it was ceded at the arbitration. The matter is pleaded and they should prove it. The ninth order sought relates to the costs of the liquidation. They claim it arose because of the prolonged liquidation ending 2018. The respondent contends the liquidation ended in December, 2005 when the portfolio was sold.  
5 After that date no further liquidation expenses were incurred. Paragraph 6 (xxvi) (a) of the plaint which is respondent to in paragraph 8 of the defence. The tenth order seeks documents related to the sale of the two plots in Kampala. In para 13 of the affidavit in reply, the claim by the other 17 entities having been struck out, this order become irrelevant. All documents related to were tendered in Misc. Application 1047 2022. The documentation will be scanty in light of the  
10 passage of time since the sale was over twenty years ago.

g. Submissions in rejoinder by counsel for the applicants.

The affidavit of Margaret Kasule in reply is answered by an affidavit in rejoinder. The two  
15 respondents. The 2<sup>nd</sup> respondent is covered by *The Bankers' Books Act*. The Financial Institutions Act too is applicable. The applicants were shareholders of the 2<sup>nd</sup> respondent and are no longer in control of the bank. Most of the documents are in the hands of the 1<sup>st</sup> respondent. For many years since 1999 are in control of the 1<sup>st</sup> respondent. The documents are listed. They are relevant to prove fraud, falsehoods, misrepresentation and payment of fictitious creditors.  
20 Section 63 of the Evidence Act. They are to pay some fictitious beneficiaries and that justifies attachment before judgment. The injunction we rely section 64 of *The Civil Procedure Act* and Oder 41 of *The Civil Procedure Rules*.

h. The decision.

25 This is an omnibus application because it contains four categories of applications in one, namely; - attachment before judgment, an interlocutory injunction order, discovery of multiple documents and inspection of bankers; books. An application comprising of two or more applications which are interrelated is allowable at law as a matter of procedure for the avoidance of a multiplicity of  
30 suits relating to the same subject matter. For reasons of expediency, the court will now proceed to consider the three components separately.

- (i) Attachment before judgment of shs. 14,091,238,475/= held by the 1<sup>st</sup> respondent; alternatively, an order requiring the 1<sup>st</sup> respondent to deposit the said sum in Court.

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Section 64 (b) and (e) of *The Civil Procedure Act* provides that in order to prevent the ends of justice from being defeated, the court may, if it is so prescribed, direct the defendant to furnish security to produce any property belonging to him or her and to place the same at the disposal of the court or order the attachment of any property, or make such other interlocutory orders as may appear to the court to be just and convenient. The Court's authority to order attachment before judgment is then prescribed by Order 40 rule (1) of *The Civil Procedure Rules* which states as follows;

15 Where at any stage of a suit, other than a suit of the nature referred to in section 12 (a) to (d) of the Act, the court is satisfied by affidavit or otherwise: -

- (a) that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him or her—
- 20 (i) has absconded or left the local limits of the jurisdiction of the court;
- (ii) is about to abscond or leave the local limits of the jurisdiction of the court; or
- (iii) has disposed of or removed from the local limits of the jurisdiction of the court his or her property or any part of it; or
- 25 (b) that the defendant is about to leave Uganda in circumstances affording a reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him or her before the court to show cause why he or she should
- 30 not furnish security for his or her appearance.

The conditions that must be satisfied are; - the applicant should show, *prima facie*, that his claim is bonafide and valid and also satisfy the court that the respondent is about to remove or dispose of the whole or part of his or her property, with the intention of obstructing or delaying the execution of any decree that may be passed against him or her. in all instances before this power

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is exercised the applicant is required, unless the court otherwise directs, to specify the property required to be attached and the estimated value of the property. The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

5 Whether the respondent will have sufficient assets at the end of a trial to fully satisfy any judgment that may be obtained is a pertinent consideration both for the applicant and court. The last thing a litigant wants to do is to incur expenditure on litigation only to receive a paper judgment that cannot be satisfied. A plaintiff though is not normally entitled to secure assets in advance to ensure that they will be available to satisfy a judgment that may not come for years  
10 (see *Lister v. Stubbs*, [1890] All E.R. 797). Attachment before the Judgment is considered a very harsh remedy because it substantially interferes with the defendant's property rights before the final resolution of the overall dispute. During the pendency of the suit, a defendant is normally entitled to carry on its ordinary course of business, and if business takes a turn for the worse and there is no money left by the time a judgment is granted, that is too bad for the applicant.

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However, in situations where the respondent has acted fraudulently in the past or may act fraudulently in the future, a plaintiff may be able to apply to the court for an order of attachment before judgment (a *Mareva injunction*). Hence in *Bahman (Prince Abdul) Bin Turki Al Sudairy v. Abu Taha*, [1980] 3 ALL ER 409 at 412 Lord Denning M.R. stated that;

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*A Mareva injunction* can be granted against a man even though he is based in this country if the circumstances are such that there is a danger of his absconding or a danger of the assets being removed out of jurisdiction or disposed within jurisdiction or otherwise dealt with so that there is a danger that the plaintiff if he gets judgment  
25 will not be able to get it satisfied.

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The rationale behind an order of this nature was explained in *Polly Peck International plc v. Nadir (No 2)* [1992] 4 All ER 769, 785g-786a, as follows:

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So far as it lies in their power, the courts will not permit the course of justice to be frustrated by a defendant taking action, the purpose of which is to render nugatory or less effective any judgment or order which the applicant may thereafter obtain. It is not the purpose of [the] injunction to prevent a defendant acting as he would have acted in the absence of a claim against him. Whilst a defendant who is a natural person can and should be enjoined from indulging in a spending spree undertaken

with the intention of dissipating or reducing his assets before the day of judgment, he cannot be required to reduce his ordinary standard of living with a view to putting by sums to satisfy a judgment which may or may not be given in the future. Equally no defendant, whether a natural or a juridical person, can be enjoined in terms which will prevent him from carrying on his business in the ordinary way or from meeting his debts or other obligations as they come due prior to judgment being given in the action. Justice requires that defendants be free to incur and discharge obligations in respect of professional advice and assistance in resisting the applicant's claims. It is not the purpose of a [the] injunction to render the applicant a secured creditor, although this may be the result if the defendant offers a third party guarantee or bond in order to avoid such an injunction being imposed.

Such an order freezes the respondent's assets pending trial. They are granted for an important but limited purpose: to prevent a respondent dissipating his assets with the intention or effect of frustrating enforcement of a prospective judgment. They are not granted to give a claimant advance security for his claim, although they may have that effect. They are not an end in themselves. They are a supplementary remedy, granted to protect the efficacy of court proceedings, domestic or foreign (see *Fourie v. La Roux* [2007] UKHL 1).

Because orders of this nature run contrary to the general rule against execution before judgment, extreme caution should be exercised before grant of such an order. It may be abused by the applicant who may choose to use it as a leverage for coercing the defendant to settle the suit, or as an end in itself, thereby truncating the pending litigation at the very outset or, cause unnecessary hardship to the respondent or third parties. The order should be made in exceptional cases and for that reason, for the order to issue, the applicant must establish that:

1. The applicant 's case for damages against the respondent is strong and likely to succeed;
2. There is evidence that the respondent is removing, or there is a real risk that the respondent is about to remove, his or her assets from the jurisdiction to avoid the possibility of a judgment; OR
3. The respondent is otherwise dissipating or disposing of his or her assets in a manner clearly distinct from his or her usual or ordinary course of business or living so as to render the possibility of future tracing of the assets remote, if not impossible; AND

4. The applicant is prepared to pay the respondent damages in the event that the court later determines that the order should never have been issued and the respondent suffers damage as a result of the order.

5 An order of this nature can have very serious adverse effects often over a long period, sometimes even financial ruin, for the individual or company against whom it is made. The court should therefore be satisfied not only that there is a properly arguable case against the respondent and a risk of dissipation or hiding of assets, but also as to the proportionality of the order. Mere foreign residence or domicile of the respondent is not enough. The Court ought to be furnished with  
10 details, so far as they can be established, about the nature and financial standing of the respondent's business including its length of establishment.

Regarding the existence of a suit that is likely to succeed, the test of a good arguable case is that it must be one which is more than barely capable of serious argument, and yet not necessarily  
15 one which the Judge believes to have a better than 50 per cent chance of success (see *The Niedersachsen [1983] 1 W.L.R. 1412*). I have considered the assertions in the plaint filed by the applicants and the respondent's written statement of defence. The suit is based on averments of fact, which if established by evidence, are capable of supporting a finding in the applicants' favour. I am satisfied that the applicants' claim meets this test.

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Risk of dissipation is usually the most important factor. If the applicant can satisfy the test, it is then for the court to decide whether it is just and convenient to grant the order. An order of this nature is not meant to prohibit the respondent from dealing with its property in the ordinary and proper course of business but only where there is a real risk that the respondent will dissipate or  
25 dispose of the property other than in the ordinary course of business. It is for that reason that both Order 40 r 1 (a) (iii) and Order 41 rule (1) (b) of *The Civil Procedure Rules* require proof that the respondent has dealt with its property or any part of it "with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him or her," or that the circumstances afford a reasonable probability that the  
30 applicant will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the respondent in the suit

I am persuaded by the decision in *Uganda Electricity Board (In Liquidation) v. Royal Van Zanten (U) Ltd*, H.C. Misc Application No. 251 of 2006, where it was decided that;

5 Court ought to be satisfied not only that the defendant is really about to dispose of his property or about to remove it from its jurisdiction but also that the disposal or removal is with intent to obstruct or delay the execution of any decree that may be passed..... the satisfaction must be of the Court as regards these matters and it must be based on some material derived either from the affidavit of the party, applying ... or otherwise. (emphasis added).

10 The standard of candour required in applications for orders of this nature was explained in *Rex v. Kensington Income Tax Commissioners, Ex parte de Polignac (Princess) [1917] 1 K.B. 486 at 509*), and emphasised in *Re Stanford International Bank Ltd [2011] Ch 33*, as follows;

15 ... it is essential that the duty of candour laid upon any applicant for an order without notice is fully understood and complied with. It is not limited to an obligation not to misrepresent. It consists in a duty to consider what any other interested person would, if present, wish to adduce by way of fact, or to say in answer to the application, and to place that material before the judge. .... Even in relatively small value cases, the potential of a restraint order to disrupt other commercial or personal  
20 dealings is considerable. .... An application for a restraint order is emphatically not a routine matter of form, with the expectation that it will routinely be granted. The fact that the initial application is likely to be forced into a busy list, with very limited time for the judge to deal with it, is a yet further reason for the obligation of disclosure to be taken very seriously. In effect [an applicant] seeking an ex parte  
25 order must put on his defence hat and ask himself what, if he were representing the respondent or a third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge.

30 The level of disclosure required was outlined in *Siporex Trade SA v. Comdel Commodities [1986] 2 LR 428 at 437* as follows;

1. The applicant is required to show the utmost duty of good faith and must present his case fully and fairly; as such “fair presentation” cannot be separated from the duty;
2. The affidavit or witness statement in support of the application must summarise the case and the evidence on which it is based;
- 35 3. The applicant must identity the key points for and against the application and not rely on general statements and the mere exhibiting of unhelpful documents;

4. He or she must investigate the nature of the claim alleged and facts relied on before applying and must identify any likely defences;
5. He must disclose all facts, or matters, which reasonably could be taken to be material by the judge deciding whether to grant the application; the question of materiality is not to be determined by the applicant.

The applicant must ensure that the information included in the affidavits sworn in support of the application to the court constitutes full and frank disclosure of all relevant and material facts. This is because applications of this nature are usually brought without notice to the respondent (since to give prior notice would risk the assets being dissipated or removed before the court can hear the matter), and therefore the court makes an initial order having heard only one side of the story. To a great extent, therefore, the court is at that stage relying on the candour and integrity of the applicant and must assume, when granting such orders, that it has not been misled. Any evidence to support the inference that the respondent is, or will dissipate or dispose of assets, must be carefully considered by court. To show that there is a real risk of dissipation, the applicant is required to disclose all relevant evidence showing assets are being divested or dissipated.

Being a discretionary remedy, the court must also consider the proportionality of the order. The effect of the order on the respondent's ability to conduct its business in the ordinary course is a relevant consideration since its liability is yet to be determined. The question of proportionality relates to how to balance the need to preserve the interests of the applicant pending the outcome of the decision of court, protecting the integrity and not undermining the authority of the court's orders and judgment while at the same time protecting the rights of innocent third parties lawfully created in the course of commercial transactions with the respondent.

Ordinarily the applicant will be required to make an undertaking that if it is later determined that the order should not have been granted and the respondent suffers damages as a result of attaching its property, the applicant will pay the respondent the damages. Such an undertaking is almost certainly mandatory, unless dispensed with by court for good reason such as the possibility of stifling the action (see *Customs and Excise Commissioners v. Anchor Foods Ltd*

[1999] 1 WLR 1139). The requirement is meant to weed out speculative or tactical applications and provides the court with added assurance that the applicant is serious and confident in the justness of its cause.

5 Further justification of such a cross-undertaking is to be found in *Re Bloomsbury International Ltd* [2010] EWHC 1150 (Ch), 12, Per Floyd J; -

10 The court makes the litigant give a cross undertaking in damages against the possibility that it may turn out at trial that the order should not have been made. In a case where it does turn out that an order should not have been made, the party restrained may have suffered harm at the behest of the litigant which would result in injustice if there existed no means for it to be redressed. Absent a cross undertaking, the law does not provide any automatic means of redress for a party who is harmed by litigation wrongly brought against him in good faith. The cross undertaking is the means by which the court ensures that it is in a position to do justice at the end of the case

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In the instant case, the averments neither disclose irrefutable evidence to show that there is a real risk that the respondents are removing or about to deal with funds sought to be attached purposely to avoid the possibility of a judgment nor a dissipation, removal or disposal of the funds in a manner clearly distinct from the respondents' usual or ordinary course of business so as to render the possibility of future tracing of the funds remote. To show that there is a real risk of dissipation, the applicant is required to disclose all relevant evidence showing assets are being divested or dissipated (used wastefully or squandered). The applicants have simply not taken sufficient steps to obtain and furnish the information to court. The activities complained of are within the 1<sup>st</sup> respondent's usual or ordinary course of business as a Liquidator of the 2<sup>nd</sup> respondent.

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The Court has neither been furnished with a justification for dispensing with this requirement nor has it found any. Mere possibility or fear of dissipation is insufficient to convince the Court to grant the remedy. As a result, the order sought is disproportionate to the nature of the action and in the circumstances taken as a whole, I am not persuaded that it is just and equitable to grant the order of attachment. The balance of convenience does not favour the applicant. In the final result, for the foregoing reasons, this aspect of the application is dismissed.

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- (ii) Restraining the respondents from distributing the said shs. 14,091,238,475/= held by the 1<sup>st</sup> respondent to the contested\disputed creditors, pending determination of the suit.

5 It has been established by the law and the decided cases that, the main purpose for issuance of a temporary injunction order is the preservation of the suit property and the maintenance of the *status quo* between the parties pending the disposal of the main suit. The conditions for the grant of an interlocutory injunction are now, well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not  
10 normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience (see *E.A. Industries v. Trufoods*, [1972] E.A. 420). The conditions that have to be fulfilled before court exercises its discretion to grant an interlocutory injunction have been well laid out as the following:-

- 15
1. The Applicant has shown a *prima facie* case with a probability of success.
  2. The likelihood of the applicants suffering irreparable damage which would not be adequately compensated by award of damages.
  3. Where in doubt in respect of the above 2 considerations, then the application will be decided on a balance of convenience (see *Fellowes and Son v. Fisher* [1976] I QB 122).

20 These principles can be found in such cases as *American Cyanamid Co v. Ethicon Limited* [1975] AC 396; *Geilla v Cassman Brown Co. Ltd* [1973] E.A. 358 and *GAPCO Uganda Limited v. Kaweesa and another H.C. Misc Application No. 259 of 2013*.

- i. Whether the applicants have a *prima facie* case against the respondents.

25 First, a preliminary assessment must be made of the merits of the suit that has been filed against the respondents, to ensure that there is a “serious question to be tried.” One of the criteria to be applied when considering whether or not to grant a temporary injunction is disclosure by the applicant’s pleadings, of a “serious triable issue,” with a possibility of success, not necessarily

one that has a probability of success (see *American Cyanamid v. Ethicon* [1975] AC 396; [1975] ALL ER 504; *Godfrey Sekitoleko and four others v. Seezi Peter Mutabazi and two others*, [2001–2005] HCB 80 and *Nsubuga and another v. Mutawe* [1974] E.A 487). There is no need to be satisfied that a permanent injunction is probable at trial; the court only needs be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. A serious question is thus any question that is not frivolous or vexatious. As long as the claim is not frivolous or vexatious, the requirement of a *prima facie* case is met.

The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried, and that there is at least a reasonable chance that the applicant will succeed at trial. The applicant needs to show only a reasonable likelihood of success on the merits. The applicant's burden on this part of the test is relatively low, and in most cases an applicant will be able to show that there is a serious question to be tried. The applicant is required to provide reasonably available evidence to satisfy the court with a sufficient degree of certainty that the applicant is the rights-holder and that his or her rights are being infringed, or that such infringement is imminent. The applicant must show a strong probability that the feared conduct and resulting damage will occur.

Although the merits of the parties' respective cases and their relative strengths are not to be considered at this stage, the court notes that the applicant's claim in the suit is premised on allegations of fraud in the conduct of the liquidation. It is trite that a liquidator occupies a position of trust in relation to the company in liquidation. The shareholders or creditors may sue a liquidator for improper conduct based on causes of action derived from breach of statutory duties and also other fiduciary duties imposed on a liquidator, including the duty to act with complete impartiality, independence and transparency in conducting and discharging his duties, and to transact or dispose of the liquidation process promptly or expeditiously or as soon as practicable. Failure to take reasonable steps to bring the liquidation process to an early conclusion may constitute improper conduct which entitles the creditors and shareholders to bring a suit against a liquidator on behalf of the company. On such an application the court may, if it thinks the allegations warrant investigation, examine the conduct of the respondent and order appropriate compensation to be paid to the company.

In the written statement of defence, the respondents contest all these claims and contend that the suit is barred by limitation, does not disclose a cause of action, on account of *res judicata* and is frivolous and vexatious. The pleadings of both parties raise pertinent issues of law and fact. I am therefore satisfied that the claim is not frivolous or vexatious; there are serious questions of law and fact to be tried. Accordingly, a *prima facie* case has been established. The applicants therefore have discharged the onus of proof in this respect.

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- ii. Whether the applicants will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue.

Second, the applicant must show that she will suffer irreparable harm if the court refused to grant the injunction and the respondents were allowed to continue in their course of conduct. “Irreparable” in this context refers not to the size of the harm that would be suffered, but its nature. If the harm could not be quantified by payment of money, or if the harm is not readily calculated or estimated, this part of the test will usually be satisfied. In some cases, the availability of damages often precludes such a finding.

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Irreparable damage has been defined by *Black’s Law Dictionary*, 9<sup>th</sup> Edition page 447 to mean; “damages that cannot be easily ascertained because there is no fixed pecuniary standard of measurement.” It has also been defined as “loss that cannot be compensated for with money” (see *City Council of Kampala v. Donozio Musisi Sekyaya C.A. Civil Application No. 3 of 2000*).

25

The purpose of granting a temporary injunction is for preservation of the parties, legal rights pending litigation. The court doesn’t determine the legal rights to the property but merely preserves it in its current condition until the legal title or ownership can be established or declared. If failure to grant the injunction might compromise the applicants’ ability to assert their claimed rights over the land, for example when intervening adverse claims by third parties are created, there is a very high likelihood of occasioning a loss that cannot be compensated for with money. In this case, the learned Assistant Registrar did not advert to this requirement. This too

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was an error of omission. Regarding the balance of convenience, the learned Registrar did not express an opinion at all. This too was an error of omission.

5 The Court may grant a temporary injunction if it is apparent that the respondent is about to embark on a course of action that would infringe an applicant's rights. The court will particularly be inclined to grant the injunction where there appears to be a *prima facie* breach of property rights, or where the potential harm that could flow should a court order not be granted is difficult or impossible to calculate and quantify at a later stage in the suit.

10 As an injunction is an equitable and discretionary remedy, it is a general rule that an injunction will not be granted where damages are an adequate remedy. Before an injunction is ordered, it must be established that an award of damages is not an adequate remedy. That type of claim can be made in exceptional cases involving breach of contract, akin to a breach of fiduciary duty, where the normal remedies are inadequate and where deterrence of others is an important factor.

15 An injunction ought not to have been granted where the respondent would be restored to the financial position it would have been in had the distributorship not been terminated early. In order to establish that damages are not adequate, the innocent party will generally have to evidence either that a) the subject matter of the contract is rare or unique or b) damages would be financially ineffective. Damages may be found to be an inadequate remedy in the following  
20 circumstances, among others: (a) the damage is impossible to repair; (b) the damage is not easily susceptible to be measured in economic terms; (c) the harm caused is not a financial one; (d) monetary damages are unlikely to be recovered; (e) an award of damages is inappropriate in light of the importance of the interest in issue; and (f) the harm has not yet occurred or the wrong is continuing. If there is an adequate alternative remedy, the claimant should pursue such remedy.

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Examples of rare or unique subject matters might be the sale of an interest in land (as no two pieces of land are the same) or a one-off antique vase. In both scenarios, damages may not be an adequate remedy because no market substitute exists, and the innocent party would therefore be unable to secure equivalent performance (no matter what the price). Examples of circumstances  
30 where damages may be financially ineffective might be where the defaulting party is insolvent and unable to pay; if damages would be difficult to quantify (e.g. a contract to indemnify); if an

order for the payment of damages would be difficult to enforce (e.g. because any enforcement would need to be in a foreign country); or if an express term of the contract restricts or limits the damages recoverable for that particular breach.

5 I find that the pleadings show that it is common ground that the property at stake is a sum of shs.  
14,091,238,475/= which the 1<sup>st</sup> respondent plans to distribute to creditors whom the applicants  
consider to be fictitious. In the event that the applicants succeed in that claim, the remedy would  
be an order of a refund and an award of general damages to the 2<sup>nd</sup> respondent rather than  
themselves. This therefore essentially is a case in which, if the applicants succeed, the court will  
10 be required to make an award of damages to compensate the 2<sup>nd</sup> respondent as rights holders for  
economic injury suffered through the violation of its property rights, if proved, and this is not  
such a daunting task. I therefore do not find this to be case in which the applicants are likely to  
suffer loss or injury that cannot be quantified by payment of money, or that is not readily  
calculated or estimated. The applicants therefore have not discharged the onus of proof in this  
15 respect.

iii. Balance of convenience (whether the threatened injury to the applicant outweighs  
the threatened harm the injunction might inflict on the respondents).

20 When the court is in doubt considering the outcome of its consideration of the first two factors,  
the third part of the test involves the court assessing which of the parties would suffer greater  
harm from the granting or refusal of the injunction pending trial. Unless the material available to  
the court at the hearing of the application for an interlocutory injunction fails to disclose that the  
applicant has any real prospect of succeeding in his or her claim at the trial, the court should go  
25 on to consider whether the balance of convenience lies in favour of granting or refusing the  
interlocutory relief that is sought.

This part of the test is referred to as the “balance of convenience.” Balance of convenience  
means comparative mischief or inconvenience that may be caused to the either party in the event  
30 of refusal or grant of injunction. It is necessary to assess the harm to the applicant if there is no  
injunction, and the prejudice or harm to the respondent if an injunction is imposed. The courts

examine a variety of factors, including the harm likely to be suffered by both parties from the granting or refusal of the injunction, and the current *status quo* as at the time of the injunction.

5 The Court has the duty to balance or weigh the scales of justice by ensuring that the suit is not rendered nugatory while at the same time ensuring that a respondent is not impeded from the pursuit of his or her contractual rights. No doubt it would be wrong to grant a temporary injunction order pending disposal of the suit where the suit is frivolous or where such order would inflict greater hardship than it would avoid. Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application, some disadvantages which his or her ultimate success at the trial may show he or she ought to have been spared and the disadvantages may be such that the recovery of damages to which he or she would then be entitled would not be sufficient to compensate him or her fully for all of them.

15 The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his or her succeeding at the trial is always a significant factor in assessing where the balance of convenience lies. The governing principle is that the court should first consider whether if the applicant were to succeed at the trial in establishing his or her right to a permanent injunction, he or she would be adequately compensated by an award of damages for the loss he or she would have sustained as a result of the respondent's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the respondent would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the applicant's claim appears to be at this stage.

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If, on the other hand, damages would not provide an adequate remedy for the applicant in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the respondent were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated by the applicant for the loss he or she would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages would be an adequate remedy and the applicant

would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

For example, if the *status quo* is that the respondent has been carrying on the activity complained of for a long period of time, and the applicant knew or should have known of the activity, but has not previously objected, the court will be reluctant to make an order preventing the respondent from continuing the conduct. On the other hand, if the respondent has only recently embarked on the conduct and has not expended significant resources, then this may well place the balance of convenience in favour of the applicant.

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To the contrary, if the respondent is enjoined temporarily from doing something that he or she has not done before, the only effect of the interlocutory injunction in the event of his or her succeeding at the trial is to postpone the date at which he or she is able to embark upon a course of action which he or she has not previously found it necessary to undertake; whereas to interrupt him or her in the conduct of an established enterprise would cause much greater inconvenience to him or her since he or she would have to start again to establish it in the event of his or her succeeding at the trial. If it is determined that an injunction is an appropriate remedy, the terms of the order should be drafted so as to be no wider than what is necessary to provide an adequate remedy for the wrong that has been proven and to protect the plaintiff's rights.

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The relevant considerations in the instant case are that the sum of money sought to be enjoined accrues from a process of liquidation whose distribution is guided by law. The court will thus be reluctant to make an order preventing the 1<sup>st</sup> respondent from continuing the activity. The applicants seek the interlocutory injunction so as to protect the 2<sup>nd</sup> respondent against injury by violation of its right for which I have already found it could be adequately compensated in damages if the uncertainty were resolved in its favour at the trial. The applicant's need for such protection must be weighed against the corresponding need of the 1<sup>st</sup> respondent to be protected against injury resulting from being prevented from performing its legally imposed duties for which it may not be adequately compensated in damages if the uncertainty were resolved in its favour at the trial. Having done so, I find that the balance of convenience in favour of the respondents.. In light of all the foregoing, the order, if granted, would inflict greater hardship

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than it would avoid, hence the balance favours not granting the order sought. This aspect of the application is accordingly dismissed.

5 (iii) Bankers' Books and any entries thereof to show further and better particulars of statement of liquidation account where the shs. 14,091,238,475/= is currently held.

10 A copy of an entry in a banker's book may be received in all legal proceedings as *prima facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded, provided it is shown that the book was one of the ordinary books of the bank, that the entry was made in the usual and ordinary course of business, that the book is in the custody and control of the bank, and that the copy has been examined with the original entry and is correct.

15 According to section 1 (a) *The Evidence (Banker's Books) Act*, any person, company or corporation carrying on the business of banking in Uganda, is a bank or banker. The business of banking involves receiving or accepting money on deposit, and may include the performance of related activities that are not exclusive to banks, including paying drafts or checks, lending money or any other activity authorised by applicable law. Among the functions of the 1<sup>st</sup> respondent as prescribed by section 4 (2) (d), (h) and (i) of *The Bank of Uganda Act*, is to be the  
20 banker to the Government, be the banker to financial institutions and be the clearinghouse for cheques and other financial instruments for financial institutions. In performing those functions, the 1<sup>st</sup> respondent receives or accepts money on deposit. *Corpus Juris Secundum* Vol. 9, "Banks and Banking," defines the business of banking as follows;

25 Banking is the business or employment of a bank or banker, and as defined by law and custom consists of receiving deposits payable on demand, discounting commercial paper, making loans of money on collateral security, issuing notes payable on demand and intended to circulate as money, collecting notes or drafts deposited, buying and selling bills of exchange, negotiating loans and dealing in  
30 negotiable securities.... It is said, however, that any person engaged in the business carried on by banks of deposit, of discount or of circulation is doing a banking business although but one of these functions is exercised



The business of banking involves receiving money on current account or deposit; accepting bills of exchange; making, discounting, buying, selling, collecting or dealing in bills of exchange, promissory notes and drafts whether negotiable or not, buying, selling or collecting coupons; buying or selling foreign exchange by cable transfer or otherwise; issuing for subscription or purchase or underwriting the issue of loans, shares or securities; making or negotiating loans for commercial or industrial objects; or granting and issuing letters of credit and circular notes: except in so far as such operations form part of and are for the purpose of and incidental to the conduct of a business carried on for other purposes by the company, firm or individual by whom such operations are transacted.

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“Having a place of business where deposits are received and paid out on cheques, and where money is loaned upon security, is the substance of the business of a bank (see *Warren v. Shook* 50 A.L.R. 1337 at 1338). The principal part of a banker’s business is receiving money on deposit, allowing the same to be drawn against as and when the depositor desires, and paying interest on the amounts standing on deposit (see *Bank of Chettinad v. Com.of Income Tax [1948] A.C. 378; Re Bottomgate Industrial Co-operative Society (1891), 65 L.T.R. 712*, approved in *R. v. Industrial Disputes Tribunal [1954] 2 All E.R. 730*). Although commercial banks take current accounts, accept deposits of money on current account or otherwise, pay cheques drawn on themselves and collect cheques for their customers, to grant loans, to issue its promissory notes, or to perform any one or more of those functions. which functions the 1<sup>st</sup> respondent as the Central Bank may not be engaged in, that by itself does not take it outside the ambit of the definition in section 1 (a) *The Evidence (Banker’s Books) Act*.

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Some of the identifying functions are essential to the conception, but very few are exclusive activities of bankers. Chequing privileges accorded depositors, and general dealing in credit, are characteristic of and perhaps essential to banking. The conclusion which seems to be deducible is that the business of banking consists in dealing in money, the precious metals, and in bonds and negotiable securities. It is this dealing that confers the power of lending on them or of purchasing them, whichever the bank directors may deem most for the advantage of the corporation, which constitutes the institution a bank. When a business carries on even one of the primary activities,

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it may properly be called banking. It is for that reason that the 1<sup>st</sup> respondent, by carrying on the business of banking in Uganda, is subject to *The Evidence (Banker's Books) Act*.

*The Evidence (Banker's Books) Act*, performs a dual purpose of relaxing the “best evidence” rule and the hearsay rule. The Act allows a copy of an entry in a banker’s book to be produced, rather than the original entry itself, and it allows the entry (which could be proved by a duly authenticated copy) to be admitted as proof of the truth of its contents. The Act may not be invoked simply because the adversary is a bank. It applies to entries made in the usual course of banking business in books which were, at the time the entry was made, one of the ordinary books of the bank concerned as required by specific regulatory duties to maintain records. “Bankers’ books” are defined as including ledgers, day books, cash books, account books and all other books used in the ordinary business of the bank, maintained for regulatory compliance (see section 1 (b) of *The Evidence (Banker's Books) Act*). Paid cheques and paying-in slips retained by a bank after the conclusion of a banking transaction to which they relate do not fall within that definition (see *Barker v. Wilson* [1980] 1 WLR 884; [1980] 2 All ER 81 and *Williams v. Williams* [1988] QB 161).

The activities for which the 1<sup>st</sup> respondent is now sued do not arise from the conduct of its usual course of banking business, but rather its roles of supervision, regulation, control and disciplining of all financial institutions under section 4 (2) (j) of *The Bank of Uganda Act*, and that of seizure, management, control and closure on account of the 2<sup>nd</sup> respondent’s inability to meet its obligations to its depositors and other creditors, in accordance with sections 30 and 31 (4) of *The Financial Institutions Act*. The application therefore is erroneous to the extent that it seeks discovery of documents to which *The Evidence (Banker's Books) Act* is inapplicable. The Act does not create a right to discovery where there is none. The Act was never intended to cover everything that a bank has, or does, or writes down, in the course of its ordinary business as a bank. The applicants have failed to link the documents requested for sufficiently clearly, to specific regulatory duties to maintain records as are imposed on a bank in the conduct of its usual course of banking business.

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(iv) Orders of discovery of; - (a) the list of paid creditors, un paid creditors, verified and unverified Creditors; (b) the list of documents showing the utilization of the said shs. 14,091,238,475/=; (c) the documents showing the source, disbursement and or expenditure of US \$ 11,450,000 involved in the purchase of the 49 shares of the Uganda Commercial Banks limited; (d) the documents related to all transactions from bidding, granting exclusivity, to execution of the Debt Purchase and Transfer Agreements, final Reports submitted by JN Kirkland, Ms Octavian Advisors PLC, Nile River Acquisition Company and SIL investment Limited; (e) documents relating to the liquidation's costs of shs. 8,219,188,997/=; and (f) documents related to the sale of Plot 30 Kampala Road and Plot 66 William Street.

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.

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.

5 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*  
10 *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  
15 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,  
20 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.

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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  
30 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 explain 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  
5 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  
10 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.

15

Having examined the applicants' pleadings in the suit and the defences thereto, I find that an application seeking discovery of "the documents related to all transactions from bidding, granting exclusivity, to execution of the Debt Purchase and Transfer Agreements, final Reports submitted by JN Kirkland, Ms Octavian Advisors PLC, Nile River Acquisition Company and  
20 SIL investment Limited," is too vague, ambiguous and overbroad that it does not identify any particular class or type of documents, is not reasonably calculated to lead to the discovery of admissible evidence but rather constitutes a request to peruse everything in the respondents' files relating to those transactions, which in effect is tantamount to a fishing expedition. It potentially encompasses information far beyond the claims and defences at issue in this case. Although the  
25 law generally favours discovery, the scope of discovery is not limitless; the request must be precise and exact as well as relevant to the case. A party moving to compel production carries the initial burden of establishing, with specificity, that the requested documents are relevant. This aspect of the request is overbroad and unduly burdensome; it lacks specificity as to time and subject matter such that it would take an unreasonable amount of time to fulfil in relation to the  
30 reasonable needs of the case (proportionality). The Court is unable to determine their relevance

and materiality, hence the applicants have not satisfied Court that this aspect of the discovery sought is relevant and proportional to the needs of the case.

As regards the rest of the documents sought, I find that the application is sufficiently explicit to  
5 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. The information sought to be discovered is material and relevant to the extent  
10 that the applicants intend to use its content to advance their already pleaded case, which is that  
the process of liquidation of the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent is replete with incidents of  
fraud.

ii. Not otherwise privileged or protected by law.

15 Discovery covers any non-privileged matter that is relevant to any party's claim or defence and  
proportional to the needs of the case. 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  
20 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.

25 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  
30 their respective affidavits in reply. I find that none of the documents sought may be excluded  
from discovery on basis of exemption or immunity.

iii. Documents in the respondents' possession, custody, control or power.

To be subject to production or inspection, the documents sought must be within the respondent's  
5 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  
10 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  
15 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  
20 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  
25 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.

30



It is the respondents' case that the lists of paid creditors, unpaid creditors, verified and unverified Creditors, showing the utilisation of the shs, 14,091,238,475/= already forms part of the pleadings before Court. Examination of the record has proved this to be the true position. Where the information sought may be derived or ascertained from public sources and the burden of deriving or ascertaining it is substantially the same for the applicant as for the respondent, it is a sufficient answer to such application to specify the records from which the information may be derived or ascertained. A specification of the public source in sufficient detail to permit the applicant to locate and to identify, as readily as can the respondent, the records from which the answer may be ascertained, is an adequate response. For that reason the Court will not issue an order in respect of this category of information. Concerning documents related to the sale of Plot 30 Kampala Road and Plot 66 William Street, the Court having previously found that the claim in respect thereof vests in corporate entities which are not party to this litigation, this information is no longer relevant to this case.

As regards documents showing the source, disbursement and or expenditure of US \$ 11,450,000 involved in the purchase of the 49 shares of the Uganda Commercial Banks limited, and documents relating to the liquidation's costs of shs. 8,219,188,997/= it is apparent that these documents are neither public documents nor 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, all of them are in the ostensible possession, custody, or control of the 1<sup>st</sup> respondent.

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  
5 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  
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  
15 should attempt first to obtain the adversary's voluntary cooperation, by serving a notice to produce documents on the other party. Parties must first confer in a good faith effort to resolve any disputes related to pre-trial discovery. 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  
20 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  
25 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  
30 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.

5

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.

Counsel must certify that good faith efforts were made and describe those efforts by date and means of communication. The Court may deny relief if counsel fails to abide by this obligation. The Court should be invited to make the order only where the respondent has refused or failed to respond in full to the applicants' discovery requests. The respondents having been served with a request to which they did not make apposite response, the Court holds the view that attempts at voluntary co-operation were futile, in that case necessitating an order of discovery.

In conclusion, I find that the applicant has made out a proper case for the grant of an order of discovery as against the 1<sup>st</sup> respondent only with regard to some of the documents and not others. It is for that reason that the application is hereby allowed in part. Consequently, the 1<sup>st</sup> 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 documents showing the source,

disbursement and or expenditure of US \$ 11,450,000 involved in the purchase of the 49 shares of the Uganda Commercial Banks limited, and documents relating to the liquidation's costs of shs. 8,219,188,997/= The costs of the application are to abide the outcome of the suit.

5 Delivered electronically this 10<sup>th</sup> day of March, 2023  
**Mubiru**.....

.....**Stephen**

Stephen Mubiru  
Judge,  
10<sup>th</sup> March, 2023.

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