

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**MISCELLANEOUS APPLICATION NO. 2042 OF 2023**  
**(ARISING FROM CIVIL SUIT NO. 219 OF 2017)**

**MUNYANGABE EMMANUEL**  
**(Suing through his lawful attorney**  
**MUGISHA CLEMENT PACIFIQUE)**

**] APPLICANT**

**VERSUS**

**1. EQUITY BANK (U) LIMITED**  
**2. COMMISSIONER LAND REGISTRATION**

**] RESPONDENTS**

**Before: Hon. Justice Ocaya Thomas O.R**

**RULING**

**Introduction:**

This application was brought by way of Notice of Motion under Section 98 of the Civil Procedure Act, Cap 71, Orders 41 Rule 1 and 52 Rules 1 and 2 of the Civil Procedure Rules, SI 71-1 seeking the following orders:

The Commissioner Land Registration doth issue certified copies of the following documents to the 1<sup>st</sup> Counter defendant –

- i. A copy of the transfer from between Jean Paul Niyonzima and Marie Grace Mfanshatuyishime as vendor and Emmanue Munyagabe and Mukamana Joseph as purchasers in respect of the land comprised in Busiro Block 349 Plot 308 at Nalumunye.
- ii. A copy of the certificate of title for the land comprised in Busiro Block 349 Plot 308 Nalumunye.
- iii. A copy of the transfer form between Jomayi Property Consultants Ltd as Vendor on one hand and Jean Paul Niyonzima and Marie Grace Mfanshattuyishime as

5 Purchaser on the other in respect of the land comprised in Busiro Block 349 Plot 306 at Nalumunye.

iv. A copy of the certificate of title for the land comprised in Busiro Block 349 Plot 306 at Nalumunye.

10 Further orders against the 1<sup>st</sup> Respondent, Equity Bank (U) Ltd doth issue certified copies of –

i. Letter of reference BG/GEN/028/2016 dated 28<sup>th</sup> July 2016 from M/s Byamugisha Gabriel & Co. Advocates addressed to the Credit Manager, Equity Bank, Nakulabye Branch in respect of a Mortgage to Munyangabe Emmanuel on  
15 land comprised in Busiro Block 349 Plot 306 at Nalumunyi.

ii. Letter of reference BG/GEN/029/2016 dated 21<sup>st</sup> September, 2016 from M/s Byamugisha Gabriel & Co. Advocates addressed to the Credit Manager, Equity Bank, Nakulabye Branch in respect of a mortgage to Munyangabe Emmanuel on  
land comprised in Busiro Block 349 Plot 306 at Nalumunyi.

20 iii. All documents supporting the payment of UGX 31,365,200/= to Premier Credit as the outstanding loan account of Marie Grace Mfashatuyishime and Jean Paul Niyonzima.

iv. All documents of release of the title of Busiro Block 349 Plot 306 at Nalumunyi by Premier Credit to Equity Bank (U) Ltd.

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This application is supported by the affidavit of Mr. Mugisha Pacifique, the lawful Attorney of the Applicant and the arguments briefly are that –

Around 15<sup>th</sup> March 2014 Jean Paul Niyonzima and Marie Grace Mfashatuyishime sold  
30 to the Applicant land comprised in Busiro Block 349 Plot 306 measuring 0.109 which is neighboring the suit land in HCCS No. 219 of 2017 and having completed the aforesaid transaction, Jean Paul Niyonzima and Marie Grace Mfashatuyishime mortgaged to Premier Credit their land comprised in Busiro Block 349 Plot 306 land at Nalumunyi but the same was about to be a subject of foreclosure to which the Applicant was approached  
35 to rescue the vendors and purchased the suit land, paid off the mortgage/loan facility owed to Premier Credit and gave the Vendors the balance of the purchase price. That for that purpose, the Applicant obtained a loan facility from Equity Bank (U) Ltd to facilitate the purchase of the suit land.



5 That the registered proprietors, Marie Grace Mfashatuyishime and Jean Paul Niyonzima transferred the suit land and the same was registered in the names of, Munyangabe Emmanuel the Applicant which was subsequently mortgaged to and handed over to Equity Bank (U) Ltd.

10 That the Applicant was later shocked when Marie Grace Mfashatuyishime filed a counterclaim seeking cancelation of the Applicant's title of the suit land on grounds that she never agreed to the sale of the suit land and that her consent was not given in accordance with the law as the documents of sale and transfer were written in English yet she is illiterate in the English language.

15 That it is in the interest of Justice that orders be granted and the aforementioned documents be obtained to enable Court to arrive at a just conclusion in HCCS. 219 of 2017.

20 The 1<sup>st</sup> Respondent filed an affidavit in reply deponed by Mr. Isiko Charles, a legal officer in the 1<sup>st</sup> Respondent Bank and briefly he stated that –

That the Applicant seeks certified copies of letters authored by M/s Byamugisha Gabriel & Co. Advocates dated 28<sup>th</sup> July 2016 and 21<sup>st</sup> September 2016 addressed to the Credit  
25 Manager, Equity Bank Nankulabye branch and the 1<sup>st</sup> Respondent cannot give certified copies of documents which were not authored by them and, the 1<sup>st</sup> Respondent is not possession of the said letters being sought by the Applicant.

That the Applicant is also seeking all documents supporting the payment of UGX  
30 31,365,200/= to Premier Credit as the outstanding loan account of Marie Grace Mfashatuyishime and Jean Paul Niyonzima which are not of the 1<sup>st</sup> Respondent as the money was deposited on the Applicant's account on the 29<sup>th</sup> of June 2016 and the 1<sup>st</sup> Respondent was not party to the transaction between the Premier Credit and Marie Grace Mfashatuyishime and Jean Paul Niyonzima. The deponent attached a copy of the  
35 Applicant's loan statement marked annexure A.

That the Applicant also requested for all documents of release of the title of Busiro Block 349 Plot 306 at Nalumunyi by Premier Credit to the 1<sup>st</sup> Respondent. That it is common

5 practice in banking that the release of mortgage documents is handed over to the borrower who was Marie Grace Mfashatuyishime and Jean Paul Niyonzima.

That the 1<sup>st</sup> Respondent cannot offer certified copies of documents which were not authored by it as the same documents being requested for were authored by Premier  
10 Credit.

Further that the Applicant brought the application under the wrong law and they intend to raise an objection to the same.

The Applicant filed an affidavit in rejoinder deponed by Mr. Mugisha Pacifique and he  
15 responded that –

In rejoinder that he knows by letter dated 14<sup>th</sup> day of June 2016 from the 1<sup>st</sup> Respondent to Premier Credit Ltd, the 1<sup>st</sup> Respondent requested for information and all documents relating to the loan and mortgage held by Jean Paul Niyonzima and Marie Grace Mfashatuyishime in respect of the suit land and it is desired that the Applicant have a  
20 copy of the said letter.

That he also knows that by the letter dated 15<sup>th</sup> June 2016 from Premier Credit Ltd to the 1<sup>st</sup> Respondent's letter of 14<sup>th</sup> June 2016 disclosing and clarifying the full details of the loan and mortgage of the said Jean Paul Niyonzima and Marie Grace Mfashatuyishime  
25 held with them in respect of the suit land and it is desired that we have a copy of the said letter. The deponent attached copies of letters marked "U" and "V" respectively.

That the 1<sup>st</sup> Respondent confirmed that she deposited money on the Applicant's Account on the 29<sup>th</sup> day of June 2016 and she attached bank statement.  
30

That the bank statement from the 1<sup>st</sup> Respondent further indicates that on the 30<sup>th</sup> June 2023, a transfer of UGX 25,546,200/= from the said Applicant's account to Premier Credit Ltd was made.

35 That the revelation further stamps the fact that the 1<sup>st</sup> Respondent participated in the transactions that led to pay off the loan held by Maria Grace and Jean Niyonzima and it is the documents regarding their involvement in the process to wit the certified copy of the bank statement and documents relating to transfer of funds from the Applicant's

5 Account which is domiciled in their bank and correspondence in regards to the subject that we desire to access.

Further that in paragraph 11 of the 1<sup>st</sup> Respondent's Written Statement of Defense, the 1<sup>st</sup> Respondent admitted to having received the certificate of title for the suit land described as land comprised in Busiro Block 749 Plot 306 at Nalumunye upon payment of UGX 31,365,200/= by the Applicant to Premier Credit Ltd on the 29<sup>th</sup> June 2016. The deponent attached a copy of the 1<sup>st</sup> Respondent's Written Statement of Defense as annexure "S".

15 It is pertinent to note at this stage that the 2<sup>nd</sup> Respondent, Commissioner Land Registration was not a party in the main suit and has not filed a response or entered an appearance in this application despite being served with the notice on the 11<sup>th</sup> December 2023 and the same was acknowledged with the official stamp appended on the hearing notice and, an affidavit of service to that effect was sworn by a process server Mrs. Zawedde Pauline. The affidavit of service was filed in Court on the 14<sup>th</sup> of December 2023.

The brief background of this matter is that the Applicant is the Plaintiff in Civil Suit No. 219 of 2017 instituted against the 1<sup>st</sup> Respondent as 1<sup>st</sup> Defendant, Marie Grace Mfashatuyishime, as 2<sup>nd</sup> Defendant and Jean Paul Niyonzima, as the 3<sup>rd</sup> Defendant respectively seeking damages for breach of contract and fiduciary duty of care among others. The 2<sup>nd</sup> Defendant/ counterclaimant filed a counterclaim arguing lack of consent in the transaction of the suit land hence this application by the Applicant seeking to obtain documents relating to the transaction of suit land.

30

### **Representation:**

The Applicant was represented by the law firm of M/s Datum Advocates (formerly Kibuuka Rashid & Co. Advocates) while the 1<sup>st</sup> Respondent was represented by M/s OSH Advocates and the 2<sup>nd</sup> Respondent did not enter appearance and was unrepresented.

35

### **Evidence and Submissions:**

The Applicant led evidence by way of an affidavit deposed by Mr. Mugisha Pacifique, the lawful Attorney of the Applicant in support of the application and the 1<sup>st</sup> Respondent



5 equally led evidence by way of an Affidavit in reply deposed by Mr. Isiko Charles, a legal officer in the 1<sup>st</sup> Respondent Bank. The 2<sup>nd</sup> Respondent did not lead evidence.

Both the Applicant and 1<sup>st</sup> Respondent filed submissions in support of their respective cases. I have considered all the submissions of the parties before coming to the ruling  
10 below, suffice to say that I have not seen the need to reiterate the same below but will refer to them where appropriate in the decision.

### **Decision:**

#### **PART ONE: DECISION ON PRELIMINARY POINT OF LAW**

15 The 1<sup>st</sup> Respondent raised a Preliminary point of law on the propriety of this application, that the Applicant brought this application under the wrong law.

The 1<sup>st</sup> Respondent contended that the action sought is a discovery under Order 10 Rule  
20 12 and 24 of the Civil Procedure Rules.

A preliminary objection raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It is thus based on a commonly accepted set of facts as pleaded by both parties. It cannot be raised if any fact has to be ascertained  
25 or if what is sought is the exercise of judicial discretion. Preliminary objections relate to points of law, raised at the outset of a case by the defence without going into the merits of the case. In any preliminary objection therefore, there is no room for ascertainment of facts through affidavit oral evidence. See **Yaya Farajallah v Obur Ronald & Ors HCCA 81/2016**

30 Matters that require evidence cannot be entertained as preliminary objections but must instead be resolved in the main suit. See **Lweza Clays & Another vs Tropical Bank & Another, SCCA 31 of 2018, Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696.**

35 In determining a preliminary point of law, the court must consider the pleadings and assume the contents therein to be correct. See **Mukisa Biscuit Manufacturing Co v West End Distributors [1969] EA 696, N. A. S. Airport Services v Attorney General [1959] EA 53.**

5 Counsel for the 1<sup>st</sup> Respondent contended that what the present application is really an application for discovery which ought to have been premised on Order 10 Rules 12 and 24 and ought to have been brought by chamber summons and not the notice of motion employed by the Applicant. The 1<sup>st</sup> Respondent also contended that the Applicant could not have premised its application under Section 98 of the Civil Procedure Act as the same  
10 only applies where there isn't a specific provision conferring a remedy, in which circumstances this court's inherent powers, preserved by the above provision may be invoked.

This Application was brought by way of a Notice of Motion under Section 98 of the Civil  
15 Procedure Act, Cap 71, which gives Court discretionary powers and Order 52 Rules 1 and 2 provides for the mode of proceeding by way of Notice of Motion where the rules does not provide for a particular mode of proceeding.

Order 10 rule 12(1) of the Civil Procedure Rules provides that:

20 *"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. "*

Order 10 rule 24 provides that

25 *"Applications under this Order shall be by summons in chambers."*

I agree with the submissions of Counsel for the 1<sup>st</sup> Respondent that this is essentially an application for discovery. What is more, the Applicant premised their application on Order 41 of the CPR which is inapplicable in the present circumstances.

30 The question then becomes, what is the effect of proceeding by the wrong law and the wrong procedure? it is now settled law that reliance on the wrong law, or the presentation of an application under the wrong law is not fatal, as long as the court has jurisdiction to entertain the application and the procedure utilised can accommodate the application.

35 See **Article 126(2)(e), Saggu v Roadmaster Cycles Ltd 2002 1 EA 258. Gids Consults Limited & Anor v Naren Mehta HCMA 864/2022, Joselyne Kalembe v Buildnet Construction Materials and Hardware H CIP 7/2022.**



5 In the instant case, the application was brought before a court with the jurisdiction to entertain it, but by notice of motion instead of chamber summons. The distinction between the two modes of commencement is very small and both modes rely on a motion supported by affidavit evidence. In my view, whereas the wrong commencement mode was employed, it is nonetheless one that can support the application. The situation would  
10 have been different, for example, if this application had been filed in a Magistrate's court (which wouldn't have jurisdiction) or by a non-compatible mode.

I therefore take the view that such an error is not fatal and would not warrant the dismissal of this application. Accordingly, I overrule this objection.

## **PART II: DECISION ON MERITS OF THE APPLICATION**

**Order 10 Rule 12 (1)** of the CPR provides thus

"Any party may, without filing any affidavit, apply to the court for an order directing any  
20 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 key considerations for the grant of an application for discovery or production are;

(a) The discovery or production should be necessary for the determination of the dispute between the parties.

25 (b) The documents sought are in the possession/power of the party against whom discovery or production is sought.

(c) The discovery or production is not a "fishing expedition" by the seeking party.

### Necessity of Discovery

In **Simbamanyo Estates Limited & Anor v Equity Bank Uganda Limited & Ors**, HCMA **583/2022**, the court explained the requirement for relevance in applications of this manner in this way

35 "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



5 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  
10 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  
15 worth,” since after all, it is for the Court ultimately to judge the sufficiency or weight of  
the relevant evidence.

In **Kabaka of Buganda v Male Mabirizi CACA 187/2017**, the court held that the documents sought must advance the applicant’s case or destroy the Respondent’s case.

20 The Applicant contended that the purpose of the application for discovery was to demonstrate the complicity of the 2<sup>nd</sup> Counterclaimant in the impugned transaction, which would run contrary to her averments in the pleadings that the same transaction was entered without her consent, and the documents were executed in a language she is not familiar with.

25 In my view, the Applicant has demonstrated in respect of all but one of the documents sufficiently the necessity and evidential value of the impugned documents, and I return the finding that this requirement is made out.

30 The Applicant sought a copy of the transfer form and certificate of title in respect of land described as Busiro Block 349 Plot 308 at Nalumunye. My reading of the pleadings and evidence shows that the suit property is Busiro Block 349 Plot 306 and the Applicant did not demonstrate the need for the above stated documents in respect of Plot 308. I therefore find that the relevance of these documents has not been made out.

35



5 The documents sought are in the possession/power of the party against whom discovery or production is sought.

I will find determine the questions as to custodianship of all the documents in respect of which discovery against the 1<sup>st</sup> Respondent is sought with the exception to the certificate of the title and transfer forms in respect of Busiro Block 349 Plot 308.

10

In the **Sibamanyo Case** (*supra*), the court explained the requirement for possession or control in the following manner:

“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  
15 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.”

20

Counsel for the 1<sup>st</sup> Respondent contended that the documents referred to are not in its control because

(a) It does not have possession of the said letters

(b) The documents supporting the payment of UGX 31,365,200 are not in  
25 the possession of the 1<sup>st</sup> Respondent as the transfer was made on 29 June 2016 and the 1<sup>st</sup> Respondent was not a party to the transactions with Premier Credit Limited [“PCL”]

(c) The documents of release of the title to land described as Busiro Block 349 Plot 306 are not in the 1<sup>st</sup> Respondent’s possession as they were  
30 handed over to the borrower.

In respect of the documents referred to in (b) above, it was the Applicant’s evidence that the 1<sup>st</sup> Respondent wrote to PCL seeking information and all documents relating to the loan between PCL and John Paul Niyonzima [“JPN”] and Marie Grace Mfashatuyishime  
35 [“MGM”] vide a letter dated 14 June 2016, that the said details were provided in a letter by PCL to the 1<sup>st</sup> Respondent dated 15 June 2016.



5 What is clear is that the 1<sup>st</sup> Respondent facilitated the release of the mortgage by PCL by  
advancing to the borrower the sums owing on the loan. It is unlikely that the 1<sup>st</sup>  
Respondent would advance money for the satisfaction of the debt of JPN and MGM  
without corresponding contractual arrangements with them. I found the contentions  
made by the 1<sup>st</sup> Respondent on this head rather unconvincing since the evidence shows a  
10 record of its participation.

Regarding documents mentioned in (a) and (c) above, and also applicable to documents  
in (b), the starting point is Section 46(6) and (7) of the Financial Institutions Act which  
provides for the preservation of transactional documents and information for a minimum  
15 ten-year period. Accordingly, it is my firm view that the said documents are within the  
control of the 1<sup>st</sup> Respondent.

I however reject the submission of Counsel for the Applicant that the Evidence (Banker's  
Books) Act is applicable in the instant case. The definition of "Banker's Books" in Section  
20 2(b) of the said act does not cover correspondence, contracts or security documents in  
my view. The act is confined to financial and other entries dealt with in accounting books  
(including financial records and books of first entry).

As regards the question of certification, the 1<sup>st</sup> Respondent contended that the documents  
25 sought are authored by others and cannot be certified by it. First, one of the documents  
sought is the letter dated 14<sup>th</sup> June 2016 said to be authored by the 1<sup>st</sup> Respondent and  
therefore, this can be certified by it. As regards the other letters and documents, the  
purpose certification is not always to demonstrate the source of the document from the  
first author.

30 A recipient of a document may, in appropriate circumstances, certify that the copy  
provided is an accurate copy of the document they received. This, in my view, is what is  
sought. I therefore found the contentions of counsel for the 1<sup>st</sup> Respondent to this end  
unhelpful.

35 As regards the transfer forms and copies of the certificate of title in respect of Busiro Block  
349 Plot 308, I take the view that the relevance of the certificate of title and transfer forms  
in respect of Busiro Block 349 Plot 308 has not been demonstrated to me. I have reviewed

5 the plaintiff, defence and the pleadings in this application and all of them are confined to  
Busiro Block 349 Plot 306 not Plot 308. In the plaintiff, the reliefs sought by the Applicant  
deal with Plot 306 and not 308. There isn't any reference of Plot 308 and I have not been  
provided with an explanation as to the relevance or effect of the documents sought in  
respect of Plot 308 to the Applicant's claim herein. Therefore, I do not find the need to  
10 comment about whether the prayer for discovery of these documents meets the rest of  
the discovery criteria.

The discovery or production is not a "fishing expedition" by the seeking party

As a principle of law, applications of this nature will be rejected if they are being used by  
15 a party to found a claim [what is famously called "a fishing expedition"]. See **Real  
Engineering Contractors v Rubanda District Local Government HCMA 53/2021**.

As noted above, the Applicant contended that the purpose of the application for discovery  
was to demonstrate the complicity of the 2<sup>nd</sup> Counterclaimant in the impugned  
20 transaction, which would run contrary to her averments in the pleadings that the same  
transaction was entered without her consent, and the documents were executed in a  
language she is not familiar with. In my view, the Applicant has demonstrated sufficiently  
the necessity and evidential value of the impugned documents, and I am convinced that  
this application is not a fishing expedition.

25 **Conclusion:**

In the premises, I make the following orders;

- 30 (a) This Applicant's application for discovery of the certificate of title in  
respect of Busiro Block 349 Plot 308 is declined.
- (b) The Applicant's application for discovery of the transfer form between  
Jean Paul Niyonzima and Marie Grace Mfashatuyishime as vendors  
and Emmanuel Munyangabe and Mukama Joseph as purchasers in  
respect of Busiro Block 349 Plot 308 is declined.
- 35 (c) Discovery of all other documents indicated in the Applicant's notice of  
motion is allowed.



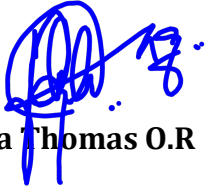
5 (d) The Respondents are hereby ordered to provide the Applicant with the documents in (C) above within thirty (30) days from the date of this ruling.

(e) Costs of this application shall be in cause.

10 I so order.

Delivered electronically this 27th day of March 2024 and uploaded on ECCMIS.

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Ocaya Thomas O.R  
Judge,

27<sup>th</sup> March, 2024