



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NARIOBI**

**HCC NO. 128 OF 2019**

**JOEL OGUK MULUMA BOI.....1ST APPLICANT**

**BERNARD NGALA CHWEYA.....2<sup>ND</sup> APPLICANT**

**MARUICE ARIRO ORIMBO.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**VICTOR OTIENO OLEWE T/A**

**M/S VICTOR OTIENO &**

**ASSOCIATES ADVOCATES.....1<sup>ST</sup> RESPONDENT**

**ULTIMATE ENGINEERING.....2<sup>ND</sup> RESPONDENT**

**EQUITY BANK.....INTERESTED PARTY**

**RULING**

This suit was initiated by way of Originating Summons filed on 21<sup>st</sup> May, 2019. There are two substantive issues set out. The first is a prayer to order the respondents to honour a professional undertaking to the applicants and remit a sum of Kshs. 16,600,000/= . The second is a prayer to order the respondents to remit to the applicants a sum of Kshs. 16,600,000/= being the balance of the agency fees as soon as the balance of the purchase price is released to them by the interested party and or any financial institution who are partly financing the sale transaction.

Subject to directions of the court, such proceedings are subjected to directions where the contesting parties may elect to proceed by way of affidavit evidence and if need be, oral evidence. Whatever the case, litigants are supposed to ensure, at the filing of the suit, full compliance with Order 3 of the Civil Procedure Rules.

In the instant case, the applicants gave a list of documents to be used during the trial. There was no list of witnesses or witness statement as contemplated by Order 3 of the Rules aforesaid.

This is not the first time the court has been called upon to make a ruling relating to the dispute herein. On 19<sup>th</sup> December, 2019 the court delivered a ruling dismissing the applicants' application to compel the respondents to honour a professional undertaking said to have been given on 27<sup>th</sup> August, 2018.

There is now before me an application by way of Notice of Motion dated 18<sup>th</sup> August, 2020 under Order 16 Rules 5,6 and 8 of the Civil Procedure Rules, seeking orders that summons be issued to the Land Registrar to produce the latest entry in LR No. 3734/281 and to the Kenya Commercial Bank to produce the loan agreement secured by the suit property, and statement of account showing how the loan proceeds were applied. The application is opposed and there are grounds of opposition dated 13<sup>th</sup> July, 2020 to that effect.

I have already observed that a party is bound to comply with Order 3 of the Civil Procedure Rules at the time of filing a suit. The two parties sought to be summoned are not part of the list of witnesses neither are their witness statements on record. I have looked at the Originating Summons and nowhere in the issues set for determination is any pointer towards the two witnesses sought to be called.

In any case, in respect of the Land Registrar, any person may apply and make a search at the Lands Registry and be issued with a certificate of search, to confirm any entries in the said registry. Whatever the case, there must be a nexus between the pleadings and the information sought to be introduced. Even then, the Registrar being a public officer shall not be compelled to do so due to conditions set out in Section

132 of the Evidence Act.

In respect of the second party, that is KCB, no court may not allow such a prayer for reasons that, it will be breach of the fiduciary relationship between the parties to the loan agreement. In fact, such evidence falls within Part II of the Evidence Act relating to privileged information. In that case Section 140 of the Evidence Act is instructive. I know this court has the power to order a bank witness to prove matters in dispute but in the instant case, there is not any special cause to give such an order.

Both the Land Registrar and KCB are not parties to the present dispute and therefore the order sought by the applicants is likely to cause prejudice to the said parties, who in any case have not been identified as having played any part in the transaction at the root of this dispute. See **Thomas Ngarachu Ngugi & 5 Others v Wilfred Wanyoike & 6 Others (2019) e KLR** , **Dahir Sadik Ausaad v Modogashe Construction Ltd & 3 Others (2016) e KLR**.

Evidence is the foundation of any cause of action. A party does not file a suit and then embark on the exercise of looking for evidence. It is not hard therefore to agree with the submissions by the respondents that, in filing this application, the applicants are on a fishing expedition.

This court cannot countenance such an exercise for reasons that, such orders may not be granted without causing prejudice not only to the witnesses sought to be called, but also the respondents. This application therefore dismissed with costs to the respondents.

***Dated, signed and delivered at Nairobi this 25th day of February, 2021.***

**A. MBOGHOLI MSAGHA**

**JUDGE**