

**+IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 70 OF 2005**

<b>1. WAMBURA EVARIST 2. MARY MATEREGO 3. J. NYANZA t/a NATHANIEL SERVICE 4. MWEMA NYITUGA 5. JOHN MAWAZO &amp; ZULU NYAHENGE 6. REGINA MASENYI 7. MICHAEL NYEMKUMBARA</b>	}	<b>.....PLAINTIFFS</b>
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**VERSUS**

<b>1. FISHPAK (T) LTD (Under Liquidation) 2. SADDOCK DOTTO MAGAI</b>	}	<b>.....DEFENDANTS</b>
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**R U L I N G**

Date of Hearing – 21/7/2006

Date of Ruling – 27/7/2006

**MASSATI, J:**

This is an application under O. XIII Rule 2 and ss. 93 and 95 of the Civil Procedure Code for this Court to allow the Applicants to produce the proceedings of Civil Case No. 13 of 2004 in support of their case.

The affidavit is supported by the affidavit of GODWIN MUGANYIZI. According to paragraphs 3, 4, 5, 6, 7 and 8 of the amended affidavit the application is being prosecuted on

the grounds that what the Applicants intend to produce had already been produced and some issues decided upon in Commercial Case No. 13 of 2004, and that the judgment of that case had already been admitted as evidence in the present case, and that some of the findings made in that case might be res judicata in the present case, that his efforts to obtain a certified copy of the proceedings were not successful, but last and most importantly, the production of the said proceedings would not prejudice the Respondents.

Mr. Muganyizi, learned Counsel who argued the application submitted and acknowledged that this Court's powers under O. XIII Rule 2 of the Civil Procedure Code could only be exercised if an applicant shows good cause. He cited a passage from **SAHAR'S CIVIL PROCEDURE CODE Vol. 1**, 5<sup>th</sup> Ed. pp. 1101 – 1102 and submitted that “good cause” included the Court finding that the document was genuine and relevant. He then proceeded to quote a passage from **MULLA – CIVIL PROCEDURE CODE** Vol. 2 at p. 1407 that: -

*“Showing good cause intends to prevent belated production of documents so that it does not work injustice to the defendant. It is also meant to prevent fraud by the late production of documents. However no suspicion can attach to certified copies of public documents such as records of government or judicial proceedings. Such*

*documents may be received in evidence though not produced at the first hearing.”*

Mr. Muganyizi went on to argue that according to his affidavit, strong and good causes exist for the production of the proceedings, alerting the Court to the danger of committing errors such as estoppel by judgment or res judicata if the proceedings were not admitted. So he prayed for the grant of the application.

Mr. Bwana, learned Counsel, who appeared for the Respondent filed a counter affidavit by SADOCK DOTO MAGAI, according to which paragraphs 4, 6, 7, 8 of the counter affidavit strongly oppose the Applicants’ affidavit. In Court, Mr. Bwana submitted that good cause is a question of fact in each case and they would be different on each case. He went on to quote MULLA (supra) at p. 1408 that:

*“good cause” means an adequate, sound and genuine ground or reason.”*

He said Mr. Muganyizi, did not demonstrate what were the sound reasons that prevented him from producing the documents prior or on the first day of hearing. He went on to submit that it was only in anticipation of the possible line of defence that the Applicants thought of relying on the said

proceedings, otherwise they had ample opportunity to produce them at the first hearing, because the said proceedings were certified on 22/3/2005, while the suit was instituted on 12/8/2005. Besides, there is no evidence to show what efforts the Applicants made in obtaining the copies. He said this was a case of gross negligence which could not constitute a good cause. Therefore he prayed for the dismissal of the application with costs.

Mr. Muganyizi submitted in rebuttal that the reasons for failing to get the proceedings in time were set out in paragraph 8 of his affidavit and that they did not anticipate any objection from the Defendants because already there was a judgment on the said case. He said, Mr. Bwana did not respond to the possibility of a plea of res judicata, neither did he challenge that the proceedings were above suspicion, nor refute that they would cause no injustice to the Defendants. He submitted that showing good cause did not mean penalizing the Applicant. He said if a document is prima facie genuine, a Court ought to receive it. He said Mr. Bwana did not substantiate how would the production of the proceedings otherwise prejudice the Defendants. So he urged the Court to exercise its discretion and allow the application as prayed.

The issues before me are first, what is “good cause” and secondly whether the application shows “good cause” for the

purposes of O. XIII Rule 2 of the Civil Procedure Code 1966 (Cap 33 – RE. 2002).

From the submissions of the learned Counsel, I think, there is no serious dispute as to what constitutes “good cause” under O. XIII Rule 2 of the Civil Procedure Code. According to MULLA op. cit. 16<sup>th</sup> ed. Vol. 2 at p. 2186, the term “good cause” means, “adequate, sound, and genuine reasons”. These, according to the author depend upon the facts and circumstances of each case. There is therefore no set formula to determine as to what constitutes a good cause. Whether there is good cause would depend on the facts of each case.

As to the scope of the rule, **SARKAR ON CODE OF CIVIL PROCEDURE** 10<sup>th</sup> ed. Vol. 1 at p. 1181 puts it thus: -

*“The rule of exclusion applies to documents in “the possession or power” of a party on which he relies and which should have been produced at first hearing, but not when a party was not aware of its existence.”*

Although the language of O. XIII Rule 2 is peremptory, it nevertheless gives discretion to the Court to receive any documents produced late if it is satisfied that there is good cause and on the following principles.

1. The main object of O. 13 Rules 1 and 2 is to prevent the parties from manufacturing evidence pending the trial to meet unexpected exigencies and not to penalize for non production of documents before the Court in specified time.
2. For fair trial documentary evidence even though filed late should not generally be excluded, unless it would prejudice the adversary. Mere production of a document at a late stage will not normally prejudice the adversary unless it is established that the party intending to produce the document did it only to protract the litigation or to burden the record or confuse the issues or to sub serve any ulterior motive within the knowledge of the parties.
3. If good cause is shown to the satisfaction of the Court for the non production of the documents at the earliest stage and the document is above suspicion, Courts are expected to receive it and give an opportunity to the party.

Now from my reading of the authorities all or any of the principles shown above may be applied in determining whether or not to admit documents sought to be produced under O. XIII Rule 2 of the Civil Procedure Code.

Have the Applicants shown good cause in the present case? In this case there is no dispute, as Mr. Bwana has rightly pointed out that the current proceedings were certified as far back as 22/3/2005. It is also true that the present suit was instituted on 12/8/2005. No explanation was given by the Applicants why the said proceedings could not get into their possession or power before instituting or at the first hearing of the suit. To that extent and in that sense, there is no good cause. However, on the other hand, Mr. Bwana has not suggested whether the said proceedings were suspicious in any way, or would prejudice the Defendants' case and if so how? And as MULLA (supra) puts it at p. 2187.

*“No suspicion can be attached to certified copies of public documents, such as records of the government or records of judicial proceedings. Such copies, therefore may be received in evidence, though they have not been produced at the first hearing.”*

I am thus satisfied that production of the judicial proceedings in Commercial Case 13 of 2004, although not produced at the first hearing or listed, would not prejudice the Defendants and in fact, advance fair trial and substantive justice. That to me amounts to good cause.

For the above reasons, I would allow the application.  
Costs shall, however, follow the event in the suit.

Order accordingly.

A handwritten signature in black ink, appearing to be 'S.A. Massati', written over a horizontal line.

**S.A. MASSATI**

**JUDGE**

**27/7/2006**

**1,459 words**