

**IN THE HIGH COURT OF THE UNITED  
REPUBLIC OF TANZANIA  
(LAND DIVISION)  
AT DAR-ES-SALAAM**

**LAND CASE NO.199 OF 2019**

**LATIFA HASSAN ALIBHAI.....PLAINTIFF**

**Versus**

**JAYENDRA J AMRCHAND.....1<sup>st</sup> DEFENDANT**

**RAKHEE JAYANDRA**

**JAGJIWAN.....2<sup>nd</sup> DEFENDANT**

*Last Order: 10<sup>th</sup> March 2021  
Date of Ruling: 30<sup>th</sup> April 2021*

**RULING**

**NANGELA, J.:**

The Plaintiff is suing the Defendants seeking for judgement, decree and orders of this Court as follows:

1. Declaration that house (Flat) on right wing of Plot No.5 Block 35, House No.1 is a legal property of the Plaintiff as per the Share Agreement certificate issued by Suchak Flats Limited.
2. That, the Defendants collectively to pay damages of TZS 100,000,000 or as the Court deem fit to the Plaintiff

- for mental and physical torture caused.
3. Defendants be ordered to remove their swing and all other things kept in the corridor of the house (Flat) to allow free movement of Plaintiff in and out of her Flat/house easily.
  4. Defendants be restrained from interfering with the Plaintiff's peaceful enjoyment of Flat/House No.1.
  5. Costs of this suit.
  6. Any other relief this Honourable Court may deem just to grant.

The hearing of this case commenced and the Plaintiff case progressed to the end paving way for the Defendants' case to open. However, on 10<sup>th</sup> March 2021, when the defence case opened, the learned counsel for the Defendants, Ms Lema, sought to be admitted into evidence a certificate of title, **CT. Number 31498** (referred hereafter as **the "CT"**) which was tendered by **DW-1** (the 2<sup>nd</sup> Defendant).

Mr Gulam Hossan, learned Advocate for the Plaintiff, objected to the production, tendering and admissibility of the said document as an exhibit in this case. **DW-1** had tendered the **"CT"** with a view to prove that she is a

lawful owner of the disputed Flat **(House) No.1**, on right wing of Plot No.5 Block 35.

The rationale for Mr Gulam's objection was that, nowhere in the pleadings or in the list of documents filed by the Defendants was such a document mentioned or referred to. He contended that, producing and admitting it, at such a time as this, will prejudice the Plaintiff who had no time to verify or authenticate its genuineness.

For her part, Ms Lema conceded that, indeed, the document sought to be produced and tendered by **DW-1** for its admission into evidence, was not listed in the **List of Documents** intended to be relied upon by the Defendants, a list which was **filed in this Court on 4<sup>th</sup> September 2019**. That fact, nonetheless, Ms Lema contended and urged this Court to do away with the objection raised by Mr Gulam. She maintained that, such a document was vital in helping this Court to rightfully determine the merits of this case.

To further polish her submission, Ms Lema submitted and urged this Court to invoke its



wisdom and apply the Overriding Objective Principle enshrined in **section 3A** of the **Civil Procedure Code, Cap.33 R.E. 2019**, specifically sub-section (2) and admit the document.

On a rejoinder submission, Mr Gulam was vociferous. He rejoined that, procedures which are laid down to govern production and admissibility of documents into evidence in Court were not laid down without a purpose. He contended that, the rules of evidence were meant to give the opposite party a chance as well to investigate and authenticate evidence produced by the opposite party and not to allow any party to be taken by surprise to their prejudice.

While I do quite agree with Mr Gulam's argument, I still find, however, that, such cannot be the only *raison d'etre* warranting the upholding of his objection. At least there should be better arguments based on what the existing law says, and I will come into that shortly.

This Court took the liberty of asking the learned counsel for the Defendants why the



document she was seeking to introduce into evidence was not included in the list filed in this Court if she knew it was of the kind of importance she had emphasized.

According to Ms Lema, the only reason was that, the Defendants had not share the document to her earlier enough. Despite such a lame duck excuse, as I indeed find it to be, Ms Lema insisted that the document should be admitted in the interest of justice and, that; questions regarding its genuineness should not be allowed to lead to its rejection as that will have a detrimental effect to the case.

I have given due consideration to the submissions made by both parties. It should be noted, however, that neither of the parties referred to **Order XIII** of the Civil Procedure Code, Cap. 33 RE 2019. **Order XIII rule 1 (1) (2) and (3)** of the Civil Procedure Code, Cap 33 R.E. 2019 states as hereunder:

*Order XIII -(1) (1) The parties or their advocates shall produce, **at the first hearing of the suit, all the documentary evidence** of every description in their*

*possession or power, or **which they intend to rely and which has not already been filed in court**, and all documents which the court has ordered to be produced. (2) The court shall receive the document so produced provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.*

*(2). **No documentary evidence in the possession or power of any party which should have been, but has not been, produced in accordance with the requirements of rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the court for the non-production thereof;** and the court receiving any such evidence shall record the reasons for so doing.*

*(3) The court may, at any stage of the suit, reject any document which it considers irrelevant or otherwise inadmissible,*

*recording the grounds of such rejection."*

As it may be noted from the above provision, unlike **Order VII rule 14 and 18 of the CPC** which applies to Plaintiff only, the only rule which we can safely consider in our deliberation in light of the objection raised by Mr Gulam, is **Order XIII rule 1 (1), (2) of the CPC, RE 2019**.

Rule 1(1) of Order XIII, allows both parties to produce "***at the first hearing of the suit***", *all the documentary evidence of every description in their possession or power, or which they intend to rely and which has not already been filed in court*". The phrase "***at the first hearing of the suit***" which appears in **Order XIII rule 1 (1) of the CPC, Cap.33 R.E 2019**, is an important phraseology and needs to be looked at carefully regarding what it means.

In the context of this case, does it refer to the time when the Defendant was summoned to file defence or at the date following completion



of all pleadings or when the Plaintiff or Defendant case opens?

I have had the opportunity of resorting to case law discussing a similar provision like ours. The case in point is the Indian case of **Ashoka Marketing Ltd. vs Rothas Kumar and Ors. on 28 March, 1966** (Equivalent citations: **AIR 1966 Cal 591, 70 CWN 729** (*available online from <https://indiankanoon.org/doc/1695880>*)).

In that case, the Calcutta High Court had an ample time of considering **Order XIII rule 1 (1) of the Indian Civil Procedure Code, 1908**, a provision which is *in pari materia* to **Order XIII rule 1 (1) of the CPC, R.E 2019**.

On paragraph 18 of that case, the Court observed, and I quote, *in extenso*, that:

*" Now, the scheme of the Code is such that the date fixed by the summons, for appearance of the defendant, **cannot be the date of hearing of the suit or the date contemplated by Rule 1 of order XIII of the Code, for***

**production of documents, if the suit be a contested one.**

..... The scheme of the Code is such that interrogation and discovery, **production and inspection of documents should all be completed before a case be taken up for hearing on evidence.** I respectfully agree ... that **the word 'hearing'** is one of those comprehensive words which may be used with a more or less extensive meaning according to the context. In the context in which they are used, the words "**at the first hearing of the suit**" in Order XIII Rule 1, mean that hearing, **after the pleadings are completed and before issues are framed under Order XIV.** Up to that stage, production of documents are permissible, **without cause being shown**, as contemplated by Rule 2 of Order XIII, **but thereafter "good cause" must be shown for late production of documents.**"

Essentially, and, as it may be observed from the above Indian decision, which I find to be helpful and quite persuasive, production of all documents is a step which needs to be observed **before** the Court draws up issues to be determined. This is particularly so, because, all such documents intended to be relied upon by the parties, will have a bearing on the issues drawn by the Court.

In other words, before proceeding under Order XIV of the CPC, parties must ensure that they have tendered in court exhibits which seek to prove or otherwise disprove their case depending on who is producing which document and for what purpose.

In this present case at hand, and as rightly said by Mr Gulam, the document which Ms Lema intends to rely on was never mentioned anywhere in the **"NOTICE of Defendants' List of Documents to be relied upon"** filed on 4<sup>th</sup> of September 2019 under **Order XIII rule 1** of the CPC.

The record of this case shows that on 10<sup>th</sup> October 2019, this Court convened a First Pre-



trial conference (1<sup>st</sup> PTC). In that 1<sup>st</sup> PTC, the learned counsel for the Defendant reserved a right to file a list of additional documents to be relied upon in the course of hearing of the case. Such a list of documents was filed on 4<sup>th</sup> of September 2019 and the document intended to be relied upon was not among the documents listed.

On 24<sup>th</sup> October 2019, this Court convened for its **Final Pre-Trial Conference** wherein it drew up a list of issues agreed upon by all parties. Essentially, this step comes after all pleadings have been filed, **including list of additional documents to be relied upon**. I have stated, and as the record of this Court indicates, that, such list was the filed on 4<sup>th</sup> of September 2019 under **Order XIII rule 1 of the CPC, Cap.33 RE 2019**.

According to the **ASHOKA's case (supra)**,

*"[t]he language of Rule 1 is peremptory. This is so because the object of the rule is to prevent fraud by late production of suspicious documents."*

As noted herein above, the document produced by Ms Lema was not in the list. As per the persuasive interpretation given in the **ASHOKA's case (supra)**, and our **Order XIII rule 1 (1) of the CPC Cap.33, R.E 2019**, the document ought to have been included in the list **prior to** the drawing up of the issues and, that would have augured well with the order issued on 10<sup>th</sup> October 2019, which granted the Defendant a reserved right to file for additional list of documents.

Since the document which Ms Lema intends to produce was not in the list, have the doors been shut behind her back? The answer is "NO", **but** with a condition.

In the case of **ASHOKA (supra)** the Court was of the view that, **Order XIII rule 1**

*"is not, however, penal in nature and the peremptory language of Rule 1 notwithstanding, Rule 2 invests in Courts of law discretion to accept documents..."*

In our circumstances, therefore, **Order XIII rule 2 of the CPC, Cap. 33 RE 219**, is the relevant provision that will come to Ms

Lema's aid if, however, she meets the relevant condition attached to it. The provision states as follows:

*" 2. No documentary evidence in the possession or power of any party which should have been, but has not been, produced in accordance with the requirements of rule 1, shall be received at any subsequent stage of the proceedings **unless good cause is shown to the satisfaction of the court for the non-production thereof**; and the court receiving any such evidence shall record the reasons for so doing."*

The above provision requires documents which were not produced pursuant to **Order XIII rule 1(1) of the CPC**, to be considered or received only when the person intending to produce them has adduced to the Court's satisfaction, reasons as to why they were not produced in line with what **rule 1(1) of Order XIII** of the CPC provides.



The need to adduce such reasons which the Court will also register, cannot be overemphasized. See the decision of the Court of Appeal in the case of **Eusto K Ntagalinda v Tanzania Fish Processors Ltd, Civil Appeal No.23 of 2012 (CAT) (Mwanza) (unreported)**. That being said, the vital question is whether the Defendants have availed to this Court sufficient reasons regarding why the document purporting to be a **Certificate of Title No.31498** was not produced before the Court in line with the requirements of Order **XIII rule 1 (1)** of the CPC.

As I indicated earlier here above, this Court solicited information from the Defendants' learned counsel regarding the reasons why the document was not included in the list. The reason offered was merely that her clients (the Defendants) had not communicated it to her prior to the hearing. She gave no further reasons regarding that non-communication by the Defendants of that document which she alleged to be vital in deciding the case.

Further, instead of giving reasons regarding why the document was not included in the list filed in this Court on 4<sup>th</sup> September 2019, Ms Lema asked this Court to resort to the Oxygen Principle and allow for the production of the document. In my view, however, I do not think this is an appropriate case which will entitle one to invoke the oxygen principle. That principle cannot just be invoked when and as one would wish.

As I stated earlier, the rationale for or object of **Order XIII rule 1** is to prevent fraud by late production of suspicious documents. Besides, **rule 1** is a rule that protects the adverse party from suffering injustice which may result from production of fraudulent documents. This is the reason why rule 2 of Order XIII commences with a very strict or peremptory note that:

***"No documentary evidence in the possession or power of any party which should have been, but has not been, produced in accordance with the requirements of rule 1***

***shall be received at any subsequent stage of the proceedings...."***

However, there is a discretion left to the Court to receive documents which were not produced in line with **Rule 1 of Order XIII of the CPC, Cap.33 R.E 2019**. Even so, such discretion is to be exercised judiciously taking into account the dangers which **Rule 1 of Order XIII** seeks to avert in the course of the proceedings.

The above position is clear since, in the **ASHOK Case (supra)**, the Court was of the view, regarding **Order XIII rule 2**, that:

*"Rule 2 invests in Courts of law discretion to accept documents, **particularly those which are above suspicion**, even though not produced at the first hearing."*

In the present case I am called upon to exercise my discretion. Exercise of judicial discretion is not an issue guided by hard and fast rules but rather the principles of justice, equity and common sense. This position is well laid down in a number of decisions of the Court



of Appeal. See, e.g., **Tanga Cement Company Limited v. Jumanne O. Massanga and Amos A. Mwalwanda, Civil Application No.6 of 2001 (Unreported -CAT)**.

In my view, therefore, that, although **Order XIII rule 2** of the CPC calls for **good cause to be shown to the satisfaction of the Court** before document not produced as per **rule 1 of Order XIII** is permitted, taking into account the principles of justice, equity and common sense, I find that this Court can still proceed and receive that particular document.

The reasons for such a position is that, the document, seems to be a **Certificate of Title** issued by a government office, and can be of assistance in the proper determination of this suit. This sort of position should not seem to be alarming anyone because, even in the **ASHOK's case** (supra), the Court was of very convincing views that since:

*"Courts exist to assure fair trials, documentary evidence, **even though filed late**, should not generally be excluded, if such*

*evidence be needed for proper decision of the case ...."*

The Court relied also on another Indian case of **Gopika Raman Roy v. Atal Singh, 56 Ind App 119, at p. 127: (AIR 1929 PC 99 at p. 103)**, where their Lordships of the Privy Council observed, that:

*"... even where rules of exclusion apply and the documents cannot be filed without leave of the Court, that leave should not ordinarily be refused where the documents are official records of undoubted authenticity, which may assist the Court to decide rightly the issue before it."*

(Emphasis added).

Consequently, although the Defendants have not been able to demonstrate solid reasons regarding their delayed production of the document which they now seek to be produced in Court, I do not propose to refuse admitting the document simply because, that relevant document, is not one of such documents which

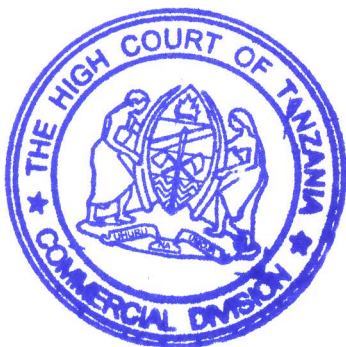
would be suspicious documents, but one that forms parts of official records or documents.

I, therefore, respectfully follow the line of thinking adopted in the **GOPIKA's case (supra)** and allow the 2<sup>nd</sup> Defendant to make use of the document disclosed to his Court on 3<sup>rd</sup> March, 2012, albeit with an expression of my dissatisfaction of the manner of disclosure.

In the upshot, I will overrule the objection raised by the Plaintiff's Advocate, Mr Gulam. In any case, Mr Gulam has the liberty of challenging its genuineness and authentication as well. He will also have time to cross-examine the witness.

**It is so ordered.**

**DATED at DAR-ES-SALAAM 30<sup>th</sup> April, 2021.**



.....  
**DEO JOHN NANGELA**  
**JUDGE,**