

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE SUB-REGISTRY OF MWANZA  
AT MWANZA  
PROBATE AND ADMINISTRATION CAUSE NO. 7 OF 2021**

**IN THE MATTER OF THE ESTATE OF THE LATE JAPHET MBOGO GILYOMA (The  
deceased)  
AND  
IN THE MATTER OF PETITION FOR LETTERS OF ADMINISTRATION BY ALICE  
KAMBONA GILYOMA AND ROSE MBOGO GILYOMA**

**RULING**

*14<sup>th</sup> June & 19<sup>th</sup> August, 2022*

***Kahyoza, J.:***

Adam Methusela, (**Dw1**) sought to tender documents, which the caveators did not annex to the affidavit filed under rule 84 of the Probate Rules. He sought to produce the documents under **Ord. XIII rule 1** of the **Civil Procedure Code**, [Cap. 33 R.E. 2019] (the CPC) as exhibit in Court. The documents, which Adam Methusela, (**Dw1**) was seeking to introduce as evidence are birth certificates of Japhet Gilyoma and Isack Japhet Gilyoma. Mr. Gunda, the petitioners' advocate objected the documents to be admitted because the respondents' advocate violated the law regarding tendering of documents not annexed to pleadings. He submitted that the respondents'

advocate violated rule 1 (1) of Order XIII of the CPC. He submitted that the respondents' advocate did not apply for leave showing why he could not annex the documents before tendering the documents.

The respondents' advocate agreed that the petitioners' advocate were served with a list of additional documents a day before the date of hearing. It was the respondents' advocate's argument that he complied with the law of production of documentary exhibits. He submitted that documents not annexed to pleadings may be produced on before commencing hearing by filing in court a list of additional documents and serve the adverse party. He invited the Court to rule 1 (1) of Order XIII of the CPC. He concluded that the petitioners' advocate did not establish documents sought to be admitted will prejudice the petitioners.

The respondents' advocate added that in the advent of the principle of overriding objective, courts are required to disregard technicalities and decide matters on merit to avoid to cause unnecessary delays and costs. In his rejoinder, the petitioners' advocate submitted that rule 1 (1) of Order XIII of the CPC provided a list of additional documents ought to be produced before the first hearing date. He added that advocates have a duty to assist

the court to comply with the law and not hide under the principle of overriding objective.

I wish to point out that the law is clear that documents to be tendered as exhibits are those annexed to the plaint or to the written statement of defence or those produced to court in accordance with rule 1(1) and (2) of **Order XIII of the CPC**. Adam Methusela, (**Dw1**) seeks to tender documents not attached to the pleadings. He seeks to rely on Order XIII rule 1 of the CPC. Sub-rule (1) and (2) of rule 1 of Order XIII rule 1 of the CPC provide that-

*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, on 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. (emphasis is added)*

Giving rule 1 of Order XIII of the CPC its literal meaning, that rule implies that a list of additional documents must be filed in court and served on the adverse party before hearing of the case commences. The first hearing under rule 1 of Order XIII of the CPC implies before the plaintiff or

the petitioner testified. The rationale of rule 1 of **Order XIII of the CPC**, is not hard to find; **one**, is to ensure there is fair trial, that is each party has a right to know the evidence against him before hearing commences so as to prepare his case. A party cannot know the existence of the documentary evidence unless the same is brought to his attention. Thus, after the party filed documents under rule 1 of Order XIII of the CPC, he must serve the adverse party before the hearing commences.

**Two**, another rationale of rule 1 of Order XIII of the CPC is to prevent fraud by late production of forged or dubious documents and not to penalise parties for non-production in time. The distinguished author Sakar gave this second rationale in the book of the **Code of Civil Procedure** 11<sup>th</sup> Ed. Reprint 2007 at page 1363.

It my view that late tendering of documents or failure to comply with law regarding tendering of documents raises questions of genuineness of those documents, which in my view affects the weight to attach to the document but not its admissibility. The High Court of India in the case of **Ashoka Marketing Ltd V. Rothas Kumar and Others** AIR 1966 cal 591, ZO CWN 729 while dealing with Ord. XIII R. 1 of the Code of Civil Procedure

of India which is *pari materia* to Ord XIII R. 1 of our Civil Procedure Code observed that-

*"The 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. The Rule is not, however, penal in nature and the peremptory language of Rule notwithstanding, 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. 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.*

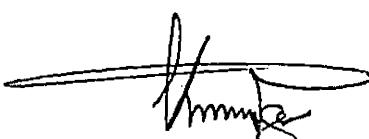
The respondents' advocate did not tell this court why he failed to produced a list of documents at the first hearing. He waited until the petitioners closed their case to file a list of additional documents. The procedure the respondents' advocate adopted denied the petitioners a right to prepare their case and bring evidence to counter the evidence or verify authenticity of the documents.

I am alive of the principle of averring objective which requires courts to give effect to substantive justice to avoid raising costs of litigation and causing delays. That notwithstanding, rules of procedures must be complied to ensure parties play on level ground. To allow the respondents or

defendants to produce documents not annexed to the pleadings or produced before the first hearing not only denies the plaintiff or the defendant an opportunity to appreciate the adverse party's case in advance and prepare to counter or admit but also encourages the defendant or the respondent to manufacture evidence. To ensure parties have no chance to manufacture documentary evidence India has amended Ord. XIII rules 1 and 2 of the Code of Civil Procedure of India. Currently, the Ord. XIII R. 1 of the Code of Civil Procedure of India provides that a list of additional documents must be produced before the court frames issues. I wish it was the position our Civil Procedure Code.

In the end, I find that the respondents' advocate did not comply with the procedure of producing documents not attached to pleadings under rule 1 of Order XIII of the CPC. Consequently, I will not admit the birth certificates of Japhet Gilyoma and Isack Japhet Gilyoma as exhibit.

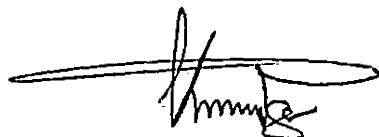
It is so ordered accordingly.



**J. R. Kahyoza**  
**JUDGE**  
**19/8/2022**



**Court:** Ruling delivered in presence of and Mr. Gunda and Mr. Silous advocates for the Petitioners/ Plaintiffs and Mr. Kipeja for caveators/ defendants.



**J.R. Kahyoza**  
**Judge**  
**19/08/2022**