

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

MISC LAND APPLICATION NO. 605 OF 2018

(Arising from Land Case No. 102 of 2016)

MUSTAQUIM MURTAZA DARUGAR.....APPLICANT

VERSUS

MAGERETH JOHN MBOMBO.....1ST RESPONDENT
GERVES NDYMKAMA.....2ND RESPONDENT
EMMANUEL MOLLEL.....3RD RESPONDENT

Date of Last Order: 17.05.2022
Date of Ruling: 13.06.2022

RULING

V.L. MAKANI, J

The applicant is MUSTAQUIM MURTAZA DARUGAR. He is applying for the following orders:

- 1. That this Honourable Court be pleased to set aside the dismissal order which was made against the Land Case No.102 of 2016, on 9th October 2019 .*
- 2. That this honourable court be please to restore the said Land Case No.102 of 2016 so that it can be heard interparties and on merits.*
- 3. Costs of this application be borne by respondents.*
- 4. Any other reliefs this honourable court may deem fit and just to*

The application is made under Order IX Rule 6(1) of the Civil Procedure Code, CAP 33 RE 2019 and was argued by way of written

submissions. Mr. Saiwelo Kumwenda, Advocate drew and filed submissions on behalf of the applicant, while the respondents jointly drew and filed their submissions in reply.

Mr. Kumwenda prayed to adopt the contents of the applicant's affidavit. He gave the background of the matter that the applicant filed in this court Land Case No.102 of 2016. That the said case was dismissed due to applicant's failure to appear in court. He said he was representing the applicant but he had to withdraw from representing the applicant because of lack of instructions due to lack of fees. That the applicant was facing financial depression as his security company had no clients to the extent that several employees started suing the applicant in the labour courts hence several executions were troubling him. He said the applicant failed to pay him for the labour cases and the Land Case No.102 of 2016. He said he dropped the case in 2018 but he was still attending on tolerance until early 2019 when his patience elapsed, and he completely stopped attending the court for the applicant. He went on to say that the applicant had to appear himself but he was met with an accident at his home and was disabled, he therefore failed to appear causing dismissal of Land Case No.102 of 2016. He said the applicant was so sick he could not move

anywhere and his doctor advised him to remain in doors to avoid disturbing the objects which were inserted in his legs and thighs.

Mr. Kumwenda said the situation worsened and thus the dismissal of Land Case No.102 of 2016. He said the applicant confronted the situation for a year alone at his residence as his wife travelled for maternity leave. That the main reasons of applicant's failure to appear in Land Case No.102 of 2016 is sickness (**Annextures "2", and "3"**). He also relied on the case of **Jehangir Aziz Abdulrazak vs. Balozi Ibrahim Abubakar & Bibi Sophia Ibrahim, Civil application No.79 of 2019 (CAT-DSM)** (unreported) and the case of **Jon David Kashekya vs. Attorney General, Civil application No.1 of 2012** (unreported). He prayed for this court to restore Land Case No.102 of 2016 so that it can be heard inter-partes and on merit.

In reply, the respondents prayed to adopt the contents of their joint counter affidavit. They said the issue alleged by the applicant that he was involved in labour disputes with his workers were not disclosed in his affidavit therefore the same cannot be relied upon. They added that the applicant has failed to show sufficient cause for his non-

appearance when the case was called for hearing. The respondents said the applicant felt sick eight months after the dismissal of the case. According to the affidavit the case was dismissed on 09/10/2019 while the applicant was admitted in hospital on 18/06/2020. That even the allegation of terminating his contract with Mr. Kumwenda in 2018 is unfounded as the said advocate entered appearance in Land Case No.102 of 2016 on 27/03/2019. They said a married man living with his family in the same locality with the court cannot be incapable of notifying the court that he had such a problem. They relied on the case of **Kalunga and Company Advocates Ltd vs National Bank of Commerce Ltd (2006) TLR 235** and the case of **Attorney General Tanzania Ports Authority & Another, Civil application No.87 of 2016**. The respondents prayed for the application to be dismissed with costs.

In his rejoinder, Mr. Kumwenda said that respondents have failed to differentiate between this application and the previous Misc. Land Application No.535 of 2020 which was for extension of time to file the application at hand. That the respondent's submission is based on the affidavits and counter affidavits for extension of time.

I have gone through affidavits and submissions by both parties, the main issue for consideration is whether this application has merit.

It is settled law that an applicant seeking to set aside a dismissal order for non-appearance or want of prosecution, he has to furnish the court with sufficient reasons for non-appearance when the suit is called for hearing (see the case of **Sadru Mangalji vs. Abdul Aziz Lalani & Others, Misc. Commercial Application No. 126 of 2016 (HC-Commercial Division, Mwanza)** (unreported))

It is Mr. Kumwenda's argument that applicant herein was confronted with sickness and financial constraint, that he failed to appear in Land Case No. 102 of 2106. As a result, the said land case was dismissed for want of appearance. The records shows that Land Case No.102 of 2016 was dismissed on 09/10/2019. On that date the court observed that Mr. Kumwenda who was representing the applicant, last appeared in Court on 27/03/2019. Indeed, it is more than five months from Mr. Kumwenda's last appearance to the date of the dismissal order. For whatever reason advanced by the applicant, be on sickness or financial difficulties as alleged, he had ample time to notify the court of his absence and the reasons thereto. However, he

did not bother to notify the court by any means. I am aware of **Annexure MMDII** by the applicant. The same is a letter narrating the history of the alleged sickness of the applicant. As the respondents pointed out and I agree, the records show that the case was dismissed before the sickness befell the applicant. In the premise, sickness cannot be the reason for failure by the applicant to notify the court of his absence. Further the annexure shows that the applicant was not admitted he was attending outpatient and he knew that he had in this court Land Case No. 102 of 2016 so he would have made efforts to ensure that the court is notified of his sickness. I am quite sure the applicant did not just stay at home uselessly because he had a company and he had assistants so they would have in one way or the other informed the court of the challenges facing him. Since the court was not informed of anything, if at all there was one, then it would have been absurd for the case to be lying idle in the coffers of the court from 2019 to 2021 awaiting the applicant to decide when to enter appearance.

The annexure to the affidavit in my view is also questionable and an afterthought if I may say because it was prepared on 19/06/2020, which is 8 months after Land Case 102 of 2016 was dismissed. The

letter is addressed to whom it may concern and not the court, and it is not a medical certificate. It would have made more sense if the author of the said letter had sworn an affidavit to substantiate the contents of the letter and the photograph. In the absence of an affidavit as above said, the application cannot succeed only on the strength of the letter and annexed photograph of the alleged applicant with POP on the right foot. In any case, the court does not even know if indeed the photograph represents the image of the applicant.

In the result, the applicant has failed to demonstrate sufficient grounds for this court to set aside its dismissal order in Land Case No.102 of 2016. The application is devoid of any merit and is hereby dismissed with costs.

It is so ordered.



V.L. Makani
V.L. MAKANI
JUDGE
13/06/2022