

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

**MISC. LAND APPLICATION NO. 697 OF 2021**

(Arising from Misc. Land Application No. 630 of 2020)

**ALLY ABASI ALLY .....APPLICANT**

**VERSUS**

**NAJMA HASSAN ALLY KANJI.....RESPONDENT**

Date of Last Order: 14.06.2022  
Date of Ruling: 25.07.2022

**RULING**

**V.L. MAKANI, J**

The applicant in this matter is ALLY ABASI ALLY. He is applying to set aside the decision of this court in Misc. Land Application No. 630 of 2020 which was dismissed for want of prosecution on 23/11/2021.

The application is made under Order IX Rule 6(1) and section 95 of the Civil Procedure Code CAP 33 RE 2019 (the **CPC**) and it is supported by the affidavit of the applicant herein. The application was opposed by the filing of the counter-affidavit of Aziza Msangi, Advocate for the respondent.

With leave of the court the application was argued by way of written submissions. The applicant had the services of Mr. Luguwa, Advocate who in his submissions adopted the contents of the affidavit of the applicant. He further said that on 11/11/2021 he appeared in court for this case and he proposed to the court for this matter to come for hearing on 23/11/2021 at 02:00pm because he had another matter at the Commercial Court. He said, unfortunately the time that was noted by the court was 11:00am. He however pointed out that they were served with a summons to appear on 22/11/2021 and he sent his clerk one Richard John Kimeru to follow up on that date as he had other matter. His clerk came back and told him that the matter was scheduled for hearing the next day 23/11/2021 at 02:00pm. He said when he entered appearance on that date, he found his colleague Ms Aziza Msangi leaving the Judge's Chamber and he was told that the matter was dismissed for want of prosecution. He said his absence was not deliberate but due to confusion on the dates and time. he further said the matter is touching on the rights to property so he prayed for this application to be granted so that the applicant can defend his case.

Ms. Aziza adopted the contents of the affidavit. She said according to paragraph 6 of the affidavit it shows that the applicant was in court on 12/11/2021 and attended several cases listed in the said paragraph. She however pointed out that the applicant was not in court on 11/11/2021 but it was only his advocate Mr. Luguwa who appeared and the matter was fixed for hearing on 23/11/2021. She said there is no proof that the applicant was to appear before Hon. Mkapa, J and Hon. Mgeyekwa, J as alleged. She said the facts in paragraph 6 are not true and the court cannot rely on them. Ms. Msangi went on saying that the contents of paragraph 6,7,8 and 9 are all hearsay as the applicant was not in court on the fateful date. She prayed for the court to disregard these paragraphs. She observed that it is trite law that an affidavit which contains hearsay statements or untruth cannot be relied upon. She relied on the case of **Unyangala Enterprises Limited & 5 Others vs. Stanbic Bank (T) Limited, Civil Application No. 56 of 2004 (CAT-DSM)** (unreported).

Ms. Msangi also submitted that paragraph 8 of the affidavit refers to the clerk one Richard John who followed up matters in court on behalf of Mr. Luguwa, but there is no affidavit of the said Richard John to

support this assertion. She said it is a requirement that all persons whose evidence is material to the matter in dispute to file affidavit as was illustrated in **Unyangala Enterprises (T) Limited** (supra). Ms. Msangi said on 23/11/2021 when the matter was called neither the applicant nor Mr. Luguwa were present considering that on 11/11/2021 when the matter was fixed for hearing on 23/11/2021 Mr. Luguwa was present. She concluded by saying that there are no sufficient reasons that have been advanced to warrant the setting aside the dismissal order.

In rejoinder Mr. Luguwa reiterated his main submissions and went on saying that he does not object that he was in court on 11/11/2021 and the matter was fixed for hearing on 23/11/2021. He, however, pointed out that the next day on 12/11/2021 he was served with summons to appear on 22/11/2021 and when he went to court and by the assistance of his clerk, they found that the case was cause-listed for 23/11/2021 at 02:00pm. He noted that there was an issue of time but though the time agreed upon was 02:00pm on 23/11/2021 but the time noted by the court was 11:00am. He said the court should consider substantial justice and invoke the overriding principle to save the application by vacating the order dismissing Misc.

Land Application No. 630 of 2020 and restoring the application so it is heard on merit.

I have gone through the affidavit, counter-affidavit and the submissions by Counsel. The main issue for consideration is whether the application before the court has merit.

It is settled law that an applicant seeking to set aside a dismissal order of the court for non-appearance has to furnish the court with sufficient reasons for his/her absence when the matter was set for hearing (see the case of **Sadru Mangalji vs. Abdul Aziz Lalani & 2 Others, Misc. Commercial Application No. 126 of 2016 (HC-Commercial Division, Mwanza** (unreported)).

The main reason by the applicant for non-appearance in court on the day of hearing is that there was confusion because, firstly, the matter was set for hearing on 23/11/2021 at 02:00pm but it was called earlier; secondly, there was a summons issued for 22/11/2021 but the matter was set for hearing on 23/11/2021.

On 11/11/2021 when Mr. Luguwa and Ms. Msangi were present in court it was agreed and the matter was set for hearing on 23/11/2021. There was a dialogue of the time, but it was agreed that the matter should be proceed on 11:00am and that was what was recorded by the court. When the matter came for hearing on 23/11/2021 at 11:00am, Mr. Luguwa was not present, but the court stayed the matter up until 01:35pm, but still Mr. Luguwa and his client were not present. The court then proceeded to dismiss the application. It is settled law that the record of the court is the one which is supposed to be relied upon and the time recorded was 11:00am. There is no reason to doubt the record of the court because in case there were any doubts, then Ms. Msangi and her client would not have been in court on the set date and time. In essence therefore Mr. Luguwa was not present in court when the matter was called for hearing and there was no information that was advanced for his non-appearance.

Mr. Luguwa also alleged that there was confusion because of the summons which notified him to appear on 22/11/2021. However, the summons is not an issue because Mr. Luguwa himself alleged that he was informed by his clerk one Richard that the matter was scheduled

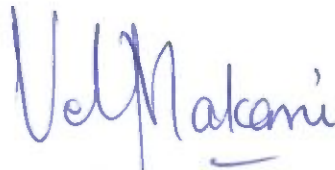
for the next day as agreed. So, this could not have caused the confusion that Mr. Luguwa wants this court to believe. In any case there is no affidavit of Richard to confirm these facts.

Further, and as stated by Ms. Msangi, and correctly in my view, the affidavit is sworn by the applicant, and in view thereof the contents of paragraphs 6,7,8 and 9 of the affidavit sworn by the applicant cannot be relied upon because the applicant was not in court on 11/11/2021 when the matter was set for hearing on 23/11/2021. A quick look reveal that the information cannot be that of the applicant but of Mr. Luguwa and since he is not the one who has sworn the affidavit the affidavit becomes defective as contents therein are not true. It is settled law that where an affidavit has elements of falsehood then it cannot be relied upon. It was held in the case of **Ignazio Messina vs. Willow Investments SPRL & Another, Civil Application No. 21 of 2001 (CAT-DSM)** (unreported) that an affidavit tainted with untruth is no affidavit at all and cannot be relied upon to support an application. Similarly, an affidavit whose contents are not of the deponent but of someone else is defective because it has colour of falsehood, as such cannot be relied upon. And once an affidavit is

defective it means it cannot support the application; thus, the application automatically collapses.

In view of the above, I find that the applicant has failed to give sufficient reasons for non-appearance in court to enable the court to exercise its discretionary powers to restore the application. Consequently, the application is dismissed. There shall be no order as to costs.

It is so ordered.



**V.L. MAKANI**  
**JUDGE**  
**25/07/2022**