



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. 498 OF 2013**

**BETWEEN**

**CAPTAIN PATRICK KARANJA NJENGA ..... PLAINTIFF**

**AND**

**KENYA REVENUE AUTHORITY ..... DEFENDANT**

**RULING**

1. The Plaintiff has moved the court by the Notice of Motion dated 5<sup>th</sup> March 2020 seeking to set aside the dismissal order made on 31<sup>st</sup> January 2020. The application is supported by the affidavit of the Plaintiff's Advocate on record, Braimoh Mburu, sworn on 5<sup>th</sup> March 2020. It is opposed by the replying affidavit of Richard Ngari, the Defendant's advocate, sworn on 13<sup>th</sup> March 2020. The matter was canvassed by written submissions which I have considered.

2. The dismissal order was a culmination of previous proceedings which I shall summa rise. On 29<sup>th</sup> November 2019, I directed the parties to agree on facts and issues for determination. When the matter came up on 15<sup>th</sup> January 2020, counsel for the Plaintiff did not attend court hence I directed the Plaintiff to show cause why he had not complied with the orders of 29<sup>th</sup> November 2019. On the day of the Notice to Show Cause, 30<sup>th</sup> January 2020, the court was informed that Mr Mburu, counsel for the plaintiff was attending a burial and he needed more time to comply. I adjourned the matter to the next day, 31<sup>st</sup> January 2020. On that date no reason was furnished why the Plaintiff had not complied with my orders. I dismissed the suit thus precipitating this application.

3. Mr Mburu stated that he had partly complied with the court's directions by filing a set of agreed issues on 31<sup>st</sup> January 2020 but failed to file facts. He stated that his absence from court was occasioned by fact the that he understood the matter would be mentioned on 31<sup>st</sup> January 2020. He also claimed that the Defendant has never filed a witness statement in the matter. He stated that the Plaintiff was ready to comply with any orders that the court may direct and that the Plaintiff should not be made to pay for the mistakes of his advocate.

4. The Defendant takes the position that the Plaintiff's counsel failure to attend court on 31<sup>st</sup> January 2020 were not explained. He averred that this is an old matter that has been pending since 2013 and its continued existence continues to cause prejudice to the Defendant. Counsel for the Defendant urged the court to impose terms it deems it fit to secure the Defendant's position.

5. This is a matter that has been in court for a period of 7 years and this court's directions were intended to ensure that the matter is dealt with without further delay. Under the overriding objective, advocates and parties have an obligation to assist the court in ensuring that justice is conducted in a fair, just and proportionate manner. **Section 1A(3) of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** provides as follows:

*1A (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.*

6. Although I dismissed the case for no compliance, the orders I made were very clear that the parties agree on facts and issues. I said so because looking at the claim and defence, the dispute was narrow and involve interpretation of the applicable tax law to a set of facts which appear undisputed and then the issue of consequential loss. It is surprising that parties cannot agree on such a simple way to dispose of the suit hence the blame for delay of the matter lay on both counsel who are not taking their responsibility to the court seriously. I should not punish the Plaintiff for his advocate's indolence in the matter.

7. I allow the Notice of Motion dated 5<sup>th</sup> March 2020, set aside the dismissal order dated 31<sup>st</sup> January 2020 and reinstate the suit for hearing. The parties are directed to agree on facts and issues within the next fourteen (14) days. In addition, the parties shall file all witness statement and documents and shall file affidavits indicating that they do not have any further documents in their power and or possession other than the documents produced.

**DATED and DELIVERED at NAIROBI this 31<sup>st</sup> day of AUGUST 2020.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Mburu instructed by Righa & Mburu Advocates for the Plaintiff.

Mr Ngari, Advocate instructed by Kenya Revenue Authority for the Defendant.