THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

MISCELLANEOUS. APPLICATION 754 OF 2020

(ARISING OUT OF HCCS NO. 612 OF 2015)

CNOOC UGANDA LTD ::APPLICANT

VERSUS

COMMISSIONER GENERAL URA:::::::::::::::::::::::::::::::::::::::RESPONDENT

BEFORE HON: JUSTICE RICHARD WEJULI WABWIRE

RULING

This Application was brought under sections 82 and 98 CPA and Order 46 rules 1(10, 2 and 8 seeking orders that this court reviews its decision in HCCS 612 of 2015 and the suit be reinstated and further that costs of this Application be provided for.

The Application is supported by Affidavits sworn by Martin Mbanza, an Advocate in the employment of Birungyi Barata and Associates, who are Counsel for the Applicants. The grounds upon which it is based are stated in the said Affidavit in Support and a Supplementary Affidavit but briefly are that;

21 - On 22nd September 2015, the Applicant filed CS 612 of 2015
22 appealing against an assessment raised by the Respondents.
23 The matter was consolidated with CS 864 of 2014 and CS 508
24 of 2015.
25 - When the matters were fixed for scheduling on the 27th August
26 2017, it did not take off because the Judge had been
27 transferred. That whereas CS 864 of 2014 was settled by the
28 parties, CS 508 of 2015 was transferred to the TAT.
29 - On the 16th November the respondent wrote to Court seeking
30 audience to address court on its lack of jurisdiction over the
31 matter. On the 7th September, the Applicants wrote to Court
32 requesting for a hearing date. On the 17th September 2020, the
33 applicant learnt that the suit had been dismissed, that they did
34 not receive any notice to show cause why the suit should not be
35 dismissed.
36 - That the matter was not cause listed on the 7th August 2020
37 when it was dismissed.
38 - That the matter was consolidated with CS 864 of 2014 and CS
39 508 of 2015 but it was handled differently.
40 - That the applicant is aggrieved by the order of this court as it
41 was issued erroneously and the respondents, without giving
42 notice, issued Agency Notices and collected money from the
43 applicants bank accounts held with Standard Chartered Bank
44 and City Bank. That following issuance of the Agency Notices,
45 the Applicant filed TAT MA 153 of 2020(arising from TAT MA134

46 of 2020) for an interim order to restrain the respondents from
47 enforcement.

48 • That it is in the interest of justice that the application is granted.

49 The Respondents contested the Application in an Affidavit in Reply
50 deponed by Bakashaba Donald in which he averred that the
51 Respondents would raise preliminary objections that this court has
52 no jurisdiction to entertain this application and that the application
53 contravenes the lis pendens rule and that the application is bad in
54 law, frivolous misconceived and amounts to forum shopping.

55 That as a result of the Applicants inaction to have the matter heard
56 after 2 years, the Respondents wrote to this court of 16th November
57 2019 requesting for the matter to be fixed for hearing and that owing
58 to the applicants inaction , the matter was righty and lawfully
59 dismissed on the 17th August 2020 for want of prosecution. That
60 whereas there was an application for consolidation of the HCCSuits
61 no. 864 of 2014, 508 of 2015 and 612 of 2015 the process was never
62 effected and that consequently CS 864 was withdrawn while 508 was
63 transferred to TAT and the same is pending hearing.

64 When the Application came up for hearing, the Applicants were
65 represented by two Counsel, namely; Counsel Cephas Birungyi of
66 Birungyi Barata Advocates and Ellison Karuhanga of Kampala
67 Associated Advocates, while the Respondents were represented by
68 Counsel Mwajuma Nakku Mubiru and Ronald Baluku Masamba of
69 the respondents Legal Department. They addressed Court by oral
70 submissions.

71 Counsel for the Respondents raised preliminary points of law which
72 were heard but Court reserved its ruling and proceeded to hear the
73 merits of the Application.

74 Counsel on either side addressed Court at length, first on the
75 preliminary objections and then on the merits of the Application. I
76 will address them in that order.

77 **Preliminary Objection**

78 **1) Jurisdiction**

79 The Respondents raised a preliminary objection regarding the
80 jurisdiction of this court. They vehemently submitted about the lack
81 of jurisdiction of this court over tax matters and more specifically
82 over this application.

83 They submitted that this Court does not have Jurisdiction to
84 entertain the Application since the dispute is within the precincts of
85 the Tax Appeals Tribunal. That consequently in as far as this
86 Honorable Court does not have that Jurisdiction to entertain matters
87 relating to a tax dispute, it does not therefore have the Jurisdiction
88 to entertain an Application to reinstate a tax dispute.

89 They cited the case of **URA V Rabbo Investments** CA
90 12/2004(SC)which is explicit on the issue of jurisdiction of the High
91 Court over tax matters.

92 In my opinion, the contention about the jurisdiction of court over this
93 application is premature and misconceived. At this stage, court is

94 only concerned with establishing whether the application meets the
95 prerequisites for review, which are;

96 (a) Discovery of new and important matters of evidence previously
97 overlooked by excusable misfortune.
98 (b) Some mistake apparent on the face of the record.
99 (c) For any other sufficient reasons,
100 But the expression 'sufficient' should be read as meaning
101 sufficiently analogous to (a) and (b) above."

102 In the circumstances of this case, the contention regarding
103 jurisdiction can only arise after the issue of review and that is in the
104 event that the matter is reinstated.

105 **2) Contravention of the Lis pendens Rule.**

106 Counsel for the Respondents submitted that the Application
107 contravenes the lis pendens rule (see **Section 6 of the Civil**
108 **procedure Act**)

109 That on 17th September, the Applicant filed an Application in the Tax
110 Appeals Tribunal vide **TAT Application No. 134 of 2020** in which
111 all the matters in contention are the same, the parties are the same
112 and the amount of money contested is the same as that in CS 612 of
113 2015, for which this Application for reinstatement is made. That this
114 contravenes the lis pendens rule (**s.6 CPA)**.

115 They also submitted that the Application amounts to an abuse of
116 court process and cited **Section 172 of the Judicature Act** which

117 enjoins Courts, in the administration of justice, to as much as
118 possible avoid multiplicity of suits.

119 They cited the case of **Springs International Hotel limited versus**
120 **Hotel Diplomat and Boney Katatumba, High Court Civil Suit No.**
121 **227 of 2011** in Court dismissed that suit for offending the lis
122 pendens rule, to argue that the Application be dismissed.

123 In reply, Counsel Birungyi for the Applicants contended that the
124 Respondents were only bent on denying the Applicants access to
125 justice by stifling hearing of the matter, be it in the High Court or at
126 the Tax Appeals Tribunal. That having extracted the orders
127 dismissing the suit in the High Court, the Respondents also extracted
128 an order dismissing the Application filed by the Applicants in the Tax
129 Appeals Tribunal. That consequently the argument that the matter
130 was in both Courts is not in good faith as the Respondents exhibited
131 in Exhibit "G" attached to their Affidavit in Reply and are therefore
132 are aware that the matter was dismissed at the Tax Appeals Tribunal.

133 The Applicants contended that the matter having been dismissed in
134 this court, the Applicants sought intervention of the Tax Appeals
135 Tribunal to address an administrative issue of Agency Notices and
136 not the substantial dispute which had been dismissed in the suit at
137 the High Court. That the issue of Agency Notices arose after the Main
138 suit in the High Court had been dismissed. The Applicants case
139 therefore was that it was not true that there was a cause of action in
140 respect of the Agency Notices in the High Court.

141 That premised on the foregoing, the issue of multiplicity of suits and
142 abuse of court process does not therefore arise. That neither the lis
143 pendens rule nor the case of Springs International Hotels Ltd (supra)
144 apply in the instant case because it is about reinstatement of the
145 main suit so that it is properly transferred to the Tax Appeals
146 Tribunal.

147 Counsel submitted that they were not seeking the matter to be heard
148 in the High Court, but for it to be transferred to the Tax Appeal
149 Tribunal rather than be dismissed. That this was their prayer and
150 that they also found no merit in a tax payer being denied access to
151 justice. – Submissions. Evidence from the Bar. Counsel Ellison
152 Karuhanga for the Applicants, invoked Section 17 of the Judicature
153 Act which mandates this Court with inherent powers to prevent
154 abuse of processes of court and to ensure that substantive justice is
155 administered without undue regard to technicalities, to argue that
156 the Application is one that is worth being heard within the context of
157 this provision and that for that matter, the case be reinstated and
158 heard on its merits. That to deny the Applicants an opportunity to
159 be heard, as the Respondents are bent on doing, is against the spirit
160 of Section 17 of the Judicature Act and Article 126(2) (e) of the
161 Constitution of the Republic of Uganda.

162 In rejoinder, Counsel for the Respondents submitted that exhibit "G"
163 which was mentioned in the Respondent's Affidavit in Reply is a
164 dismissal of an Application for an interim order, Miscellaneous

165 Application No. 153 of 2020 arising out of TAT Main Application No.
166 134 of 2020 and not a dismissal of the main Application.

167 That TAT Application No. 134 of 2020 is still pending hearing by the
168 Tax Appeals Tribunal and that so the argument that they are being
169 locked out of court is not right. That there is no withdrawal order for
170 the said Application as provided for under Order 25 Rule 1 for
171 withdrawal of any case that is subsisting in Court.

172 That the prayers in the Application before the Tax Appeals Tribunal
173 and those in the dismissed Civil Suit are the same, and hence the
174 submission that this Application, which not only posed an abuse of
175 court process but potentially exposed the concerned judicial officers
176 to the danger of arriving at different and perhaps conflicting decisions
177 in cases of the same facts offends the lis pendens rule.

178 **Whether the Application, when granted will occasion**
179 **contravention of the lis pendens rule, and whether the**
180 **Application is an abuse of Court process**.

181 Section 6 CPA which underpins the lis pendens rule states that;

182 **"No court shall proceed with the trial of any suit or**
183 **proceeding in which the matter in issue is also directly and**
184 **substantially in issue in a previously instituted suit or**
185 **proceeding between the same parties, or between parties**
186 **under whom they or any of them claim, litigating under the**
187 **same title, where that suit or proceeding is pending in the**
188 **same or any other court having jurisdiction in Uganda to**
189 **grant the relief claimed."**

I will start by determining **whether the matter in issue in TAT MA 134 of 2020 are directly and substantially in issue as those in CS 612 of 2015**.

I have had the benefit of perusing TAT MA 134 of 2020 and the Plaint in CS 612 of 2015.

The parties in TAT MA 34 of 2020 are CNOOC Uganda Ltd and the Commissioner General, URA, the particulars of the tax dispute are VAT and withholding tax and Paragraph 3 on the statement and reasons in support of the Application is in pari materia with paragraph 5(d) & (E) of the Plaint which stipulates the facts constituting the cause of action.

They both bear the same cause of action and seek the same remedies and are between the same parties. I have also established that indeed the application which was dismissed at the TAT was one for an interim order which sought to stop the Agency Notices. The main Application, TAT 134 of 2020, which is the one that bears similarities with 612 of 2015 is still live at the TAT.

Premised on the foregoing it is unequivocally illustrated that the two matters TAT MA 134 and CS 612 are similar.

Would the Application then contravene the lis pendens rule and amount to an abuse of court process?

When TAT MA 134 of 2020 was filed, CS 612 had been dismissed on the 17th August 2020. At the time of filing TAT 134 therefore, there was no contravention of the lis pendens rule.

214 The Respondents case however is that should the dismissed case CS
215 612 be reinstated, then this would contravene the rule.

216 In my view, the lis Pendens rule is not to be applied mechanically. It
217 is applied so as to give effect to the goal of avoiding irreconcilable
218 decisions. But also most importantly it should not leave a litigant in
219 limbo without locus to be heard whichever way.

220 It is worth noting that prior to this, the residual matters- CS 612 and
221 508, after the consolidation, were transferred to TAT but, for
222 unknown reasons, CS 612 of 2015 remained within the system of
223 this Court while CS 508 of 2015 was moved to the TAT. The files
224 ought to have been moved together.

225 Had the consolidation and transfer orders been effected as ordered
226 by Court, then the dismissal and the instant application would never
227 have arisen in the first place.

228 Whereas therefore on the face of it the Application may be viewed as
229 an abuse of the lis pendens rule, the peculiar context of this case ,
230 which I have already highlighted present a different conclusion that
231 absolves the Applicant from abuse of process.

232 **Whether there is an error apparent in the order for dismissal of**
233 **HCCS 612 of 2015 and if so, whether order can/should be set**
234 **aside**

235 **Submissions by Counsel**

236 Counsel Birungyi, for the Applicant, drew Courts attention to the fact
237 that on the 16th November 2019, the Respondents wrote to the

Registrar seeking a date to be heard on points that Court had no jurisdiction over the matter. That similarly, on the 7th September 2020, the Applicants also wrote to court seeking for directions in the same matter and on the 17th September 2020, they were informed that the suit had been dismissed on the 7th August 2020. That they were never served with Notice to show cause why the suit should not be dismissed yet the matter was consolidated with other subsisting matters, and further that the matter was not cause listed.

That it is for this reason that the Applicants sought to have the matter reviewed as it must have been dismissed in error.

Counsel submitted there was no indication under what Order the matter was dismissed but that they made the assumption that the order was made under Order 17 rules 5 and 6 CPR as amended by statutory instrument 33 of 2019.

They submitted that if this was the case, then there is ground for this Honorable court to review its decision based on the facts as stated in the Affidavit in Support and in the Supplementary Affidavit that steps had actually been taken by the Respondents to have the matter addressed. That as stated in the Consolidation order that;

> "In the premises the applicant's Application is granted with each party to pay its costs because this suit is before 3 separate Judges, the file is sent to the Registry for consolidation of the physical file and to have the file reallocated to one of the Judges".

262 That the consolidation order confirms that under Order 17 rule 5 an
263 action was taken to schedule, to mediate and to consolidate the suits.
264 That further, an action was taken to get directions to transfer the file
265 to the Tax Appeals Tribunal because the applicants could not move
266 a file from the High Court to the Tax Appeals Tribunal with no Court
267 order.

268 They drew Courts attention to exhibit "D" a letter dated 16th
269 November, 2019 from the Respondents to the Registrar of the Court.
270 The Respondents wrote seeking a hearing date for the matter. The
271 letter is copied to counsel for the applicant, who they contend was
272 therefore properly informed that the position was that the parties
273 were waiting for directions of court.

274 They submitted that so in respect of Order 17 r 5 & 6 CPR, which
275 provides that action should not have been taken by either party, not
276 only were steps taken, but the dismissal should not have fallen within
277 that rule.

278 Counsel was aggrieved by the fact that whereas it is the Respondents
279 who had moved Court and were bidding Courts directions, it is the
280 very Respondents who have now tried to take advantage of the Rule
281 to say that there were no steps taken to have the matter prosecuted
282 and that this was not done in good faith.

283 They cited the case **Bank of Uganda vs Ismail Damule and 1004**
284 **others Misc. Application No. 742 of 2016** in which Court stated
285 that well as the Judge had the discretion not to award costs, not
286 giving reasons for that action of not awarding costs was an error and

that error was sufficient for the Judge to review the matter, to highlight the submission that in the instant case, want of prosecution was not clarified and under which order the matter was dismissed.

Counsel also cited the case of **Mera Investments versus Uganda Investment Authority, Misc. Application No. 114 of 2015** in which Court addressed dismissal that had also been under order 17 Rule 6 of the Civil Procedure Rules as well as jurisdiction of this Court. On Jurisdiction, it was held that the High Court is a court of unlimited Jurisdiction except in so far as it is limited by statute and the fact that the specific procedure is provided by law cannot operate to restrict the court's Jurisdiction.

On the aspect of proceedings under Order 17 r 6 CPR his lordship Justice Madrama J, as he then was, when reinstating a matter on review, held that

"…..in the very least the respondent's counsel ought to have notified the applicant's counsel. This is because the court did not move on its own motion but was moved by one of the parties who specifically invoked Order 17 Rule 6 in light of the recent communication between the parties I am inclined to invoke the inherent powers of the court which I hereby do and set aside the dismissal without commenting on the merits of the suit or the defense. The suit is hereby reinstated….".

This case **Mera (supra**) is however distinguished from the facts of the instant matter as in the instant case, none of the parties moved Court. In the instant case, Court moved suo motu.

312 They also cited the case of **Edson Kanyagwera versus Bastrori**
313 **Tumwebaze and it is Civil Appeal No. 6 of 2004** in which it was
314 held that absence of an affidavit of service constitutes an error or
315 mistake on the face of the record.

316 In closing the Applicants submissions, Counsel Ellison Karuhanga
317 summarized that the Applicants contention was basically that there
318 was an error apparent on the face of the record in two respects,
319 namely that the applicant was not served with the hearing notice,
320 that this being a consolidated suit CS 612 of 2015 could not have
321 been called on its own, that was an error to proceed with this matter
322 in the absence of proceeding of the matters with which it had been
323 consolidated. That for that to happen the consolidation would have
324 to have been set aside.

325 That regarding dismissal for want of prosecution, for there to be a
326 hearing, the applicant should have been served with a hearing notice,
327 and that failure to be served with the hearing notice constitutes an
328 error apparent on the face of the record. And further that Order 17
329 Rule 5 and 6 of the principal Civil Procedure Rules was amended by
330 Statutory Instrument 33 of 2019 by substituting Order 17 Rules 5
331 and 6 in which now is included a provision that mandates dismissal
332 only if no step is taken by either party with a view of proceeding with
333 the suit for a period of 6 months after the mandatory scheduling
334 conference.

335 They prayed that this Honorable court be pleased to review the order
336 on the grounds that there are sufficient grounds, that it is a matter

337 of substantial financial importance as the sum involved on the record
338 is over UGX 46 billion in dispute and as stated earlier, the purpose
339 is to bring the case to life and have it dealt with by this Honorable
340 Court in the manner to have it transferred to the Tax Appeals
341 Tribunal and that there would be no injustice whatsoever either to
342 this court or to the respondents when that is done.

343 In reply, the Respondents contend that well as an Application was
344 filed for consolidation of High Court Civil Suit No. 612 of 2015, 868
345 of 2014 and 508 of 2015, the process of consolidation was never
346 effected. That there was no consolidation.

347 That the physical consolidation did not take place and consequently,
348 High Court Civil Suit No. 868 of 2014 was withdrawn by consent of
349 both parties while High Court Civil Suit No. 508 of 2015 was filed
350 afresh in the tax appeals tribunal and the same is pending hearing.
351 The statement that the suit was filed afresh is however submission
352 from the Bar. It is not averred by the party as at Paragraph 5 of the
353 Affidavit in Reply, the deponent states that CS 508 was transferred
354 to Tat and is pending hearing. He does not say that it was filed afresh.
355 The two are procedurally different.

356 That due to the laxity and dilatory conduct of the applicant, Civil Suit
357 No. 612 of 2015 was rightly dismissed for want of prosecution.

358 That the applicant then filed an Application in the Tax Appeals
359 Tribunal based on the same facts and issues that are in contention
360 as those in the dismissed Civil Suit No. 612 of 2015 which is sought

361 to be reinstated. That the said Application is still subsisting and has
362 not been withdrawn from the Tax Appeals Tribunal.

363 That this Honorable court properly exercised its discretion to dismiss
364 this suit as provided for under Oder 17 Rule 6.

365 That well as the applicant stated that the presumption is that the
366 dismissal was under Order 17 Rule 5, it is on record that none of the
367 parties were present when the main suit was dismissed and that it is
368 a well-known principle of law that the court may on its own motion
369 dismiss a suit for want of prosecution where no action has been taken
370 by either party.

371 That the rules set out under Order 17 Rule 6 do not provide that
372 the dismissal should be on a merit but a decision to dismiss is based
373 on the rules and on general to delay in prosecuting a suit. That it
374 has nothing to do with the merit of the case.

375 That the applicant has not furnished sufficient cause for failure to
376 take steps for a period of over or close to five years and cannot justify
377 this failure.

378 She cited the case of **Comtell Intergrater's Africa ltd versus**
379 **National social security fund High Court Misc. Application No.**
380 **772 of 2016** in which Court stated that the steps to be considered
381 as steps taken, must be those that are evident on the court record
382 and that in the instant case there are none.

383 That well as the applicant claims to have taken steps to prosecute
384 this matter, there is no evidence on record and the only evidence

385 sought to be relied on is the letter of 7th September, 2020 which was
386 written after this Application had been dismissed in August 2020.

387 Regarding the 6 months rule under the amended civil procedure
388 Rules 33 of 2019 that action should not have been taken for a period
389 of 6 months after closure of the mandatory scheduling conference,
390 the Respondents contended that if the letter by the respondent of
391 November, 2019 that is attached as annexure "D" of the Application
392 was to be considered, then at the very least by July 2020, when the
393 courts were opened for business, the Applicant should have been
394 seen to take some action but he did not and is therefore guilty of
395 dilatory conduct.

396 That section 98 of the civil procedure Act is not available for the
397 Applicants in the instant case because the inherent power of court is
398 exercised only where there is no specific remedy available, which is
399 not the case in the instant case. That courts should be reluctant to
400 exercise inherent power where a specific remedy exists. That the
401 applicant has an alternative remedy of filing a fresh suit and has
402 indeed exercised this option through filing an Application in the Tax
403 Appeals Tribunal that is still subsisting and pending hearing.

404 The Respondents cited the case of **Kibuigumu Patrick alias**
405 **Munakukama versus Aisha Muluji and Hassan Basajja Balaba**
406 **Misc. Application No. 455 of 2014** in which an Application was
407 found incompetent where the applicant had an alternative remedy
408 and sought to rely on Section98

409 In rejoinder Counsel for the Applicants, while addressing the issue of
410 jurisdiction of this court, contended that jurisdiction in this case,
411 which is in respect to review of orders under the Civil Procedure
412 Rules, lies with the judge who made the order. That the jurisdiction
413 is strictly about the review and it does not concern itself with any
414 other subject matter.

415 Regarding submissions that none of the parties was present at the
416 time the order was extracted and at the time the order was heard,
417 that then means that the order is defective because it says "at the
418 hearing". That if there was a hearing at which neither the
419 respondents nor the applicants were present then there is an error
420 on the face of the record which warrants review of the order.

421 Contrary to the Applicants apparent contest to this courts mandate
422 to proceed without notice to the parties to show cause why the matter
423 should not be dismissed; under Order 17 rules 5 & 6 CPR, this court
424 can on its own motion and without notice to the parties proceed suo
425 motu. I hasten to add that whereas where Court opts to invite the
426 parties to show cause why a matter should not be dismissed, notice
427 is issued and the parties are expected to attend court, under Order
428 17 rules 5 and 6 CPR, by which Court proceeded, the right to
429 audience is not as a matter of course. There is therefore a clear
430 distinction where Court elects to proceed under order 17 r 2 CPR and
431 when it proceeds under Order 17 r 5 & 6 (as amended by SI33 of
432 2019) CPR as it did in the instance. In the instant case, Court moved
433 suo motu and did not invite the parties for a hearing, and the Court's

434 minute on the record shows so. However, the Order that was
435 extracted is worded in such a way that it implies that there was a
436 hearing and attendance by the parties, whereas not. To that extent,
437 that amounts to an error apparent on the face of the order in that
438 regard.

439 Counsel for the Applicant contended that the law under which the
440 matter was dismissed should have been mentioned in the order and
441 that the omission to do so amounted to an error on the record and
442 was therefore fatal.

443 The trial record states that the matter was dismissed for want of
444 prosecution. The only provision of the law which allows for that is
445 Order 17 rules 5 & 6 CPR. The record indicates as such.

446 None the less, the dismissal was in error as it was not compliant with
447 prerequisites for dismissal or abatement stipulated under Order 17 r
448 5 & 6 (as amended by SI33 of 2019) CPR.

449 On the contention that the Applicants did not take any steps to fix
450 the matter for hearing, Counsel for the Applicant submitted that it is
451 within the power of this court to cause-list matters and that well
452 aware of the fact that the Respondents had taken a step, in their
453 letter of 16th November 2019 to Court, to have the matter fixed, it
454 would have been superfluous and busy bodying for the Applicants to
455 do so as well

456 **Resolution**

457 **S.82 of the CPA and O.46 Rule 1 of the CPR** spell out the law of
458 review.

459 Section 82 of the Civil Procedure Act provides that;

460 "Any person considering himself or herself aggrieved – by a
461 decree or order from which an appeal is allowed by this Act, but
462 from which no appeal has been preferred or

463 By a decree or order from which no appeal is allowed by this
464 Act, may apply for review of judgment to the court which passed
465 the decree or order and the court may make such order on the
466 decree or order as it thinks fit."

467 **Order 46 Rule 1 of the CPR** sates as follows;

468 "(1) any person considering himself or herself aggrieved—

469 By a decree or order from which an appeal is allowed, but from
470 which no appeal has been preferred; or

471 by a decree or order from which no appeal is hereby allowed,
472 and who from the discovery of new and important matter of
473 evidence which, after the exercise of due diligence, was not
474 within his or her knowledge or could not be produced by him or
475 her at the time when the decree was passed or the order made,
476 or on account of some mistake or error apparent on the face of
477 the record, or for any other sufficient reason, desires to obtain
478 a review of the decree passed or order made against him or her,
479 may apply for a review of judgment to the court which passed
480 the decree or made the order."

481 In **Re-Nakivubo Chemis (U) Ltd (1979) HCB 12** Manyindo J, as he
482 then was, held that;

483 "The three cases in which review of a judgment or orders is allowed
484 are those of;

485 (a) <u>Discovery of new and important matters of evidence previously</u>
486 <u>overlooked by excusable misfortune.</u>
487 (b) <u>Some mistake apparent on the face of the record.</u>
488 (c) <u>For any other sufficient reasons,</u>
489 But the expression 'sufficient' should be read as meaning
490 sufficiently analogous to (a) and (b) above."

491 In law, "mistake or error apparent on the face of record" refers to an
492 evident error which does not require extraneous matter to show its
493 incorrectness. It connotes an error so manifest and clear that no
494 court would permit such an error to remain on the record. It may be
495 an error of law, but law must be definite and capable of
496 ascertainment; see **Attorney General & O'rs vs. Boniface**
497 **Byanyima HCMA No. 1789 of 2000, Levi Outa vs. Uganda**
498 **Transport Company [1995] HCB 340.**

499 When dismissing CS 612 of 2015, this court noted as follows;

500 "Last step taken was WSD filed on 5/10/2015. No step has
501 since then been taken to have matter prosecuted. Dismissed for
502 want of prosecution. No order as to costs."

503 It now transpires, from the evidence of the documents filed by the
504 parties and the submissions in this application, that the

505 Respondents had moved Court, in a letter dated 16th Novembers
506 2019, addressed to the Registrar of this Court and copied to Birungyi
507 Barata & Associates, seeking a date to be fixed for them to appear
508 and address Court on the proposition that the case was improperly
509 before this Court.

510 This letter, dated 16th November 2019 and marked "D" attached to
511 the Affidavit in Support of the Application was filed with the Court
512 Registry on the 18th November 2019. It was however never placed on
513 the trial file and therefore never came to my attention on the occasion
514 of the dismissal.

515 On the 17th August 2020, when the suit was dismissed, this court
516 did not therefore address itself to the contents of that letter. Hitherto
517 the trial file does not have the letter on the record. It only appears as
518 an attachment to the Applicants pleadings in the instant application.

519 The Applicants further contended that the dismissal was improper
520 for the reason that under the amended Civil Procedure Rules – Order
521 17 r 5 & 6 as amended by SI 33 of 2019, dismissal for want of
522 prosecution is only possible if neither of the parties takes any steps
523 with a view to proceeding, within a period of six months following
524 closure of the mandatory scheduling conference.

525 Order 17 r 5 states as follows;

526 "Dismissal of suit for want of prosecution:

527 In any case not otherwise provided for, in which no application
528 is made or step taken for a period of 6 months by either party,

529 with a view to proceeding with the suit after the mandatory
530 scheduling conference, the suit shall automatically abet and
531 where the suit abets under sub rule 1 of this Rule the plaintiff
532 may, subject to the law of limitation, bring a fresh suit".

533 In the case of **Nyamogo & Nyamogo Advocates vs. Kogo (2001) 2**
534 **EA 173** in which court considered whether an erroneous decision
535 constitutes an error on the face of the record sufficient to permit
536 review, when making a distinction between a mere erroneous
537 decision and an error apparent on the face of the record Court held
538 that;

539 "Where an error on a substantial point of law stares one in the
540 face and there could reasonably be no two opinions, a clear case
541 of error apparent on the face of the record would be made out.
542 An error which has to be established by a long drawn process
543 of reasoning or on points where there may conceivably be two
544 opinions can hardly be said to be an error apparent on the face
545 of the record. Again, if a view adopted by the court in the original
546 record is a possible one, it cannot be an error apparent on the
547 face of the record even though another view was possible."

548 Similarly in a more recent decision of **Lalwak Alex vs. Opio Mark**
549 **(HCCA No.0058 of 2016),** Justice Stephen Mubiru observed that;

550 "The error and omission must be self-evident and should not
551 require an elaborate argument to be established. It will not be a
552 sufficient ground for review that court could have taken a
553 different view of the matter. That Court proceeded on an

554 incorrect exposition of the law and reached an erroneous
555 conclusion of law is not a proper ground for review."

556 It is not in dispute and both parties have averred in Affidavits
557 deponed in support of their respective cases that schedule
558 conferencing for Civil Suit 612 of 2015 had not taken place when it
559 had been slated to happen and the suit has consequently never been
560 through schedule conferencing.

561 When court dismissed the matter, it was oblivious of three critical
562 things, namely; the letter of 16th November 2019 from the
563 Respondents to the Court asking for the matter to be fixed for
564 hearing, the consolidation order and the record of proceedings from
565 which this court should have discerned that scheduling had not yet
566 taken place.

567 The case was therefore dismissed before the prerequisites for
568 dismissal under order 17 Rules 5 & 6 CPR were met, specifically
569 mandatory schedule conferencing had not even taken place.

570 Dismissal was therefore premised on error for having been done
571 prematurely under order 17 rules 5 and 6 CPR as amended by SI 33
572 of 2019 and also that evidence of the Respondents having moved
573 court in November 2019 to grant a date to be heard was not taken
574 into account.

575 This matter however poses peculiarities in the manner in which it
576 has morphed in the court system, I am therefore constrained to

577 comment on the circumstances that led to dismissal of HCCS 612 of
578 2015.

579 On the 17th August 2020, as part of the exercise to weed out inactive
580 cases which clogg the court system and also in effort towards
581 reducing the case backlog, Court moved suo motu under Order 17
582 rules 5 and 6 and dismissed Civil Suit 612 of 2015- CNOOC V URA,
583 among several other cases which met the criteria, that is to say, cases
584 for which no step had been taken to have the matter prosecuted.

585 Under Order 17 rules 5 & 6 CPR, this court can on its own motion
586 and without notice to the parties proceed suo motu. I hasten to add
587 that whereas where Court opts to invite the parties to show cause
588 why a matter should not be dismissed, notice is issued and the
589 parties are expected to attend court, under Order 17 rules 5 and 6
590 CPR, by which Court proceeded in the instant case, the right of
591 audience is not a matter of course where court moves on its own.
592 There is therefore a clear distinction where Court elects to proceed
593 under order 17 r 2 CPR and when it proceeds under Order 17 r 5 &
594 6 (as amended by SI 33 of 2019) CPR as it did in the instance.

595 In the instant case, Court moved *suo motu* and indeed proceeded to
596 dismiss the suit without giving the parties audience to appear and
597 show cause. The Court's minute on record in the trial file shows so.
598 The facts of this case are distinguishable from those in the case of
599 Mera **Investments V UIA, MA 114 of 2015** in which one of the
600 parties, the Respondents in that case, had moved court. That said,

601 the Order which was extracted is worded in such a way that it implies
602 that there was a hearing and attendance by the parties, whereas not.

603 The pitfalls regarding the way this matter has been handled could
604 potentially occasion a miscarriage of justice for either party.

605 In the first place, one could argue that this court ought to have
606 queried its own systems and interrogated its jurisdiction over this
607 matter right from the onset, to wit; the physical consolidation of Civil
608 suit 612 of 2015 with CS 508 of 2015 and CS 864 of 2014 which was
609 later settled was not effected as directed by court on the 27/4/2017;
610 transfer of CS 508 of 2015 alone to the TAT without CS 612 of 2015
611 yet it is a part of the consolidated residual matter, was irregular; the
612 omission to have the Respondents letter of 16th November 2019 and
613 the absence of the record of proceedings on the case file were
614 administrative irregularities .

615 This matter had been fixed for schedule conferencing but on the day
616 when the matter was to be scheduled, the Judge was transferred and
617 the schedule conferencing did not take place. There is however
618 nothing on the record of the file to show this.

619 One of the underlying mischiefs that specialized tribunals are
620 intended to resolve is the opportunity they provide for expeditious
621 disposal of cases, reduction of case backlog and mitigation of costs
622 associated with litigation. It is therefore justified in all ways that the
623 parties take advantage of this avenue for resolution of their dispute.
624 The Court seized with original jurisdiction over tax matters is the tax
625 Appeals Tribunal.

626 Whereas the mischief that is intended to be addressed by qualifying
627 this Court's jurisdiction in matters such as the instant case, can
628 never have been to close out litigants from accessing justice, the
629 Applicants/Plaintiffs ought to have in the first instance initiated the
630 suit at the TAT.

631 That said, the dismissal of CS 612 of 2015 was shrouded in case
632 management irregularities and as have been highlighted these have
633 now come to light. There are multiple errors on the record including
634 the wording of the order itself.

635 Litigants should however not be locked out on account of errors
636 which are not of their making but possibly of their Counsel and the
637 Court system.

638 All the parties should therefore be given a fair opportunity to state
639 their respective cases especially given that the factors that led to
640 dismissal of 612 of 2015 were not the handicraft of either of the
641 parties.

642 However, that said, judicial discretion cannot be exercised in vain,
643 even if CS 612 of 2015 is reinstated, it is not in the right court. - see
644 **URA V Rabbo CA 12of 2004**). This matter was however consolidated
645 with HCCS 508 of 205 (vide MA 1153 of 2016 (arising from CS 868
646 of 2014 grated on the 27/04/2017) which is now before the TAT and
647 according to Paragraph 15 of the Affidavit in Reply, is pending
648 hearing.

649 The consolidation Order has never been set aside or reversed and so
650 CS 612 of 2015 ad CS 508 of 2015 are for all intents and purposes
651 remain consolidated and as such are one file for purposes of case
652 management and disposal of the matter.

653 Finally, in view of the numerous irregularities on the file that
654 culminated into the erroneous decision of dismissal of CS 612 of
655 2015 I do hereby set aside the said dismissal of civil suit 612 of 2015
656 and order that the matter is reinstated.

657 I am however mindful of the fact that the Applicants have a pending
658 Application before the TAT whose cause of action and remedies
659 sought are in pari materia with CS 612 of 2015. In the event, CS 612
660 of 2015 will be stayed pending the resolution of TAT Misc App 134 of
661 2020.

662 Costs shall abide the outcome of the main suit.

663 Delivered at Kampala by email to Counsel for the respective parties
664 and signed copies for the parties placed on file this 6th day of
665 November, 2020.

666 ……………………………………………………

667 **RICHARD WEJULI WABWIRE**

668 **JUDGE**

669 .

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