**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISCELLANEOUS COMMERCIAL CAUSE NO. 243 OF 2015**

**(Arising from Commercial Case No. 85 of 2014)**

**MEIS INDUSTRIES LIMITED**
**ISLAM ALLY SALEH** ..... **APPLICANT**
**MEREY ALLY SALEH**

**VERSUS**

**TWIGA BANKCORP** ..... **RESPONDENTS**

1st December, 2015 & 18th February, 2016

**RULING**

**MWAMBEGELE, J.:**

This application has been taken by the applicants seeking the indulgence of this court to allow them file out of time an application for setting aside the dismissal order of this court made on 17.06.2015 dismissing Commercial Case No. 85 of 2014. The application has been supported by an affidavit of Mr. Peter Kibatala, learned counsel.

The application was argued before me on 01.12.2015 during which Mr. Kibatala and Mr. Kakamba, learned counsel appeared for the applicants and respondent respectively.

The reasons why the applicants could not challenge the dismissal order in time, as can be gleaned in the affidavit supporting the application, are two. First, that the applicants were not aware of the dismissal order and secondly that there was delay in locating the relevant court file.

It is the submission of the learned counsel for the applicants that he did not appear on the date set out for pre-trial conference and asked Mr. Kakamba, learned counsel for the respondent to hold his brief but, instead, when the matter was called on for the said pre-trial conference, Mr. Kakamba prayed for dismissal of the suit for want of prosecution. That he was not aware of the order and when he became aware of it he tried to locate the file for perusal but the same could not be located. The learned counsel avers further that with the assistance of one Kanyochele; a court clerk, the file was located on 10.09.2015 and on perusal, the learned counsel realized that suit had indeed been dismissed for want of appearance on 17.06.2015.

The averments by the learned counsel for the applicants have been strenuously attacked by Mr. Kakamba, learned counsel for the respondent as being untrue. The onslaught has been made by the learned counsel for the respondent in the counter-affidavit, skeleton written arguments as well as oral arguments during the hearing of the application. The learned counsel for the respondent states at para 6 of the counter-affidavit that he informed Mr. Kibatala, learned counsel for the applicants of the date of 1st Pre-trial

conference through his mobile phone number 0713848540. On the question of perusal of the court file, the learned counsel attacked the submission by the learned counsel for the applicants that if that were true he should have attached an Exchequer Receipt Voucher (ERV) for perusal. Likewise, if it were true that the learned counsel located the file with the help of one Kanyochele; a court clerk, the said Kanyochele, he argued, should have sworn an affidavit to that effect. On these premises, the learned counsel for the respondent submits that the learned counsel for the applicants has not brought sufficient reasons to warrant the court grant the orders sought. What comes in picture, he submits, is sheer negligence and inaction. This application must have been triggered by the execution process, he submits.

In a short rejoinder, the learned counsel for the applicants' submitted that his was not perusal *per se*. That is the reason why he could not produce any ERV to the effect. He rejoins that it is not true that they have been persistently and consistently not entering appearance.

I have subjected the learned rival arguments by the learned counsel for both parties to serious consideration they deserve. As rightly put by the learned counsel for the respondent and conceded by the learned counsel for the applicants, for an application of this nature to succeed there must be given sufficient reasons to the satisfaction of the court why the order was not challenged in requisite time. That is to say, an application for extension of time is entirely in the discretion of the court to grant or refuse it, and that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause - see: ***Ratnam Vs Cumarasamy and another*** [1964] 3 All ER 933, ***Mumello Vs Bank of***

***Tanzania*** [2006] 1 EA 227, ***Tanga Cement Company Vs Jumanne D. Masanwa & Anor***, Civil Application No. 6 of 2001 (CAT unreported), ***Kalunga and Company Advocates Vs National Bank of Commerce Ltd and Another, Civil Application No. 124 of 2005***, ***Regional Manager, TANROADS Kagera Vs Ruaha Concrete Company Limited,*** Civil Application No. 96 of 2007 (CAT unreported) and ***Lucy Chimba Bahonge Vs Suleiman Rashid Juma***, Civil Application No. 8 of 2005 (CAT unreported), to mention but a few.

Admittedly, what amounts to reasonable or sufficient cause has not been defined under section 14 (1) of the Law of Limitation Act, Cap 89 of the Revised Edition, 2002, under which the applicant has made his application. The reasons why there in no such explanation was explained better by this court (Mwandambo, J.) in an unreported decision of ***Emmanuel Billinge Vs Praxeda Ogweyo & Anor*** Misc. Application No. 168 of 2012:

> "... what constitutes reasonable or sufficient cause has not been defined under the section because that being a matter for the court's discretion cannot be laid down by any hard and fast rules but to be determined by reference to all the circumstances of each particular case."

As was held in the ***TANROADS Kagera*** case (supra), the question being within the discretion of the court, an applicant must place before the Court material which will move the Court to exercise its judicial discretion in order to extend the time limited by the rules.

In the case at hand, the reasons brought to the fore by Mr. Kibatala are, to say the least, frivolous. The learned counsel has kept on shifting the buck on Mr. Kakamba that he asked him to hold his brief and notify him on the way forward but that he was never informed and when the case was called for 1st PTC, surprisingly, Mr. Kakamba prayed for dismissal of the case for nonapppearance. This is a very serious allegation against a colleague in the profession. Luckily, Mr. Kakamba, learned counsel for the respondent has managed to disprove him to the satisfaction of the court. And to clinch it all, the record vindicates Mr. Kakamba.

The learned counsel for the respondent has also made a very serious allegation against this court; that the relevant file was missing but yet he never filed an affidavit of the said Kanyochole; a court officer, to prove this very relevant and serious allegation. Thus this allegation, serious as it is and relevant for the grant of the application as it is, in the absence of any affidavital evidence from the said Kanyochole; a court officer who helped the learned counsel for the applicants, remains an allegation from the bar which is unacceptable.

Again, the learned counsel for the applicants states that he perused the court file only to learn that the suit had been dismissed for want of appearance on 17.06.2015 before His Lordship Songoro, J. But yet, no perusal ERV is provided to substantiate this relevant fact under the pretext that his "was not perusal *per se*". Whatever that means, this averment as well has not been sufficiently proved.

The reasons bought to the fore on which this court could exercise discretion to grant the orders sought are, as already alluded to above, frivolous. What becomes evident is sheer negligence and inaction on the part of the learned counsel for the applicants.

It must be put clear that this court has discretion to extend time under section 14 of the Law of Limitation but such extension can only be exercised if sufficient reason has been given by an applicant. Only sufficient cause for the delay, and not sympathy, will make an application of this nature succeed. I wish to associate myself with a fairly old decision of this court (Sir Ralph Windham, CJ) of ***Daphne Parry Vs Murray Alexander Carson*** [1963] 1 EA 546 at 549 at which the following passage was quoted from Rustomji, at p. 88 of the 5th Edn. of his **Law of Limitation** putting this position after considering a number of Indian decisions upon the proper exercise by the court of its discretion to enlarge time under section 5 of the Indian Limitation Act, 1908 which is *in pari materia* with section 14 of our Law of Limitation Act:

> "Though the court should no doubt give a liberal interpretation to the words 'sufficient cause', its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as

time-barred, even at the risk of injustice and hardship to the appellant."

See also: ***Daud s/o Haga Vs Jenitha Abdon Machafu,*** Civil Application No. 19 of 2006 (CAT unreported) and ***Coca Cola Kwanza Limited Vs the Hon Minister for Labour & 2 Ors*** Miscellaneous Civil Application No. 197of 2013 (unreported, Mwandambo, J.)

The above said, I find the present application seriously wanting in merit and proceed to dismiss it with costs to the respondents.

Order accordingly.

DATED at DAR ES SALAAM this 18th day of February, 2016.

**J. C. M. MWAMBEGELE**
**JUDGE**