



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Misc Civ Appli 60 of 2005

ZACHARIAH B. SHIMECHEROAPPLICANT

V E R S U S

THE ATTORNEY GENERAL

THE COMMISSIONER OF POLICE.....RESPONDENTS

RULING

The Applicant, ZACHARIAH SHIMECHERO, made an application to this court on 19-8-2005 seeking ***“leave to file suit out of time.”*** In his affidavit sworn on 27-7-05 in support of the application, he averred that he is entitled to be paid damages by the Government of the Republic of Kenya on account of the latter’s breach of statutory duty to protect him in December, 1998 as a result of which breach he was attacked by armed raiders in his Shishi Farm in Trans-nzoia District when his animals valued about Shs.7 million were stolen and property destroyed and the applicant and his family subjected to trauma.

In the grounds for making the application, the applicant stated that:-

- (a) *the Applicant has a good case against the Respondents with high chances of success;*
- (b) *the Applicant had earlier instructed M/S Khaminwa & Khaminwa advocates to file a suit against the Respondents which advocates failed to act in good time or at all;*
- (c) *the Applicants said previous advocates failed to adequately advise the Applicant;*
- (d) *the Applicant was taken ill and was bed-ridden for years following his involvement in a near-fatal road accident.*

The Applicant averred in his affidavit in support of the application that after the said attack in December 1998, he ***“soon after”*** instructed M/S Khaminwa & Khaminwa Advocates to act for him in his intended claim against the Kenya Government. He did not however give the date on which he engaged the said firm to act for him.

The applicant averred in his affidavit in support of the application that he was on 12-3-2001 involved in a motor accident in which he suffered severe bodily injuries and that he remained bed-ridden for 4½ years. He got little recovery in September 2003, he said, when he made enquiries from M/S Khaminwa & Khaminwa Advocates about his claim and on 11.9.2003 was ***“astounded to learn that his lawyers had not yet filed his claim in court.”***

However, the said firm of lawyers promised action, he said, but took none. In paragraphs 17, 18, 19 and

20 of his said affidavit, the applicant stated:-

“17. That true to the saying that misfortunes don’t come singly, I was on 14th September 2004, attacked and assaulted by thugs at my home whereupon I sustained serious injuries and was against hospitalized. (copy of the discharge summary annexed and marked “ZB6”)

18. That from the above foregoing, it is crystal clear that my failure to file the suit against the Attorney General within the required time was neither deliberate nor intentional but was occasioned by circumstances beyond my control, to wit the accident that grounded and disabled me, and my previous advocates who failed to act on my instructions. (copy of the doctors case summary marked “ZB7”).

19. That I know of my own knowledge that I have a good claim against the Respondent which claim I should be allowed to pursue. (copy of the plaint annexed and marked “B8”)

20. That I have been advised by my advocates on record which advise I verily believe to be true, that the failure of my previous advocates should not be visited upon me.”

In the light of this, should the court grant the applicant leave to file suit out of time?

The Applicant’s intended claim was contractual. It alleged breach of duty such as is referred to in S.27 (1) of the Limitations of Actions Act. In the instant case, the cause of action is alleged to have accrued sometime in December of 1998 and therefore the year limitation period ended on

The application herein was brought after years from the date of the accrual of the cause of action.

Under section 27(1) of the Limitation of Actions Act, limitation period cannot be invoked in defence where an action is for breach of duty and damages are claimed for personal injuries and leave has been granted and the requirements of section 27(2) of the Limitation of Actions Act fulfilled in relation to the cause of action. Those requirements entail proof that material facts relating to the cause of action were or included facts of a decisive character which were at all times **outside the knowledge of the applicant** until a date which either was after the limitation period or was not earlier than one year before the end of that period and in either case was a date not earlier than one year before the date on which the action was brought.

The provisions of section 28(2) of the Limitation of Actions Act enjoin the Court to grant leave only if evidence exists to satisfy the court that if the intended action was brought forthwith and such evidence was adduced in that action, it would in the absence of any evidence to the contrary be sufficient to establish that cause of action (apart from any defence under s.4 (2) of Cap 22) and to meet the requirements of section 27(2) of the Act.

Has the Applicant met the requirements of Sections 27(2) and 28(2) of the Limitation of Actions Act? The material facts relating to the cause of action were never outside the knowledge of the applicant who even instructed counsel to act for him. Moreover, it cannot be said that there exists evidence in favour of the Applicant on the basis of which it can be said that if the Applicant were allowed to bring the action, and such evidence were adduced it would be sufficient to establish the cause of action and fulfill the requirements of Section 27(2) of the Limitation of Actions Act in relation to that cause of action. In the circumstances, I am unable to grant the orders sought and accordingly I dismiss the application.

Delivered, dated and signed at Kakamega on 17th October, 2006.

G. B. M. KARIUKI

J U D G E