



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

**AT KAKAMEGA**

**Civil Suit 168B of 2000**

**MOHAMED OSMAN**

**ABDALLAH .....APPLICANT**

**VERSUS**

**BENSON**

**KIMANI .....RESPONDENT**

**RULING**

The Applicant Mohammed Osman Abdallah seeks an order to file suit out of time. He presented to court on 4.1.2000 an application by way of Originating Summons of the same date which was premised on section 3A of the civil Procedure Act Cap 21, and order XXXVI Rule 3C of the Civil Procedure Rules and sections 27 and 28 of the Limitation of Actions Act, Cap 22, of the Laws of Kenya.

In the ground on which the application is made, the applicant blames his former counsel for not having filed the suit in time and states that the delay was not intentional and that if leave to file suit out of time is not granted, he stands to suffer irreparable loss. He also states that the Respondent, Benson Kimani, will not be prejudiced in any way by the grant of the order.

In his affidavit sworn on 3<sup>rd</sup> October 2000, the Applicant avers that he was involved in a road accident on 22.9.96 while traveling as a passenger in the Respondent's motor vehicle No. KAG 691J following which he instructed M/S Khan & Saisi Advocates to sue for damages on his behalf and that the latter promised to do so. By the end of 1999, the said advocates had not filed suit and consequently the Applicant withdrew his instructions from them and proceeded to instruct his current advocates, Anziya & Company. He also avers that he has a good case against the Respondent and that it is in the interest of justice that he be granted leave to file suit against the Respondent out of time.

The salient features of the application are that the alleged cause of action was tortuous. It occurred in September of 1996. The application for leave to file suit out of time was brought 4 years after the accrual of the cause of action. Under section 4(2) of the Limitation of Actions act, cap 22, the action should have been brought within 3 years from the date on which the cause of action accrued. That period elapsed in September or October of 1999. The Applicant states that he discovered towards the end of 1999 that his former advocates had not file suit and that that is when he decided to withdraw his instructions from the. He does not specify when he instructed his present advocates but he deposes in is affidavit that by the time he did so the time for filing suit had elapsed.

Under section 27 of the Limitation of Actions Act Cap 22, this court has jurisdiction, inter alia, to extend limitation period in cases where the conditions set in that section have been met. For an applicant in a tortuous action to succeed in bringing himself within the parameters set out in section 27 of the said act, he must establish that

- a) The action is for damages and
- b) the damages claimed in the suit relate to or include damages for personal injuries and

c) the 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 was either after the 3 years limitation period or was not earlier than one year before the end of the 3 years limitation period and in either case the date was not earlier than one year before the action was brought providing that under section 28(8) of the Limitation of Actions Act, it appears to the court on the evidence adduced by the Applicant that if the action were brought forthwith and the like evidence was adduced in that action; that evidence would in the absence of any evidence to the contrary be sufficient to establish that cause of action and to fulfill the requirements of section 27(2) in relation to that cause of action.

In the present application, the material facts were at all times within the knowledge of the Applicant from the date of accrual of the cause of action.

The Applicant has not brought the intended suit yet. Rule 3C(1) of Order 36 of the Civil Procedure Rules enjoins him to seek leave by way of an ex parte application made by way of Originating Summons, which he has done. Section 27 of the Limitation of actions Act must be read with section 28(1) and (2) of the Act. Section 28(2) of the Limitations of actions is emphatic that only if it appear to the court if such action were brought forthwith and the evidence adduced by the Applicant would in the absence of any evidence to the contrary be sufficient to establish that cause of action and to fulfil the requirements of section 27(2) in relation to that cause of action will the court grant leave. In the instant application, the Applicant has not met the conditions set by the Limitation of actions Act. His application is hopelessly unmeritorious. I observe, moreover, that the annexure to his affidavit marked MOA 1 merely authorized M/S Khan & Saisi Advocates to act for him. It does not show that he gave them adequate instructions to enable them to institute litigation on his behalf. It is idle for him to start blaming the said firm for not having taken legal action on his behalf. Besides after his decision to withdraw instruction from them at the end of 1999, he does not state when he instructed his present advocate who filed on his behalf the present application almost a year later on 4<sup>th</sup> October 2000. There is no material to show that he has evidence which in absence of any contrary evidence would be sufficient to establish the alleged cause of action and fulfil the requirements of section 27(2) of the Limitations of Actions Act. The Applicant sat on his rights for too long. The dilator mess on his part in coming to court was unreasonably long and unsatisfactorily explained.

I find that the Applicant has not met the legal criteria set by the Limitations of Actions Act in the circumstances I dismiss the application with costs.

Dated at Kakamega this 11<sup>th</sup> day of March 2004.

G.B.M. KARIUKI

J U D G E