

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 229 OF 2001 (O. S.)

NANCY NJERI NJUGUNAPLAINTIFF

VERSUS

PETER OPUMBI

ATTORNEY GENERAL.....DEFENDANTS

RULING

This is an Ex-parte Originating Summons brought under Order XXXVI Rule 3 of the Civil Procedure Rules and Section 27 of the Limitation of Actions Act (Cap 22). In it the Applicant seeks, in the main, leave to enable her institute a claim for damages against the Respondents arising from a road traffic accident which took place on December 25, 1993 outside the limitation period. The Summons was supported by the affidavit of the Applicant sworn on June 28, 2001 in which she deposed as follows. She is the widow of Joshua Njuguna Wanyoike (Deceased) who was killed in a road traffic accident on December 25, 1993 along Nakuru/Lanet Road. In 1994, she filed NAKURU HCCC NO. 925 OF 1994 through Chuma Mburu Advocate against the present Respondents.

On November 8, 1996 the suit against the 2nd Respondent, who is the Attorney General of the Republic of Kenya was struck out for non-compliance with the provisions of Section 13A of the Government Proceedings Act (Cap 40). In 1994, the same Advocate applied for grant of representation on behalf of the Applicant, the Certificate of Confirmation whereof was issued on July 19, 1995. Her Advocate assured her that the case was on until in April 2001 when he handed to her the file the same having been withdrawn.

She complained that the said Advocate had concealed material facts from her knowledge until the limitation period had expired.

Before the Court can allow a Plaintiff to bring a claim founded on tort outside the period of limitation, Section 28 of Cap 22 requires that the Applicant must, inter alia, fulfill the requirements of Section 27(2) in relation to the cause of action. In this respect, it is the responsibility of an Applicant to show that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the Plaintiff until a date which:-

- (a) either was after the three year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and
- (b) in either case, was a date not earlier than one year before the date on which the action was brought.

The Applicant in this case was possessed of all material facts in relation to the cause of action in question and was able to instruct her Advocate in 1994 before the limitation period to file the case alluded to earlier. Those facts have been within her knowledge since that time and it is now close to 10 years after the event that she seeks leave to institute proceedings out of time. What is important in these cases is the knowledge of the Applicant and not the conduct of his Advocate in dealing with the Applicant's instructions. The fulfillment of the requirements of Section 27(2) is a statutory condition from which one

cannot escape. The Applicant before me has not fulfilled the requirements of that subsection and she cannot be allowed to enjoy the statutory discretion in the matter.

I, therefore, dismiss the Originating Summons dated June 28, 2001. Since the same was Ex-parte, I make no order for costs.

Dated and Delivered at Nakuru this 25th day of June, 2003.

ALNASHIR VISRAM

JUDGE