



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISUMU**  
**CIVIL CASE NO. 359 OF 2000**

**JANE AOKO OWINO.....PLAINTIFF**

**VERSUS**

**BLUE SHIELD INSURANCE CO. LTD.....DEFENDANT**

**RULING**

This is a preliminary objection on points of law to an affidavit sworn on 22nd October 2003 by Mr. Kasamani, the Counsel for the defendant, in this case, in support of an application of the same date seeking a stay of execution and setting aside of judgment made in favour of the plaintiff on 23rd July 2003.

In support of this objection, Mr. Orenge for the plaintiff contended that in his affidavit in support of the said application Mr. Kasamani deponed to contentions matters which only the defendant should have done.

According to Mr. Orenge the bone of contention in these proceedings is whether or not a statutory notice was served upon the defendant which is the Insurance Company in compliance with Section 10 (2) of the Insurance (motor Vehicle Third Party) Risks, Act (Cap 405). He further contended that the only person who can either deny or admit that such service was effected and can depone to the validity of it is the defendant, and that where the defendant can positively demonstrate that service of the said notice was not effected then the defendant will succeed in setting aside the judgment obtained against it.

He relied on several authorities where it was held in each case that it is not competent for party's advocate to swear to the contested issues. Mr. Kasamani for the defendant opposed this preliminary objection and submitted that there is no provision in Order XV111 of C.P.R. or in all the authorities cited where advocates for parties are barred from swearing affidavits. He conceded that the only limitation barring advocates is they should not depone to matters which are in dispute in the suits. He further contended that in paragraph 1 of the said affidavit he had deponed to the facts in the court file and the law and that each paragraph of the affidavit is supported by an annexure from the file.

According to Mr. Kasamani the fact that the plaintiff purported to retrospectively serve a notice upon the defendant could be contested as it was a fact. He denied that he deponed to any contentions matters. I have perused the record of this case and I note that both the affidavits in support and the replying one were sworn by advocates for the parties. The issue which Mr. Orenge for the plaintiff claimed to be in dispute is whether the defendant was served with a notice in terms of section 10(2) of Cap 405 which is before or within 14 days after commencement of the suit in which judgment was given.

However in paragraphs 2,3 and 4 of his replying affidavit Mr. Orenge admitted that the plaintiff did not serve the defendant as laid down in the said Act and that in fact M/S Blue Shield Insurance Company

Ltd was wrongly served with the notice and that much later on when the error was discovered an application for leave to serve it out of time was made in Kisumu H.C. Miscellaneous Civil Application No. 135 of 2001 under Sections 27 and 28 of the Limitations of Actions Act by an Originating Summons brought under Order XXXV1 rule 3D (3) of CPR.

All these facts are not in dispute as they are all on record. In my view what will be in dispute is in this case is whether the plaintiff was entitled to seek to extend time for serving the notice under Section 10(2) of Cap 405 under sections 27 and 28 of the Limitations Act as it did. The authorities indicate that leave obtained ex parte under sections 27 and 28 of the Limitations of Actions Act can be challenged by the defendant at the trial.

Apart from the above dispute I find that the preliminary objection raised in this case is without merit and accordingly I dismiss it with costs.

Dated and delivered this 4th December 2003 in the presence of Mr. Orengo and Mr. Mwamu for Mr. Kasamani.

**B.K. Tanui**

**JUDGE**

**4/12/2003**

Coram Tanui, J

Kasamani for defendant / applicant

N/A respondent

Rose c.c.

**KASAMANI**

I was not here a while ago when the ruling was delivered.

I pray that the interim orders of stay be extended.

**ORDER**

(1) Matter stood over to 02/02/2004 for hearing.

(2) Interim orders extended to that date.

(3) Costs in the cause.

**B.K. Tanui**

**JUDGE**

