



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO.1443 OF 1999**

**NGUGI MBUGUA :::::::::::::::::::::::::::::::::::PLAINTIFF**

**V E R S U S**

**CANON INSURANCE CO. LTD :::::::::::::::::::::::::::DEFENDANT**

**R U L I N G**

The application dated 24th October 2001 filed by the plaintiff is made under Order VI Rule 13 (1) (b) (c) and (d) asking for orders that the statement of defence dated 14th September 1999 be struck out and judgment be entered for the plaintiff on grounds that it is a mere sham and a general denial while in fact the defendant accepts the facts of the plaintiff.

In his supporting affidavit the applicant says there was a decree for payment of damages in the amount of KShs.307,066/= against the insured but the Insurance Company has failed to settle the decretal amount in HCCC No.5727 of 1989. The decree was issued on 1st April 1998.

The defendant has in a replying affidavit sworn on 28th November 2001 stated that there is a triable issue raised in the defence which ought to be heard stating whether the plaintiff was served with a statutory notice.

The issue of statutory notice is raised in paragraph 6 of the defence where the defendant is denying receipt of any Notice of judgement. Section 10 (2) of (Insurance Third Party Risks) Act Cap 405 says:-

“No sum shall be payable by an insurer under the foregoing provisions of this section:-

(a) In respect of any judgment unless before or within fourteen days after the commencement of proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or .....

Here there is no reply to the averment that there was no notice, moreover the plaintiff does not claim that in 14 days the insurer was notified, which meant that the matter was put in issue. There ought to have been a special reply. It appears this raises an issue of fact that ought to be settled on evidence.

Under Order 6 Rule 13(1) b c and d of the Civil Procedure Rules the court exercises this jurisdiction with circumspection and ought only to strike out a pleading where it is fairly clear that there is no defence and or where no issue at all is raised that deserves a hearing. It is a drastic order and will only be applied where the defence raised no triable issue, or completely raises no issue and or falls properly under the sub-paragraphs of Order 6 Rule 13.

In my view there is a triable issue to be resolved in evidence and for that reason I disallow the application but order that there be no order as to costs. However I direct that the main case be put down for hearing immediately.

**A. I. HAYANGA**

**J U D G E**

**Delivered this 10th day of September 2002**

**A. I. HAYANGA**

**J U D G E**