



IN THE COURT OF APPEAL

AT KISUMU

CORAM: KWACH, OMOLO & AKIWUMI, JJ.A

CIVIL APPEAL NO. 19 OF 1996

BETWEEN

MOUNT ELGON HARDWARE.....APPELLANT

AND

UNITED MILLERS LTD..... RESPONDENT

*(Appeal from the decree of the High court of Kenya at Bungoma by (Hon. Mr. Justice B. K. Tanui)
dated 6th September, 1995*

IN

H.C.C.C. NO. 43 1994

JUDGEMENT OF THE COURT

There is no merit at all in this appeal and it must be dismissed. The appellant's claim was based on alleged negligence but as the learned trial judge correctly observed the appellant did not plead any particulars of negligence in its plaint. That was expressly contrary to the provisions of Order VI Rule 8 (1) of the Civil Procedure Rules. It is elementary learning that in claims involving allegations of negligence. The particulars of such negligence must be specifically pleaded – see MUKASA V SINGH AND OTHERS [1969] E. A. 442. It is still the duty of a party alleging negligence to prove the same and a party cannot be allowed to prove that which he has not pleaded.

Furthermore the respondent denied any form of negligence on its part and in turn, alleged negligence against the appellant. The respondent properly pleaded the particulars of such negligence. The appellant wholly failed to traverse by any further pleadings the particulars of negligence alleged in the respondent's defence. In those circumstances, the learned Judge was perfectly entitled to conclude that the appellant had admitted the negligence alleged in the defence, in terms of Order VI Rule 9 (1) of the Civil Procedure Rules.

That should be enough to dispose of this appeal but Mr. Maside for the appellant also touched on the issue of vicarious liability which formed his first ground of appeal. The respondent had sent its lorry to collect sugar from Mumias. On their way to Mumias the driver and the loader were instructed to pass through Bungoma and accomplish some task on their way to Mumias. They duly did so and safely arrived at Mumias. While at Mumias the driver of the respondent's lorry remembered that he had to

attend some court hearing in Nairobi. He contacted the respondent's office in Kisumu and another replacing driver was immediately dispatched to Mumias but in the meantime, the first driver handed the keys of the vehicle to the loader to be handed over to his replacement. It appears that the loader to be allowed someone called Patrick Wafula not authorized to do so by the respondent, to drive the vehicle from Mumias to Bungoma where the accident took place. In those circumstances even if the issue of negligence could have been successfully surmounted, we do not see how the learned Judge's conclusion that Patrick Wafula was not a servant or agent of the respondent or that he was not driving the vehicle for the benefit of the respondent could have been successfully challenged. Even if the respondent authorized the handing-over of the vehicle keys to the loader, it cannot possibly be said that the respondent authorized the loader to allow Patrick Wafula to drive the vehicle to Bungoma. The respondent could not have reasonably contemplated such an eventuality particularly when he had sent another driver to replace the former one. As we have said, there is no merit this appeal and our order is that it be and is hereby dismissed with costs to the respondent.

Dated and delivered at Kisumu this 21st day of March, 1996.

R. O. KWACH

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JUDGE OF APPEAL

R. S. C. OMOLO

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JUDGE OF APPEAL

A. M. AKIWUMI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR