



## **Kariuki v Mitchell Cotts Kenya Limited**

**High Court, at Nairobi January 31, 1985**

**Gachuhi J**

**Civil Case No 2756 of 1984**

### **Cases**

**John Lancaster Radiators Ltd v General Motor Radiator Co Ltd and Others [1964] 2 A E R 685 at p 688**

### **Statutes**

**1. Civil Procedure Rules Order XII rule 6, Order VI Rule 9(3)**

**2. Civil Procedure Act section 3A of the**

**January 31, 1985, Gachuhi J delivered the following Ruling.**

The plaintiff applies to this court by way of motion under order XII rule 6, order VI Rule 9(3) of the Civil Procedure Rules and section 3A of the Civil Procedure Act for judgment on the ground that the defendant has admitted the claim. The motion is supported by the affidavit of the plaintiff.

In the affidavit, the plaintiff state that the defendant has specifically denied some paragraphs of the plaint while others not and in particular where the claim is the tort of negligence as a separate cause of action.

Mr Khaminwa for the plaintiff submits that there is no firm denial of the plaintiffs claim as the items of goods were entrusted to the defendant to clear and forward them to the plaintiff which the defendant failed to deliver. He further submits that the defence merely sets up in para 6 of the defence that items were stolen and reported to the police. Mr Nowrojee for the defendant submits that the denial of every allegation in the plaint is specifically denied. In the outset, the defendant deny that they are common carrier but merely acted as agents of the plaintiff in clearing the goods and entrusting them to a carrier.

The plaintiff's claim is based on breach of duty entrusted to the defendant to clear goods from the warehouse at Mombasa and to safely or securely carry the said goods and deliver them to the plaintiff. The way or manner the defendant failed to execute duty entrusted to them may amount to negligence, but negligence cannot be a claim by itself distinct from the breach of duty. Negligence is a means of proving breach of duty whereby damages arises.

In the defence, the defendant has admitted duty entrusted to them and goes further to set out that the goods were cleared and entrusted to a reputable and reliable transporter who informed the defendant that the items were stolen enroute and the theft reported to the police.

The defendant denies that it is a common carrier but a mere agent and acted as such for the plaintiff in clearing and forwarding the goods to the plaintiff. Breach of duty has to be proved, where not admitted.

The manner the defendant was negligent in discharging their duty has been demonstrated by failure to deliver the goods.

The authorities referred to me by Mr Nowrojee which Mr Khaminwa submits they are not relevant; deals with by a denial of every single allegation in the statement of claim, in particular, in John Lancaster Radiators Ltd v General Motor Radiator Co Ltd and Others [1964] 2 A E R 685 where at p 688 Letter B it was held that the defence was not evasive or obscure in that the denial of every single allegation in the

statement of claim was held to be sufficient. That was the position by then in England. Mr Khaminwa did not refer to any authority in his submission, but maintains that there was no specific denial to paragraphs 8,9, and 10 of the Plaint. Paragraph 8 reads:

“8 Further and in the alternative the plaintiff reiterates the contents of paragraphs 4 and 5 and further states that it was an implied term of the said agreement or alternatively it was the duty of the defendant to carry the said goods carefully, safely and securely.”

Paragraph 9 sets out negligence in breach of the said agreement and paragraph 10 is particulars of loss and damages as a result of the negligence.

The application for the judgment is based on these three paragraphs that the defendant has not firmly denied the plaintiff's claim and that there is no defence and that there is no triable issue based on these paragraphs.

Perhaps it is only fair to see the rules of pleadings in the Civil Procedure Rules.

Order VI rule 9 deals with admissions and denials: judgment for the plaintiff in the sum of Kshs 68,850 together with interest therein and the cost on this motion. Claim under prayer (b), (c) (d) and (e) to be pursued.