REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA AND KANYEIHAMBA, JJSC.)

CIVIL APPEAL NO. 2 OF 2001

BETWEEN

TORORO CEMENT CO. LTD ---------- APPELLANT

AND

FROKINA INTERNATIONAL LTD. ---------- RESPONDENT

(Appeal from the decision of the Court of Appeal at Kampala (Kato, Mpagi-Bahigeine and Kitumba, JJ.A) dated 12th January 2001, in Civil Appeal No. 21 of 2000]

JUDGMENT OF TSEKOOKO, JSC:

This is a second appeal. It is from the decision of the Court of Appeal confirming the ruling by the High Court, on an interlocutory point of objection, (Mugamba, J) that the plaint disclosed a cause of action.

The appellant and the respondent were, respectively defendant and plaintiff, in

the High Court in a suit from which these proceedings arise. In paragraphs 4 and 5 of the plaint in that suit, the plaintiff averred as follows:

> "4 On 18/8/99 the defendant's truck and its trailer rammed into the plaintiffs premises on plot M587 Nakivubo View and extensively destroyed its doors and walls".

5. The accident was caused by negligence of the defendant's driver for which the defendant is vicariously liable"

In its written statement of defence, the defendant responded in paragraph three that the contents of paragraphs 3, 4 and 5 of the plaint are denied in total and the plaintiff shall be put to strict proof thereof.

When the suit came up for hearing before Mugamba, Ag. J., Mr. Lumweno, counsel for the defendant, raised a preliminary point of objection to the plaint, contending that the plaint was defective and offended Rule 11(a) of Order 7 of the CP. Rules because it did not disclose a cause of action. Mr. Zeija, for the plaintiff, resisted the objection because, firstly the written statement of defence had not suggested, nor did the list of authorities indicate, that a preliminary point of objection would be raised. Secondly, learned counsel contended that the averments in paragraph 4 of the plaint sufficiently disclosed a cause of action.

In his ruling, the learned trial judge rejected the objection and he was upheld by the Court of Appeal where the defendant had appealed. The defendant has now appealed to this court against the decision of the Court of Appeal.

The memorandum of appeal contains two grounds which are formulated in this way: -

1. The learned Justices erred in law by holding that the plaint disclosed a cause of action.
2. The learned Justices erred in law by failing to appreciate that once negligence was pleaded then the particulars of the alleged negligence had to be set out in the pleadings.

Counsel for both parties filed written submissions in this Court as they had done in the court below. I now proceed to consider those submissions.

The contentions of Messrs Lumweno & Co. Advocates, for the defendant are that the plaint is defective because it does not disclose a cause of action and so it should have been, and it should now be, rejected under Order 7 Rule 11(a) of the Civil Procedure Rules. Counsel referred particularly to paragraphs 4 and 5 of the plaint. Counsel cited a number of authorities in support of his arguments. These authorities include H. Katarahwire Vs. P. Lwanga (1988-1990) HCB 86; Mukasa Vs. Singh & others (1969) EA. 442, Bullens and Leakes and Jacob's Precedents of Pleadings, 12th, Ed, page 685; J. L. Okello Vs. Uganda National Examinations Council -Supreme Court Civil Appeal No. 12 of 1987 (unreported).

These authorities illustrate the point that it is not enough for a plaintiff in his statement of claim to allege merely that the defendant acted negligently and thereby caused him damage. Particulars must be given in the plaint showing precisely in what respect the defendant was negligent. Counsel criticised the Court of Appeal for holding that paragraphs 4, 5 and 7 of the plaint gave sufficient particulars of negligence and the damage suffered by the plaintiff. Counsel also expressed concern that although he provided the Court of Appeal with numerous relevant authorities for consideration by that Court, the authorities were not considered. On this last point I will straight away say that learned counsel did not demonstrate how sure he is that the Court of Appeal did not consider the authorities he cited.

Messrs Kwesigabo, Bamwine and Walubiri, Advocates, counsel for the plaintiff, supported the decisions of the Courts below that the plaint disclosed a cause of action and that it complied with the requirements of 0.7 Rule 11(a). Counsel relied on some authorities cited by the appellant's counsel in addition to the following: **Auto Garage & others Vs. Motokov (No 3) (1971) EA. 514; Carter Vs. Attorney-General (1936) 5 EACA, 18; W. Kigundu Vs. Attorney General, Sup. Court Civil Appeal 27 of 1993** (unreported).

I start with the contention by the plaintiff that because the written statement of defence did not indicate that the defence would raise a preliminary point of objection, it was therefore not proper for the objection to be raised as a preliminary point.

Whether a plaint does or does not disclose a cause of action is a matter of law which can be raised by the defendant as a preliminary point at the commencement of the hearing of the action even if the point had not been pleaded in the written statement of defence. Obviously it is proper and good practice to aver in the opposite party's pleadings that the pleadings by the other side are defective and that at the trial a preliminary point of objection would be raised. But failure to so plead does not in my opinion bar a party from raising the point. There is, of course, advantage in raising a likely preliminary point in the pleadings. This puts the opposite party on notice so that that party in minded to put its pleadings in order before court hearing. In that way Court's time may be saved if parties can sort out preliminary matters in advance.

I ought at this stage to note the apparent non-compliance with the provisions of Order XB of the Civil Procedure Rules. During the hearing of this appeal, we were informed from the bar by counsel, that prior to the hearing of the case, no scheduling conference took place in the High Court. Under the new Order XB of the CP Rules, the holding of a scheduling conference in civil cases is mandatory. See Rule 1(1) thereof. The principal objective of the scheduling conference is to enable court to assist parties to dispose of cases expeditiously by sorting out points of agreement and disagreement or assessing the

possibility of mediation, arbitration and other forms of settling the suit. After a scheduling Conference, and where it is necessary, interlocutory applications can then be made and be disposed of before the suit is fixed for hearing. In that way the progress of the suit is managed systematically. In this case, it is my view that the point raised by the present proceedings should have been properly raised and dealt with during a scheduling conference or soon thereafter. One hopes that the holding of scheduling conference will be a regular feature in the trial of civil cases by all trial courts.

Be that as it may, the trial judge discussed the question of

disclosure of cause of action in these words: -

> *"It was further averred by counsel for the defendant that the plaint should be rejected on the score that particulars of negligence were not given. With respect, that is a matter that should be visited on the occasion of hearing of evidence. In fact it was held, inter-alia, in Auto Garage that a plaint may disclose a cause of action without containing all the facts constituting a cause of action provided that the violation by the defendant of a right of the plaintiff is shown".*

I do not with respect quite appreciate what the learned judge meant by the words:

> "that is a matter that should be visited on the occasion of hearing of evidence".

In the context quoted above I understand the learned judge to suggest that particulars of negligence would be given at the time of giving evidence. If I understand him correctly, then with respect, I cannot agree. Particulars of negligence are an important aspect of any party's case, and therefore, it is important that particulars of negligence should be pleaded early so as to assist in framing issues as well as in avoiding surprises which are bound to happen if

particulars of negligence are merely introduced as an intrusion during trial at the time evidence is adduced. A party must know the species of negligence which the opposite party seeks to rely on.

The Court of Appeal supported the trial judge that within the three tests set out in the case of **Auto Garage & Another Vs. Motokov (No.3) (1971) EA. 514,** the plaint disclosed a cause of action. Mpagi-Bahigeine, JA; in her lead judgment first correctly stated that:

> *"Particulars of negligence must therefore be given in pleading showing in what respects the defendant was negligent. The plaintiff ought to state facts upon which the supposed duty to plaintiff is founded, and whose breach the defendant* is *charged with. Then should follow an allegation of precise breach of that duty of which the plaintiff complains and lastly particulars of the damage sustained.....*

With great respect I think that it is not quite correct to say, as did the learned justice state later, that:

> *"It is not always necessary to tabulate them, (particulars of negligence) as suggested by Mr. Lumweno. This would be a mere matter of form not sufficient ground for rejection of a plaint".*

Whilst I agree that a plaint may disclose a cause of action without pleading all the facts which give rise to it, with respect, I do not agree that paragraphs 4, 5 and 7 in the present plaint give sufficient particulars of negligence. Nor do I share the view that it is not always necessary to tabulate particulars of negligence. The present plaint could be sufficient if the plaintiff only chose to rely on the doctrine of Res Ipsa Loquitor which may turn out to be risky.

It is the common practice in cases of negligence for a party, or his advocate, who intends to rely on negligence to plead particulars of negligence either within a paragraph of the pleadings or in more than one paragraph. Reliance on the three tests in the **Motokov case** (supra) must be taken with care. That was not

a case of negligence but a case of sale of goods. When at page 519, **Spry,** V.P, in his lead judgment concluded that:-

> *"I would summarise the position as I see it by saying that if a plaint shows that the plaintiff enjoyed a right, that the right has been violated and that the defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or defect may be put right by amendment",*

he clearly showed that where a plaint discloses a cause of action but is deficient in particulars, the plaint can be amended so as to include particulars, say of negligence.

I agree with the Court of Appeal when it held that the alternative is for the appellant to ask for further and better particulars under 0.6 Rule 3. Or indeed, the plaintiff could have sought leave to amend the plaint. This course would have avoided the necessity for these proceedings.

As I said earlier, an interlocutory application should have been made during the scheduling conference or soon after the scheduling conference: In **Mukasa Vs Singh and others (1969) EA.** 442 and in the High Court decision of **H. Katarahwire Vs P. Lwanga** (supra), the court explained the need for pleading particulars of negligence. In **Mukasa's case, Sheridan,** Ag. CJ, held that the plaintiff must plead particulars of negligence on which he relies, and which will be binding on him, before he can shift the onus of disproving negligence onto the defendant. He rejected the plaint with costs. In its offending para 4 of the plaint in that case, it was pleaded, in so far as relevant, that:-

> *"..... The defendants' servants and/or agents and defendant No.3 at about miles 7 Kampala/Bombo Road, drove their respective vehicles so negligently*

that they collided and as a result of the accident Mary Namakula died from injuries she sustained in the accident.

<u>Particulars o f Negligence</u> The weather was clear, the road was tarmac dam and straight, the road was dry and in good repair, and traffic was light, yet the vehicles collided. Under the circumstances, the plaintiff will rely on, the doctrine of res Ipso loquitur".

The drafting of the main body of the above quoted para 4 is not much different from the contents of pleadings in paragraphs 4 and 5 complained of in these proceedings.

The plaintiff relies on Article 126 of the Constitution for the view that the plaint is not defective. I do not think that Article 126 of the Constitution was meant to encourage sloppy drafting of pleadings. Properly drafted pleadings define issues in contest. That is why we have rules. What can be argued legitimately is that because of that Article and by authority of decided cases, a plaint ought not to be rejected for failure to disclose a cause of action unless even when it is amended, within the limits of the law, a cause of action is not disclosed. But the party whose pleadings are objected to must be graceful enough to recognize the defect in its pleading and seek Court's leave, if it is possible, to rectify the relevant defect instead of being adamant as the plaintiff has been in these proceedings.

The essence of pleadings is to enable parlies to define issues in dispute. In this case the issue in dispute is negligence. Issues on negligence can be defined by giving particulars of the alleged negligence.

The decision of this Court in **Okello Vs UNEB** (supra) does not exempt parties from giving particulars of negligence. That case was concerned with form. But that decision quite clearly indicates that where pleadings contain irregularities or defects, those irregularities can be cured by amendment so that a case is decided on its merits. Similarly the cases of **Bennet vs Chemical Construction Ltd** (1971) 1 WLR 1751, **Embu Road Services vs Riimi** (1968) EA. 22 and **Msuri Muhhiddin vs Nazzor Bin Seif** (1960) EA. 202 which have been relied by my learned brothers do not affect the requirement that particulars of negligence should be alleged in the plaint where the claim is based on negligence. And with due respect I would point out that all the three cases went on appeal after full trial where the plaintiff had alleged negligence. So, in a sense, the three cases are distinguishable from the case before us.

It is my opinion that whereas the plaint disclosed a cause of action, because of the alleged negligence, the defendant is entitled to know the particulars of negligence complained of in order to enable it to prepare its defence properly. In that regard ground one ought to fail but I would allow ground two in part.

In the result I would allow the appeal in part. Unless the plaintiff wants to confine its case under the doctrine of res ipsa loquitur, the plaintiff, if it so wishes, should seek leave of the trial court to be allowed to amend the plaint so as to include particulars of the alleged negligence.

I would award the appellant no costs of the appeal. I would award the respondent 1/2 of the costs here and in the Court of Appeal. I would make no order as to the preliminary objection in the High Court.

I would also order that all relevant proceedings be sent to the High Court for the trial of the suit to proceed.

JUDGMENT OF ODER - JSC.

I have had the benefit of reading in draft the judgment of Tsekooko, JSC.

The respondent sued the appellant at Kampala, in High Court Civil Suit No. 1215 of 2000. In paragraphs 4, 5 and 6 of its plaint, the respondent averred;

"4. On 18-8-99 the defendant's truck and its trailer rammed into the plaintiff's premises on Plot M.587, Nakivubo View *and extensively destroyed its doors and walls.*

5. The accident was caused by negligence of the Defendant's driver for which the defendant is vicariously liable.

6. The plaintiff contacted Turn Key Constructors and Engineers to estimate the costs of repair of the damaged premises and the cost was estimated at Shs. 6,248,734=.

In Paragraphs 3 and 4 of its written statement of defence, the appellant denied in total the respondent's averments in its plaint.

At the trial of the suit the respondent's Counsel raised a preliminary objection under order 7, rule 11(a) of the Civil Procedure Rules. The learned trial judge

overruled the objection. The respondent appealed to the Court of Appeal against the learned trial's decision, which dismissed the appeal.

The appellant's memorandum of appeal to this court set out two grounds of appeal:

1. *The Justices erred in law by holding that the plaint disclosed a cause of action.*

2. *The learned Justices erred in law by failing to appreciate that once negligence was pleaded then the particulars of the alleged negligence had to be set out in its pleadings.*

Order 7, rule 7(a) of the Civil Procedure Rules provides that the plaint shall be rejected -

"(a) where it does not disclose a cause of action."

A cause of action means every fact which is material to be proved to enable the plaintiff to succeed or every fact which, if denied, the plaintiff must prove in order to obtain judgment. See - *Cooke -vs- Gull LR.8E.P. page 116* and *Read -vs- Brown, 22 QBD p.31.*

It is now well established in our jurisdiction that a plaint has disclosed a cause of contain even though it omits some fact which the rules require it to contain and which must be pleaded before the plaintiff can succeed in the suit. What is important in considering whether a cause of action is revealed by the pleadings are the questions whether a right exists and whether it has been violated. *Cotter -vs- Attorney General (1938) 5 EACA 18.* The guide-lines were stated by the Court of Appeal for East Africa in Auto *Garage -vs- Motokov (No. 3) (1971) EA. 514.* There are:

(i) the plaint must show that the plaintiff enjoyed a right;

(ii) that right has been violated; and

(iii) that the defendant is liable.

If all three elements are present than a cause of action is disclosed and any defect or omission can be put right by amendment. The trial judge has discretion to allow such an amendment. Where no cause of action is disclosed no amendment can be allowed because the plaint is a nullity.

In the instant case the respondent would have to prove that the damaged premises were its property and its right in that property has been violated; that it was the appellant's truck which rammed into and damaged it, as a result of which the respondent sustained financial loss, and further that there was no contributory negligence on its part. The three elements set out in *Motokov (No.3)* (supra), are present in the plaint in the instant case. It is clear, therefore, that the respondent's plaint discloses a cause of action on the basis of the brief pleading therein. The first ground of appeal should, therefore, fail.

The action in this case is founded on negligence. Actionable negligence consists of a breach of duty of care and skill by the defendant towards a person to whom the defendant owes that duty; and the breach of duty has caused that other person, the plaintiff, without contributory negligence on his part, injury to his person or property. *Heaven -vs- Pender (1883) 11 QBD at 509.* Particulars of negligence must be given, showing in what respect the defendant was negligent. The plaint therefore ought to state facts upon which the alleged duty to the plaintiff is based, the alleged breach of which the defendant is alleged to have committed. This should be the particulars of the alleged negligence complained of by the plaintiff and the particulars of the

damage sustained. ***Nurdin Ali Devji and Others -vs- Meghi Co. and Others (1953) EACA. 132.***

In the instant case, the plaint alleges that the defendants truck rammed into the respondent's premises. This, allegedly, was the result of negligencee by the appellant's driver. Particulars of the alleged negligence were not stated in the plaint. In my view, such particulars should have been pleaded in order that the appellant was sufficiently informed of the case it had to meet. Particulars could also have been supplied by amendment of **[.....]**

JUDGMENT OF KAROKORA, J.S.C

I have read in draft the judgment prepared by Tsekooko JSC, and have found that the facts of the appeal are very brief and are not in dispute. Paragraphs 4, 5 and 7 of the plaint spell them out as follows:-

> *"4. On 18/8/99 the defendants truck and its trailer rammed into the plaintiffs premises on plot M587 Nakivubo view and extensively destroyed its door and walls,*
>
> *5. The accident was caused by negligence of the defendant's drives' for which the defendant is vicariously liable."*
>
> *7. As a result of the said accident the plaintiff has suffered general damages of which the Defendant is liable to wit: loss of rental income*

The defendant, in its written statement of defence denied in toto the contents of paragraphs 4, 5 and 7 of the plaint.

However, at the trial before the High Court, the defendant raised a preliminary objection that the plaint was defective and offended Rule 11(a) of Order 7 as it never disclosed a cause of action. The objection was overruled by the trial Judge. The defendant appealed to the Court of Appeal on two grounds, namely,

1. That the learned judge erred in law by holding that the plaint disclosed a cause of action.

2. The learned judge erred in law by failing to appreciate that once negligence was pleaded then the particulars of the alleged negligence had to be set out in the pleadings

The Court of Appeal dismissed the appeal and hence this appeal which is premised on two grounds, namely that:

1. The learned justices erred in law by holding that the plaint disclosed a cause of action.

2. The learned justices erred in law by failing to appreciate that once negligence was pleaded then the particulars of the alleged negligence had to be set out in the pleadings.

These are the same grounds, which were raised before the Court of Appeal.

It is important to note that after citing the cases of *Colter v Attorney-General for Kenya (1938) 5 EACA 18 and Auto Garage v Motokov - 1971 EA 514* Mpagi-Bahigeine JA, who wrote the lead judgment of the court with which the other two (2) justices concurred, rightly stated in my view, that in order to

prove that there was a cause of action it was necessary for the plaintiff to establish three essential elements, namely;

(a) That the plaint must show that the plaintiff enjoyed a right.

(b) That the right has been violate and

(c) That the defendant is liable.

The learned justice then went on to state that:

> *'If all the three elements are present then a cause of action is disclosed and any defect or omission can be put right by amendment. The judge has a discretion to allow such amendment. However, if any element is missing then no cause of action is established and no amendment will be allowed, the under lying principle being that where a plaint is a nullity, no amendment can redeem it, whereas a mere defect or an irregularity may be curable by amendment where the ends of just so demand, where a cause of action is otherwise disclosed."*

After citing paragraphs 4, 5 and 7 of the plaint she continued and stated that:

> *'With the above guidelines in mind, it is the respondent's right of property which was violated when the truck allegedly belonging to the appellants ran into them, extensively damaging its walls and doors and thereby causing financial loss to the respondent.*
>
> *It is important to note that a cause of action means every fact which is material to be proved to enable the plaintiff to succeed. The respondent will have to prove that the*

premises were his property and that it is the appellant's truck that rammed into it damaging it is a result of which he sustained financial loss and that further he was not in any way responsible for contributory negligence in this respect the three elements set out in Motokov (No.3) (supra) are present in the plaint, the subject of this appeal.

There is therefore no doubt that a clear cause of action is disclosed by the plaintiff.

I would in view of the above, not fault the Court of Appeal, when it concluded that there was a cause of action disclosed in the plaint. In the result, ground one must fail.

Turning to ground two, which complained that once negligence was pleaded then the particulars of the negligence had to be set out in the pleadings,

I think that although generally it is a rule of practice for a plaintiff to plead particulars of negligence, in the instant case the facts spelt our in paragraphs 4, 5 and 7 of the plaint show prima facie evidence of negligence. If the appellants' truck rammed into the respondents' premises, causing extensive damage to the walls and door, it would be imposing an uphill task to expect the owner of the premises to know the circumstances of how the truck rammed into its premises.

In my view, since ordinarily vehicles are driven along the roads, paragraphs 4, 5 and 7 of the plaint would attract the doctrine of res ipsa Loquitor to be invoked. These paragraphs suggest that there is not any other explanation other than negligence of the appellant. The appellant could avoid liability by

showing that there was no negligence on their part which contributed to the accident or that the accident was due to circumstances not within their control. I think that the case of *Bennet v Chemical Construction G.B (1971) 1WLR 1571* is relevant where Davies LJ held inter alia

> *".....if the accident is proved to have happened in such a way that prima facie, it could not have happened without negligence on the part of the defendant then it is for defendant to explain and show how the accident would have happened without negligence of the defendant. I have stated in my opinion it is not necessary to plead res ipsa loquitur. If the facts pleaded show that the cause of the accident was apparently and on its face due to some negligence, that is sufficient."*

I think, the above view is reinforced by the dictum of Odoki, JSC, as he then was, in the case of *Okello v UNEB civil Appeal No. 12 of 1982* (SC) unreported, while he was considering whether the plaint should be rejected on the ground that it did not state particulars of fraud. There, the learned justice stated that:

> *"I agree it is a rule of practice to specify the particulars of fraud under definite heading entitled "particulars of fraud". But in my view that is only a requirement as to the form of pleadings whose departure from will not necessarily vitiate the pleadings. In this connection, I would agree with what Spry J said in Castelino v Rodriqnes (1972) EA 223. Of course rules are made to be observed, but irregularities of form may be ignored or cured by amendment where they have occasioned no prejudice. In these matters of form, courts are much less strict to day than formerly."*

Although in *Okello v UNEB* (supra) the complaint concerned omission to plead particulars of fraud, I would apply the same principle in the instant case where the complaint concerned omission to plead the particulars of negligence.

In my view, in the instant case if there were any defects or omission in the pleadings by respondent these could be cured by amendments at any stage during the proceeding of the case. Finally, since there is a cause of action, I would let the case proceed and be decided on merit.

Therefore, in view of the above, ground two must fail.

I would in the circumstances dismiss this appeal with 1/2 the costs to the respondent and in the CA.

JUDGMENT OF KANYEIHAMBA, J.S.C.

I had the benefit of reading in draft, the judgment of my brother, Tsekooko J S C . and in my view this appeal should fail.

The facts of this case have been ably set out in the judgment of Tsekooko J S C . and I need not repeat the same here except in so far as they relate to this judgment. In the High Court, in a suit from which this appeal originates and in paragraphs 4 and 5 of the plaint, the respondent averred that on 18/8/99, the defendant's truck and its trailer rammed into the plaintiffs premises on plot M 587, Nakivubo View and extensively destroyed its doors and walls and that the accident was caused by the negligence of the defendant's driver for which the defendant is vicariously liable.

At the hearing of the suit, counsel for the defendant raised a preliminary point of objection, contending that the plaint did not disclose a cause of action, was defective and offended against Rule 11 (a) of Order 7 of the Civil Procedure Rules. In his ruling, the learned trial judge over-ruled the objection and his ruling was upheld by the Court of Appeal, rightly so, in my opinion. In her lead judgment the learned Justice, Mpagi-Bahigeine, J.A. held that there was a cause of action disclosed with sufficient particulars of negligence.

While, with respect I do not agree with the learned Justice of Appeal that the plaint disclosed sufficient particulars of negligence, in my opinion, the plaint as presently framed discloses a cause of action. In normal circumstances, vehicles are intended and ought to be driven on roads and streets and not into other people's buildings, property or houses beyond the boundaries of those roads or streets. Consequently, where such an event occurs and is pleaded in a plaint and supported by particulars it is not enough for the defendant to fold his or her hands and expect the plaintiff to prove the details of any negligence. It might have been at night when the plaintiff and any potential witness would have been asleep or unable to see what happened. Once a plaintiff shows that his or her legally protected rights have been violated in circumstances which are self-evident and it is the defendant or his agents who caused the violation, a cause of action arises.

In Embu Public Road Services Ltd v. Riimi, (1968) E.A. *22,* the husband of the respondent was killed while travelling as a passenger in a bus which overturned after one of its main springs broke while it was travelling a long a straight stretch of road. The respondent relied on the doctrine of *re ipsa loquitur.* The evidence showed that it could have

been possible for the driver to control the bus. The fact that he failed to do so was self-evident that he was either inattentive or negligent. The Court of

appeal for East Africa confirming the judgment of the learned trial judge, held that,

> *"where the circumstances of the accident give rise to the inference of negligence, then the defendant in order to escape liability has to show' that or that the explanation for the accident was consistent only with the absence of negligence."'*

Similarly, in *Msuri Muhhiddin v. Nazzor Bin Seif El Kassaby and Another* (1960) E A . 201, it was held that the respondents in that case could only avoid liability by showing that there was no negligence on their part which contributed to the accident, or that there was a probable cause of the accident which did not connote negligence on their part or that the accident was due to circumstances not within their control. I agree with the learned Justices of the Court of Appeal that in this case there was a cause of action and it is open to the plaintiff to plead particulars of negligence or the doctrine of *res ipsa loquitur.* Therefore both grounds of appeal ought to fail.

In the result I would dismiss this appeal with costs.

JUDGMENT OF MULENGA JSC

This is an interlocutor) appeal. It originates from a civil suit filed by the respondent in the High Court claiming compensation for loss incurred as a result of damage to its premises. It was alleged in the plaint that the appellant's truck and trailer had rammed into the premises and extensively destroyed doors and walls thereof, and that this was caused by the negligence of the appellant's driver for which the appellant was vicariously liable. In its defence the appellant simply denied the allegations. When the suit came up for hearin, however, the appellant took a preliminary point of law that the plaint should be rejected under 0.7 r.11(a) of the Civil Procedure Rules (CPR), contending that the plaint did not disclose a cause of action because no particulars of negligence were set out therein. That contention was overruled by the learned trial judge. On appeal the Court of Appeal upheld the trial court decision.

In this second appeal, the appellant reiterates the same contention in the first ground of appeal. I would unhesitatingly hold that there is no merit in that ground. The cause of action was disclosed to be negligence. The facts constituting the cause of action, as required under 0.7 r.l(e) of the CPR are contained in the plaint. In a nutshell, they are that on 18.8.99 the respondent's premises were extensively destroyed when the appellant's truck and trailer rammed into them due to the negligence of the appellant's driver, for which negligence, the appellant is vicariously liable. Undoubtedly a better drawn plaint would have included more particulars. However, what was pleaded in the plaint discloses a cause of action in the tort of negligence. The first ground of appeal must therefore fail.

The second ground of appeal complains that the Court of Appeal *"failed to appreciate"* that *"particulars of the alleged negligence had to be set out in the pleading. " I* would also have summarily dismissed that ground with the observation that failure to set out particulars of negligence in a plaint, is not a ground for rejecting the plaint. 1 am however, constrained to make a few observations in relation to it, because of a remark made by the learned trial judge which appears to have received oblique approval by the Court of Appeal and 1 think it ought not to be allowed to stand.

1 agree with my learned brother Tsekooko JSC, whose judgment I read in draft, that the learned trial judge erred in the remark he made to the effect that particulars of negligence is a matter for evidence. Particulars of negligence is undoubtedly a matter of pleadings. They have to be set out, not at the whims or discretion of the party pleading the negligence, but as a matter of proper pleading. If the party pleading negligence omits to set out particulars thereof, the court can order that party to do so. 0.6 r.3 of the CPR provides:

> **"3.** ***A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, may in all cases be ordered upon such terms as to costs or otherwise as may be just."*** (emphasis added)

An order under this rule is ordinarily made on application by one party, but the court can make it on its own motion, if it deems it necessary for better bringing out the issues for determination.

It is apparent to me that in the instant case there was a mix up of two distinct matters, namely ***"cause of action"*** and ***"further and better particulars."*** It is most probable that this resulted from the all too frequent but undesirable ***desire to "ambush"*** the opponent. Instead of requesting for better particulars, and if they were not given, applying for an order under 0.6 r.3 of the CPR, the appellant erroneously pursued the contention that the plaint did not disclose a cause of action. In my opinion, the trial judge could at that stage have ordered the respondent to provide the particulars. Unfortunately, as I have already noted, he took the erroneous view that it was a matter for evidence. Be that as it may, the appellant cannot be heard now, to blame the courts below, for not holding that the plaint should set out further and better particulars. They were not asked to so hold or order.

Having said that however, I hasten to add, that the facts pleaded in the plaint did not sufficiently disclose the **particulars of negligence** which the respondent intends to rely on. If indeed it intends to rely on the maxim ***res ipsa loquitur*** it ought to plead so. It is of course not for me to pre-empt the parties by suggesting what further particulars should be given. Nonetheless I should point out that as the plaint stands, it would be open to the respondent to adduce evidence to prove a string of **diverse acts or omissions** by the appellant's driver, which the appellant has not been made aware of through the pleadings. That would be unfair. The fundamental purpose for pleadings is to enable each party to know what case it has to answer or meet. I am not pursuaded that where it will be relied upon, it is not necessary to plead the maxim ***res ipsa loquitur.*** If the appellant had pleaded that it would rely on the maxim, then it would be bound by that pleading. The court would then after hearing all the evidence, adjudicate whether indeed the facts proved showed negligence. For the court to take the view at this stage that no more particulars need to be given because the maxim applies, would, in my opinion, amount to prejudging the case.

All in all I would dismiss the appeal. However, although the respondent is technically successful, 1 would not award it the full costs. In my opinion, much as the appellant misdirected its approach in the original objection and erroneously pursued the appeals, the appeals could have been avoided if the respondent had been, as Tsekooko JSC, puts it, ***"graceful enough to recognize"*** the deficiency in the plaint and conceded to supply the particulars of negligence. For that reason I would award to the respondent only 1/2 of the costs of the appeals in this Court and the Court of

Appeal. I would make no order as to costs for the preliminary objection in the High Court.

Dated at Mengo the 24th day of April 2002.