



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS

CIVIL CASE NO.219 OF 2001

UNIBILT KENYA LTD (UNDER RECEIVERSHIP).....PLAINTIFF

VERSUS

MUKHI AND SONS LIMITED.....DEFENDANT

JUDGMENT

By a Plaintiff dated 16th February, 2001, the Plaintiff sued the Defendant seeking an order compelling the Defendant to deliver to the Plaintiff 3l pallets of tinplate, damages, interest on damages and costs. On 20th March 2001 the Defendant filed a defence and set up a Counter claim seeking a declaration that it was entitled to a lien on the said pallets and further sought an order compelling the Plaintiff to pay the Defendant's charges in default, the Defendant be at liberty to sell the said pallets to recover its charges.

The agreed facts are as follows:-

- 1. The Defendant rendered to the Plaintiff clearing and forwarding services during the period 1997 and July 1998.**
- 2. As at 31st July 1998 the Plaintiff was indebted to the Defendant in the sum of Kshs 3,573,193.10**
- 3. Under an Agreement between the Plaintiff and the Defendant for the provision of the clearing and forwarding services it was expressly agreed that the Defendant "shall have a general as well as a particular lien on all goods for unpaid account."**
- 4. On 9th November 1998 the Defendant instituted HCCC N0.689 of 1998 against the Plaintiff to recover the said sum of Kshs 3,573,193.10.**
- 5. At the time of institution of HCCC No. 689 of 1998 the Defendant was holding pursuant to its contractual right of lien the Plaintiff's Cargo namely pallets of tinplate at its warehouse pending payment/settlement of its outstanding account.**
- 6. On 6th March 2000 the High Court of Kenya at Nairobi in HCCC No.689 of 1998 decreed that the Plaintiff do pay to the Defendant the sum of Kshs 3,573,193/10, interest and costs which decree remains unsatisfied to date.**
- 7. On 16th March 2000 Kenya Commercial Bank Ltd by a Deed of Appointment dated 16th March 2000 appointed joint receivers and managers in respect of the Plaintiff who in the name of the Plaintiff instituted this suit seeking to recover the goods held by the**

Defendant.

Based on the foregoing Agreed facts the parties further agreed that the issues for determination are as follows:-

- 1. Whether the Defendant in the present suit was put on election between suing the Plaintiff for charges or retaining the Plaintiffs cargo in the exercise of its right of lien.**
- 2. Whether by instituting HCCC No. 689 of 1998 the Defendant in this suit lost its right of lien.**

The parties further agreed that if the findings of the Court on the above issues is in the negative the Plaintiff's suit should be dismissed with costs and the Defendant's Counter claim should be allowed with costs and if on the other hand the finding of the Court on the above issues is positive then the Plaintiff's suit should be allowed and the Defendant's counter claim dismissed with costs. The Parties filed an Agreement in the above terms pursuant to the provisions of Order XIV Rule 6 of the Civil Procedure Rules. The matter came before me on 14th May 2004. Mr. Arua was instructed by the Plaintiff and Mr. Kairu appeared for the Defendant. In addition to written submissions filed, Counsel made oral submissions in Court and highlighted what was in the written submissions.

Counsel for the Defendant submitted that the Defendant has a lien on the Plaintiff's cargo and the filing of HCCC No. 689 of 1998 did not take away that right. In his view a lien merely confers a passive right of retention. The filing of HCCC No.689 of 1998 and the subsequent decree did not substitute the Defendant's lien over the Plaintiff's cargo as the Doctrine of Election is not applicable. Counsel relied on Stroud's Judicial Dictionary Volume 1 at page 787 where the Learned Author writes:

“Every case of election therefore presupposes a plurality of gifts or rights with an intention, expressed or implied of the party who has a right to control one or both that one should be a substitute for the other. The party who is to take has a choice but he cannot enjoy the benefit of both.”

Counsel further relied on the decision in the case of George Barker (Transport) Ltd –v- Eynon (1974) 1 ALL ER 900 for the proposition that where a lien exists before the appointment of a receiver the contract conferring the lien is binding on the receiver.

Counsel further relied on the case of Re: British Tea Table Company (1897) Ltd –v- The Company (1910) 101 L.T.P 707 for the same proposition that a lien survives the receivership. He prayed that the Plaintiff's claim be dismissed and that judgment be entered for the Defendant on the counterclaim.

Counsel for the Plaintiff submitted that the Doctrine of Election applies in this case. The Defendant elected to sue for its charges and therefore lost the right of lien. Counsel cited 5 English authorities in support of his submission, one of which was the case of Brewer –v- Sparrow: 1827 7B & C.310(1824-34) ALL E.R.525. In this case the Defendant wrongfully sold goods of a bankrupt. The assignees of the bankrupt received the accounts of the sale and accepted from the Defendant the balance appearing due on the accounts. It was held that they had elected to ratify the sale and they could not afterwards sue the Defendants for conversion. The other 4 English cases involved the same Doctrine of Election.

Counsel further submitted that the Defendant's counter-claim is incompetent by reason of being res judicata. In Nairobi HCCC No.689 of 1998 the Defendant claimed Kshs 3,573,193.10 being its clearing and forwarding charges. By its counterclaim in this suit it seeks to enforce its right of lien. The counterclaim in Counsel's view should be struck out. The plea of Res judicata was however not framed as an issue for my determination.

The Agreement between the Plaintiff and the Defendant for the provision of clearing and forwarding services expressly provided that the Defendants “shall have a general as well as a particular lien on all goods for unpaid account.” A General lien and a particular lien are both categories of a legal lien.

Halsbury's Laws of England 4th Edition paragraph 502 at page 221 describes the same as a right at Common Law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied. Paragraph 519 of the said Halsbury's Laws of England states:

A Legal lien is a right of defence and not a right of action and saving special cases does not give any right to sell the thing retained.

The Plaintiff herein was not able to pay the Defendant's charges. The only way the Defendant could recover its charges was therefore by way of a suit. The Defendant did so by filing Nairobi HCCC No. 689 of 1998. In my view the Defendant did not have much choice in the matter. The filing of the said suit was not inconsistent with the Defendant's lien on the Plaintiff's cargo. Indeed in my view the filing of Nairobi HCCC No. 689 of 1998 was consistent with the Defendant's said lien. The Doctrine of Election would apply if the filing of the said suit would substitute the Defendant's lien on the Plaintiffs' cargo or if the filing of the said suit would be inconsistent with the Defendant's lien on the cargo. This in fact is the principle that runs through the cases relied upon by the Plaintiff in this case. I have therefore no hesitation whatsoever in finding that the Defendant in the present suit was not put on election between suing the Plaintiff for charges or retaining the Plaintiff's cargo in the exercise of its right of lien. It follows as day follows night that the answer to the second Agreed Issue must be in the negative. By instituting HCCC No.689 of 1998 the Defendant in the present case did not lose its right of lien on the Plaintiff's cargo.

The parties submitted on the effect of the receivership of the Plaintiff on the Defendant's right of lien even though the same was not framed as an issue for my determination. If I had been asked to make a determination on the same, I would have held that the receivership of the Plaintiff did not take away the Defendant's lien over the Plaintiff's cargo. I have found support for this in paragraph 531 and 532 in Halsbury's Laws of England 4th Edition volume 28 at page 236 where it is stated:

531 Effect of liquidation.

“.....where a general lien has been created by contract it is not defeated by the later crystallisation of a floating charge which was in existence but not crystallised at the time of creation of the lien”

AND 532 Effect of receivership.

“.....where a lien exists before the appointment or where there is a contract authorizing the exercise of a general lien in certain events such a contract is binding on the receiver even if the relevant events occur after the date of his appointment.”

Having determined the Agreed Issues in the negative I order that the Plaintiff's suit be and is hereby dismissed with costs and the Defendant's Counter claim be and is hereby allowed with costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JUNE 2004.

F. AZANGALALA

AG. JUDGE

Read in the presence of: