

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 289 OF 1974

LUMMUS CO. LTD.....PLAINTIFF

VERSUS

EAST AFRICAN HARBOURS CORPORATION.....DEFENDANT

JUDGMENT

related the facts of the dispute in which a crude oil tower which the plaintiff had shipped from England to Mombasa had been damaged on the quayside when being discharged by a crane belonging to and operated by the defendant. His Lordship found that the damage was solely attributable to the defendant, through its servants or agents, and that the defendant could not avail itself of the protection afforded by regulation 61(1)(g) of the East African Harbours Regulations. He then considered the defendant's plea that it was entitled to the protection of the exemption and limitation clause in the bill of lading. He continued.

Finally the defendant seeks to rely on clause 29 of the bill of lading which provides:

Exemptions and Immunities of All Servants and Agents of the Carrier

It is hereby expressly agreed that no servant or agent of the carrier (including every independent contractor from time to time employed by the carrier) shall in any circumstance whatsoever be under any liability whatsoever to the shipper, consignee or owner of the goods or to any holder of this bill of lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, but without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability defence and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the carrier or independent contractor acting as aforesaid and for the purpose of all the foregoing provisions of this clause the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this bill of lading.

In *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1974] 2 WLR 865 where there was an identical clause (clause 1) and the Privy Council held, by a majority of three to two, overruling the Court of Appeal in New Zealand that although the stevedore was not a party to the contract he was made a party by the bill of lading. Although this is a persuasive authority and English cases are to be treated with great respect in matters concerning shipping (*Coffee Marketing Board v Harbours Corporation* [1973] EA 126), I do not think I am bound by it in view of *Halal Shipping Co Ltd v Securities Bremer Allegemene* [1965] EA 690 where, in an appeal from Aden, the East African Court of Appeal held that the appellants stevedore (who was sued by the consignee for damages for the loss of goods due to its admitted negligence) could not rely on exemption clauses in the bill of lading as it was not a party to it. This was followed in an appeal from Uganda in *Kayanja v New India Assurance Co Ltd* [1968] EA 295.

I think it is for the Court of Appeal to decide whether to follow the majority of the Privy Council or to say

that it prefers the statement by Viscount Dilhorne in his dissenting opinion at page 875:

Anxiety to save negligent people from the consequences of their negligence does not lead me to give an unnatural and artificial meaning to the clause and a meaning which the words it contains do not bear. To give effect to the appellants' contentions appears to me to surrender to the anxiety to which Fullagar J referred [in *Wilson v Darling Island Stevedoring & Lighterage Co Ltd* (1965) 95 CLR 43, 70], a surrender which cannot be justified simply by labelling the bill of lading a commercial document. It is no more a commercial document than a consignment note for the carriage of goods by rail or road and it should not be forgotten that ordinary members of the public as well as those engaged in commerce send goods by sea as well as overland.

A possible distinction is that in that case there was a finding of fact by the trial judge that the carrier was indisputably authorised by the stevedore to contract as its agent for the purposes of clause 1. There was no evidence of that in the instant case. This defence also fails.

It follows that there will be judgment for the plaintiff for Shs 180,226.60 and £56,494.23 with interest at court rates and costs. Certificate for two counsel.

Order accordingly.

Dated and Delivered at Nairobi this 31st day of March 1977.

D.J.SHERIDAN

JUDGE