REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO. 258 OF 1969

HASHAM JIVA……..……..…….. PLAINTIFF

VERSUS

ESMAIL SERVICE STATION……... DEFENDANT

JUDGMENT

The plaintiff has sued the defendant for damages for wrongly detaining his motor vehicle, and the defendant pleaded that he had a lien for work done to it. He also counterclaimed for the amount which he claimed to be due to him for such work. The counterclaim also contained a claim for Shs 1000 for tyres supplied to the plaintiff and the defence contained a similar averment. It had no relevance to the lien and had no proper place in the defence stating no more than that the sale and delivery were made. I am now asked to allow it to be amended to aver a sale of the tyres and their delivery by the defendant to the plaintiff to the account of a limited liability company at the oral request of and upon an undertaking to pay for them by the plaintiff who pledged the vehicle for such payment.

The application was opposed, if I understood plaintiff's counsel correctly, on four main grounds: that the application was made *mala fide* and too late; that the amendment was of no use to the defendant because of the provisions of section 3 of the Law of Contract Act; that the lien having been lost by the act of counter-claiming, the amendment was useless; and that to grant the amendment would entail, a pleading over with consequential waste of time and money.

Most of the opposition was taken up with the matter of the counterclaim. I pointed out to the counsel that the proposed amendment was in no way connected with the lien and that, as the record has it, "We have travelled very far", but counsel insisted that it was necessary to his argument. With great respect it was not, for the fact that the lien may have been lost could have no effect on a totally different transaction claimed to support a totally different right. But I shall deal with what was put to me about it as I shall deal with all other grounds of opposition.

The application is certainly made at a very late stage of the proceedings, for the case for the plaintiff is closed and the defendant is being crossexamined; but an amendment to pleadings may be made at any time during a trial and it may even be made on appeal. To suggest, as was suggested to me, that "lateness shows *mala fides*" appeals to me not at all. Whether the mere fact of lateness shows *mala fides* must be gone into rather deeper than that. It is said that the reason why the amendment is sought is to improve evidence; but whatever my views may be at the end of the day, I do not now think it to be so. It is perfectly true that the documents so far put in evidence may not support the amended averment, but counsel for the defendant suggested a pledge when he cross-examined the plaintiff' and the defendant gave evidence about it. I am asked to call for an affidavit before possibly allowing the application; but I see no reason to do so. An amendment to pleadings ought to be allowed if thereby the real substantial question can be raised between the parties, and it should be given unless the court is satisfied that the

party applying is acting *mala fide* or that, by his blunder, he has done some injury to his opponent which cannot be compensated for by' costs or otherwise: *Harji Karsan v Monjee Raghavjee* (1943) 10 EACA 10. I find no *mala fides* and I think the amendment, if allowed, will enable the substantial question of the pledge to be resolved.

Whether the amendment goes so far as to plead a contract to answer for the debt or default of someone else I need not now consider. Section 3, above, deals with cases where a suit is brought, subsection (1) beginning "No suit shall be brought ...". The defendant is not bringing a suit, but defending one. I do not believe that the fact of the defendant not having the vehicle's log book need disturb me.

Various cases were cited to me as authority for the proposition that the very act of counterclaiming destroys a possessory lien. Most of them related to security being taken, a situation far removed from the bringing of a claim by way of counter-claim; but general principles can be deduced from those cases which I now cite and which span almost a century in time. In *Stevenson v Blakelock* (1813) I M&S 535, 544, Lord Ellenborough CJ said:

> The right of suit and the right of lien are distinct rights, both arising out of the implied contracts, and both subsisting at the same time.

and in *Rederiactieselskabet "Superior" v Dewar & Webb* [1909] 2 KB 998, 1006, the Court said:

> Now there certainly is no principle of law which prevents a right of lien upon goods being superadded to a right of action of debt for the money which the lien secures ...

So much for the subsistence of the rights. Now as to the loss of the lien. In *Re Taylor Stileman & Underwood* [1891] 1 Ch 590, 597, Lindley LJ said:

> Whether a lien is waived or not by taking a security depends upon the intention expressed or to be inferred from the position of the parties and all the circumstances of the case.

and Kay LJ concurring (at page 600) held:

> I take it that the true rule is that stated by Lindley LJ, that in every case where you have to consider whether a lien has been waived you must weigh all the circumstances of that particular case ...

In *Re Morris* [1908] 1 KB 473, 479, Buckley LJ, quoting Lindley LJ, said:

> Whether a lien is waived or not by taking a security depends on the intention expressed or to be inferred from the position of the parties and all the circumstances of the case,

with Kennedy LJ (at page 482) adding:

> In *Cowell v Simpson* and ... in *Re Taylor, Stileman and Underwood* ... the judgments do expressly refer to the fact that the security was of a nature 'inconsistent' or 'incompatible' with the retention of the solicitor's lien.

And, finally, in *Hill & Sons v London Central Markets Cold Storage Co Ltd* (1910) 102 LT 715, 716, Hamilton J had this to say:

> I accept the guidance of the passages which have been cited to me on pages 478 and 479 of *Re Morris* to the effect that what one has to consider when the discharge of a lien which otherwise would have arisen or has already arisen is in question, is whether or not, looking at the whole of the transaction, the position of the parties, and the circumstances of the case, the new position is inconsistent with the further continuance of the lien.

I accept, to reproduce Hamilton J's language, the guidance of all the passages. I have quoted. I particularly draw attention to the fact that not even in the security cases does the mere taking of the security spell out the loss of the lien. What follows?

Counsel have not been able to discover a single case in the books to support the proposition that if you bring an action for a debt due to you, you thereby lose the lien which you have till then had over goods which you hold for that debt. Nor do I think that such a case is possible of finding for the *Stevenson v Blakelock and Rederiactieselskabet* cases indicate that you do not. I apprehend that the right of action for the debt and the right of lien exist concurrently. In my judgment the right to sue is not inconsistent or incompatible with the retention of the lien. To say that by taking the opportunity in an action brought against you to claim money which you say is due to you, you have manifested an intention to. give up your lien when you have just pleaded that you have not, is quite unattractive to me. Nor would it, I think, attract the compilers of "Bailment" in *6 Atkins' Encyclopaedia of Court Forms in Civil Proceedings* 1976), because (on pages 247 and 248) there is a draft pleading (albeit concerning an innkeeper's lien, but the legal position appears to me to be no different from that of an artificer's lien), which begins, "Defence of lien by innkeeper to claim for detention of goods and Counterclaim for amount due by guest". The supposed defence raises the plea of a lien for a £20 bill, and the counterclaim "counterclaims the sum of £20". Nothing in the facts before me requires me to hold that there has been a waiver of the lien simply by the raising of the counterclaim.

That there will have to be a pleading over, with consequential delay and the incurring of extra costs, cannot outweigh what I have said about the *bona fides* and lateness of the application. I allow the amendment, but I have resolved to reserve costs.

Order accordingly.

Dated at Nairobi this 14th day of October 1977.

E. TREVELYAN

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JUDGE