**Unibilt Kenya Ltd (Under Receivership) v Mukhi and Sons Ltd**

**Division:** Milimani Commercial Courts of Kenya at Nairobi

**Date of Judgment:** 21 June 2004

**Case Number:** 219/01

**Before:** Azangalala AJ

**Sourced by:** LawAfrica

**Summarised by:** A Mwanzia

*[1] Contract – Lien – Election – Whether by filing suit party loses right of lien – Whether doctrine of*

*election applicable under the circumstances.*

**JUDGMENT**

**AZANGALALA AJ:** By a plaint dated 16 February 2001, the plaintiff sued the defendant seeking an order compelling the defendant to deliver to the plaintiff 31 pallets of tinplate, damages, interest on damages and costs. On 20 March 2001 the defendant filed a defence and set up a counterclaim 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 an forwarding services during the period 1997 and

July 1998.

2. As at 31 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 service 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 9 November 1998 the defendant instituted High Court civil case number 689 of 1998 against the plaintiff to recover the said sum of KShs 3 573 193-10.

5. A t the time of institution of High Court civil case number 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 6 March 2000 the High Court of Kenya at Nairobi in High Court civil case number 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 16 March 2000 Kenya Commercial Bank Ltd by a deed of appointment dated 16 March 2000 appointed joint receivers and managers in respect of the p laintiff 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. W the defendant in the present suit was put on election between suing the plaintiff for charges or retaining the plaintiff’s cargo in the exercise of its right of lien.

2. W hether by instituting High Court civil case number 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 counterclaim 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 counterclaim dismissed with costs.

The parties filed an agreement in the above terms pursuant to the provisions of Order XIV, rule 6 of

Civil Procedure Rules. The matter came before me on 14 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 High Court civil case number 689 of 1998 did not take away that right. In his view a lien merely confers a passive right of retention. The filing of High Court civil case number 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 787 where the learned author writers:

“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 LTP 707 for the same proposition that a lien survives the receivership. He prayed the plaintiff’s claim be dismissed and the 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 five English authorities in support of his submission, one of which was the case of *Brewer v Sparrow* 1827 7B and C 310 (1824-34)

All ER 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 four English cases involved the same doctrine of election.

Counsel further submitted that the defendant’s counterclaim is incompetent by reason of being *res judicata*. In Nairobi High Court civil case number 689 of 1998 the defendant claimed KShs 3 573 193-10being its clearing and forwarding charges. By its counterclaim in this suit it seeks to enforce its right oflien. The counterclaim in counsel’s view should be struck out. The plea of *res judicata* was however notframed 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* (4 ed) paragraph 502 at 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 po.ssession 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 High Court civil case number 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 High Court civil case number 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 plaintiff’s 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 High Court civil case number 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* (4 ed) volume 28 at 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”.

*532 effect of receivership* “where a lien exists before the appointment or where there is a contract authorising 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 counterclaim be and is hereby allowed with costs.

Order accordingly.

For the plaintiff:

*Mr Arua*

For the defendant:

*Mr Kairu*