



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM:RO Kwach, RS Omolo & A.B. SHAH)

CIVIL APPEAL 83 OF 1995

BAMBURI PORTLAND CEMENT COMPANY LIMITED.....APPELLANT

AND

IMRANALI CHANDBHAI ABDULHUSSEIN.....RESPONDENT

**(Appeal from a judgment and decree of the High Court of Kenya at Mombasa
(Wambilyangah, J.) dated 7th December, 1994**

IN

H.C.C.C. NO. 749 OF 1992)

JUDGMENT OF KWACH, J.A.

I have had the advantage of reading in draft the judgments of my learned brothers Omolo and Shah JJ.A. and I agree with them. As the legal issues raised in this appeal are of great importance, I think, I should add a few remarks of my own. In this judgment, I shall refer to both parties in their original capacities.

Bamburi Portland Cement Company Ltd, the appellant, (hereinafter called "the defendant") is the sole manufacturer of Cement in Kenya. It enjoys a virtual monopoly in the cement industry. Imranali Abdulhussein, the respondent in this appeal, (hereinafter called "the plaintiff") was at the material time in transport business and had left a fleet of lorries. He contracted with several companies in Malindi to transport cement purchased by these companies from the defendant's plant at Bamburi in Mombasa. The plaintiff's evidence which the trial Judge accepted, was that in order to meet the requirements of his customers under these contracts, he deployed six lorries and charged Shs.4,000/- per lorry per day on a 5 – day week.

Prior to the commencement of the proceedings giving rise to this appeal the plaintiff was indebted to a company called Kenya Cement Marketing Ltd (Kencem) which Kencem had instructed its advocates to recover from the plaintiff. The plaintiff did not clear the debt, or at least part of it, and in order to put pressure on the plaintiff, the defendant, obviously with the connivance of or in collusion with Kencem, decided to deny the plaintiff entry into its premises at Bamburi with the result that the plaintiff defaulted on his obligation to his customers and claims to have suffered loss and damage.

The defendant attempted to justify its action on the ground that Kencem is a subsidiary company of the defendant. It is in fact the marketing and distribution arm of the defendant. The defendant first refused to admit the plaintiff's lorries on 11th August, 1992. The exclusion continued right up to, and beyond 19th October, 1992, when the plaintiff filed proceedings against the defendant claiming damages. The cause of action as pleaded in the plaint, which appears to have been drawn in hurry and contains number of careless mistakes, was that the defendant was guilty of inducing breaches of the plaintiff's contracts with third parties namely the plaintiff's customers, and of denying the plaintiff his right to perform these contracts by locking him out. The defence filed by the defendant dated 24th November, 1992, made no reference to the debt owed by the plaintiff to Kencem but stated that the defendant as the owner and occupier of the premises at the Bamburi plant reserved the right of admission into its premises and could deny entry to anyone including the plaintiff. It was contended on behalf of the defendant that he plaintiff was for all practical purposes a trespasser.

As I have already said, the plaintiff was first locked out on 11th August, 1992 but apart from filing suit on 22nd October, 1992, he took no other effective step to bring the defendant to heel until 5th April, 1993, when it filed an application for a temporary injunction under Order 39 rr 1 and 2 of the Civil Procedure Rules. This application was not heard until 15th July, 1993 when the orders sought on the summons were granted tot he plaintiff with the consent of the defendant. The fact that the defendant did not resist the plaintiff's application for injunction is important because it proves that if the relief had been sought earlier the same result would have been achieved and the loss and damage to the plaintiff would have been minimised. We sought an explanation for this delay from Mr. Khaminwa, for the plaintiff but apart from being economical with the truth, so to speak, his attitude, which I found most strange, was that we had no business inquiring into this aspect of the case. We obliged him but as things stand this particular point is the one decisive point on which this appeal has ultimately been decided.

The Judge awarded the plaintiff a sum of Shs.3,780,000/- as special damages alleged to have been lost over a period of 9 months. There was everything wrong with this award. The special damages claimed were neither pleaded nor proved as required by law. Secondly, the evidence given by the plaintiff did not prove his loss even, on a balance of probabilities. He told the Judge that he did not produce audited accounts because he had not been asked to do so. He said he had them and could produce them but he did not. He also said he had tax returns but which he chose not to produce. He also said he was charging Shs.4,000/-, for each lorry per day, but produced no credible evidence to support this claim. Although the plaintiff did not produce any documentary evidence in support of these claims, the Judge accepted the scanty evidence given by him and made a hefty award of damages in his favour. This award is the subject of challenge in this appeal and I shall revert to it in a moment.

The defendant is contesting both liability and damages. The plaintiff's cause of action as pleaded, and as it emerged from the evidence, was that the defendant knowingly and intentionally induce third parties to break their contracts with the plaintiff without reasonable justification or excuse thereby causing him loss and damage. The defendant knew that the plaintiff had contracts with third parties to transport cement which he could not fulfil unless he was given unimpeded access to the defendant's factory. And what did the defendant do? It locked out the plaintiff out of the factory thereby rendering him totally incapable of collecting cement destined for third parties. As if that was not bad enough, the defendant went further in a number of instances, and made a direct appeal to some of the parties with whom the plaintiff did business, not, to give any contracts for the carriage of cement to the plaintiff. These allegations were never denied and they could not have been, Lord Diplock L.J. in the case of [Emerald Construction Co. Ltd vs Lowthian](#), [1966] 1 WLR 691 at page 703, thus:

“Upon the claim framed in this way there is no real dispute as the law applicable. There are three essential elements in the tort of unlawful procurement of a breach of contract: the act, the intent and the resulting damage.”

The burden on the plaintiff is to show that there was an intentional invasion of his contractual rights, not merely that the breach of contract was the natural consequence of the defendant's conduct. The defendant must be shown to have knowledge of the existence of the contract but he does not need to know the relevant terms of the contract. In the present case, the defendant was not only aware of the existence of the contracts but it also knew the relevant terms of these contracts. The defendant's conduct extended beyond merely inducing breaches; it had an element of intimidation. It is shameful that a company of the standing of the defendant should find it necessary to resort to intimidation to collect debts owed to it or its subsidiaries. It was totally unnecessary to subject the plaintiff to such humiliation just to collect a debt on behalf of a third party. The defendant displayed the sort of corporate arrogance that has become the trade mark of monopolies in Kenya. If they can get away with inflated prices, and redundancies what will they stop at? On liability the defence and the Judge was right to find for the plaintiff.

With regard to damages, this had been adequately covered by my brothers Omolo and Shah JJ.A. and there is no need for me to go over the same ground again except to say that I entirely agree with the basis and quantum of their assessment. For the violation of his legal rights the plaintiff is entitled only to nominal damages.

Like my brother Shah J.A., I continued to be deeply concerned about the ruthlessness with which decrees issued by the superior court in Mombasa are being executed. Whether one is a victor or the vanquished justice must strive to maintain a soft spot for the weak. I particularly agree with his views on Order 21 r. 7(4) of the Civil Procedure Rules.

For all these reasons, I would dismiss the appeal on the issue of liability but allow it on the issue of damages to the extent proposed by my brother Omolo J.A.

JUDGMENT OF OMOLO, J.A.

As far as I am aware, Bamburi Portland Cement Company Ltd, the appellant hereinafter, is the sole manufacturer of cement in Kenya. There may be one other manufacturing company at Athi River, but it is a sister company of the appellant, or so I believe. To put it bluntly, the appellant is a monopoly as far as the cement industry is concerned in Kenya. Because it is a manufacturer, the appellant is not, for obvious reasons permitted by law to be a distributor of its product. So the appellant formed a subsidiary company called Kencem Limited to do that which the appellant could not itself lawfully do, namely to distribute cement. But whatever may be the reason or reasons which led to the creation of Kencem Ltd, that company, as the learned Judge correctly pointed out in his judgment, is a separate and distinct legal entity on its own and the appellant cannot purport to act on its behalf except upon its own. (i.e Kencem's) authority. There was absolutely no evidence before the Judge that Kencem had authorised the appellant to be its debt-collector. I have found it necessary to relate these matters because of what follows next.

Imranali Chandbhai Abdulhussein, the respondent herein, is or was at time or times material to his claim in the superior court, a transporter and for that purpose, he had six or nine lorries. He said he had customers on behalf of whom he would collect cement from the appellant's premises and deliver to them. In his plaint dated the 19th October, 1992 and filed on the 22nd October, 1992, the appellant named those customers as Kassamjee Ltd., Malindi Hardware, Ezzi and Electrical, Rajabu Stores in Malindi, Alibhai Massamjee in Malindi, Jivanjee Stores in Malindi and Mullas also of Malindi. In the meantime, the respondent owed some money to Kencem Ltd. The lawyers of Kencem demanded payment from the respondent. The lawyers of Kencem demanded payment from the respondent. The respondent was able to reach a compromise with those lawyers and he was allowed to pay the debt by monthly instalments. The respondent religiously stuck to the terms of the arrangement. Then for some reason which I am unable to appreciate the appellant butted into the matter. It peremptorily barred the

respondent's lorries from entering its premises, unless the debt to Kencem was paid. This was on 11th August, 1992. On the 17th August, 1992, M/s Kilifi Ezzi Electrical & Hardware wrote to the appellant, apparently enquiring why its cement had not been collected and on the 21st August, 1992, the appellant wrote back to them as follows:-

“.....

Kindly be advised that M/s Imranali Chandbhai owes us through Kencem K.Shs.216,239.30 which he is yet to settle. Hence the management made a ruling that I Chandabhai's lorries won't be allowed at our premises until this issue is cleared. All those firms that he transports for, are equally affected.”

Kenya National Trading Corporation made an inquiry on the 26th August, 1992. The appellant wrote back on the 31st August, 1992 stating that it would supply the balance of the respondent's then cement order and then suspend any dealings with the respondent until the money owed to the appellant through Kencem had been fully paid.

In these circumstances, it was not surprising that the respondent filed suit against the appellant and in paragraphs 5, 6 and 7 of the plaint, it was averred as follows:

"5. The plaintiff states that on the 11th August, 1992 the defendant has refused to allow the plaintiff's transport vehicles and lorries to enter the said Bamburi Cement Factory to load the said customers cement thus have effectively prevented the plaintiff from performing his contracts with his customers.

7. That the said refusal by the defendant is without reasonable cause or any at all has wrongfully and maliciously induced breach of contract between the plaintiff and his clients whom (sic) have used him to have their cement transported out of the defendant company premises.

8. Furthermore the defendant company has written in (sic) the plaintiff's clients informing them not to do any business with the plaintiff without giving reasonable or any at all cause as to why the plaintiff's clients should boycott the plaintiff's transport business."

The respondent's claim against the appellant was obviously in tort, it could have been in contract because there was no contract at all between the appellant and the respondent. Mr. Khanna's first contention before the Judge, and which he also attempted to put before us was that the appellant, as the lawful occupier of the premises had the right to exclude anyone from its premises, unless of course there be a contract between the parties barring such exclusion. In general terms, I would agree that an owner of premises is in law entitled to exclude all persons without legitimate business there. But I started this judgment by stating that the appellant is a monopoly in the manufacture of cement. The respondent was not going to the appellant's premises for pleasure. His lorries were going there to collect cement and that was purpose mutually beneficial to the appellant and to the respondent. The respondent said in his evidence that he had clients or customers and the appellant was aware of that fact. Mr. Khanna told us as he also told the Judge, that the appellant did not prove that he had customers and that he equally did not prove that the appellant was aware of any contracts between the respondent and any one else. I do not myself treat both contentions with any seriousness. The appellant's sales manager, one Benedict Ongeru, gave evidence on behalf of the appellant and that witness, when cross-examined, told the Judge as follows:

“He would sell the cement which he would collect from us. We knew that he had many customers. We knew that by stopping him he would lose customers and business
.....”

What would be clearer than that? The appellant knew that the respondent had customers with whom he did business. The appellant, may not have known the exact nature of the relationship the respondent had with his customers but that is really neither here nor there. As a reasonable person the appellant must have known that the respondent was doing business. That is what the appellant's witness told the Judge. The appellant must have known or ought to have known that the respondent could only obtain supply of cement from it: the respondent could not have obtained supply from anywhere else. Again, on the appellant own showing. It wrote KNTC informing it that the respondent owed them money through Kencem and would no longer be supplied with cement. Taking all the facts into account, the inevitable conclusion to be drawn was that the appellant was bent on grounding the operations of the respondent. In my view, the respondent proved as required bylaw that knowing well that the respondent had customers doing business with him, the appellant nevertheless chose to bar the respondent's lorries from entering its premises. On this aspect of the matter, the learned Judge was clearly right.

The respondent's claim was on the ground that the appellant had induced a breach of contract between him (respondent) and his customers. On this point, Mr. Khanna's submission was that there was no inducement, i.e. that the appellant's act of preventing the respondent's vehicles from going into its premises could not amount to an inducement to breach the contract between the respondent and his customers. I suppose it cannot be said that the appellant induced the respondent to break his contract with his customers. As far as I understand the evidence the respondent did not claim and could not have claimed that the appellant induced him to break his contract with his customers. All that the respondent could say was that the appellant's act of preventing his lorries from going into its premises forced him into a situation in which he was unable to perform his part of the contract to his customers. So that as far as the respondent was concerned, there cannot be and there could not be any question of the appellant inducing him to break his contract or contracts. But I do not think that anything really turns on this point. The point is that the appellant knew that the respondent had contracts which could only be performed if it continued to supply the respondent with cement. It capriciously decided to stop the vehicles from entering its premises and the effect of that was that the respondent was unable to obtain cement. The reason the appellant offered for its action was false. The respondent never owed the appellant any money. The only person the respondent owed money was Kencem Ltd. And on this aspect of the matter the respondent had reached an accommodation with Kencem's lawyers. I respectfully agree with the trial Judge that the appellant's action amounted to arm-twisting and was wholly unlawful.

So that whether the matter be viewed as an inducement to break the contract, or procuring a breach of contract or interfering with a contract, it really cannot make any difference. The appellant knew that by its unlawful action, the respondent would not be in a position to supply his customers and that must be the reason why the appellant was very keen to explain to some of the respondents' customers what had taken place between it and the respondent. I can find nothing in the case of ALLEN V. FLOOD & TAYLOR[1898] AC 1 or any of the authorities which Mr. Khanna cited to us, that would make me reach a decision differed from that arrived at by the trial Judge. On the issue of liability, I have no doubt that the Judge arrived at the correct conclusion, and I can find no basis for interfering with him. I would myself dismiss the appeal against the liability.

That leaves the question of damages. The respondent claimed special damages at the rate of Shs.24,000/- per day. That claim which was pleaded in paragraph 9(a) of the plaint was clearly for special damages and in his evidence the respondent purported to prove those damages. This court has said time without number that special damages must not only be specifically pleaded but must strictly proved. Authorities to that effect are legion. The respondent asserted that he was earning a daily profit of Shs.4000/- per lorry and he had six lorries for transporting cement. That was basis of the claim for Shs.24,000/- daily. When cross-examined, the respondent asserted that he had his audited accounts and income-tax returns and he could produce them. He did not produce them because they were at home and he did not ask for an adjournment to enable him bring those books. It cannot be assumed that because a man is

doing substantial business, he must be making profits. The burden was upon the respondent to prove, of course upon a balance of probabilities, that he was in fact making profits. On his own evidence, he had at home books which could have easily proved the point that he was making a profit of Shs.24,000/- in a day. He chose not to produce those books and instead on the word of his mouth that he was in fact making such profits. I have not the slightest doubt that the learned Judge was wrong in believing the respondent on this aspect of the case. Shs.24,000/- a day is, by any standards a large sum of money. The respondent was stopped from entering the appellant's premises on the 11th August, 1992. He did not file until the 19th October, 1992 and did not apply for an injunction until the 5th April, 1993. The application for the injunction was not heard until 5th July, 1993. If the respondent had been losing Shs.24,000/- a day as he claimed, I have no doubt that he would not have adopted such a lethargic manner of prosecuting his claim. There is no discretion in a trial Judge when assessing special damages. The damages must be proved. We are accordingly not dealing with the exercise of a discretion by the trial Judge. As I have said, the respondent in my view failed to prove that he was earning Shs.24,000/- per day from his cement transport business and the learned Judge was with respect, in error in awarding to him the colossal sum of Shs.3,780,000/- as special damages merely because he asserted he had suffered such a loss.

But the appellant's action in summarily barring the respondent's lorries from its premises was oppressive high-handed and unlawful. The court must accordingly award to the respondent some damages. Such damages however, can only be nominal. As I have said the respondent if he had promptly pressed his claim, would have obtained an injunction as he eventually did, within a period of two months. He was duty-bound to mitigate his losses, and the obvious was by which he could have done so was to file for an injunction when he instituted his suit in October, 1992.

Instead, he did not ask for one until April, 1993, some six months later. The respondent was not entitled to behave in that way at the expense of the appellant. The respondent claimed Shs.14,000 per lorry per day and the Judge awarded to him Shs.3,500/- per lorry per day. There was no basis for that award and I would, instead award to the respondent a nominal sum of Shs. 1,000/- per day for 20 working days a month for two months. That, according to my calculation, comes to a total of Shs.40,000/- in all.

Accordingly I would allow the appeal on the issue of assessment of damages, set aside the award of Shs.3,780,000/- made by the trial Judge and in lieu thereof substitute it with an award of Shs.40,000/-.

On costs, the appellant substantially succeeded in having the damages drastically reduced. In the event I would award to the appellant two thirds of the costs of the appeal. I would award to the respondent the costs in the superior court but such costs must be based on the award made on this appeal. As my two learned brothers agree, these shall be the order of the court.

JUDGMENT OF SHAH, J.A.

I have had the advantage of reading in draft the judgment of my learned brethren Kwach and Omolo JJ.A. and I entirely agree with them.

I would want to point out that an act of inducement by itself is not actionable. The procurer must act with the requisite knowledge and intention. The general principle is that the claimant must show that there was an intentional invasion of his contractual rights and not merely that the breach of contract was the natural consequence of the defendant's conduct.

The position in this case is clear. The appellant company admittedly has the sole monopoly of manufacturing cement in Kenya. The appellant's associate company is E.A. Portland Cement

Company Limited and the selling organization of both these companies is yet another company known as Kenya Cement Marketing Limited. Although these are all different entities in law between them they control the production and marketing of cement in Kenya.

There are of course several distributors and stockists of cement in Kenya who would sell cement to customers after adding their profit margin to ex-factory cement price.

For nearly 8 years the respondent had been collecting from the appellant's premises cement for transport and delivery to his customers and the appellant was fully aware of this fact. The defence witness called by the appellant (Mr. Benedict Ogeri) admitted that the respondent was an appointed distributor by the appellant company's subsidiary company and that he needed an authority from the marketing company (Kenya Cement Marketing Limited – hereinafter referred to as 'Kencem') stating the tonnage.

The appellant was also aware of the fact that the respondent was to sell the cement on his own behalf.

Mr. Ogeri admitted that the appellant knew that his (the respondent's) customers would suffer when the appellant was stopped from entering the appellant's premises. The appellant knew that the respondent had many customers and that by stopping his lorries from collecting the cement he would lose customers and business.

Whilst knowing all this, simply for non-payment by the appellant to Kencem of some Shs.200,000/= due and owing by the respondent to Kencem the appellant stopped the respondent's lorries from entering its premises. I would not hesitate in saying as the learned judge did in the superior court that the appellant arm-twisted the respondent into paying, or attempted to do so. There are lawful ways of collecting debts. These are sufficient. In fact M/s Waruhiu & Muite advocates for Kencem were collecting the debt due by the respondent to Kencem. Speaking for myself, I do not like arm-twisting methods to collect debts.

Additionally the appellant in fact wrote to Kilifi Ezzi Electrical & Hardware (a firm presumably), to whom the respondent used to sell cement) that as the respondent owed money to Kencem his lorries were not allowed to enter the appellant's premises. The appellant in its letter of 21st August, 1992 to the said Kilifi Ezzi Electrical & Hardware made it quite clear that all firms that the respondent transported cement for were equally affected. In my view this is a brazen method of inducing a breach of contract between the respondent and his customers. The appellant acted with knowledge and intention. It was an intentional invasion of the respondent's contractual rights in so far as the contracts between the respondent and his customers were concerned.

Mr. Khanna for the appellant urged that the respondent could have bought the cement from the appellant's distributors and stockists. It is on record that even Kenya National Trading Corporation was informed by the appellant that it would suspend dealings with the respondent until Kencem was paid.

As I have already pointed out earlier, in this case, the entry was refused merely to get the respondent to pay up a debt due to Kencem whilst the exercise of debt collection was in the hands of M/s Waruhiu & Muite.

Mr. Khanna urged that his client had a right to deny entry to its premises to any one. That in normal circumstances is so. Any person not having business dealings with the appellant could be stopped lawfully by the appellant from entering its premises but what was wrong in the present case was the appellant's mode of denying entry to respondent's lorries which caused the inducement of breaches of respondent's contracts to supply cement to his customers.

I agree therefore that on the issue of liability this appeal must fail.

I come now to the issue of damages. The damages claimed in the body of the plaint were claimed as special damages; a claim for general damages was only included in the prayers. The respondent elected to claim special damages and confined such claim even in his evidence to damages suffered by him as a result of the lorries being kept idle.

The respondent without producing any tangible evidence of losses resorted to saying that he was losing Shs.24,000/= per day as a result of the appellant's action. He had, he said, income tax returns. He had, he said, audited accounts. He did not produce them. These factors lead me to conclude that production of these documents would have been palatable so the respondent in improving his losses. In proving special damages (which have to be strictly proved) it is not sufficient to simply state that he was losing so much per lorry per day. Overheads of a transport business are not insubstantial. Simple calculations of his overheads as pointed out by the appellant's counsel in cross-examination show that his overheads could well have exceeded his income. The learned judge, with respect, went wrong in not taking into account such overheads. As special damages have to be strictly proved and as the same were not so proved what damages is the respondent entitled to? I would say only nominal damages.

The duty of mitigating damages is always on the party suffering damage. What did the respondent do? When access was denied to him by the appellant he did not file a suit until 19th October, 1992; that was more than two months. He did not apply for a mandatory injunction until 5th April, 1993 and which was granted with consent of the appellant on 15th July, 1993.

Had he moved the Court expeditiously he would have obtained access for his lorries forthwith.

Dr. Khaminwa submitted that it was the obligation of the appellant to tell the respondent to apply for access. That cannot be correct. The appellant had made it clear it was not giving access as early as 11th August, 1992. The respondent cannot sit on his laurels twiddling his thumbs waiting for the appellant to give him access.

It would not be amiss to say that if the respondent was ever earning as much as he purported to prove, he would not have been paying instalments of Kshs.20,000/= per month for the Kencem debt and that too after a guarantor was called upon and did pay a sum of Shs.200,000/=. It stands to reason therefore (inter alia) not the respondent's evidence as regards his daily losses was made up and without any foundation.

I would in the circumstances award nominal damages. Taking into account the respondent's inaction in moving the court to obtain an injunction to mitigate his damages, I would give him a loss period of two months. The figure of loss not having been proved I would estimate his losses at Shs.1000/= per day and allow him a 20-day working month and award nominal damages of Kshs.40,000/=.

I would like to end by making some pertinent observations as regards the execution of the decree. Section 94 of the Civil Procedure Act requires that for execution of a decree before taxation leave must be obtained from the High Court, such leave may be sought informally at the time judgment is delivered but if that is not done then it must be made by way of a notice of motion. The motion must be served on the other party and heard inter partes. Order 21 r 7(4) of the Civil Procedure Rules purports to confer on the registrar and deputy registrar the power specifically given to High Court under section 94 of the Act. Rule 7(4) is clearly ultra vires section 94 of the Act because the section reserves that power exclusively to the High Court. I concur in the orders proposed by my learned brother Omolo, J.A.

Dated and delivered at Mombasa this 26th day of January, 1996.

A. B. SHAH

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JUDGE OF APPEAL

R.S.C OMOLO

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JUDGE OF APPEAL

R.O KWACH

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR