



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL SUIT 749 OF 1992**

**IMRANALI CHANDBHAI ABDULHUSSEIN. ....PLAINTIFF**

**VERSUS**

**BAMBURI PORTLAND CEMENT COMPANY LTD..... DEFENDANT**

**J U D G M E N T**

The plaintiff brought this action seeking to recover compensatory damages for financial loss suffered as a result of having been prevented from taking his six Lorries to the defendant's factory premises for loading them with cement and then transporting that cement to his various customer's premises or agreed destinations.

What are the Background facts to this dispute?

The plaintiff operates the businesses of a transporter and wholesaler. He had done the businesses for 9 years. As such he was a contracted agent of KENCHEM Ltd. and over a period he fell into some arrears. In his payments, he became an debtor. KENCHEM Ltd. then instructed their advocates M/s. WARUHIU and MUIITE to collect the debt on their behalf. As a result of negotiations between the advocates and the plaintiff a compromise arrangement was concluded whereby the plaintiff would liquidate the debt by monthly instalments.

The plaintiff continued to service the debt within the framework of that compromise. If he had failed to do so the advocates would have been constrained to begin a court action for recovering the money owed to the client. But nothing of the sort was done. They must have been satisfied that the plaintiff was adhering to the compromise.

It is said herein that KENCHEM Ltd. is either a sister company or a subsidiary company or a marketing company of the Bamburi Portland Cement Co. Ltd. (the defendant in this suit). But no evidence was led to show the actual working or operational relationship between the two companies. Even if it is so close-knit each company, being a limited liability company must operate within the ambit of the Companies Act which confers upon such companies the status of a separate legal entity. (See the Principles of Modern Company Law 3rd Edn. by L.C.B. Gower on the consequences of incorporation).

Be that as it may, the defendant was quite unhappy with the manner in which the plaintiff was repaying the debt owed to KENCHEM Ltd. So it banned the plaintiff from loading his Lorries with cement within its premises. The plaintiff's main business entailed contracted transportation of cement from the defendant's premises to the premises of the customers. He also had his own cement in his store which he distributed by virtue of his agency with KENCHEM Ltd. As a result of the defendant's ban on his lorries he inevitably failed to operate his businesses. Even his distribution agency was affected. In this latter connection it is relevant to show that the defendant also put pressure on K.N.T.C. to cancel the plaintiff's agency. The plaintiff had 9 lorries; but as a result of the defendant's action his business came to a virtual standstill. He

had no money to service the hire-purchase agreements in respect of some of the lorries. Two were repossessed. I will deal with the specific aspects of this evidence elsewhere in this judgment. It is sufficient to point out at this stage that according to the plaintiff his business virtually grounded to a halt as a result of the defendant's action.

#### What were the specific offending acts of the defendant

First, there is the defendant's letter (Exh.1). It was addressed to one of the plaintiff's 'contracted customers. It was written in response to that customer as inquiry why the plaintiff had been prevented from transporting his bulk of cement. So far as material the letter reads as follows:

"Kindly be advised that M/s.Imranali Chandabhai owes through KENCEM KShs.216237/30 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 firms that he transports for are equally affected".

This letter was dated 21st August 1992. It was answer to the customers' letter dated 17th August 1992. It follows that the defendant's act had been done around that time. In the letter to Kenya National Trading Corporation dated 31st August 1992 headed NON-SUPPLY OF CEMENT TO IMRANALI CHANDABHAI ABDUL HUSSEIN they said:

"We are pleased to inform you that we will supply the balance of the current order and then suspend any dealings until the money he owes us through KENCEM has been fully paid".

It is contended by the plaintiff in paragraph 6 of his plaint, that the refusal by the defendant to supply the plaintiff's vehicle with cement was without reasonable cause; that it wrongfully and maliciously induced breach of contract between the plaintiff and his clients who used him to have their cement transported out of the, defendant's premises. It was further contended that the defendant wrote to the plaintiff's clients informing, them not to do any business with the plaintiff without giving reasonable cause as to why the plaintiff's clients, should boycott the plaintiff's transport business.

In paragraph 9(a) of the plaint the particulars of the loss are stated as follows:

"The plaintiff was transporting cement for his clients in Malindi, namely Kassamjee Ltd, Malindi Hardwares, Ezzi and Electrical Hardware in Kilifi, Rajibu Stores in Malindi, Alibhai Massamjee in Malindi, Jivanjee Stores in Malindi and Mullaas in Malindi. The plaintiff was using 6 lorries to meet his clients orders and for each lorry he was charging Shs4000/=, this was on daily basis except weekends and as from 11th August 1992 he has been losing Shs.24,000,/= [worth of business per day".

- What defence was Pleaded?

In paragraph, 3 and 4 of the statement of defence it is averred:

3. The defendant denies paragraphs 2, 3, 4, 5, 6, 7, 8, ,10 and 11 of the plaint and puts the plaint to strict, proof thereof.

4. Further, and in the alternative and without prejudice to the foregoing the defendant will contend that it reserves the, right of admission to anybody from entering or from bringing anything into its premises and/or compound and the plaintiff's and his lorries were therefore lawfully refused to enter the Defendant's premises or compound or commit any act of trespass therein. The defendant will further contend that the plaintiff was notified of this refusal well in advance so as to avoid any loss or damage". At the trial it is the, averment in paragraph 4 of the Statement of defence which became the, central aspect in the litigation. The question raised was whether the defendant was justified? That is the question which I have, to grapple with in the judgment.

In the evidence tendered by the defendant's marketing manager it was clear that the dealings were in two parts, namely that of distributorship for which he was given authority by KENCEM Ltd to enter the

defendant's premises to collect cement which he would distribute on behalf of KENCEM; and that of merely transporting people's quantities of cement for charge. For the latter business he would not have required authority from, KENCEM Ltd. or the defendant. All he needed was the availability of his customers' cement for transportation.

Mrs. Khaminwa forcibly submitted that KENCEM being a limited liability company had a different legal entity altogether from that of subscribers or the parent company; and it alone could have been entitled to recover money from its debtor at its own pace and without the intervention from the parent company. Mr. Ongera seemed to appreciate the fact that KENCEM knew best how to manage its own affairs when he responded as follows to the cross-examination by the plaintiff's advocate:

A: "I know that he has not cleared the debt owed to KENCEM but I do not have the figures.

Q: Why have you not taken the matter to court?

A; "We have not yet reached that stage". Neither this witness nor, the defendant's advocate could put his finger on the rule or concept in law which entitled the parent company to destroy the business of a debtor of its subsidiary company because of an outstanding debt.

In my considered view the consequence of incorporation is that the limited liability company is a legal entity - distinct from its members (See Gower's Book at page 68). It means that the 'subsidiary company's dealings vis-a-vis third parties are conducted to the exclusion of the parent company. It follows that KenceM Ltd. had its own right to insist that the plaintiff should pay up the debt. Moreover, at any rate, KENCEM Ltd, had already properly invoked the necessary-legal machinery; and it was satisfied with the progress of the matter. If it had not, it would have been perfectly entitled to instruct its advocate to institute the necessary court proceedings for the quicker recovery of the money. The fact that it had not done so would only mean that it was quite satisfied with the advocate's efforts in the matter. In any case, there was no witness from KENCEM Ltd to say (or at all least to suggest) that it was not so satisfied and that it had sought the arm-twisting tactic of the parent company.

Did the defendant realise the implications of its actions?

In his answers, to the advocates questioning the defendant's witness said: "We knew that he had many customers. We knew that he would lose customers and business. We knew that; he had his customers to suffer when we stopped him from entering our premises. It is true that we stopped him from carrying on substantial business".

In my opinion the defendant's deliberate action was absolutely unwarranted and inexcusable and was! without any justification.

The action was only animated by gross malice and bad motive. It is an action which a prudent parent company would never at all have resorted to.

There was an available legal mechanism for compelling the plaintiff to pay the debt to the subsidiary company if at all the plaintiff was refusing to do so.

Does the plaintiff have any cause of action?

Has he pleaded any actionable cause of action?

Is he entitled to the relief sought?

These are the questions I have now to grapple with. In his submissions, Mr. Khanna on behalf of the defendants said:

I have also to submit that even if the plaintiff had owed no money the defendants had a complete discretion

whether or not to allow the plaintiff into its premises. There was no contractual duty on the part of the defendant which made it obligatory for the plaintiff to have full access to the premises of the defendant. It is also my submission that it was not the defendant's duty in law to allow the plaintiff, to its premises".

There are two observations which must be made in regard to these contentions. First, that as long as KENCEM Ltd maintained its distributor relationship with the plaintiff (and the defendant did not adduce evidence to that this relationship had been extinguished) it meant that the plaintiff would have been entitled to distribute cement, on behalf of KENCEM Ltd.

Secondly, even if the plaintiff's distributor relationship with KENCEM had ceased to exist the plaintiff would have had an inherent right to merely transport cement for and on behalf of his other customers.

Whereas the defendant might have had the capacity to control or limit the plaintiff's role as a distributor-agent of KENCEM Ltd such right or capacity was totally non-existent in the latter aspect: so long as the plaintiff could procure contracts he would have been entitled to go to the company's premises for loading and taking away, his customers cement. But it is clear that Mr. Khanna and indeed the defendant did not seem to appreciate these obvious distinctions. The defendant is a vital component of an economic fabric of the country. The plaintiff has also the ordinary right as a citizen of this country. He is thus at liberty to earn his living provided he does not violate some special law prohibiting him from so doing. Thus the defendant could not have a right to interfere with his right to earn a living. That would be contrary to the public policy of this country.

But for more fundamental aspect is that as regards the debt owed the KENCEM Ltd is that the plaintiff had amicably resolved what dispute there was 'within a legally accepted mechanism i.e the management that enable the plaintiff to liquidate his indebtedness by monthly remittances to the advocate retained by KENCEM Ltd. One essential ingredient of a legal system is that parties to a dispute should be able to predict the legal consequences of their actions. Certainly, a debtor who has entered into a compromise with his creditor should be able to know that so long as he abides by the compromise he will live in peace. Another ingredient is that parties should be discouraged from taking the law into their own hands. Even trespassers to one's property or land are sued to court orders of their eviction. In my view the defendant should have sought the relief of the court against the plaintiff if it considered his compromise with the KENCEM's advocate to be either invalid or not binding on it.

I therefore find as a fact that the defendant acts of barring the plaintiff's lorries from going to its premises and subsequently communicating or publishing its decision to the plaintiff's contract amounted to unlawful inducement of breach of the plaintiff's contracts with his various customers. These acts were patently intentional and without reasonable excuse. They were intended to cripple him financially. The following passage CLARK and LINDSELL ON TORTS 15th Edn. paragraph 792 at page 379 is aptly relevant:

Lord McNaghten said that a violation of legal right committed knowingly is a cause of action and. .... it is a violation of legal right interfere with contractual relations, recognized by law if there be no sufficient justification for the interference. It had been so decided in LUMLEY V. GYE by a majority in the Queen's Bench with respect to contracts of personal service, and by the court of Appeal in Bowen v. Hall and Temperton v. Russel where it was held to extend to other classes of contract. It has now been held to apply to all contracts of kinds".

In the case of Torquay Hotel Co, Ltd. v. Cousins (1969) 2 Ch. 106 it was said at p. 128:

"It is unlawful to induce a breach of subsisting contractual relations without justification....,"

For these reasons I find the defendant liable as pleaded in plaint. I reject the defence.

The issue of damages

The plaintiff has adduced evidence that he had 9 lorries, 6 of which were made available for the

performance of his customers' contracts. The defendants did not challenge this evidence. In fact they acknowledged it when they communicated their ban to his customers. D.W.I in his evidence to this court said:

"We knew that his customers would suffer when we stopped him from entering our premises. It is true that we stopped him from carrying substantial business".

The plaintiff has also adduced evidence that his transport business earned him Shs.4000/= per lorry per day. So he computes his daily loss Shs.24,000/= in respect of the six lorries. This evidence was also uncontroverted. However, Mr.Khanna sought to show through cross-examination of the plaintiff and submission that the plaintiff's overheads or inputs exceeded or cancelled whatever profits, he would have made. I find that the approach preposterous in as much as it negates any economic motivation in an entrepreneur. Would, the plaintiff have invested his resources, energy and time in a venture which was not at all beneficial or profit making?

At any rate the DW1 himself clearly recognised or conceded that his employer's action did deprive the plaintiff substantial business. In my view, "substantial business" must mean lucrative business where proof is made. Moreover, Mr.Khanna's contention were utterly conjectural. In my view the claim of Shs.400,000/= per lorry per day is quite reasonable. It is by no means an extraordinarily daunting figure. In this connection it has to be remembered that in a case like the present one the damages to be awarded are in the nature of compensation i.e they are intended as practicably possible to put the plaintiff in the position where he would have been but for the unlawful act of the defendant.... These damages are measured against his lost profits. The plaintiff here said he did not work on weekends. So he worked for 20 days in each month.

The plaintiff; has prayed for Shs.4000/= x 20 working days x 11 full months. He contends that the, illegal act. Was, committed on the 11th of August -1992. He would be entitled, to profits for profits for 10 days in that month when the weekends are discounted. He resumed his work on the 15th July 1993. Again, he would be entitled to profits for 11 days in the month of July (excluding the weekends,). But I have also to consider the fact the plaintiff should have endeavored somewhat to mitigate damages. This may have meant endeavoring to liquidate the debt owed at a faster pace. But against this argument one must consider the financial disarray or chaos which the defendant's needless and reprehensible act brought to him and his business. It certainly required a longer period to regain one's balance. It must not be forgotten that he had several vehicles on hire purchase and 2 of them were repossessed as a result of his inability to adhere to the hire purchase agreement. Such events must have put him out of his balance or thrown him into a state of panic.

As suggested by Mr. Khanna I am expected to make an allowance for the running expenses of the lorries, which however, I do not consider to be as exaggerated, or as gross as Mr. Khanna suggested. Instead of Shs. 4000/= per lorry per day I award Shs.3,500/=. Instead of 11 months I give compensation for 9 months. In each month I give compensation for 20 days. These figures are: Shs.3,500 x 20 days x 9 months x 6 lorries. The result is Shs. 3,780,000/=.

Accordingly, I enter judgment for the plaintiff against the defendant for Shs. 3,780,000/= with interest at court rates from the date of the plaint and costs.

Dated and Delivered on the 7th of December, 1994

I.C.C WAMBILYANGAH

JUDGE