REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA ATMOMBASA

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 recovercompensatory damages for financial loss suffered as a result ofhaving been prevented from taking his six Lorries to thedefendant's factory premises for loading them with cement andthen transporting that cement to his various customer'spremises or agreed destinations.

What are the Background facts to this dispute"

The plaintiff operates, the businesses of a transporter andof wholesaler. He had done the businesses for 9 years. Assuch he was a contracted agent of KENCEM Ltd. and over aperiod he fell into some arrears. In his payments, he became" adebtor. KENCEM Ltd. then instructed their advocates M/s.WARUHIU and MUITE to collect the debt on their behalf. As aresult of negotiations between the advocates and the plaintiffa compromise arrangement was concluded whereby the plaintiffwould liquidated 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 KENCEM Ltd. is either a sistercompany or a subsidiary company or a marketing company of theBamburi Portland Cement Co. Ltd. (the defendant in this suit).But no evidence was led to show the actual working oroperational relationship between the two companies. Even if itis so close-knit each company, being a limited liability companymust operate within the ambit of the Companies Act whichconfers upon such companies the status of a separate legalentity.(See the Principles of Modern Company Law 3rd Edn. byL.C.B. Gower on the consequences of incorporation).

Be that as it may, the defendant was quite unhappy withthe manner in which the plaintiff was repaying the debt owed toKENCEM Ltd. So it banned the plaintiff from loading hisLorries with cement within its premises. The plaintiff's mainbusiness entailed contracted transportation of cement from thedefendant's premises to the premises of the customers. He alsohad his own cement in his store

which he distributed by virtueof his agency with KENCEM Ltd. As a result of the defendant'sban on his lorries he inevitably failed to operate hisbusinesses.Even his distribution agency was affected.Inthis latter connection it is relevant to show that thedefendant also put pressure on K.N.T.C. to cancel theplaintiff's agency. The plaintiff had 9 lorries: but as aresult of. the defendant's action his business came to a virtual standstill. He had no money to service the hire-purchaseagreements in respect of some of the lorries. Two wererepossessed. I will deal with the specific aspects of thisevidence elsewhere in this judgment. It is sufficient to pointout at this stage that according to the plaintiff his businessvirtually grounded to a halt as a result of the defendant'saction.

What were the specific offending acts of the defendant

First, there is the defendant's letter (Exh.1). It wasaddressed to one of the' plaintiff's 'contracted customers. Itwas written in. response to that customer as inquiry why theplaintiff had been prevented from transporting his bulk ofcement. 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 yetto settle hence the management made a ruling thatI. Chandabhai's lorries won't be allowed at ourpremises until this issue is cleared. All firmsthat he transports for are equally affected".

This letter was dated 2lst August 1992. It was answer to thecustomers' letter dated 17th August 1992. It follows that thedefendant's act had been done around that time.In the letter to Kenya National Trading Corporation dated 31stAugust 1992 headed NON-SUPPLY OF CEMENT TO IMRANALI CHANDABHAIABDUL HUSSEIN they said:

"We are pleased to inform you that we will supplythe balance of the current order and then suspendany dealings until the money he owes us throughKENCEM has been fully paid".

It is contended by he plaintiff in paragraph 6 of his plaint,that the refusal by the defendant to supply the plaintiff'svehicle with cement was without reasonable cause; that itwrongfully and maliciously induced breach of contract betweenthe plaintiff and his clients who used him to have their cementtransported out of the, defendant's premises.It was further contended that the defendant wrote to theplaintiff's clients informing, them not to do any business withthe plaintiff without giving reasonable cause as to why theplaintiff's clients, should boycott the plaintiff's transportbusiness.

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

"The plaintiff was transporting cement for hisclients in Malindi, namely Kassamjee Ltd, MalindiHardwares,Ezzi and Electrical Hardware in Kilifi,Rajibu Stores in Malindi, Alibhai Massamjee inMalindi, Jivanjee Stores in Malindi and Mullaas in Malindi. The plaintiff was using 6 lorries to meethis clients orders and for each lorry he wascharging Shs4000/=, this was on daily basis exceptweekends and as from l1th August 1992 he has beenloosing Shs.24,000,/= [worth of business per day".

- What defence was Pleaded"

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

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 withoutprejudice to the foregoing the defendant willcontend that

it reserves the, right of admission toanybody from entering or from bringing anything intoits premises and/or compound and the plaintiff's andhis lorries were therefore lawfully refused to enterthe Defendant's premises or compound or commit anyact of trespass therein. The defendant will furthercontend that the plaintiff was notified of thisrefusal well in advance so as to avoid any loss ordamage".At the trial it is the, averment in paragraph 4 of the Statementof 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 marketingmanager it was clear that the dealings were in two parts,namely that of distributorship for which he was given authorityby KENCEM Ltd to enter the defendant's premises to collect cement which he would distribute on behalf of KENCEM; and thatof merely transporting people's quantities of cement forcharge. For the latter business he would not have requiredauthority from, KENCEM Ltd. or the defendant. All he needed wasthe availability of his customers' cement for transportation.

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

A: "I know that he has not cleared the debt owed toKENCEM 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". Neitherthis witness nor, the defendant’s advocate could' put his finger on the rule or concept in law. whichentitled the parent company to destroy the businessof a debtor of its subsidiary company because of anoutstanding debt.

In my considered view the consequence of incorporation isthat the limited liability company is legal entity - distinctfrom its members (See Gower's Book at page 68).It means that the ‘subsidiary company's dealings vis-a vis third parties areconducted to the exclusion of the parent company. It followsthat Kencem Ltd. had its own right to insist that the plaintiffshould 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 advocates 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'switness 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 absolutelyunwarranted and inexecusable and was! without any justification.

The action was only animated by gross malice and badmotive. It is an action which a prudent parent company wouldnever 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 defendantsaid:

I have also to submit that even if the plaintiffhad owed no money the defendants had a completediscretion whether or not to allow the plaintiffinto its premises. There was no contractual duty onthe part of the defendant which made it obligatoryfor the plaintiff to have full access to the premisesof the defendant. It is also my submission that itwas not the defendant's duty in law to allow theplaintiff, to its premises".

There are two observations which must be made in regard to these contentions. First, that as long KENCEM Ltd maintained its distributorrelationship with the plaintiff (and the defendant did notadduce evidence to that this relationship had been extinguished) it meant that the plaintiff would have been entitled todistribute cement, on behalf of KENCEM Ltd.

Secondly, even if the plaintiff's distributor relationshipwith KENCEM had ceased to exist the plaintiff would have had aninherent right to merely transport cement for and on behalf ofhis other customers.

Whereas the defendant might have had the capacity tocontrol or limit the plaintiff's: role as a distributor-agent of KENCEM Ltd such right or capacity was totally non-existent inthe latter aspect: so long as the plaintiff could procurecontracts he would have been entitled to go to the company'spremises 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 defedant is a vital component of an economic fabric of inthe country. The plaintiff has also the ordinary right as acitizen of this country. He is thus at liberty to earn hisliving provided he does not violate some special lawprohibiting him from so doing. Thus defendant could not have aright to interfere with his right to earn a living. That wouldbe 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 indebtness by monthly remittances to the advocate retained by KENCEM Ltd. One essential ingredient of alegal system is that parties to a dispute should be able topredict the legal consequences of their actions Certainly, adebtor who has entered into a compromise with his creditor should be able to know that so long as he abides by thecompromise he will live in peace. Another ingredient is thatparties should be discouraged from taking the law into theirown hands. Even trespassers to ones property or land are suedto court orders of their eviction. In my view the defendantshould have sought the relief of the court against theplaintiff if it considered his compromise with the KENCEM'Sadvocate to be either invalid or not binding on it.

I therefore find as a fact that the defendant acts ofbarring the plaintiff's lorries from going to its premises andsubsequently communicating or publishing its decision to the plaintiff's contract amounted to unlawful inducement of breachof the plaintiff's contracts with his various customers. Theseacts were patently intentional and without reasonable excuse.They were intended to cripple him financially. The followingpassage CLARK and LINDSELL ON TORTS 15th Edn. paragraph 792 atpage 3 79 is aptly relevant:

Lord Mcnaghte' said that a violation of legal rightcommitted knowingly is a cause of action and. ....it is a violation of legal right interfere with contractual relations, recognized bylaw if there be no sufficient justification for theintereference. It had been so decided in LUMLEY V.GYE by a majority in the Queen's Bench with respectto contracts of personal service, and by the courtof Appeal in Bowen v. Hall and Temperton v. Russelwhere it was held to extent to other classes ofcontract. It has now been held to apply to allcontracts of Kinds".

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

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

For these reasons 1 find the defendant liable as pleaded inplaint. 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 hiscustomers' contracts. The defendants did not challenge thisevidence. In fact they acknowledged it when they communicatedtheir ban to his customers. D.W.I in his evidence to thiscourt said:

"We knew that his customers would suffer when westopped him form entering our premises. It is truethat we stopped him from carrying substantialbusiness".

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

At any rate the DW1 himself clearly recognised or concededthat his employer’s action did deprive the plaintiff substantialbusiness. In my view, "substantial business" must meanlucrative business where proof is made. Moreover, Mr.Khanna's contention were utterly conjectural. In my view theclaim 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 likethe present one the damages to be, awarded are in the nature ofcompensation i.e they are intended as practicably possible toput the plaintiff in the position where he would have been butfor the unlawful act of the defendant....These damages aremeasured against his lost profits. The plaintiff here said hedid not work on weekends. So he worked for 20 days in eachmonth.

The plaintiff; has prayed for Shs.4000/= x 20 working days x 11full months. He contends that the, illegal act. Was, committed onthe 11th of August -1992. He would be entitled, to profits forprofits for 10

days in that month when the weekends arediscounted. He resumed his work on the 15th July 1993. Again,he would be entitled to profits for 11 days in the month ofJuly (excluding the weekends,). But I have also to consider thefact the plaintiff should have endeavored somewhat to mitigatedamages. This may have meant endeavoring to liquidate thedebt owed at a faster pace. But against this argument one must consider the financial disarray or chaos which the defendant'sneedless 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 purchaseagreement. Such events must have put him out of his balance orthrown him into a state of panic.

As suggested by Mr. Khanna I am expected to make anallowance for the running expenses of the lorries, whichhowever, I do not consider to be as exaggerated, or as gross asMr. Khanna suggested. Instead of Shs. 4000/= per lorry per dayI award Shs.3,500/=. Instead of 11 months I give compensationfor 9 months. In each month I give compensation for 20 days.These figures are: Shs.3,500 x20 days x 9 months x 6 lorries.The result is Shs. 3,780,000/=.

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

Dated and Delivered on the 7th of December, 1994

I.C.C WAMBILYANGAH

JUDGE