



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 2066 of 1986

POP IN KENYA LIMITED1ST PLAINTIFF

RAJNIKANT KHETSHI SHAH2ND PLAINTIFF

HASMUKH DEVCHAND SUMARIA3RD PLAINTIFF

RATILAL KHETSHI SHAH4TH PLAINTIFF

VERSUS

HABIB BANK A. G. ZURICHDEFENDANT

JUDGEMENT

It is not in dispute that the 1st Plaintiff on the 21.1.1981 executed a floating debenture in favour of the Defendant to secure loans granted to it expressed not in the aggregate exceeding Kshs.10 million. The Plaintiff undertook on demand, to pay all money which were then or at any time thereafter may be due and owing PROVIDED ALWAYS that the total sum shall not at any time exceed Kshs. 10 million in addition to interest or other moneys as aforesaid and to which shall be added further interest as thereafter prescribed.

By way of collateral security, the second and fourth Plaintiffs executed a mortgage dated 21.1.1981 in favour of the Defendant over their property known as Land Reference Number 209/2779/5 and a charge by the second and third Plaintiff dated the 21.1.1981 in favour of the Defendant over Land Reference Number 209/3007/3.

It is alleged in the Re-amended Plaint that on the 1.10.1985 the Defendant's officer with an accountant delivered a letter and asked the second Plaintiff to pay a sum of Kshs.16,849,135 in cash and on being told this was not possible, gave a letter to the second Plaintiff appointing a Receiver and Manager (the Receiver) and wrongfully took over the business and assets of the 1st Plaintiff.

It is alleged that the value of the stock of the 1st Plaintiff was worth Kshs.7,182,460.05 and the fixtures and fittings Kshs.3 million. Further that the Receiver realized Kshs.350,000/= by sale of goods from 2.10.1985 to 17.10.1985 and sold the assets of the 1st Plaintiff at a price unknown. The first Plaintiff it is alleged was making a profit of Kshs.1.8 million per month.

It is alleged the demand for Kshs.16,849,135 for an immediate payment in cash was unlawful and that the

appointment of the Receiver breached the provisions of Clauses 12 and 13 of the said debenture.

The 1st Plaintiff claims special damages for loss in a sum of Kshs.15,537,460.05 as set out in the Re-amended Plaintiff and continues to suffer loss of profits at the rate of Kshs.630,000/= per day. Further the 1st Plaintiff claims that it suffers loss of rent at the rate of Kshs.150,000/= per month from 1.10.1985. A sum of Kshs.311,858.00 per annum from 1.10.1985 is lost in respect of insurance premiums until terminated.

It is admitted that the Defendant by two separate letters of 11.3.1986 addressed respectively to the second and fourth Plaintiffs; and the second and third Plaintiff demanded payment of a sum of Kshs.17,862,057/10 in respect of principal amount and interest on arrears being notice that the Defendant intended to exercise its statutory power of sale over the properties respectively mortgaged and charged.

It is alleged that the Defendant had realized substantial sums of money in the months of January, February, March and April 1986 by the wrongful sale of assets of the 1st Plaintiff valued at Kshs.10,182,460/05 which it credited to the 1st Plaintiff's account would have resulted in there being no arrears of interest on its account.

The Second, Third and Fourth Plaintiff alleged that no statutory notice requiring payment of the mortgage money had been served giving three months notice after service of the same and that the Defendant was not entitled to exercise its statutory power of sale.

It is alleged that the sale of the property of the Second and Fourth Plaintiffs and also of the Third Plaintiff was done fraudulently by claiming that they were respectively in default of the payment of the principal sum and interest.

The sums set out in the Re-amended Plaintiff were claimed by the 1st Plaintiff simultaneously, an injunction was sought to remove the receiver and reinstate the 1st Plaintiff to manage its business.

An injunction is also sought by the 2nd, 3rd and 4th Plaintiffs to restrain the Defendant from selling the said properties together with damages and other relief.

The amended Defence mainly put in issue the allegations contained in the Re-Amended Plaintiff.

The Fourth Plaintiff gave evidence and stated that on the 1.10.1985 an officer of the Bank and Mr. Kigundu arrived at the 1st Plaintiff's business premises and he was given a letter demanding a sum of Kshs.16,849,135.00 in cash. The letter was produced at page 71 of the Bundle of Agreed documents. He was given a letter by Mr. Kigundu (page 72 in the Bundle) informing him that he had been appointed receiver and manager of the 1st Plaintiff whereupon he handed over his keys and assets. He claimed he had stock, furniture and motor vehicles worth Kshs. 7 million, vehicles worth 1 million and furniture worth 3 million.

He gave evidence of attempts to settle the matter with the 1st Defendant including two trips to London which he said was paid for by the 1st Defendant.

His turnover was Kshs.8 million and net profit Kshs.630,000/=. He was of the view that the Defendant should have given time to pay Kshs.10 million.

He claimed loss of stock in the value of Kshs.15,537,460.05 also loss of profit of Kshs.630,000/= per month. He gave evidence to support the Plaintiff's other claims.

He thought it wrongful for the Defendant to sell the properties.

In cross examination he denied the 1st Plaintiff owed Kshs.17 million.

It was his contention that the Bank was not entitled to interest over and above Kshs.10 million.

The Defendant called Igutal Allawala a manager of the Defendant bank since 1984.

He produced the bank account of the 1st Plaintiff from 1984 to 1986. The account was not run satisfactorily. Interest was not being paid which was running at Kshs.200,000/= per month on the loan of Kshs.10 million to the 1st Plaintiff.

The Receiver took over the premises on 1.10.85 and started running the business. PW1 was helping him. No one protested Kshs.10 million.

The Receiver ran the business for about 15 days. The premises were closed and after promises to bring money failed, the Receiver in April, 1986 disposed of the assets.

The loan account as at 28.2.86 was in debit to the tune of Kshs.20,339,970.55 and the current account in debit in the sum of Kshs.2,459,706.74.

The facts as I find them are that the 1st Plaintiff borrowed a sum of Kshs.10 million from the 1st Defendant which was secured by the Debenture dated 21.1.1981 together with a mortgage given by the Second and Fourth Plaintiffs and a charge given by the Third Defendant over their respective properties. The mortgage and charge were collateral to the Debenture as set out in the first schedule thereto.

That the 1st Plaintiff failed to pay interest accruing on the loan and to service the same thereby the account fell into arrears as appears in Exhibit D1. That on the 1st October 1985 the sum due to the Defendant was Kshs.21,537,956.90 of which Kshs.16,849,135 was secured by the Debenture. This is stated in the demand notice of the 1.10.1985 (Page 71 in the bundle).

I do not believe that when the Defendant's representative went to the premises with the proposed receiver that he demanded cash from the 2nd Plaintiff. I hold that he presented the letter of the 1.10.1985 to the 2nd Defendant which demand the sum due. This was notice to the 1st Plaintiff that on failure to pay the Defendant would enforce its rights under the Debenture. The Debenture provided that on demand in writing made, the Plaintiff will pay all money due to the Defendant as set out in the Debenture including interest thereon. By Clause 12 of the Debenture at any time after the principal money secured becomes payable as a result of lawful demand being made by the bank, the Defendant was entitled to appoint Receiver and or manager of the property and assets charged. Under Clause 13 of the Debenture every receiver of manager so appointed shall be the agent of the company and shall have conferred on him the powers set out by the letter of the 1.10.1985 (72 in the bundle).

That the receiver appointed attempted to run the business of the 1st Plaintiff for a short time but closed the business down and then sold the assets. I do not believe the 2nd Plaintiff's evidence as to the value of the assets of the business and accept that the sums shown in the Receiver's accounts (Ex. D2) relating to the sums banked and expenses incurred together with the proceeds from the sale of assets as fair and accurate.

That the 1st Plaintiff had defaulted in the payment of interest for a considerable period of time and that at least two months interest was due and outstanding when the Defendant wrote to the 2nd, 3rd and 4th Plaintiffs on the 11th March, 1986. That in exercise of its statutory power of sale the Defendant sold the parcels comprised in the said mortgage and charge and the sums so received were credited to the 1st Plaintiff's account.

This matter went on appeal from an interlocutory ruling of Shields J to the Court of Appeal in Appeal No.147 of 1989. In the Judgement of the Court of Appeal Kwach JA held 1st Plaintiff in addition to the sum of Kshs.10 million secured by the Debenture was also liable to pay interest therein as provided for in the Debenture. He also referred to the statutory notice served on the 2nd, 3rd and 4th Plaintiffs in which it

was intimated that in default of payment of Kshs.17,862,057/= within 21 days the Defendant could exercise its statutory power of sale. He took no objection to this notice.

Mr. Shah submitted that the notice was too old. However once given and the statutory power of sale arose there is no time limit as to when it can be exercised. No question of estoppel or laches arises.

In the result I find that the 1st Plaintiff was liable to repay on demand the sum of Kshs.10 million together with interest therein as set out and calculated in accordance with the terms of the Debenture.

I reject the submissions of Mr. Shah that interest charged on the principal sum was capitalized. The interest charged continued to accrue due. That the 1st Plaintiff having defaulted in repayment of interest the Defendant was perfectly within its rights to demand payment from the 1st Plaintiff for the sum due and appoint a receiver manager to collect the assets of the 1st Plaintiff to repay the Defendant. That the Receiver appointed was the agent of the company. That his appointment was lawful and he acted properly and in accordance with his receivership and that he accounted properly to the Defendant for the sums recovered by him, which were duly credited to the 1st Plaintiff's account.

That the Defendant had a right to exercise its statutory power of sale in respect of the properties of the Second and Fourth Plaintiffs as well as that of the 3rd Plaintiff and that the sale of the properties was lawful and that the proceeds for the sale was properly credited to the account of the 1st Plaintiff. With regard to the 2nd Plaintiff's evidence with regard to loss of profits, I find that these were wholly exaggerated. That the 1st Plaintiff's business being profitable then it would not have been in arrears with its payments to the Defendant. It is because the business of the 1st Plaintiff was loss making that it found itself in the position that it was unable to pay the amounts due to the Defendant.

In the result the Plaintiff's having failed in their respective claims, I dismiss the Plaint with costs to the Defendant.

Dated and delivered at Nairobi this 15th day of March 2006.

P. J. RANSLEY

JUDGE