



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, AZANGALALA & SICHALE, JJ.A.)

CIVIL APPEAL NO. 246 OF 2010

BETWEEN

POP IN KENYA LIMITED.....1ST APPELLANT

RAJNIKANT KHETSHI SHAH.....2ND APPELLANT

HASMUKH DEVCHAND SUMARIA.....3RD APPELLANT

RATILAL KHETSHI SHAH.....4TH APPELLANT

HABIB BANK A.G. ZURICH.....RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Ransley, J.) dated 15th March, 2006

in

H.C.C.C. No.2066 of 1986)

JUDGMENT OF THE COURT

[1] This is an appeal by the unsuccessful defendants now appellants, **Pop - In - Kenya Limited**, (1st appellant), **Rajnikant Khetshi Shah**, (2nd appellant), **Hasmukh Devchand Sumaria**, (3rd appellant) and **Ratilal Khetshi Shah**, (4th appellant), from the judgment of the High Court, (Ransley, J., as he then was), dated 15th March, 2006. The learned Judge dismissed the appellants' suit in which they claimed against the respondent, **Habib Bank A.G. Zurich**, *inter alia*, special and general damages; various sums on taking of accounts; a mandatory injunction to remove receivers and managers appointed by the respondent to manage the 1st appellant; a prohibitive injunction to restrain the respondent from selling **Land Reference Number 209/2779/5** and **Land Reference Number 209/3007/3** (hereinafter "the suit property or properties") which were registered in the names of the 2nd and 4th appellants.

[2] The litigation arose from loan facilities extended by the respondent to the 1st appellant which facilities were secured, by a debenture over the 1st appellant's assets and a mortgage and/or charge over the suit properties. There is some controversy as to the sum - advanced to the 1st appellant and secured as aforesaid as the appellants claimed that the maximum sum secured by the debenture and the

mortgage/charge was Ksh. 10 Million. The respondent on its part claimed that the sum secured was the said Ksh. 10 Million plus interest and other charges.

[3] In their re-amended plaint, the appellants claimed that on 1st October, 1985 the respondent demanded immediate payment of Ksh.16,849,135/- from the 1st appellant by a letter of even date and when it failed to pay, the respondent issued another letter appointing a receiver/manager who then took over the business of the 1st appellant together with its assets including stock in trade. According to the appellants the actions of the respondent wrongfully suspended the powers and authority of the 2nd and 3rd appellants to manage and run the business and affairs of the 1st appellant.

[4] The appellants further averred that the receiver/manager realized from sale of stock Kshs.350,000/= between 2nd October, 1985 and thereafter sold the 1st appellant's assets for an undisclosed amount and never credited the 1st appellant's account with the proceeds thereof. In consequence of the wrongful and unlawful appointment of the receiver/manager, the appellants claimed that they suffered loss and damage particulars of which were enumerated. In those premises the appellants sought discharge of charge, release of the mortgage over the suit property and an injunction restraining the respondent from selling the suit property.

[5] The appellants further averred that on 11th March, 1986, the respondent served the 2nd, 3rd and 4th appellants with notices demanding payment of Kshs.17,862,057/= within twenty one (21) days failing which the respondent threatened to exercise its statutory power of sale. According to the appellants, the sum demanded exceeded the maximum sum secured of Kshs. 10 Million and further failed to take into account the sums realized from sale of stock and assets of the 1st appellant by the receiver/manager which sums settled the sums owed to the respondent.

[6] The appellants further pleaded that the said notices did not accord the 2nd and 4th appellants, as chargors, the requisite period within which the charge debt would be paid thereby depriving the respondent of its right to exercise the statutory power of sale.

[7] The appellants also pleaded that the respondent applied and increased rates of interest without approval of the Central Bank of Kenya and that the 1st appellant was entitled to recover any excess sums thereby paid to the respondent. They further averred that the respondent applied a rate of interest on the 1st appellant's overdraft account contrary to the terms of the debenture executed by the 1st appellant and the respondent and that excess sums paid by the 1st appellant be repaid on the taking of accounts.

[8] The appellants further pleaded that in January, 1980, the appellant agreed with the respondent to pay additional charges or interest in respect of an overdraft account of **Banhill Investments Limited**, one of its associated companies, in consideration of the 1st appellant and the said associated company enjoying overdraft facilities with the respondent. They also averred that in September, 1981, the 1st appellant and the respondent agreed that at the consideration of the 1st appellant paying additional charges or interest, the 1st respondent would extend the overdraft facilities to **Pop-In-Limited** another of the 1st appellant's associated companies. A similar arrangement was made in respect of **Deep Investments Limited** another of the 1st appellant's associated companies in January, 1982.

[9] The appellants further pleaded that pursuant to those agreements, the 1st appellant delivered to the respondent signed vouchers and or cheques in settlement of the increased charges or interest yet the respondent, notwithstanding the settlement, continued to charge compound interest on the 1st respondent's account with the respondent contrary to directions and orders of the Central Bank. According to the appellants, the sums wrongfully charged by the respondent and paid by the 1st appellant were recoverable from the respondent and amounted to Kshs.21,982,770.04 as at the date of the re-amended plaint.

[10] The appellants further pleaded that without the consent of the 2nd and 4th appellants, the 1st appellant and the respondent opened a loan account which, as on 19th September, 1984 had a credit balance of Kshs.72,635/45 and that any sums due on accounts opened after 21st January, 1981 were not payable by the 2nd, 3rd and 4th appellants.

[11] The appellants also averred that in the year 1984, the 1st appellant endorsed promisory notes worth Ksh. 3 Million to the respondent which were eventually dishonoured and the respondent, according to the appellants, wrongfully debited the 1st appellant's account with the value of the sums in the promisory notes and charged interest and other charges thereon with the total sum debited in respect of the promisory notes amounting to Kshs.4,055,605.56 which sum the 1st appellant claimed as money had and received by the respondent for the use of the 1st appellant.

[12] The appellants further pleaded that in 1986, the respondent wrongfully debited the 1st appellant's account with professional and court fees arising from **HCCC No. 1480 of 1986 (OS)** and **H.C.C.C. No. 1774 of 1986 (O.S.)** which sums attracted interest and at the time of filing the re-amended plaint amounted to Ksh.234,458.42. The 1st appellant claimed the said sum as money had and received by the respondent for the use of the 1st appellant. Related to this averment, the appellants pleaded that costs in the said suits were taxed and the 1st appellant paid the same yet the respondent failed to reverse debit entries made in respect of costs.

[13] It was further pleaded by the appellants that by letter of 30th January, 1987, the respondent demanded from the 2nd, 3rd and 4th appellants' payment of Ksh.7 Million and threatened that unless payment was made within three months of service, the respondent would exercise its statutory power of sale. According to the appellants, it was the respondent which in fact owed the 1st appellant about Kshs.31,788.47 as at 31st January, 1987 which meant that the respondent was not entitled to exercise its statutory power of sale.

[14] In its amended defence dated 30th June, 1987, the respondent averred that the sum advanced to the appellants was Kshs. 10 Million plus interest and other charges stated in the security documents which included a debenture, a mortgage and charge and that under the debenture, it lawfully appointed a receiver/manager after making a lawful demand for sums owed to it by the 1st appellant and when default persisted.

[15] The respondent further pleaded that the only assets which the receiver/manager took over were stock, furniture, fixtures and business of the 1st appellant in its shop premises on Moi Avenue, Nairobi, which assets were valued at Kshs.6,500,000/=. However, the receivership, according to the respondent, was not finalised as the 2nd and 3rd appellants as directors of the 1st appellant failed to furnish a statement of affairs and correct details of assets and liabilities of the 1st appellant. The respondent also pleaded that it had by then not received any sums from the receiver/manager as at the time of filing the amended defence.

[16] With respect to complaints made regarding issuance of statutory notices, the respondent pleaded that under the **Transfer of Property Act**, it was not required to issue a three months notice as interest was in arrears for more than two months.

[17] The respondent denied all the other claims made by the appellants as the same had not been made by the appellants in their previous suits i.e. **HCCC No. 1480 of 1986 (O.S.)** and **HCCC No. 1774 of 1986 (OS)**, in which the appellants had acknowledged their indebtedness to the respondent and had pleaded for time to pay the same.

[18] After several applications were considered and determined, the appellants lodged a Chamber Summons dated 6th June, 1996, seeking mainly an injunction restraining the respondent from selling the suit property pending the hearing and determination of the suit. The application was heard by **Shields, J., (as he then was)** who was satisfied with the prima facie merits of the application and granted the injunction restraining the sale of the suit property pending the hearing of the suit.

[19] The respondent was aggrieved by the injunction and therefore appealed to this Court in **Civil Appeal No. 147 of 1989**. The appeal was allowed as this Court found that **Shields, J.,** had erred in holding that interest was not chargeable on the amount borrowed by the 1st appellant. It was the further finding of the Court that the dispute between the appellants and the respondent was as to the exact amount due under the security documents which dispute was not a ground upon which a mortgagee/chargee who had served a

valid statutory notice of sale, could be restrained from exercising its statutory power of sale. The Court cited with approval the following authorities: **Bharmal Kanji Shah & Another -v- Shah Devar Devji [1965] EA 91**; **J. L. Lavuna & Others -v- Civil Servants Housing Co. Ltd. and Another [Civil Application No. Nai. 14 of 1995] (UR)** and Halsburys Laws of England Vol. 32, 4th Edition Paragraph 725.

[20] The suit was eventually heard by **Ransley, J. (as he then was)**. The 2nd appellant presented the appellant's case at the trial. He reiterated the averments in the re-amended plaint that on 1st October, 1985, he was visited by an officer of the respondent who was accompanied by one **Gichida**. He was served with a letter demanding Kshs.16,849,135/- which, according to him, was not the correct amount due as it exceeded the maximum sum of Kshs. 10 Million chargeable under the security documents. When the 2nd appellant could not raise the sum demanded, the respondent's official served him with another letter appointing a receiver/manager.

[21] The 2nd appellant claimed, that the 1st appellant suffered loss of profits of Kshs. 630,000/- per month. In September of the same year, their landlord took possession of the business premises. In his view, the 1st appellant suffered loss of rent of Kshs. 150,000/- per month and of insurance policies which were terminated. The 2nd appellant did not know the value of stock the 1st appellant had when the receiver/manager was appointed but was positive that the value was sufficient to discharge the 2nd, 3rd and 4th appellants.

[22] The 2nd appellant acknowledged that the charged property had been sold by public auction for a total sum of Kshs. 28.5 Million. He contended that the sale of the suit property was wrongful and unlawful as the stock and assets were sufficient to cover their liability.

[23] On cross-examination, the 2nd appellant admitted that the 1st appellant was indebted to the respondent in the sum of Kshs.17 Million. He also admitted that he had sought for time to pay the sums due but his efforts to settle the indebtedness were not successful. In his view, the stock and assets were valued at Kshs.11 Million which could have settled the 1st appellant's indebtedness with the respondent. He further acknowledged that he did not complain about the receivership until the suit was filed.

[24] The respondent's case was presented through **Iqbal Allawala**, (DW 1), the manager of the respondent. He reiterated the averments in the amended statement of defence that the respondent had advanced Kshs. 10 Million to the 1st appellant on the security of documents already referred to above. He contended that the 1st appellant defaulted in the repayment agreed and the respondent sought to realize its securities. A receiver was appointed who run the 1st appellant's business for 15 days. The appellants did not challenge that appointment. In 1995 or 1996, according to DW 1, the respondent sold the charged properties for a total of Kshs.35,900,000/-.

[25] On cross-examination, DW 1 denied that the maximum amount secured under the security documents was 10 Million. He was firm that interest was payable over and above the sum advanced to the 1st appellant. He further denied that the charged property was sold without serving a statutory notice.

[26] Parties filed written submissions and after considering the evidence adduced and the material placed before him by the parties, **Ransley, J.**, held that by clause 12 of the debenture, at any time after the principal sum secured become payable as a result of a lawful demand having been made, the respondent was entitled to appoint a receiver. He further held that under Clause 13 of the same debenture, the receiver, on appointment, became an agent of the 1st appellant with powers conferred upon him by the letter of appointment. It was also the finding of the learned Judge that the 1st appellant had defaulted in the payment of interest for a considerable period of time and in any event for at least two (2) months prior to the notices of 11th March, 1986.

[27] The learned Judge further held that the respondent lawfully exercised its statutory power of sale, and sold the charged property proceeds whereof were credited to the 1st appellant's account. He agreed with the respondent that the 1st appellant was liable to repay, on demand, Kshs. 10 Million plus interest thereon as set out in the security documents. With regard to the value of the 1st appellant at the material

time, the learned Judge found that the 1st appellant was not running a profitable enterprise otherwise it would not have been in arrears in making its payments. In the end, the learned Judge dismissed the appellants' claims which he found speculative.

[28] The appellants were aggrieved and lodged the appeal before us premised on five (5) grounds namely, that the learned Judge erred in failing to find that the maximum amount advanced to the 1st appellant and secured by the security documents was Kshs. 10 Million which sum included interest and other charges; that he erred in failing to hold that the appointment of the receiver/manager was void as it was not under seal; that he erred in rejecting the appellant's evidence that they suffered loss of Kshs.15,100,000/-; that the learned Judge erred in failing to hold that the letters of 11th March, 1986 and 30th January, 1987 were invalid and that the sale of the charged property was without service of valid statutory notices of sale and that the learned Judge erred in holding that the amounts secured under the mortgage and charge with interest were due and owing by the appellants as no valid demand for payment had been made followed by default as required in law and therefore the subsequent sale of the charged property was fraudulent, unlawful and wrong.

[29] At the hearing of this appeal, **Mr. Isindu**, learned counsel for the appellants, relied upon submissions which had been made on behalf of the appellants at the trial of the action before the High Court and urged us to allow the appeal with costs. **Mr. Regeru**, learned counsel for the respondent, too placed reliance upon submissions which were made on behalf of the respondent at the trial but highlighted before us, various provisions of the charge documents which made provision for interest and other charges in excess of the sums of Kshs. 10 Million advanced by the respondent to the 1st appellant. Learned counsel further highlighted certain provisions of the debenture document and contended that the appointment of the receiver by the respondent was lawful after due demand was made for payment.

[30] On the claim that the appellants' were entitled to Kshs. 15,100,000/-, learned counsel contended that the same was neither specifically pleaded nor strictly proved as it was a special damage claim. On the challenge raised against statutory notices, learned counsel submitted that the notices were valid and were served as required in law. Learned counsel referred to the challenge made before the High Court at interlocutory stage when a temporary injunction was successfully sought but was set aside on appeal to this Court. Thereafter, the charged property was sold and lawfully transferred to other parties who have not been joined.

[31] We have considered the record, the respective submissions of learned counsel, the authorities cited to us and the applicable law. This being a first appeal we are enjoined to re-appraise the evidence and draw our own inference of fact bearing in mind that we did not see the witnesses testify and must therefore give allowance for that (See ***Selle -v- Associated Motor Boat Company Ltd. [1968] EA 123***).

[32] With regard to the first complaint that the 1st appellant's liability to the respondent was limited to a maximum of Kshs. 10 Million, the provisions of the debenture, the mortgage and the charge are pertinent. Starting with the debenture, clauses 1 and 2 thereof are relevant. In clause 1, there is the following proviso:

"PROVIDED ALWAYS that the total sum for which this Debenture constitutes a security shall not at any time exceed the sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-), in addition to interest or other moneys as aforesaid and to which shall be added further interest as hereafter prescribed from the time of such moneys becoming payable until actual payment".

And Clause 2 provides, in part, with respect to interest:

"2. The Company shall pay interest on all moneys and liabilities from time to time due or payable as aforesaid at such rate or rates.....as the Bank shall in its sole discretion decide".

[33] We have also considered the charge registered over LR No. 209/3007/3 which, in clause 1(a), provides, in part:

"1 The Mortgagors jointly and severally covenant...

(a) On the 21st day February, One Thousand Nine Hundred and Eighty one... to pay to the Bank such sum not exceeding Kenya Shillings Ten Million (Kshs.10,000,000/-).....together with commission and other usual bank charges and other costs charges and expenses and together with interest at such rate or rates... as the Bank shall at its sole discretion from time to time decide".

There is also sub-clause 1(b) which reads:

"(b) On the seventh day next after the same respectively shall have been advanced to pay to the Bank the total sums which may be advanced by the Bank.....together with commission and other usual bank charges and other costs and charges and expenses and together with interest thereon as aforesaid".

And sub-clause (I) (C) is in the following terms: -

"C At any time after the legal date of redemption or as the case may be after any such seventh day as aforesaid,

ON DEMAND in writing made to the mortgagors to pay to the Bank the total of all moneys which shall or may be for the time being owing as aforesaid by the Borrower to the Bank together with interest.....

AND PROVIDED ALWAYS that the total moneys for which this charge constitutes a securityshall not at any one time exceed the sum of Kenya Shillings Ten Million (Kshs.10,000,000/ -) together with interest as aforesaid and the said charges commission and expenses and together with further interest".

[34] Similar clauses are found in the mortgage document registered against *LR No. 209/27779/5*. The proviso clause 1 (c) reads:

"AND PROVIDED ALWAYS that the total moneys for which this charge constitutes a security shall not at any one time exceed the sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-) together with interest as aforesaid and the said commission charges and expenses and together with further interest at the rate aforesaid...".

[35] The above provisions brook of no ambiguity. We are unable to appreciate the appellants' complaint that the 1st appellant's liability to the respondent did not exceed Kshs. 10 Million. It is, in our view, plain that the principal sum advanced or to be advanced to the 1st appellant could not exceed Kshs. 10 Million and the sum attracted interest as stipulated in all the security documents. The respondent's income is substantially derived from interest it charges on sums advanced to its customers. It would not, in the circumstances, make commercial sense to advance the principal sum and expect no return on the investment.

[36] That being our view, we find no merit in the first ground of appeal which we hereby accordingly reject.

[37] The second complaint is in respect of the respondent's appointment of a receiver/manager to run the business of the 1st appellant. In the memorandum of appeal, the appellants complain that the said appointment was not under the seal of the Bank. This complaint, in our view, does not merit a detailed analysis. We say so, because the receivership was in place for only a brief period and for that period the appellants raised no complaint. The appellants are attempting to close the stable after the horse has bolted. The complainant, in the circumstances, is not serious. It is in any event, a challenge on form and not substance. Further, the 2nd appellant who presented the case of the appellants at the trial was categorical that the receiver/manager was introduced by an official of the respondent. The respondent

admitted appointing the receiver/manager and the latter's *bona fides* were not challenged. In any event, the right of the respondent to appoint a receiver/manager in the circumstances was beyond dispute.

[38] In the premises, we find no merit in the second ground of appeal which we also reject.

[39] The third complaint is in respect of the refusal of the learned Judge to award the appellants Kshs. 15,100,000/- being profits and loss occasioned by the appointment of the receiver/manager. On this aspect of the appellants' complaint, the learned Judge stated:

"The 1st plaintiff claims special damages for loss in a sum of Kshs.15,537,460.05 as set out in the re-amended plaint 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 1st October, 1985. A sum of Kshs.311,858.00 per annum from 1st October, 1985 is lost in respect of insurance premiums until terminated.

.....

.....

With regard to the 2nd plaintiff's evidence with regard to loss of profits, I find that these were exaggerated. That the 1st plaintiff 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".

[40] Starting with the pleading in the statement of claim, we observe that the learned Judge referred to the averments in the re-amended plaint. We perused the record and were not able to trace the order allowing the filing of the re-arranged plaint but as no objection was raised by the respondent, we shall assume the re-amended plaint was properly filed. Having considered the averment in paragraph 4 of the same we are satisfied that the claim for Kshs.15,337,460/05 was pleaded. However, our perusal of the testimony of the 2nd appellant shows that the said claim was not strictly proved. The 2nd appellant merely alleged that the 1st appellant's "*turnover was about 1.8 Million a month gross. Profit was about 35% about 630,000/- per month*". That, with respect, cannot amount to strict proof of the special damage claim made by the 1st appellant. The 2nd appellant did not refer to any books of account or bank statements or any orders of purchases and sales made by the 1st appellant to demonstrate the volume of business the 1st appellant was engaged in. Cases on proof of special damages are legion. (See *Mwai -v- Kenya Tourist Development Corporation [1983] KLR 358*, among others).

[41] In *Hahn -v- Singh [1985] KLR 716*, this Court stated, *inter alia*, that whereas special damages will only be awarded if they are not only specifically pleaded but also strictly proved, the degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves. In the case before us, the 1st appellant was running a business concern and claimed to have suffered loss of profits of Kshs. 630,000/- per month. Surely, a business capable of making such profits must have had established structures such as business books, supply lines, qualified staff such as accountants and other tools of an efficient business concern. Yet, no such structures were demonstrated nor, as already said, were simple books of accounts such as balance sheets, ledgers, cash books, trading and profit and loss accounts referred to by the 2nd appellant during his testimony. In our view, this was a classic case where figures are plucked from the air and thrown before a court as proof of special damages.

[42] That precisely is what was rejected in *Ashcroft -v- Curtin [1971] 3 All ER 1208*, in which the following paragraph appears:

"Plaintiffs must understand that, if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost, I ask you to give me these damages'.They have to prove it".

We adopt those sentiments and have come to the conclusion that the learned Judge of the High Court cannot be faulted for not granting the appellants the special damages they claimed.

[43] The last complaint related to the issue of notices. The appellants complained that the notices dated 11th March, 1986 and 30th January, 1987 were not valid statutory notices and consequently that the sale of the mortgaged and charged property was not lawful. The notices of 11th March, 1986 stated:

"Re: Charge dated 21st January, 1981 from yourselves to Habib Bank A. G. Zurich over property being LR 209/2779/5.

We are acting for Habib Bank A. G. Zurich on whose instructions we write as follows:

As you are aware, there is a very substantial amount due from Pop-In-(Kenya) Limited to our clients which the company has failed to pay. This amount comprises the principal amount as well as interest thereon which is in arrears by more than two months.

In terms of the above mentioned charge our clients hereby demand from you an immediate payment of the amount secured by the charge that is Kshs.17,862,057.00 calculated upto 28th February, 1986. Further interest is payable at the rate of 14% per centum until payment in full. Please note that if this amount is not received within the next twenty one days our clients will exercise the mortgages' statutory power of sale conferred on them by statute and by the said charge without any further reference to you".

[44] A letter of demand in the same terms and of even date was written in respect of LR No. 209/3007/3. The suit properties were registered under the ***Government Lands Act Cap 280 Laws of Kenya (now repealed)***. The substantive law with regard to the exercise of statutory power of sale was therefore the ***Transfer of Property Act. Section 69 A*** of that Act provides:

"69A (1) A mortgagee shall not exercise the mortgagee's statutory power of sale unless and until

(a) notice requiring payment of the mortgage - money has been served on the mortgagor or one of two more mortgagors, and default has been made in payment of the mortgage - money or part thereof for three months after such service; or

(b) some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

(c) there has been a breach of some provisions contained in the mortgage instrument or in this Act, and on the part of the mortgagor or some person concurring in making the mortgage, to be observed or performed, other than and besides, a covenant for payment of the mortgage money or interest thereon".

[45] The learned Judge found as a fact that the 1st appellant had by 11th March, 1986, 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 respondent wrote to the 2nd, 3rd and 4th appellants on 11th March, 1986. That factual finding cannot be faulted as the appellants were of the view that only the principal sum of Kshs. 10 Million was repayable. We have already observed above that, that view cannot be supported by the charge documents. Given the default in the payment of interest for at least two months, the respondent was entitled under ***section 69A(1)***

(b) of TPA to exercise its statutory power of sale.

[46] Our perusal of the record also reveals that by its letter of 30th January, 1987 2010 the respondent wrote to the 2nd, 3rd and 4th appellants demanding payment of sums due then taking into account the prima facie finding at the interlocutory stage that the maximum sum, due was Kshs. 10 Million. The letter

concluded as follows:

"Accordingly, on the instructions of our clients and on their behalf, we hereby call upon you to pay to our clients within three months of the date of service of this notice, a sum of Kshs. 7 Million failing which our clients will without any further reference, exercise their right to sell the above mentioned immovable properties as provided by the Transfer of Property Act and by the said mortgage and the charge".

[47] There is no gainsaying that it was subsequent to this notice that the charged properties were sold. This time round, the respondent seemed to have had **section 69A (1) (a)** of the **TPA** in mind. The notice clearly gave the 2nd, 3rd and 4th appellants, the three months' notice envisaged under the said section of the **Act**. The notice clearly satisfied the requirements of a statutory notice stated in the case of **Trust Bank Ltd -v- Eros Chemists Limited & Another [2000] eKLR**. In that case, the appellant had given the respondents a fourteen day notice to pay the sums advanced on the security of certain property. The High Court found that notice invalid and this Court, confirming that decision, stated:

"In our judgment, the notice is to guard the rights of the mortgagor because if the statutory right of sale is exercised the mortgagor's equity of redemption would be extinguished. This would be a serious matter. The law clearly intended to protect the mortgagor in his right to redeem and warn of an intended right of sale. For that right to accrue the statute provided for a three months' period to lapse after service of notice. In our judgment a notice seeking to sell the charged property must expressly state that the sale shall take place after the three months' period".

[48] We do not find it necessary to prescribe the form of notice which should be issued by chargees or mortgagee's before exercising their statutory power of sale. As we, stated in the **Trust Bank Ltd**. case (supra), it is sufficient that the notice gives the chargor or mortgagor the prescribed period of warning. So, in addition to the notices of 11th March, 1986, the letter of 30th January, 1987 clearly gave the 2nd, 3rd and 4th appellants requisite notice before the charged properties were sold. We, therefore, do not find any merit in the 4th complaint which we also reject.

[49] The upshot is that the entire appeal has no merit. We order that it be and is hereby dismissed with costs thereof to the respondent.

Dated and delivered at Nairobi this 7th day of October, 2016.

H. M. OKWENGU

.....

JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR