THE REPUBLIC OF UGANDA

IN THE SUPREME COURT

AT MENGO

[CORAM: ODOKI CJ, ODER, TSEKOOKO, KAROKORA AND KENYEIHAMBA, JJ.SC.]

CIVIL APPEAL NO. 8 OF 2001

BETWEEN

NON-PERFORMING ASSET RECOVERY TRUST :::::::: APPELLANT

AND

1. KAPEEKA COFFEE WORKS Ltd.)
2. ABU KASOZI KADJINGO) :::::::::::::::::::::::::::: RESPONDENTS

[Appeal from the decision of the Court of Appeal at Kampala (OKELLO, MPAGI-BAHIGEINE AND ENGWAU, JJ.A) dated 2nd March, 2001, in Court of Appeal Civil Appeal 53/2000].

JUDGMENT OF TSEKOOKO, JSC:

This is a Second Appeal. It is from the decision of the Court of Appeal which reversed the decision of the Non-Performing Assets Recovery Tribunal rejecting contentions by the respondents (as defendants) that the amended plaint filed by the present appellant did not disclose a cause of action.

The background to this appeal can be simply stated. The first Respondent Kapeeka Coffee Works Ltd., is a limited liability company of which the second

respondent, (Abu Kasozi Kadjingo), and one Haji Bamali Kadjingo are directors. In December, 1990, the first respondent applied for and obtained a loan from the Uganda Commercial Bank (UCB) for purposes of rehabilitating its coffee factory called Kapeeka Coffee Factory. On 13th December, 1990, UCB and the first respondent executed a loan agreement (Annexture E to plaint) under which UCB lent US$550159.21 to the first respondent. The agreement stated that the money was to be used exclusively for the financing and carrying out of the investment Project at Kapeeka Coffee Factory. The second respondent signed the said agreement for and on behalf of Kapeeka Coffee Works Ltd., the first respondent. Annexture "F" to the plaint is a UCB credit ledger card and it shows that on the same day on which the agreement was executed (13/12/1990), a credit ledger card was opened by UCB in the name of Kapeeka Coffee Hullery. On that ledger are written the words "Amount of loan shs .US$550159.21". Among the securities provided for the loan is a piece of land registered as Bulemezi Block 269 plot 37 and its registered proprietor is the first respondent.

In 1994, the Non-performing Assets Recovery Trust Statute, 1994 was enacted. The Statute established the Non-Performing Assets Recovery Trust (NPRT) , the present appellant. One of the principal functions of NPART is to recover loans which are described by the Statute as Non-performing Assets. They are described as non-performing because they were not being serviced in the sense that the borrowers have defaulted in repaying the loans. Those assets were transferred by UCB to NPART under the provisions of the said Statute. Because the loan of the first respondent had been designated as a non-performing asset, on 7th December, 1995, the UCB by Deed of Assignment of same date assigned the loan to NPART, the appellant. The assignment was executed by virtue of Regulation 4(a) of the Non-performing Assets Recovery Trust Regulations, 1995 (hereafter called the regulations). The Statute also created a Tribunal through which some of the non-performing loans could be recovered by Court action.

The appellant instituted a suit in the Tribunal to recover the loan from the two respondents and a Haji Bumali Kadjingo. In their joint amended written statement of defence, the two respondents denied liability and averred that if the loan was given, it was advanced and disbursed to Kapeeka Coffee Hullery which is a different legal entity from Kapeeka Coffee Works Ltd.

When the suit was called on for hearing in the Tribunal on 15/2/2000, Counsel for the respondents raised a preliminary point of law to the effect that as money was given to Kapeeka Coffee Hullery, a different legal entity, and not to the two respondents, the plaint did not disclose a cause of action against each of the two respondents. The same point of objection was raised on behalf of Haji Bumali Kadjingo. An additional point raised on behalf of the Haji was that because there was no Deed of Assignment showing that the Haji was liable to be sued by NPART, there was no cause of action against the Haji. The Tribunal overruled the objections. Thereafter only the present respondents appealed to the Court of Appeal. Haji Bumali Kidjingo did not appeal.

In the Court of Appeal, four grounds of appeal were raised. The first was that the Tribunal failed to appreciate that the Deed of assignment named Kapeeka Coffee Hullery as the debtor and not the appellants. The second ground was that the Tribunal erred in law "by failing to hold that the Respondent's plaint disclosed no cause of action against the appellants". The appeal was decided on the basis of ground two.

The Court of Appeal held that there was noncompliance with Reg. 4 (b) which requires the bank to forward to the respondents a copy of the notice of assignment of the non-performing asset to the owner, the borrower, and that the omission rendered the plaint defective as it thereby disclosed no cause of action against the present respondents. In the view of the Court of Appeal, forwarding of the notice under Regulation 4(b), was mandatory and omission to forward the notice was fatal to the case. So the Court of Appeal overturned the ruling of the Tribunal. The

appellant has brought this appeal against that decision of the Court of Appeal. The respondents filed notice of grounds affirming the decision of the court.

The present appeal is based on two grounds. These are: -

1. The Honourable Justices of the Court of Appeal erred in law and fact in holding that the appellant's omission to plead notice under regulation 4(b) of the NPART Regulations, 1995, was non-compliance with a mandatory provision of the law rendering the appellant's plaint fatally defective and affected the right of the assignee to recover the debt.

2. The Honourable Justices of the Court of Appeal erred in law and fact in holding that for reason of the appellant's omission to plead notice, the amended plaint disclosed no cause of action against the appellant.

I think that these two grounds in effect complain about the same thing.

Submissions for both parties were written and are on the court record. The written submissions for the appellant are signed by Ms. Laurita Mulenga while those for the respondents are signed by an unnamed advocate from the firm of Messrs Lumweno & Co., Advocates.

Ms. Mulenga, counsel for the appellant, submitted that whereas Regulation 4(b) prescribed the form of notice of assignment and directed UCB to forward the notice of assignment to the owner of the Non-Performing Assets, the regulation does not create an obligation upon the appellant, as assignee, to make an averment in its claim in the plaint that the Bank had forwarded the said notice to the owner of the non- performing asset, as held by the honourable Justices of the Court of Appeal. She contended that the Court of Appeal erred when it relied on a procedure under S.136 of the Law of Property Act, 1925 of England which requires that all facts necessary to bring the case **within that section** must be set out in the statement of claim. Under S.136 of the Law of Property Act of England, the assignment of a debt is effectual in law only on the date the notice is given to the debtor of such

assignment. She argued that the position under the Non-Performing Assets Recovery Trust Statute and its Regulations is fundamentally different. Under the regulations, notice of assignment is forwarded to the debtor by the Bank as assignor and not by the assignee. The deed of assignment, notice of assignment and transfer of the documents, deeds of title and other instruments pertaining to the debt, comprise a transfer of the non-performing asset and not the assignment per se, which is itself by operation of law.

Counsel for the respondents first made general submissions on both grounds 1 and 2. Counsel submitted that the appellant's amended plaint failed to comply with the mandatory requirement of Regulation 4 (b) of the Regulations, rendering it incurably defective thereby disclosing no cause of action against the Respondents. He contended that Regulation 4 (b) must be complied with before the appellant could maintain a cause of action against the first Respondent. The effect of its omission was therefore fatal to the appellant's plaint, as it was a non-compliance with a mandatory provision of the law.

Counsel contended that even if the appellant had pleaded all the other facts constituting its cause of action but omitted, as it did, to plead that the assignment was in writing and that notice in writing thereof was duly given to the debtor, the appellant's amended plaint would still disclose no cause of action against the Respondents. He relied on **Bullen, Leake and Jacobs precedents of" Pleadings** 12th Edition at P 43 where the learned authors of that Book observed that:

"Again, in an action by the assignee of a debt a legal chose in action, it is an essential requirement that the assignment was in writing and that notice in writing thereof was duly given to the debtor and such facts must accordingly be pleaded otherwise the plaintiff would have no title to sue".

Counsel again submitted that even if the appellant had pleaded all the other facts constituting its cause of action but failed, as it did, to comply with a mandatory provision of the law, namely Regulation 4(b), by requiring the Bank to give notice

of assignment in the prescribed form to the first Respondent, as the borrower thereof, the appellant's amended plaint would still disclose no cause of action against the Respondents. Counsel further contended that the deed of assignment was not attached to the plaint.

In my view this last contention appears to be baseless because copies of the plaint on the Court record have the deed of assignment marked as Annexture "A". Indeed, I think that even the fact of assignment is pleaded in paragraph 3 of the plaint. I note from the proceedings in the Tribunal that Counsel claimed to have read the Deed. There is no explanation given to show where defence counsel found and read the deed of assignment except from a copy annexed to the plaint which was served upon his clients.

In their written statement of defence, the contention of the two respondents was that they are not liable because the ledger card Annexture 'F' shows that the loan money was not disbursed to them but to Kapeeka Coffee Hullery which they claimed was a different entity. That defence was essentially the subject of the point of objection which Counsel raised in the Tribunal on behalf of the two respondents. It was only in the objection raised on behalf of Bumali Kadjingo, who did not appeal to the Court of Appeal, that the question of lack of notice of assignment was raised as an additional point of objection in favour of Haji Bumali.

I am a little puzzled by the contentions of respondents' Counsel that the appellant neither pleaded nor attached notice of assignment to the pleadings. As I indicated earlier, Mr. Lumweno, Counsel for the respondents, both in his opening and replying submissions on the point of objection in the Tribunal, referred to the Deed of assignment. He did not say where he had seen the Deed to which he was referring. That Deed must have been the copy attached to the copies of the plaint served upon his clients or the Deed must have been given to his clients earlier.

Be that as it may, in the Court of Appeal, the decision was based on arguments revolving around ground two. In connection with that ground, counsel for the present respondents cited to that Court a statement of law and practice from **Bullen, Leake and Jacob's Precedents of Pleadings, 12th Ed.,** page 129 for the proposition that where a plaintiff's claim is based on an absolute assignment all facts necessary to bring the case within the provisions of section 136 of the English Law of Property Act, 1925 must be set out in the statement of claim, namely, that the assignment is absolute and in writing and that notice of assignment was given in writing to the debtor before the commencement of the action. Counsel again submitted in that Court that the plaint in the present proceedings did not show that the plaintiff was suing under assignment and that notice of assignment had been given in writing to the debtor before the commencement of the action. He therefore contended that failure by the plaintiff to so plead rendered its plaint defective and consequently it did not disclose any cause of action against the present respondents. In response Counsel for the present appellant submitted in the Court of Appeal, and that Court rightly agreed with the submission, that the assignment, to the appellant, of non-performing asset by UCB was statutory and not contractual. The other contentions by the appellant were that the Deed of assignment dated 7/12/95, was merely a procedural signification of the handing over to NPART of the said non-performing asset, having been effected by operation of law. This latter contention was actually accepted by the Court of Appeal, and I respectfully agree that the transfer under S. 11 of the Statute is by operation of law. Counsel for the appellant again contended that the respondents had failed to pay shs. 839, 030, 583/= which was assigned to the appellant and which had been due to UCB as reflected in the Deed of assignment (Annexture A.) to the plaint. In his leading judgment, Okello, JA, quoted Section 11 of the Statute which deals with the transfer to the appellant of the Non-performing assets. The learned Justice also quoted Regulation 4 of the Regulations.

In my view that regulation provides the method or procedure to effect the transfer by UCB to the appellant of non-performing assets and

documents connected thereto. But the leaned Justice held that those provisions must be complied with. He then held : -

"In the Instant case, paragraph 4 of the plaint shows that the respondent had a right which was assigned to it which the appellants (1st and 2nd defendants) violated causing the respondent (plaintiff) damage".

After setting out the whole of paragraph 4 of the plaint, the learned Justice of Appeal held that:-

> *"In my view the above paragraph 4 of the plaint is wanting in one important aspect in that it failed to comply with regulation 4(b). This regulation requires that notice of the assignment in favour of the Trust shall be forwarded by the bank to the owner.....*
>
> *It is clear that the provisions of regulation 4(b) of the Regulations have not been complied with. The effect of this omission is fatal to the respondent's plaint, as it is non-compliance with a mandatory provision of the law. It affected the allegedly assigned right of the respondent which it claimed was violated by the appellant. On the principle in Auto Garage & Others (supra) the omission renders the plaint defective as it thereby discloses no cause of action against the appellant."*

I find some difficulty in reconciling the finding of the learned justice conveyed in the last sentence in the passage quoted above and the earlier holding where the learned justice found that-

"paragraph 4 of the plaint shows that the respondent had a right which was assigned to it which the appellant violated".

Moreover, it does not appear clear to me what it is for which the learned justice found the plaint defective. Was the defect caused by failure by UCB to forward the notice or was the defect due to non-pleading of notice of assignment?

Be that as it may, I think that the submissions, on the matter under consideration, by learned Counsel for the defendants both in the Court of Appeal and in this Court, were misleading and authorities cited were wholly out of context. The references in **Bullen Leake's Pleadings** are concerned with assignments under Section 136(1) of the English **Law of Property Act, 1925.** In olden days, at common law no action could be brought by the assignee of a chose in action against the debtor; in equity he could sue if he made the assignor a party to the 13 action. In England the right of an assignee to sue in his own name was clarified by Subsection (1) of S.136 of the Law of Property Act, 1925 which reads as follows:-

> **"Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, <u>of which express notice in writing has been given to the debtor</u>, or trustee, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer <u>from the date of such notice</u>: (a) the legal right to such . debt or thing in action: (b) all legal and other remedies for the same and: (c) The power to give a good discharge for the same without the concurrence of the assignor".** (Underlining supplied).

Clearly, these statutory provisions refer to assignment by any creditor (assignor) who must give notice as required by these provisions in order to perfect the assignment. The assignment is imperfect until notice of assignment is served on the debtor. These provisions refer to a notice to be given by an assignor of things contemplated in that section. The commentary about pleadings set out in **Bullen &**

Leake (supra) which was extensively quoted and relied upon by counsel in the Court of Appeal, and here, is commentary about a plaint in respect of a claim arising because of assignment under the said S.136. In English court proceedings, therefore, the pleading must plead all necessary facts to bring the suit within the ambit of S.136 (1) of the Law of Property Act, 1925. The commentary does not refer to pleadings in respect of a claim which falls outside that section. According to section 50 of our Judicature Statute, 1996, the English Law of Property Act, 1925, is not one of the U.K. Statutes which have effect in Uganda. Accordingly, court case pleadings in Uganda do not have to follow the sample from ***Bullent, Leake and Jacob*** cited by learned counsel.

The law governing the vesting of rights in non-performing assets into the appellant is section 11 of the Statute. That section reads as follows:

> **11 (1) "Notwithstanding any law or agreement to the contrary , the Trust may direct the bank and the bank shall, upon such direction, transfer to the Trust such of its non performing assets -**

a) **in existence at the commencement of the statute;**

b) **as may exist as determined by a special audit and valuation undertaken in relation**

15 **to the assets, at the commencement of this Statute and the cost of the audit and valuation shall be added to the balance of the non-performing assets.**

> **(2) "All assets rights liabilities and obligations attached to a non-performing asset transferred by the bank to the Trust under this section, which immediately before the date of transfer were held by or subsisted against the bank shall, subject to any directions given by the Minister in writing, vest in, or as the case may be, subsist against the Trust".**

It is my view that immediately any non-performing asset is transferred to the Trust, all assets, rights and liabilities attaching to that non-performing asset vest in the appellant, subject only to any written directions by the Minister. In my opinion,

therefore, the vesting of the assets, rights and liabilities does not depend upon the operations of Reg. 4.

Regulation 4 provides as follows: -

> ***"Upon direction in accordance with Section 11 of the Statute, the bank shall transfer to the Trust the Identified Non-Performing Assets in the following manner -***
>
> ***(a) The bank shall execute a Deed of Assignment in respect of each Non-Performing Asset in favour of the Trust in the form prescribed in the first schedule to the Regulations;***
>
> ***(b) Notice of assignment in favour of the Trust shall be in the form prescribed in the second schedule and shall be forwarded by the bank to the owner.***
>
> *(c) The bank shall deliver to the Trust on the date of execution of Deed of Assignment such Agreements, Mortgages Debentures, Instruments, Documents of Title, records and other documents in respect of the Non-Performing Asset. Where any or all such Agreements Mortgages, Debentures, Instruments, Documents of Tile, records and other documents in respect of the Non- Performing Assets have been registered the bank shall indicate in writing the particulars of such registration".*

In terms of Reg.5, all assets, rights and obligations attached to a non-performing asset transferred by the bank in the manner provided by Reg. 4 shall be deemed to have been transferred to the appellant with effect from 10th October, 1994.

I think that regulation 4 simply sets out the procedures to be followed to effect and formalise the transfer. There is no provision either in the statute or in the

regulations which provides any sanction in case the Bank fails to notify the owner of the non-performing asset about the transfer or the assignment. Section 16(3) of the Statute provides that institution of cases in the Tribunal is regulated in a manner provided by the Civil Procedure Rules. The plaint in these proceedings was instituted in the manner prescribed by the Civil Procedure Rules. Paragraph 3 of the plaint was formulated as follows: -

> **"3 The plaintiff's claim against the defendants jointly and severally is for the total sum of shs.839,030,582/= with further interest from 30th September, 1995, being the outstanding sum owed in respect of the loan facility applied for by the defendant (sic) and advanced to the 1st Defendant by the Uganda Commercial Bank. (A copy of the deed of assignment of the debt to the plaintiff is herewith attached and marked Annexture "A")" .**

I think that this paragraph pleaded the fact of assignment. True it could have been better formulated but it pleads assignment and I think this is in conformity with the provisions of Orders 6 and 7 of the Civil Procedure Rules. It should be noted that Courts, both in Uganda, and in East Africa have held that annexing a document to a pleading (in this case to a plaint) has the effect of incorporating the contents of that document in the pleadings: See **African Overseas Trading Vs. Tansukh S. Acharya** (1963) EA. 468. and **Castelino Vs. Rodri-gues (1972) EA.** 223.

In my view, the annexture to the plaint of the Deed of Assignment was sufficient pleading of the contents of the deed and of the assignment itself.

As observed earlier, I am not certain whether the complaint is that the bank did not forward the deed to the defendants or whether the complaint is that the appellant failed to plead the fact of assignment or whether the complaint is about both non-delivery of the deed and non-pleading of it. Okello JA and Mpagi-Bahigeine JA both seem to have held that the complaint is both and that the plaint should have stated that the Deed was forwarded to the defendants.

I would point out that none of the provisions of the Statute nor the Regulation require the plaint to plead that the notice was served on the borrowers, the respondents. Moreover the provisions of the two enactments do not provide a sanction to be imposed on the appellant because of the failure by the UCB to forward the notice of the Deed of Assignment to the respondents. On this basis and with respect, I think that the Court of Appeal erred in rejecting the plaint for the reasons given. In my view there is a distinction between S.136 and our S. 11. Sec. 136(1) makes it clear that the assignment becomes effective on the date of giving notice. On the other hand, under our S.ll (2), assignment is immediate upon assignment being effected regardless of when a copy of the deed is served upon the borrower. Besides, Regulation 5 puts the point beyond dispute by providing that assets, rights and obligations attached to a non-performing asset which is transferred are deemed to have been transferred with effect from 10/10/1994, a date which preceded the institution of the court action in these proceedings.

Secondly Regulation 4 (b) does not specify the time within which the Bank should forward the notice or what happens if no notice is given. It would, therefore, seem that by serving the defendants with copies of the plaint to which a copy of the Deed of assignment had been annexed, the appellant achieved the objective of notifying the respondents.

Finally, in a letter dated 28/1/1995,(Annexture J to the plaint), written by the second respondent, on a letter head of the first respondent, and which letter was addressed to the General Manager, DFS -UCB, the second respondent stated in the third paragraph of the letter that: -

> **"Kindly therefore stay any intention to transfer us to the <u>TRUST</u> until March by which time our negotiations should be complete".**

This shows that the respondents were aware that they were to be transferred to the Trust- I note that in their amended written statement of defence, the respondents denied every paragraph in the plaint except paragraph 9, which refers to the giving of notice to sue.

For the reasons given, I think first that the vesting of the right for the appellant to sue is by operation of law. It does not depend on service of the Deed of Assignment upon the respondents by the Bank. In any case, Article 126(2) (e) would take care of the complaint raised here.

I think that as there is no time limit within which to serve the notice of assignment, the respondents were, in this case, served with the deed upon receipt of copies of the plaint.

I accordingly think that the Court of Appeal erred when it held that omission to serve notice and omission to plead the fact of service rendered the plaint defective. In my opinion, both grounds 1 and

2 should succeed.

The respondents filed notice of grounds for affirming the decision of the Court of Appeal. The notice contains 5 grounds. Complaints in grounds 1 to 4 stated that **failure by the Bank to give notice of assignment to the first respondent as the debtor of the loan in issue meant:**

1. **That the appellant had no title to sue.**

2. **The appellant's cause of action was premature.**

3. **That the said loan still vested in the Bank and not the appellant.**

4. **That validity of the assignment of the said loan to the appellant was incompetent and therefore void in law.**

In ground five the complaint is that failure by the appellant to plead in its statement of claiming that the assignment was in writing and that notice in writing thereof had been given by the bank to the first Respondent as the debtor thereof meant that the Appellant had no title to sue the Respondents.

The respondents' counsel filed written submissions in respect of these grounds. The appellant's counsel filed a reply thereto. I have read the record, considered all aspects of the case and I am satisfied that my discussion of grounds 1 and 2 of the memorandum of appeal disposes of these five grounds in the Notice for Affirming the decision of the Court of Appeal. Accordingly I think that all the five grounds should fail.

In the result, for the reasons I have endeavoured to give, I would allow this appeal and I would set aside the orders of the Court of Appeal. I would order that the hearing of the suit should proceed expeditiously in the Tribunal. I would award the appellant the costs of this appeal and in the Court of Appeal. I would dismiss the notice for affirming the decision of the Court of Appeal with costs to the appellant.

JUDGMENT OF ODER - JSC

I have had the benefit of reading in draft the judgment of Tsekooko, JSC, with which I agree. The appeal should succeed. I have nothing useful to add.

JUDGMENT OF ODOKI, CJ

I have had the advantage of reading in draft the judgement of Tsekooko, JSC and I agree with him that this appeal should be allowed with costs here and below and that the suit should be remitted back to the Tribunal for hearing.

As the other members of the Court also agree with the Judgment and orders proposed by Tsekooko, JSC there will be an order in the terms proposed by Tsekooko, JSC.

JUDGMENT OF KANYEIHAMBA, J.S.C.

I have read in draft, the judgment of my brother, Tsekooko, J S C . and I agree that this appeal should succeed for the reasons he has given. I also agree with the orders he has proposed.

JUDGMENT OF KAROKORA, J.S.C.

I have had the benefit of reading in draft the judgment prepared by my learned brother, Tsekooko, JSC and I do agree with him that this appeal must succeed with costs here and in the courts below. I would further dismiss the notice for affirming the decision of the Court of Appeal with costs to the appellant. I only wish to add a few comments on whether plaintiffs failure to give Notice of the Deed of Assignment in favour of the Trust to defendant was fatal to plaintiffs suit.

The facts were clearly spelt out in the judgment of Tsekooko, JSC and therefore it is not necessary for me to repeat them here. Suffice it to say that the appellant, pursuant to the provisions of section 11 of the Non-Performing Assets Recovery Trust, Statute and Regulations (Statutory Instrument No. 76 of 1995) made under the Statute, filed a suit to recover a sum of Shs. 839,030,582/= with interest which the respondent owed to the Uganda Commercial Bank. When the suit came up for hearing before the Tribunal, the respondent raised a preliminary objection that the

plaint disclosed no cause of action. It was submitted that the 1st defendant was a limited company. It was different from Kapeeka Coffee Hullery to which the loan was advanced. Besides, by the Deed of Assignment made on 7/12/95, Kapeeka Coffee Hullery (No. 5) was the debtor of the loan balance of Shs. 839,030,585/ = . Morever, there was no proof that the money was disbursed to the Kapeeka Coffee Hullery. The right person to be sued was Kapeeka Coffee Hullery as was shown on the Deed of Assignment.

After hearing submissions from both Counsel, the Tribunal overruled the preliminary objection, because the claim against

> *"4 Upon direction in accordance with section 11 of the statute, the Bank shall transfer to the Trust the identified non-performing assets in the following manner.*

(a) *The bank shall execute a deed of assignment in respect of each non-performing asset in favour of the Trust in the form prescribed in the first schedule to the regulations.*

(b) *Notice of assignment in favour of the* Trust shall be in the form prescribed, in the second schedule and *shall be forwarded by the bank to the owner.*

> *(c)* .....

It is important to observe that after the Court of Appeal had
cited paragraph 4 of the plaint, which enumerated a number of rights which were assigned to it which had been violated by the respondent, causing the appellant damage, Okello, JA, who wrote the leading judgment of the court with which the other two justices concurred, stated that:-

> *"In my view, the above paragraph of the plaint is wanting in one important aspect in that it failed to comply with regulation 4(b) of SI 76 of 1995. This regulation requires that notice of the assignment in favour of the Trust shall be forwarded by the bank to the owner". Ms. Mulenga*

submitted that paragraph 9 of the respondent's amended plaint disclosed that a the defendants was made jointly and or severally. The tribunal ordered the case to proceed so that the issue is decided on merit.

The defendant appealed to the Court of Appeal which allowed the appeal, and struck out the plaint for disclosing no cause of action. They awarded costs of the appeal and in the Tribunal. The appellant appealed to this court on two grounds which have been carefully considered by Tsekooko, JSC in his judgment. In my view, the main objection by the appellant against the decision of the Court of Appeal is the 1st ground whose disposal can dispose of the whole appeal. The ground stated that:-

> *"The justices of appeal erred in law and fact in holding that the appellant's omission to plead notice under regulation 4(b) of the NPART Regulations 76/ 95 was non-compliance with a mandatory provision of the law rendering the appellant's plaint fatally defective and affected the right of the assignment to recover the debt."*

I think it is necessary to cite the provisions of Regulation 4(b) of the Non-Performing Assets Recovery Trust Regulations (Statutory Instrument No. 76 of 1995) in order to appreciate whether omission to plead notice of assignment in favour of the NPART having been forwarded by the bank to the owners was fatal to the appellant's/plaint. Regulation 4(b) provides as follows: -

> *notice was sent out to the debtor. Paragraph 9 of the amended plaint read thus:-'9. Notice of intention to sue was served upon the defendant.'*
>
> *The above is notice of intention to sue. It does not meet the requirement of regulation 4(b) above. That regulation requires that notice of the assignment in favour of the Trust which must be in a prescribed form, be forwarded by the bank to the owner.*

The owner is defined in paragraph 3 to mean the borrower in respect of a non-performing assets. It is clear that the provision of regulation 4(b) of the regulations has not been compiled with. The effect of this omission is fatal to the respondent's plaint as it is a noncompliance with a mandatory provision of the law. It affected the alleged assigned right of the respondent which is claimed was violated by the appellant. On the principle in Auto Garage & others the omission renders the plaint defective as it thereby discloses no cause of action against the appellant"

With respect, I would not agree with the Court of Appeal that Regulation 4(b) of the NPART Regulations imposes a duty upon the trust to give notice of the assignment in favour of the trust to the owner. Regulation 4(b) makes it a duty upon the bank to forward the notice of assignment to the owner of the debt. It does not impose a duty upon the trust to give notice of assignment to the owner. However, in the instant case, the appellant stated in the amended plaint, in paragraph 3 that a copy of the deed of assignment of the debt to the plaintiff was attached as Annexture "A" to the plaint which was served upon the respondent. Therefore, the respondent was served with a copy of the deed of assignment by the plaintiff. In my view although the respondent denied having been served with a copy of the deed of assignment, this matter cannot be resolved on a preliminary objection. It has to be resolved when parties adduce evidence in court and the issue is resolved on merit. In the result, I would hold that the objection was prematurely raised and determined. Therefore in the circumstances, there was a cause of action disclosed by the plaint. Therefore ground one must succeed. Consequently, I would agree with the conclusions and orders proposed by Tsekooko, JSC.

Dated at Mengo this 23rd day of April, 2002.