

**DEVELOPMENT BANK OF RWANDA
LTD (BRD Ltd) v. SPLENDID
KALISIMBI Ltd**

[Rwanda COURT OF APPEAL – RCOMAA 00058/2018/CA
(Mukanyundo, P.J., Munyangeri and Mukandamage, J.) May10,
2019]

Commercial law – Company – Insolvency – Upon the commencement of the insolvency proceedings, no company’s asset can be removed from the pool of the company’s property even if it was mortgaged before its liquidation – Law N° 35/2013 of 29/05/2013 modifying and complementing – Law N° 12/2009 of 26/5/2009 relating to commercial recovery and settling of issues arising from insolvency, article 4.

Facts: BRD Ltd gave Splendid company a secured loan, which the latter defaulted on that loan and later became insolvent and the court appointed a provisional administrator.

Meanwhile, as BRD Ltd had begun the process of selling the mortgage, the provisional administrator of Splendid Kalisimbi (under liquidation) notified BRD of the stay of the secured claims because of the reorganizational plan, consequently, BRD Ltd sued to the Commercial High Court Nyarugenge requesting for the relief from the stay of the claims of the secured debts. The Court found the application without merit because Splendid Ltd had already become insolvent and that mortgage cannot be deducted from the property of that company before they share the as provided by the law.

BRD Ltd appealed in the Commercial High Court arguing that the court ruled *ultra petita* because it applied for the relief from the stay of the secured claim instead the Court examined the insolvency and the provisional administrator acted illegally when hr refused to deduct the mortgage from the property of Splendid Kalisimbi. The Court sustained the rulings of the Commercial Court of Nyarugenge and ordered that the mortgage should not be removed from the property of the company to be sold.

BRD Ltd appealed to the Supreme Court and after the reform, the case was transferred to the Court of Appeal, it argued that the Commercial High Court did not examine the grounds of its appeal relating to determining whether the Commercial Court of Nyarugenge ruled *ultra petita* because it applied for relief from the stay of the secured claim instead it ruled on the issue concerning the insolvency of splendid, the provisional administrator acted illegally when hr refused to deduct the mortgage from the property of Splendid Kalisimbi.

In its defense, Splendid argues that due to the legitimate ground of a reorganizational plan of commercial activity the claims on the mortgage are suspended and also that since its insolvent the court could not take a decision which is detrimental to its situation.

Facts: 1. Upon the commencement of the insolvency proceedings, no company's asset can be removed from the pool of the company's property even if it was mortgaged before its liquidation.

The appeal lacks merit.

**Court fees deposit covers the expenses incurred by the court
in this case.**

Statutes and statutory instruments referred to:

Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, article 111.

Law N° 35/2013 of 29/05/2013 modifying and complementing Law N° 12/2009 of 26/5/2009 relating to commercial recovery and settling of issues arising from insolvency, article 4.

No cases referred to.

Judgment

I. BACKGROUND OF THE CASE

[1] On 09/09/2016, the Commercial Court of Nyarugenge rendered a judgment RCOM 00985/16/TC/NYGE and ordered for the commencement of the insolvency proceeding of Splendid Kalisimbi Ltd and appointed Advocate Mukwende Milimo Olivier as the provisional administrator with the main duty of keeping Splendid Kalisimbi Ltd functioning.

[2] On 14/09/2016 Advocate Mukwende Milimo Olivier wrote to BRD Ltd notifying it the stay of the claim of the secured debt against Splendid Kalisimbi Ltd because the Court ordered for the commencement of insolvency proceedings.

[3] On 21/01/2017, BRD Ltd, applied for relief from stay by of the claim of the secured debt to the Commercial Court of

Nyarugenge on the ground that the provisional administrator did not submit a reorganization plan, to first be confirmed by the Court and even if it was submitted it is invalid because it was not first confirmed by the committee of the creditors and also that the reorganization plan is not possible in a case where the provisional administrator do not cooperate with the committee of the creditors and also that he does not have a sustainable reorganizational plan. The Court found the application of BRD without merit and ordered BRD to pay counsel fees to Splendid Kalisimbi Ltd.

[4] BRD Ltd appealed to the Commercial High Court arguing that the court erred in ruling ultra petita, the Court confirmed that there is a reorganizational plan submitted by Splendid Kalisimbi Ltd under liquidation without proof in disregard of the irregularities done by the provisional administrator and also that it erred in confirming that the reorganizational plan of Splendid Kalisimbi Ltd can be implemented.

[5] That Court found the appeal with no merit and thus sustained the judgment RCOM 00351/2017/TC/NYGE rendered by the Commercial Court of Nyarugenge, ordered that the property on plot N° 1/01/09/03/867, located in the Kigali City, Nyarugenge District, Nyarugenge Sector, Kiyovu Cell, remains in the property of Splendid Kalisimbi Ltd under liquidation which has to be auctioned.

[6] BRD Ltd appealed to the Supreme Court and the case was transferred in the Court of Appeal as provided by article 105, of Law N° 30/2018 of 02/06/2018 regulating the Jurisdiction of Courts and registered on RCAA 00058/2018/CA.

[7] The case was heard in public on 26/03/2019, BRD Ltd assisted by Counsel Mugeni Anita, Splendid Kalisimbi Ltd under liquidation represented by its provisional administrator Advocate Mukwende Milimo Olivier, assisted by Counsel Murutasibe Joseph together with Counsel Nyiringabo Théoneste.

[8] At the beginning of the hearing, Counsel Murutasibe Joseph, withdrawn the objection of inadmissibility on the ground that BRD Ltd lost the case on both levels on the same ground, however, they still insist on the one which relates to the value of the subject matter not being equal to 50.000.000 Frw confirmed by the judge in case of disputes. After the submission of both the Court made a bench ruling that the case is in its jurisdiction because the mortgage under BRD Ltd trusteeship which it requests to auction has a value which is far more than 50.000.000Frw provided by the law because it is worth 2.300.000.000Frw, this was based on the provisions of article 28, paragraph 2:7° of the Organic Law N° 03/2012/OL of 13/06/2002 determining the organization, functioning and jurisdiction of the Supreme Court, thus it proceeded with the hearing of the case on merit.

II. ANALYSIS OF THE LEGAL ISSUE

1. Whether there were irregularities in the appealed judgment

a) Concerning the issue that the judge ruled *ultra petita*

[9] Counsel Mugeni Anita representing BRD Ltd argues that the judge ruled *ultra petita* because BRD Ltd applied for relief from a stay of the claim of the secured debt, but the Court did

not examine it instead it ruled on the insolvency of Splendid Kalisimbi Ltd.

[10] Counsel Mugeni Anita state that they were surprised to see the provisional administrator producing an order extending the reorganizational plan of Splendid Kalisimbi Ltd under liquidation after the expiration of the period of six months which is provided by the law.

[11] Counsel Murutasibe Joseph and Counsel Nyiringabo Théoneste argue that article 4, relating to commercial recovery and settling of issues arising from the insolvency of 2013, provides for the grounds for the stay of the claims on secured debts and that Splendid Kalisimbi Ltd under liquidation is under insolvency, thus the demands of BRD are groundless. They state that the Commercial High Court examined the grounds of appeal submitted to it and ruled on them and it couldn't make a decision which Splendid Kalisimbi Ltd en liquidation while it's in insolvency, which no longer exists in business.

[12] They further argue that the committee of the creditors was delayed to be instituted because BRD Ltd was not cooperative and that is the reason the period for the reorganizational plan was extended.

DETERMINATION OF THE COURT

[13] Article 4 of the Law N° 35/2013 of 29/05/2013 modifying and complementing Law N° 12/2009 of 26/5/2009 relating to commercial recovery and settling of issues arising from insolvency provides that “Upon the commencement of the insolvency proceedings:

1° the commencement or continuation of individual actions or proceedings concerning the assets of the debtor and the rights, obligations or liabilities of the debtor shall be stayed;

2° the execution of judgments related to the assets of the debtor's property shall be stayed;

3° the right of a counterparty to terminate any contract with the debtor shall be suspended;

4° the right to transfer, mortgage or otherwise dispose of any assets of the debtor shall be suspended.

[14] The documents in the case file demonstrate that BRD Ltd applied for the relief of the claims on secured debt, requesting to be allowed to sell the mortgage furnished to it by Splendid Kalisimbi Ltd under liquidation before the commencement of insolvency proceedings and also the Court appointed a provisional administrator however the Commercial Court of Nyarugenge held that Splendid Kalisimbi Ltd under liquidation becomes insolvent when this case was on appeal level.

[15] The case file demonstrates that on appeal the Commercial High Court was requested to examine whether the Commercial Court of Nyarugenge ruled *ultra petita*, to determine whether there was no evidence produced to prove that there was a reorganizational plan for Splendid Kalisimbi Ltd under liquidation, to assess whether the provisional administrator acted unlawfully and whether the court confirmed the reorganizational plan of Splendid Kalisimbi Ltd under liquidation illegally, but the Court found that there are some issues not to be examined , because after the closure of

the hearing, an order putting Splendid Kalisimbi Ltd under liquidation was submitted, which lead the Court to only analyze whether the mortgage granted to BRD Ltd can be deducted from the property to be sold by the liquidator of Splendid Kalisimbi Ltd under liquidation, but the court found BRD Ltd's claim unfounded because it had to wait for the division of the proceeds since it is among the creditors who have to be paid first because the mortgage was given to the owner who also has the right over it..

[16] The Court finds that the arguments of BRD Ltd that the Commercial High Court did not examine the grounds of appeal concerning the issue of whether the Commercial Court of Nyarugenge ruled *ultra petita*, whether there was no evidence produced to prove the reorganizational plan submitted by Splendid Kalisimbi Ltd under liquidation, whether the provisional administrator acted unlawfully and whether the court unlawfully confirmed the reorganizational plan of Splendid Kalisimbi Ltd en liquidation are without merit because as motivated in paragraph 9 of the appealed judgment, those requests were not possible pursuant to article 4 of the Law N° 35/2013 of 29/05/2013 mentioned above, provides that "Upon the commencement of the insolvency proceedings the commencement or continuation of individual actions or proceedings concerning the assets of the debtor and the rights, obligations or liabilities of the debtor shall be stayed;, therefore the Commercial High Court did not err because it could not rule on the reorganizational plan or the the claims regarding its property because Splendid Kalisimbi Ltd had already being declared insolvent.

b) The issue concerning whether the mortgage furnished to BRD Ltd should be deducted from the property which is to be sold by the liquidator.

[17] Counsel Mugeni Anita argues that BRD Ltd was given a mortgage by Splendid Kalisimbi Ltd under liquidation but not is under auction and it has taken the time and since it was mortgage was given to BRD Ltd 100%, implies that it has the right to remove its mortgage from the auction and sell it by itself as provided by article 37 ter, relating to commercial recovery and settling of issues arising from insolvency of 2009 which was amended in 2013-2018.

[18] Counsel Mukwende Milimo Olivier, representing Splendid Kalisimbi Ltd en liquidation argues that there is a will to conduct the auction, that BRD Ltd has already been paid 99.000.000 Frw and its not the only one to be paid because there are other creditors such as RSSB, RAA, BPR Ltd and Nyarugenge District.

[19] Counsel Nyiringabo Théoneste states that the demands of BRD Ltd cannot be done when the company is under liquidation, instead it is done during a reorganizational plan.

DERTEMINATION OF THE COURT

[20] The Court finds the demands of BRD Ltd that the mortgage should be deducted from the property of Splendid Kalisimbi Ltd under liquidation which has to be sold by the liquidator lacks merit because as provided by article 4 of the Law N°35/2013 of 29/05/2013 modifying and completing article 37, of the Law N°12/2009 of 26/05/2009 mentioned

above, as motivated by the Commercial High Court in paragraph 15 of the appealed judgment the fact that Splendid Kalisimbi Ltd en liquidation was liquidated, the Court cannot order that the mortgage claimed by BRD Ltd be deducted from those to be sold because the purpose of liquidation is to sell the property to pay the creditors.

[21] Pursuant to the motivations given above, the Court finds that since the credit issued by BRD Ltd is guaranteed by the mortgage has to wait for the liquidation of Splendid Kalisimbi Ltd in order to be paid as provided by the laws.

2. Concerning the damages requested for in this case.

[22] The counsel for Splendid Kalisimbi Ltd en liquidation argue that it has been litigating this case on the second level of appeal, therefore the Court of Appeal to award it counsel fees equivalent to three million (3,000,000Frw) on each level and the procedural fees of two million (2,000,000Frw) on all levels.

[23] The counsel for BRD Ltd argues that there is no basis for the claimed damages because it is its legal right to appeal for those it is not contented with including the laws which were not adhered to.

DERTEMINATION OF THE COURT

[24] Article 111 of the Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure provides that The claim for representation fees is an incidental claim to the principal claim aiming to repay expenses incurred during judicial proceedings.

[25] The Court finds that Splendid Kalisimbi Ltd en liquidation was represented by counsel it hired, therefore BRD Ltd must give 500,000Frw of the counsel fees and 300.000Frw of the procedural fees awarded in the discretion of the court because what it claims for is excessive.

III. DECISION OF THE COURT

[26] Decides that the appeal of BRD Ltd lacks merit.

[27] Decides that the judgment RCOMA 00476/2017/CHC/HCC rendered by Commercial High Court on 19/05/2017 is sustained except the counsel and procedural fees awarded to Splendid Kalisimbi Ltd (en liquidation) on this level.

[28] Orders BRD Ltd to give Splendid Kalisimbi Ltd (en liquidation) 800.000Frw for both procedural and counsel fees.

[29] The deposits of the court fees are equivalent to the deeds of the court in this case.