

MUNYANEZA ET.AL v. ACCESS BANK Ltd

[Rwanda COURT OF APPEAL – RCOMAA 00090/2018/CA
(Mukanyundo P.J., Ngagi na Kanyange, J.) June 26, 2019]

Contract– Personal guarantee – The guarantor continues to be under the obligations to repay the credit unless those obligations are extinguished on the grounds provided by the law.

Contract – Loan contract – Personal guarantee – A personal guarantor cannot renege on his promise of repaying the loan in case the principal debtor fails to repay it on the pretext that the principal loan contract was restructured in case the restructuring did not change the basis of the personal guarantee.

Facts: ACCESS BANK RWANDA Ltd gave a loan to EXERT ENGINEERING Group Ltd, Munyaneza Félicien and Mudenge Emmanuel, both provided personal guarantee for that loan.

The principal debtor defaulted on the payment of the loan, thus the Bank sued the personal guarantors in the Commercial Court of Nyarugenge requesting that they pay the principal loan, interest, and various damages. The Court ordered the personal guarantor to repay the loan.

The personal guarantors were not contented with the rulings and appealed in the Commercial High Court, that court found the peal without merit and thus sustained the appealed judgment.

They again appealed in the Court of Appeal claiming that the Commercial High Court intentionally disregarded the principle of law which provides that guarantee is not implied, the personal guarantor has to be directly notified of the guarantee, they claim that they were never informed of the restructured contract in which the bank amended the intended purpose of the loan but instead the previous court held that restructuring the contract does not exonerate them from personal guarantee, disregarding the fact that being a director of a company does not mean that you must remain a personal guarantor even when the contract is restructured, therefore they argue that they cannot be liable for the loan which is provided in the restructured which they were never notified of.

The bank argues that the appellants provided a personal guarantee for the loan but not for the intended purpose of that loan, thus they are obliged to repay it and that it was not necessary to notify the personal guarantor of the restructured contract because they were not going to provide a personal guarantee for the intended purpose of the loan because they had already provided a personal guarantee on the loan, therefore there was no need to be notified because the principal contract was not changed, it was only restructured,.

Held: 1. The guarantor continues to be under the obligations to repay the credit unless those obligations are extinguished on the grounds provided by the law.

2. A personal guarantor cannot renege on his promise of repaying the loan in case the principal debtor fails to repay it on the pretext that the principal loan contract was restructured in

case the restructuring did not change the basis of the personal guarantee.

The appeal lacks merit.

Statutes and statutory instruments referred to:

Decree-Law of 30/07/1888 relating to contracts or obligations, article 258, article 552 and 573.

Law N° 45/2011 of 25/11/2011 regulating contract, article 113.

No cases referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] On 25/09/2014, ACCESS BANK RWANDA Ltd, and EXERT ENGINEERING Group Ltd entered into a loan of 2,070,000,000Frw with an interest rate of 16% per annum; The loan consisted of 3 phases namely: Term loan facility amounting to 410,000,000Frw which ACCESS BANK RWANDA Ltd paid for EXERT ENGINEERING GROUP Ltd from COGEBANQUE Rwanda Ltd, Asset Finance amounting to 560,000,000Frw for the purchase of work machines to use in the tender which MINAGRI and the University of Rwanda awarded to EXERT ENGINEERING GROUP Ltd and, the Nyagatare branch, and a contract finance facility amounting to

1,100,000,000Frw to be used to complete the aforementioned contract, EXERT ENGINEERING GROUP Ltd had a partnership with MINAGRI and the University of Rwanda. Before the issuance of the loan, Munyaneza Félicien and Mudenge Emmanuel each stood personal guarantee as set out in the contract they had with ACCESS BANK RWANDA Ltd on 20/05/2014.

[2] EXERT ENGINEERING GROUP Ltd defaulted on the payment, prompting ACCESS BANK RWANDA Ltd to sue Munyaneza Félicien and Mudenge Emmanuel, its personal guarantee, claiming that they repay the debt amounting to 2,556,352,640Frw calculated as of 01/11/2016 and which will continue to accumulate until the full amount is paid, it also requests for various damages.

[3] The hearing began in Commercial Court of Nyarugenge, Munyaneza Félicien and Mudenge Emmanuel admitting that the contract dated 20/05/2014 was indeed concluded, but that the loan on which it was concluded have already been paid because EXERT ENGINEERING GROUP Ltd did not get the Guarantee Line. They told the Court that the 970,000,000Frw which they acknowledge to have stood surety for, ACCESS BANK RWANDA Ltd have already reimbursed it when it sold the house and the machines of EXERT ENGINEERING GROUP Ltd which is used for the construction.

[4] On 13/10/2017, the Commercial Court of Nyarugenge ruled that Munyaneza Félicien and Mudenge Emmanuel had not respected the personal guarantee of the loan which ACCESS BANK RWANDA Ltd gave to EXERT ENGINEERING GROUP Ltd, held that their argument that there are some mortgages sold and repaid the loan is unfounded, and that even

the claim that the caveat on their property which was done at the land registrar's office should be lifted is also unfounded, it should also not be justified. The Court ruled that the debt of Munyaneza Félicien and Mudenge Emmanuel to ACCESS BANK RWANDA Ltd is computed up to 22/12/2016, when the Court declared the commencement of insolvency proceedings of EXERT ENGINEERING GROUP Ltd as held in the judgment RCOM 0729/2016 / TC / NYGE and R COM 0756/2016 / TC / NYGE, ordered Munyaneza Félicien and Mudenge Emmanuel to repay ACCESS BANK RWANDA Ltd the outstanding debt which is on the account of EXERT ENGINEERING GROUP Ltd of 2,594,697,930 Frw of the debt outstanding on the account of EXERT ENGINEERING GROUP Ltd as of 26/05/2017 and also 500,000 Frw for counsel fees.

[5] Mudenge Emmanuel and Munyaneza Félicien appealed to the Commercial High Court, and on 21/06/2018, in the judgment RCOMA 00723/2017 / CHC / HCC, that Court held that the appeal of Mudenge Emmanuel and Munyaneza Félicien is without merit, it sustained the appealed judgment and ordered them to pay to the ACCESS BANK RWANDA Ltd the procedural and counsel fees of 1,000,000 Frw.

[6] Mudenge Emmanuel and Munyaneza Félicien were not contented with the rulings of the case and appealed to the Court of Appeal, arguing that the Commercial High Court deliberately disregarded the provisions of the law stating that personal guarantee is not implied, and that the guarantor should be notified of the obligations as stated by the scholars and that it refused to lift the caveat on their property while the debt they guaranteed had already been paid and that they cannot be held

liable for the loan which is provided in the restructured agreement which they were not notified of, thus they request the Court to lift that caveat.

[7] Another ground of appeal is that they should not be liable for a debt of 1,100,000,000Frw because they have no restructured personal guarantee agreement with ACCESS BANK RWANDA Ltd to agree on the purpose of the loan. Therefore, they are not liable for that loan because the contract is only binding to the parties.

[8] The case was heard in public on 07/05/2019, with Mudenge Emmanuel and Munyaneza Félicien represented by Counsel Mugengangabo Jean Népomuscène while ACCESS BANK RWANDA Ltd was represented by Counsel Bizumuremyi Isaac, who immediately raised the objection that the Chief Registrar of the Court of Appeal should have first examined the objection of inadmissibility of the second appeal of Mudenge Emmanuel and Munyaneza Félicien because they lost on the first and second instance on the same grounds, therefore pursuant to article 52 of Law N° 30/2018 of 02/06/2018 determining the jurisdiction of courts, he requests the Court to compel the Chief Registrar to examine it instead of being examined for the first time by the trial court. Due to the fact that Counsel. Bizumuremyi Isaac had submitted the court submissions regarding that objection through the IECMS on the eve of the hearing, the Court decided to adjourn the hearing so that Counsel Jean Jean Népomuscène could prepare his defense, the hearing was scheduled on 14/05/2019.

[9] On that date, the case was heard in public, with the parties represented as before, the court heard the submissions on that objection. On 24/05/2019, the Court ruled that ACCESS

BANK RWANDA Ltd claim that the Chief Registrar should re-examine the admissibility of the second appeal filed by Mudenge Emmanuel and Munyaneza Félicien is unfounded, holding that the hearing should proceed on the 24/06/2019

[10] On that date, the case was heard in public, both parties represented as before, Me Bizumuremyi Isaac arguing that he has withdrawn the objection of lack of jurisdiction of the Court of Appeal is based on the ground that the appellants lost on the same grounds on the first and second instance, the pronouncement of the judgment was scheduled on 26/07/2019.

II. ANALYSIS OF THE LEGAL ISSUES

1. Whether Munyaneza Félicien and Mudenge Emmanuel are not liable for the loan which is provided in the restructured agreement because they were not notified of it.

[11] Counsel Mugengangabo Jean Népomuscène, assisting Munyaneza Félicien and Mudenge Emmanuel, argues that the Commercial High Court deliberately disregarded the provisions of the law stating that personal guarantee is not implied, and that the guarantor should be notified of the obligations as stated by the scholars and that it refused to lift the caveat on their property while the debt they guaranteed had already been paid and that they cannot be held liable for the loan which is provided in the restructured agreement which they were not notified of.

[12] He further argues that what they are challenging about the decision of the Commercial High Court, is that it held that even though the loan contract was restructured, it does not

preclude Mudenge Emmanuel and Munyaneza Félicien from being the personal guarantors; while the fact that a person is the CEO of a company, does not mean that when a contract is restructured he/she continues to be a personal guarantor, that the loan for which they are personal guarantors is 2,070,000,000Frw minus the 1,100,000,000Frw because its intended purpose as stipulated in the original contract was changed as reflected in the restructured contract dated 03/06/2014. He requests the Court to determine whether in case the intended purpose of the loan is restructured between the bank and the debtor, still makes the personal guarantor of the original loan contract liable for the restructured loan.

[13] Counsel Bizumuremyi Isaac argues that in the restructuring of the contract, the 1,100,000,000Frw was divided into three parts, 700,000,000Frw was for the guarantee, 300,000,000Frw was the discount and 100,000,000Frw was overdraft, which means that if they arguing that the purpose of the 1,100 .000.000Frw was restructured, they would have argued on the amount of the 400,000,000Frw because the intended purpose of the 700,000,000Frw was not restructured because its purpose remained that of the guarantee. He argues that Mudenge Emmanuel and Munyaneza Félicien are personal guarantors of the loan but not its intended purpose, therefore, they have the responsibility to repay it because they were personal guarantors for it, and that they will not be liable for the things that were removed from the contract, that this is stipulated in the first clause subsection "a", of the personal guarantor contract.

[14] He further argues that concerning the fact that the personal guarantor had to be notified of the restructuring of the

contract, he states that it was not necessary because they did not have to be a personal guarantee for the intended purpose of the loan while they were personal guarantee for the loan, therefore since the original contract was not altered but was restructured, there was no need to notify them.

DETERMINATION OF THE COURT

[15] Article 552 of Civil Code Book III provides that: "The personal guarantor assures the creditor to pay him/her in cases the debtor defaults on the payment". Article 573 of that Law provides that the obligations originating from personal guarantee is terminated by the same grounds as of any obligations.

[16] The case file demonstrates that on 29/05/2014, ACCESS BANK RWANDA Ltd and EXERT ENGINEERING GROUP Ltd made a loan contract N^o. 5855 / HCC / LH / TN14 comprising of three categories which are term loan facility amounting to 410,000,000Frw, which ACCESS BANK RWANDA Ltd paid on behalf of EXERT ENGINEERING GROUP Ltd in COGEBANQUE RWANDA Ltd, Asset Finance amounting to 560,000,000Frw for the purchase the machines to be used by EXERT ENGINEERING GROUP Ltd in the tender it had been awarded by MINAGRI and the University of Rwanda, Nyagatare campus and a contract finance facility amounting to 1,100,000,000Frw for facilitating the execution of the aforementioned contract, Munyaneza Félicien and Mudenge Emmanuel were the personal guarantees for that loan of 2,070,000,000Frw issued on 20/05/2014 as evidenced by the contract they signed on 02/06/2014 before the notary.

[17] Also, the file contains a document entitled "Amendment No. 1 to the Principle Loan Agreement No. 5855 / HCC / LH / TN / 14 of May 30, 2014" dated 03/06/2014 signed by Munyaneza Félicien as the Managing Director of EXERT ENGINEERING GROUP Ltd. The preamble of that contract states that the bank and the debtor acknowledge that the contract is part of the principle and forms an integral part of it¹.

[18] The Court finds that since EXERT ENGINEERING GROUP Ltd was given a loan on which it defaulted on as indicated in the judgment RCOM 0729/2016 / TC / NYGE and RCOM 0756/2016 / TC / NYGE, which approved the commencement of insolvency proceeding of EXERT ENGINEERING GROUP Ltd, nothing prevents ACCESS BANK RWANDA Ltd to request Munyaneza Félicien and Mudenge Emmanuel to be liable for the loan that they guaranteed as provided by article 552 of the Civil Code Book III cited mentioned above.

[19] The Court finds that the contract dated 03/06/2014 does not replace the principle contract of 29/04/2014, which provides for the laon of 2,070,000,000Frw that Munyaneza Félicien and Mudenge Emmanuel were personal guarantees, whereby each was a personal guarantee for the entire loan, rather it forms an integral part of it and the amendments in the contract between the two parties do not affect the clauses relating to its guarantee, which means that while the loan which Munyaneza Félicien and Mudenge Emmanuel are personal guarantee is not yet repaid, and even in the restructuring contract it is not mentioned that the

¹ The Bank and the Borrower hereby agree that the present addendum agreement constitutes part of the principle agreement and forms an integral part of it.

clause relating to their status as personal guarantee was also restructured , they continue to be liable for that loan until there are grounds for the extinction of thier guaranteeship² as provided by article 573 of the Civil Code Book III cited above.

[20] The Court finds that Munyaneza Félicien and Mudenge Emmanuel's claim that they are not liable for the loan in the restructured contract because they were not notified of it is unfounded because, as mentioned above, the guarantee clause was not amended, implying that it retained its value, especially that the contract titled « Amendment N° 1 to the Principle Loan Agreement N°5855/HCC/LH/TN/14 of May 30, 2014” did not replace the principle contract, which was signed by Munyaneza Félicien as Managing Director of EXERT ENGINEERING GROUP Ltd.

[21] The Court also finds that their claim that they are not liable for the 1.100.000.000Frw because its intended purpose was changed also lacks merit because they were a personal guarantee for the entire loan, including the 1,100,000,000Frw. Regarding the fact that they had to be notified of the restructuring of the contract, the Court finds that since it was clear that other clauses of the principle contract remained valid, including the one concerning their guarantee, there was no need to notify them, again it also finds that since Munyaneza Félicien was the Managing Director of EXERT ENGINEERING GROUP Ltd, who signed the restructuring contract cannot turn

² Articles 98-108 of the Law N° 45/2011 of 25/11/2011 governing contracts provides that a debtor’s manifestation of assent to the the extinguishment of obligations is not effective, unless: 1° it is made for after consideration; 2° it is a promise that would be enforceable without consideration; 3° it has induced an action or abstention

and allege that they were not notified that their obligations of being personal guarantee of the company's loan remain on the loan that the company owes to the bank.

[22] Based on the legal provisions in the preceding articles, the Court finds that Munyaneza Félicien and Mudenge Emmanuel are the personal guarantee of EXERT ENGINEERING GROUP Ltd and are liable for the loan that company owes ACCESS BANK RWANDA Ltd

2. Whether the sales contract of the mortgage should remain valid so that it can be considered in reducing the debt of Munyaneza Félicien and Mudenge Emmanuel

[23] Counsel Mugengangabo Jean Népomuscène, assisting Munyaneza Félicien and Mudenge Emmanuel, argues that the sales contract of the mortgaged house on the will of EXERT ENGINEERING GROUP Ltd should not have been invalidated and that the bank faulted when it based on a letter from the receiver which stated that sales contract was null and void and reimbursed ULTRA INVESTMENT the 1,500,000,000Frw which it had paid for the house, which was later sold again at a small price, which led the loan of EXERT ENGINEERING GROUP Ltd not to reduce significantly.

[24] Counsel Bizumuremyi Isaac argues that the mortgage was sold by Munyaneza Félicien, without any involvement of ACCESS BANK RWANDA Ltd, except that it was a witness to the contract. He further added that the liquidator appointed by the court had written to ACCESS BANK RWANDA Ltd informing him that the mortgage was sold by an incompetent person, prompting the bank to reimburse to ULTRA

INVESTMENT the 1,500,000,000Frw which it had paid for the house and it was later lawfully sold for 300,000,000Frw.

DETERMINATION OF THE COURT

[25] Article 113, paragraph one of Law N° 45/2011 of 25/11/2011 relating to contracts provides that "a contract has effects on parties (...).

[26] The Court finds that the sales contract of the mortgage furnished by EXERT ENGINEERING GROUP Ltd was between ULTRA INVESTMENT and Munyaneza Félicien, and does not affect ACCESS BANK RWANDA Ltd, except that it got its payments as money for the payment somewhere else. So the fact that the liquidator of EXERT ENGINEERING GROUP Ltd wrote to the bank requesting it to reimburse the proceeds from the sale of the mortgage and indeed the bank reimbursed it, it made no fault since it would not retain the proceeds got from an invalidated sale.

[27] The Court finds that even though the mortgage was sold at a very low price compared to the previous one, the bank did not play any role because it had no interest in reimbursing the money it got from the sale of the mortgage nor receiving little proceeds than the one it had received before.

[28] Pursuant to the motivations above, the Court finds the appeal of Munyaneza Félicien and Mudenge Emmanuel on this issue lacks merit because it cannot rule that the sales contract which was nullified because of its illegality that it remains in place and the proceeds from it be valid.

3. Determining the basis of damages requested in this case.

[29] Munyaneza Félicien and Mudenge Emmanuel request the Court to reverse the damages they were charged (550,000Frw in the Commercial Court of Nyarugenge and 2,000,000Frw in the Commercial High Court) because ACCESS BANK RWANDA Ltd was the one who dragged them into unnecessary lawsuits demanding to pay the loan which they did not guarantee, they demand that instead, it gives them 8,000,000Frw each, for the counsel fees at the Commercial Court of Nyarugenge to the Court of Appeal each, of the lawyer's fee. They also request that the Court orders it to reimburse them 100,000 Frw for the court fees they paid when appealing the judgment RCOM 00120/2017 / TC / NYGE and 150,000Frw they paid when appealing the judgment RCOMA 00723/2017 / CHC / HCC, and 2,000,000 Frw for procedural fees.

[30] Concerning the damages requested, Counsel Bizumuremyi Isaac argues that Munyaneza Félicien and Mudenge Emmanuel should pay the damages they were imposed and they should not be awarded counsel and procedural fees they claim for unless they have won the case.

[31] ACCESS BANK RWANDA Ltd requests to be given the counsel fees of 1,000,000Frw to each and 10,000,000Frw for procedural fees because it has spent more than two years (since 10/01/2017) litigating this case.

DETERMINATION OF THE COURT

[32] Article 111 of the Law N^o 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. The claim for legal costs is adjudicated at the same time with the principal claim. It can also be admitted and adjudicated even if the principal claim has not been admitted. ”.

[33] The Court of Appeals finds that Munyaneza Félicien and Mudenge Emmanuel should not be awarded the damages they claim for, because they are the ones who did not honour the contract they concluded with ACCESS BANK RWANDA Ltd, therefore they should not claim to be refunded the expenses they incurred on this case.

[34] The Court finds that ACCESS BANK RWANDA Ltd hired an advocate on this instance, its obvious that it paid for those services, therefore it finds that Munyaneza Félicien and Mudenge Emmanuel have to give the bank 700,000Frw for the counsel fees awarded in the discretion of the court.

[35] It also finds that they should give the bank procedural fees on this level, but since the amount requested for is excessive and ACCESS BANK RWANDA Ltd does not prove how it computed it, and it cannot be computed beginning from 2017 since there are those it was awarded at the Commercial High Court, therefore they have given the bank three hundred thousand francs (300,000Frw) on this level. The court finds that the fact that the ACCESS BANK RWANDA Ltd has been

litigating this case for two years, it cannot be based on to award it damages, as Mudenge Emmanuel and Munyaneza Félicien had the right to appeal when they felt unsatisfied with the decisions of the previous courts.

III. DECISION OF THE COURT

[36] Holds that the appeal of Mudenge Emmanuel and Munyaneza Félicien lacks merit;

[37] Sustains the rulings of the judgment RCOMA 00723/2017/CHC/HCC rendered by the Commercial High Court on 21/06/2018.

[38] Orders Mudenge Emmanuel and Munyaneza Félicien to give ACCESS BANK RWANDA Ltd seven hundred thousand (700.000Frw) for counsel fees and three thousand francs (300.000Frw) for the procedural fees on this level;

[39] Declares that the court fees deposits are equivalent to the expenses incurred by the court in this case.

