

NZITONDA v COGEBANQUE LTD ET.AL.

[Rwanda COURT OF APPEAL – RCOMAA 00012/2019/CA (Karimunda, P.J.) December 09, 2019]

Commercial procedure – The claim requesting for invalidation or stay of an auction – The filing and hearing of the claim requesting for the invalidation of an auction is conducted as a summary procedure because it aimed at protecting the interests of the mortgagor and that of the buyer of the mortgage in the public auction which may be prejudiced due to the delay of the lawsuits in the courts of law – The claim requesting for the invalidation of an auction can be appealed for the second time within three days in case it fulfils the requirements since it's a principal claim – Law N° 22/2018 of 29 / 04/2018 relating to the civil, commercial, labour and administrative procedure, article 260.

Fact: After Entreprise de Construction & Techniques d'Architecture (E.C.T.A) won the tender for the construction of a modern market at Mulindi, it entered into a loan contract with COGEBANK Ltd, Nzitonda, its director was its personal guarantee and also furnished a mortgage on its behalf. E.C.T.A failed to honour its contractual obligations and consequently, the mortgage was auctioned.

Nzitonda filed a claim to Commercial Court requesting to invalidate the auction because it was unlawfully conducted. That court rendered the judgment and held that the auction was unlawfully conducted, based on the ground that Nzitonda was not notified of the selling terms and conditions of the mortgage, was not notified of the out of the expertise conducted on his property and also the Registrar General did not respect the seven (7) days provided by the instructions of the Registrar General regulating public auction of mortgage, therefore, it ordered COGEBANK Ltd to reimburse Higiuro the money he brought the mortgage and also ordered COGEBANK Ltd together with Gashema to jointly pay Nzitonda various damages.

Higiuro and Gashema were not satisfied with the rulings, thus appealed to the Commercial High Court, whereby Higiuro stated that the Commercial Court held that Nzitonda was not notified of the selling terms and conditions on the mortgage while he was notified of it, laws do not oblige to notify the owner of the property about the outcome of the expertise, laws do not from the expertise and that the Registrar General not approving the auction within seven days, is not a ground for declaring null and void the mortgage. For Gashema, he requested the Court to examine whether Nzitonda was not notified of the selling terms and conditions on the mortgage, whether it was also his duty to inform him about those conditions mentioned above, he also requested for the damages.

The Commercial High Court found the appeal filed by Higiuro and Gashema with merit and held that the auction was legally conducted.

Nzitonda appealed against the rulings of the Commercial High Court to the Court of Appeal stating that the court disregarded that he was not notified of the outcome of the expertise conducted on his property and the procedures of its auction, also that the registrar General did not comply with the law.

Higiuro raised an objection of inadmissibility of the appeal on the ground that it is Nzitonda's second appeal on a summary procedure claim while a second appeal on a summary procedure claim is

inadmissible and also that the time limit for filing the appeal wasn't respected. Gashema also concurs with him on the objection raised.

Regarding the objection raised, Nzitonda (the appellant) argues that his appeal does not originate from a summary procedure claim because from the beginning of this case it was heard as an ordinary claim, thus finds no ground to reject his second appeal. Regarding the issue of not respecting the time limit for appeal, he states that he observed the ordinary time limit of filing an appeal, and since he did not file a summary procedure claim, there is no ground to compute the time limit based on that provided for when appealing a summary procedure claims

Held: 1.A claim for invalidation of an auction can be appealed for the second time because it is not a summary procedure claim even though it is filed and heard in the same period as the one provided for a summary procedure.

2. Even though the claim for invalidation of an auction it's not a summary procedure but since the law provides that it should be filed and heard in the same period as the one provided for a summary procedure, makes the time limit for the appeal against a claim for invalidation of an auction to be three working days from the time the order was pronounced or from the day the parties were aware of the decision. Therefore, since the appellant did not demonstrate exceptional reasons that are beyond his/her control as to why he did not comply with the time limit his appeal is not admitted (rejected).

**The appeal is rejected because it was not filed within the time limit;
Court fees on the appellant.**

Statutes and statutory instruments referred to:

Law N° 22/2018 of 29 / 04/2018 relating to the civil, commercial, labour and administrative procedure, article 21, 185, 188 and 260.

No cases referred to.

Judgment

I. BACKGROUND OF THE CASE

[1] Entreprise de Construction & Techniques d'Architecture (E.C.T.A), for which Nzitonda Kiyengo is Director, after winning the tender for the construction of a modern market in Mulindi, signed a loan agreement with COGEBANQUE Ltd, Nzitonda Kiyengo being the personal guarantee of ECTA, he also furnished his property located in Bwiza village, Kibaza Cell, Kacyiru Sector, Gasabo District, Kigali City, registered on UPI 1/02/07/03 / 1458. E.C.T.A defaulted on the payment, the mortgage furnished by Nzitonda Kiyengo was auctioned. Nzitonda Kiyengo contested the auction that it was illegally conducted, thus he filed a claim at the Commercial Court of Nyarugenge requesting that the auction be invalidated.

[2] In the Judgment RCOM 01138/2017 / TC / NYGE rendered on 13/03/2018, the Commercial Court of Nyarugenge found that during the auction some procedures were violated, such as the

fact that Nzitonda Kiyengo was not given the selling terms and conditions of his mortgage, was not given the result of the valuation (expertise) of his property which he is entitled to, and that in approving of the auction, the Registrar General did not comply with the seven days provided for in the Instructions on modalities of lease, sale, public auction and mortgage acquisition, it held that the auction of 24/02/2017 conducted while selling Nzitonda Kiyengo's property located on parcel UPI 1/02/07/03/1458 is invalid, ordered COGEBANQUE Ltd and Gashema Félicien to jointly pay Nzitonda Kiyengo 1,850,000 Frw in damages, COGEANQ pays Higiuro Martin 86,417,378 Frw including the amount he paid for the house in the house, interest, damages and court fees, COGEBANQUE Ltd and Gashema Félic to jointly pay HIGIRO Martin damages amounting to 1,000,000 Frw.

[3] Higiuro Martin and Gashema Félicien were not contented with the rulings of the case and appealed to the Commercial High Court, Higiuro Martin argued that the Commercial Court ruled that Nzitonda Kiyengo was not notified of the selling terms and conditions well as he was notified, that the instructions do not provide that he should be notified of the property valuation, and for the Registrar General not approving the auction within seven days is not a ground for the cancellation of the auction, he requests that if on the appeal, the court sustains that the auction is invalid, he should be reimbursed the money he used to renovate that house. Gashema Félicien, on the other hand, requests the Court to examine whether indeed Nzitonda Kiyengo was not notified of the selling terms and conditions and whether it was his responsibility to inform him, he concludes by requesting damages.

[4] The appeal of Higiuro Martin was registered on RCOMA 00269/2018 / CHC / HCC, and that of Gashema Félicien registered on RCOMA 00274/2018 / CHC / HCC, during in the hearing, the two cases were combined, the judgment was rendered on 18/09/2018, the Commercial High Court found that Nzitonda Kiyengo himself submitted document which indicate where his wife signed that she has received to the "Approval of Selling Terms and Conditions" accompanied by the Selling Terms and Conditions, that he did not state that he had not received some other document and that there was no law stipulating that Nzitonda Kiyengo should be notified of the property valuation, the fact that he was notified of the selling terms and conditions of the auction which contained the value of the property is sufficient, especially that he already had the property valuation which was carried out while furnishing the mortgage, that the fact that a seven-day period had been set for the Registrar General to approve the auction, was intended to ensure that the buyer did not end up in doubt while he has already paid for that property, it held that the appeal of Gashema Félicien and HIGIRO Martin have merit, that the auction for the property of Nzitonda Kiyengo was conducted in accordance with the law, that the appealed judgment is reversed, that the damages awarded on the first instance are squashed, and Nzitonda Kiyengo to give Gashema Félicien, Higiuro Martin and COGEBANQUE damages of 1.200.000 Frw each , all damages amounting to 3,600,000 Frw.

[5] Nzitonda Kiyengo was not contented with the rulings and appealed to the Court of Appeal, stating that in the appealed judgment, the Court ignored the fact that he had not been notified of the value of his property and the auction procedures, and that the Registrar General did not comply with the provisions of article 16 of the Instructions of the Registrar General N° 03/2010/Org of 16/11/2010 on modalities of lease, sale, public auction and mortgage acquisition which provides that the Registrar General was required to submit a report approving the deeds of the receiver within seven days.

[6] The case was heard in public on 03/12/2019, Nzitonda Kiyengo assisted by Counsel FONYO Munyamashara Patient together with Counsel Nkaka Kagobora Séraphin, COGEBANQUE Ltd represented by Counsel Kayitare Serge, Gashema Félicien represented by Counsel Bikotwa Bruce, while Higiuro was represented by Counsel Ndahimana Jean Bosco, the Registrar General was represented by Counsel Nkusi Fred, who raised the objection of non-admissibility of the appeal filed by Higiuro Martin on the ground that it was the second appeal on the summary procedure which cannot be appealed twice and also that he filed the appeal beyond the time limit.

II. ANALYSIS OF THE LEGAL ISSUES

II.1. Whether a summary procedure can be admitted on the second appeal.

[7] Higiuro Martin and his counsel Ndahimana Jean Bosco, argue that the claim filed by Nzitonda Kiyengo is a claim requesting for the cancellation of the auction, which is heard and appealed as a summary procedure as provided for in article 260 of Law No 22/2018 of 29 / 04/2018 relating to the civil, commercial, labour and administrative procedure, that is why the Commercial High Court did not hold a pre-trial hearing. They explain that a second appeal is not admissible on the summary procedure, this is the ground on which they base their objection of lack of jurisdiction.

[8] Counsel Bikotwa Bruce, representing Gashema Félicien, argues that a summary procedure cannot be appealed twice as it would be contrary to the provisions of article 21 of Law no 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure.

[9] Counsel Nkusi Fred, representing the Registrar General and Counsel Kayitare Serge, representing COGEBANQUE Ltd, have nothing to argue about the objection raised.

[10] Counsel Fonyo Munyamashara Patient, assisting Nzitonda Kiyengo argues that the claim cannot be a summary procedure and be heard as an ordinary case. He explains that the fact that they did not organize a pre-trial hearing was not due to the fact that it was a summary procedure but because it was not provided for by law, that in the Commercial Court held a preliminary hearing and the Commercial High Court just heard the case that is why he finds that the second appeal should be admitted.

DETERMINATION OF THE COURT

[11] Article 21, paragraph one, point 6, of the Law N° 22/2018 of 29/04/2018 Law relating to the civil, commercial, labour and administrative procedure, provides that " The court registrar cannot register a claim if the claimant : 6° files the second appeal in case of urgent applications ..."

[12] Article 185 of Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure provides that: "If there is need to have an interim ruling on a matter which requires urgent resolution, an action is filed in accordance with the ordinary procedure regarding principal suits, before an urgent applications judge in the jurisdiction where the urgent measure is required in accordance with ordinary summons procedure. An application for summary procedure is instituted through the same procedure as ordinary proceedings."

[13] Article 260, paragraph 5, of Law No 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, provides that « The suspension or invalidation of an auction conducted based on the decision of the Registrar General is requested to the Registrar General. The Registrar General responds within three (3) working days. In case there is a party not satisfied by the decision of the Registrar General or who does not get a response in the time limit provided for by in this paragraph, the party files a claim in the commercial court in accordance with provisions of this Article within five (5) working days running from the date the party was notified of the decision.»

[14] The case file indicates that the claim which was filed in the Intermediate Court of Nyarugenge on 15/06/2017 was "nullification of the auction dated 24/02/2017", NZITONDA Kiyengo claiming that COGEBANQUE Ltd ignored the truth and requested that his residential house which he had lent to ECTA as a mortgage be sold in the auction which was held on 24/02/2017, that auction was not held in accordance with the rules and regulations, he requested that it should be declared null and void.

[15] The Court finds that although the summary procedure is usually related to a principal claim, the claim for the stay or cancellation of the auction is not related to the principal claim, the fact that the legislator in article 260, paragraph four, of Law N° 22 / 2018 of 29/04/2018 mentioned above, that such a claim is filed and heard within the same time limit as of that of the summary procedure, the intention was not because she/he wanted to change its nature of being an independent claim, rather the purpose was to protect the owner of the sold property who challenges its auction and the successful bidder winner from the loss which can be caused by the delay of the case in the court.

[16] The Court finds that while a claim for suspension or annulment of an auction in its nature is not a summary procedure and it is filed and heard as a summary procedure, nothing prevents it from being appealed on the second level, and therefore the arguments of Counsel BIKOTWA Bruce that appeal on the second level on stay or invalidating the auction is prohibited by section 6 of the first paragraph of article 21 of Law N° 22/2018 of 29/04/2018 of the law mentioned above is without merit because when that article is read together with article 188, paragraph 3, of that law¹ what is prohibited is the second appeal of the summary procedure attached to a principle case is that when those articles are read and article 185 of that law², makes it clear that what is prohibited from being appealed a second time is an urgent complaint relating to another ground of appeal.II.2. Whether the appeal was not filed within the time limit

[17] Higirot Martin and Counsel Ndahimana Jean Bosco representing him argue that the appealed judgment was rendered on 18/09/2018, Nzitonda Kiyengo appealed on 15/10/2018, which means that he appealed in accordance within the days in a month yet based on the provisions of article 188 and 260, paragraph 4, of Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, he should not have exceeded three working days, which is counted beginning from the date of the pronouncement of the judgment, the reason they request this court to reject the appeal because it was not filed within the time limit.

¹ "Appeals against summary procedure orders are submitted to a superior court and are appealable only once.."

² If there is a need to have an interim ruling on a matter which requires urgent resolution, an action is filed in accordance with the ordinary procedure regarding principal suits, before an urgent applications judge in the jurisdiction where the urgent measure is required in accordance with ordinary summons procedure."

[18] The counsel for Gashema Félicien, Advocate Bikotwa Bruce, and Advocate Nkusi Fred, representing the Registrar General, argued that the claims of Higiyo Martin and his counsel are founded, thus they request the Court to reject the appeal.

[19] The counsel for COGEBANQUE Ltd, Advocate Kayitare Serge that the claim for staying or cancellation of the auction is a special claim which should be filed and appealed within the same time limit as that of the summary procedure, he also finds that Nzitonda Kiyengo did not comply with the time limit of appealing.

[20] The counsel for Nzitonda Kiyengo, Advocate Fonyo Munyamashara Patient and Advocate Nkaka Kagobora Séraphin argue that in the Commercial High Court they appealed within the usual time limit of the appeal, they find that since the claim filed is not a summary procedure there is no ground the period of filing an appeal should be computed the same way as that of the summary procedure.

DETERMINATION OF THE COURT

[21] Article 188, paragraph 2, of Law No 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, provides that « The appeal is made within three (3) working days from the time the order was pronounced or from the day the parties were aware of the decision. The case also is decided in a period not exceeding three (3) days. »

[22] The case file demonstrates that the appealed case was pronounced on 18/09/2018, after coming into force of the Law No 22/2018 of 9/04/2018 mentioned above, implying that it's the one which should have been implied because it was appealed on 15/10/2018.

[23] The Court finds that between 18/09/2018, when that case was adjudicated and 15/10/2018 when it was appealed, it is almost 27 days, yet article 188, paragraph 2, of Law No 22/2018 of 29/04/2019 cited above provides that " The appeal is made within three (3) working days from the time the order was pronounced...", which means that Nzitonda Kiyengo delayed late to appeal and before this Court, he does not demonstrate an event of force majeure that prevented him from appealing within the time limit prescribed by law, therefore his appeal was not filed within the time limit.

III. DECISION OF THE COURT

[24] Holds that the appeal of Nzitonda Kiyengo is not admitted because it was not filed within the time limit ;

[25] Orders that the court fees amounting to 50.000 Frw be paid by Nzitonda Kiyengo.