

RWASIBO v. I&M BANK RWANDA Ltd ET AL

[Rwanda COMMERCIAL HIGH COURT – RCOMA 0104/14/HCC (Mukamurera, P.J.)
April 28, 2014]

Contracts or obligations law – Loan contract – Power of attorney over the property – Conveyance of a property which is co-owned by coheirs to a creditor as security on a loan without authorization of some of them – The holder of power of attorney over the property cannot furnish it as a guarantee when all rightful owners did not authorize it – Law of 20/07/1920 relating to properties, article 32.

Facts: In 1984, BCR concluded two different loan contracts with Rwasibo. One of 18 million and another one of 10 million but he was only given the loan of 18 million. The later died without having fully paid the debt and this led BCR to sue his heirs so as to be paid but it lost the case due to the fact that it has not respected its obligations of granting the loan which was as agreed upon.

Some of the heirs of Rwasibo Jean Baptiste including Rwasibo Jean Bosco, Rwasibo Louis and Rwasibo Joseph requested to Kigali First instance Court the order on the management of the properties left by the deceased and this was granted.

In 1997, those heirs concluded the loan contract with BCR. Rwasibo Bernard, one of Rwasibo Jean Baptiste's children lodged a claim before Nyarugenge Commercial Court requesting that the loan contract concluded between BCR and his three siblings be nullified. The court decided that the contract remains valid since it was signed by the people who have the quality; it condemned Rwasibo Bernard to pay to BCR the damages amounting to 3,000,000Frw together with 300,000Frw for the advocate's fees.

Rwasibo Bernard appealed to the Commercial High Court arguing that the first court misconceived the order for the management of the property and that it did not consider the letter of 16/12/1997 that BCR has written to Rwasibo.

The representative of BCR stated that the appeal is baseless since the ones who signed on the contract had the quality, they were granted the order no 694/I.J.B/97 which authorised them to manage the properties of the deceased, and that the loan was granted in the interest of the family.

With regard to the letter written to the Succession Rwasibo, BCR said that it is not valid since the first instance court has taken a decision thereon it and stated that the loan contract was signed by the people authorised by the court.

Held: 1. The power of attorney for managing inheritance assets of Rwasibo Jean Baptiste does not confer to its holder the right to furnish them as a guarantee when all coheirs did not authorize it. Thus the loan contract and the security furnished by the holder of power of attorney to manage the property of the deceased are void.

Appeal has no merit.

Security is void.

Appealed judgment is reversed.

Court fees will be paid back to the appellant by the respondents.

Statutes or statutory instruments referred to:

Law of 20/07/1920 relating to properties, article 32.

No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Rwasibo Jean Baptiste concluded a loan contract with BCR on 21/03/1984, they agreed upon that he has to be granted two loans, but BCR gave to him only one loan of 18,000,000Frw while another of 10,000,000Frw was not granted. Then after Rwasibo Jean Baptiste has deceased, and BCR sued his heirs claiming to be paid the debt originating from the loan it has granted him. The case was finally decided by the Supreme Court where BCR has lost the case due to the fact that it could not claim to be paid back the debt while it did not perform its obligations of giving all the loans which were agreed upon.

[2] Some of Rwasibo Jean Baptiste's heirs who are Rwasibo Jean Bosco, Rwasibo Louis and Rwasibo Joseph requested Kigali First instance court an order for the management of the property left by their father and this was granted to them on 30/09/1997. On 16/12/1997 they concluded with BCR a loan contract amounting to 26,303,692Frw which is as follows:

- 1) 12,303,692Frw: consolidation of your engagements stopped on 12/08/1987 and resulting from your previous mortgaged loan.
- 2) 14,000,000Frw: additional mortgaged loan reserved for reparation of your house located in Kicukiro whose 1,100,000Frw has been paid in advance to you on your current account.

[3] One of Rwasibo Jean Bosco's children who is called Rwasibo Bernard lodged a claim before Nyarugenge Commercial Court requesting for the nullification of the contract signed between BCR and his three siblings so that BCR should give back the guaranty it was given made of the house located in the plot N° 2087 in Kicukiro and also requested for damages. BCR argued that contract cannot be nullified since it was signed by the heirs who have been authorized by the court and they aimed at executing their father's obligations he had with the bank and repairing the house he has left. The court has stated that the claim is baseless; it decided that the contract remains valid since it has been signed by rightful people; Rwasibo Bernard was condemned to pay to BCR the damages amounting to 3,000,000Frw and 300,000Frw for the advocate's fees.

[4] Rwasibo Bernard was not satisfied with the decision and appealed to this court saying that the court which rendered this judgment on the first instance, misconceived the order N° 694/I.J.B/97 and that it ignored the letter dated on 16/12/1997 which BCR wrote to Rwasibo Succession, and he does not admit the damages he was ordered to pay. The representative of BCR argues that that appeal is baseless, and he claims for being involved in court proceedings and the lawyer's fees.

[5] Within the first hearing which was held on 16/12/1997, the representative of BCR first requested the court to order the forced intervention of the heirs of Rwasibo Louis and Rwasibo Joseph since these ones are among those who signed the contract at issue as it was

requested in the first instance level but they were not satisfied with the decision taken thereon. After examining the request, the court decided to go on with the hearing with the ordinary parties in the case (see the detailed statements in the order of 14/03/2014).

[6] On the date of the hearing in merits only the representative of BCR and Rwasibo Bernard attended but Rwasibo Bosco defaulted to appear without even notifying the court the ground of his absence, while lawfully knew the date of the hearing , and upon the request of other parties the court decided to go on with the hearing in his absence as provided for by the article 59 of CCLAP.

II. ANALYSIS OF LEGAL ISSUES

The court will analyse the issue related to the order n° 694/I.J.B/97 for management, it analyses what is related to the loan that BCR has granted within the letter of 16/12/1997, and it will also analyse the issue of damages which were ordered in the first instance and those which are claimed in appeal level.

1. With regard to the order of management n° 694/I.J.B/97.

[7] Rwasibo Bernard and his counsel, Rwagatare Janvier, state that the order for the management n° 694/I.J.B/97 that the court gave to Rwasibo Joseph (+), Rwasibo Louis (+) and Rwasibo Jean Bosco was for managing the property of the heirs of Rwasibo Jean Baptiste but that they were not authorized to guarantee it or to sell it (disposition act) without the knowledge of other members of the family. According to them, this is error committed by the judge by deciding that they were authorized to what they did, while to have the power to manage the property does not imply that you have full ownership. The problem is that the judge did not deny that what was done is the act of disposition, but he adds that they should not only look at the guaranty but also what it aimed at; while he had to analyze whether they had the quality to do what they did.

[8] Rusanganwa Jean Bosco, the counsel for BCR which became I&M Bank, states that this ground is baseless since those who signed on the contract had the power granted by the order n° 694/I.J.B/97 which gave to them the right of managing the property left by Rwasibo Jean Baptiste including repairing them and covering unexecuted obligations that the deceased owed to for BCR and it was done within the interests of the family. Except that, the law provides for the management of another parson's property (art. 247 to 251 CCBIII).Moreover, the plaintiff does not prove what he did as the heir from 1997 for protecting the property and the debt left by his father. Therefore, what has been done by those having the order may not be nullified since they had right to do that and it was in the interests of the family.

[9] The court realizes that the order which given to Rwasibo Joseph, Rwasibo Louis and Rwasibo Jean Bosco was for managing the property left by Rwasibo Jean Baptiste as it is even mentioned in its title that it is clear that it is an order for management n° 694/I.J.B/97. The person with the right of managing the property cannot give it as security without the authorization of the rightful owners. This is underlined by the article 32 of CCB II which provides for that "none of the co-owners can, without the consent of the others, change the destination of the co-owned property, nor encumber it of real rights above of his indivisible share. Thus, both the loan and mortgage contract concluded by those above mentioned who had the order for managing the property, they have no effect on other Rwasibo's heirs since they did what they were not authorized to, and they were not mandated by all the concerned.

Arguing that it was in the interests of the family, this also may not be considered since it is that family which could know its interests and provide how to protect them, it cannot allow a person to vest himself with the right he has not while that family is present.

2. Analyzing the issue related to the loan granted BCR has in the letter of 16/12/1997.

[10] Rwasibo Bernard and his counsel state that the court disregarded the letter that BCR wrote to Rwasibo Succession on 16/12/1997, since its analysis indicates that it was written to Rwasibo Joseph, Rwasibo Louis and Rwasibo Jean Bosco. Another thing is that that others heirs were not notified of it and they did not authorize for the loan and mortgage contract. They further explained that the way that loan was granted is a fraud since the bank did not prove whether it has given the loan after being revealed with or making the expertise of what has been damaged for it to see whether the loan for repairing that house may really be granted or make a follow up to see really if that loan was used on that house. They went on stating that BCR has granted that loan basing on the contract of 21/03/1984 and on the rendered judgment which are RCA 10.263/Kig and RA 2022/13/03/93 and on the application for the loan of 26/08/1997, however if you see the granted loan, it has no relation with the above mentioned contract and the mentioned judgments. The fact that there has been the grant of the loans which have no relation with what has been said and be granted to non-authorized people, it is another ground which makes him to claim that that contract concluded in the name of Rwasibo's heirs, him also included may be terminated.

[11] The Counsel for BCR (I&M Bank) states that this ground may not be considered since the court has decided on that and stated that the loan contract was signed by the people who were authorized by the court. When asked whether he so finds that what has been performed by those who signed the contract is the act of management or act of disposition, he responded that it is disposition act but Rwasibo's heirs should not say that they are not concerned with the loan especially that it was based on the loan left by their father plus the loan for the reparation of the house belonging to the heirs. Thus, the plaintiff could not say that the loan does not concern him while he does not prove what he has done on the debt left by his father regarding the reparation of that house, rather he could thank those who did it. He kept stating that those who were granted the loan were given an order for managing the properties, which is that circumstance that they have taken the loan for repairing, and they issued the house to be repaired as a security. He thus concluded that this should not be disregarded.

[12] Regarding the loan granted by BCR on 16/12/1997, the court finds that its representative states that it was performed in the way of executing Rwasibo Jean Baptiste's obligations on the contract he has concluded with BCR, and in the context of executing the court decision in the judgments RCA 10.263/Kig and RA 2022/13/03/93. In examining that contract and those judgments, the court exactly realizes that it has been written that it is based on another contract of 21/03/1984 and on those judgments but also based on another loan requested on 26/08/1997. The representative of BCR does not prove whether that loan has been requested by all heirs of Rwasibo. The fact that it has been requested by some of them while they do not prove whether others have mandated them or have personally authorized them, this may not be considered for all heirs. Furthermore, the requested loan has no relation with the contract entered into between BCR and Rwasibo Jean Baptiste, and the amount of money granted as in the loan contract is different from the one which was within the old contract, and even they do not have the same cause. All these, therefore, demonstrate that the loan granted on 16/12/1997 is different from the one which was within the contract entered into between BCR and Rwasibo Jean Baptiste. Therefore, it should not be considered

as a loan which was granted in the context execution of the judgments referred to since the later also ordered the execution of the contract concluded between BCR and Rwasibo though, as it has been explained, it is not the that contract which was executed. Thus it is not those judgments which were executed. Moreover, apart from that, the parties to the loan and security contracts had no powers to do so as explained above. Therefore, all that had been performed based on those contracts are invalid.

3. With regard to the damages awarded at the first instance and those claimed in appeal.

[13] Both Rwasibo Bernard and his counsel claim no damages would have been awarded to BCR rather the latter should have been charged the damages for fraudulently granting those loans in the name of Rwasibo's succession, thus he requests for 50,000,000Frw in damages, 5,000,000Frw for procedural fees and 10,000,000Frw for the counsel fees.

[14] The counsel for BCR (I&M Bank) adduces that those damages are baseless since the bank did not act fraudulently; rather it has to be paid the damages amounting to 1,000,000Frw for being dragged into law suits and 1,000,000Frw for the counsel fees at appeal level.

[15] The court realises that the damages which were awarded to BCR the first instance must be set aside since it lost the judgment on which they are based on. Consequently, the claim of the damages on appeal is inadmissible. With regard to the procedural and advocate fees claimed by Rwasibo Bernard, the court views that they must be granted based on article 258 CCBIII which states, "any act of an individual which prejudices another person, obliges the one whose act caused damage to repair it". The fact that he resorted to the courts to settle the issue necessitated the hiring of a lawyer who must be remunerated and there are expenses incurred for the follow-up of the case. Therefore, the despondences have to be held liable since they are root cause. However, the Court views that those damages may be awarded within the discretion of the court basing expenses to the case and its duration, since those claimed are excessive and there is no proof it is the exact amount. Thus, it awards 500,000Frw for the procedural fees and 1,000,000Frw for the counsel fees. Other claimed damages amounting to 50,000,000Frw for fraudulent use of the name of Rwasibo Succession must not be awarded because he did not prove the prejudice cause by the illegal acts for him to be awarded the damages especially he has been reimbursed with what he spent following up on his issue in court.

III. THE DECISION OF THE COURT

[16] Decides that Rwasibo Bernard's appeal has merit.

[17] Decides that the loan contract concluded between BCR and Rwasibo Jean Bosco, Rwasibo Louis and Rwasibo Joseph on 16/12/1997 does not concern other heirs of Rwasibo Jean Baptiste who did not sign it.

[18] Decides that the mortgage of the house on plot n° 2087 as an auxiliary to that contract is set aside.

[19] Decides that the damages awarded to BCR in first instance are set aside.

[20] Orders BCR which became I&M Bank together with Rwasibo Jean Bosco to pay to Rwasibo Bernard the procedural and counsel damages.

[21] Overturns the appealed judgment.

[22] Orders both BCR which became I&M Bank Rwanda Ltd and Rwasibo Jean Bosco to pay to Rwasibo Bernard the procedural damages amounting to 500,000Frw and the counsel fees amounting to 1,000,000Frw, which equal to 1,500,000Frw, each one must pay 750,000Frw.

[23] Orders both BCR which became I&M Bank Rwanda Ltd and Rwasibo Jean Bosco to pay back to Rwasibo Bernard 75,000Frw for the court fees deposited at appeal level, each one must pay 37,500Frw.