

NDIZIHIWE ET AL v. MUDAKEMWA ET AL

[Rwanda SUPREME COURT – RCAA 0136/11/CS (Rugege, P.J., Mugenzi and Munyangeri N., J.) February 14, 2014]

Civil procedure – Appeal – Self deprivation of the right to appeal on screening decision – The appellant has the right of self-deprivation of his lodged appeal even when the respondent does not accept it – Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 26.

Contracts or obligations law – Damages on the loss incurred due to self-deprivation of an appeal by the appellant – The respondent has the right to compensation of costs incurred due to the appeal lodged against him but self-deprived of by the appellant later – Law of 30/07/1888 relating to contracts or obligations, article 258.

Facts: After realizing that their appeal in the Supreme Court was dismissed because of the delay to file it. Ndizihwe and Nyirabihogo appealed against the decision, but later wrote and declared that they opted to deprive themselves of the right to that appeal action. Mudakemwa and other respondents recognize that self-deprivation of the right to appeal action is the right of the litigant, but argue that this is not likely to prevent them from being awarded damages resulting from the loss incurred from reference and counsel fees.

Held: 1. Nothing is likely to prevent the plaintiff from depriving him/herself of the right to action when s/he acts according to the rules of procedure, even when the respondent rebuts it, because it is a right recognized to him/her by the law.

2. Damages requested by the respondents in cross appeal are not related to the subject matter of the case, rather, are only related to the costs incurred due to the appeal action deprived of by the appellants, in which they were sued. They deserve to be awarded them without necessarily initiating a new claim for those damages.

**Appellants allowed the deprivation of the right to appeal.
Respondents are awarded counsel fees and reference fees.
Court fees to be paid by appellants.**

Statutes referred to:

Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 26.

Law of 30/07/1888 relating to contracts or obligations, article 258.

No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] After Ndizihwe and Nyirabihogo appealed to the Supreme Court against the Judgment RCA188/10/HC/MUS rendered by the High Court, the subject matter of the case

being the succession of the assets left by Rusigariye, the Judge in charge of case screening decided, on 11th November, 2011, that the appeal was dismissed since it had been submitted too late.

[2] Ndizihiwe and Nyirabihogo appealed against that screening decision, but later, in their letter dated on 4th December, 2013, they informed the Court that they deprive themselves of the appeal, based on article 26 of Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure.

[3] The respondents who are Mudakemwa, Mukarutura and Nyiransekanabo, disputed that they reject the appellant's move to deprive themselves of the action, because they had already submitted a cross appeal on 10th October, 2013 requesting the compensation for counsel and procedural fees.

[4] The hearing was conducted in public on 14th January, 2014; the appellants were represented by Habyarimana Christine, the Counsel. The respondents were represented by Uwimana Shani, the Counsel.

II. ANALYSIS OF LEGAL ISSUES

[5] In this case, it is to be analyzed whether the deprivation of the right by the appellants is likely to be admitted. Next, it will be examined whether or not the cross appeal submitted by the respondent, before the appellant decide to deprive himself of the right to action, is likely to be admitted in case the appellant's self-deprivation of the right of action is granted.

Concerning the admission of the deprivation of the right to action

[6] The Counsel for the appellants, states that they opted for self-deprivation of the right to action based on article 26 of the Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure. He notes that their request must be granted without any other requirements because the law specifically states that the acceptance of another party is not a requirement. The Counsel for the respondents acknowledges that the admission of the self-deprivation of the right to action is the right of the applicant, but argues that it does not prevent the respondents from requesting for damages.

[7] Article 26 of the Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure provides that self-deprivation of the right to action is a self denial of one's capacity to plead and make a follow up of the claim, and further stipulates that acceptance by the other party is not necessary.

[8] The Court finds that based on those provisions of the law, nothing is likely to prevent the petitioner from being allowed self-deprivation of the right to action when she/he acts according to the rules of procedure, even when the respondent rejects it. Instead, it remains a right recognized to them by the law. Therefore, Ndizihiwe and Nyirabihogo are allowed to deprive themselves of their appeal.

Concerning compensation requested by the respondents

[9] Habyarimana, the Counsel for Ndizihiwe and Nyirabihogo, declares that self-deprivation of the right to action, as stipulated in article 26 of the Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure does not require the acceptance of the other party.

[10] She states that even the cross appeal filed by the respondents cannot prevent the approval of self-deprivation of the right to action because such a cross appeal is accessory to the main claim. When the holders deprive themselves of the right, the cross appeal attached to the claim is not to be examined. Furthermore, article 167 of the new law relating to the civil, commercial, labour and administrative procedure stipulates in paragraph three, that if the principal appeal was not received, then the cross appeal may not be received either.

[11] She explains that if the respondents want to petition for the damages they intended to request, they would have to initiate a principal claim relying on article 258 Civil Code book III, and demonstrate the actual loss incurred due to the faults committed by Ndizihiwe and Nyirabihogo.

[12] Uwimana Shani, the Counsel for the respondents, Mudakemwa, Mukarutura and Nyiransekanabo states that even if article 26 provides that the acceptance of the other party is unnecessary in order for the party seeking to deprive him/herself of the right to action is authorized to do so by the Court, the loss that the respondent incurred from the follow up of the case and paying the Counsel must not be disregarded. She also states that in this Court there are case laws determining compensation for such a loss.

[13] She explains that her clients engaged a legal advocate to draft for them defense submissions and they paid her 1,000,000 Rwf excluding the procedural expenses. They also came to Supreme Court three times from Gisenyi, which is the reason why they request to be paid 2,500,000 Rwf which includes procedural and counsel fees especially that the appellants deprived themselves of the right to action after the respondents had already submitted their defence submissions.

[14] Concerning the issue that the respondents should initiate another claim to request for the compensation for the amount paid to the counsel and procedural costs, Uwimana, the Counsel declares that this would be obstructive for her clients and it would be disregarding the long period of time they spent on the case.

[15] The Court finds that, considering the explanations provided by respondents as mentioned above, the damages sought are not related to the subject matter of the case, instead, they are related to their expenditures due to the appeal of the case in which they were sued. Therefore, it is obvious that pursuant to article 258 of the civil code book III respondents have incurred the loss occasioned by that appeal. As a result, respondents deserve to be refunded with the expenditures in that context without being required to initiate a new claim for those damages.

[16] Regarding the quantum of the damages they request, the Court finds no convincing evidence submitted to justify 2,500,000Rwf as the actual amount paid for counsel and procedural fees. Therefore, they must be awarded, in the discretion of the Court, 500,000 Rwf for counsel fees for all of them and 200,000 Rwf each for procedural fees amounting to 1,100,000 Rwf.

III. DECISION OF THE COURT

[17] Admits the self-deprivation of the right to appeal by Ndizihiwe and Nyirabihogo.

[18] Orders them to pay Mudakemwa, Mukarutura and Nyiransekanabo compensation for the amount paid due to the appeal, amounting to 1,100,000 Rwf, including 500,000 Rwf for the counsel fees and 600,000Rwf of procedural fees.

[19] Orders each of them to pay $\frac{1}{2}$ of court fees amounting to 48,250 Rwfs, meaning 24,125 Rwf each.