

HOTEL OKAPI v. BPR

[Rwanda SUPREME COURT – RCOMA 0032/12/CS (Mugenzi, P.J., Kanyange and Munyangeri, J.) March 14, 2014]

Commercial law – Company – Capacity of representing a company in contract it concludes with others – When a debtor pretends to represent the company, it is considered as such, as long as the latter did neither disown nor sue him/her for usurpation of power.

Contract or obligation law – Apparent mandate – Performance of contract – When there is an apparent mandate, another party may presume that the contractor has a mandate, the contract concluded in that context binds the mandator – Law of 30/07/1888 relating to contract or obligation, article 33.

Contract or obligation law – Suretyship – The Payment made by the surety without seeking the payment in properties of the principal debtor in case he/she consented to that in suretyship contract – When the surety accepted to pay without seeking the payment from the debtor, the creditor has right to sue either the surety or both in solidum – Law of 30/07/1888 relating to contract or obligation, article 560.

Facts: HOTEL OKAPI represented by Nkunda Leatitia concluded a loan contract with Banque Populaire du Rwanda, Remera branch and the loan was deposited on the HOTEL OKAPI account on which Nkunda Leatitia signed jointly with Rumanyika Jean Marie Vianney, the legal representative of HOTEL OKAPI. “Banque Populaire du Rwanda” requested HOTEL OKAPI to repay the loan and Rumanyika Jean Marie Vianney, the legal representative, responded that he does not recognize the loan because the contract was signed by an incompetent person.

“Banque Populaire du Rwanda” filed a claim to the Commercial High Court requesting that HOTEL OKAPI represented by Rumanyika Jean Marie Vianney and Nkunda Leatitia to jointly repay the loan and its interests guaranteed by Nkunda Leatitia. The Commercial High Court decided that the respondents will jointly pay the loan and its interests.

HOTEL OKAPI, represented by Rumanyika and Nkunda Leatitia who was forced to intervene, appealed to the Supreme Court stating that “Banque Populaire du Rwanda” negligently granted the loan to a person not representing HOTEL OKAPI. Nkunda Leatitia stated that she was a surety and the principal debtor did not fail to pay. She added that she should be requested to pay in case the principal debtor fails to pay even if she committed herself to repay the debt without the prior seeking of the payment from the properties of HOTEL OKAPI.

“Banque Populaire du Rwanda” proved that Rumanyika Jean Marie Vianney and Nkunda Leatitia performed different transactions on different dates on loan account. Therefore, the bank had not negligently granted the loan because Nkunda who used to perform transaction on the account was not sued for usurpation of power. In addition, the bank stated that Nkunda Laetitia as the surety of the loan must jointly repay it with HOTEL OKAPI.

In this case also, “Banque Populaire du Rwanda” filed a cross appeal requesting to be paid the principal debt, late interests, procedural and advocate fees; while Nkunda Leatitia was requesting not to pay the loan because she is the surety and that the principal debtor is not insolvent.

Held: 1. When one of the signatories of the loan account uses it for the transfer of the loan he/she requested, it is considered as he/she has a mandate. The contract concluded in this circumstance, shall be fully executed by the presumed mandator. The so called bank account owner shall not pretend that he/she did not confer on him/her the power of attorney in case he/she did not disown or sue him/her for usurpation of power. Thus, the appellant shall perform the loan contract signed by the forced intervenor.

2. In case there is an apparent mandate, another party may presume that the contractor has a mandate and this may lead him/her not to assess the reliability of the power of attorney of the contractor. Therefore, the contract concluded in that context must be fully executed by the presumed mandator.

3. The surety is obligated to pay the creditor only in case of insolvency of the principal debtor. The payment must be first sought from the properties of the principal debtor unless the benefit of discussion has been waived. Thus, the fact that the forced intervenor accepted to pay the loan he guaranteed without seeking for the payment from the debtor's properties, the creditor has right to sue him/her on his/her own. Otherwise, they shall jointly pay the loan when the creditor chooses to sue them *in solidum*, which the defendant did. Thus they shall jointly pay the principal loan, its interests and advocate fees.

**Appeal lacks merit.
Cross appeal of the defendant has merit in part.
The cross appeal of the intervenor has no merit.
Costs to both parties.**

Statutes and statutory instruments referred to:

Law of 30/07/1888 relating to contract or obligation, articles 33 and 560.

No cases referred to.

Authors Cited:

Philippe, T. et Loïc, C., Droit de la Responsabilité, Dalloz Action, Paris, p.544.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] The case arises from the loan contract concluded on 29 April 2008 between “Banque Populaire du Rwanda”, Remera branch and HOTEL OKAPI which was represented by Nkunda Laetitia. The “Banque Populaire du Rwanda” stated that it requested HOTEL OKAPI to pay that debt and the latter responded that it is not aware of it as the contract was signed by an incompetent person.

[2] The “Banque Populaire du Rwanda” filed a claim before the Commercial High Court requesting it to order HOTEL OKAPI represented by Rumanyika Jean Marie Vianney with Nkunda Laetitia, the surety who was forced to intervene, to jointly pay the principal debt and interests computed up to 4 August 2009.

[3] The Commercial High Court ruled the case and decided that the claim of “Banque Populaire du Rwanda” has merit and ordered HOTEL OKAPI represented by Rumanyika Jean Marie Vianney and Nkunda Leatitia to jointly pay 31,490,040 Rwf constituting of the principal debt, its interests and procedural fees.

[4] HOTEL OKAPI appealed to the Supreme Court stating that the Commercial High Court disregarded its articles of association because it ruled without any proof that Nkunda has been representing HOTEL OKAPI while the “Banque Populaire du Rwanda negligently granted the loan to a person not representing HOTEL OKAPI. Nkunda who was force to intervene in this case, confirms that she concluded the contract in the name of HOTEL OKAPI and the money was deposited on its account and used in its interests.

[5] The case was held in public on 4 February 2014, HOTEL OKAPI represented by the Counsel, Bizimana Shoshi, and Nkunda Leatitia represented by the Counsel, Rwigema Aimable while “Banque Populaire du Rwanda” was represented by the Counsel, Ntaganda Kabare Festo.

II. ANALYSIS OF LEGAL ISSUES

a. To know who was granted the loan of 20,000,000 Rwf between HOTEL OKAPI and Nkunda

[6] Shoshi, the counsel for HOTEL OKAPI states that the Judge at Commercial High Court disregarded the articles of association of HOTEL OKAPI and decided that Nkunda represented it at the time of concluding the loan contract while it was provided with those articles of association that Rumanyika JMV was the legal representative of HOTEL OKAPI.

[7] He stated that “Banque Populaire du Rwanda” negligently concluded a contract with an incompetent person. He added that, stating that HOTEL OKAPI has been represented by different people is not sufficient, because its articles of association clearly prove that it is represented by Rumanyika JMV. Thus, it must bear the consequences.

[8] He states that HOTEL OKAPI did not get the loan being represented by Nkunda Leatitia. He added that the Hotel possesses the minutes of extraordinary meeting of 19 September 2007 of its members drawn up by Notary proving that the legal representative of HOTEL OKAPI is Rumanyika JMV. He added that Nkunda Leatitia only rented the Hotel, and fraudulently signed the contract but HOTEL OKAPI has made an agreement with her while HOTEL OKAPI had agreed with her that the rent fees would pay back the loan that HOTEL OKAPI had for the bank and it is in this context that the latter was misled.

[9] He stated that Nkunda was authorized to sign on the Hotel account because of compensation. With regards to the total amount of the loan, the counsel, Shoshi states that his client does not recognize the loan and there is no reason to dispute on its amount because it is not the grounds of appeal.

[10] Rwigema, the counsel for Nkunda states that the judge did not disregard the articles of association of HOTEL OKAPI but rather the HOTEL has had many representatives who do not appear in its articles of association, the way Nkunda was designated and latter get the loan as representative of HOTEL OKAPI. He added that the money was deposited on its account and withdrawn at different period to repay the loan that HOTEL OKAPI represented

by Rumanyika had for BCR as indicated by the bank statement n° 401.200.783.111 of HOTEL OKAPI where on 11 June 2008, it withdrew 12,098,747Rwf.

[11] He keeps stating that it is unconceivable how Rumanyika, as the legal representative of HOTEL OKAPI, continued performing regular transactions on this account and allowed himself and Nkunda to sign on it after the loan was granted. He added that it would be illogical for HOTEL OKAPI to decline its responsibilities while it used the money having Rumanyika as legal representative.

[12] Ntaganda, the counsel for “Banque Populaire du Rwanda” states that the loan application was made by HOTEL OKAPI represented by Nkunda. Additionally, Rumanyika and Nkunda Leatitia were authorized to withdraw from the account and it is clear that they have performed different transactions on different dates. Therefore, the bank had not negligently granted the loan because Nkunda who used to perform transaction on the account was not sued for usurpation of power. The current debt to be paid by HOTEL OKAPI and Nkunda Leatitia is 44,487,042 Rwf.

THE VIEW OF THE COURT

[13] The documents in the case file demonstrate that the loan contract was concluded on 28 April 2008 between HOTEL OKAPI and “Banque Populaire du Rwanda” and signed by Nkunda who accepted to be surety of the loan by virtue of the contract.

[14] Furthermore, the case file demonstrates that the account n° 401.200.783.111 of HOTEL OKAPI¹ was opened and signed by Rumanyika and Nkunda and it is on that account that the loan was deposited.

[15] The Court finds that when Nkunda signed for OKAPI to get the loan she did not sufficiently prove to “Banque Populaire Rwanda” that she was a legal representative of OKAPI. However, it is very clear that there are facts to which the bank referred to in trusting Nkunda as surety of OKAPI. The facts include the document demonstrating the signatories of OKAPI account, Rumanyika and Nkunda as were shown on that document as president and first vice president of board of directors respectively. In addition, it was on that account that the loan was supposed to be deposited and was so done. Furthermore, OKAPI did not disown Nkunda as mandatory.

[16] The Court notes that this is consistent with explanation of law scholars namely Philippe le Tourneau and Loïc Cadiet, who state that “when there is an apparent mandate, another party may presume that the contractor has a mandate and this may lead to him/her not to assess the reliability of the power of attorney of the contractor. The contract concluded in this context must be fully executed by the presumed mandator”².

[17] The Court finds that, as it was decided by the Commercial High Court, HOTEL OKAPI represented by Nkunda Leatitia must execute the loan contract it signed on April 28,

¹ See different documents in case file of judgment from page 84 to 88.

² “Le mandat apparent suppose la croyance légitime du tiers dans l’existence du mandat, qui suppose elle-même que les circonstances le dispensaient de vérifier les pouvoirs du pseudo mandataire. La totalité des effets de la convention conclue par le mandataire apparent doivent être exécutés par le prétendu mandant”.

2008 as it is provided by article 33 relating to contract or obligation stating that contracts made in accordance with the law shall be binding between parties³.

b. Concerning the cross appeal of “Banque Populaire du Rwanda”

[18] Banque Populaire du Rwanda requested that the amount of the debt should be computed up to date, for it to be paid 40,470,040 Rwf, and 4,017,004 Rwf for procedural and advocate’s fees.

[19] As requested by the “Banque Populaire du Rwanda”, the Court finds that it must be paid 39,670,040 Rwf computed up to 9 December 2013, consisting of 20,000,000 Rwf computed on ordinary interests of 14% and 4% of late interests in 1059 days as demonstrated by “Banque Populaire du Rwanda” in the document dated 9 December 2013 which is not contradicted by the opponents.

[20] The Court finds that “Banque Populaire du Rwanda” cannot be granted procedural and advocate’s fees as requested because they are excessive, yet it does not provide any justification. Therefore, the Court awards an additional amount of 500,000 Rwf in addition to 500,000 Rwf allocated in the first instance.

c. Concerning the cross appeal of Nkunda against HOTEL OKAPI.

[21] Rwigema, the counsel for Nkunda Laetitia requests the Court not to order her to pay the loan because she was surety and the principal debtor did not fail to pay. He added that Nkunda should be requested to pay in case the principal debtor fails too.

[22] Shoshi, the counsel for HOTEL OKAPI states that he has no comment on the cross appeal of Nkunda. He added that the decision of the previous judge must be considered, while Kabare Ntaganda Festo, the counsel for “Banque Populaire du Rwanda” states that Nkunda as the surety of the loan must jointly with HOTEL OKAPI repay the loan. He also requested 500,000 Rwf of procedural and advocate’s fees.

THE VIEW OF THE COURT

[23] The case file demonstrates that on 29 May 2008 “Banque Populaire du Rwanda”, Remera branch concluded the suretyship contract with Nkunda for securing the loan of 20,000,000Rwf and its interests granted to HOTEL OKAPI. She committed herself to repay the debt without the prior seeking of the payment from the properties of HOTEL OKAPI⁴.

[24] Concerning the issue of whether “Banque Populaire du Rwanda”, Remera branch has the right to sue the surety without necessarily suing the principal debtor, article 560 of contracts or obligations provides that the surety is obligated to pay the creditor only in case of insolvency of the principal debtor. The payment must be first sought from the properties of the principal debtor unless the benefit of discussion has been waived.

[25] The Court finds that in the contract signed by Nkunda provides that as the surety she undertook to pay the loan without necessarily seeking the payments from the properties of

³ Contracts made in accordance with the law shall be binding between parties. They may only be revoked at the consent of the parties or for reasons based on law. They shall be performed in good faith.

⁴ The article 3 of suretyship contract between “Banque Populaire du Rwanda”, Remera branch and Nkunda Laetitia

HOTEL OKAPI, the principal debtor. “Banque Populaire du Rwanda” has right to sue either the surety; Nkunda Leatitia or both *in solidum* as it did. Therefore, with regards to the concluded contract and on article 560 above mentioned, Nkunda and HOTEL OKAPI, represented by Rumanyika Jean Marie Vianney are condemned *in solidum*, to pay the principal debt and its interests.

[26] The Court finds worthy 500,000 Rwf of procedural and advocate’s fees as requested by “Banque Populaire du Rwanda” because it hired and paid the counsel at this instance.

III. DECISION OF THE COURT

[27] Decides that the appeal of HOTEL OKAPI represented by Rumanyika Jean Marie Vianney lacks merit.

[28] Decides that the cross appeal of “Banque Populaire du Rwanda” has merit in part.

[29] Decides that the cross appeal of Nkunda Leatitia lacks merit.

[30] Orders HOTEL OKAPI and Nkunda Leatitia and “Banque Populaire du Rwanda” to pay *in solidum* 40,670,040 Rwf (39,670,040 Rwf + 500,000 Rwf + 500,000 Rwf).

[31] Orders HOTEL OKAPI and Nkunda Leatitia to pay *in solidum* 44,400 Rwf of Court fees.