

## GAJU v. ACCESS BANK

[Rwanda SUPREME COURT – RCOMA 0138/12/SC (Nyirinkwaya, P.J., Hatangimbabazi and Hitiyaremye, J.) May 16, 2014]

*Contracts or obligation law – Securities – Suretyship contract – Express information to the surety – The surety cannot be held liable for the payment of a loan as long as he /she was not expressly informed about it, because it is the obligation of the creditor to provide him/her with information in order to allow him/her to know the terms of the obligation he/she commits to – Law of 30/07/1888 relating to contract or obligations, article 555.*

*Contracts or obligation law – Damages for being dragged into lawsuits and counsel fees – No damage for being unfairly sued could be granted to the party in the case when it has no merit, but if some of his/her grounds had merit in appellate level and that he/she hired an advocate, advocate fees are granted upon court's discretion.*

**Facts:** ACCESS BANK RWANDA Ltd granted a loan of 25,000,000Frw to Twagira Azzy, and this debt was secured by Gaju his wife; and this debt has been fully paid as agreed by both parties. Later, Azzy was granted another loan amounting to 12,000,000Frw by the same bank and it was secured by his house. He defaulted to pay the loan, and the bank sued him before the Commercial High Court together with his wife Gaju Cynthia, where the Court declared the claim of ACCESS BANK to be valid and both Twagira Azzy and Gaju lost the case.

Gaju was not satisfied with the decision and appealed against it before the Supreme Court claiming ignorance about the loan of 12,000,000Frw granted to her husband by ACCESS BANK. Furthermore, she stated that she did never guaranteed the new loan as she did for the first one and that there is no guarantee encumbered on her matrimonial house since it is not registered as provided for by the law, She finally requested damages for being dragged into lawsuits and counsel fees.

The Bank argues that it was unnecessary to inform Gaju about the second loan basing on the suretyship contract that she signed whereby she agreed to secure all other future loans her husband will be granted, thus holding both responsible for payment of that loan they are sued for. The bank argues in addition that the contract on encumbered house has no time expiry, and indeed, Twagira encumbered it as a matrimonial house and this was agreed upon by Gaju through the suretyship contract they signed.

ACCESS Bank ended stating that Gaju does not deserve to be awarded any damages because involving her in lawsuit was the only option for it to recover the debt.

**Held:** 1. In case a secured loan through suretyship was paid, and after the debt is paid the borrower is granted another loan; the surety is not considered as securing the second loan as long as she was not expressly informed about it, because it is the obligation of the lender to provide him/her with information in order to allow him/her to know the terms of the obligation he/she commits to.

2. When it is proven that the surety was not involved in the suretyship contract, the guaranty cannot be considered as valid since he/she was not informed for his/her engagement.

3. No damage for being unfairly sued could be granted to the party in the case when it has no merit, but if some of his grounds had merit in appellate level and that he/she hired an advocate, advocate fees are granted upon court's discretion.

**Appeal has merit.  
Judgment RCOM 0087/12/HCC is overturned.  
Court fees are charged to the respondent.**

**Statute and statutory instruments referred to:**

Law of 30/07/1888 relating to contract or obligations, article 555.

**No case referred to.**

**Authors cited:**

Thierry Bonneau, Droit Bancaire, 7<sup>é</sup> éd., Montchrestien, Domat Droit Privé, 2007, p. 525.  
Dominique Legeais, Le cautionnement, Edition Economica, 1995, pp.27-28, 40.

## **Judgment**

### **I. BRIEF BACKGROUND OF THE CASE**

[1] On 28/04/2006, ACCESS BANK RWANDA Ltd gave a loan of 25.000.000Frw to Twagira Azzy, and this debt was guaranteed by Gaju Cynthia as proven by the “certificate of security bonds on joint and indivisible liability” signed on the above mentioned date, and also in Article 11 of the contract made, it is said that she agreed that the mortgage of the matrimonial home issued by her husband would constitute the payment, in case Twagira fails to pay, but both parties to the case admitted that the debt has been paid.

[2] On 24/04/2007, the bank gave Twagira Azzy another loan of 12,000,000Frw, and both parties agreed that this debt would be paid within 24 months, and the borrower agreed to mortgage his house located in Kagarama Sector, Kicukiro District as a guaranty.

[3] Twagira Azzy breached the contract when he failed to perform his duties in the contract by paying the debt of 12,000,000Frw as agreed and, the bank sued him with Gaju Cynthia before the Commercial High Court. The case claim was registered on RCOM 0087/12/HCC and the case was decided on 29/06/2012, and found the claim of ACCESS BANK RWANDA Ltd with merit and both Twagira Azzy and Gaju Cynthia lost it, and were ordered to pay to ACCESS BANK RWANDA Ltd the amount of 25,230,942Frw and 1,009,550Frw for the proportional right.

[4] Gaju Cynthia was not satisfied with the decision and appealed against it before the Supreme Court arguing that ACCESS BANK did not respect her rights as a client with regard to the loan contract of 12,000,000Frw that this bank made with Twagira. She goes on to state that ACCESS BANK based on the strong position it had, and the articles which does not protect her as weaker party who is ignorant about the bank transactions and violated her rights. In addition, She states that she did not admit to the debt that she was not aware of, more especially when it could have follow the same process as the one she signed before in the loan contract she guaranteed for 25.000.000Frw. Therefore she finds her matrimonial

home not mortgaged as ACCESS BANK wished it to be because it is not registered as provided for by the law.

[5] The case was heard in public on 04/04/2014, Me Mugengangabo Jean Nepo pleading on behalf of Gaju Cynthia, while Me Bugingo Jean Bosco pleaded on behalf of ACCESS BANK, and Me Shema Gerard pleaded on behalf of Twagira Azzy.

## **II. ANALYSIS OF LEGAL ISSUES.**

### **1. Knowing whether Gaju Cynthia guaranteed the loan of 12,000,000Frw that Twagira Azzy was given by ACCESS.**

[6] The Counsel for Gaju Cynthia argues in appeal against the decision of the court that ordered her together with her husband Twagira to pay the loan of ACCESS BANK of 12,000,000Frw she was not aware of, that she did not guarantee it as it happened in the first loan of 25,000,000Frw.

[7] Gaju's counsel goes on to argue saying that the fact that Twagira Azzy went back and signed for another loan contract of 12,000,000Frw with the bank and the Bank confirming Gaju to continue being the guarantee to that second loan without notifying her, is regarded as violation of the right of the customer who is waiting for services as it is provided for in Article 33 of the Law relating to competition and consumer protection.

[8] He said that ACCESS BANK professionally knows what it does , and refusing to call and explain to Gaju their client about the second loan was violating her rights because she had be. Informed at least about the amount of the loan given, the period of payment, the percentage of interest rate per year and other loan related issues.

[9] The Counsel for ACCESS BANK argues that ACCESS BANK based on the contract Gaju Cynthia signed known as "the act of guaranty on joint liability" on the loan of 25,000,000Frw given to her husband, where in its first article, it is clearly stated that she will guarantee other loans that Twagira will take, and that Gaju after reading it as an intellectual person , she signed it freely committing herself,, while in its article 11, she consented together with her husband to give their house for guarantee, therefore, he states that the Bank found it not necessary for Gaju Cynthia to be notified of the second loan of 12,000,000Frw since there was a mortgage which was given before and it continued to be given as a guaranty.

[10] The counsel for ACCESS BANK in conclusion says that neither Gaju Cynthia nor her husband Twagira Azzy, none of them revealed that the mortgage was no more belonging to them, that's why they have to jointly be held responsible for the debt they are sued for.

[11] The counsel for Twagira Azzy on behalf of his client admits the loan and that he is ready to pay it, he also requests the court to sustain the judgement of the Commercial High Court saying that he is ready to start paying the loan after the decision is taken, that's why she desires that delayed payment interests be waved.

## **THE VIEW OF THE COURT**

[12] With regard to “Surety contract/ guaranty”, Article 555 of the civil code book III, provides that “the guaranty is not presumed, it has to be express that it cannot be extended far from the limits in which it was signed for”.

[13] The legal scholar in banking law Thierry Bonneau, in his book called “Droit Bancaire”, in the part regarding the right of the guarantor of the bank loan, explains that “the issuing of a loan joins two people, who may be having different capacities economically, that’s why the protection of the weaker party is an obligation in all activities concerning the loan even in others which are not related to it, the weaker parties have to be protected who are the borrower and the guarantor”<sup>1</sup>

[14] Regarding the guarantor (caution), that Legal scholar explains that the guarantor must be informed, not only at the time of the signature of that guaranty, but even during the execution of that contract, and the institution that has given the loan to the principal debtor, has to inform him/her that the borrower did not respect his/her obligations of paying the loan.

[15] This is similar to the statements of another legal scholar called Dominique Legeais<sup>2</sup> who explains that credit institutions have exclusive obligations to inform their clients and their guarantors and give evidence to justify that they have fulfilled that obligation. (*...une obligation d’information a été mise à la charge des établissements de crédit lorsque le cautionnement consenti par une personne physique ou morale est la condition d’un crédit accordé à une entreprise quelle que soit sa forme.....Quel que soit le cautionnement, le créancier tenu à un devoir d’information, doit...rapporter la preuve de l’exécution de son obligation*).

[16] Basing on the arguments by legal scholars mentioned above, to consider the guarantor to have expressly agreed the obligation of guaranteeing the borrower in a financial institution, the court finds that this institution must have given him/her enough information about that loan, for him/her to know and understand the nature and the amount of the obligation he/she commits him/herself to.

[17] The Court Finds that when Gaju signed the insurance contract on 28/04/2006, the loan she had expressly guaranteed was for 25,000,000Frw, and that this contract has been already paid as admitted by both parties to the case.

[18] With regard to the loan of 12,000,000Frw borrowed by Twagira after paying the first loan of 25,000,000Frw mentioned above, the court finds no proof of notification from ACCESS BANK, to justify that Gaju Cynthia was informed about the loan while the contract was in execution. The court finds also that ACCESS BANK notified her only in the letter of 20/03/2012 requesting her to pay basing on the contract she signed before when she guaranteed the loan of 25,000,000Frw, then Gaju also responded to it on 23/03/2012 through its counsel explaining how she is not informed about that debt, either by Twagira or the bank.

[19] The Court also finds no merit in the arguments presented by the bank that it was not necessary to notify Gaju Cynthia of the second loan of 12,000,000Frw given to Twagira

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<sup>1</sup> Thierry Bonneau, Droit Bancaire, 7<sup>e</sup> éd., Montchrestien, Domat Droit Privé, 2007, p.525, n°703: “la distribution du crédit met en rapport des parties dont la situation économique n’est pas forcément la même: l’une peut être en position de faiblesse par rapport à l’autre. La protection de la partie faible est alors un objectif à poursuivre dans le domaine des opérations de crédit comme il l’est dans d’autres domaines. Cette protection a deux destinations: le débiteur et la caution”.

<sup>2</sup> Dominique Legeais, Le cautionnement, Edition Economica, 1995, p.27-28, 40

based on article 1 of the contract of “Suretyship of joint and indivisible liability” she signed saying that she guarantees all the present and potential debts that Twagira would have, because the explanations given above demonstrate that this article does not exclude the obligations of the bank to share enough information with the guarantor relating to the loan, which information could use in exercising her legal rights of resolving the guaranty she/he has given when it deems necessary.

[20] Basing on what has been previously said, the Court finds no ground to base on deciding that Gaju is responsible of guaranteeing a loan contract of 12,000,000Frw, in case ACCESS BANK fails to prove that Gaju was notified about it, for her to know its amount. Therefore ACCESS BANK cannot request her to jointly pay anything resulting from that loan with Twagira. The court also finds that the loan as decided by the Commercial High Court should be paid by Twagira Azzy the borrower, who admits and is held liable for it.

## **2. Knowing whether Gaju has given the mortgage on the matrimonial house for the debt at issue in this case of 12,000,000Frw.**

[21] The counsel for Gaju Cynthia states that she gave no mortgage on the house for the loan of 12,000,000Frw given to Twagira by ACCESS BANK and her wish is to stop ACCESS BANK to continue considering this house as the mortgage for a debt of 12,000,000Frw she is not aware of.

[22] The counsel for ACCESS BANK argues that the house is still regarded as its mortgage more importantly that the commitment had no limited period, and Twagira mortgaged it as a matrimonial house, and that Gaju has agreed to it when she signed on the contract of guaranty on the loan of 25,000,000Frw. He states also that it is very clear in article 11 of that contract, where it is written that: *“la caution, épouse du débiteur principal, declare avoir pris connaissance de la promesse d’hypothèque que son conjoint a donné à la BANCOR, en couverture des engagement et donne son plein consentement à la constitution de ladite hypothèque”* and translated as the guarantee who is the spouse of the principal debtor declare to have knowledge of mortgage that her spouse has given to BANCOR, to cover the commitments and gives her full consent for the mentioned mortgage.

## **THE VIEW OF THE COURT**

[23] Basing on what has been said above, the Court finds that Gaju gave no guaranty for the loan of 12,000,000Frw which was given to Twagira by ACCESS BANK, it is understood that he gave no security for that loan as the ACCESS BANK argues it, because what is provided for in the article 11 of the guaranty contract made on 28/04/2006 only regards the guaranty of 25,000,000Frw, which has been paid as both parties to the case admit it, hence having no relation with the contract which was made thereafter on 02 May 2007 when ACCESS BANK gave a loan of 12,000,000Frw to Twagira without notifying Gaju of it for her comment.

### **1. With regard to the damages that Gaju Cynthia claims.**

[24] Gaju’s counsel claims damages of 2,000,000Frw for involving his clients in court proceedings and putting her on stress when she heard that her property might be auctioned, and claims also 5,000,000Frw for the lawyer’s fees.

[25] The counsel for ACCESS BANK objects for Gaju's claim saying that she agreed to be the guarantor for her husband who failed to pay, therefore he states that involving her in court was necessary as the only option the Bank had the court proceedings as she claims it, because nothing else would the bank do than seizing the court.

### **THE VIEW OF THE COURT**

[26] The Court finds that it was the right of ACCESS BANK to sue Gaju before the courts in case it considered it right, therefore, he claim of damages based on having been involved in court proceedings is baseless and holds no merit.

[27] The Court finds that since there is an argument that Gaju benefited from her appeal which required her to seek for an advocate to plead for her, she may be provided with, within the discretionary power of the court, 300,000Frw for the fees for the counsel who pleaded that case.

### **III. THE DECISION OF THE COURT**

[28] Decides that Gaju's appeal has merit.

[29] Decides that she gave no guaranty for the debt of 12,000,000Frw, and she did not give the mortgage on the house together with her husband Twagira.

[30] Decides that the decision of the judgment RCOM 0087/12/ HCC changes with regard to Gaju Cynthia, meaning that only Twagira Azzy is the one responsible to pay to ACCESS BANK RWANDA Ltd money amounting to 25,230,942Frw as decided by the Commercial High Court.

[31] Orders ACCESS BANK to pay to Gaju Cynthia 300,000Frw for the lawyer's fees.

[32] Orders ACCESS BANK to pay the court fees equal to 23,150Frw, failure to pay, it will be taken from its property through the government coercion.