

GAHIGA v. FORTIS BUSINESS HOLDINGS LLC

[Rwanda SUPREME COURT – RCA0010/11/CS (Kanyange, P.J., Mukandamage and Rugabirwa, J.) February 21, 2014]

Law determining the jurisdiction of courts – Application for Exequatur – Requirements for exequatur in Rwanda – The application for exequatur of a judgment in Rwanda is not granted when there was violation of the right to defence during the Court proceedings – The Constitution of Republic of Rwanda of 04 June 2003 as amended to date, article 18 – Organic Law N°51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of Courts, article 91 – Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 10.

Damages – Damages for being dragged into lawsuits – Counsel fees – Procedural fees – Damages for being dragged into lawsuits are not awarded when their basis were not established – Procedural and counsel fees are awarded in the court’s discretion in case their computations were not established.

Facts: Fortis Business Holdings LLC sued Gahiga in the High Court at Kigali requesting for the exequatur of judgment N°09103391 rendered by the Supreme Court of New York in Rwanda; in the default of Gahiga, the Court declared the application has merit and granted the exequatur of that judgment in Rwanda

Gahiga filed opposition against that judgment, consequently the court rejected his opposition claim, thus he appealed against that decision in the Supreme Court claiming that the court rejected his opposition while the case was heard in his default and moreover he was not lawfully summoned which deprived him the right to defense.

The Court declared that Gahiga was deprived of the right to defense as provided for by the Constitution of Rwanda, therefore he must be accorded right that is granted to the party whose the judgment was ruled in default, so that he can file an opposition claim of the judgment rendered by the High Court at Kigali

In his defence, Gahiga claims that he was ordered to pay 6,596,526.37USD, while the case was adjudicated without summoning him or being represented so that he can defend himself, even though the contract he concluded with Fortis Business Holdings LLC he consented to judgment by confession. Therefore he is of the view that those are contrary to the public order and general principles of the Rwandan laws which accords the right to defence.

Gahiga adduces that the judgment which Fortis Business Holdings LLC requests its exequatur in Rwanda, the same was also requested for it in Switzerland. Fortis Business Holdings LLC lost the case on both the first and appeal level, thus he prays that the Court applies the precedent of those courts

Gahiga also claims that Fortis Business Holdings LLC pays him moral damages, procedural and counsel fees and damages for being dragged into vexatious litigations.

Fortis Business Holdings LLC claims that all the requirements for the judgment to be executed in Rwanda were fulfilled because its court procedure does not violate the public order and the general principle of the Rwandan laws and that in the contract concluded between them, they asserted that it is not necessary that for Gahiga to appear and defend himself.

Fortis Business Holdings LLC also claims that the damages requested are baseless because his claims originate from the contract they concluded. Regarding the procedural and counsel fees, it argues that they should not be awarded to him because he does not produce the evidence for them.

Held: 1. The fact that the appellant was not summoned to defend himself in the case N°09103391, his right to defence was not violated and that right is public order procedure in the Rwandan laws, therefore that judgment cannot be executed in Rwanda because the defendants right were violated.

2. It is not necessary to examine whether the debt owed to Fortis Business Holdings LLC was reimbursed by Carl Linde because the judgment N°09103391 cannot be executed in Rwanda.

3. Damages for vexatious actions are not awarded if their basis were not established.

4. Procedural and counsel fees are awarded in the court discretion in case their computations were not established.

**Appeal has merit;
The court fees to be borne by the respondent.**

Statutes and statutory instruments referred to:

The Constitution of Republic of Rwanda of 04 June 2003 as amended to date, article 18.

Organic Law N°51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of Courts, article 91.

Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 10.

No case referred to.

Judgment

I. BACKGROUND OF THE CASE

[1] Fortis Business Holdings LLC sued Gahiga Médard in the High Court of Kigali applying for the exequatur of the judgment N°09103391 rendered by the Supreme Court of the state of New York in Rwanda.

[2] The Court delivered judgment RC0004/11/HC/KIG, in the default of Médard Gahiga, and held that the claim was lawfully instituted and has merit; therefore it ordered for its execution in Rwanda.

[3] After the delivery of the judgment, Médard Gahiga applied for the opposition and the Court rendered the judgment RC0038/11/HC/KIG, and held that the claim of opposition against the judgment RC0004/11/HC/KIG is not admissible and upheld the previous rulings. It motivated that Fortis Business Holdings LLC erred where it sued him unnecessarily and following the purpose in such claims and the issues to be examined by the judge as provided by the law, such claims are not conducted through contradictory process. Furthermore, Gahinga was not able to indicate the legal provisions he bases on to lodge the opposition of such cases.

[4] Gahiga appealed in the Supreme Court, claiming that the court rejected his opposition claim while he was not lawfully summoned which prevented him to exercise his right to defense.

[5] After examining whether the opposition claim of Gahiga for the judgment RC0004/11/HC/KIG should have been admitted by the High Court, this Court found that Gahiga was considered like a party while he was not summoned to plead. Therefore he was deprived of his right to defence in courts of law which is enshrined in article 18 of the Constitution of 04/06/2003 as amended to date, given that in such cases, parties are normally summoned to appear, thus it declared that he should be regain the right which is usually accorded to a party whose case was heard in absentia and be allowed to oppose the judgment RC0004/11/HC/KIG.

[6] The hearing of the case on merit resumed on 14/01/2014 in public whereby Fortis Business Holdings LLC was assisted by Counsel Mugisha Richard, while Gahiga Médard was assisted by Counsel Rwihandagaza Richard.

II. ANALYSIS OF LEGAL ISSUES

a. Whether the judgment N°09103391 delivered by the Supreme Court of the State of New York fulfills the requirements of exequatur in Rwanda

[7] Counsel Mugisha claims that Gahiga Médard and Robert Hirsch stood jointly and severally surety for Hirsch & Cie Company for the loan it got from Fortis Business Holdings LLC worth 5,250,000USD.

[8] In addition, in order to confirm the security, Gahiga stood surety for the loan of Hirsch & Cie on 06/10/2008 in accordance with article 111 Swiss Code of Obligations), whereby he even signed a guaranty agreement.

[9] Counsel Mugisha alleges in addition that in accordance to article 19 of the Guaranty Agreement, both party assented that in case of default of payment there will be confession of judgement in favour of the applicant in accordance to article of 3218 of Civil practice law and rules of the state of New York, for all unpaid amount of dollars, interests, procedural and counsel fees, which implies the hearing of the case was conducted without summoning him.

[10] He argues therefore that it was in that context that on 11/03/2009, Fortis Business Holdings seized the Supreme Court of New York state whereby through the judgment by confession N°09103391 Gahiga was ordered to pay a total of 6,596,526.37USD, therefore it requests that judgment to be executed in Rwanda because it is aware that Gahiga owns the property which can be realized for payment.

[11] As of the law, Counsel Mugisha adduces that following article 91 of the Organic Law N°51/2008 of 09/09/2008 determining the organization, functioning and jurisdiction of Courts, all the requirements for the exequatur to be carried in Rwanda were fulfilled because the process of its adjudication is neither contrary to the public order nor to the general principles of law, that the rendered judgment complies with the law and that in the agreement between both parties, they consented that it is not necessary for Gahiga to appear in order to exercise his right to defence.

[12] He further alleges that the entire loan for which Gahiga lost in the case, only 1,700,000USD was paid.

[13] Counsel Rwihandagaza representing Gahiga argues that on 08 September 2008, Hirsch & Cie Company was given a loan of 5,250,000USD by Fortis Business Holdings LLC which was secured by Robert Hirsch, Carl Linde and Gahiga guarantee, and when the loan was not paid on time, Fortis Business Holdings LLC sought payment from Gahiga Médard and Carl Linde.

[14] He further adduces that the judgment N°09103391 rendered on 11 March 2009 by the Supreme Court of the State of New York (*jugement par acquiescement – judgment by confession*), in which Gahiga was ordered to pay 6,596,526.37USD, was rendered without being served the summon so that he can appear to present his defence or being informed of the date of the hearing for him to be present or be represented.

[15] Therefore, Counsel Rwihandagaza is of the opinion that even though in the agreement Gahiga concluded with Fortis Business Holdings LLC he consented to the judgment by confession, the judgment for which the exequatur in Rwanda is requested is contrary to the public order and even general principles of law which are followed in Rwanda because Gahiga was not summoned and be given an opportunity to defend himself for his interests (violation of the right to defense), which is contrary to the provisions of article 18 of the Constitution of the Republic of Rwanda of 04/06/2003 as amended to date, as well as the provisions of article 10 of the Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, which provides that no judgment can be rendered without the party defending himself of being summoned.

[16] Regarding the loan, Counsel Rwihandagaza argues that Robert Hirsch was declared bankrupt on 14 July 2009 and Hirsch & Cie Company was declared bankrupt on 01 December 2011, therefore Fortis Business Holdings LLC declared its credit to the office in charge of Lausanne and it was accepted to be paid. He was paid 1,700,000USD by SAN Foundation which bought *Hôtel Megève* which belonged to Robert Hirsch. He further argues that there is another payment got from the sale of Carl Linde's property located in Tel-Aviv, Israel and in London, the total amount paid being 7,250,000USD, therefore there is no reason to apply for the exequatur for the mentioned judgment in Rwanda.

[17] He further adduces that Gahiga was surprised by the payment order of CHF 6,474,058.80 served to him on 01 October 2010 (*commandement de payer N°01022559*) pursuant to the mentioned judgment, of which he opposed. On 06 October 2011, Fortis Business Holdings LLC seized the First Instance Canton Court of Genève applying for the exequatur in Switzerland but it lost as demonstrated in the judgment rendered on 19 September 2012, as it appealed and also lost as demonstrated in the judgment rendered on 22 March 2013, and it has sued in Rwandan Courts for the cases it had lost. Therefore he prays that the court applies the precedents of those courts so that it rejects the exequatur of the above mentioned judgment in Rwanda.

THE VIEW OF THE COURT

[18] Regarding the exequatur of decisions taken by foreign courts, article 91 of the Organic Law N°51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of Courts provides that in examination of such applications the following shall be considered:

1° whether the foreign judgment does not contradict Public order or basic Legal tenets of Rwandan public laws;

2° whether the case was finally heard and determined in accordance with the laws of the country of origin;

3° whether a copy of the judgment is by all means authentic in accordance with such laws;

4° whether the right of defence was respected.

[19] The contention in this judgment concerns the judgment N°09103391 delivered on 11/03/2009 by the Supreme Court of the State of New York of which is applied to be executed in Rwanda was rendered contrary to the general laws of public order and the principles of law followed in Rwanda and also his right to defence was violated because Gahiga was not summoned and be given an opportunity to defend himself for his interests (violation of right to defence).

[20] As explained in the legal dictionary¹ “confession of judgment is. a written agreement in which the defendant in a lawsuit admits liability and accepts the amount of agreed-upon damages he/she must pay to plaintiff (person suing him/her), and agrees that the statement may be filed as a court judgment against him/her if he/she does not pay or perform as agreed. This avoids further legal proceedings and may prevent a legal judgment being entered (made) if the terms are fulfilled by defendant”.

[21] Regarding the right to defence, article 18 paragraph 2 of the Constitution of the Republic of Rwanda of 04/06/2003 as amended to date, provides that the right to be informed of the nature and cause of charges and the right to defence are absolute at all levels and degrees of proceedings before administrative, judicial and all other decision making organs.

[22] Regarding the Court procedures, article 10 of the Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure also emphasize the right to defence by providing that no party to the case shall be subject to a Court ruling without being heard or summoned.

[23] It is evident that in the case N°09103391 which was adjudicated by the Supreme Court of the State of New York, Gahiga Médard was not summoned to defend himself, thus it did not respect his right to defence, which is provided in the above mentioned legal provisions. Furthermore the required procedures for the case to be heard in the Rwandan courts were not respected as required by the mentioned procedure law.

[24] In accordance to the motivations stated above, the Court finds that the contested judgment in this case should not be executed in Rwanda because during it’s hearing the right of the defendant was violated and also it is contrary to the public order which regulates the court proceedings in the Rwandan Courts.

[25] That also concurs with the rulings of the judgment delivered 22 March 2013 by Court of Justice of Canton of Genève in Switzerland, on the similar claim where Fortis Business Holdings LLC sued Gahiga Médard, it held that a judgment delivered in foreign country cannot be executed in that country if it did not respect the laws of public order relating to court procedures, which provides that the party must be informed that he was sued, served

¹ <http://legal-dictionary.thefreedictionary.com/Confession+of+Judgment>.

with summon and submit his defence submissions. Thus it found that the Court of the State of New York rendered judgment against Gahiga without fulfilling those requirements, thus it rejected the appeal of Fortis Business Holdings LLC.

[26] Therefore the Court finds that it is not necessary to examine whether judgment N°09103391 rendered by the Supreme Court of the State of New York should not be executed in Rwanda on the basis that the loan of Fortis Business Holdings LLC reimbursed by Carl Linde.

b. The basis of the damages claimed by Gahiga Médard

[27] Counsel Rwihandagaza claims that Fortis Business Holdings LLC instituted vexatious action against Gahiga (Reckless and vexatious action), thus it should pay him moral damages amounting to 150,000,000Frw, and 20.000.000Frw for procedural and counsel fees.

[28] Counsel Mugisha argues that the moral damages which Gahiga claims from Fortis Business Holdings LLC are baseless because it's claims in this case originates from the agreements they concluded, regarding the procedural and counsel fees does not prove it, thus it should not be awarded to him.

THE VIEW OF THE COURT

[29] Regarding the moral damages amounting to 150,000,000Frw claimed by Gahiga, the court finds that there is no evidence that Fortis Business Holdings LLC instituted vexatious action for exequatur in Rwanda because it thought that it had a ground, thus they should not be awarded to him.

[30] Regarding the procedural and counsel fees of 20,000,000Frw, the Court is of the view that Gahiga does not prove how he computed them, therefore he is awarded 5,000,000Frw in the discretion of the Court.

III. DECISION OF THE COURT

[31] Holds that the claim of Fortis Business Holdings LLC lacks merit.

[32] Orders that judgment N°09103391 delivered on 11 March 2009 by the Supreme Court of the State of New York must not be executed in Rwanda.

[33] Orders Fortis Business Holdings LLC to pay Gahiga Médard 500,000Frw for the procedural and counsel fees.

[34] Orders Fortis Business Holdings LLC to pay 25,750Frw for the court fees.