NTEGEYE v. ECOBANK RWANDA LTD ET AL

[Rwanda SUPREME COURT – RS/REV/INJUST/COM0001/16/CS (Rugege, P.J., Kanyange, Gakwaya, Hitiyaremye, Ngagi and Karimunda, J.) September 9, 2016]

Contract – Transaction agreement – Whenever the litigants agree to terminate a dispute, this agreement should be binding on them given that the transaction agreement stands for a final judgment – Decree of 30/07/1888 relating to contracts or obligations, articles 591 and 595.

Damages – Moral damages – Pecuniary damages – Counsel fees – Procedural expenses – The litigant who loses the case is not awarded moral damages – In case the court rejects the claim of the plaintiff, the respondent is awarded procedural expenses and counsel fees as long as he/she hired the advocate services – The counsel fees are awarded upon the discretion of the court in case the requested amount is excessive.

Facts: In the year 1993, Ntegeye Bernard applied for a loan to BACAR S.A to develop his plot N°1200 located at Kacyiru-North, which he was granted. Later on, he applied for another one to complete of which he got a promise to be granted it. However, the Genocide against Tutsi broke out before he got the loan. After the Genocide, he approached BCDI S.A (now called ECOBANK Rwanda Ltd) to provide him with the money to complete his house. BCDI S.A gave him 50,000,000Frw after redemption of BACAR S.A's loan equal to 42,485,087Frw. Ntegeye Bernard states that the balance of 7,516,953Frw couldn't cover the cost of completion of his house which led him to apply for a loan increment. Before getting the feedback, the bank requested him to reimburse 8,527,976Frw of loan interests, meanwhile the reply regarding the loan increment request was communicated 11 months later whereby it was denied, and instead he was requested to immediately pay the loan which was evaluated at 73,836,942Frw without notice.

In order to reimburse the bank loan, Ntegeye Bernard signed an agreement with the bank on 09/02/2001, whereby both parties agreed that he allocates his house and garnishments valued at 45,607,038Frw, and the balance of the loan being 28,232,000Frw. In the sixth clause of the agreement, it was agreed that in case the bank decides to sell the house, Ntegeye Bernard will have pre-emption right for 10 years (10) (*droit de préemption/préférence*). On 11 April 2003, BCDI SA sold the house to Rwanda National Bank without serving notice to Ntegeye Bernard.

Ntegeye Bernard filed to the Arbitral Tribunal stating that BCDI S.A breached the agreement they had, by selling his house without notifying him, therefore he requested the cancellation of the sale and enjoyment of pre-emption right as well as ordering BCDI to pay damages and interests. He also requested the intervention of Rwanda National Bank alleging that any decision to be taken is likely to affect it.

The Arbitral tribunal adjudicated that BCDI SA did not breach the contract therefore there is no ground for the National Bank of Rwanda to intervene. It found further that the ground of pre-emption right raised by Ntegeye to be theoretical because it is obvious that he could not buy the house sold while he failed to reimburse the loan. However, it held that the Bank did not respect its obligation relating to pre-emption right and therefore it was charged to pay 5,000,000Frw in damages.

Unsatisfied with the decision, Ntegeye Bernard seized the High Court alleging that the arbitral tribunal erred in admitting the claim of BCDI SA, which led it to order him to reimburse 28,232,000Frw of the loan, yet it was a separate claim which ought to be filed to

another competent court because it can't be confused with a defence in merit of the case. He alleged in addition that the court was mistaken since the regulation of National Bank of Rwanda is not likely to bar the performance of the contract between him and the bank. This Court nullified the sale on the ground that Ntegeye had a known address to the extent that the bank would not fail to inform him about the sale of his house, especially that when it was sold, the period of 10 years specified in the contract was not yet expired to imply that Ntegeye was barred from the enjoyment of his pre-emption right.

The High Court decided in addition that Ntegeye did no longer owe any loan to BCDI SA and was awarded pecuniary and moral damages.

BCDI S.A. and National Bank of Rwanda appealed against the decision to the Supreme Court whereby they stated that the court ruled *ultra petita* whereby it cancelled the sale contract while it was not requested by the plaintiff. They allege in addition that the court ruled that Ntegeye did not owe any loan to BCDI SA due to the fact that it is not conversant with banking practices about the computation of the principal debt and interests.

The Supreme Court decided that Ntegeye still owes 48,102,687Frw to BCDI and this led him to submit his claim to the Office of the Ombudsman to examine the injustice he incurred in the judgment and the later wrote to the President of the Supreme Court praying him to order the case review due to injustice.

At the beginning of the hearing, ECOBANK Rwanda Ltd reminded the objection of inadmissibility of the claim of Ntegeye it once raised alleging that after the adjudication of the case in the Supreme Court, they managed to come up with a transaction agreement on its execution in which it was agreed that none of them would seek cancellation of the contract. On the other hand, Ntegeye submits that the contract they concluded relates to the execution of the judgment rather than transaction agreement.

Held: 1. The review due to injustice should not be admitted given that the transaction agreement he signed with ECOBANK Rwanda Ltd concerning the said judgment which was done after he submitted his claim to the Office of the Ombudsman, defeated that judgment.

2. Moral and pecuniary damages requested by the plaintiff, should not be examined as far as his claim was rejected and counsel fees requested are not awarded because he loses the case on this instance level.

3. The procedural expenses and counsel fees requested by ECOBANK Rwanda Ltd and National Bank Rwanda should be awarded because they ought to follow this case and hire the services of advocates, therefore each bank is awarded eight hundred thousand (800,000Frw) for procedural and counsel fees upon court's discretion.

Claim rejected.
Court fees to the plaintiff.

Statutes and statutory instruments referred to:
Decree of 30/07/1888 relating to contracts or obligations, articles 591 and 595.

No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] In 1993, Ntegeye Bernard applied for a loan in BACAR SA for developing the plot N°1200 located in Kacyiru-North and it was granted. Thereafter, he applied for another one which was intended to complete the construction, and he was promised to get it but the Genocide against Tutsi took place before it was disbursed. After the Genocide, he approached BCDI SA (which became ECOBANK Rwanda Ltd) to provide him with it. BCDI SA provided him with 50,000,000Frw after redeeming the loan amounting to 42,485,087Frw from BACAR SA. Ntegeye states that the balance of 7,516,953Frw was not enough to complete his building and this made him to apply for an additional loan. Before getting the feedback, the Bank instructed him to pay 8,527,976Frw for the interests and rejected the application for additional loan after 11 months. However, he was instructed to pay immediately and without notice the whole debt which amounted to 73,836,942Frw.

[2] For the purpose of servicing the loan, Ntegeye Bernard made an agreement with the Bank on 09 February 2001 and agreed to give it the building and the materials therein, which had the total value of 45,607,038Frw, and remained a loan balance of 28,232,000Frw. Clause 6 of the agreement provided Ntegeye with the preferential right in case the Bank wanted to sell that house within a period of ten years. On 11April 2003, BCDI SA sold that house to the National Bank of Rwanda without notifying Ntegeye Bernard.

[3] Ntegeye Bernard seized the arbitral court arguing that BCDI S.A breached clause 6 of the agreement, and sold his house without informing him. He claims that any transaction carried over the plot N°1200 located in Kacyiru-North be nullified and the preferential right provided in the agreement be respected. In addition he requests that BCDI S.A pay damages and interests. Furthermore Ntegeye Bernard requests for the intervention of the National Bank of Rwanda arguing that it is likely to be affected by any decision taken.

[4] Within the award rendered on 02 December2005, the arbitral court held that there is no ground for National Bank of Rwanda's intervention, and also the agreement surrendering the house to BCDI SA was concluded to service a part of the loan which Ntegeye Bernard owed to the Bank since he is the one who gave the title deeds of that house encompassing the cadastral plan, lease contract and construction permit. Thus it ruled that BCDI S.A did not breach the agreement, because even at the time Ntegeye Bernard requested that clause 6 of the agreement be executed he had not yet paid the debt he owed to the Bank, and also that he did not inform the Bank about his situation since the signature of that agreement. Furthermore the house was sold pursuant to the Regulation of the National Bank of Rwanda N°05/2000 of 29/03/2000, therefore it concluded that no clause of the agreement entered between that bank and the National Bank of Rwanda or what has been done on the plot N°1200 since the day it was sold, is in contradiction with the law.

[5] In addition, the court found that the defense of Ntegeye Bernard which relies on pre-emption right is only theoretical, because he couldn't have bought the house that was sold at 100,000,000Frw while he failed to reimburse the loan amounting to 28,232,000Frw. However, the court blamed the bank to have not honored its obligation of communication to Ntegeye Bernard about the mentioned sale; consequently, it was ordered to pay 5,000,000Frw.

[6] Ntegeye Bernard was not satisfied with the decision, and he seized the High court alleging that the arbitral tribunal erred in admitting the claim of BCDI SA, which led it to order him to reimburse 28,232,000Frw of the loan and yet it was a separate claim which

ought to be submitted to another competent court because it can't be confused with a defense in merit of the case. He alleged in addition that the court mixed up the situation because the regulation of National Bank of Rwanda is not likely to bar the performance of the contract between him and the bank.

[7] In the judgment RCOMA0020/05/11/HC/KIG rendered on 31 May 2007, the court found that since Ntegeye Bernard signed contracts of loan with BCDI S.A, he gave the bank his address at Po.Box.445 KIGALI, C/O PNUD-KIGALI, Po.Box.2920 KIGALI, C/O Birasamashyo Augustin or at Po.Box.910 LUANDA-ANGOLA, and this shows that the bank would have found him at one of these addresses if it wanted to communicate about the house selling issue and that the 10 years period had not yet expired to imply that Ntegeye Bernard lost the pre-emption right.

[8] The court found further that BCDI S.A sold the house while Ntegeye Bernard owed nothing to the bank because the bank statement of the account N°110-2534703-9 indicates that on 31 December 2002 there was no loan that Ntegeye Bernard owed the bank. The court decided that BCDI S.A shouldn't have based on Rwanda National Bank regulations that were relied on by selling the house because those regulations are not supposed to defeat the agreements signed in the presence of the notary which became binding. It ordered the termination of the agreement that was titled "*acte de cession d'immeuble*", and Ntegeye Bernard was given back his house and it awarded him 6,000,000Frw of pecuniary damages in terms of the rent and 5,000,000Frw for moral damages.

[9] BCDI S.A and Rwanda National Bank lodged an appeal against this decision to the Supreme Court, arguing that:

a) The Supreme Court ruled *ultra petita* because none of the parties requested the termination of the agreement of 09 February 2001;

b) Ntegeye Bernard cannot rely on the fact that he was not aware of the situation of his loan yet he was communicated on 30 March 2001 through a notice reminding him about the loan he had, and asked to explain how he will pay and his lawyer Birasamashyo Augustin received the notice to pay on 26 April 2001;

c) The High Court erred in stating that Ntegeye Bernard owed no debt to the bank basing on bank account statement, which indicates that it was conversant with the functioning of banks regarding the computation of the loan and interests;

d) There was misinterpretation of the Regulation N°5/2000 of the Rwanda National Bank whereby it held that it cannot nullify the agreement signed in the presence of the notary while it cannot contradict the said regulation because it is meant to implement articles 34 and 35 of the law N°08/99 of 18/06/1999 governing banks and other financial institutions.

[10] In the judgment N°RCOMAA005/07/CS rendered by the Supreme Court on 30 July 2010, the court found that:

a) The court ruled *ultra petita* because the High Court held that there was dol in sale contract between BCDI S.A and the Rwanda National Bank, even though evidence should have been provided for that, and in spite of resolving it, it terminated the one concluded between Ntegeye Bernard and BCDI S.A which had no link with it;

b) In order to transfer the ownership of the house from Ntegeye Bernard, there have been negotiations, whereby Birasamashyo Augustin with full power of attorney

signed in lieu of Ntegeye Bernard, and it was agreed that Ntegeye Bernard shall hand his house to BCDI S.A, and its price be deducted from the loan he owed the bank amounting to 73,839,942Frw, and the balance of the loan being 28,232,000Frw. This agreement does not fall within the provision of article 17 of the Decree Law of 15/05/1922 governing mortgages;

c) The agreement signed between Ntegeye Bernard and BCDI S.A should be considered as a result of both party consent meant to find a way to service the loan, especially that even the Legislator found that such agreement does not impede the interests of the mortgagee as it is emphasized in article 2 of the Law No13/2010 of 07/05/2010 modifying the Law N°10/2009 of 14/04/2009, because what was prohibited to be included in the mortgage agreement was allowed, therefore the requirements for the contract concluded on 09 February2001 to be validly considered as sale, were met.

[11] The Supreme Court concluded that Ntegeye Bernard owed to the BCDI S.A a loan, because after assessing all documents in relation to the loan, and Ntegeye Bernard's bank accounts in BCDI S.A, the expert Habimana José found that there is no evidence showing that the loan of 28,232,000Frw was paid and 70,000USD which was deposited on an account is not a credit balance instead it is a credit transit because deposits were done progressively in low amounts, and therefore, decided that Ntegeye Bernard must pay BCDI S.A 48,102,687Frw and 4% of prorated fees.

[12] Ntegeye Bernard wrote to the Ombudsman Office requesting to examine the injustice occurred in the judgment rendered on 30 July 2010. On the 18 June 2014 the Ombudsman Office wrote to the President of the Supreme Court requesting the review due to injustice of the judgment N°RCOMAA005/07/CS delivered on 30 July 2010.

[13] In the order N°011/2016 of 29/02/2016, the President of the court requested the Supreme Court registry to schedule the hearing of this case N°RCOMAA005/07/CS rendered by the Supreme Court on the 30July 2010 in order to examine if there was injustice.

[14] The hearing was held in public on the 15 June 2016, whereby Ntegeye Bernard was represented by Counsel Zawadi Stephen and Counsel Mubangizi Frank, ECOBANK Rwanda Ltd represented by Counsel Munyaneza Remy and Rwanda National Bank was represented by Counsel Byiringiro Jacques, Counsel Cyiza Clément and Counsel Murego Jean-Léonard.

[15] At the beginning of the hearing, ECOBANK Rwanda Ltd reminded the objection of inadmissibility of the claim of Ntegeye Bernard it raised because after the delivery of the judgment by the Supreme Court, they agreed on its execution and both parties agreed that none of them shall seek cancellation of this agreement.

II. ANALYSIS OF LEGAL ISSUES

II.1. Whether transaction agreement prevents the admissibility of the claim of case review due to injustice.

[16] Counsel Munyaneza Remy for ECOBANK Ltd states that after the delivery of the judgment by the Supreme Court, both parties concluded a transaction agreement, whereby each party renounced to some of its interests and consequently ECOBANK Rwanda Ltd accepted to renounce 14,102,687Frw, and stopped the process of judgment execution, in

order to avoid the case to be subject to case review or review due to injustice, and they agreed that none of them would seek the termination of this contract. When the contract was signed, ECOBANK Rwanda Ltd was not aware that Ntegeye Bernard submitted his request to Ombudsman Office, therefore, he prays to this court to rely on article 583 of civil code book III, and reject the claim.

[17] Counsel Cyiza Clément, Counsel Murego Jean-Léonard and Counsel Byiringiro Jacques, representing Rwanda National Bank, allege that the transaction agreement was meant to settle the execution of the judgment rendered by the Supreme Court and Ntegeye Bernard signed it with capacity and status to do so and was aware of the effect which is amicable settlement with ECOBANK Ltd in order to avoid the public auction of his properties, and this led ECOBANK Ltd to allow him to pay a small amount on the sum he was ordered to pay by the court. Therefore, they request the court to consider the transaction agreement and dismiss the claim of Ntegeye Bernard.

[18] Ntegeye Bernard states that he is the one who suggested amicable agreement with the bank, ECOBANK Rwanda Ltd agreed to be paid 34,000,000Frw because it was aware that it was for nothing, and he paid it in order to avoid the public auction of his valuable properties, and this has nothing to do with the request to address the injustice he submitted to the ombudsman office.

[19] Mubangizi Frank the counsel for Ntegeye Bernard argues that the execution of the judgment should not be confused with the case review due to injustice; that considering the signed agreement as a transaction would be reclassification because no transaction occurred, instead the execution of the judgment. He explains that Ntegeye Bernard submitted his request to the Ombudsman Office in 2012 while the transaction agreement was signed in 2014, therefore if he concluded a transaction with ECOBANK Rwanda Ltd, he would have deprived himself with the right to action, and the fact that he did not do so, indicates that the contract agreement was not a transaction. He concludes that ECOBANK Rwanda Ltd and the National Bank of Rwanda do not challenge the claim submitted to the Ombudsman Office, therefore he requests this court to admit the claim of Ntegeye Bernard.

[20] Counsel Zawadi Stephen for Ntegeye Bernard, states that the injustice reported to the Ombudsman Office prevails over the transaction agreement, that what happened between Ntegeye Bernard and ECOBANK Rwanda Ltd was a way of executing the judgment without prejudicing Ntegeye Bernard, and this agreement slightly reduces injustice and that when it was signed, ECOBANK Rwanda Ltd had already received a letter that Ntegeye Bernard wrote to the Ombudsman Office, he therefore realizes that the court has nothing to examine about "transactional act" instead it should admit the case submitted to it, and redress injustice that Ntegeye Bernard is undergoing.

OPINION OF THE COURT

[21] Article 81, paragraph 1 of the Organic Law N°03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court which states that: "The review of a final decision due to injustice shall only be applied for on any of the following grounds:

> 1° when there is unquestionable evidence of corruption, favoritism or nepotism that were relied upon in the judgment and that were unknown to the losing party during the course of the proceedings;

2° when there are provisions and irrefutable evidence that the judge ignored in rendering the judgment;

3° when the judgment cannot be executed due to the drafting of its content".

[22] Article 591 of the civil code book III suggests that: "The transactions between parties have the authority of *res judicata*. They cannot be challenged because of an error of law or a lesion.

[23] Article 595 of the same code reads that: "The transaction agreement on a final judgment, of which the parties or one of them had no knowledge of its existence, is null. If the judgment ignored by the parties was subject to appeal, the transaction will be valid."

[24] The documents in the case file indicate that in the judgment N° RCOMAA0005/07/CS rendered by the Supreme Court on the 30 July 2010, it was examined *in limine litis* whether the High Court of the Republic ruled *ultra petita* when it decided the cancellation of agreement titled "*acte de cession d'immeuble*", it examined again whether ECOBANK Rwanda Ltd purchased the mortgage it was given by Ntegeye Bernard in order to reduce or exhaust the loan. It further examined if really no 70,000US dollars Ntegeye Bernard transited through his account open in ECOBANK Rwanda Ltd in order to service the loan. On all these issues the court found the appeal lodged by ECOBANK Rwanda Ltd with merit, and then examined the issue relating to the balance of the loan which Ntegeye Bernard owes to ECOBANK Rwanda Ltd. Hence, it decided that at the date of the adjudication of the case, (on 30 July 2010) the said loan amounted to 48,102,687Frw.

[25] Furthermore, the documents in the case file indicate that the Supreme Court examined the appeal lodged by the Rwanda National Bank requesting to decide that there exists no irregularity in the purchasing contract of the house it concluded with ECOBANK Rwanda Ltd, and the court found it with merit, and concerning the cross appeal of Ntegeye Bernard requesting to examine whether the agreement between him and ECOBANK Rwanda Ltd was implemented, it dismissed his claim because it was not examined by previous courts.

[26] In addition, the case file contains the transaction agreement, signed on 06 March 2014 between Ntegeye Bernard and ECOBANK Rwanda Ltd indicating that both parties agreed on the execution of the judgment N° RCOMAA0005/07/CS rendered by the Supreme Court on 30 July 2010, and whereby its first clause stipulates that Ntegeye Bernard accepts to pay 34,000,000Frw in order to solve the dispute with ECOBANK Rwanda Ltd as mentioned in the case N° RCOMAA0005/07/CS ("*Monsieur Ntegeye Bernard s'engage à verser la somme de 34,000,000Frw à ECOBANK Rwanda en vue de liquider tous ses engagements qu'il a envers ECOBANK Rwanda Ltd en rapport avec le jugement ci haut cité*"), while its 3rd clause states that both parties agreed on the execution of the judgment N° RCOMAA0005/07/CS, without any duress to sign the transaction agreement with knowledge of its effects, and agreed to follow and respect it with good faith (*les parties s'engagent à clôturer la mise en application de l'arrêt RCOMAA0005/07 de la Cour Suprême et à exécuter de bonne foi la transaction. Les parties s'interdisent expressément de remettre en cause la mise en application de la transaction et de ce fait les parties rappellent connaitre pleinement la portée de leur engagement volontaire auquel elles ont donné un consentement libre et éclairé.*» (cote 95).

[27] The court finds that the 3rd clause of the transaction agreement Ntegeye Bernard had with ECOBANK Rwanda Ltd on 06 March 2014, clarifies that all disputes he had with the

bank were settled, and this indicates that for he has been a party to that case, the transaction agreement should remain valid in whole, and indeed, Ntegeye Bernard admitted that he signed the transaction agreement being aware of its consequences. Furthermore, he admitted its existence in the course of the hearing, and all these indicate that the said agreement should be considered as a final judgment and could not be terminated based on misinterpretation of the law or lesion by one of the parties. Therefore the arguments of Ntegeye Bernard and his counsels that the agreement concluded with ECOBANK Rwanda Ltd relates to the execution of the judgment instead of a transaction lack merit.

[28] The court realizes furthermore that Ntegeye Bernard had concluded the transaction agreement with ECOBANK Rwanda Ltd after reporting to the Ombudsman Office his claim due to injustice because it was submitted in 2012, while he entered into transaction with ECOBANK Rwanda Ltd on 06 March 2014, whereby he agreed to settle all disputes relating to the execution including the ones submitted to the Ombudsman Office (without reserve). This implies that when he settled the disputes with the bank, he was conscious that he did not undergo the injustice otherwise, he would have indicated the grounds which were subject to the transaction agreement, therefore, given that he did contrary and instead after the transaction agreement, declared that it only concerns the loan declared by the court; that indicates contradiction because he agreed to amicable settlement on all parts of the judgment well aware that they contain no injustice .

[29] The court finds that pursuant to the foregoing motivation and on the legal provision cited above, the claim for the review of the judgment RCOMAA0005/07/CS rendered by the Supreme Court due to injustice filed by Ntegeye Bernard on the 30 July 2010 should not be admitted on the ground that the transaction agreement concluded with ECOBANK Rwanda regarding this entire judgment and concluded after reporting his case to the Ombudsman Office replaced that judgment.

II.2. Whether damages requested by ECOBANK Rwanda Ltd, National Bank of Rwanda, and Ntegeye Bernard should be awarded.

[30] Counsel Munyaneza Remy representing ECOBANK Rwanda Ltd, alleges that Ntegeye Bernard dragged the bank in unnecessary trials in breach of the transaction agreement therefore should be ordered to pay 2,000,000Frw for procedural and counsel fees.

[31] Counsel Byiringiro Jacques representing Rwanda National Bank states that this bank was dragged into unnecessary lawsuits so he requests for procedural and counsel fees amounting to 2,000,000Frw.

[32] Counsel Mubangizi Frank and Counsel Zawadi Stephen assisting Ntegeye Bernard , stated in the preliminary hearing that it is their client who deserves to be awarded 50,000,000Frw of moral damages, 493,584USD for pecuniary damages and 15,000,000Frw corresponding to hiring the service of two advocates.

OPINION OF THE COURT

[33] The court realizes that it should not examine moral and pecuniary damages claimed by Ntegeye Bernard, given that his claim was rejected, and concerning the counsel fees he is requesting for, they are not awarded because he has lost the case at this instance level.

[34] The court finds that, regarding procedural and counsel fees requested by ECOBANK Rwanda Ltd and the National Bank of Rwanda, they deserve to be awarded them because they had to follow up their case and hired the service lawyers, therefore each one is awarded eight hundred thousand (800,000Frw) for procedural and counsel fees fixed upon court's discretion.

III. THE COURT'S DECISION

[35] It finds with merit the objection raised by ECOBANK Rwanda Ltd;

[36] It dismisses the claim of review of the judgment N^{o} RCOMAA0005/07/CS rendered on 30 July 2010 by the Supreme Court due to injustice filed by Ntegeye Bernard;

[37] It orders Ntegeye Bernard to pay ECOBANK Rwanda Ltd procedural and counsel fees amounting to eight hundred thousand (800,000Frw);

[38] It orders Ntegeye Bernard to pay the Rwanda National Bank the procedural and counsel fees amounting to eight hundred thousand (800,000Frw);

[39] It orders Ntegeye Bernard to pay court fees of 100,000Frw.