

## MUJAWIMANA ET AL v. BANK OF KIGALI Ltd (B.K)

[Rwanda SUPREME COURT – RCOMAA0008/14/CS (Kayitesi Z. P.J., Kayitesi R. and Nyirandabaruta, J.) July 22, 2016]

*Mortgage – Immovable properties – The value of the mortgage contract – Registration of mortgage – The legally concluded mortgage contract binds the parties even when the mortgage was not registered – Decree Law of 30/07/1888 relating to the contracts or obligations, articles 33 and 34*

*Mortgage – Annulment of mortgage contract – The fact that rights holders on the property which was attached as a mortgage in the mortgage loan contract did not consent to it, implies that the mortgages were illegally furnished – Organic Law N°08/2005 of 14/07/2005 determining the use and management of land in Rwanda, articles 35 and 38 – Law N°22/99 of 12/11/1999 to supplement book I of the civil code and to institute part five regarding matrimonial regimes, liberalities and successions, articles 21 and 35.*

**Facts:** Late Nyagatare Théogène got various loans from Bank of Kigali Ltd whereby he mortgaged his house and he died before the entire reimbursement of the credit. This led the Bank of Kigali suing his heirs before the Commercial High Court requesting for reimbursement of those loans, consequently, the Court ordered them to reimburse them.

The heirs of the deceased and his wife initiated a lawsuit to the Commercial Court of Nyarugenge requesting for the annulment of the mortgage contract on the ground that they were not informed of it nor did the wife signed it.

The Court ruled that there cannot be annulment of mortgage contract on the ground that it has never existed because they were not registered in the mortgage registry held by the Registrar General, thus it ordered them to pay damages and counsel fees to the Bank of Kigali Ltd.

They appealed to the Commercial High Court claiming that the previous Court disregarded the precedents set in the similar cases. This Court also held that there was no mortgage contract concluded between the deceased and the Bank, thus it ordered them to pay the bank damages in addition to those awarded by the previous Court. Furthermore, the heirs of Nyagatare lodged an appeal to the Supreme Court alleging that the Court has declared the mortgages inexistent as long as they have not been recorded in the registry held by the Registrar General, yet the mortgage contract was concluded before the establishment of the office of Registrar General as well as the enactment of the Law on mortgages.

They further state that laws providing for the requirement of prior consent of family members to the constitution of mortgage were not respected since Nyagatare Théogène furnished the properties in mortgage in favor of the Bank of Kigali Ltd without the consent of his wife and children. The Bank states that there had been no constitution of mortgages by the deceased because what happened is the conclusion of mortgage loan contract.

The heirs of the deceased prayed again for damages for being dragged into unnecessary lawsuits while the Bank of Kigali Ltd states that they should not be paid since their claim lacks merit.

**Held:** 1. The legally concluded mortgage contract binds the parties even when the mortgage was not registered. Therefore none could deny the existence of the mortgage contract between Nyagatare Théogène and the Bank of Kigali Ltd while it is evidenced by documents.

2. The fact that rights holders on the property which was attached as a mortgage in the mortgage loan contract did not consent to it, implies that the mortgages were illegally furnished. Therefore, the mortgage contract between the Bank of Kigali Ltd and Nyagatare Théogène must be quashed, because his spouse did not sign on it.

3. The fact that Mujawimana Rose, Tuyisenge Rachel and Ishimwe Leah Aliah incurred expenses for follow-up of these proceedings by hiring the lawyers, they should be awarded damages. However as what they claiming for are inordinate, they should be awarded in the discretion of the Court

**Appeal has merit.  
Court fees to the defendant.**

**Statutes and statutory instruments referred to:**

Organic Law N°08/2005 of 14/07/2005 determining the use and management of land in Rwanda, articles 35 and 38.

Law N°45/2011 of 25/11/2011 governing contract, articles 64, 65.

Law N° 22/99 of 12/11/1999 to supplement book I of the civil code and to institute part five regarding matrimonial regimes, liberalities and successions, articles 21 and 35.

Decree Law of 30/07/1888 relating to the contracts or obligations, articles 33, 34 and 258.

**Cases referred to:**

Rwigema v. ECOBANK, RCOM0001/07/CS, rendered by the Supreme Court on July 24, 2008.

**Authors Cited:**

Gael Piette, Droit de sûreté, 9<sup>ème</sup> éd. Université moments Ltd. Mouléno cedex.2015, p.142;147.

Francois T'S kint, Sûretés et principes généraux du droit de poursuite des créanciers, Larcier, 200, p.312.

Alain Bénabent, Droit des obligations, 14<sup>ème</sup> éd., LGDJ, 2014, p.176.

## **Judgment**

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

[1] Before his death Nyagatare Théogène got a loan from the Bank of Kigali whereby he mortgaged his house and he died before the entire reimbursement of the credit. In the judgment RCOMA0295/11/HCC delivered on 14 July 2012 by the Commercial High Court, his heirs were ordered to reimburse. His wife Mujawimana Rose, as well as his children Tuyisenge Rachel and Ishimwe Leah contested the loan, stating that they were not informed nor assented to it, consequently they cannot be held responsible. This is the reason for which they initiated a claim to the Court requesting the invalidation of the mortgage contract.

[2] On 13 November 2013, the Commercial Court of Nyarugenge rendered the judgment RCOMA0722/13/TC/NYGE whereby it decided that the mortgage stated by the applicants is invalid because it was not registered in the mortgage registry held by the Registrar General, therefore, it held that the termination of an inexistent contract is impossible, and ordered the defendants to pay the bank of Kigali damages and counsel fees amounting to 600,000Frws.

[3] Mujawimana Rose, Tuyisenge Rachel and Ishimwe Leah appealed to the Commercial High Court arguing that the Court confused the conclusion of the contract with its registration, and in addition, there have been serious contradictions in the arguments of the court as well as the disregard of the precedents.

[4] The Commercial High Court rendered the judgment RCOMA0552/13/HCC on 12 December 2013, whereby it decided that there was no mortgage contract between the Bank of Kigali Ltd and Nyagatare Théogène, and ordered the appellants to give the Bank of Kigali Ltd 400,000Frw of counsel fees in addition to 600,000Frw incurred at the first instance court as well as damages amounting to 1,000,000Frw.

[5] Unsatisfied with the decision of the court, Mujawimana Rose, Tuyisenge Rachel and Ishimwe Leah lodged an appeal to the Court Supreme arguing that there was disregard of evidence, laws and precedents, thus not awarding them damages.

[6] The hearing was held in public on 07 August 2016, whereby Mujawimana Rose, Tuyishime Rachel and Ishimwe Leah Aliah were represented by Counsel Mutabazi Abayo Jean Claude, and the Bank of Kigali Ltd was represented by Counsel Rusanganwa Jean Bosco.

## **II. ANALYSIS OF THE LEGAL ISSUE**

**The issue to be analysed in this judgment is whether there has been the mortgage contract between Théogène Nyagatare and the Bank of Kigali Ltd, if it is so, it deserves to be invalidated, as well as requested damages.**

### **1) Whether there has been a mortgage contract between the Bank of Kigali Ltd and Nyagatare Théogène.**

[7] Mutabazi Abayo Jean Claude, the Counsel, states that the Court held that there has been no mortgage contract because it is not registered in the registry of the Registrar General, while this contract took place because even the opponent which is the Bank of Kigali Ltd admits it, apart from that it alleges that it was not registered. He adds that this contract took place before the existence of the office of the registrar General as well as the law on mortgages. He states that the mortgaged properties are known, as well as their location and the followed procedure. He proceeds that the mortgage contract exists between two parties, and its validity does not depend on the intervention of the Registrar General. He states that the existence of the contract is proved by the fact that the documents of the House located at Remera in the plot N°2685, those of the house located in Rwamagana District, other property furnished in mortgage by Nyagatare situated at Kabare-Muhazi, the house located in the plot N°1647 in Kigabiro-Rwamagana, are held by the Bank of Kigali because they constitute its mortgage. Furthermore, he alleges that the registration requirements provided for by the law are carried out after the consent of the parties to the mortgage.

[8] Counsel Mutabazi Abayo Jean Claude pursues that according to the law enacted in 2009 and amended in 2010, the obligation of mortgage registration lies to the Bank of Kigali, given that it is the one holding the titles of the mortgaged properties, therefore, it should not rely on its failure to do so and allege the contract to be invalid.

[9] Counsel Mutabazi Abayo Jean Claude, explains the consequences of defaulting on registering the mortgages by stating that if the debtor furnished the mortgage but without being registered, when he defaults to pay, the Bank resorts to the court whereby the mortgage is auctioned by the bailiff, while in case the mortgage is registered, the execution is done without recourse to judicial proceedings. He argues that before the establishment of the office of the Registrar General, whenever a bank was furnished a mortgage, article 53 of the Law relating to the civil, commercial, labour and administrative procedure, had to be relied on for the auction without recourse to judicial proceedings, therefore, concerning the contract between the Bank of Kigali and Nyagatare Théogène, the duty to register the mortgage lied to the bank given that it is mentioned in their contract that *“le client autorise expressement la Banque à requérir au près de Monsieur le conservateur des Titres Fonciers l’inscription hypothécaire de 1er rang sur les biens décrits ci-avant....”*. This indicates that it is obvious that Nyagatare mandated the bank to register the mortgage. Therefore, the failure for the bank to do so implies that it cannot auction it for its reimbursement, instead, it has to resort to the courts of law and wait for the ruling, and the bank cannot allege before the court to be in possession of mortgage which it did not register.

[10] Counsel Rusanganwa, states that the appellants do not challenge the grounds relied on by the court provided by article 4 of the Law N°10/2009 of 14/05/2009 on mortgages which states that “the mortgage is considered to be valid when recorded in the mortgage register in the office of the Registrar General”, therefore, none should request for the invalidation of the void contract. He states that the appellants do not demonstrate evidence which were disregarded, that basing on the contract titled mortgage loan contract, they present requesting for the invalidation of the mortgage contract as well as written correspondences indicating the mortgaged houses in the contract, he finds that the heirs of Nyagatare cannot deny the concluded contract, especially that the Bank of Kigali alleges that Nyagatare did not furnish the mortgage, instead, it was concluded a mortgage loan contract, those properties being meant to constitute the mortgage, because on page 2 of that contract, it is indicated the mortgage registration whereby they indicated the procedure to be followed. He further states that there is no way the heirs of Nyagatare can request for the invalidation of that contract alleging that it is a mortgage contract whereas Nyagatare consented only to the encumbrance of the mortgage.

[11] Counsel Rusanganwa Jean Bosco was asked in which way the Bank of Kigali Ltd possesses the titles of the houses indicated in this case while he denies that there was no mortgage contract, he replied that indeed the bank has those titles because the heirs of Nyagatare Théogène never requested for them. He goes further to state that the possession of those titles by the bank indicates that the encumbrance of the mortgage had commenced but were not yet concluded, and that the Bank of Kigali was given those documents by Nyagatare so that the mortgages can be furnished as they had agreed, however, what was done was just the initial process because they had agreed in the contract that the mortgage will be registered to the land Registry.

## VIEW OF THE COURT

[12] Article 33 of the Decree Law of 30/07/1888 establishing Civil code book III which was into force when Nyagatare Théogène and Bank of Kigali Ltd concluded the mortgage loan contract on 19/07/2005 as well as the subsequent contracts, states that contracts made in accordance with the law shall be binding between parties while article 34 of this same law states that a contract shall not only cover the subject matter but also the effects that equity, practices or law impute to the obligations according to the nature of the contract<sup>1</sup>.

[13] It is indicated in the case file that Nyagatare Théogène requested for the extension of the date of payment up to 2 February 2009, and the Bank of Kigali Ltd informed him on 5 March 2009 that the loan amounts to 124,000,000Frw, including 24,000,000Frw that had to be paid not later than 31 August 2009 and that he should continue to pay back 15,472,369Frw which he had been given to buy the house at the plot N°2685 located at Remera-Kimironko. He was reminded to subscribe for insurance of the mortgage furnished in favor of the bank namely the mortgage with the value of 50,000,000Frw which should have been registered on the first rank on the Plot N°2685 located Remera-Gasabo, in Kigali City, the mortgage with the value of 21,000,000Frw which should have been registered on the first rank on the Plot N°1647 located at Kigabiro-Rwamagana, given that the bank was furnished with the titles of the immovable properties including the title of the House located at Kabare-Muhazi in Eastern province as well as the titles of immovable properties located at Kigabiro-Rwamagana (other two houses) thus he could not sale, donate or mortgage them without the consent of the bank. In addition, the bank was furnished as pledge over properties amounting to 50,000,000Frw on the first rank.

[14] The documents in the case file reveal that on 17 June 2009 Nyagatare applied for an overdraft, and on 27 July 2009, the Bank of Kigali notified him that his loan amounts to 148,000,000Frw, and he was reminded that the mortgage furnished to the bank consist of all properties mentioned in the previous paragraph, the Bank of Kigali having the obligation to apply for their registration as laid down in the mortgage loan contract of 19 July 2005 mentioned above (on the second page) as it was always reminded in every document granting him the loan and corresponding mortgages.

[15] The Supreme Court finds that the Bank of Kigali and Nyagatare Théogène concluded various mortgage loan contracts, and it was the duty of the Bank of Kigali Ltd to apply for registration of these mortgages. Among these contracts, including that of 19 July 2005, as the first addendum (N°001) to the mortgage loan contract concluded in the presence of the public notary Norbert Kamugisha. In this contract, Nyagatare Théogène furnished to the Bank of Kigali Ltd as mortgage the houses on and those which will be constructed on plot N°1647 located at Kigabiro - Rwamagana, and handed it the emphyteutic lease of that plot N°L139/RWA/2005. There is also a correspondence document of 27 July 2009 which the Bank of Kigali Ltd served to Nyagatare notifying him of the loan amount, It also reminded him that the mortgage it possesses for all the loans includes the house located on plot N° 2685 located at Remera – Kimironko, the house on plot N°1647 Kigabiro - Rwamagana (these two mortgages should have been registered on the first rank), two houses situated at Kigabiro-Rwamagana, as well as pledge on goodwill

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<sup>1</sup> The statements in both provisions are also found in articles 64 and 65 of the Law N°45/2011 of 25/11/2011 governing contracts.

with the value of 50,000,000Frw, the titles of all those immovable properties handed to the Bank of Kigali Ltd by Nyagatare Théogène, who even gave it the right to apply for their registration.

[16] Regarding the registration of the mortgage, the law scholars state that it is done in order to create the preferential right over other creditors, as well as to inform the latter the existence of the loan and the preferential right of the creditor but that the failure to register does not invalidate the contract since the registration aims only at informing the public that immovable property was furnished in mortgage.<sup>2</sup>

[17] Therefore, the Court finds that as previously mentioned the mortgage contract between Nyagatare Théogène and the Bank of Kigali Ltd existed and binds the parties as provided for by article 33 the law mentioned above, and as explained it cannot be cancelled nor invalidated by the default of mortgages registration and none could deny its existence while they evidenced by documents.

## **2) Whether the mortgage contract between the Bank of Kigali and Nyagatare Théogène should be terminated.**

[18] Mutabazi Abayo Jean Claude, the counsel states that article 35 of the Organic Law determining the use and management of the land of the year 2005 provided that final transfer of rights on land by a representative of the family requires the prior consent of all other members of the family who are joint owners of such rights ( spouse, the children with majority age, minors represented by their parents), therefore the property is furnished as mortgage with the prior consent of all family members, which was not respected when Nyagatare Théogène furnished all mortgages to the Bank of Kigali Ltd, because he did it without the consent of his wife and children. He further states that in furnishing these mortgages article 21 of the Law N°22/99 of 12/11/1999 supplementing book I of the civil code and instituting part five regarding matrimonial regime, liberalities and succession, provides that whatever be the matrimonial regime chosen and the management modalities of the patrimony of spouses the agreement of both spouses shall be required for the donation of an immovable property and any other property in the community, as well as for the acknowledgement of any right attached to those properties.

[19] In conclusion, Mutabazi Abayo Jean Claude, the counsel states that among the assets that Nyagatare Théogène furnished in mortgage includes the part of the property over which Mujawimana Rose has the right, therefore if the Court decides that the contract was concluded, it implies that the mortgage would be furnished over the part belonging to Nyagatare only and therefore if the contact is invalidated Mujawimana Rose would have the right over the entire property.

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<sup>2</sup> (1) Gael Piette, Droit de sûreté, 9ème éd. Université moments Ltd. Mouloua cedex.2015, p.142; 147. (Les conditions de fond de l'hypothèque concernent le constituant, la créance garantie et l'assiette de la sûreté. le respect d'une condition de forme est généralement nécessaire : la rédaction d'un acte notarié... l'inscription va permettre d'assurer la publicité d'hypothèque, donc de rendre la sûreté opposable aux tiers. A défaut de publicité, l'hypothèque est inopposable aux tiers, qu'ils soient de bonne ou de mauvaise foi. L'inscription est donc une condition d'opposabilité et non une condition de validité. Une hypothèque non publiée est valable entre les parties).

(2) François T'S Kint, Sûretés et principes généraux du droit de poursuite des créanciers, Larquier, 200, p.312. (L'inscription de l'hypothèque en assure la publicité. Elle ne crée aucun droit. L'inscription ne fait que révéler, aux yeux des tiers, le droit d'hypothèque).

[20] Counsel Rusanganwa states that the contract that the opponents request for invalidation consist of the loan contract because no mortgage contract was concluded and that the Bank of Kigali Ltd will not auction on the basis of this contract, rather on the judgment because the contract was concluded before the year 2009, whereby on its page 4 they agreed on the sale without recourse to judicial proceedings, but this is impossible as longer as this mortgage was not registered, and that the mortgage contract implies that when the loan is not paid the auction occurs whereby the creditor enjoys the preferential right, but that this is impossible whenever the mortgage is not registered. He argues that in case the Court decides the cancellation of the mortgage contract, it will imply the cancellation of the loan contract given that both contracts were concluded in a single document. He alleges that as longer as the bank does not hold the title, it cannot claim the mortgage right, therefore the heirs of Nyagatare cannot allege that the bank has the right on the property of Nyagatare.

## **VIEW OF THE COURT**

[21] Article 35 of Organic Law N°08/2005 of 14/07/2005 determining the use and management of land in Rwanda provides that final transfer of right on land like sale, donation or exchange by the representative of the family requires the prior consent of all other members of the family who are joint owners of such right while article 38 provides that the consent mentioned in article 35 of this Organic Law is also necessary in land mortgaging, lease, long term renting or in case there is mutual consent on the right of servitude.

[22] Article 21 of the law N°22/99 of 12/11/1999 supplementing book I of the civil code and instituting part five regarding matrimonial regime, liberalities and succession, provides that whatever be the matrimonial regime chosen and the management modalities of the patrimony of spouses the agreement of both spouses shall be required for the donation of an immovable property and any other property in the community, as well as for the acknowledgement of any right attached to those properties.

[23] The Court finds that in the mortgage loan contract concluded between Nyagatare Théogène and the Bank of Kigali Ltd on 19 July 2005 as well as in subsequent contracts till that of 27 July 2009, whereby the Bank of Kigali Ltd promised him a loan who in return furnished a house at the plot N°2685 located at Remera-Kimironko by handing its title deed to it as well as the house at the plot N°1647 located in Kigabiro-Rwamagana with its title in mortgage, it is nowhere indicated that his wife Mujawimana Rose consented to these mortgages because her signature is not apposed anywhere. These findings prove that the mortgages furnished by Nyagatare Théogène to the Bank of Kigali Ltd which holds their titles as its counsel admitted to the court whereby he even argued that the reason the bank still hold them is due to the fact that the heirs of Nyagatare Théogène did not request them; were furnished in contradiction with the law because they did not comply with the requirements of aforementioned articles 35 and 21. Therefore, the said mortgage contract should be invalidated and the titles of the aforementioned immovable properties be handed back to Mujawimana Rose, the spouse of Nyagatare Théogène.

[24] However, the Court finds that because there is no particular mortgage contract that Nyagatare concluded with the Bank of Kigali Ltd, rather the clauses about the collateral are stated in the mortgage loan contract of 19 July 2005 and that of 5 March 2009 as well as that of

27 July 2009, it should be perceived that the invalidation of this mortgage contract must not impact the entire aforementioned loan contract. In contrast, it only concerns its clauses regarding the mortgage over the house at plot N°2685 located at Remera-Kimironko as well as that over the house at plot N°1647 located in Kigabiro-Rwamagana especially that the appellants in this case who are among the heirs of Nyagatare Théogène lost the case RCOMA0154/12/CS rendered by this court on 5 February 2016 about the loan their *de cuius* owed to the Bank of Kigali Ltd which became final. This position is supported by some law scholars who state that the contract may be invalidated in part, the rest remaining intact in case the judge finds that both parts may be separated like in synallagmatic or donation contracts.<sup>3</sup> The position to invalidate the unlawful mortgage is also supported by the precedents of this court in the judgment RCOM0001/07/CS of 24 July 2008 between Ms. Rwigema Chantal and ECOBANK whereby it held that Ms. Rwigema Chantal did not participate in the conclusion of the mortgage over the family house furnished to BCDI by Mazimpaka because she was not notified to give her consent.

### **3) With regard to damages requested in this case.**

[25] Counsel Mutabazi Abayo Jean Claude, states that the Commercial High Court denied to award damages to his clients on the basis that their claim lacks merit given that they failed to demonstrate the existence of mortgage contract, therefore having been demonstrated in this court, it should be rectified in order for them to be awarded damages considering they have been dragged into lawsuits from the Commercial Court to the Supreme court, whereby they be awarded 1,000,000Frw of procedural fees and 6,000,000Frw of counsel fees.

[26] Rusanganwa, the Counsel, argues that no damages should be awarded because their claim lacks merit given that the heirs of Nyagatare pursued the case in his lieu since they had no choice as they cannot disown Nyagatare Théogène deeds, rather his client should be awarded 2,000,000Frw of procedural fees and 2,000,000Frw of counsel. Counsel Mutabazi Abayo Jean Claude requests the Court to examine the claims of the counsel for Bank of Kigali Ltd in its discretion.

## **OPINION OF THE COURT**

[27] The Court finds that Mujawimana Rose, Tuyisenge Rachel and Ishimwe Leah Aliah incurred expenses for follow-up of these proceedings by hiring the lawyers, therefore it is necessary for them to be awarded damages basing on article 258 of CCB.III, but since damages requested are excessive, the Bank of Kigali Ltd should pay the 1,800,000Frw including procedural and counsel fees awarded in the discretion of the court.

[28] The Court finds that damages requested by the Bank of Kigali Ltd should not be awarded because it loses the case.

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

[29] Finds with merit the appeal of Mujawimana Rose, Tuyisenge Rachel and Ishimwe Leah Aliah.

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<sup>3</sup>Alain Bénabent, Droit des obligations, 14<sup>ème</sup> éd. LGDJ, 2014, p.176.



[30] Overturns the judgment RCOMA0552/13/HCC delivered by Commercial High Court.

[31] Invalidate the mortgage contract between Nyagatare Théogène and Bank of Kigali Ltd over the house at the plot N°2685 located in Remera-Kimironko and the house at the plot N°1647 located in Kigabiro-Rwamagana.

[32] Orders the Bank of Kigali Ltd to hand back to Mujawimana Rose all documents relating to those immovable properties mentioned above.

[33] Orders it to pay Mujawimana Rose, Tuyisenge Rachel and Ishimwe Leah 1,800,000Frw of procedural and counsel fees.

[34] Instructs the Bank of Kigali Ltd to pay the court fees.