NYAMASWA v. MUKAMUSONI

[Rwanda SUPREME COURT – RS/REV/CIV 0001/15/CS (Hatangimbabazi, P.J., Gatete and Nyirandabaruta, J.) April 21, 2017]

Civil procedure – Application for the case review – New element of evidence – A piece of evidence cannot be considered as new in case it has ever been produced in previous Courts and found without value – If the litigant discovers a document or any piece of evidence, he must instantly produce it before the court. If not, and the case is disposed off, he is the one to bear the consequences, but in case he wants to use it as a new element of evidence, he has to prove that it was impossible to access it during the course of the hearing. – Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 183 (3).

Facts: Mukamusoni filed a claim at the Intermediate Court of Gasabo claiming that when she was serving her prison sentence he unlawfully possessed and demolished her properties and constructed new building on them; Rudasingwa and Mugorukeye intervened in this case claiming that they have properties among those in litigation.

The Intermediate Court found without merit the voluntary intervention because they sued the wrong the party; it further declared that Nyamaswa occupied Mukamusoni’s property when she was in prison and it ordered him to give her compensation for the demolished houses.

Nyamaswa appealed to the High Court stating that he paid Zaninka, the daughter of Mukamusoni the value of those assets and he argues that Mukamusoni also was aware of it; the Court overturned the appealed judgment and ordered Mukamusoni to pay court fees.

Mukamusoni appealed to the Supreme Court claiming that the High Court relied on inexistent evidence and declare that the sale of the properties by Zaninka was lawfully whilst it was not and thus ruled that the property in litigation belongs to Nyamaswa.

The Supreme Court held that Nyamaswa unlawfully occupied the property which is being litigated between his family and Mukamusoni; then it ordered Nyamaswa to compensate Mukamusoni.

After obtaining unequivocal elements of evidence which comprise of the minutes of the expropriation and the letter which was written by Kigali city, to prove the injustice contained in the judgment, Nyamaswa applied for the case review on the ground that if the Court had seen those elements of evidence it would have taken a different position and also that the previous Courts declared that the documents which he produced were not original copies because they did not bear the signature of authority, but now the documents he produced were issued by the authority , because it is supported by the letter of Kigali city since the minutes of expropriation is accompanied by the stamped letter of Kigali city.

In her defense, Mukamusoni argues that the element of evidence should not be considered as a new evidence because the draft and the original document both were issued on the same day and the only difference is the signatures of the technicians and also

that this document is not an official one because it does not bear the signature and stamp of Kigali City authorities or that of the officer in charge of planning in Gasabo District, thus nothing proves that the document was issued by the Kigali City authorities; this is the reason he argues that the submitted document had already been produced in the courts before. In conclusion, both parties request for procedural and counsel fees.

Held: 1. A piece of evidence cannot be considered as new in case it has ever been produced in previous Court and found without value, therefore it is obvious that the element of evidence which Nyamaswa states that it is new was discussed upon in previous Court and it was found lacking merit because it did not bear the signature of the authority and it is the same that he has produced again as a new element of evidence.

2. If the litigant discovers a document or any piece of evidence, he must instantly produce it before the court. If not, and the case is disposed off, he is the one to bear the consequences, but in case he wants to use it as a new element of evidence, he has to prove that it was impossible to access it during the course of the hearing.

3. Procedural and counsel fees are awarded in the discretion of the Court when what is requested by the parties is excessive.

Application for the case review is rejected.
The court fees deposited, equal to the cost of this case.

Statutes and statutory instruments referred to:

Decree law of 30/07/1888 relating to contracts or conventional obligations, article 258.

Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 183 (3).

Cases referred to:

Brasseries et Limonaderies du Rwanda (BRALIRWA) Ltd vs Sindikubwabo Cyprien, RS/REV/COM 0001/13/CS, rendered by the Supreme Court on 26/02/2016.

Authors Cited:

Isabelle Desprès & Laurent Dargent, code de procédure civile, Dalloz, Paris, 2009, p.435.

Serge Guinchard, Droit et pratique de la procedure civile, édition 1999, page 1270, Nº6224.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] This case began at the Intermediate Court of Gasabo, Mukamusoni Astérie suing Nyamaswa Ephron claiming that when she was serving her prison sentence he unlawfully possessed and demolished her properties and constructed new building on them; Rudasingwa Emmanuel and Mugorukeye Annociata intervened in this case claiming that they have properties among those in litigation.

[2] In the judgment RC0049/07/YGI/GSBO rendered by the Intermediate Court of Gasabo on 18/12/2009, it held that the plot occupied by Musabye Sebera Vincent belongs to

Mugorukeye Annociata whereas, that of Rudasingwa Emmanuel is occupied by Sentama Gasore; therefore their claim lacks merit because they sued the wrong party (Nyamaswa Ephron). It further decided that Nyamaswa Ephron occupied the property of Mukamusoni Astérie while she was serving her prison sentence; it was not allocated to him by the government as he alleges, that Zaninka, the daughter of Mukamusoni Astérie whom he alleges that she sold the property to him was not given the power of attorney to represent her mother in the sale of the properties, then it ordered him to pay 29,935,545Frw equivalent to the value of her demolished houses.

[3] Nyamaswa Ephron appealed to the High Court and in the judgment RCA0058/10/HC/KIG rendered on 10/02/2012 it held that Nyamaswa Ephron paid Zaninka the price of her mother's properties in 2001, and Mukamusoni was aware of it; it overturned the appealed judgment and ordered Mukamusoni Astérie to pay the court fees worth 67,150Frw.

[4] Mukamusoni Astérie was not satisfied with the rulings of the judgment; she appealed before the Supreme Court stating that the judge of the High Court relied on inexistent evidence and held that the property in litigation belongs to Nyamaswa Ephron, he declared that the sale of the properties by Zaninka was lawfully whilst it was not.

[5] In the judgment RCAA0022/12/CS rendered on 09/01/2015, the Supreme Court ruled that the property being litigated between the family of Nyamaswa Ephron's family and Mukamusoni Astérie was unlawfully acquired by former, it overturned the judgment RCA0058/10/HC/KIG rendered by the High Court on 10/02/2012; it ordered Nyamaswa Ephron to give 19,542,300Frw to Mukamusoni Astérie in compensation.

[6] Nyamaswa Ephron applied for review of the judgment rendered by the Supreme Court claiming that since the delivering of the judgment there are unequivocal elements of evidence which prove the injustice contained in the judgment; he proceeds that his claim is based on article 186(3) of Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, those evidence are the authentic deed of the expropriation and the letter which was written by Kigali City.

[7] The hearing of the case was conducted in public on 14/03/2017, Nyamaswa Ephron represented by Counsel Nsengiyumva Niyondora and Rwihandagaza Richard whereas Mukamusoni Astérie represented by Counsel Ntigurirwa François.

II. ANALYSIS OF THE LEGAL ISSUES

Whether there are new elements of evidence submitted by Nyamaswa Ephron for the judgment RCAA0022/12/CS to be reviewed.

[8] Nyamaswa Ephron states that since the delivering of the judgment there are irrevocable evidence which includes the authentic deed of expropriation and the letter issued by Kigali City in reply to the letter dated 12/03/2015 wrote by his wife Mukeshimana Georgette.

[9] Counsel Nsengiyumva Niyondora claims that there are minutes of the expropriation which are linked to a letter of Kigali City. He states that in the judgment which is subject to review, the Court held that the land which Nyamaswa and his family occupy was unlawfully acquired; that there was no

expropriation at Kimironko aimed at relocating those with ramshackle houses in order to build the houses of Kigali City plan, however on 12/03/2015, Kigali City wrote to him a letter informing him about the expropriation which was supposed to be carried out on 28/04/2001 and it indicates the one who compensated and the one who got compensation, that the Kigali City technicians drafted the minute of the expropriation and signed on it even though Mayor of Kigali city did not. This renders invalid the statements of witnesses that there was no expropriation carried out in Kimironko.

[10] Counsel Nsengiyumva Niyondora states that if the Supreme Court found this element of evidence it would have not reached the same decision taken in the judgment which is subject to review, because paragraph 14 and 15 of the judgment rendered by the Intermediate Court contain a copy of minutes for expropriation which is not signed by technicians, that Court declared that there is no original copy, this also invalidate the statement that the evidence had been produced to the Court before, and even later Nyamaswa Ephron got bank statement for the payment he made which is also another new element of evidence.

[11] Counsel Rwihandagaza Richard also assisting Nyamaswa Ephron explains that the reason why they did not request for that evidence from Kigali City from the beginning until the pronouncement of the judgment at the Supreme Court, because during the hearing at the Intermediate Court they demonstrated the obstacles which Nyamaswa Ephron uncounted in obtaining that element of evidence; and they had to pray for forced intervention of Kigali City hoping that it will explain on the issue of the expropriation as it is indicated in paragraph 6,

page 2 of the judgment rendered by the Intermediate Court of Gasabo; this implies that even if the evidence was obtained, but it was hard.

[12] He further argues that the latest document they submitted was got from the administration, because it was supported by the letter from Kigali City because expropriation minutes were accompanied by a stamped letter of Kigali City. He finds that if the judge had that new evidence, he would have taken a different position.

[13] Ntigurirwa François, the counsel for Mukamusoni argues that the new evidence submitted by the appellant do not hold value because its draft was produced before the Intermediate Court of Gasabo (see paragraph 14 of the judgment), the photocopy and the alleged original copy were all issued on the 28/01/2001, this means that they are all drafts, therefore it is not a new element of evidence since that draft was produced in all Courts, what both documents indicate is the amount of money paid and the person who received that payment, the difference is that the first document does not bear the signatures of those paid while the one considered as original bears the signatures of those paid on 21/05/2001, thus it is not a new evidence.

[14] Counsel Ntigurirwa further explains that the signed minutes could not be considered as a new evidence and the appellant demonstrates that the Court refused to value it because it was not signed, otherwise what they consider as the final document bears the same date as the draft, what changed are the signatures of the technicians which were added on it, however draft and the final document were issued on the same date. Furthermore, he states that this document is not an official one

because it does not bear the signature and stamp of Kigali City authorities nor that of the officer in charge of planning in Gasabo District , thus nothing proves that the document was issued by the Kigali City authorities, this is the reason he argues that the submitted document had already been produced in the courts before , he also requests to examine the reason why one document bears signatures of two technicians, while the other one bears none, whilst they were both issued on the same day, he prays the Court to hold that the element of evidence at hand is not new .

[15] Concerning the bank statement produced by the adversary as an evidence indicating that Nyamaswa Ephron withdrawn money from the bank , he states that nothing proves that the money withdrawn was meant for the payment of those who were expropriated, and also the date for expropriation is different from the one on which he withdrew the money from the bank , they further argue that even if he paid that money, the court ruled that he must ask the one he paid to reimburse the money because Mukamusoni did not give her the power of attorney.

VIEW OF THE COURT

[16] Article 186 (3) of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, provides the grounds for application for review which include : "…if, since the time of rendering the judgment, it was evident that there was injustice due to the judgment for which the review is sought, whether an element of evidence was in the file but was not noticed by the court or was revealed later".

[17] The case file demonstrates that there is a letter which Mukeshimana Georgette wrote to Kigali City on 16/02/2015 requesting for the minutes of the expropriation of 28/04/2001. In the letter dated 12/03/2015, Kigali City replied that pursuant to her letter, the minutes of expropriation of Zaninka and Umubyeyi Marie Claire are hereby sent to her.

[18] The case file demonstrates that in the judgment RCAA0022/12/CS rendered by the Supreme Court on 09/01/2015 (paragraph 9), Nyamaswa Ephron stated that in 2001 he bought a plot of 18 meters to 35 meters at 350,000Frw from Zaninka which the latter got as the descending partition, then in order for that plot to have the required measurements it was became necessary to add 12 meters taken from Mukamusoni Astérie's plot, in which there was an old house and he paid 418,000Frw for it.

[19] Furthermore, the Case file demonstrates that in judgment RC0049/07/TGI/GSBO rendered on 18/12/2009 by the Intermediate Court of Gasabo (paragraph 12), Rwihandagaza Richard, the counsel for Nyamaswa Ephron by then stated that the authorities were aware when his client acquired that property, he got the necessary documents from the concerned organs after the expropriation. In paragraph 13, he stated that the expropriation is not only conducted for public interest, but also individuals can agree between themselves, in paragraph 15, he explained that the reason why the documents of expropriation do not indicate the date on which it was conducted and signature of authorities, it is because they gave them to him in order to see if his adversary acknowledges them, that the original copy was retained by the authority of Kigali City.

[20] Concerning the new element of evidence of the minutes of expropriation submitted by Nyamaswa Ephron requesting for review of the case; the Court finds that this document should not be considered as a new evidence because it was submitted before Intermediate Court of Gasabo although it did not bear the signature of the Mayor of Kigali City; it is the same document he produces again at this instance as a new element of evidence and it is obvious that it was discussed upon but it was found lacking merit.

[21] Basing on the above motivations, the Court finds that the evidence of the letter that Kigali city wrote to Mukeshimana Georgette, the wife of Nyamaswa on 12/03/2015, in response to the letter dated 16/02/2015, requesting for the minutes of expropriation of 28/04/2001, whereby it sent to her those minutes which was also not signed by the concerned authority, it cannot be considered as a new element of evidence which is provided for by article 186, 3° of the Law N°21/2012 of 14/06/2012 mentioned above and also on given motivations, because those minutes were presented before and that letter alone is no importance without minutes.

[22] The Court further finds that even if those minutes are to be considered as not have been presented to court before, on the ground that it now bears the signature of the technicians, again it cannot be considered as a new element of evidence which can based on to review the judgment RCAA0022/12/CS, because Nyamaswa Ephron who presents it was aware of its existence and did not request for it so that he produced since the hearing of the case in the Intermediate Court to the last instance at the Supreme Court until it became binding. And moreover, he does not prove that it was impossible to obtain that document which

he considers as a new element of evidence so that he could present it before the judgment became binding[1].

[23] The opinion that the evidence which could have been submitted before the judgment became final not to be considered as a new element of evidence that can lead to review of the case, is also shared by law scholars like Serge GUINCHARD[2] whereby he opines that if the litigant discovers a document or any piece of evidence, he must instantly produces it before the court. The failure to do so, and the case is concluded he is accountable for his own action, and in that case the review of the case is impossible. He further explains that even if that evidence is in the criminal file, which is still pending, whereby it cannot be available, the party in need of it must request the court to stay the hearing.

[24] This concurs with the legal position established by this Court in the judgments it rendered, such as in the judgment RS/REV/COM 0001/13/CS whereby it held that "... the case

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[1] Isabelle Desprès et Laurent Dargent, code de procédure civile, Dalloz, Paris, 2009,P.435, Le demandeur sans faute de sa part, doit avoir été dans l'impossibilité de faire valoir la cause , avant que la décision ait acquis force de chose jugée… Et c'est au demandeur qu'il appartient de faire la preuve de cette impossibilité

[2] Serge GUINCHARD, DROIT ET PRATIQUE DE LA PROCEDURE CIVILE, édition 1999, page 1270, N°6224 . "Si le plaideur découvre la pièce avant la décision, il doit en faire état sans délai. A défaut, c'est à raison de sa propre faute qu'il n'a pu en être tenu compte, et le recours en révision est fermé. S'il s'agit d'une pièce d'un dossier pénal, dont l'existence est connu, mais insusceptible d'être versé déjà aux débats parce que l'instruction n'est pas finie, il importe de demander à la juridiction de surseoir"

commenced at the Court of first instance of Kigali in 2000, in 2009 it was in Commercial High Court and it was rendered at the last instance by the Supreme Court in 2010, during those 10 years, BRALIRWA Ltd does not demonstrate the obstacle which prevented it to acquire that element of evidence which it relies its application, or demonstrates that it tried and failed... ”.

Whether Mukamusoni Astérie would be granted damages which she requests in this case.

[25] Ntigurirwa, Counsel for Mukamusoni Astérie argues that Nyamaswa has to give his client damages worth 4,500,000Frw on the basis of article 258 of Decree law of 30 July 1888 civil code book III, which includes 2,000,000Frw of the counsel fees; 2,000,000Frw of the moral damages resulting from dragging her into lawsuits and 500,000Frw of the procedural fees.

[26] Counsel for Nyamaswa Ephron states that those damages are unjustifiable instead; he is the one who deserves them.

VIEW OF THE COURT

[27] The Court finds the fact that Nyamaswa Ephron applied for the review of the case, this led Mukamusoni Astérie to incur expenses because it became necessary to follow up the case and hiring a counsel; therefore basing on article 258 mentioned above, he should give her 700,000Frw of procedural and counsel fees, awarded in the discretion of the Court since what she requests is excessive.

III. DECISION OF THE COURT

[28] Rejects the application of the case review filed by Nyamaswa Ephron.

[29] Orders Nyamaswa Ephron to pay Mukamusoni Astérie 700,000Frw of the procedural and counsel fees.

[30] Orders that 100,000Frw which Nyamaswa Ephron deposited as court fees are equal to the cost of this case