

I&M BANK v. SEBULIKOKO

[Rwanda SUPREME COURT – RCOMAA00052/2016/SC- RCOMAA 0057/16/CS
(Kayitesi R, P.J., Ngagi and Hitiyaremye, J.) 09 June 2017]

Contract law – Contract of Security interests – Re- registration of security interests – The fact that security interests are not re-registered, this does not invalidate them, as long as the debt exists however it is not opposable to third parties.

Facts: I&M Bank gave a loan of 2,434,879,505Frw to Sebulikoko (representing ECSNE), for purchasing road construction machines, on 07/11/2013, they concluded a guarantee contract on movable properties. The loan was also guaranteed by Rwasibo Mutesi Beatrice and it had to be paid off by 25/04/2015.

The loan was not paid, then I&M Bank seized and auctioned the securities with the authorisation of the Registrar General of Rwanda Development Board (RDB), but the proceeds did not cover the loan and the bank sued Sebulikoko and his guarantor before the Commercial Court of Nyarugenge requesting to be paid the balance.

Sebulikoko and his guarantor also filed a claim before Commercial Court of Nyarugenge requesting for the cancellation of the auction of the securities because it was done illegally and they also requested for counter expertise because their assets auctioned had higher value than the loan of the bank.

They filed also a counter claim requesting for the set off, so that the balance be given to Sebulikoko because the value of the assets sold is higher than the loan they have. The Commercial High Court of Nyarugenge found the claim of Sebulikoko and his guarantor without merit and that of I&M with merit and ordered the debtor and his guarantor to jointly pay the bank.

Sebulikoko and his guarantor were not contented with the rulings of the Commercial High Court of Nyarugenge and appealed to the Commercial High Court claiming that I&M Bank auctioned their assets which are no longer registered as their securities because the period of its registration elapsed. The Court found the appeal with merit in part and decided that the securities were illegally auctioned because they ceased to belong to the bank.

I&M Bank was not contented with the decision of the Commercial High Court which held that the assets sold were no longer its securities because the period of its validity had expired and it did not re-register it, it appealed to the Supreme Court arguing that in deciding that the assets sold were no longer its securities the Commercial High Court ignored the reason they were furnished was the loan that Sebulikoko and his guarantor failed to pay.

Sebulikoko and his guarantor lodged a cross appeal claiming that the bank should be liable for the loss they incurred due to the auction of securities which were not registered, they also requested the court to order the set off. The bank stated that Sebulikoko had agreed to pay and that on his request there was also restructuring of his contract but he did not comply with it.

Held: 1. The registration of the loan securities is meant to notify its existence to the third party, but when its registration period expires and if is not re-registered it does not invalidate them, however it is not opposable to third parties.

2. The purpose of the loan securities is to secure the payment of the loan, so that, as long as the loan is not reimbursed, the loan securities also remain. The fact that the loan securities were not re-registered in the office of the Registrar General of Rwanda Development Board (RDB) does not invalidate them because the loan for which they were furnished has not been paid

Appeal has merit.

Cross appeal has no merit.

Court fees are borne by Sebulikoko and his guarantor.

Statutes and statutory instrument referred to:

Law N°34/2013 of 24/05/2013 on security interests in movable property, article 2,7, 8, 19,27.

No cases referred to.

Doctrine:

L. Aynes P.& Crocq, Droit des sûretés, 9^e édition, Paris, L.G.D.J., 2015.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] This case started at the Commercial Court of Nyarugenge whereby I&M Bank Ltd filed a claim against Sebulikoko Niyomwungeri Emmanuel (representing ECSNE) and Rwasibo Mutesi Beatrice his guarantor, requesting them to repay the debt of 2,434,879,505Frw that it gave him to buy road construction machines. I&M Bank Ltd argued that after realizing that it was not going to be paid, it decided to get the payment from the mortgage it was given by Sebulikoko Niyomwungeri Emmanuel (representing ECSNE) but they were not sufficient to cover the whole debt.

[2] Sebulikoko Niyomwungeri Emmanuel and Rwasibo Mutesi Béatrice also filed a claim to the Commercial Court of Nyarugenge stating that the calling of the loan made by I&M Bank Ltd should be cancelled because it was unlawful, and they also claimed that the loan which is demanded to be repaid is excessive, they request that it should be computed again through counter expertise. They also filed a cross claim requesting for a set off basing on the value indicated by expertise of the auctioned properties of 3,646,457,285Frw, and then loan of 2.434.879.505Frw and the remaining balance of 1,221,577,700Frw be refunded to Sebulikoko Niyomwungeri Emmanuel.

[3] In the judgment RCOM0957/15/TC/NYGE – RCOM1673/15/TC/NYGE, the Commercial Court of Nyarugenge, found the claim of Sebulikoko Niyomwungeri Emmanuel and Rwasibo Mutesi Béatrice without merit while that of I&M Bank Ltd was found merit; hence it ordered Sebulikoko Niyomwungeri Emmanuel (representing ECSNE) and Rwasibo Mutesi Béatrice (his guarantor) to jointly pay I&M Bank Ltd 2,439,879,505Frw.

[4] Sebulikoko Niyomwungeri Emmanuel and Rwasibo Mutesi Béatrice appealed to the Commercial High Court stating that the previous court disregarded the fact that I&M Bank Ltd acted beyond its right when it seized their movable property and auctioned it when it was

obvious that those properties were no longer a registered mortgage of I&M Bank Ltd;Sebulikoko was misquoted because he did not request to annul the auction of the securities because it was unlawfull, because he could not claim for what he had been already granted by the judgment RCOMA0459/15/HCC, there was confusion of the facts, whereby the Court declared that the conducted expertise is the one which demonstrates the value of the auctioned property, which is not true, rather with assistance of an accountant Sebulikoko demonstrated the commercial loss he was caused by auctioning his property, therefore he prays for a set off.

[5] In the judgment RCOMA00100/2016/CHC/HCC rendered on 15/07/2016, the Commercial High Court found with merit in part the appeal of Sebulikoko Niyomwungeri Emmanuel and Rwasibo Mutesi Béatrice and decided that the vehicles and machines of Sebulikoko Niyomwungeri Emmanuel who represents ECSNE were auctioned when they were no longer mortgage of I&M Bank Ltd, therefore, they should be given back to the appellants because they were unlawfully auctioned.

[6] I&M Bank Ltd not satisfied with this decision, appealed to the Supreme Court stating that by deciding that the vehicles and machines were auctioned when they had ceased to be mortgage of I&M Bank Ltd, the previous court ignored the purpose of that mortgage which was to secure the loan which Sebulikoko and his guarantor defaulted to reimburse, therefore, clause 7 of mortgage contract of 07/11/2013 should have been applied; the fact that Sebulikoko Niyomwungeri Emmanuel/ECSNE and Rwasibo Mutesi Béatrice defaulted to reimburse the loan they owe it till now, rather they dragged it into lawsuits, it is intentional breach of contract, thus, they should pay damages worth 10,000,000Frw, 5,000,000Frw of counsel fees and 3,000,000Frw of procedure fees.

[7] Sebulikoko and his guarantor also filed a cross appeal whereby Sebulikoko argued that the Commercial High Court held that he did not demonstrate that the machines were at work or were ready for work, but it disregarded that he had a lot of works he was preparing to begin; he prays that the Supreme Court disgnate an expert to determine the loss incurred because he is no longer able to demonstrate it, whereas for Rwasibo Béatrice, she argues that I&M Bank Ltd should bear the consequences and the loss caused by the auction of the mortgage which was not registered, thus she requests for a set off, so that I&M Bank Ltd gives them 1,214,577,780Frw.

[8] The case was heard in public on 09/05/2017, I&M Bank Ltd represented by Counsel Rubasha Hubert whereas Sebulikoko Niyomwungeri Emmanuel and Rwasibo Mutesi Béatrice were represented by Counsel Nzirabatinyi Fidèle, Rwagatare Janvier and Kavutse Ephrem.

II. ANALYSIS OF THE LEGAL ISSUES

A. appeal of I&M BANK Ltd

1. Whether the property auctioned by I&M Bank Ltd was no longer its mortgage.

[9] Counsel Rubasha Hubert argues that the Commercial High Court disregarded the main reason that led Sebulikoko Niyomwungeri Emmanuel and his guarantor to furnish the mortgage, that it declared that I&M Bank Ltd auctioned the property which was no longer its mortgage, however the court did not nullify the debt they owe it especially that in the case RCOM0957-1673/15/TC/NYGE they acknowledged that loan, thus at the time of the auction,

those mortgages were in custody of I&M BANK Ltd. He further states that article 27 of the Law N°34/2013 of 24/05/2013 on security interests in movable property provides that the creditor remains with the mortgage as long as he/she is not paid. He concludes that article 194 of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure provides that the movable and immovable assets of a debtor shall constitute a common and general security of his/her creditors, therefore I&M Bank Ltd had the right to auction the mortgage it was given by Sebulikoko.

[10] Counsel Rubasha Hurbert continues arguing that the Commercial High Court contradicted the other decisions made by that court in previous two cases, it ordered that Sebulikoko Niyomwungeri Emmanuel be given back the machines and vehicles which were auctioned because it was unlawfully auctioned since they were no longer its mortgages, disregarding that the first judgment (RCOMA0320/HC/HCC) sustained the decision of Registrar General which gave I&M Bank Ltd the right to keep the movable property it was furnished as a mortgage by ECSNE, whereas the second judgment (RCOMA0391/15/HCC) held that the auction of the properties mortgaged by Sebulikoko Niyomwungeri Emmanuel was lawfully conducted. Therefore, in his opinion I&M Bank Ltd had the right and capacity to carry out the auction since it was granted to it by the court. He concludes by stating that the Commercial High Court erred in holding that all mortgages were unlawfully auctioned because they expired on 25/04/2015 whilst some of them were expiring in 2018, in addition to that as long as I&M Bank Ltd was constantly writing to Sebulikoko requesting for the payment of the loan he owes it, it was no longer necessary to re-register the mortgage.

[11] Counsel Kavutse Ephrem who represents the defendants argues that Sebulikoko Niyomwungeri Emmanuel and his guarantor do not deny the loan, but the mistake of I&M Bank Ltd was to sell the property which was no longer its mortgage, because it did not re-register in the office of Registrar General in RDB.

[12] Counsel Rwagatare Janvier also representing the defendants argues that the issue in the Commercial High Court was not the loan because Sebulikoko does not deny it, that the issue was whether the mortgage was legally registered at the time of its auction. He states that the registration of the mortgage expired on 25/04/2015, and the bank seized it on 08/05/2015, therefore, it contravened article 27 of Law N°34/2013 of 24/05/2013 on security interests in movable property, because the bank had to register it not later than 25/04/2015, the fact that it did not do it, means that it lost the right on that mortgage. He continues stating that the decisions of the judgments RCOMA0320/HC/HCC and RCOMA0391/15/HCC were summary procedure, the first was about the management of the property whereas the second was about the auction but none of them give I&M Bank Ltd the right to sell those mortgages. Regarding the issue that some of those securities had to expire in 2018, he states that I&M Bank Ltd should prove it since it is the claimant, whereas concerning the notices served to Sebulikoko, he states that they do not replace the Law.

[13] Counsel Nzirabatinyi Fidèle who also represents the defendants argues that to affirm that as long as the loan exists the mortgage also exists, is to disregard the provisions of the law, he requests the court that it interprets article 7,8 and 27 of Law N°34/2013 of 24/05/2013 on security interests in movable property. He continues arguing that even if article 194 of the Law N°21/2012 of 14/06/2012 cited by the counsel for I&M Bank Ltd which relates to general security is applied, the procedure used by the bank to seize the property is unlawful, therefore that article is of no use.

VIEW OF THE COURT

[14] Article 27 of the Law N°34/2013 of 24/05/2013 on security interests in movable property provides that the registration of a security interest shall be effective as of the date of registration :

1° until the expiration of the term specified in the contract;

2° if the term of the obligation continues beyond the term specified in the registration, until the end of the extended term stated in a notice of the continuation that is registered before the original term expires; or

3° if the obligation is terminated before the end of the term specified in the notice, until the date of registration of the effectiveness of the notice.

[15] Article 2 (19) of the Law N°34/2013 of 24/05/2013 mentioned above, explains the mortgage as a right in personal property that secures payment or performance of an obligation.

[16] To determine whether I&M Bank Ltd sold the mortgages which were expired, the Court finds it necessary to first establish the purpose of the mortgage, its value to the mortgagee, its registration and re- registration and consequence for not re-registration to the mortgagee.

[17] As it is explained by law scholars, the purpose of the mortgage is to provide the security that the loan will be paid, it should not be separated from the obligation of reimbursing the due loan, its aim is that, the mortgage protects the creditor to not suffer the loss that should be resulted from the default of payment the loan he provided. They continue explaining that the mortgage can not be separated from the loan¹..

[18] Concerning the registration of the mortgage, those law scholars also explain that the registration of the mortgage on immovable property² aims to inform third parties to the contract that the mortgaged was registered, but even if the period of registration expires without being renewed, this should not invalidate the mortgage, however it is not opposable to the third parties³.

[19] The case file demonstrates that on 07/11/2013, Sebulikoko Niyomwungeri Emmanuel⁴ concluded with I&M Bank Ltd a contract of mortgage on immovable property, Rwasibo Mutesi Béatrice was personal guarantee of that loan which has to be reimbursed not later than 25/04/2015. After that, Sebulikoko failed to pay properly the loan he was

¹ Les sûretés garantissent l'exécution future d'une obligation ; elles sont indissociables de l'obligation de somme d'argent à terme. Elles permettent au créancier de se prémunir contre la défaillance du débiteur, (... sans sûreté, pas de crédit...). L. AYNES, P. CROCQ, Droit des sûretés, 9e édition, Paris, L.G.D.J., 2015, p.13.

² the Law scholars state that the registration of the movable property is done the same way as for the immovable but it remains with its owner (débiteur) rikorwa kimwe n'iry'umutungo utimukanwa (L. AYNES, P. CROCQ, op.cit., p. 279)

³ En cas de péremption de l'inscription, l'hypothèque n'est pas éteinte, mais perd son opposabilité (L. AYNES, P. CROCQ, op.cit., p. 365).

⁴ In the contract it is Niyomwungeri Emmanuel

granted by I&M Bank Ltd, upon authorisation of the Registrar General, that bank sold the mortgages but they did not cover the debt which Sebulikoko owes bank.

[20] Determining whether I&M Bank Ltd sold the mortgages which are invalid due to not being re-registered, as it was mentioned above the Court finds the mortgage is provided with the purpose of securing the debt, so that as long as the debt is not paid, also the mortgage is still valid. The court finds that the arguments of Sebulikoko's counsel that as the mortgage was not re-registered to the office of the Registrar General in RDB invalidated it, this should not be considered because the clause 7 of the contract relating to the security interest of 07/11/2013 which both parties agreed on, provides that as long the loan contract is valid, all auxiliary contracts will also be valid, therefore, because Sebulikoko admits the loan which still exists, and it is the one which mortgage is based on, it implies that the mortgage remains valid even if it was not re-registered.

[21] The court finds that article 7, 8 and 27 of the Law N° 34/2013 of 24/05/2013 on security interests in movable property which Sebulikoko's counsel and his personal guarantee applied in their pleadings to prove that the mortgages were invalid, can not help them because, though the article 7 of that Law provides that a security interest shall be effective upon its registration by the Registrar General, this article was applied because the security interest was registered by the Registrar General and was given a valid period, and also both parties agreed that it will remain effective as long as the contract of the main debt is valid. The Court finds further that, the provisions of article 8 of the law mentioned above is not an issue because it concerns the third party and there is no third party in this contract. Whereas the provision of article 27 *litera* 1 of the law mentioned above, that the registration of the security interest is effective the day of its registration to the period mentioned in the contract, the court finds that, even if the contract provided for the security interest to be ended on 25/04/2015, the clause 7 of that contract stipulates that the security interest remains valid as long as the main debt contract is still valid. The Court also finds that the provisions of article 27 *litera* 2 mentioned above which had to be applied in case of extending the period of registration of the security interest. Therefore, Sebulikoko and his personal guarantee should not rely on not extending this period with the intention of proving that if this formality of extending period was not done, the security interest loses its validity, they disregarded the provision of clause 7 of the contract of security interest mentioned above.

[22] The Court further finds that basing on the judgment RCOMA0391/15/HCC in which a court held that I&M Bank continues to have the custody of the movable property for which it was given as securities, in the judgment RCOMA0391/15/HCC the Court also decided that the auction proceeds, I&M Bank had the right to seize and sell the securities furnished by Sebulikoko Niyomwungeri Emmanuel, therefore it is not necessary to examine whether there was securities which should have been valid until 2018 and whether the securities should have been re-registered because it was handled in the previous paragraphs.

[23] For the Commercial High Court to motivate that (in paragraph 13) that the judge of the Commercial Court of Nyarugenge ruled *ultra petita*, whereby he examined the issue related to invalidating the auction of the securities while it was not requested in the claim filed, considering the judgment of the Commercial Court of Nyarugenge (paragraphs 24-31), the Court finds that the judge did not rule *ultra petita* because he was motivating the counter claim raised by Sebulikoko's counsel which concerns a set off, where he argued that the sale of the securities was illegally conducted because it was done after the expiration of its valid period, he also added that the auction was nullified by the judgment RCOMA0459/15/HCC,

for these reasons he requests that I&M Bank pays the balance between the value established by the expertise carried out on the auctioned securities and the loan. Therefore, the fact that in examining that issue the judge analysed the judgment RCOMA0459/15/HCC, together with the Judgments RCOMA0320/15/HCC and RCOMA0391/15/HCC and held that the rulings of the judgment RCOMA0320/15/HCC and RCOMA0391/15/HCC are the ones to be sustained because they were not reversed by judgment RCOMA 0459/15/HCC, that implies that he did not err, because since that court decided that the auction of Sebulikoko's assets be proceeded, it could not contradict itself holding that the auction is annulled.

[24] Basing on the motivations and the provisions given above, the Court finds that I&M Bank sold the vehicles and machines which were furnished as securities by Sebulikoko Niyomwungeri Emmanuel who represents ECSNE when those securities were still valid, therefore that ground of I&M Bank's appeal has merit.

2. Whether I&M Bank Ltd should be awarded the damages requested

[25] Counsel Rubasha Hubert states that Sebulikoko Niyomwungeri Emmanuel/ECSNE and Rwasibo Mutesi Béatrice failed to pay I&M Bank Ltd up to now instead they dragged it into lawsuits, that is a breach of contract, thus they should be ordered to pay damages of 10,000,000Frw, counsel fees of 5,000,000Frw and the procedural fees of 3,000,000Frw.

[26] Counsel for Sebulikoko Niyomwungeri Emmanuel argues that the damages requested by I&M Bank are groundless because he is the one who was illegally deprived of his property as also it was also indicated in the court cases rather is the one who should be awarded damages. Counsel for Rwasibo Mutesi Béatrice that those damages are groundless because Rwasibo and Sebulikoko who represents ECSNE demonstrated that it is I&M Bank which faulted by selling the securities which are no longer valid disregarding the provisions of article 27 of the Law N°34/2013 aforementioned.

VIEW OF THE COURT

[27] Regarding damages of 10,000,000Frw requested by I&M Bank Ltd, the court finds that they should not be awarded because it requests them basing on the fact that Sebulikoko breached the contract and being dragged in lawsuits because the grounds of the judgment rendered by the Commercial Court which demonstrated that I&M Bank was awarded interests on the principal loan for delay were not reversed, therefore it should not be awarded additional damages to those interests with regards to the issue of being dragged into law suits, it requests them as if Sebulikoko was the one who dragged it into law suits, therefore it should not base on its right to appeal endowed by article 162 of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure to request damages for being dragged into lawsuits.

[28] Regarding the counsel and procedural fees, the Court finds that since I&M bank's appeal has merit, it is obvious that it incurred procedural and counsel expenses, therefore Sebulikoko together with his guarantee have to pay 300,000Frw and 500,000Frw for procedural and counsel fees respectively awarded in the court's discretion because what it requests for is excessive and did not prove for it.

B. The cross appeal of Sebulikoko Niyomwungeri Emmanuel

[29] Counsel for Sebulikoko argues that the fact that Commercial High Court held that he did not demonstrate that those machines were at work or were ready to be used but the court disregarded that he had a lot of work which he was about to start ,however since there was a lot of changes, the Supreme Court order an expert to determine the loss incurred because Sebulikoko can no longer demonstrate it, as it was ordered in the case RADA0001/05/CS rendered on 02/09/2009, they further request the court to orderfor set off the debts, in calculating the loss incurred they argue that the daily income which had to be generated by the machines demonstrated by Sebulikoko should be the one to be based on, and be awarded damages for being brought into lawsuits equivalent to 10,000,000FRw, moral damages of 30,000,000Frw and counsel fees of 15,000,000Frw.

[30] I&M Bank argues that the claims of Sebulikoko are groundless because he admitted that the work he had with DRC, Burundi and Rwanda was cancelled as the contract he had with those countries were terminated, and he promised to pay the bank from the income he would get from those tenders, but he failed, at his request there was restructuring of the contract with the bank arguing that ECSNE has various tenders but it failed to pay.

THE VIEW OF THE COURT

[31] The Court finds that without examining the statements of both parties on the cross appeal, since I&M Bank legally auctioned the securities it was furnished by Sebulikoko Niyomwungeri Emmanuel as explained above (Par. 21) this implies that there is no need to examine the loss incurred by Sebulikoko which he says that it was caused by auctioning the securities, therefore the cross appeal has no merit.

III. DECISION OF THE COURT

[32] Decides that the appeal of I&M Bank Ltd has merit ;

[33] Finds the cross appeal of Sebulikoko Niyomwungeri Emmanuel without merit;

[34] Holds that the securities furnished by Sebulikoko Niyomwungeri Emmanuel who represents ECSNE, were sold by I&M Bank Ltd when they were still valid;

[35] Decides that the rulings of the judgment RCOMA 00100/2016/CHC/HCC rendered on 15/07/2016 by the Commercial High Court is only reversed with regard to the securities;

[36] Orders Sebulikoko Niyomwungeri Emmanuel who represents ECSNE together with Rwasibo Mutesi Béatrice to give I&M Bank Ltd 300,000Frw of the procedural fees and 500,000Frw for the counsel fees;

[37] Orders Sebulikoko Niyomwungeri Emmanuel who represents ECSNE and Rwasibo Mutesi Béatrice to jointly reimburse I&M Bank Ltd 100,000Frw for the court fees