

MUREKATETE v. RWANDA REVENUE AUTHORITY (RRA)

[Rwanda SUPREME COURT – RCOMAA0038/2016/CS – RCOMAA0043/16/CS (Mutashya, P.J., Nyirinkwaya and Karimunda, J.) January, 12, 2018]

Company law – Piercing the corporate veil – Shareholders and directors of a company shall not be liable for the company's deeds, except when there is a court decision which ruled on their liability – Law N°25/2005 on tax procedure, article 46 bis – Law N°27/2017 of 31/05/2017 governing companies, article 23 and 95.

Company law – Piercing the corporate veil – Caveat – A caveat cannot be put on the personal properties of shareholders and directors of company before a competent court hold them liable for the faults committed by the company.

Fact: After Rwanda Revenue Authority put a caveat on the house of Murekatete on the ground that there are taxes which DISCOME Ltd owes, for which she is a director and shareholder, Murekatete filed a claim to the Commercial Court of Nyarugenge requesting for the removal of the caveat because the property of the shareholder is separate from that of the company, she also requested for various damages. RRA also filed a counterclaim requesting that Murekatete be compelled to pay the tax imposed on that company.

That court ordered for removal of that caveat on the ground that RRA did not have the right to put a caveat on her house as long as there was no decision by the Court ordering her to pay the tax imposed on that company; regarding the counterclaim, it held that it is inadmissible because it is a separate claim.

Rwanda Revenue Authority appealed to the Commercial High Court stating that it put a caveat on Murekatete's immovable property due to the fact that when DISCOME Ltd was audited, Murekatete sold its properties; which led it to not pay the tax, and also its counterclaim should have been admitted because it is was submitted in its defense and it is also related to the principal claim.

The Commercial High Court motivated that a caveat on the immovable property is the temporary measure, which can be put in place before filing a claim to the competent court to decide on the liability of shareholders and directors of a company, especially that article 46 bis of the Law N°25/2005 of 04/12/2005 on tax procedure does not provide that filing a claim to the court precedes any act carried out on their personal assets. Therefore, the appealed judgment is overturned. It also finds that the counterclaim should have been admitted because it is related to the principal claim filed by Murekatete, but it cannot be examined for the first time at appeal level.

Murekatete appealed against that judgment to the Supreme Court arguing that the Commercial High Court disregarded that a commercial company with legal personality is liable on its own, that its directors or shareholders are not held liable for its deeds because they are distinct from the company and the provisions of article 46 bis of the above mentioned Law are only applicable after the decision of the court.

In its defense, Rwanda Revenue Authority it states that even though normally the company's property is separate from that of its shareholders, that does not exonerate them from liability when it is established that they had a role which led the company to default on its obligation of paying tax, basing on article 46 bis of the Law N°25/2005 of 04/12/2005 on tax procedure, and that article does not provide that the court should first decide on the liability of directors and shareholders of company before putting a caveat on their private properties, and also if it waits for the ruling, it will find the properties from

which the tax would be got embezzled or concealed, it also requests that the counterclaim it lodged beginning from the first instance be admitted and examined. Both parties conclude requesting for procedural and counsel fees.

Held: 1. Shareholders and directors of a company shall not be liable for the company's deeds, except when there is a court decision which ruled on their liability.

2. A caveat cannot be put on the personal properties of shareholders and directors of company before a competent court hold them liable for the faults committed by the company; therefore, the caveat put on the immovable property of Murekatete should be removed because it is unlawful.

3. The claim for the liability of directors and shareholders of commercial company is a separate claim which should not be considered as a counterclaim of the principal suit filed by the plaintiff because they are not related. Thus, the counterclaim submitted by RRA is inadmissible.

**Appeal has merit;
Cross appeal lacks merit;
Court fees to RRA.**

Statutes and statutory instruments referred to:

Law N°25/2005 on tax procedure, article 46 bis.

Law N°27/2017 of 31/05/2017 governing companies, article 23 and 95.

Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 106, 107 and 283.

Cases referred to:

RRA v. Munyampundu et.al, RCOMAA00040/2016/SC rendered on 22/12/2017 by the Supreme Court.

Judgment

I. BACKGROUND OF THE CASE

On 11/02/2015, Rwanda Revenue Authority applied for a caveat on the house of Murekatete Clémentine Vervelde located on plot N°UPI 1/02/13/02/631, in the letter, it wrote to the Director General of Rwanda Natural Resources Authority and copied to Murekatete Clémentine Vervelde, stating that the caveat is due to the tax she owes it.

On 12/05/2015, Murekatete Clémentine Vervelde filed a claim to the Commercial Court of Nyarugenge requesting for the removal for the caveat on her house because the assets of the shareholder are separate from those of the company and requested for various damages.

In its defense, Rwanda Revenue Authority argues that the caveat put on the immovable property of Murekatete Clémentine Vervelde is in accordance with article 46 bis of the Law N°25/2005 on tax procedures which provides that directors and shareholders who are directly involved in the control and management of company shall be jointly liable for any tax liability if they led to the company's inability to meet its tax obligations, due to the fact that as the director and a sole shareholder of DISCOME Ltd is responsible for the company failure to pay tax.

██████████ Rwanda Revenue Authority filed a counterclaim requesting that Murekatete Clémentine Vervelde be ordered compelled to pay the tax which DISCOME Ltd was charged amounting to 25,490,933Frw, procedural and counsel fees.

██████████ On 23/11/2015, the Commercial Court of Nyarugenge rendered the judgment RCOM0783/15/TC/NYGE and ordered the caveat on Murekatete Clémentine Vervelde's house to be removed because eventhough article 46 bis of the Law N°25/2005 on tax procedures provides for the liabilities of directors and shareholders of the company when all in that article conditions are fulfilled , but it also provides that such liability shall be determined by a competent court, this implies that RRA did not have the right to put a caveat on Murekatete Clémentine Vervelde's house as long as the court has not yet ordered her to pay the tax imposed on DISCOME Ltd.

██████████ Regarding the damages which Murekatete Clémentine Vervelde requested, the Court ruled that she should not be awarded damages originating from the closure for her house because she does not prove it. Concerning procedure and counsel fees, the court awarded her 500,000Frw.

██████████ Concerning the counterclaim filed by RRA requesting the Court to compel Murekatete Clémentine Vervelde to pay the tax imposed on DISCOME Ltd, the Court held that the claim is inadmissible because it is a separate claim which is provided by article 46 bis of the Law N°25/2005 on tax procedure, thus it should not be considered as a counterclaim provided by article 107 of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure filed by the plaintiff.

██████████ RRA appealed against that judgment to the Commercial High Court stating that it urgently put a caveat on the house of Murekatete Clémentine Vervelde basing on article 46 bis of the mentioned Law on tax procedure and on article 283, paragraph 1 of the Law relating to the civil, commercial, labour and administrative procedure also cited above, this is due to the fact that when DISCOME Ltd was audited, Murekatete Clémentine Vervelde sold its properties which led it to default on tax and also tha its counterclaim should have been admitted basing on article 107 of the law relating to the civil, commercial, labour and administrative because it is a counterclaim and it is related to the one which was filed by the plaintiff.

██████████ In the Judgment RCOMA0672/15/HCC rendered on 13/05/2016, that court reversed the judgment rendered by Commercial Court of Nyarugenge set aside the damages which RRA was ordered to pay at the first instance, and ordered Murekatete Clémentine Vervelde to pay RRA 300,000Frw for procedure and counsel fees.

██████████ In its decision, the Court motivated that caveat is a temporary measure, thus it could be put in place before filing a claim to the competent court so that it rules on the liability of shareholders or directors of the company, especially that article 46 bis of the law on procedure tax does not provide that filing a claim to the court precedes any act on their personal assets.

██████████ It further motivated that waiting for the liability of directors and shareholders of the company to be established by the courts before seizing or carrying any provisional act to prevent them from misappropriating their properties can rather be a loophole to disguise them purposely not to pay company's debts when they liability in not paying those debts have been established.

██████████ Concerning the counterclaim filed by RRA beginning from the first instance, the Court declared that the grounds based on by the previous Court to reject the claim have no merit because it was purposely for defense and it is related to the one submitted by Murekatete Clémentine Vervelde,

however it should not be examined on appeal because it would be examining any issue for the first time at appeal level.

█ Murekatete Clémentine Vervelde appealed to the Supreme Court arguing that the High Court disregarded the company Law and tax Law, RRA raised the objection of lack of jurisdiction of the Supreme Court basing on value of the subject matter, after that objection being debated upon and deliberated on, in the interlocutory judgment of 30/06/2017, the Court decided that it has the jurisdiction over it, RRA filed a cross appeal requesting to compel Murekatete Clémentine Vervelde to pay the tax imposed on DISCOME Ltd as it requested since the hearing at the first instance in counterclaim it filed.

█ The case on merit was heard on 05/12/2017, Murekatete Clémentine Vervelde represented by counsel Zawadi Stephen whereas RRA was represented by counsel Byiringiro Bajeni.

II. ANALYSIS OF THE LEGAL ISSUES

Whether the caveat put on the property of Murekatete Clémentine Vervelde located on plot number UPI 1/02/13/02/631 has to be removed

█ The counsel for Murekatete Clémentine Vervelde argues that article 137 of the Law N°07/2010 of 27/04/2009 relating to companies provides that a shareholder shall not be liable for an obligation of the company by reason only of being a shareholder.

█ He further argues that a commercial company with legal personality is liable on its own, that its directors or shareholders are not held liable because they are distinct from the company, that the latter can sue and be sued, pay tax, hire employees and do any other thing which people does.

█ He further states that the provisions of article 46 bis of the Law N°25/2005 on tax procedure are applied after the decision of the competent court, concerning Murekatete Clémentine Vervelde, there is no such decision rendered by the court before RRA put a caveat on her immovable property, which means that it was contrary to the tax laws.

█ The counsel for RRA states that even though normally the company's property is separate from that of its shareholders, that does not exonerate them from liability when it is established that they had a role which led the company to default on its obligation of paying tax, basing on article 46 bis of the Law N°25/2005 of 04/12/2005 on tax procedure, and that article does not provide that the court should first decide on the liability of directors and shareholders of company before putting a caveat on their private properties, and also if it waits for the ruling, it will find the properties from which the tax would be got embezzled or concealed.

█ He continues stating that RRA put a caveat on Murekatete Clémentine Vervelde's house because after seeing the draft of the company's tax she immediately sold 2 vehicles of the company, which made RRA to also instantly put a caveat on heir immovable property so that she does not conceal it with the purpose of not paying the tax.

█ He further states that RRA put a caveat on Murekatete Clémentine Vervelde's house on the basis of article 283, *litera* 1 of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, which allows a creditor to submit a request to put a caveat on immovable property belonging to the debtor.

VIEW OF THE COURT

Article 46 bis of the Law N°25/2005 of 04/12/2005 on tax procedure provides that directors who are directly involved in the control and management of a private company shall be jointly liable for any tax liabilities incurred by the company if it can be reasonably concluded that they intentionally or negligently caused the company to incur the tax liabilities. Shareholders who become involved in the management of the company and/or misuse company's funds shall also be liable for any tax liability if they led to the company's inability to meet its tax obligations. A competent court shall determine the liability of the directors and shareholder(s) under this article.

The provisions of this article are exception to the principle which provides that a company has legal personality which is distinct from that of its shareholders, as it is provided under article 23 of the Law N°27/2017 of 31/05/2017 governing companies, this is the reason why, as it is mentioned also under article 95 of that law, a shareholder in limited company shall not be held liable for the obligations of a company only because of being a shareholder, his/her liability is limited to any amount unpaid on a share held by the shareholder(1), any liability expressly provided for in the company's incorporation documents(2), any distribution received by the shareholder to the extent that the distribution is recoverable(3).

Regarding caveat on immovable property, article 283 of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, provides that "any creditor or interested party may submit a request to the Registrar of land titles or to the Sector or the District Executive Secretary in the area the property is located in order to prevent any transfer of the immovable property belonging to the debtor".

The court finds that article 46 bis of the Law on the tax procedure mentioned, which RRA relied on putting caveat on immovable property of Murekatete Clémentine Vervelde, only gives it the right to file a claim to the competent court seeking to establish the liability of directors and shareholders stated in that article, however, it does not grant the right of putting a caveat on the immovable property of directors or shareholders of the company.

Regarding article 283, litera 1 of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure which is also based on by RRA in putting a caveat on the house of Murekatete Clémentine Vervelde, the court finds that it provides for a provisional measure of preventing the transfer of immovable property of the debtor, but it cannot be applied to prevent the transfer of Murekatete Clémentine Vervelde's house because RRA did not prove the debt of tax which she owes it, therefore she should not be held liable of the tax imposed to DISCOME Ltd as long as no competent court has yet decided that she should be liable of that tax.

The court finds that what have been stated above that Murekatete Clémentine Vervelde's house should not be prevented from being sold because of the tax which was imposed on DISCOME Ltd, is consistent with various case laws of this court including that of RRA v. Munyampundu Antoine and Mukarugambwa Béatrice, whereby in paragraph 26, it motivated that the liability of directors and shareholders of company is an exception which is decided only by the court.¹

Basing on the laws and motivations provided above, the Court finds that the caveat which was put on Murekatete Clémentine Vervelde's immovable property located on plot N° UPI 1/02/13/02/631 should be removed because it is unlawful.

¹ Judgment RCOMAA00040/2016/SC rendered on 22/12/2017 by the Supreme Court

Whether Murekatete Clémentine Vervelde should be compelled to pay the tax imposed on DISCOME Ltd

█ Counsel for RRA states that the Commercial High Court motivated that the counterclaim filed beginning from the first instance requesting that Murekatete Clémentine Vervelde be held liable for the taxes of DISCOME Ltd basing on article 46 bis of the Law N°25/2005 on tax procedure on the ground that she led the company to default on the tax it was charged should have been admitted because it is related to the principal claim which seeks to remove the caveat filed by Murekatete Clémentine Vervelde, but surprisingly in paragraph 36 of the judgment, the Commercial High Court declared that it cannot examine that counterclaim for the first time on appeal.

█ He further argues that the motivations of the judge are contrary to the above mentioned article 171 of the Law relating to the civil, commercial, labour and administrative procedure which provides that “when the appeal court overrules the appealed judgment, the court shall hear the case in substance unless the overruling was done because there were irregularities in lodging the appeal or for lack of jurisdiction”, that is the reason why he requests this court to examine the counterclaim of RRA which it filed beginning from the first instance, so that this Court holds that Murekatete Clémentine Vervelde is liable for the tax imposed on DISCOME Ltd.

█ He goes further to state that the reason why RRA finds Murekatete Clémentine Vervelde should be held liable for the taxes imposed on DISCOME Ltd is that when DISCOME Ltd was audited, she sold its assets, which is considered as the reason for not paying the tax it was imposed, typical example is the sale agreement of two vehicles concluded between DISCOME Ltd (seller) and DITRAC Solution Ltd (buyer) on 30/04/2013.

█ He states that the other reason which proves that Murekatete Clémentine Vervelde was involved in invasion of the tax imposed on DISCOME Ltd is that she sold its properties after getting a letter which was rectifying that of 05/03/2013, and instead of responding to it within thirty days as provided by article 27 of the law on tax procedure, she immediately sold the properties of DISCOME Ltd with the purpose of evading the tax which the company was charged, because if she was willing to fulfill her obligation of paying tax, she would have done it because considering the tax she was required to pay as indicated in the letter concluding the audit which she received on 26/06/2013 worth 19,895,205Frw, and if compared to 38,000,000Frw she received for selling the two vehicles belonging to DISCOME Ltd, this money should have been used to pay the tax which DISCOME Ltd owes RRA.

█ Counsel for Murekatete Clémentine Vervelde states that it was well motivated by the High Court that the claim submitted by RRA should not be examined for the first time on the appeal level, thus, he finds that also this Court could not examine it for the first time on the second appeal.

VIEW OF THE COURT

█ In its cross appeal, RRA prays to the Court to admit and examine the counterclaim filed beginning from Commercial Court so that Murekatete Clémentine Vervelde is held liable for the tax imposed on DISCOME Ltd basing on article 46 bis of the law N° 25/2005 of 04/12/2005 on tax procedure because of her alleged role in the failure of the company to pay the taxes it was charged.

█ Article 106 of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure provides that a counterclaim is any claim filed by the defendant, seeking judgment against the plaintiff, whereas article 107 of that law in *litera* 2, provides that the counterclaim

shall be admissible only if they constitute a defence to the main suit or those that are related to it (1), they are intended to claim for damages for abuse of process in the case(2), or they seek compensation between the parties(3).

█ The court finds that the claim filed by RRA requesting that the defendant be compel to pay the tax imposed on DISCOME Ltd, it is not counterclaim to the principal suit filed by Murekatete Clémentine Vervelde requesting to remove the caveat because it was unlawful, and it was demonstrated by the Commercial Court that it is not related to the principal suit, because it is a separate claim based on different ground of liabilities of directors and shareholders of a commercial company relating to the tax imposed on that company, as it is explained under article 46 bis of the law on tax procedure, therefore, it should not be admitted.

█ The court also finds that there is no other ground which is in line with the above mentioned article 107, litera 2 of the Law relating to the civil, commercial, labour and administrative procedure for the counterclaim filed by RRA can be admitted, therefore, its cross appeal has no merit.

Concerning the procedural and counsel fees requested by the parties

█ The counsel for Murekatete Clémentine Vervelde states that because RRA dragged his client into unnecessary lawsuits should pay her 5,000,000Frw in damages because her house title were taken and consequently could not get tenants ; that it should also pay counsel fees worth 1,000,000Frw on this instance and 1,100,000Frw for the two previous instance.

█ The counsel for RRA states that the damages which Murekatete Clémentine Vervelde requests for are groundless because the title deeds of the house were not seized, the caveat on the house cannot prevent it from being rented and that she should not be awarded counsel fees she requests for since she was the one who dragged RRA into lawsuit.

█ He concludes requesting that RRA be awarded 2,000,000Frw for the counsel and procedure fees.

VIEW OF THE COURT:

█ The Court finds that Murekatete Clémentine Vervelde should not be awarded the damages resulting from the loss suffered because she does not prove it, but she should be awarded procedure and counsel fees on three instances she pleaded, because RRA dragged her in unnecessary lawsuits, this made her to incur the expenses in preparation of the case and to hire a lawyer to defend her, therefore, in its discretion, basing on the nature of the case, the time spent, the three instances, she is awarded 2,600,000Frw.

III. DECISION OF THE COURT

█ Finds with merit the appeal of Murekatete Clémentine Vervelde;

█ Finds without merit the cross appeal of Rwanda Revenue Authority;

█ Overturns the Judgment RCOMA0672/15/HCC rendered on 13/05/2016 by the Commercial High Court;

█ Decides that the caveat put on immovable property located on plot N° UPI 1/02/13/02/631 of Murekatete Clémentine Vervelde be removed;

██████ Decides that the claim filed by RRA requesting that Murekatete Clémentine Vervelde be ordered to pay the tax imposed on DISCOME Ltd should not be admitted;

██████ Orders RRA to pay 2,600,000Frw of the counsel and procedure fees to Murekatete Clémentine Vervelde for the three instances in which she pleaded;

██████ It also orders RRA to pay the court fees of 100,000Frw