

ANGEL PHARMACY LTD v. NDABATEZE

[Rwanda SUPREME COURT – RS/REV/INJUST/COM 0005/15/CS (Kayitesi Z, P.J., Nyirinkwaya and Ngagi, J.) January 15, 2016]

Company law – Certificate of Incorporation – Certificate of incorporation is conclusive evidence that from the date of registration stated in the certificate, the company is incorporated until it is removed from the register of companies.

Company law – Pharmacy – The value of the license issued by Ministry of Health – The license issued by Ministry of Health authorizes the pharmacy, which has been already stocked and prepared to start operating, but it is not proof of ownership of the pharmacy.

Facts: This case originates from the disputes between Umukumburwa and Ndabateze, whereby Umukumburwa argues that together with the orphans she was taking care of incorporated Angel Pharmacy Ltd, but because the law at the time did not allow a person who did not study pharmacology to start a pharmacy, she negotiated with Ndabateze who had studied it to apply for authorization from MINISANTE. After getting the authorization Ndabateze became the Managing Director and she was paid 300,000Frw per month.

Ndabateze later claimed that Angel pharmacy was hers; thus disagreement rose, which led to Angel Pharmacy Ltd filing a lawsuit in Nyarugenge Commercial Court and the judgment was in her favor, the Court ruled that Angel pharmacy did not exist, but there was a legal entity called Angel Pharmacy Ltd, held that the shareholders are its founders and that Ndabateze was not its shareholder.

Ndabateze appealed to the Commercial High Court, it rendered the judgment and held that Umukumburwa, the representative of Angel Pharmacy Ltd should hand back Angel pharmacy to Ndabateze as agreed when they began to work together.

Umukumburwa uhagarariye Angel Pharmacy Ltd avuga ko akarengane yagiriwe gakubiye muri ibi bikurikira; kuba urukiko rwategetse ko agomba gusubiza Ndabateze Angel pharmacy kandi itarigeze ibaho, ahubwo mu rwego rw'amategeko hariho Angel Pharmacy Ltd nkuko ndetse bigaragazwa n'ibaruwa yanditswe n'Ubuyobozi bwa RDB ndetse no kuba urwo rubanza ntirushyobora kurangizwa kuko Angel Pharmacy itabaho.

Umukumburwa wrote to the Office of the Ombudsman requesting that the judgment rendered by the Commercial High Court be reviewed because it was vitiated with injustice. The Ombudsman wrote to the President of the Supreme Court requesting that the mentioned judgment be reviewed on the grounds of injustice.

Umukumburwa, the representative for Angel Pharmacy Ltd argues that the injustice is manifested in the following grounds; the court ordered that she should hand over Angel Pharmacy to Ndabateze which never existed as explained in the letter of RDB and the fact that the judgment can't be executed because Angel pharmacy does not exist.

In her defence, Ndabateze Adéline denied that she was an employee of Umukumburwa, that the latter is confusing ANGEL PHARMACY with ANGEL PHARMACY Ltd. She stated that she

was given 300,000 Frw per month because of the document she submitted when applying for the operating license.

- Held:** 1. Certificate of incorporation is conclusive evidence that: from the date of registration stated in the certificate, the company is incorporated until it is removed from the register of companies.
2. The license issued by Ministry of Health authorizes the pharmacy, which has been already stocked and prepared to start operating, but it is not proof of ownership of the pharmacy.
3. Any act of a man, which causes damage to another obliges the person by whose fault it happened to repair it

**The claim has merit in parts.
Court fees on Ndabateze.**

Statutes and statutory instruments:

Law N° 07/2009 of 27/04/2009 relating to companies (abrogated), article 2(39, b),4, 17(2) and 18.

Ministerial Order N ° 20/15 of 03/05/2005 determining the requirements in the opening, operating and transferring pharmaceutical sales, article 6

Law of 10/07/1888 governing contracts or obligations (abrogated), article 258

No cases referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Umukumburwa Alice argues that on 21/10/2011, she founded the Angel Pharmacy Ltd in partnership with the orphans she was raising namely Akizanye Elaine, Nduwawe Ange and Umuhoza Aimée and was their guarantor. But since the law at the time did not allow a person who is not a pharmacist to start that business, Umukumburwa Alice requested her pharmacist friend Ndabateze Adeline to apply for a certificate from MINISANTE, and was given the authorization to open a pharmacy as a “Managing Director” but was not a shareholder, after the pharmacy started operating, Mukumburwa Alice and her colleagues were paying Ndabateze Adeline 300,000 Frw per month as its “Managing Director”.

[2] Thereafter there were misunderstandings between Ndabateze Adeline and Umukumburwa Alice as Ndabateze Adeline claimed ownership of Angel Pharmacy, Angel PHARMACY Ltd filed a claim at the Commercial Court of Nyarugenge, in judgment N°. RCOM 0480/14 / TC / NYGE, the case was rendered in the favour of the plaintiff, whereby the Court held that Angel Pharmacy does not exist, but rather Angel Pharmacy Ltd is the one which exists legally, that the shareholders are its founders and that Ndabateze Adeline is not a shareholder.

[3] Ndabateze Adeline Adeline appealed to the High Court of Commerce, her appeal registered on N°. RCOMA 0465/14 / HCC and on 23/10/2014, the Court held that Mukumburwa Alice representing Angel Pharmacy Ltd must handover Angel Pharmacy to Ndabelle Adeline as they agreed when they began to work together.

[4] On 04/11/2014, Umukumburwa Alice representing Angel Pharmacy Ltd wrote to the Office of the Ombudsman requesting that case No. RCOMA 0465/14 / HCC be reviewed due to injustice. On 01/12/2014, the Ombudsman wrote to the President of the Supreme Court requesting that judgment N°. RCOMA 0465/14 / HCC rendered by the Commercial High Court be reviewed due to the following grounds:

- 1) The court ordered that Umukumburwa Alice, who represents Angel Pharmacy Ltd, hand over Angel Pharmacy to Ndeline expect Adeline Angel Pharmacy, which is not possible because, as emphasized by the letter N°. RDB / 3 / RH / 0238/02/2014 written by RDB responding to Umukumburwa Alice, who had requested it to give information on Angel Pharmacy, which Ndabateze Adeline claims to be hers and Angel Pharmacy Ltd also claims it, and then it replied that Ndabateze Adeline is registered on Pharmacie Bethel with code 101808806, which implies that even if Angel Pharmacy also existed, it only existed theoretically but legally never existed;
- 2) The fact that the Court ruled that the Umukumburwa Alice representing Angel Pharmacy Ltd hands over Angel Pharmacy to Adeline Angel Pharmacy, will lead to failure to enforce the judgment because Angel Pharmacy does not exist.

[5] On 21/11/2014, Angel Pharmacy Ltd represented by Umukumburwa Alice appealed Judgment N° RCOMA 0465/14/HCC (through EFS)¹, the claim was registered on N° RCOMAA 0054/14/CS, and on 12/06/2015, the Supreme Court found that the claim does not fall within its jurisdiction.

[6] The first hearing of this case (RS / REV / INJUST / COM 0005/15 / CS) was held in public on 13/10/2015, Angel Pharmacy Ltd represented by Umukumburwa Alice assisted by Counsel Niyondora Nsengiyumva, while Ndabateze Adeline represented by her husband Ngwabije Murihano Ephrem represented by Counsel Ngabonziza Julien and Counsel NDAYAMBAJE Iyamuremye Simon.

[7] At the beginning of the hearing, Ngwabije Murihano Ephrem raised the objection of inadmissibility of the claim on the ground that the appellant availed two remedies at the same time while it's barred by article 12 of Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, and also the grounds of injustice do not match with the provisions of article 81 of Organic Law N°. 03/2012 / OL of 13/06 / 2012 Law determining the organization, functioning and jurisdiction of the Supreme Court. Those objections were overlured by the Court, in its interlocutory judgment dated 20/11/2015, therefore the hearing in merit was scheduled on 09/12/2015.

¹ Electronic Filing System.

[8] The hearing on 09/12/2015 was held in public, Angel Pharmacy Ltd represented by Umukumburwa Alice assisted by Counsel Niyondora Nsengiyumva, while Ndabateze Adeline assisted by Counsel Ndayambaje Iyamuremye Simon.

II. ANALYSIS OF THE LEGAL ISSUES

Determining which pharmacy holds a legal personality between Angel Pharmacy Ltd and Angel Pharmacy, and its owner

[9] Umukumburwa Alice, the representative of Angel Pharmacy Ltd, argues that they started the pharmacy when they are orphan, they sought the assistance of Ndabateze Adeline, who had studied pharmacology, got an "authorization" a year later, and they started working. Later Ndabateze Adeline asked them to give her the authorization (permit) so that she begins her pharmacy, then conflicts rose, they got another employee, and Ndabateze Adeline also got another employee called Mutabazi Serge.

[10] Counsel Niyondora Nsengiyumva, assisting Umukumburwa Alice, argues that the Court examines whether the Commercial Company exists because of the Commercial Register issued to it or whether it is subject to the authorization license issued by MINISANTE, that Angel Pharmacy Ltd was legally approved on 21/10/2011, it demonstrates its shareholders, and that once the company is registered that is when it is given the license to operate the pharmacy. She further argues that Ndabateze Adeline admits that she was paid 300,000 Frw per month, that if she was the owner of the pharmacy she should not have been paid that money, that she received it because she was an employee of the company working as a Director Manager.

[11] Ndabateze Adeline argues that Umukumburwa is confusing Angel Pharmacy with Angel Pharmacy Ltd, that she has never been an employee of Umukumburwa Alice. She further argues that, as a pharmacist, she started Pharmacie Bethel, and Umukumburwa Alice approached her and requested her to work together in the pharmacy, she started Angel Pharmacy on her business register, and she used to send Umukumburwa on her behalf and she used to sign on her behalf (P.O), if she was her employer she would not have sent her on errands and 300,000 Frw was given to her because of her document which she submitted in applying for authorization to begin the pharmacy. She further argues that they greed with Umukumburwa Alice that she will be the accountant while her mother (of Adeline Ndabateze) will be the cashier and that they would share the profit every month and after a year they will separate, and she gives Umukumburwa the money for "Comptoir", and that of the remaining drugs, and she continues her pharmaceutical business under her Enterprise.

[12] Counsel Iyamuremye Simon assisting Ndabateze Adeline argues that Umukumburwa Alice the representative of Angel Pharmacy Ltd, applied for the documents to open the pharmacy but failed and used Ndabateze Adeline's documents. He claims that the owner of the pharmacy is the one who has the authorization granted by MINISANTE.

DETERMINATION OF THE COURT

On the issue of determining the pharmacy which holds legal personality between Angel Pharmacy Ltd and Angel Pharmacy

[13] Article 4 of the Law N° 07/2009 of 27/04/2009 relating to companies provides that "It shall be compulsory to register a company in the Registrar General's office.". And for article 17,2° of that Law provides that a certificate of registration of a company is conclusive evidence that from the date of registration stated in the certificate, the company is incorporated. Article 18 also provides that A company registered under this Law shall be a company with a separate legal status and with the name by which it is registered and continues to exist until it is removed from the register of companies.

[14] The case file indicates that Angel Pharmacy Ltd was registered in the Office of the Registrar General in the Rwanda Development Board (RDB) on 21/10/2011 and was amended on 09/10/2012, as indicated by "Full Registration for Domestic Company". The file also shows that the company's shareholders are Umukumburwa Alice, Akizanye Alain, Nduwawe Ange and Umuhiza Aimée; Umukumburwa Alice is the legal representative whereas Ndabateze Adeline, who is not among the shareholder, is its Managing Director. The Memorandum of Association of Angel Pharmacy Ltd dated 07/10/2011, which is also the company's founding certificate, issued by RDB, also indicates that Umukumburwa Alice, Akizanye Alain, Nduwawe Ange and Umuhiza Aimée are shareholders in Angel Pharmacy Ltd, Ndabateze Adeline as Managing Director; and that the company is engaged in the retail sale of pharmaceutical and medical goods, cosmetics and toilet articles in specialized stores and that the capital is 2,500,000 Frw which was contributed in equal proportions to all four (4) shareholders.

[15] The case file also indicates that in a letter dated 19/02/2014, the Secretary General of Commerce at RDB wrote to Alice Umukumburwa, states clearly that Angel Pharmacy Ltd is a company registered with the Rwanda Development Board, and that Nabateze Adeline has a personal business in the name of "Pharmacie Bethel".

[16] Based on the motivations provided in the preceding paragraphs, the Court finds that Angel PHARMACY Ltd represented by Umukumburwa Alice is the one registered in the RDB, as required by Article 4 of the Company law, it is also the one with legal personality since it is the one that complies with the legal requirements, and Angel Pharmacy, Ndabateze Adeline claims to be hers, even if its operating, it doesn't appear to be legally incorporated; because it was never registered in RDB.

The issue of determining the ownership of Angel Pharmacy Ltd

[17] Article 2,32°,b of the Law N° 07/2009 of 27/04/2009 relating to companies provides that person whose name appears in a request for company registration at the time of its incorporation and who is regarded as a shareholder until his/her name is. entered in the share register;

[18] Article 6 of the Ministerial Order N ° 20/15 of 03/05/2005 determining the requirements in the opening, operating and transferring pharmaceutical sales provides that when the pharmacist works for others, the pharmacy opening document must be accompanied by a document proving that partnership called the "Partnership Agreement" which is signed by the pharmacist and the legal person representing the company.

[19] On the issue of determining whether the license issued by MINISANTE to operate a pharmacy is a legal document with incorporates it and that the one in whose names the license is written is the owner of the pharmacy, the Court finds that Umukumburwa Alice consented with

Ndabateze Adeline to co-operate the pharmacy, but the agreement of cooperation was only verbal, as there is no document proving it as provided for in article 6 of the Ministerial Order N° 20/15 of 03/05/2005 mentioned above which provides that the pharmacist may work for other persons. The Court finds that in the agreement between the two parties, the party represented by the Umukumburwa Alice was the one who sought the capital to buy medicine, equipment, pay the house rent, and so on, while the role of Ndabateze Adeline was to seek a license through her documents which include a trade license, ID, diploma, etc., in order for the pharmacy to be authorized to start business activities and Ndabateze Adeline was paid 300,000 Frw per month for that authorization.

[20] It is also clear that applying for the license of the pharmacy started on 18/05/2012, when Adeline Ndabateze wrote to MINISANTE requesting the authorization to open the pharmacy, on 08/06/2012, the National Pharmaceutical Establishments Committee submitted an audit report confirming the fulfillment of the requirements for the pharmacy to be allowed to begin operating, the license was granted on 09/08/2012 as evidenced by letter N° 20/4265 / PH / INSP / JK / 2012 of 09/08/2012, which MINISANTE wrote to Ndabateze Adeline authorizing her to open pharmacy activities in ANGEL. This confirms that the pharmacy was first registered with the RDB in 2011, and the operating license was issued later and the pharmacy was already in place, especially since it is also licensed after a technical inspection to ensure that all requirements are met.

[21] The Court finds that the license issued by MINISANTE does not confer ownership of the pharmacy on the one whose name is written on it because article 6 of the ministerial Order allows for a partnership between the pharmacist and another person to work on behalf of the company, rather the license is a document that authorizes the pharmacy, which has been already stocked and prepared to start operating, that it is not a proof that the pharmacy exists and that it belongs to so and so. The Court finds that Ndabateze Adeline could not be the owner of the pharmacy and then be paid for the license she acquired for her pharmacy, but also to be reimbursed for the license she was given, because the shareholder, if she is not an employee of the company is not entitled to a salary, but instead, dividends interest on the shares as provided for in article 156 of the aforementioned Law N° 07/2009 of 27/04/2009 on companies states that shareholders are entitled to dividends (...); therefore, Angel Pharmacy Ltd is represented by the Umukumburwa Alice which is a legally existing pharmacy as described above

[22] The Court finds that Angel Pharmacy Ltd is legally incorporated, and is the one that had to continue with the pharmaceutical activities and that Angel Pharmacy does not exist legally and must not continue to operate under that name because it would be contrary to this decision of the court.

[23] Based on the motivations and the legal provisions given above, the Court finds that the shareholders who are the founders of the Angel Pharmacy Ltd and the owners are Umukumburwa Alice, Akizanye Alaine, Nduwawe Ange and Umuhzoza Aimée, as indicated by the Memorandum of Association issued by RDB on 07/10/2011, as they are the ones who requested for its incorporation and the pharmacy cannot be claimed by any other person other than the one who put together the capital and collected the documents for its existence and Ndabateze Adeline is its Managing Director who is not among the shareholders.

Whether damages should be awarded in this case

[24] Umukumburwa Alice, representing Angel Pharmacy Ltd, claims for the following damages:

- Procedural fees of 5,955,000 Frw which includes 1,960,000 Frw incurred in the Commercial Court of Nyarugenge in the cases N° RCOM 0480/14 / TC / NYAR and N° RCOM 0529/14 / TC / NYAR, 550,000 Frw incurred in the Commercial High Court the case N°. RCOMA 0465/14 / HCC, 500,000 Frw incurred to follow-up on the case at the Ombudsman office and 2,945,000 Frw spent to follow-up the case at the Supreme Court in the case RCOMA 0008/15 / CS.

- Income damage amounting to 3,850,000Frw, consisting of 100,000Frw for relocation and 3,750,000Frw of interest he would have received from her business from 28/08/2015, which increases until the case is over;

- Damages amounting to 2,000,000Frw related to the fact that Ndabateze Adeline is carrying her activities her which raises the taxes she must pay;

- Damages amounting to 3,000,000Frw for the name ANGEL, which Ndabateze Adeline used while it was used as a memorial to their parents as it was the name of her young sister Nduwawe Ange who was 6 months old when their parents died;

The total amount of damages is 14,805,000 Frw, plus the Advocate's fee in the case for the review of the judgment due to injustice amounting to 1,500,000 Frw.

[25] Advocate Iyamuremye Simon, the counsel for Ndabateze Adéline, argues that the damages claimed are unfounded because Umukumburwa Alice is using improper means to obtain a pharmacy which belongs to another person, he advises her to apply for the legal documents of her pharmacy without using the pharmacy of Ndabateze Adeline.

DETERMINATION OF THE COURT

[26] Article 258 of Book Three of the Civil Code provides that: “Any act of a man, which causes damage to another obliges the person by whose fault it happened to repair it”.

[27] In this case, Umukumburwa Alice, the representative of Angel Pharmacy Ltd is claiming for 1,960,000Frw in damages for the expenses she incurred in case N°. RCOM 0480/14 / TC / NYAR and N°. RCOM 0529/14 / TC / NYAR² decided by the Commercial Court of Nyarugenge; the case file however demonstrates that she was awarded 800,000Frw in the case N° RCOM 0480/14 / TC / NYAR. The court finds that Angel Pharmacy Ltd should be awarded 800,000Frw that had been awarded in the previous case because it is a reasonable amount.

[28] Concerning the costs in judgment N°. RCOMA 0465/14 / HCC rendered by the Commercial High Court, the Court also finds that 550,000 requested should be awarded because Angel Pharmacy Ltd incurred expenses to follow up on this case Regarding the 500,000Frw requested by Umukumburwa which she spent to take the matter to the Ombudsman Office, the

² This case relates to a summary claim in Case N°. RCOM 0480/14 / TC / NYAR whereby the subject matter was: “ Requesting to open the Pharmacy and having the authorization to operate to be written in my names so that we operate as we await the ruling of the court on the principal claim ”, and it is obvious that concerning damages the judge had explained that they should be claimed in the principal case (RCOM 0480/14 / NYAR).

Court also finds that it should be awarded because the injustice in the judgment N^o. RCOMA 0465/14 / HCC caused those costs while taking the matter to the Ombudsman Office.

[29] Concerning the procedural fees for the case before this Court, the Court finds that 2,940,000 Frw arises from the summary procedure (N^o. RCOM 0008/15 / CS) requested by Umukumburwa Alice the representative Angel Pharmacy Ltd, and 1,500,000 Frw originating from the principal claim (N^o RS / REV / INJUST / COM 0005/15 / CS), is excessive, and therefore in its discretion it awards Angel pharmacy Ltd eight hundred thousand francs (800,000Frw) for prosecution and counsel fees for both cases³.

[30] Regarding pecuniary damages claimed, the Court finds that they should not be awarded because Umukumburwa Alice representing Angel Pharmacy Ltd claims them on the ground that she did not work during that period and was removed from her place of work, and in her oral submissions there is a point in she explains that Angel Pharmacy Ltd was operating in another house, which means that, except the misunderstandings with Ndabateze Adéline on the functioning of the pharmacy they had, Umukumburwa Alice continued to conduct her pharmaceutical business. Also, even if Angel Pharmacy Ltd had suspended its operations, there is no proof for her claim of economic damages. As for the \$ 100,000 relocation fee requested by the Umukumburwa Alice, the Court also finds that it should not be awarded because there is no evidence that it was Ndabateze Adéline who removed her from her office, especially since this Court (of the Supreme Court) in case N^o. RCOM 0008/15 / CS rendered on 31/07/2015, had ordered for the temporary stay of the execution of the judgment N^o. RCOMA 0465/14 / HCC pending trial of Case N^o. RS / REV / INJUST / COM 0005/14 / CS.

[31] Regarding the costs and damages resulting from Ndabateze Adeline using her name in her business which raises the taxes she is liable to pay and also the damages resulting from Ndabateze Adeline using the name of Angel, the Court finds that all such damages should not be awarded because, according to the explanation of Umukumburwa Alice, the pharmacy which sparked a dispute between Umukumburwa Alice (who invested in medicine, the rent of the building and the purchase of other equipment) and Ndabateze Adeline (who used her documents to seek the operating permit of the pharmacy), therefore, Umukumburwa Alice representing Angel Pharmacy Ltd cannot claim damages for it.

[32] According to the motivations given above, the Court finds that Angel Pharmacy Ltd is awarded damages equivalent to 2.650.000Frw including 800.000Frw awarded by the Commercial Court in judgment N^o RCOM 0480/14/TC/NYAR, 550.000 Frw spent on the case N^o RCOMA 0465/14/HCC in the Commercial High Court, 500.000 Frw spent taking her issue to the Ombudsman Office and 800.000 Frw spent on the case being reviewed due to injustice (N^o RS/REV/INJUST/COM 0005/15/CS).

III. DECISION OF THE COURT

³ Article 320, the last paragraph of the Law N^o 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, provides that "damages and related expenses incurred by the party during the hearing of summary procedure shall be claimed together with the principal application."

[33] Holds that the claim of Angel Pharmacy Ltd for the review of the judgment on the grounds of injustice has merit in parts.

[34] Holds that Angel Pharmacy Ltd is the one existing legally, it is the one which should continue to operate the pharmaceutical activities.

[35] Holds that the shareholders of Angel pharmacy Ltd are Umukumburwa Alice, Akizanye Elaine, Nduwawe Ange and Umuhoza Aimée.