

RWAGASANA v BANK OF KIGALI (BK) LTD

[Rwanda SUPREME COURT – RCOMAA0056/15/SC-
RCOMAA00025/2017SC-RCOM 0003/17/CS-
RCOM00004/2017/SC (Mutashya, P.J., Rugabirwa and
Nyirinkwaya J.) 26 January 2018]

Contract law – Loan agreement – Borrower’s obligations of paying interests stipulated in the performance contract – A bank does not err if it claims interests from payment done as performance guaranty on behalf of a borrower when the latter fails to perform the tender – Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, article 9, Law N°45/2011 of 25/11/2011 governing contracts, article 64.

Contract law – Loan agreement – Non-repudiation of the loan the insurer agreed to secure – An insurer married to the bank’s borrower cannot repudiate the loan offered to his/her spouse on the grounds that he/she did not sign for it while they share that property in case it is proven that he/she signed for all loans taken by his/her spouse – Law N°45/2011 of 25/11/2011, article 64.

Commercial procedure law – Counsel fees – Procedural fees and counsel fees are awarded in Court discretion though their percentage was stipulated in contract when it is found that it is an act of appropriation of excess illegal benefit and the applicant fails to prove its use.

Commercial procedure law –Expert fees – When an expert fee is paid by the bank instead of its client, the latter is obliged to refund it in case he/she loses the case.

Facts: Rwagasana was granted by Bank of Kigali Ltd (BK Ltd) different loans for various occasions, on the existing loans, he was also given facility for performance Guarantee, line of credit and those spent for repurchase of the loan ((rachat credit) he had in ECOBANK.

All parties concluded loan agreements, suretyship and security, they agreed that in case the borrower fails to comply with terms of payment, the bank would sue to the court, in their contract, they agreed that the interests rate shall be 17.25% per month but they also agreed for late fines of 2% in addition to 17.25%, all amounting to 19.25% when he fails to pay the loan he was granted. Rwagasana did not respect the contract and consequently, the bank placed him in class 5 of the borrowers who do not pay.

The above reasons provoked Rwagasana to sue before Nyarugenge Commercial Court, his wife also intervened in the case, claiming to suspend the auction of their houses offered as securities, he also claimed for stopping payment of different loans, he further claims that the bank should not keep computing late fines after termination of loan agreements, he also claims for various damages.

The court found their claim with merit in part, and decided that the auction for their house be suspended, and the bank be awarded the damages related to the loss it endured, the court also decided that the interests rate raised after the revocation of the contract be reset to the agreed rate by both parties in the contract they concluded.

BK Ltd, Rwagasana and Mukakimenyi appealed before the Commercial High Court, the Court found BK Ltd's appeal with

merit whilst it found Rwagasana's appeal without, and it quashed the rulings of the judgment.

Rwagasana appealed to the Supreme Court stating that the previous courts decided that he has to pay for performance guarantee for which BK Ltd paid on his behalf and related regular interests and late fines whilst BK did not prove that payment.

Before the Supreme Court, Rwagasana argues that the expertise report should not be considered because it does not reveal all debts claimed by BK Ltd, he adds that the report does not indicate how the loans were granted and terms of payment expressed in their agreement.

He also states that the counsel fee and procedural fee he is asked to pay are excessive because they include excess interest rate and BK is not even proving its use.

Mukakimenyi appealed stating that there is a loan she does not recognize because she did not sign for it and that she is married to Rwagasana Thomas who owns 50% of their common property.

Before this Court, in its defense, BK Ltd states that it granted different loans to Rwagasana, it explained how those loans were added to other existing loans because he was not complying with terms of payment, BK Ltd further states that all those loans should be paid together with related regular interests and late fines on the rate agreed upon in loan contracts.

It stated that the expert report has to be considered because it indicates how all loans were granted to Rwagasana Thomas though it is not matching with the total amount it sued for. As regards to counsel and procedural fees, BK stated that they have to pay them for they are provided in the security contract they concluded.

With regarding the statement of Mukakimenyi of refusing to pay back the loan with the ground that she did not sign, in its defence, BK states that it is baseless because she signed on all loan agreements granted to Rwagasana before a lawyer (notary).

Held: 1. A bank does not err if it claims interests from payment done as performance guaranty on behalf of a borrower when the latter fails to perform the tender.

2. Procedural fees and counsel fees are awarded in Court discretion regardless the claim against its percentage stipulated in contract in case it is excessive and the party requesting it is unable to prove its uses.

3. The spouse of the bank's borrower cannot repudiate the loan offered to his/her spouse on the grounds that he/she did not sign for it while they share that property in case it is proven that he/she signed for all loans taken by his/her spouse.

4. When an expert fee is paid by the bank instead of its client, the latter is obliged to refund it in case he/she loses the case.

**Appeal has no merit;
Cross appeal has no merit in part;
The claim filed by BK has merit in part;
The judgment rendered by the Commercial High Court is
sustained;
The appellants have to pay principal loan and late fines.
Court fees cover expenses of the case.**

Statutes referred to:

Organic law N° 08/2005 of 14th July 2005 Determining the Use and Management of Land in Rwanda, article 34 and 35;
Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, article 9;
Law N°45/2011 of 25/11/2011 governing contracts, article 64;
Law N° 15/2004 of 12/06/2004 relating to evidence and its production, article 76;
Law N° 22/99 of 12/11/1999 supplementing Book I of the Civil Code and instituting Part Five regarding matrimonial regime, liberalities and successions, article 21;
Law N° 30/07/1888 relating to contract or obligation, article 258.

No case referred to.

Judgment

I. BACKGROUND OF THE CASE

[1] This case started before the Commercial Court of Nyarugenge whereby RwagasanaThomas sued BK Ltd, praying to stay the auction of his houses located on plot N° 322/324 situated in Nyagatare District because the agreement concluded between parties stipulates that in case the loan is not paid, the matter shall be sent to courts, that he should not pay 9% for court fees, fees for execution, commissions and no privileged fees because it's an abusing clause and that interests rate should not increase from 17,25% to 19,5% basing on the fact that Rwagasana was placed in class 5 of those who do not pay appropriately, in addition, BK Ltd should not continue computing default interests after termination of the contract which was done

on 06/12/2012, Rwagasana also claims for various damages. Mukakimenyi Marie Rosine, Rwagasana Thomas's wife, voluntarily intervened in that case.

[2] In his pleadings, Rwagasana Thomas argues that he should not pay to BK Ltd, excessive loan worth 879,296,362 Frw calculated up to 09/08/2013 because interests rate of 19,5%, which was applied on that loan, that rate is not stipulated in the contract concluded between parties and those interests should not be computed after cancellation of the contract. While counsel for BK Ltd argues that it does not claim excessive loan from Rwagasana Thomas, rather, he has to pay the loan all amounting to 879,296,362Frw and 261,864,547Frw for the performance guaranty, they add, default interests have to be computed until the loan is entirely paid.

[3] That Court rendered the judgment RCOM 0774/13/TC/Nyge on 28/11/2013, holding that Rwagasana Thomas's claim and that of Mukakimenyi Marie Rosine have merit in part, the Court held that the house located in plot N° 322/324 situated in Nyagatare District cannot be auctioned through Registrar General in RDB, It decided that 9% of the court fees, fees for execution, commissions and no privileged fees should not be considered because it would be an abusive clause, the Court ordered that BK Ltd be awarded real damages equivalent to the loss occurred.

[4] That Court also held that the performance guaranty of 261,864,547Frw should be deducted from the loan claimed by BK Ltd because that money was not offered, and that the interests which were increased after cancellation of the contract up to 19,5% must be returned to 17,25%, the rate agreed on by both parties of the contract.

[5] That Court also motivated that Rwagasana Thomas should not pay 91,016,449Frw to BK Ltd because the latter did not produce any element of evidence that it claims from him that amount of money, but 665,248.503Frw should remain in debt claimed because Rwagasana Thomas owes that money to BK Ltd contrary to what he pretends to convince, because when BK Ltd wrote to him in the letter dated 07/09/2012, It gave him last warning, his account N° 040-0293075-71 had a debt worth 717,157.248Frw and also, Rwagasana Thomas did not deny that debt since the beginning.

[6] BK Ltd, Rwagasana Thomas and Mukakimenyi Marie Rosine appealed to the Commercial High Court, that Court rendered the judgment RCOMA 0591/13/HCC-RCOMA0007/14/HCC on 03/07/2014, finding BK Ltd's appeal with merit, that Rwagasana Thomas and Mukakimenyi Marie Rosine's appeal lacks merit, that the rulings of the appealed judgment are quashed, the Court ordered Rwagasana Thomas and Mukakimenyi Marie Rosine to give BK Ltd, 500,000Frw for procedural fees and counsel fees, 500,000Frw for being dragged into unnecessary lawsuits, It ordered Rwagasana Thomas to give Habineza Emmanuel 350.000 Frw for the fees of the expert appointed by the Court for auditing with intention to reveal the status of the loan offered to Rwagasana Thomas.

[7] That Court motivated that 9% for procedural fees, council fees, court bailiff fees and fees of execution of the judgment, commissions and no privileged fees are not abusing clauses because in loan agreement concluded between both parties, it is stipulated that in case Rwagasana Thomas defaults to pay BK Ltd, 2% for default interests shall apply in addition to 17.25 % which is regular interests, all amounting to 19.25%.

[8] That Court also motivated that 240,994,500Frw for performance guaranty should be added to loan for which Rwagasana Thomas owes to BK Ltd because the latter paid for him in Ministry of Health. And also, Rwagasana Thomas did not produce any element of evidence to prove that BK Ltd claims more than it deserves as he pretends to convince, but in order to clarify the amount of the total loan, there is a need of appointing the expert in accounting as Rwagasana Thomas requested so on first instance as well as at appellate level, but due to the fact that Rwagasana Thomas refused to pay the expert for him to prepare a report, Rwagasana has to be ordered to pay 350,000Frw as fees for the expert appointed by the Court, fees which are equivalent to preliminary works, and the case is to be adjudicated using his submissions instead of basing on the testimony of the expert.

[9] Rwagasana Thomas appealed to the Supreme Court against the judgment RCOMA 0591/13/HCC-RCOMA 0007/14/HCC, his appeal was registered on N° RCOMAA 0056/15/SC – RCOMAA 00025/2017/SC.

[10] After realising that the outcome of the auction of Rwagasana Thomas's houses did not cover the debt he owes to BK Ltd, the latter filed a claim before the Commercial High Court praying that RWAGASANA Thomas and Mukakimenyi Marie Rosine pay the remaining loan equivalent to 2,174,151,697Frw which comprises of 888,923,978Frw for principal loan+ 1,285,719Frw for interests(les agios) calculated up to 17/08/2001 but that claim was not heard but it was transferred to this court and the claim was recorded on RCOM0003/17/CS - RCOM 00004/2017/SC and combined with Rwagasana Thomas's appeal which was recorded on RCOMAA0056/15/SC –

RCOMAA00025/2017/SC because the cases are related and parties are the same.

[11] The public hearing was conducted on 25/07/2017, Rwagasana Thomas was assisted by Counsel Mutabazi Abayo Claude, Mukakimenyi Marie Rosine was assisted by Rwinikiza Félix whereas BK Ltd was represented by Counsel Rusanganwa Jean Bosco.

[12] At the beginning of the hearing, counsel for BK Ltd stated that they withdraw the objection of lack of jurisdiction of the Supreme Court which was raised in pre-trial meeting of 25/01/2017 whereby he mentioned that the value of the subject matter is under 50,000,000Frw, and then, the case was heard in merit.

[13] On 26/07/2017, this Court appointed Ayinkamiye Spéciose as an expert so that she can demonstrate the amount of the principal loan and related interests which Rwagasana Thomas owes to BK Ltd.

[14] On 30/10/2017, AYINKAMIYE Spéciose submitted the report which contains responses of the issues requested by the Court to be analysed, the parties submitted additional submissions reacting on the report. The hearing of the case was resumed on 13/12/2017, on that day ; Ayinkamiye Spéciose explained her report and parties reacted on that.

II. ANALYSIS OF LEGAL ISSUES

1. To know the amount of the principal loan and related interests which Rwagasana Thomas owes to BK Ltd

[15] Rwagasana Thomas and his counsel state that BK Ltd offered him different loans for various occasions, for him to build commercial houses, schools, hospitals and other activities as stipulated in the agreement concluded between them, but BK Ltd claimed 668,248,503Frw as per bank statement in the following manner: 100,000,000Frw of 23/08/2010, 189,452,100Frw of 02/07/2010, 119,740,499Frw of 04/12/2012, 256,055,904Frw of 27/08/2010, and 409,192,599Frw, and that BK Ltd kept computing default interests after cancellation of the contract while there is no written agreement to prove all those loans.

[16] They further state that the Commercial High Court held that he has to pay to BK Ltd 240,994,500Frw for performance guaranty and its interests, that those amount should be added to other loans he owes the bank, they argue that the Court disregarded that those are not loans because there was no contract that governs them. They add that another ground for which rwagasana Thomas should not pay that money to BK Ltd is that the latter did not produce any element of evidence to prove that it paid that loan to MINISANTE on his behalf, that in case the bank proves it, Rwagasana Thomas would pay 240,994,500Frw agreed upon by both parties without interests because they didn't agree on them.

[17] They kept explaining that since 07/09/2012, when BK Ltd wrote to Rwagasana Thomas claiming its debt, up to 11/03/2015 he paid the debt as follows: on 15/01/2013 he paid 46,572,417Frw and 32,072,857Frw, on 20/06/2013 he paid 879,083,831Frw, on 14/01/2014 he paid 89,730,282Frw, on 14/03/2014 he paid

126,728,540Frw, while on 11/03/2015 he paid 40,000,000Frw, all amounting to 1,214,187,927Frw, that the fact that on 07/09/2012 BK Ltd wrote to Rwagasana Thomas claiming from him to pay 1,164,321,782 Frw while he had already paid 1,214,187,927 Frw, rather they find that BK Ltd should reimburse him 49.866.145Frw as surplus of that amount. They pray to the Court to hold that Rwagasana Thomas has fully paid all loans offered to him, that BK Ltd should reimburse him 1,000,000,000Frw which he paid with no reason.

[18] With regard to the value of the expert's report, Counsel Mutabazi Abayo Claude assisting Rwagasana Thomas, argues that the report should not be considered because it does not enumerate all loans for which BK Ltd claims, how loans were granted and terms of payment agreed upon between parties and that, the expert didn't demonstrate amount of payment paid before and after auction of Rwagasana Thomas's house because the expert failed to mention how 40,000,000Frw earned from auction reduced the debt.

[19] He also states that the expert showed that Rwagasana Thomas has outstanding debt of 1,668,645,757Frw, this amount includes interests of 786,948,623Frw calculated on the interest rate of 19.25 %, but they cannot know where she found that rate because parties didn't agree on that in contract concluded, rather, she should have used interest rate of 17.25 % as one stipulated in the contract concluded between parties before Notary.

[20] He adds, the expert didn't demonstrate whether 786,948,623Frw are regular interests or default interests because regular interests would not be computed any more from the day of cancellation of the contract or from the day of a write off debt in BK Ltd's records, but defaults interests had to be computed till

the moment of rendering the judgment as decided so in judges retreat that took place at Rubavu District, he adds that it's not reasonable how those interests be almost equivalent to the debt being claimed worth 881,697,134Frw.

[21] Concerning the value of the expert's report, Mukakimenyi Marie Rosine and her counsel argue that the report should not be considered because it does not demonstrate loans which she jointly has with her husband and those which are separate loans due to the fact that there were loan agreement and guaranty agreement which she didn't sign. They further state that it's not understandable how a loan worth 881,697,134Frw is almost equivalent to its interests equal to 786,948,623Frw calculated on the rate of 19.25 % not agreed upon in agreement concluded between parties.

[22] Counsel Rusanganwa Jean Bosco states that BK Ltd granted to Rwagasana Thomas, different loans for various occasions from 2010 to 2012 as indicated in agreement concluded because on 02/03/2010 it offered him 294,775,152Frw composed of 94,775,152Frw for the repurchase of the debt he owed to ECOBANK and credit ligh of 200,000,000Frw, and that these loans came as addition to other loans granted to him because he was not complying with the payment, that on 31/01/2012, all loans were 1,048,187,160Frw as stipulated in agreement dated 31/01/2012.

[23] He states that on 11/06/2012, BK Ltd wrote to Rwagasana Thomas claiming from him for a payment of 1,055,701,542Frw at least, amount which originates from the loan worth 1,118,645,689Frw that includes 63,244,147Frw for mortgage loan, that he failed to comply with it, and consequently, on 07/09/2012 BK Ltd gave him last warning and asked him to pay

1,164,321,782Frw, on 06/12/2012, it cancelled the contract and requested him to pay the debt equivalent to 1,211,614,537Frw.

[24] He explains that the bank statement of Rwagasana Thomas's current account N° 00293075-71 demonstrates that there was a deposit of the money from his house's auction, thus on 11/03/2015, it reduced his debt from 927,581,853Frw to 887,581,853Frw, this amount is composed of 240,994,500Frw for performance guaranty that BK Ltd paid for him in MINISANTE on 10/06/2014 basing on suretyship agreement concluded between them but that loan does not include default interests which were computed from 01/01/2013 as proven by bank statement of the account N° 09860175-36, that due to the fact that money obtained in auction did not cover Rwagasana Thomas's debt, that is the ground of suing him before the Court claiming a payment of 888,923,978Frw for principal loan and defaults interests (agios) worth 1,285,227,719Frw computed till 17/08/2016, all amounting to 2,174,151,697Frw, he adds, defaults interests should be computed until the debt is fully paid.

[25] He further states that the interests rate agreed upon in the contract is 17.25 % per month though the expert calculated those interests on the basis of a year, that the rate was increased to 19,25% because as stipulated by that contract as well as rules of credit (*Règlement des Ouvertures de Crédit*) issued by BK Ltd, Rwagasana Thomas voluntarily agreed and signed for paying 2 % as additional defaults interests to 17.25 % in case he fails to pay the loan.

[26] With regard to 240,994,500Frw for performance guaranty, Counsel Rusanganwa states that pursuant to article 64 of the Law governing the contract, Rwagasana Thomas should pay the loan and related interests as parties agreed on in

suretyship agreement concluded on 31/01/2012, in addition, on 10/06/2014, BK Ltd paid 240,994,500Frw for him in Ministry of Health using its account in National Bank of Rwanda, that amount of money was added to other loans because Rwagasana Thomas failed to perform the tender for which BK Ltd guaranteed since it carries out money related business.

[27] Concerning the value of the expert's report, Counsel Rusanganwa Jean Bosco states that the report should be considered since the expert affirmed that Rwagasana Thomas owes BK Ltd 881,697,134Frw for principal loan and 786,948,623Frw for default interests (agios), all amounting to 1,668,645,757Frw though that amount is not equivalent to that claimed by BK Ltd at the beginning which worth 2,174,151,697Frw computed till 17/08/2001.

[28] The expert explains that regular interests rate of 17.25 %, is one stipulated in the contract, but that rate was increased with 2 % for default interests, consequently the rate became 19.25 % as indicated in the letter dated 06/12/2012 which BK Ltd wrote to Rwagasana Thomas informing him a change of interests rate to 19.25 % because he failed to pay debts, she adds that Rwagasana received that letter and acknowledged to receive it on 27/03/2013 but he did not react on it which implies that he agreed, and also 19.25 % as interests rate is the one which favours him because if he did not receive the letter, regular and defaults interests would have been calculated on the rate of 41 % per year.

[29] She further states that all payments through Rwagasana Thomas's account include those from his houses' auction which decreased loans as indicated in the report. She adds, Mukakimenyi Marie Rosine signed all agreements concluded between Rwagasana Thomas and BK Ltd.

DETERMINATION OF THE COURT

[30] With regard to the report of the expert, article 76 of the law N° 15/2004 of 12/06/2004 relating to evidence and its production provides “that evidence by experts is that which is intended to give to the court, explanations based on expertise as well as conclusion which is beyond the ordinary knowledge of a judge in his or her duties, depending on the underlying special expertise”, while article 98 of the same law provides that “a court is not bound to follow the opinion of experts if it is contrary to the conviction of judges.”

[31] Basing on that article, the Court finds that the report should be considered in adjudicating the case because it was prepared by an expert in compliance with request of the Court, thus the Court finds that the content of the report is real.

[32] Concerning the principal loan, article 64 of the Law N°45/2011 of 25/11/2011 governing contracts provides that “contracts made in accordance with the law shall be binding between parties. They may only be revoked at the consent of the parties or for reasons based on law. They have to be honestly respected.”

[33] Whilst concening late fines, article 7 paragraph 2 of the Regulation N°02/2011on credit classification and provisioning provides that” all interest on non-performing credit facilities previously accrued into income but uncollected shall be reversed and credited into interest in suspense account until paid by the borrower.”

[34] Regarding this case, the documents of the case file as well as the report of the expert appointed by the Court on 30/10/2017,

demonstrate that on 09/04/2009 Rwagasana Thomas wrote to BK Ltd praying for overdraft(*découvert*) equal to 700,000,000Frw to enable him to execute construction of FAWE GIRL'S SCHOOL located at Kayonza and it was to be paid within three (3) months. On 14/04/2009, BK Ltd, Rwagasana Thomas and Mukakimenyi Marie Rosine concluded an agreement titled "*Ouverture de crédit avec constitution d'hypothèque*" before Notary whereby BK Ltd agreed to offer him 700,000,000Frw that will be paid in three years on the interests' rate of 17.25 %, that the value of the guaranty that Rwagasana offers, equals to 120,000,000Frw and 10,800,000Frw for judicial fees and execution, commissions and no privileged fees, all equals to 130,800,000Frw. Rwagasana Thomas and Mukakimenyi Marie Rosine gave in guaranty their house located in plot N° 322/324 situated at Nyagatare in Eastern province.

[35] On 20/04/2009, BK Ltd wrote to Rwagasana Thomas informing him a credit offer of 700,000,000Frw for construction of FAWE GIRL'S SCHOOL located at Kayonza which was to be paid within three (3) months with interests' rate of 17.25% per year and a guaranty was a house mentioned above.

[36] On 01/09/2009, Rwagasana Thomas wrote to BK Ltd requesting for overdraft (*découvert*) of 100,000,000Frw for constructing 100m³ tank and for paying wages of those who worked in building of FAWE GIRL'S SCHOOL stated above.

[37] On 02/12/2009 wrote Rwagasana Thomas to BK Ltd asking extension of three (3) months up to February 2010 so that he pays under pretext that the beneficiary (FAWE GIRL'S SCHOOL) of works does not yet pay the remaining amount.

[38] On 08/12/2009, Rwagasana Thomas wrote to BK Ltd applying for the credit worth 79,902,927Frw for performance guaranty equal to 10% for the tender of 799,029,271Frw for constructing non-paved road of 27KM Nyamata – Musenyi – Shyara, in Bugesera District.

[39] On 02/12/2009, Rwagasana Thomas again wrote to BK Ltd applying for the credit equal to 298,260.45 Euros equivalent to 240,994,500Frw to finish up the tender of Bushenge hospital located in Nyamasheke District in western province.

[40] On 25/01/2010, Rwagasana Thomas wrote to BK Ltd applying for the credit of the type of overdraft(découvert) worth 200,000,000Frw for the purchase of different items of constructing Bushenge hospital mentioned above and wages of workers.

[41] On 25/01/2010, Rwagasana Thomas wrote to BK Ltd applying for the repurchase of the debt he owed to ECOBANK equal to 94,779,152Frw, BK Ltd should be given all securities of that credit with intention to gather all loans in BK Ltd.

[42] On 02/03/2010, BK Ltd wrote to Rwagasana Thomas informing him the offer of 94,775,152Frw to be paid within five (5) years, the loan calculated from 31/03/2010 on the interests' rate of 17.25 % per year.

[43] On 29/06/2010, BK Ltd concluded with Rwagasana Thomas a loan agreement with creation of a mortgage, with offer of 933,590,963Frw, the agreement indicates that the value of the mortgage is 400,000,000Frw, that he agrees to pay BK Ltd, 36,000,000 Frw for judicial fees, fees of execution, commission fee and no privileged fees, all amounting to 436,000,000Frw.

That contract was signed between BK Ltd, Rwagasana Thomas and Mukakimenyi Marie Rosine before the Notary of Gasabo District.

[44] On 16/09/2011, BK Ltd wrote to Rwagasana Thomas informing him that the Bank has agreed to extend an overdraft facility of Rwf 69,000,000, that amount has been granted fo cater for employees's salary.

[45] On 13/12/2011, Rwagasana Thomas again wrote to BK Ltd requesting the extension of three (3) months to enable him to pay an overdraft (découvert) of 200,000,000Frw which is equivalent to the cost of remaining works for reconstruction of Bushenge Hospital stated above.

[46] On 21/12/2011, BK Ltd wrote to Rwagasana Thomas informing him that the Bank has agreed to grant him an overdraft facility of 100,000,000Frw which has been granted fo facilitate his daily operations expense, it also reminds him other loans computed up to 21/12/2011.

[47] On 22/12/2011, BK Ltd concluded with Rwagasana Thomas a Loan agreement with creation of a mortgage of 1,050,929,051Frw, that the latter accepts a loan of that amount to be drawn on Bank of Kigali. In this contract concluded between BK Ltd, Rwagasana Thomas and Mukakimenyi Marie Rosine which was signed before the Notary of Gasabo District, it is stipulated that BK Ltd is given a mortgage of a house located in plot N° 1584/KIC/MAS situated at Masaka in Kicukiro District which has value equal to 13,000,000Frw, and that he agrees to pay 1,170,000Frw for judicial fees, commission fee and non privileged fees, all amounting to 14, 170,000Frw.

[48] On 05/01/2012, BK Ltd concluded with Rwagasana Thomas an agreement on mortgage N° 15329 which constitutes a house of a value worth 250,000,000Frw located in plot N° 319 situated at Nyarutarama, in Gasabo District, Rwagasana has also agreed to pay 22,500,000Frw for judicial fees, commission fee and non privileged fees, all amounting to 272,500,000Frw, the contract was concluded between BK Ltd, Rwagasana Thomas and Mukakimenyi Marie Rosine before the Notary of Gasabo District.

[49] On 26/01/2012, Rwagasana Thomas wrote to BK Ltd requesting for the extension of three (3) months to enable him to pay all loans recorded in its books especially that of overdraft(découvert) offered to construct Bushenge hospital while waiting for MINISANTE's approval for payment.

[50] On 31/01/2012, BK Ltd wrote to Rwagasana Thomas informing him that the Bank has agreed to grant him an overdraft limit for the debit balance on his account of 404,293,881Frw for a period of 3 months awaiting payments.

[51] On 20/04/2012, Rwagasana Thomas wrote to BK Ltd praying for the credit equal to 68,000,000Frw for paying wages of those worked in construction of Bushenge Hospital.

[52] On 11/06/2012, BK Ltd wrote to Rwagasana Thomas claiming for a payment of 1,118,645,689Frw of the debt he owes to Bank, computed up to 11/06/2012, the Bank added that he should at least pay 1,055,701,542Frw not later than 11/06/2012.

[53] On 07/09/2012, BK Ltd gave Rwagasana Thomas last warning letter claiming a payment worth 1,164,321,782Frw, it warned him that if he fails to pay within 30 days, BK Ltd will

begin procedures of auctioning houses offered as securities and the Bank will make him be registered on the list of those defaulting on loans. Rwagasana Thomas received that letter on 18/09/2012 and he acknowledged to receive it.

[54] On 25/09/2012, Rwagasana Thomas wrote a letter of mercy to BK Ltd praying for the extension of payment period till when the Ministry of Health pays him the rest of his money.

[55] On 06/12/2012, BK Ltd wrote to Rwagasana Thomas informing him termination of repayment program and asked him to pay 1,211,614,537Frw which constitutes principal loan, interests, commission and other charges but late fines shall still be computed on the interest rate of 19.25 % till he fully pays all loans owes to the Bank, and those late fines will be deposited on account different from accounts he had. Rwagasana Thomas received that letter on 27/03/2012 and he acknowledged to receive it.

[56] The report of 22/12/2013 and the one of 28/02/2014 prepared by court bailiffs Kanyana Bibiane and Habimana Védaste who were in charge of selling loan securities, the reports demonstrate that after selling houses located in plots N° 1/02/13/02/319 na N° 1/02/13/02/619 situated at Nyarutarama in Gasabo District which given as securities to BK Ltd by Rwagasana Thomas and Mukakimenyi Marie Rosine, there was expense in that auction, that the remaining amount was 85,480,282Frw at one house and 118,456,988Frw on another, and were deposited on Rwagasana Thomas's account N° 00040-0293075-71, consequently he reduced debt of overdraft(découvert) as indicated in the report of expert mentioned above.

[57] Notification of the loan done on 10/06/2014 which is in the case file, demonstrates that BK Ltd paid 240,994,500Frw for Rwagasana Thomas as performance guaranty for the construction of Bushenge Hospital in the Ministry of Health using its account N° 1201176 open in National Bank of Rwanda as agreed in the contract of Performance Guarantee N° 98469 in 2009, after paing on his behalf, that amount of money was added to other loans which Rwagasana Thomas owed to BK Ltd, because on 10/06/2014, BK Ltd put his account N° 040-0293075-71 in negative balance(solde negative) as proven by a document which is in the case file on identification mark 207 and *Accusé de reception d'ordre de virement immédiat*“ N° 345023 which is on identification mark 208.

[58] With regard to loans for which BK Ltd offered Rwagasana Thomas, the expert appointed by the Court analysed the loan contracts stated above, she issued her report of 30/10/2017 which demonstrates that BK Ltd offered RWAGASANA Thomas the following loans : 700,000,000Frw on 20/04/2009, 240,994,500Frw on 02/12/2009, 94,775,152Frw on 02/03/2010, 200,000,000Frw on 02/03/2010, 110,000,000Frw on 02/03/2010 and 933,590,963Frw on 29/06/2010.

[59] The expert report also shows that among those principal loans, RWAGASANA Thomas has only paid 700,000,000Frw at the end of August 2009 and that on mortgage loan facility worth 94,775,152Frw, he has only paid 56,940,552Frw and 2,719,204Frw for their late fines, the remaining amount was 73,341,651Frw which is added to other overdrafts(découverts) offered to him, that after auction of his 2 houses located in plots N° 1/02/13/02/319 and N° 1/02/13/02/619 situated at

Nyarutarama stated above, outcome of the auction (85,480,282Frw + 118,456,988 Frw) were deposited in BK Ltd to his account N° 00040-0293075-71, thus he reduced his debts, but his debts were increased by 240,994,500Frw for performance guaranty of the tender paid on his behalf in MINISANTE as explained above.

[60] Loan agreement and the expert report mentioned above which are in the case file, demonstrate that the loan which was offered by BK Ltd to Rwagasana Thomas has to be paid with its regular interests calculated on interest rate of 17.25 %, except Bank Guarantee which has to be paid with interest calculated on the rate of 3.5 %, that in case he fails to pay, the payment shall be done with late fines, thus, interests shall be calculated on the rate of 19.25 % as indicated in BK Ltd's letter addressed to him on 06/12/2012 when it terminated his repayment program.

[61] Pursuant to the motivations above, the Court finds with no merit, the statement of the Counsel for Rwagasana Thomas, that the late fines should not be calculated on the rate of 19.25% after termination of the loan agreement, because BK Ltd wrote to him on 06/12/2012 informing him that he will pay late fines calculated on the rate of 19.25%, and Rwagasana Thomas received that letter on 27/03/2012 and he acknowledged to receive it, but he did not react which implies that he has accepted that interests rate.

[62] The Court also finds, another ground for which late fines should be calculated on the rate of 19.25 %, is that, BK Ltd wrote to Rwagasana Thomas for various occasions, a letter dated 21/12/2011, 31/01/2012, 11/06/2012 and one of 07/09/2012, warning him that if he does not pay arrears as follow: 7,235,903Frw; 12,256,453Frw; 4,869,120Frw and

12,340,276Frw, he should pay late fines calculated on 19.25 %, but Rwagasana Thomas did not react on it, this proves that the expert did not err in calculating late fines on the rate of 19.25 %

[63] With regard to 240,994,500Frw of performance guarantee of thye tender, the Court finds, the fact that on 10/06/2014 BK Ltd paid that amount of money for Rwagasana Thomas in Ministry of health as proven by elements of evidence that include *Avis de credit* issued on 10/06/2014 which are found in the case file, the Commercial High Court did not err when deciding that amount to be added on other loans and related interests of 3.5% per year as also affirmed by the expert appointed by the Court since BK Ltd is an institution that carries out money related business.

[64] The Court finds without merit, the statement of RWAGASANA Thomas's Counsel, that he should not pay BK Ltd 668,248,503Frw (but real amount is 665,248,503Frw) composed of 100,000,000Frw + 189,452,100Frw + 119,740,499Frw + 256,055,904Frw indicated on BK Ltd's bank statement under pretext that BK Ltd falsely claim from him, because he did not produce any element of evidence to prove what he alleges as provided by article 9 of the Law N° 21/2012 ryo ku wa 14/06/2012 relating to the civil, commercial, labour and administrative procedure that provides that the claimant must prove a claim, failing which the respondent wins the case, due to the fact that BK Ltd kept to write informing him the amount of the debt and he failed to react but he continued requesting for other loans as explained above.

[65] Basing on article 64 of the Law as well as on the report of the expert mentioned above, the Court finds, Rwagasana Thomas has to pay 881,697,134Frw for principal loan and

786,948,623Frw for late fines all amounting to 1,668,645,757Frw because Rwagasana Thomas and Mukakimenyi Marie Rosine did not produce elements of evidence to prove wrong those mentioned above based on by the expert.

2. Whether there are agreements for which Mukakimenyi Marie Rosine did not sign, so that she should not pay jointly with Rwagasana Thomas loans granted to the latter by BK Ltd

[66] Mukakimenyi Marie Rosine and her counsel argue that she should not pay jointly with Rwagasana Thomas to BK Ltd for all loans granted to him because she did not sign on loan and performance guarantee agreements concluded between her husband and BK Ltd.

[67] They defend that among those agreements include one of 31/01/2012 for 404,293,881Frw which they claim that it should be annulled because on that loan, all family properties were offered as guaranty and Mukakimenyi Marie Rosine did not sign while she has rights equivalent to 50% of the properties as provided by articles 34 and 35 of the Organic law N° 08/2005 of 14th July 2005 determining the Use and Management of Land in Rwanda¹ and article 21 of the Law N° 22/99 of 12/11/1999 to

¹ Article 34 of that law provides that Rights based on Land may be transferred through different individuals or it may be guaranteed through succession; it may be guaranteed gratuitously, leased or sale; it may be mortgaged according to requirements and procedures provided for by ordinary civil law without prejudice to specific provisions of this organic law, whilst article 35 of that law provides that final transfer of rights on land like sale, donation or exchange by a representative of the family requires the prior consent of all other members of the family who are joint owners of such rights.

Supplement Book I of the Civil Code and to institute Part Five Regarding Matrimonial Regimes, Liberalities and Successions which provide that whatever be the matrimonial regime chosen and the management modalities of the patrimony of spouses, the agreement of both spouses shall be required for final transfer of personal immovable property and a property in the community, as well as granting any right attached to those properties.

[68] Counsel Rusanganwa Jean Bosco representing BK Ltd states that Mukakimenyi Marie Rosine and Rwagasana Thomas should jointly pay all loans granted to the latter by BK Ltd because she signed all loans agreements and performance guaranty.

DETERMINATION OF THE COURT

[69] Article 9 of the Law N° 21/2012 ryo ku wa 14/06/2012 relating to the civil, commercial, labour and administrative procedure provides that the claimant must prove a claim, failing which the respondent wins the case.

[70] The case file demonstrates that Mukakimenyi Marie Rosine signed loan agreement and that of guaranty as follow, on 14/04/2009, on 29/06/2010, and on 22/12/2011, she also signed on 05/01/2012, agreement for constitution of mortgage mentioned above.

[71] The Court finds, as the expert stated it in her report, there is no loan agreement or guaranty contract concluded between Rwagasana Thomas and BK Ltd for which Mukakimenyi Marie Rosine did not sign, thus, she loses as provided by article 9 of the law mentioned above, consequently, Mukakimenyi Marie

Rosine and Rwagasana Thomas should jointly pay BK Ltd, principal loan and late fines as motivated above.

3. Whether loan agreements concluded between Rwagasana Thomas and BK Ltd contain abusing clauses with regard to judicial fees, fees of execution, commissions and no privileged fees

[72] Rwagasana Thomas and his counsel state that he cannot pay BK Ltd 9% of principal loan which exceeds one billion for procedural fees, counsel fees fees of advertising, fees of court bailiff and execution because the contract was concluded when he was in weak position because clauses of the contract are abusive since they stipulate excessive profit to BK Ltd considering that 9% of more than a billion being claimed, may be equivalent to 160,000,000Frw for procedural ans counsel fees, and that, BK Ltd did not produce any element of evidence to prove that it has incurred that expense in procedure and pleading the case.

[73] They argue that he has completely paid judicial fees, fees of execution, commissions and no privileged fees when his houses were auctioned because those involved in auction had paid fees of advertising, fees of court bailiff, etc, but they still claim all those fees from him, but if the expert revealed all payments Rwagasana Thomas did, the expert would have found that counsel fees only were remained unpaid.

[74] Counsel Rusanganwa Jean Bosco, representing BK Ltd states that 9% for judicial fees, fees of execution, commissions and no privileged fees stipulated in the contract of guaranty, that do not constitute abusing clauses because they are not relied on

principal loan being claimed, and he should not worry while BK Ltd claims from 10,000,000Frw for procedural and counsel fees and 50,000Frw for court fees.

DETERMINATION OF THE COURT

[75] Loan agreements and that of guaranty concluded respectively on 14/04/2009, on 29/06/2010, on 22/12/2011 and the one concluded on 05/01/2012 mentioned above, stipulate that in case Rwagasana Thomas fails to pay loans granted to him, he will pay 10,800,000Frw, 36,000,000Frw, 1,170,000Frw and 22,500,000Frw for judicial fees, fees of execution, commissions and no privileged fees.

[76] Concerning judicial fees, fees of execution, commissions and no privileged fees, the Court finds, they have to be awarded to BK Ltd in discretion of the Court instead of basing on the rate of 9% of the loans he was granted, the rate stipulated in contract because it would be illicit enrichment which is not allowed by the law because BK Ltd did not produce an element of evidence to prove the amount of money it spent in following up the case, especially that its advocate had admitted that this rate should not be based on in awarding that money.

4. Whether Rwagasana Thomas should pay 350,000Frw as fees of the expert on first instance

[77] Rwagasana Thomas and counsel argue that the Commercial High Court should not have ordered him to pay Habineza Emmanuel, 350,000Frw as fees of the expert while he did not prepare an expertise report.

[78] Counsel Rusanganwa Jean Bosco representing BK Ltd states that Rwagasana Thomas has to pay that money because the expert was appointed by the Commercial High Court upon his request as indicated in paragraph 17 of the appealed judgment and the expert conducted preliminary works to the extent of issuing an invoice but he did not issue a report due to the fact that Rwagasana Thomas refused to pay him an advance.

DETERMINATION OF THE COURT

[79] The Court finds, as the Commercial High Court motivated it in paragraph 18 of the appealed judgment, the fact that Rwagasana Thomas agreed for appointing an expert in accounting so that he demonstrates in a report, the amount of the debts for which Rwagasana owes to BK Ltd and the expert appointed by that Court, did preliminary works concerning examination of duties to the extent of issuing an invoice indicating the amount of fees he was supposed to be paid but the report was not prepared because Rwagasana Thomas didn't pay that money, the Commercial High Court did not err when ordering him to pay the expert 350,000Frw equivalent to preliminary works he already did, therefore, his appeal on this ground lacks merit.

5. Whether Rwagasana Thomas should be awarded damages and to know if BK Ltd's cross appeal has merit

[80] Rwagasana Thomas and his counsel state BK Ltd should give him 20,000,000Frw as moral damages for having failed to honour the contract, 500,000Frw for procedural fees and

10,000,000Frw for counsel fees, that he cannot compensate BK Ltd because of those errors against him.

[81] Counsel Rusanganwa Jean Bosco representing BK Ltd supports that it cannot compensate Rwagasana Thomas because he breached loan agreement between them, Counsel Rusanganwa states he lodges a cross appeal claiming that Rwagasana Thomas and Mukakimenyi Marie Rosine give in solidum BK Ltd 2,000,000Frw for having dragged it into unnecessary lawsuits, 10,000,000Frw for procedural and counsel fees.

[82] Counsel Rwinikiza Félix assisting Mukakimenyi Marie Rosine states that she cannot compensate because she didn't sign all loans and guaranty agreements concluded between BK Ltd and Rwagasana Thomas while she has rights over their family property.

DETERMINATION OF THE COURT

[83] Article 258 of the civil code book III provides that any act or omission by man that causes another injury, requires that the former, due to the wrong act committed, to repair it.

[84] Pursuant to the above article, the Court finds, the Court finds, Rwagasana Thomas should not be awarded moral damages, procedural fees and counsel fees because he loses the case.

[85] With regard to damages for which BK Ltd claims in cross appeal, the Court finds, it should not be awarded moral damages for being dragged into unnecessary lawsuits because nothing proves that Rwagasana Thomas sued it with bad faith but he has

to give BK Ltd 1,000,000Frw for procedural and counsel fees on this instance, fees which are awarded in the discretion of the Court because what BK Ltd claims are excessive.

6. To know who shall be responsible for paying expertise fees on this instance

[86] The receipt of 04/01/2017 which is in the case file demonstrates that Rwagasana Thomas paid 2,000,000Frw to Ayinkamiye Spéciose, the expert appointed by this Court, so that the latter does an audit with intention of demonstrating the debt he owes BK Ltd. And also deposit slip of 01/12/2017 which is found in the case file, indicates that BK Ltd paid 2,000,000Frw to the expert to enable her preparing a report.

[87] The Court finds, Rwagasana Thomas should pay BK Ltd, 2,000,000Frw as expertise fees of that who prepared a report indicating the amount of the debt because he loses the case.

[88] In light of the above motivations, the Court finds, the total amount for which Rwagasana Thomas and Mukakimenyi Marie Rosine have to pay BK Ltd is as follows: 881,697,134Frw for principal loan + 786,948,623Frw for late fines + 1,000,000Frw for procedural and counsel fees on this instance, all amounting to 1,669,645,757Frw, they have also to give BK Ltd 2,000,000Frw as expertise fees of that who prepared a report indicating the amount of the debt, in addition to money he was ordered to pay on previous instance.

III. DECISION OF THE COURT

[89] Decides that Rwagasana Thomas's appeal lacks appeal ;

[90] Declares BK Ltd's cross appeal with merit in part ;

[91] Declares BK Ltd's claim with merit in part ;

[92] Sustains the rulings of the judgment RCOMA 0591/13/HCC-RCOMA 0007/14/HCC rendered on 03/07/2014 by the Commercial High Court 03/07/2014 ;

[93] Orders Rwagasana Thomas and Mukakimenyi Marie Rosine to pay BK Ltd 881,697,134Frw for principal loan and 786,948,623Frw for late fines all amounting to 1,668,645,757 Frw ;

[94] Orders Rwagasana Thomas and Mukakimenyi Marie Rosine to give BK Ltd 1,000,000Frw for procedural and counsel fees on this instance ;

[95] Orders Rwagasana Thomas and Mukakimenyi Marie Rosine to pay BK Ltd 2,000,000Frw for expertise fees ;

[96] Decides that court fees paid by Rwagasana Thomas when lodging his appeal, cover expenses of the case.