

KAKOZA v NYAGATARE

[Rwanda SUPREME COURT – RCOMAA 00056/14/CS (Mukanyundo, P.J., Ngagi and Rugabirwa, J.) June 23, 2017]

Company law – Company Shareholder – A shareholder is not a shareholder of the company because of payment of his/her all shares, he/she is a shareholder because he/she is registered in the shareholders' register – Payment of a portion of a share does not result in the deprivation of the shareholder's rights in the company, unless she does not pay the creditors in relation to shares.

Facts: Kakoza Nkuriza Charles formed a one-person company called Radio 1 Rwanda Ltd, with a share capital of 70,000,000 Frw. Later, he entered into an agreement with Nyagatare Jean Luc who agreed to become a shareholder of Radio 1 Rwanda Ltd, they agreed that each one of them has 50% of shares equivalent to 35,000,000 Frw.

Later, Kakoza Nkuriza Charles wrote to Nyagatare Jean Luc, informing him that he was no longer a shareholder of Radio 1 Rwanda Ltd because he had not yet paid all his shares, and asked him to provide his account number for refunding him 9,000,000Frw he had already paid.

Nyagatare immediately lodged a claim to the Commercial Court of Nyarugenge alleging that Kakoza's decision to dismiss him as a shareholder was an illegal decision, he requested to remain a shareholder, and conduct audit in Radio 1 Rwanda and to remove Kakoza from the management of the Radio and each shareholder be required to provide the proof of the payment of his shares, and he claimed for various damages.

The Commercial Court of Nyarugenge ruled that Nyagatare's claim is unfounded, it decided that he has no right to the company because he has not paid all of his shares, he has been legally dismissed, and he was ordered to pay moral damages.

Nyagatare was not satisfied with the decision and appealed to the Commercial High Court alleging that the Commercial Court of Nyarugenge has rendered the judgment disregarding the law and his pleading, he submitted that he had been illegally dismissed, and he was ordered to pay unreasonable damages.

The Commercial High Court ruled that Kakoza's decision to dismiss Nyagatare as a shareholder was illegal, it upheld that it is quashed, and it ordered him to pay damages to Nyagatare.

Kakoza was not satisfied with the decision of the Commercial High Court and appealed to the Supreme Court, alleging that the Commercial High Court disregarded the memorandum of association indicating that he had sold shares to Nyagatare, it ordered that Nyagatare should remain a shareholder of the Radio, disregarding that Nyagatare did not perform his obligations of paying shares.

Nyagatare alleges that the Court did not disregard the fact that he had not yet paid all the shares, instead it decided that the fact that he had not yet paid the shares did not deprive him of the rights of being a shareholder of Radio 1 Rwanda Ltd, as being a shareholder does not require to have paid all the shares, rather being registered in the company is the reason of being so considered.

Kakoza also states that he finds that he was entitled to dismiss Nyagatare as a shareholder of Radio one Rwanda Ltd for breach of memorandum of association. Nyagatare defends himself saying that no shareholder has the right to dismiss another shareholder.

Held:1. A shareholder is not a shareholder of the company because he/she pays all of his/her shares, he/she is a shareholder because he/she is registered in the shareholders' register.

2. Payment of a portion of a share does not result in the deprivation of the shareholder's rights in the company, unless he/she does not pay the creditors in relation to shares.

**Appeal lacks merit;
Court fees deposited cover expenses incurred in this case.**

Statutes and statutory instruments referred to:

Law n°07/2009 of 27/04/2009 relating to companies, articles 2, 31, 134 and 140.

No Cases referred to

Judgment

I. BACKGROUND OF THE CASE

[1] Kakoza Nkuriza Charles formed a one-person company called Radio 1 Rwanda¹ Ltd, with a share capital of 70,000,000 Frw. Later, he entered into an agreement with Nyagatare Jean Luc agreeing that Nyagatare Jean Luc became a shareholder of Radio 1 Rwanda Ltd, according to the Memorandum and Articles of Association dated 29/05/2011, they agreed that each one has 50% of shares equivalent to 35,000,000 Frw. On 02/08/2012, Kakoza Nkuriza Charles wrote to Jean Luc Nyagatare, informing him that he was no longer a shareholder of Radio 1 Rwanda Ltd because he had not yet paid all his shares, and asked him to give his account number for refunding him 9,000,000Frw he had already paid.

[2] Nyagatare Jean Luc immediately lodged a case to the Commercial Court of Nyarugenge alleging that Kakoza's decision to dismiss him as a shareholder was illegal, he requested the Court to remain a shareholder, and conduct audit in Radio 1 Rwanda Ltd and Kakoza be removed from the management of the Radio and each shareholder be required to provide the proof of the payment of shares, and he claimed various damages.

[3] In the judgment RCOM 0779/12 / TC / NYGE rendered on 31/01/2013, the Commercial Court of Nyarugenge ruled that the claim filed by Nyagatare Jean Luc was unfounded, stating that he had no right to the company because he had not paid all of his shares, he was legally dismissed,

¹ In a judgment, it is written "RWANDA", but in "Memorandum and Articles of Association" it is written "FM".

and he was ordered to pay damages of 1,000,000 Frw and counsel's fee of 300,000 Frw. The Court ruled in accordance with article 2, paragraph 32, of the Law n° 07/2009 of 27/04/2009 relating to companies which was in force at that time², which provides the definition of a shareholder³, and in article 6 of the Memorandum and Articles of Association which stipulates that each shareholder must invest in the company 50% of the shares equal to 35,000,000 Frw.

[4] Nyagatare Jean Luc was not satisfied with the decision, he lodged appeal to the Commercial High Court arguing that the Commercial Court of Nyarugenge had disregarded the law and his pleading, and it contradicted in itself and argued that some of the allegations in the claim were not examined and it did not consider what Kakoza Nkuriza Charles admitted at the trial that he had been illegally dismissed, and the damages awarded had no basis.

[5] In judgment RCOMA 0071/13/HCC rendered on 05/12/2014, the Commercial High Court upheld that the decision of Kakoza Nkuriza Charles of illegally dismissing Nyagatare Jean Luc as a shareholder of Radio 1 Rwanda Ltd is quashed. It ordered Kakoza Nkuriza Charles to pay to Nyagatare Jean Luc the procedural fees and counsel's fees amounting to 1,500,000 Frw, and to pay the remaining 2,000,000 Frw for the remuneration of the expert of ABC Consultants Ltd who conducted the audit of Radio 1 Rwanda Ltd, and to repay to Nyagatare Jean Luc 1,000,000 Frw which were given in advance of the expert's fees.

[6] Kakoza Nkuriza Charles was not satisfied with the decision, and he appealed to the Supreme Court arguing that the Commercial High Court disregarder the memorandum of association dated 06/06/2011 mentioning that he had sold to Nyagatare Jean Luc 50% of shares in Radio 1 Rwanda Ltd amounting to 35,000,000 Frw, he ordered to Nyagatare Jean Luc to remain a shareholder of that Radio, disregarding his obligations to pay the shares.

The Commercial High Court disregarded his role in Radio 1 Rwanda Ltd, where it stated that he did not disclose whether there was any activity or other money that was already in the company's account before Nyagatare Jean Luc joined it whereas he presented invoices mentioning his activities.

The Commercial High Court, in an interlocutory judgment dated 30/09/2013, ruled that one invoice allegedly issued by FESTIMO on 02/08/2011, worth 7,800,000 Frw was rejected as it is forged, yet in a criminal case it was found that the invoice was not forged;

He was ordered to pay procedural fees and counsel's fee amounting to 1,500,000 Frw and the claimant was not entitled to it because he was the one who knew that it was not necessary to sue, because if he fulfilled his promise there would be no litigation.

[7] The judgment was heard in public on 15/03/2016, Kakoza Nkuriza Charles assisted by Counsel Shema Gakuba Charles, Counsel Sadi Jashi and Counsel Mubangizi Frank, and Nyagatare Jean Luc assisted by Counsel Kizito Safari, who raised the objection of inadmissibility of the appeal of Kakoza Nkuriza Charles because it was not within the jurisdiction of the Supreme Court,

² This law was revised by the law n°27/2017 of 31/05/2017 relating to companies

³ Paragraph of that article provides that a shareholder is: a) person whose name appears is entered in the share register as the holder for the time being of one or more shares in the company; b) 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; c) person whose name is to be entered in the share register under an amalgamation proposal is regarded as a shareholder in an amalgamated company until his/her name is entered in the share register;

but this Court found that the objection was unfounded because the value of the case exceeded 50,000,000 Frw, the case was heard in public on the merits on 21/06/2016 , 25/10/2016 and 11/01/2017, on this date Kakoza and Nyagatare decided to go to mediation, but they failed and they returned to Court on 16/05/2017, Kakoza Nkuriza Charles assisted by Counsel Shema Gakuba Charles and Counsel Mubangizi Frank, and Nyagatare Jean Luc assisted by Counsel Kizito Safari.

II. ANALYSIS OF LEGAL ISSUES

i. Whether the fact that Nyagatare has not paid all of his shares deprives him of the right to be a shareholder of Radio 1 Rwanda Ltd

[8] Kakoza Nkuriza Charles submits that the Commercial High Court disregarded the memorandum of association of 06/06/2011 which indicates that he had sold to Nyagatare Jean Luc 50% of shares in Radio 1 Rwanda Ltd worth 35,000,000 Frw, it ordered that Nyagatare Jean Luc should remain a shareholder of that Radio, disregarding that he did not comply with his obligations to pay shares, on which the Commercial Court based by deciding that in order to remain a shareholder of Radio 1 Rwanda Ltd, he would first have to pay the remaining shares amounting to 26,000,000Frw.

[9] Nyagatare Jean Luc and his Counsel argue that the Court did not disregard the fact that he had not yet paid all of his shares, instead it ruled that the fact that he had not yet paid all of his shares did not deprive him of the right to be a shareholder of Radio 1 Rwanda Ltd, given that being a shareholder does not require to have paid all the shares, rather being registered in the company is the reason of being so considered.

DETERMINATION OF THE COURT

[10] Article 2, paragraph 32 (b), of the Law n° 07/2009 of 27/04/2009 relating to companies applicable by the time of the company formation stipulates that the shareholder is “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”. Also, article 2, paragraph 32° of the Law n° 27/2017 of 31/05/2017 governing companies stipulates that “shareholder : a person whose name is entered on the share register as the holder for the time being of one or more shares in the company”.

[11] Legal scholars simply define a shareholder as a person who invests in a company and participates in that company and has the right to know how it operates, to make a decision and to profit. They furthermore explain that the term a shareholder means anyone who owns shares in the

company⁴ S.N. Maheshwari and S.K. Maheshwari also state that a shareholder is a person whose name is written in the shareholder's register⁵.

[12] In this judgment, the case file indicates that Kakoza Nkuriza Charles founded Radio 1 Rwanda Ltd, registered it in Rwanda Development Board (RDB) on 09/05/2011 under “code” 102319058, which had 100 shares equivalent to 70,000,000 Frw, and on 29/05/2011 concluded a contract with Nyagatare Jean Luc called the “Memorandum and Articles of Association”, in which the two agreed to establish Radio 1 FM⁶ Ltd (R1FM Ltd), each one has 50 shares worth 35,000,000Frw, and on 06/06/2011, Kakoza Nkuriza Charles wrote to RDB, informing that he had sold to Nyagatare Jean Luc 50% of shares of Radio 1 Rwanda Ltd, and therefore he requested that the new shareholder be registered on the company's certificate.

[13] The case file also indicates that on 02/08/2012, Kakoza Nkuriza Charles, as the Manager of Radio 1 Rwanda Ltd wrote to Nyagatare Jean Luc, informing him that he was no longer a shareholder of Radio 1 Rwanda Ltd because he had not yet paid all his shares as per the Memorandum and Articles of Association and he asked him to provide his account number for refunding 9,000,000 Frw he had already paid, the reason why Nyagatare Jean Luc lodged the claim before the Commercial Court of Nyarugenge requesting that the decision of his dismissal would be revoked because it was illegally taken, to order that Nyagatare Jean Luc should remain a shareholder of Radio 1 Rwanda Ltd, and he requested that Kakoza Nkuriza Charles should be removed from the management of the Radio, and that he also has to provide the proof of the payment of his shares, and the audit of the financial management should be conducted.

[14] The analysis of the aforementioned legal provisions and doctrines demonstrates that there is no indication that a person becomes a shareholder because he has paid all his shares in the company, but the essential is to be registered in the register of shares of the company. The Court also finds that this is upheld by article 31, paragraph 1, of the aforementioned Law of 27/04/2009, which stipulates that the company's share capital is shares that the shareholders have agreed whether paid or not yet paid, because it indicates that the payment of shares is not the requirement for being a shareholder, rather the essential is the willingness to take acquire shares in that company. The fact that Nyagatare was not able to pay all the shares he had agreed to acquire in Radio 1 Rwanda Ltd does not deprive him of his right to be a shareholder.

[15] The Court also finds that Kakoza's statements that the Commercial High Court disregarded the agreement of 06/06/2011 between the two parties, is unfounded, as apart from the fact that the agreement does not stipulate a time limit for the shareholders to pay the shares they agreed to invest in the company so that Nyagatare would have not respected it, it does not stipulate that the shareholder who will not pay his shares in time will lose his/her rights as a shareholder of the company. The Court finds that neither the law nor the contract provides that if a shareholder does

⁴ Un actionnaire est une personne physique ou morale qui, en investissant du capital dans une entreprise, en détient une part, acquiert un droit de regard et parfois de décision, et peut recevoir des dividendes. Ce terme désigne toute personne physique ou morale détenant des actions dans une société, X, « Les termes comptables expliqués de manière simple », in *Lexique*, <https://debitoor.fr/termes-comptables/actionnaire>, consulté le 15/06/2017.

⁵ A shareholder is a person who has his/her name entered in the register of members (*S.N. Maheshwari and S.K. Maheshwari, “Membership of Company”, A Manual of Business Laws, Mumbai, Himalaya Publishing House, 2011, 5.101*).

⁶ Here it is seen as if written “FM” whereas it should be “Rwanda”.

not pay all the shares he/she has agreed to, he/she immediately loses the right to be a shareholder, and therefore there is no basis for concluding that Nyagatare's failure to pay all shares agreed precludes him from continuing to be a shareholder, especially that the elements of the evidence produced by Kakoza before this Court on 16/09/2016 are contained in a document entitled "Table indicating the invoices and evidence of Kakoza Nkuriza Charles' activities in launching Radio 1", it does not indicate that he also paid all of the shares he had agreed to invest, so that he would pretend to have the right to remain in the company, except that, as explained above, even if he had paid all his shares, that fact would not preclude Nyagatare from remaining a shareholder in Radio 1 Rwanda Ltd.

[16] The Court also finds that both parties have erred in the establishment of the company as such, in article 6 of “the Memorandum and Articles of Association” of 29/05/2011, Kakoza and Nyagatare agreed that all the shares were paid off, each one paid 35,000,000 Frw, and that was not the case, so Kakoza cannot disregard the situation when he signed the memorandum of association with Nyagatare as a shareholder of Radio 1 Rwanda Ltd, and still, state that Nyagatare is no longer a shareholder.

[17] Basing on the legal provisions, the doctrines above-mentioned and the explanations provided, the Court finds that Nyagatare Jean Luc is a shareholder of Radio 1 Rwanda Ltd, so Kakoza Nkuriza Charles statements that Nyagatare is no longer a shareholder of Radio 1 Rwanda Ltd are unfounded.

ii. Whether the decision of dismissing Nyagatare from Radio 1 Rwanda Ltd was made by Kakoza in accordance with the law.

[18] Kakoza Nkuriza Charles alleges that he felt that he had the right to dismiss Nyagatare Jean Luc as a shareholder of Radio 1 Rwanda Ltd for breach of memorandum of association by the time of the formation of the company.

[19] Counsel Mubangizi Frank and Counsel Gakuba Shema, assisting Kakoza Nkuriza Charles, argue that the fact that Kakoza decided to dismiss Nyagatare Jean Luc from Radio 1 Rwanda Ltd did not violate any legal provision because there was no other procedure he could use.

[20] Counsel Safari Kizito, assisting Nyagatare Jean Luc, argues that pursuant to article 134 of Law n° 07/2009 of 27/04/2009 relating to companies, no shareholder has the right to dismiss another shareholder. He also states that Article 31 of the Memorandum and Articles of Association provides for the settlement of dispute in case it arises, and he considers Kakoza's acts are error, as he had no right to dismiss his fellow shareholder.

DETERMINATION OF THE COURT

[21] Article 134 of the Law of 27/04/2009 relating to companies⁷ which was into force when Kakoza decided to dismiss Nyagatare provides that: “ A company may treat a shareholder as the only person entitled to : 1° exercise the right to vote attaching to the share; 2° receive notices; 3° receive a distribution in respect of the share; 4° exercise the other rights and powers attaching to the share ”.

[22] Article 140 of the Law n° 07/2009 of 27/04/2009 aforementioned⁸ provides that: “ the powers conferred to the shareholders of a company shall be exercised: 1° at a meeting of shareholders; 2° by a resolution of shareholders in lieu of a meeting; 3° by a unanimous resolution; 4° by a unanimous shareholder agreement”.

[23] Legal scholars S.N. Maheshwari and S.K. Maheshwari state that the shareholder has the right to be given a certificate of share, to be registered in the register of shareholders, to transfer the shares, to be informed about the company and to attend the meeting, to vote and review the registers, to be given the appropriate shares (...), to resign on directors, (...) ⁹.

[24] The case file indicates that on 02/08/2012, Kakoza Nkuriza Charles, as the Managing Director of Radio 1 Rwanda Ltd wrote to Nyagatare Jean Luc, informing him that he was no longer a shareholder of Radio 1 Rwanda Ltd as he had not yet paid off all his shares as per the Memorandum and Articles of Association, he requested him to provide his account number for refunding 9,000,000Frw he had already paid, this led to Nyagatare Jean Luc to file a claim requesting the removal of the decision of dismissing him because it had been illegally taken, and requesting that Kakoza Nkuriza Charles be removed from the management of the Radio, be required to provide the proof of the payment of shares, and the audit of the financial management should be conducted.

[25] The aforementioned article 31 of the Memorandum and Articles of Association of 29/05/2011 provides that “All disputes involving the company shall first be brought to the attention of the General Meeting. When the General Meeting fails to resolve the dispute, it shall be referred to an arbitrator agreed upon by both parties. When the dispute remains unresolved it shall be taken to the Rwandan competent court of law”.¹⁰. As to whether Kakoza Nkuriza Charles, as a shareholder, had the right to dismiss Nyagatare Jean Luc who was also the shareholder for the above reasons, pursuant to article 140 of Law n° 07/2009 of 27/04/2009 mentioned above, the Court finds that no procedure provided under this Law was used by Kakoza to dismiss Nyagatare from Radio 1 Rwanda Ltd. It also finds that article 134 of the aforementioned Law does not confer to a shareholder the right to dismiss a fellow shareholder, that instead that power is vested in the General Assembly of the shareholders. It finds that Kakoza's arguments that there was no other

⁷ Fundamental rights relating to shares are also provided for in the article 88 of the law n°27/2017 of 31/05/2017 relating to companies

⁸ Provisions of this article also appear in article 100 law n°27/2017 of 31/05/2017 relating to companies

⁹ Members of a company have a right to obtain certificate of shares, to get the name entered in the Register of Members, to transfer shares, to receive notices and to attend meeting, to vote and inspect directors, to approach court for the prevention of oppression and mismanagement, to apply for winding up and to share in surplus assets, etc (*S.N. Maheshwari na S.K. Maheshwari, op.cit., p. 5.106*).

registers, to get right shares, to elect directors and appoint auditors, to declare dividends, to receive statutory report, annual accounts, notice for special resolutions, to demand for investigation, to remove

¹⁰ Article 31 of the Memorandum and Articles of Association of 29/05/2011

procedure remaining because the General Assembly could not convene, was invalid because article 31 of the Memorandum and Articles of Association of 29/05/2011 stipulates that in case the dispute is not resolved by the General Assembly of the Shareholders, when the dispute remains unresolved it shall be taken to the Rwandan competent court of law.

[26] Basing on the provisions of the aforementioned law, in the memorandum and articles of association between the two parties and the opinions of legal scholars, the Court finds that Kakoza's decision to dismiss Nyagatare from Radio 1 Rwanda Ltd was illegal, so Nyagatare must retain his rights to be a shareholder in Radio 1 Rwanda Ltd.

iii. Whether there are damages which could be awarded

[27] Kakoza Nkuriza Charles and his counsels allege that the Commercial High Court ordered to Kakoza to pay to Nyagatare procedural fees and counsel's fee of 1,500,000Frw whereas he did not deserve them because he well knew that it was not necessary for him to sue because if he has fulfilled his obligations while buying shares there would not be lawsuits. They furthermore argue that based on the provisions of article 258 of the Civil Code, Book Three, Nyagatare Jean Luc should pay to Kakoza damages of 4,000,000 Frw for having dragged him in unnecessary lawsuits. They concluded by requesting Nyagatare to pay him 1,500,000 Frw of damages for each of his counsels, meaning 3,000,000 Frw for both counsels.

[28] Nyagatare Jean Luc and his counsel submit that procedural fees and counsel's fee of 1,500,000Frw that Kakoza was ordered to pay are justified because Nyagatare was the one who won the case and that there are some of the money he spent in pursuing his case including the counsel's fee. They request the Court to order to Kakoza to pay 4,000,000 Frw of counsel's fees at this instance in addition to those ordered by the Commercial High Court and moral damages of 15,000,000 Frw for the prejudice incurred for being deprived of the right to be a shareholder in Radio 1 Rwanda Ltd.

DETERMINATION OF THE COURT

[29] Regarding the amount of procedural fees amounting to 4,000,000 Frw, as well as 3,000,000 Frw of counsels' fees, claimed by Kakoza, the Court finds it unfounded because Nyagatare Jean Luc involved in this case because of the mistakes of Kakoza Nkuriza Charles, and the latter loses this case.

[30] Regarding the amount of procedural fees amounting to 1,500,000 Frw and the counsel's fee ordered by the Commercial High Court to be paid by Kakoza to Nyagatare, the Court finds it justified because Nyagatare was the one who won the case and that there was the money that he spent in pursuing his case including counsel's fee at that instance, this Court finds that the damages ordered by the Commercial High Court are proportional, and they should therefore be sustained.

[31] Regarding the amount of counsel's fees, the Court finds that the fact that the appeal of Kakoza Nkuriza Charles is unfounded indicates that Nyagatare Jean Luc, as the defendant, should continue to hire his counsel at this level, this means that there is the money spent by paying his counsel; but because the sum of 4,000,000 Frw he claims is excessive and there is no evidence he produced, in its discretion, the Court finds that he should be awarded 1,000,000 Frw in addition to

the 1,500,000 Frw ordered by the Commercial High Court, and that means the amount of 2,500,000 Frw at both instances.

[32] Regarding the 15,000,000 Frw claimed by Nyagatare Jean Luc for the prejudice he suffered due to deprivation of his rights to the shareholder in Radio 1 Rwanda Ltd, the Court finds that, as shown in the appealed judgment (under paragraph 30), those damages had been claimed for, but the Commercial High Court did not award them to him because he did not provide evidence to substantiate them. Therefore, even in this appeal he does not explain his suffered prejudice, except to state that it was caused by being deprived of the rights entitled to the shareholder, this means that this Court does not have a basis for examining whether the damages claimed are justified.

III. DECISION OF THE COURT

[33] Holds that Kakoza Nkuriza Charles' appeal was unfounded ;

[34] Holds that the judgment RCOMA 0071/13/HCC rendered by the Commercial High Court on 05/12/2014 remains unchanged, except for the procedural fee and counsel's fee awarded to Nyagatare Jean Luc at this level;

[35] Orders Kakoza Nkuriza Charles to pay to Nyagatare Jean Luc 1,000,000Frw for the counsel's fee in this case in addition to 1,500,000 Frw that had been awarded by the Commercial High Court, the total is amounting to 2,500,000 Frw.

[36] Declares that the court fees deposited by Kakoza Nkuriza Charles cover the expenses incurred in this case.