

GATETE v. ECOBANK LTD

[Rwanda SUPREME COURT – RCOM 00011/2017/CS (Mutashya, P.J., Karimunda and Muhumuza, J.) January 05, 2018]

Commercial law – Seizure – Seizure of a mortgage – The obligation of payment of the surety is limited to the limits of the secured loan – In case of restructuring of the loan agreement, the consent of the surety is obligatory in order for the previous mortgage to secure the restructured loan.

Facts: ECOBANK RWANDA LTD entered into a loan agreement with RUBIRIZI DAIRY, which was to be repaid within forty-eight (48) months, Gatete was the guarantor for the loan, and secured as guarantee a plot of land.

RUBIRIZI DAIRY Sarl did not comply with the agreement to pay the loan received with its interest within the agreed period of time, and the guarantor wrote to ECOBANK RWANDA LTD requesting it to return the mortgaged land with the intention of selling it to pay off the loan owed by RUBIRIZI DAIRY Sarl, and there was a de-registration of the mortgage, the land was subdivided into 51 plots for facilitating the sale, they were also registered and Gatete Polycarpe (the guarantor) submitted to the Bank their titles.

Gatete (the guarantor) also wrote to ECOBANK RWANDA LTD requesting to pay 39,000,000 Frw of the loan of ECOGER Company and 110,000,000 Frw of the loan of RUBIRIZI DAIRY sarl so that all loans are refunded, but the Bank responded to him by stating that the loan of RUBIRIZI DAIRY LTD to be paid equals to 149,754,850 Frw.

ECOBANK RWANDA LTD seized the Commercial Court of Nyarugenge requesting to order to RUBIRIZI DAIRY SARL and Gatete Polycarpe to pay the principal loan of 149,754,850 Frw, and interests that accrue until the payment of the loan and various damages.

The Court declared that the loan agreement dated 29/05/2008 concluded between ECOBANK RWANDA LTD and RUBIRIZI DAIRY Sarl and Gatete Polycarpe as "Propriétaire Constituant" is valid and should be based on for the calculation of company's defaulted loan.

RUBIRIZI DAIRY Sarl and GATETE appealed that decision to the Commercial High Court which held that the ruling of the case RCOM 1418/14/TC/NYGE is reversed regarding the amount of the loan, and ruled that it cannot order that the securities be sold, that as guarantor, he should not repay jointly with RUBIRIZI DAIRY Sarl as ordered in the first instance.

ECOBANK RWANDA LTD appealed to the Supreme Court, which declared that it has the right to register the mortgage secured on the plots of land derived from the mortgaged plot of land in the loan agreement concluded by both parties, and ruled that no interest for delays should be granted to RUBIRIZI DAIRY Sarl and GATETE P. It ordered to RUBIRIZI DAIRY Sarl and GATETE Polycarpe, within the limits of his guarantorship, to pay to ECOBANK RWANDA LTD 184,099,138 Frw of the loan owed to it.

Afterwards, Gatete filed a claim requesting the Court to settle the disputes that arose during the execution of the judgment, he states that the Professional Bailiff and ECOBANK RWANDA LTD had initiated the execution of judgment in violation of the Court's decisions, because the

Professional Bailiff overruled by including the property not decided by the judgment; they seized his property which was not in the limits of guarantorship, he argues that they should seize the properties that were within the limits of his guarantorship as the Court ordered, the seizure should have been limited to the mortgage associated with the specific plot of land, as such was his guarantorship.

ECOBANK also raised an objection relating to the time limit for filing the claim as it found that the claim would have been filed within two months because that was the time the Professional Bailiff notified to Gatete that the judgment was under execution.

Gatete (the guarantor) pleads that he finds that the objection has no basis because for him, the Chief Justices's Practice Directions were issued for a person who was not a party to the case because s/he is the one to be notified of the ruling of the case, and he also submits that RUBIRIZI DAIRY Sarl has movable and immovable properties; therefore, they should be firstly sold, if the payment is not covered, the mortgaged properties should be sold.

Held: Although the Bank has the obligation to register the mortgage and its proceeds, the guarantor's payment is limited to the guarantorship to pay the loan.

**A claim has merit.
Court fees cover the expenses incurred.**

Statutes and statutory referred to:

Law n° 12/2013 of 22/03/2013 governing the bailiff function, article 49.

No cases referred to.

Judgment

I. BACKGROUND OF THE CASE

[1] The case derives from the loan agreement concluded between ECOBANK RWANDA LTD and RUBIRIZI DAIRY Sarl on 29/05/2008 for a loan amounting to 133,379,294 Frw to be paid within forty-eight (48) months; Gatete Polycarpe, as its guarantor, mortgaged his plot of land n° 8957 located in Kicukiro.

[2] RUBIRIZI DAIRY Sarl did not comply with the agreement to pay the loan received and its interests within the agreed period of time. On 16/05/2012, Gatete Polycarpe wrote to ECOBANK RWANDA LTD requesting it to return the mortgaged land with the intention of selling it in order to pay the loan RUBIRIZI DAIRY Sarl owes to ECOBANK RWANDA LTD, and on 23/5/2012 the mortgage was de-registered, the land was subdivided into 51 plots in order to facilitate the sale, they were also registered, Gatete Polycarpe submitted to ECOBANK Rwanda Ltd their titles.

[3] On 14/09/2014, Gatete Polycarpe again wrote to ECOBANK RWANDA LTD requesting to pay 39,000,000 Frw of ECOGER's loan and 110,000,000 Frw of RUBIRIZI DAIRY sarl's loan so that all loans are refunded, but on 22/09/2014 ECOBANK RWANDA LTD responded to him that the due loan of RUBIRIZI DAIRY LTD on that date to be paid equals to 149,754,850 Frw.

[4] On 09/12/2014, ECOBANK RWANDA LTD seized the Commercial Court of Nyarugenge requesting to order to RUBIRIZI DAIRY SARL and Gatete Polycarpe to pay the principal loan of 149,754,850 Frw calculated up to 22/09/2014 and the interests which accrue until the payment of the loan and various damages. The Court rendered the judgment on 30/04/2015 and declared that the loan agreement concluded on 29/05/2008 by ECOBANK RWANDA LTD, RUBIRIZI DAIRY Sarl and GATETE Polycarpe as "Propriétaire Constituant" is valid and should be based on in calculating the company's defaulted loan. It declared that the 150,000,000 Frw mentioned in the letter dated 16/05/2012 written by Gatete Polycarpe to ECOBANK RWANDA LTD, is not the amount of RUBIRIZI DAIRY SARL's loan owed, but it was the value that should be sold for the mortgaged plot of land n° 8957. It declared that the letter dated 16/05/2012 indicating the period of payment of 150,000,000 Frw Green Estates Ltd Company would have bought the plot of land in case ECOBANK RWANDA LTD would have agreed to release it to be subdivided into several other plots of land. It declared that the letter, "Acte de Main Levée" dated 23/05/2012 and the sale of some of the plots of land subdivided from the plot n° 8957 Gatete Polycarpe had mortgaged in the loan agreement dated 29/05/ 2008 does not invalidate nor modify this Agreement. It held that RUBIRIZI DAIRY Sarl together with Gatete Polycarpe as "Propriétaire Constituant" must pay to ECOBANK RWANDA LTD the loan and interests arising from the loan they did not pay as they have agreed upon, and to pay procedural and counsel's fees. It ordered to RUBIRIZI DAIRY Sarl together with Gatete Polycarpe as "Propriétaire Constituant" to pay to ECOBANK RWANDA LTD 132,092,889 Frw (one hundred and thirty-two million, ninety-two thousand, eight hundred and eighty-nine).

[5] RUBIRIZI DAIRY Sarl and GATETE Polycarpe appealed the decision to the Commercial High Court, which rendered the judgment on 30/6/2015 and declared that RUBIRIZI DAIRY Sarl, ECOBANK RWANDA LTD and GATETE Polycarpe did not agree that the contract of 29/05/2008 was terminated and replaced by that of 16/5/2012, that there was no agreement stating that the interest rate of 15% per year in the agreement of 29/05/2008 stops being calculated, that ECOBANK RWANDA LTD is not obliged to be paid as long as the plots of land subdivided from the plot n° 8957 are sold. The Court also declared that the judgment RCOM 1418/14/TC/NYGE is reversed with regard to the amount of the loan, the counsel's fee and the debtor, it ordered to RUBIRIZI DAIRY Sarl to pay to ECOBANK RWANDA LTD a loan amounting to 45,607,219 Frw instead of 131,092,889 Frw. The Court found that RUBIRIZI DAIRY Sarl owed to ECOBANK RWANDA LTD the amount of money decided at the first instance, adding 1,000,000 Frw of procedural and counsel's fees decided at the first instance, and 500,000 Frw of the counsel's fee at the appeal level and to repay 50,000 Frw deposited as court fee by filing the claim, the total is 47,157,129 Frw. It also ruled that there are no procedural and counsel's fees to be paid by RUBIRIZI DAIRY Sarl to ECOBANK RWANDA LTD; it held that it cannot order that the mortgage secured by Gatete Polycarpe should be sold, that he should not as a guarantor together with RUBIRIZI DAIRY Sarl to pay to ECOBANK RWANDA LTD as ordered in the first instance; it declared that the judgment should not be provisionally executed on the loan of 111,000,000 Frw.

[6] ECOBANK RWANDA LTD appealed to the Supreme Court, this Court rendered the judgment on 30/06/2017 and held that it has the right to register the mortgage on the plots of land subdivided from the plot n° 8957 located in Kicukiro which was secured as mortgage in the loan agreement concluded by both parties; it declared that no interest for delay shall be paid to RUBIRIZI DAIRY Sarl and Gatete Polycarpe. It ordered to RUBIRIZI DAIRY Sarl and GATETE Polycarpe, within the limits of his guarantorship, to pay to ECOBANK RWANDA LTD 184,099,138 Frw for the loan owed to it; it ordered to them to jointly pay to ECOBANK RWANDA LTD the counsel's fees amounting to 1,000,000 Frw, and ordered to them again to jointly repay to ECOBANK RWANDA LTD 1,750,000 Frw for advance payment for the expert's award, it ordered to them again to pay a part of the unpaid expert's award of Habimana José amounting to 1,750,000 frw, not later than 31/07/2017.

[7] Gatete Polycarpe later filed a claim seeking the resolution of disputes arising from the execution of the judgment RCOMAA 0046/15/CS, arguing that, based on page 15 of that judgment, paragraph 57, the Professional Bailiff and ECOBANK RWANDA LTD began to execute the judgment in violation of the Court ruling.

[8] The hearing in public was held on 03/01/2018, Gatete Polycarpe was assisted by Counsel Nzeyimana Boniface, and ECOBANK RWANDA LTD represented by Counsel Nkundabarashi Moïse.

[9] In this instant case, the Court shall analyse the issue related to the claim inadmissibility because the time limit for lodging a claim has elapsed, and examine whether the Professional Bailiff overruled in the execution of the judgment by including the property not decided by the judgment.

II. ANALYSIS OF LEGAL ISSUES

a. Determine whether Gatete Polycarpe's claim should not be admitted because the time limit has elapsed

[10] Counsel Nkundabarashi Moïse representing ECOBANK raised the objection relating to the time limit for filing the claim as he found that the claim should have been lodged within a period of two months from 25/08/2017 because it was the time when the Professional Bailiff notified to Gatete Polycarpe that the judgment was being executed. Due to the fact that he filed a claim on 05/12/2017, he violated the provisions of article 50 of Practice Directions n° 002/2015 of 18/05/2015 by the Chief Justice governing civil, commercial, labour and administrative procedure for enforcing the provisions of article 208 of Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, those Practice Directions provide that the claims on the disputes arising from the execution of the judgment shall be filed within two months(2) from the date the applicant knew that a judgement is being enforced or was enforced, and therefore, he notes that the claim filed by Gatete Polycarpe would not have been admitted because it was lodged on 05/12/2017 when two (2) months have elapsed.

[11] Counsel Nzeyimana Boniface assisting Gatete Polycarpe observes that the objection is unfounded because for him, the Practice Directions of the Chief Justice was issued for a person who has not been a party to the case because he/she is the one who is notified of the ruling of the

judgment; they rely on of the article 208 of the Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure which provides that “the disputes regarding the execution of judgement shall be brought before the court that rendered the final judgment”.

[12] He further submits that in case the Court finds otherwise, it shall take into account the fact that Gatete Polycarpe, based on the Order of the Professional Bailiff issued on 25/08/2017 which was notified to him on that day, he wrote to the Professional Bailiff on 19 /10/2017 stating that what he was doing was wrong, and the Professional Bailiff responded to him on 26/10/2017, and he notes that the disputes arose from 26/10/2017, the time limit for filing the claim should be calculated from that date.

DETERMINATION OF COURT

[13] Article 208 of the Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, provides that: “Disputes regarding the execution of judgement shall be brought before the court that rendered the final judgment or that made a foreign judgement enforceable in Rwanda. The court decides thereon within fifteen (15) days of the date of receipt of the application”.

[14] Article 50 of Practice Directions n° 002/2015 of 18/05/2015 by the Chief Justice governing civil, commercial, labour and administrative procedure provides: “*A claim on the execution of judgement regarding disputes stipulated in Article 208 of the law n° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedures, shall be filed in a competent court within two months (2) from the date the applicant knew that a judgement is being enforced or was enforced*”.

[15] The case file contains the order of the Professional Bailiff called Mwitende Jean Paul of 25/08/2017 requiring Gatete Polycarpe to pay the amount of money decided in the judgment RCOMAA 0046/2015/CS rendered by the Supreme Court on 30/06/2017, and do so within fifteen (15) days from the time he received this Order, and he informed him that failure to comply with this Order in the above-mentioned period, he will seize his immovable properties.

[16] In the case file, there is also a document dated 19/10/2017 written by Gatete Polycarpe in response to the Professional Bailiff Mwitende Jean Paul, indicating him that in the seizure he conducted, he overrided by including the property not decided in the judgment and requesting him to nullify it.

[17] The case file also contains the letter dated 23/10/2017 written by the Professional Bailiff Mwitende Jean Paul in response to Gatete Polycarpe, who received it on 26/10/2017, informing him that the seizure was made in order to execute the judgment RCOMAA 0046 /2015/CS, and was lawfully done.

[18] In the case file, there is also a document submitting a claim into IECMS (Integrated Electronic Case Management System) indicating that Gatete Polycarpe filed a claim on 05/12/2017 requesting to the Court to resolve the disputes that arose during the execution of the judgment RCOMAA 0046/15/CS decided by the Supreme Court on 30/06/2017.

[19] The Court finds that, according to the correspondence between Gatete Polycarpe and the Professional Bailiff, the disputes arising from the execution of the judgment began on 26/10/2017 because when Gatete Polycarpe informed the Professional Bailiff that the conducted seizure contradicted with Court ruling, the Professional Bailiff rejected his request, stating that the seizure could not be nullified as long as the amount of money ordered by the Court is not yet fully paid, the disputes in the execution of judgment stated in article 208 of the Law n^o 21/2012 of 14/06/2012 mentioned above arose, and thus it finds that the period of two (2) months referred to in article 50 of Practice Directions n^o 002/2015 of 18/05/2015 by the Chief Justice mentioned above must start running from 26/10/2017, the period of two months has been observed since the claim was filed on 05/12/2017, as evidenced by the court submission included in the case file. Consequently, the objection raised by Counsel Nkundabarashi Moïse, representing ECOBANK, lacks merit.

B. Determine whether the Professional Bailiff overrided by including the property not decided in the judgment

[20] Gatete Polycarpe contends that in executing the judgment RCOMAA 0046/15/CS decided by the Supreme Court on 30/06/2017, ECOBANK RWANDA LTD and the Professional Bailiff violated the provisions of paragraph 57 of the final judgment and seized what the Court did not order, that is, in his case, the seizure would be conducted on the properties which were within the limits of his guarantorship as the Court ordered, the seizure should have been conducted solely on collaterals proceeding from the plot N^o8957 which serves as his guarantorship. These are the disputes he requests the Court to resolve.

[21] He states that RUBIRIZI DAIRY Sarl owns movable and immovable properties, and according to him, these properties would be the primary assets to be sold, and if the payment is not fully covered, the properties mortgaged by Gatete Polycarpe could be sold. Thus, he finds that ECOBANK RWANDA LTD and the Professional Bailiff seriously overrided, upon being aware of the situation, he wrote to the Professional Bailiff, requesting him to cease the proceeding, unfortunately, his request was declined.

[22] ECOBANK RWANDA LTD pleaded that there are no disputes at all on that issue because RUBIRIZI DAIRY Sarl and its insurer must pay to ECOBANK RWANDA LTD as decided by the Court. In addition, they are not the ones who decide how the judgment should be executed, this is clearly explained by the article 194 of the Law n^o 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure which provides that “the movable and immovable assets of a debtor shall constitute a common and general security of his/her creditors”.

DETERMINATION OF THE COURT

[23] Article 203 of Law N^o 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure provides that “Judgments must be executed in the manner and time limits provided for in their rulings”.

[24] Article 49 of the Law N^o 12/2013 of 22/03/2013 of Law governing the Bailiff Function provides that a professional bailiff has nine competences as outlined in that article including the execution of judicial decisions, the administrative decisions of competent organs and other enforcement orders.

[25] In the case file, there is the loan agreement dated 29/05/2008, ECOBANK RWANDA LTD entered into with RUBIRIZI DAIRY Sarl, ECOBANK RWANDA LTD granted to it a loan amounting to 133,379,294Frw, Gatete Polycarpe provided was the guarantor for the loan and mortgaged his plot, n° 8957 located in Rubirizi - Kicukiro.

[26] In the case file, there is also the Court Bailiff's Order of 25/08/2017 requesting Gatete Polycarpe to pay, it notified him that in case of the failure to comply with the Order, he will seize the properties co-owned with his wife mentioned in the table below, adding other properties that are not included in the plot n° 8957 located in Kicukiro - Rubirizi.

[27] In the judgment under execution RCOMAA 0046/15/CS decided by the Supreme Court on 30/06/2017, the Court, in paragraph 54, ruled that ECOBANK RWANDA Ltd is entitled to register a mortgage derived from the plot of land n° 8957 which was pledged in the loan agreement between RUBIRIZI DAIRY Sarl and ECOBANK RWANDA LTD, in order to cover the payment of the loan. In its paragraph 57, the Court ordered that RUBIRIZI DAIRY Sarl should jointly with Gatete Polycarpe within the limits of his guarantorship pay to ECOBANK RWANDA LTD 184,099,138 Frw for the loan owed to it.

[28] The Court finds that the Professional Bailiff, in the execution of the judgment against Gatete Polycarpe as the guarantor of the loan, should refrain from incorporating additional properties not covered by the collateral of the plots subdivided from the plot n° 8957 located in Rubirizi-Kicukiro because it was the specific collateral provided in the loan agreement between RUBIRIZI DAIRY Sarl and ECOBANK RWANDA LTD, this was the decision of the Court in the judgment under execution, in its paragraph 57.

[29] The Court finds that the counsel for ECOBANK RWANDA LTD argues that GATETE Polycarpe and RUBIRIZI DAIRY Sarl must jointly pay the loan owed to ECOBANK RWANDA LTD based on the article 194 of the Law N° 21/2012 of 14/06/2012 mentioned above, this should be understood in case the two would have shared the loan, but since GATETE Polycarpe entered into the agreement as guarantor, his payment is limited to his guarantorship as the Court ordered that it is restricted to the collateral he provided, that is the plot n° 8957 located in Rubirizi - Kicukiro.

C. Determine whether the damages claimed in this instant case are founded

[30] ECOBANK RWANDA LTD filed a claim incidental to the one of Gatete Polycarpe, requesting to the Court to order to the respondent to pay damages for being dragged in unnecessary lawsuits amounting to 5,000,000 Frw, procedural fees of 2,000,000 Frw, and counsel's fees of 3,000,000 Frw.

[31] Gatete Polycarpe contends that he is the one who deserves the damages as ECOBANK RWANDA LTD and the Professional Bailiff overruled and executed the judgment on the property not decided by the Court, and he requests that they should pay to him the procedural and counsel's fee amounting to 3,000, 000 Frw.

[32] Regarding these damages, ECOBANK RWANDA LTD pleaded by stating that Gatete Polycarpe is the representative of RUBIRIZI Dairy Sarl, due to the fact that he did not voluntarily pay the loan, he has no excuse to request for unevicenced claims-related damages.

DETERMINATION OF THE COURT

[33] The Court finds that the incidental claim filed by ECOBANK RWANDA LTD should not be considered as it lost this judgment and it does not justify the prejudice suffered in this instant case.

[34] Regarding the procedural and counsel's fees claimed by Counsel GATETE Polycarpe, the Court finds that he deserves them, but it awards them to him in its discretion because the applicant does not provide evidence supporting that he deserves such amount, so he should be awarded a total of 1,000,000 Frw (one million).

III. DECISION OF THE COURT

[35] Declares founded the claim for the settlement of the disputes that arose from the execution of the judgment RCOMAA 0046/15/CS filed by Gatete Polycarpe;

[36] Declares unfounded the objection raised by Counsel Nkundabarashi Moise for the claim inadmissibility;

[37] Declares unfounded the claim of ECOBANK RWANDA LTD incidental to that of Gatete Polycarpe for damages;

[38] Holds that the payment of Gatete Polycarpe shall be limited to his guarantorship as ordered by the Court, that is, on the plot n°8957 located in Rubirizi-Kicukiro;

[39] Orders to ECOBANK RWANDA LTD to pay to Gatete Polycarpe 1,000,000 Frw for the procedural and counsel's fees;
Orders that the court fee covers the expenses of the judicial proceedings.