

MURENZI ET AL. v MUTABAZI ET AL (ADD)

[Rwanda Supreme Court –RS/INJUST/RC 00009/2021/SC (Ntezilyayo, P.J., Cyanzayire and Karimunda, J.) 14 April 2022]

Judicial procedure – Civil Litigations – Lis pendens – a Court that has a jurisdiction to hear a case in lis pendens – When different competent courts were seized for a same case, one of the seized courts cedes and transfers the case to the other. And it is the higher court that takes precedence.

Judicial procedure – Civil litigations – Lis pendens – Determination of lis pendens – grounds that justify lis pendens: 1) There must be different courts that were seized for a same case, that is, carrying on a same litigation matter, and between same litigants. 2) The seized courts must all be equally competent. The same litigation matter means that the claim must be of the same root, and must be for the same cause. Same litigants mean that parties litigating in one case must be exactly the very parties litigating in the other case.

Judicial Procedure – Civil litigations – the application of a principle of Court’s own discretion. The Court cannot apply the principle of court’s own discretion for the confirmation of facts, neither can it apply such a principle on the existing usual legal provisions. Instead, when the Court has already determined the related facts and it has as well identified the applicable laws, it can now proceed with the making of different decisions and it is this time that the Court can apply the principle of own discretion.

Judicial procedure – Civil Litigations – Jurisdiction of Courts – The Court that has jurisdiction to hear cases that came from an Intermediate Court – A case whose first instance was heard by a Primary Court cannot be under the jurisdiction of the Supreme. Similarly, a case whose first instance was heard by an Intermediate and whose last instance was heard by the High Court, and which later was reviewed for injustice-related grounds cannot be brought under the jurisdiction of the Primary Court, since the sole courts that have jurisdiction for such a case are only the Court of Appeal and the Supreme Court.

Facts: This case started from The Intermediate Court of Gasabo with Mutabazi and Muhawenimana suing Murenzi together with Uwamahoro, lamenting that due to their poor construction methods, their house wall collapsed and damaged a house and a car, the plaintiffs’ properties, for which they claimed for compensation. The defendants pleaded faultless, arguing that they had no tort in the collapsing of the wall, alleging that the wall fell owing to effects of natural disasters that came adding to the plaintiffs’ poor construction since he had constructed without the construction permit. (SORAS AG Ltd (now SANLAM Assurance Générales Plc), the insurer, intervened in the case and prayed for the recovery of funds that they paid for the repairing of the damaged car. In case RC 00203/2018/GSBO, the Court referred to Experts’ reports and testimonies from the witnesses and held that the collapsed wall fell owing to the weight of soil that Murenzi had heaped against it, and ordered Murenzi together with Uwamahoro to thereof pay for a variety of damages.

Murenzi and Uwamahoro appealed the ruling before the High Court and they argued that the previous court disregarded a fact that the wall collapsed due the plaintiffs’ faults as they constructed without a construction permit, neither did they observe the required construction

standards. They also added that the submitted Expert report is not legal since its authors never concurred on it; leave alone that it is not the authors that submitted it to the Court, it was even not sworn about. Mutabazi and Muhawenimana, they too, appealed to the High Court and lamented that they hired vehicles to transport the heaped soil, and they claimed for a related compensation. SANLAM, the insurer, made a cross-appeal, and prayed that a compensation the previous court allowed them should be recaptured and feature in this case.

All the above appeals were combined under case RCA 00499/2019/HC/KIG-CMB RCA 00506/2019/HC/KIG, and the Court found that the oath giving is simply a defect in form, and that the Experts who did not present an oath about the report, could be invited to present their findings and give the oath thereof. For the disagreement among the report's authors, the court moved that such a disagreement is not material, since the authors agree on some important details, and the Court has therefore held that the lodged appeal has no justification.

Murenzi applied for injustice related case-review. The case was sent to the Supreme Court for retrial, and the Court examined the following main issues: Whether the Expert report that led to the ruling of case RCA 00499/2019/HC/KIG-CMB RCA 00506/2019/HC/KIG should be nullified; and the Court was as well to determine the causes that lead to the collapsing of Mutabazi and Muhanimana's fence wall.

Meanwhile, the applicant for injustice related case-review raised an objection of *lis pendens*, arguing that Mutabazi, the claimant, has lodged a related claim before Gasabo Primary Court and he suggests the Court to first sort issues of the pending claim. He explained that the pending case is a new claim that the plaintiff lodged whereby he requested for compensation for the newly constructed wall and for the ancillary buildings that were relatedly demolished. He argues that the new claim will certainly bring about the determination of liability and he is worried that both courts may end up with conflicting decisions and that is why he requests for a joint trial, and hence a smooth end

For the other party, the joinder of both cases causes no harm, since it will make the case end at once and thus smoothly. He even adds that in case of no *lis pendens*, the Supreme Court, as the Highest court, still has a jurisdiction to call for a case that pends before a Primary Court and have both the cases tried by this very Court.

Held: 1 When different competent courts were seized for a same case, one of the seized courts cedes and transfers the case to the other. And it is the higher court that takes up the case. Nonetheless, the subject matter under case RC 00 177/2022/TB/GSBO is actually different from the litigation matter under this very case. Therefore, this case has no situation of *lis pendens*.

2. Grounds that justify a situation of *lis pendens* must include that different courts were seized for a same case, and the seized courts must be of a same jurisdiction. A same litigation refers to a case with the same root origin, and same litigants' Same litigants means that parties litigating in one case must be exactly the very parties litigating in the other case. This case is therefore different from the above criterion, and it is another indicator that nature of this case contains no situation of *lis pendens*.

3. A case whose first instance was heard by a Primary Court cannot under the jurisdiction of the Supreme. Similarly, a case whose first instance was heard by an Intermediate and whose last instance was heard by the High Court, and which later was reviewed for injustice-related grounds cannot be brought under the jurisdiction of the Primary Court, since the sole courts that have

jurisdiction for such a case are only the Court of Appeal and the Supreme Court. Therefore, case RS/INJUST/RC 00009/2021/SC that pends before this Court and case RC 00177/2022/TB/GSBO contain no situation of lis pendens.

**The raised objection has no justification,
Case RS/INJUST/RC 0000/2021/SC and claim RC 00177/2022/TB/GSBO present no
situation of lis pendens, and therefore, they should not be combined.**

Statutes referred to:

Law n° 30/2018 of 02/06/2018 determining the Jurisdiction of Courts, articles 27,53, and 100.

No cases were referred to.

Doctrines referred to :

Serge Guinchard (eds), Droit et pratique de la procédure civile, Paris, Dalloz, 2014, p. 293.

Loïc Cadet and Emmanuel Jeuland, Droit judiciaire privé, 11e éd., Paris, 2019, p.222.

The Judge as Lawmaker: An English Perspective” in Tom Bingham, The Business of Judging:

Selected Essays and Speeches 1985-1999, Oxford, Oxford University Press, 2000, p.36.

Judgment

I. THE BACKGROUND OF THE CASE

[1] This case started from the Primary Court of Gasabo, with Mutabazi Abayo Jean Claude together with Muhawenimana Joselyne suing Murenzi Alphonse and Uwamahoro Jacqueline, lamenting that due their poor construction methods, their fence wall collapsed and damaged two cars, ancillary buildings, water tanks and their supporting metal pillars. The plaintiffs put the damage liability on Murenzi Alphonse and Uwamahoro Jacqueline, and they claimed for a variety of damages compensations.

[2] Murenzi Alphonse and Uwamahoro Jacqueline pleaded no tortness in the collapsing of their fence wall, and they lamented that Mutabazi Abayo Jean Claude, the claimant, cannot prove that the collapsed wall contained any cracking at the time of its erecting. He explained that the collapsing of the wall owed to the natural disasters that came adding to a shallow construction by Mutabazi Aboayo Jean Claude since he had put up his buildings without a construction permit; and he therefore requested the court to move that the lodged claim lacks merit.

[3] SORAS AG Ltd (now NANLAM Assurance Générales Plc) intervened into the case and prayed the Court to order Murenzi Alphonse and Uwamahoro Jacqueline to pay 2,183,000 Frw that SORAS AG Ltd spent for repair of car RAD 995 F damaged by their collapsed wall.

[4] In case RC 00203/2018/TGI/GSBO of 08/11/2019, Gasabo Intermediate Court found that witnesses’ testimonies together with Gasabo District Construction Inspection Authority, Land Surveying Technician, and a ground of commissioned Experts concurred to affirm that the collapsed wall fell off due to a mass that weighed against it, and that had it not been a weighing

weight, the wall would not have collapsed since it looked to be strong and firm. The has Court has also found that when Murenzi Jean Claude was constructing his fence wall, he leaned it against the one of Mutabazi Abayo Jean de Claude, and he heaped thereby a pile of soil and that is what made the wall to collapse. And the Court moved that the wall of Mutabazi Abayo Jean Claude collapsed owing to the activities of Murenzi Alphonse and Uwamahoro Jacqueline, and it ordered them to jointly pay Mutabazi Abayo Jean Claude and Muhawenimana Joselyne a sum of 22,159,538 Frw and 6,173 US dollars for compensation of the caused damages.

[5] Murenzi Alphonse and Uwamahoro Jacqueline appealed the ruling before the High Court and lamented that the previous court disregarded a fact that the collapsed wall could not resist the flooding waters since it was poorly built and with extreme violations of construction required standards since the owner had constructed it without a building permit. They also added that the submitted Expert report is not legal since its authors never concurred on it; leave alone that it is not the authors that submitted it to the Court, it was even not sworn about. Mutabazi and Muhawenimana, they too, appealed to the High Court and lamented that they hired vehicles to transport the piled soil, and that they were not given a related compensation yet they had proof for having hired car RAD 586 M for 850,000 Frw and car RAC 847 Y for 360,000 Frw

[6] SANLAM, the insurer, made a cross-appeal, and prayed the Court to move that a refund of 2,183,000 Frw that the previous court had allowed them be recaptured and feature under the ruling of the High Court.

[7] All the above appeals have been combined under case RCA 00499/2019/HC/KIG-CMB RCA 00506/2019/HC/KIG, it was heard on the 19/02/2021 and the Court held the following:

- i. the issue of jointly building a condominium wall was not litigated at the first instance; therefore, it cannot be examined at the appeal level.
- ii. the absence of the oath by the authors of the presented report only constitutes a defect of form, and this can be rectified by summoning the concerned authors to come and give a related oath and then present their findings before the Court.
- iii. the authors disagreement on the report's conclusion is not a material issue that might call for the report's revocation, as long the majority of its authors concur with its content.
- iv. No Expert has even concluded that the concerned wall collapsed due to effects of natural disasters, and a report made by the Village leader on the 22/05/2018 highlighted this issue as an old conflict, and it makes clear that the wall collapsed due to a pile of soil that Murenzi Aphonse heaped against it.
- v. The previous court that has discretionally awarded the plaintiffs with 720,000 Frw as compensation for the car hiring did no wrong, since the Court was not bound to abide by the sole evidence submitted by litigants with assessing the current market prices. Besides, Mutabazi Abayo Jean Claude, the plaintiff, him too had a contribution to give for loss sharing.
- vi. A sum of 20,000,000 Frw that Mutabazi Abayo Jean Claude and Muhawenimana Joselyne requested for moral damages is not granted since they cannot account for

it, neither can they prove for the pain, sorrow nor the desperation they went through due the concerned incident.

- vii. A refund of 2,183.000 Frw granted to SANLAM Assurances Générales Plc must be recaptured along the ruling of the High Court, but the very sum should be deducted from the plaintiffs' damage compensation.
- viii. The damage compensation allowed to Mutabazi Abayo Jean Claude and Muhawenimana Joselyne is deducted of 3,369,336 Frw, a value of the ancillary buildings and 2,183,000 Frw for insurance refund to SANLAM Assurances Générales Plc.

[8] The Court held that the appealed ruling changes in part, and it ordered Murenzi Alphonse together with Uwamahoro Jacqueline to jointly to pay 740,000 Frw to Mutabazi Abayo Jean Claude and Muhawenimana Joselyne for Counsel fee, court fee, and the incurred case related costs, and the Court ordered them to refund SANLAM Assurances Générales Plc with a sum of 2,183,000 Frw spent on the car repair.

[9] Murenzi Alphonse petitioned the President of the Court of Appeal, and prayed to have case CMB RCA 00499/2019/HC/KIG-RCA 00506/2019/HC/KIG rendered by the High Court on the 19/02/2021 reviewed for injustice-related ground. The President of the Court of Appeal analysed the application and wrote to the President of the Supreme Court and requested him to have the case retried. And on 07/10/2021 the President of the Supreme Court issued a writ n0 243/CJ/2021 and sent the case to the Court's Registry for retrial.

[10] The hearing was conducted in public on 08/03/2022 with Counsel Habyarimana Christine assisting Murenzi Alphonse and Uwamahoro Jacqueline, while Counsel Yaramba Ruhara Athanase together with Counsel Niyitegeka Epaphrodite represented Mutabazi Abayo Jean Claude together with Muhawenimana Joselyne whereas SANLAM Assurance Générales Plc was represented by Counsel Gafaranga Anastase.

[11] At the opening of the hearing, Counsel Habyarimana Christine informed the Court that Murenzi Alphonse that she is representing is sick, and she added that she normally assists him in the court, but she now has a mandate and a power of Attorney to represent him on the matter pertaining to the objection of lis pendens that they have filed following the pre-trial meeting; and she explained that the above objection came in late since they learnt of it shortly later after the pre-trial conference . She argued that the raised objection results from a new claim that Mutabazi Abayo Jean Claude, the plaintiff, has lodged with Gasabo Intermediate Court on the 24/02/2022, registered under case n0 RC 00177/2022/TB/GSBO. She added that When Murenzi Alphonse learnt of the new claim, he found it related to the pending case, and he requested to raise an objection of lis pendens, and that is why she suggests the Court to first look into the raised objection

II. THE ISSUE OF THE CASE AND ITS ANALYSIS.

- **Whether case RS/INJUST/RC 00009/2021 and claim RC 00177/2022/TB/GSBO pending before the Primary Court of Gasabo create a situation of lis pendens**

[12] Counsel Habyarimana Christine representing Murenzi Alphonse and Uwamahoro Jacqueline argues that the new claim that Mutabazi Abayo Jean Claude lodged with the Primary Court of Gasabo is closely related to this very case since the plaintiff sued requesting for compensation for the newly constructed wall, and for the thereby demolished ancillary buildings. She argues that the new claim will certainly bring about the determination of liability and she is worried that both courts may end up with conflicting decisions and that is why he requests for a joint trial by this Court and hence a smooth end of the case.

[13] Mutabazi Abayo Jean Claude and his legal advisors, and yet representatives of Muhawenimana Joselyne, they too agree that the concerned cases are the same, and that their joint trial will yield a smooth end. They submit that in case the Supreme Court finds a *lis pendens* thereof, it can call for the case that pends before the Primary Court and have both cases jointly tried; and they add that in case of no situation of *lis pendens*, still nothing bars the Supreme Court, the highest court, to call for a case from a Primary Court for a joint trial (he who does much, does little)

[14] Counsel Gafaranga Anastase who represents SANLAM Assurance Générales Plc, him too, submits that the two cases should be combined and jointly tried. Lest, if at all this court finds Murenzi Alphonse and Uwamahoro Jacqueline flawless, that would jeopardize the ruling on the case lodged with the Primary Court.

DETERMIANTION OF THE COURT:

[15] Sub- paragraph 3 of paragraph one of article 100 of the law n0 30/2018 of 02/06/2018 determining the Jurisdiction of Courts provides that “Where a case is filed in two different courts with competent jurisdiction, one of the courts sends the case to the other by selecting : a higher court which takes precedence over a lower court,…”

[16] The Court finds that the above article puts it clear that grounds that justify case *lis pendens* are : 1) There must be different courts that were seized for a same case, that is, carrying on a same litigation matter, and between same litigants. 2) The seized courts must all be equally competent. The same litigation matter means that the claim must be of the same root, and must be for the same cause. Same litigants means that parties litigating in one case must be exactly the very parties litigating in the other case.

[17] With regard to this case, the litigation matter of case RC 00177/2022/TB/GSBO is a request to compel Murenze Alphonse and Uwamahoro Jacqueline for the payment of a compensation for a new fence wall that Mutabazi Aboyo Jean Claude has constructed, together with a compensation for the thereby demolished ancillary buildings all due to the defendant’s poor construction methods, and the plaintiffs requested for a variety of other damage compensations. Before the Primary Court, SANLAM Assurances Générales Plc did not intervene into the case, the requests submitted before the Primary Court are different from the pleas presented under case RS/INJUST/RC 00009/2021/SC. For the Primary Court, the claim is about ordering Murenzi Alphonse and Uwamahoro Jacqueline for the payment of a contribution for the construction of a new fence wall, and a payment for compensation of the thereby demolished ancillary buildings; arguing it all due to the collapsing of Murenzi’s fence wall; Whereas for the Supreme Court, a

total of 8 requests were made: a sum of 34,038,316 Frw was requested for the compensation of both the collapsed wall and the demolished ancillary buildings

[18] The Court moves that a second justification of *lis pendens* is when both the seized courts have the required jurisdiction to hear the lodged litigation. For this matter, Serge Guinchard, a renowned scholar in the realm, says that *lis pendens* only exists if the courts seized of a same litigation are equally competent for it. Otherwise, when one of the seized courts has no jurisdiction to hear the lodged litigation, such a scenario raises an objection to do with lack of jurisdiction, but not of *lis pendens*¹. Loïc Cadiet and Emmanuel Jeuland, they too concur with the above, they as well assert that a situation of *lis pendens* only exists when competent courts were equally seized for a same litigation with a same subject matter and between the same litigants².

[19] The Court finds that the case that pends before the Primary Court of Gasabo is about a newly lodged claim and it was filed with reference to provisions of article 27 of the Law n^o 30/2018 of 02/06/2018 determining the Jurisdiction of Primary Courts for civil cases; while case n^o RS/INJUST/RC 0009/2021/SC pending under this very Court is a case that has already exhausted all its ordinary and extraordinary judicial remedies from the High Court. The Supreme Court is now reviewing this case for injustice related grounds as per the provisions of paragraph one of article 53 of the above mentioned Law n^o 30/2018 of 02/06/2018 which requests the Supreme Court to review some cases with injustice related issues, more especially cases that are likely to set a judicial precedent for other courts of law.

[20] The Court finds that a case whose first instance was heard by a Primary Court cannot be under the jurisdiction of the Supreme. And that a case whose first instance was heard by an Intermediate and whose last instance was heard by the High Court, and which later was reviewed for injustice-related grounds cannot be brought under the jurisdiction of the Primary Court, since the sole courts that have jurisdiction for such a case are only the Court of Appeal and the Supreme Court. Therefore, an objection of *lis pendens* that Counsel Habyarimana Christine alleges to be between case n^o RS/INJUST/RC 00009/2021/SC that pends under this Court and a claim n^o RC 00177/2022/TB/GSBO pending before Gasabo Intermediate Court has no justification.

[21] Similarly, the Court finds no point into the litigants' requests for the joinder of cases arguing that, regardless of a situation of *lis pends*, the Supreme Court can still order for the sought joinder since it even has a higher jurisdiction than a Primary Court. Though sub-paragraph 3 of paragraph one of article 100 of the above mentioned Law n^o 30/2018 of 02/06/2018 provides that in a scenario of case *lis pendens*, the higher court takes a precedence ; this stance does not nullify an obligation of first complying with principles of the very paragraph which state that different competent courts must have seized for a same litigation and by the same litigants.

¹ “La litispendance ne peut avoir lieu que lorsque le même litige est porté devant deux juridictions également compétentes. Si l’une des juridictions est incompétente, ce n’est pas une exception de litispendance qui doit être présentée mais une exception d’incompétence devant la juridiction estimée incompétente. Mais la litispendance pourrait être invoquée ensuite, si la juridiction se déclare compétente et si sa décision n’est pas contestée, ...” Serge Guinchard (eds), *Droit et pratique de la procédure civile*, Paris, Dalloz, 2014, p. 293

² “Il y a litispendance lorsque deux juridictions également compétentes sont saisies d’un même litige, ce qui suppose un litige portant sur le même objet, reposant sur la même cause et opposant les mêmes parties”. See Loïc Cadiet and Emmanuel Jeuland, *Droit judiciaire privé*, 11e éd., Paris, 2019, p.222.

[22] The Court finds that an otherwise alternative that might lead to the joinder of these cases, might not be justified by a sole fact that a same litigation pends before a higher court, it can instead be linked to the Court's own discretion. Nevertheless, the Court's own has governing principles. Tom Bingham, the former President of the Supreme Court of England, one of the countries that known for the promotion of the principle of Court's own discretion, says that the Court cannot apply the principle of court's own discretion for the confirmation of facts, neither can it apply such a principle on the existing usual legal provisions. Instead, when the Court has already determined the related facts and it has as well identified the applicable laws, it can now proceed with the making of different decisions and it is this time that the Court can apply the principle of own discretion. When the Court starts wondering and deliberating about a more appropriate and fair decision to take, then it has embarked on the application of the principle of court's own discretion³. And, all the above said indicates that the Court's own discretion cannot be taken an acceptable standard to justify the existence of a case lis pendens.

[23] Considering all what has been above elucidated, the Court finds that the objection of case lis pendens as raised by Murenzi Alphonse and Uwamahoro Jacqueline has no justification.

III. DECISION OF THE COURT

[24] Holds that the objection raised by Murenzi Alphonse and Uwamahoro Jacqueline has no justification.

[25] Holds that there no situation of case lis pendens between case n0 RS/INJUST/RC 00009/2021/SC and claim n0 RC 00177/2022/TB/GSBO pending before the Intermediate Court of Gasabo, and therefore, these cases are not for a joint trial.

[26] Moves that the hearing on the merit of the case will proceed on the 18/05/2022 from 8:30 am.

³ "... an issue falls within a judge's discretion if, being governed by no rule of law, its resolution depends on the individual judge's assessment of what it is fair and just to do in the particular case. He has no discretion in making his findings of fact. He has no discretion in his rulings on the law. But when having made any necessary finding of fact and any necessary ruling of law, he has to choose between different courses of action, orders, penalties or remedies he then exercises discretion. It is only when he reaches the stage of asking himself what is the fair and just thing to do or order in the instant case that he embarks on the exercise of a discretion." Reba "The Judge as Lawmaker: An English Perspective" in Tom Bingham, *The Business of Judging: Selected Essays and Speeches 1985-1999*, Oxford, Oxford University Press, 2000, p.36.