

PASSAG COMPANY Ltd v. GTBANK Ltd ET AL

[Rwanda COURT OF APPEAL – RCOMAA 00050/2018/CA
(Karimunda, P.J., Ngagi and Munyangeri J.) April 26, 2019]

Company law – Shareholder – Standing to sue in the interest of the company – A shareholder who seeks to sue in the interests of the company must first obtain relief from court – A shareholder authorized by the Court to sue for the interests of a company, does not file a lawsuit in his name but in the name of the company.

Facts: PASSAG COMPANY Ltd and ECOMIL have entered into a joint venture agreement and formed a new company called ECOMIL-PASSAG Ltd, which means that the two merged companies became shareholders of the new company. After the merger, they won a tender from Minagri, they worked together and opened a bank account at FINA BANK SA now known as GTBANK RWANDA Ltd, they also chose the signatories on that account whereby they included Gatarayiha.

The dispute arose when Minagri paid for the work done, the money was deposited in the account of ECOMIL-PASSAG Ltd in GTBANK RWANDA LTD, whereby it was withdrawn by one of the signatories called Gatarayiha. PASSAG COMPANY Ltd as a shareholder sued GTBANK in the Commercial Court stating that the money had to be withdrawn from the account only if there are three signatures out of the four signatories, requesting GTBANK to return that money to the account of

ECOMIL PASSAG Ltd. In this case, Gatarayiha was forcefully intervened.

GTBANK RWANDA Ltd raised an objection of inadmissibility of the claim on the ground that it has no contractual relationship with that company of being its client, while Gatarayiha claims that the company has no interest or standing to sue. The court dismissed the case on the ground that the company had no interest and standing to sue.

PASSAG COMPANY Ltd was not contented with the ruling and appeal to the Commercial High Court arguing that the previous court made its rulings based on the grounds that it had not been debated upon. The court found the appeal with no merit.

Again, PASSAG COMPANY Ltd was not satisfied with the decision and appealed to the Supreme Court. The case was transferred and heard by the Court of Appeal after the judiciary reform.

PASSAG COMPANY Ltd argues that the lower courts held that it had no standing to sue, yet it had it pursuant to the Law relating to the civil, commercial, labour and administrative procedure and that it should not be deprived of its rights because it still has an interest. in the “joint venture”.

For GT Bank Ltd, it argues that PASSAG COMPANY Ltd had no standing to sue because it is distinct from PASSAG ECOMIL Ltd and that PASSAG COMPANY Ltd is a being a shareholder of PASSAG-ECOMIL does not give it the standing to sue on behalf of PASSAG ECOMIL.

In his defence, Gatarayiha argues that no shareholder can personally sue for the interests of a company. He also concurs that it has no standing.

Held: 1. A shareholder who seeks to sue in the interests of the company must first obtain relief from the court.

2. A shareholder authorized by the Court to sue for the interests of a company does not file a lawsuit in his name but the name of the company.

**The appeal has merit;
Appealed judgment sustained.**

Statutes and statutory instruments referred to:

Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, article 2 and 111.

Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 2.

Law N° 07/2009 of 27/04/2009 governing companies, articles 223 and 224.

No case referred to.

Authors cited:

J.Héron, Droit judiciaire privé, Paris, Montchrestien, 1991, p. 51.

Judgment

I. BACKGROUND OF THE CASES

[1] PASSAG COMPANY Ltd and Misigaro Louis, who operates his commercial activities in the business name of ECOMIL, entered into a joint venture agreement, thus they

begun a new company called ECOMIL-PASSAG Ltd, they agreed to execute jointly the tender awarded to them by MINAGRI in Nyamugali, Kirehe District, they later opened a bank account in FINA BANK SA, currently GT BANK RWANDA Ltd, and appointed the signatories including Gatarayiha Augustin.

[2] Disputes arose when on 16/02/2013, MINAGRI made a payment of 72,534,548 Frw to paid ECOMIL-PASSAG Ltd, which GT BANK RWANDA Ltd gave to Gatarayiha Augustin, PASSAG COMPANY Ltd claimed that the money had to be withdrawn from the account only if there were three signatures out of the four signatories, thus resorting to the courts of law.

[3] The case began in Commercial Court of Nyarugenge, PASSAG COMPANY Ltd suing GT BANK RWANDA Ltd, formerly known as FINA BANK Ltd, demanding that the Court order it to return the money mentioned above on the account of ECOMIL-PASSAG Ltd, Gatarayiha Augustin was forcibly intervened. During the hearing, GT BANK RWANDA Ltd raised an objection requesting that the case filed by PASSAG COMPANY Ltd be dismissed on the ground that it has no contract with it to have and use the bank account as its client, Gatarayiha Augustin also objected that the company which sued had no interest and standing to file a claim and that there is no proof that it is a company that exists legally in accordance with the Rwandan law.

[4] On 19/07/2016, the Commercial Court of Nyarugenge rendered a judgment RCOM 00445/2016 / TC / NYGE, whereby it dismissed the cases of PASSAG COMPANY Ltd on the ground that it had no interest and standing to file a case, stating that what it is suing for is not its inherent right, rather its

the property of ECOMIL-PASSAG Ltd, and that as required by Rwandan law, a shareholder who wants to file a claim must first request for it from the Court. The Commercial Court of Nyarugenge also ruled that the decision to seize the litigated money had been revoked.

[5] PASSAG COMPANY Ltd was not contented with the ruling and appealed to the Commercial High Court claiming that the previous court in its ruling based on the grounds that had not been debated on during the hearing, on 02/02/2018, the Court rendered judgment RCOMA00461/2017 / CHC / HCC, found the appeal of PASSAG COMPANY Ltd unfounded, ordered it to pay 500,000 Frw to GT BANK RWANDA Ltd and Gatarayiha Augustin each for procedural and counsel fees, confirming the merits of the judgment under appeal.

[6] PASSAG COMPANY Ltd was not again contented with the rulings of the Commercial High Court, thus appealed to the Supreme Court arguing that it should not be deprived of its rights as it still has interest in the joint venture and that it does not acknowledge the document appointing Gatarayiha Augustin as a signatory to the bank account of ECOMIL-PASSAG Ltd and also that it was not allowed to submit on it.

[7] After the judiciary reform, its appeal was transferred to the Court of Appeal in accordance with the provisions of article 105 of Law N°30/2018 of 02/06/2018 determining the jurisdiction of the courts.

[8] The case was heard in public on 05/02/2019, PASSAG COMPANY Ltd represented by Me Gabiro David, Gatarayiha Augustin represented by Counsel Pierre Claver Zitoni and Counsel Mbarushimana Jean Marie Vianney and GT BANK

RWANDA Ltd represented by Counsel Bimenyimana Eric, The Court first examined the objection of lack of jurisdiction raised by GT BANK RWANDA Ltd arguing that PASSAG COMPANY Ltd lost on the same grounds at the first and second instance, but the court overruled it and the hearing on merits was scheduled on 27/03/2019. On the day of the hearing, PASSAG COMPANY Ltd was represented by Counsel Muhirwa Ngabo Audace, others were represented as before.

II. ANALYSIS OF THE LEGSL ISSUES

1. Whether PASSAG COMPANY Ltd had the standing to sue.

[9] Counsel Muhirwa Ngabo Audace, representing PASSAG COMPANY Ltd, argues that the Commercial High Court held that PASSAG COMPANY Ltd had no standing to sue, yet it had it in accordance with article 2 of Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure¹ which was in force when PASSAG COMPANY Ltd initiated a lawsuit at the Commercial Court of Nyarugenge. He argues that the Commercial High Court should not only have relied on the Law governing companies but also it should have based on the law relating to the civil, commercial, labour and administrative procedure.

[10] Counsel Bimenyimana Eric, representing GT Bank Ltd, argues that PASSAG COMPANY Ltd had no standing to sue because it is not PASSAG-ECOMIL Ltd. He argues that the fact

¹ This article became article 3 of the Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure.

that PASSAG COMPANY Ltd is a shareholder of PASSAG-ECOMIL does not give it the standing to sue on behalf of PASSAG-ECOMIL as the previous courts found it based on article 223 of the law governing companies, therefore he is of the view that the Commercial High Court was not in error to hold that PASSAG COMPANY Ltd had no standing to sue to the Commercial Court of Nyarugenge.

[11] Counsel Zitoni Pierre Claver, representing Gatarayiha Augustin, concurs with Counsel Bimenyimana Eric, he adds that based on article 23 of the law governing companies, no shareholder can personally sue for the rights of the company for which he is a shareholder. Counsel Mbarushimana Jean Marie Vianney, also representing Gatarayiha Augustin, also concurs with his learned colleagues because he finds that PASSAG COMPANY Ltd had no standing to sue for rights that are not it's own.

DETERMINATION OF THE COURT

[12] Article 2, paragraph one of the Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure which was in force at the time PASSAG COMPANY Ltd filed the claim provides that: “a claim is admissible in court only if the claimant has standing, interest and capacity to sue.

[13] While article 2, subsection 7°, of the Law N° 22/2018 of 29/04/2018 r relating to the civil, commercial, labour and administrative procedure defines standing as a legal ability to defend a specific interest or raise or defy a claim before the court.

[14] Legal scholars also define standing as the right to sue to courts by anyone who considers that his or her personal interests may be disturbed by the implementation of a particular provision of the law². This means that for a claim to be admitted in a court of law, the plaintiff must have a personal, direct and legal interest.

[15] Regarding this case, the documents in the case file demonstrate that MINAGRI entered into a contract with ECOMIL PASSAG Ltd, as part of the execution of the contract, on 16/02/2013 it paid 72,534,548Frw, the next day that money was taken by Gatarayiha Augustin given to him by ECOMIL-PASSAG Ltd. This forced PASSAG COMPANY Ltd to file a claim to the Commercial Court of Nyarugenge requesting it to compel FINA BANK (GT BANK RWANDA Ltd) to return that money to the bank account of ECOMIL-PASSAG Ltd.

[16] The court finds that the money in dispute was in the property of ECOMIL PASSAG Ltd, and it is the one which decided to give it to Gatarayiha Augustin, implying that it was the one with the standing to sue for its legal interest on its property when it has been invaded by anyone. As held by previous courts, this Court also finds that PASSAG COMPANY Ltd had no standing to individually sue for the property which belonged to ECOMIL-PASSAG Ltd, therefore it had no personal legal interest invaded.

² (... que soit habilitée à former une demande toute personne dont la situation est susceptible d'être affectée par l'application d'une règle de droit), J. Héron, *Droit judiciaire privé*, Paris, Montchrestien, 1991, p. 51.

[17] The Court again finds that, as held by the previous courts, article 223 of the Law N^o07/2009 of 27/04/2009 governing companies which were in force when PASSAG COMPANY Ltd filed the claim provides that: "In a company, one of the members of the Board of Directors or one of the shareholders may request the court to file a lawsuit on behalf of and in the interest of the company or its affiliated company ", this article makes it clear that the shareholder (PASSAG COMPANY Ltd) can file a lawsuit on behalf of the company (ECOMIL- PASSAG Ltd) but has to first motion the court and get relief, therefore it is obvious that PASSAG COMPANY Ltd did not comply with the provisions of the article mentioned above because it filed sued on its behalf, instead of filing the lawsuit on behalf of ECOMIL PASSAG Ltd.

[18] The Court also finds that article 224 allows a shareholder of a company or a former shareholder to sue a company, a member of the Board of Directors or one of its members or a senior employee for non-compliance with the obligations to protect the interests of the shareholders, which also PASSAG COMPANY Ltd did not comply with, because instead of suing the parties mentioned in this article for non-compliance with the obligations to protect the interests of the shareholders, it sued GT BANK RWANDA Ltd requesting to have a share in the property of ECOMIL PASSAG Ltd.

[19] The Court finds that the defense of PASSAG COMPANY Ltd that the Commercial High Court of Commerce should not only have relied on the law governing companies but should also have relied on the law relating to the civil, commercial, labour and administrative procedure has no basis, because apart from the fact that nothing prevented the court

from basing on that law if it provided a solution, even if it had based on the law relating to the civil, commercial, labour and administrative procedure there would be no difference because still, PASSAG COMPANY Ltd has no standing endowed by that law to sue ECOMIL-PASSAG Ltd.

[20] The Court also finds that again the submission of PASSAG COMPANY Ltd that it was not necessary for the company, registered in Kenya, to apply to the court requesting for a relief to sue another shareholder, is also unfounded because article 223 of Law N^o. 07/2009 of 27/04/2009 mentioned above does not provide for exceptions on foreign companies.

[21] Based on the legal provisions and the motivations given above, the Court finds that PASSAG COMPANY Ltd did not comply with the legal requirements to be allowed to file a claim on behalf of ECOMIL PASSAG Ltd, therefore the Commercial High Court did not err to sustain the rulings of the Commercial Court of Nyarugenge of dismissing the claim of PASSAG COMPANY Ltd.

2. Determining the basis of the damages claimed in this case.

[22] Counsel Muhirwa Ngabo Audace, assisting PASSAG COMPANY Ltd, requested that PASSAG COMPANY Ltd be paid 10,000,000Frw for continuing to deprive it of its legal rights on the money under litigation, 3,000,000Frw for counsel fees in addition to the one it had previously claimed all to amount to 6,000,000Frw and 2,000,000Frw for procedural fees. He argues that the damages claimed by the defendants are unfounded because they are the ones who dragged PASSAG COMPANY Ltd in lawsuits.

[23] Counsel Bimenyimana Eric, Counsel Zitoni Pierre Claver and Counsel Mbarushimana Jean Marie Vianney argue that the damages claimed by PASSAG COMPANY Ltd are unfounded because of its claims on which they are based on are without merit.

[24] Counsel Bimenyimana Eric argues that in case this Court upheld the judgment of the Commercial High Court, it should award counsel fees of 1,000,000Frw to GT BANK Ltd.

[25] Also, Counsel Zitoni Pierre Claver, assisting Gatarayiha Augustin argues that in case the Court upheld the decision of the Commercial High Court, his client should be awarded 5.000.000Frw for counsel fees, this replaces the previous requests.

DETERMINATION OF THE COURT

[26] Article 111 of the Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure provides that : “The claim for representation fees is an incidental claim to the principal claim aiming to repay expenses incurred during judicial proceedings. The claim for legal costs is adjudicated at the same time as the principal claim. It can also be admitted and adjudicated even if the principal claim has not been admitted”.

[27] The court finds that the various damages requested by PASSAG COMPANY Ltd should not be awarded because it has lost this case.

[28] The Court finds that GT BANK RWANDA Ltd and Gatarayiha Augustin incurred some expenses in the hearing of the case in which they were sued caused by the appeal of PASSAG COMPANY Ltd, so as this appeal is without merit, PASSAG COMPANY Ltd must pay GT BANK RWANDA Ltd 1,000,000Frw for the counsel and procedural fees which it requested on this instance as it is in range, and also pay Gatarayiha Augustin damages for counsel and procedural fees of 1,000,000Frw at this instance awarded in the discretion of the court, as he cannot prove that the 5,000,000Frw he claimed for is what he incurred as an expense on this case.

III. DECISION OF THE COURT

[29] The appeal of PASSAG COMPANY Ltd lacks merit;

[30] Holds that the rulings of the judgment RCOMA 00461/2017/CHC/HCC rendered by the Commercial High Court on 02/02/2018 are upheld;

[31] Orders PASSAG COMPANY Ltd to give GT BANK RWANDA Ltd and Gatarayiha Augustin, each 1.000.000Frw for the counsel and procedural fees on this instance;

[32] The court fees of this case cover the expenses of this case.

