

CITY OF KIGALI v. RWABUKWISI

[Rwanda COURT OF APPEAL – RADAA 00005/2019/CA – (Nyirandabaruta, P.J., Mukanyundo and Ngagi, J.) July 3, 2020]

Administrative law – Force majeure – The contractual liability based on non-performance is not engaged when there is an administrative act preventing one contracting party from respecting his/her obligations.

Facts: This case was initially introduced to the Intermediate Court of Nyarugenge, where Rwabusi requested that the City of Kigali be instructed to pay the rent collected from his houses that it did not reimburse, related interests and various damages.

Both parties withdrew their case and concluded a transaction whereby the defendant admitted to pay the plaintiff the total amount he was claiming from it. This agreement was not executed and this drove the plaintiff to sue again to the Intermediate Court requesting that the defendant be ordered to enforce it and he requested the provisional execution despite the appeal of the defendant.

The Intermediate Court noted that before the defendant's execution of that agreement, there is a correspondence from the Prosecution Authority addressed to the defendant demanding them to withhold the said amount of money for the reason that the plaintiff was under international arrest warrant for being suspected to have committed genocide, the reason why the defendant was not held liable for failure to fulfill its obligations.

The plaintiff lodged an appeal to the High Court where he requested the court to determine whether there has been a case of force majeure that hindered the execution of the contract by the side of the defendant. He also requested various damages as well as the provisional execution of the judgment.

The High Court realised that in the prosecution's correspondence, nowhere it indicated that the said amount of money would constitute an inculpatory element of evidence against the plaintiff such that the respondent would indicate the influence of the administration that led it to enforce such instruction of the prosecution, and it found further that if the amount of money was seized for the execution of gacaca verdict, it would have been determined the amount he ought to pay and the balance he would have to retain. Thus, it held that the defendant should not have accepted such seizure due to the fact that when a person is prosecuted for a crime, he is not deprived of the right to his/her property, and it ordered the defendant to pay various damages.

The defendant lodged an appeal to the Court of Appeal alleging that the High Court held that there was no unusual circumstance that would bar it from respecting the transaction and it was ordered to pay damages. He explains that this Court held that the seizure that was enforced by the Prosecution authority is inconsistent with the Law while it is a competent organ according to the law, which is not inconsistent with the Constitution and that the correspondence it wrote consists of an authentic deed. For these reasons, it had no other choice because this situation is considered as a force majeure and no one is allowed to refute the decisions of this organ apart from the Court.

In his appeal, the plaintiff argues that the defendant was mistaken by complying with the letter of the prosecution without exercising caution. He explains that the Prosecution Authority has the power to seize but that such action should be based on the law while being endorsed by the Court, and for this reason, he requests to be given his amount of money since the private property is inviolable.

Held: The contractual liability based on non-performance is not engaged when there is an administrative act preventing one contracting party from respecting his/her obligations, and for this

reason, this an unusual event that barred the City of Kigali from respecting the contract concluded with Rwabukwisi, the reason why it should not be held liable.

**Appeal with merit.
The judgment rendered by the High Court is reversed in whole.
Court fees to the defendant.**

Statutes and statutory instruments referred to:

Law n°014/2018 of 04/04/2018 determining the organization, functioning and competence of the national public prosecution authority and of the military prosecution department.

Law n° 30/2013 of 24/5/2013 relating to the code of criminal procedure.

Law n° 45/2011 of 25/11/2011 governing contracts.

Organic Law n° 04/2011/OL of 03/10/2011 determining the organisation, functioning and competence of the national public prosecution authority and of the military prosecution department.

Cases referred to:

Cass. com., 5 Oct. 1953: Bull. civ. 1953, III, n° 280.

Authors cited:

Ph. Malaurie, L. Aynès, Droit des obligations, Paris, LGDJ, 2015, pp. 513-514, 519.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] This case was for the first time initiated to the Intermediate Court of Nyarugenge, where Rwabukwisi Jean sued the City of Kigali, requesting this Court to order it to pay him the unpaid rents from his houses it collected without paying them to him, related interests of 18% from the year 1995 until the payment, judicial damages, and counsel fees. He also requests the Court to impose a sanction forcing execution.

[2] On 02/06/2017, both parties reached an amicable settlement, where the City of Kigali accepted to pay Rwabukwisi Jean 105,900,000Frw including his house' rent for six (6) years, late interests, and the counsel fees, and for this reason, Rwabukwisi Jean withdrew the claim.

[3] This settlement was not executed, and Rwabukwisi Jean resued the City of Kigali in the case RAD 00198/2018/TGI/NYGE, requesting the Court to order it to respect the amicable settlement they reached, to pay the counsel fees and various damages, and the provisional execution of the judgment despite the appeal by the respondent. Counsel Munderere Léopold intervened in the case demanding to be paid his fees amounting to 15,285,000Frw as provided for by the amicable settlement.

[4] In the judgment with the docket number RAD 00198/2018/TGI/NYGE rendered on 30/07/2018 by the Intermediate Court of Nyarugenge, the Court noted that on 22/08/2017, before the payment by the City of Kigali, because it was planned to be done before 31/08/2017, the Prosecution Authority has addressed it a letter instructing it to withhold that credit amount of money that should have been paid to its account open in National Bank of Rwanda used for the purpose of deposit of the withheld amounts of money, because there was an international indictment established on

13/05/2014, instructing the arrest of Rwabukwisi Jean as a genocide fugitive, which implies that this is a force majeure that justifies that the City of Kigali should not be held liable for failure to fulfill its obligations in accordance with article 4 of the agreement of 02/08/2017. It also noted that the judgment should not be provisionally executed because the claim of Rwabukwisi Jean lacks merit and that the defendant should not be awarded requested damages.

[5] Regarding the intervention claim initiated by Munderere Léopold, the Intermediate Court of Nyarugenge found it without merit too, due to the fact that the main claim was unfounded, and that 15,285,000Frw he requests is not mentioned in the agreement that Rwabukwisi Jean concluded with the City of Kigali.

[6] Rwabukwisi Jean was not satisfied with that decision and lodged an appeal to the High Court requesting it to examine whether there has been a force majeure that is the cause of the non-performance of the agreement between him and the City of Kigali. He prayed for the payment of moral and pecuniary damages as well as the provisional execution of the judgment.

[7] In the judgment with the docket number RADA 00129/2018/HC/KIG rendered on 31/05/2019, the High Court found that in the letter addressed to the City of Kigali by the Prosecution Authority, nowhere it was indicated that that amount of money was likely to constitute the inculpatory evidence against Rwabukwisi Jean as provided for by article 30 of the Law n° 30/2013 of 24/05/2013 relating to criminal procedure relied on to instruct the withholding of the money that ought to be paid to Rwabukwisi Jean, such that the City of Kigali would immediately enforce that instruction without hesitation and without demonstrating the coercion it endured from the prosecution authority.

[8] It found further that even though the money was withheld in the context of the execution of Gacaca verdict as alleged by the City of Kigali, it would have been indicated the money that Rwabukwisi Jean was ordered to pay by Gacaca Court and the balance he ought to retain or if he was ordered to pay the total amount of money. The High Court found in addition that as of the definition of the force majeure, the City of Kigali should not have accepted the withholding that was requested by the prosecution, and that the fact for an individual to be indicted does not deprive him/her of the right to his/her property. It, therefore, ordered the City of Kigali to pay Rwabukwisi Jean 7,280,625Frw of pecuniary damages, 700,000Frw of judicial damages and counsel fees, and pay back 60,000Frw of court fees for both court instances. It held that he does not deserve to be awarded the moral damages he requested because awarding them to him would amount to unlawful enrichment and that cumulative damages are not allowed.

[9] The City of Kigali lodged an appeal to the Court of Appeal, alleging that the High Court held that there was no particular reason that would bar it from performing the contract it concluded with Rwabukwisi Jean, whereas it raised groundful reasons that it disregarded and that it was instructed to pay him undeserved pecuniary damages.

[10] The hearing was carried out in public on 03/06/2020, where the City of Kigali was represented by the State attorney Mbonigaba Eulade and Rwubukwisi Jean was represented by Counsel Rudakemwa Jean Félix.

II. ISSUES AND THEIR DETERMINATION

- 1. Determining whether the letter of the Prosecution Authority of 22/08/2017 constitutes a reason that would have prevented the City of Kigali to perform the contract concluded with Rwubukwisi Jean**

[11] Counsel Mbonigaba Eulade, the state attorney states that the City of Kigali was not satisfied with the decision delivered by the High Court because this court held that the seizure effected by the Prosecution Authority was unlawful, but that the court erred in adopting this position since the prosecution authority is an organ with the competence to perform seizure in accordance with article 30 of Law n° 30/2013 of 24/05/2013 relating to the criminal procedure that was into force at that time, and that it is usually done and without being inconsistent with the Constitution. He adduces that if the seizure effected by the prosecution authority was unlawful, Rwabukwisi Jean would have attacked it before the Court because the property is still his own and inviolable, and the failure to do it by himself does not engage the City of Kigali to do it on his behalf. He goes on to adduce that another ground that the High court disregarded relies on the fact that the letter of the prosecution Authority is an authentic document and that its content is obviously an order.

[12] Mbonigaba Eulade, the state attorney for the City of Kigali states further that considering the ruling of the case by the High Court, it sounds as if Rwabukwisi Jean was dispossessed of his monies, which is not true, because though they were withheld but they remain his ownership, and that whenever the prosecution deems it necessary, it will hand them back to him. He states that by refusing to pay Rwabukwisi Jean of the agreed monies, the City of Kigali considered the effected seizure without examining whether or not it was lawful because this was not its duty.

[13] Regarding the fact that the letter of the Prosecution authority consists of a force majeure, Counsel Mbonigaba Eulade alleges that the City of Kigali was not aware that the prosecution authority would seize the monies belonging to Rwabukwisi Jean, and it did it in the context of its duties, and therefore they did not have any other choice, which implies that it should be regarded as force majeure, since the decisions of the prosecution authority are not refuted by the concerned person or the person who is bound to execute them, specially that only the court can disprove them. The failure to have informed Rwabukwisi Jean was due to the fact that this decision was meant for immediate enforcement.

[14] Counsel Rudakemwa Jean Félix states that the City of Kigali as powerful institution and that follow the rule of law was seriously mistaken by enforcing the letter of the prosecution authority without exercising caution. He admits that the prosecution authority has really the right to initiate seizure but it should be done in accordance with the law as provided for by article 30 of the Law N° 30/2013 of 24/05/2013 relating to criminal procedure that was into force, and it should be approved by the court following article 34 of the same law. He goes on stating that Rwabukwisi resides at a known address, thus, the statements according to which he was missing would not be considered as true because he has never escaped the prosecution, and for this reason, article 34 of the Constitution must be respected and, he should be given his monies especially that the private property is inviolable.

DETERMINATION OF THE COURT

[15] Article 4 of the amicable settlement of damages dispute concluded between the City of Kigali and Rwabukwisi Jean on 02/06/2017 stipulates the following: In the event of the occurrence of force majeure not due to the debtor (City of Kigali) and that are unpredictable at the time of signatory of this agreement, preventing its execution as agreed upon by the parties, the debtor is not held liable for non-performance of its obligations. The party that becomes aware of that event informs immediately the other party in order to agree on what should be done.

[16] The analysis of this clause of the agreement above makes it clear that both parties have anticipated the solution in the event of the occurrence of a force majeure that would not be predictable at the time of signing the agreement, and of which the City of Kigali is not liable for, and which are

likely to prevent the execution of the agreement. Both parties have thus agreed that such events discharge the side that did not execute their obligations of the agreement. In other words, the other side is not imputed the fault of failing their obligations.

[17] The law scholars on civil liabilities, state that the debtor is not liable where the non-performance is attributable to a foreign cause, unless he was bound by a guarantee obligation. Foreign causes to the debtor include the force majeure, creditors actions, and third party's actions or the acts of the public administration. These grounds of exemption release the debtor, unless they were of a temporary nature. In this case, the execution is suspended¹.

[18] As far as this case is concerned, the case file indicates that after the contract concluded on 02/06/2017 between the City of Kigali and Rwabukwisi Jean, who was claiming the rents from the buildings that were located in quartier Mateus and settled the matter of damages amicably; the Prosecution Authority wrote to the City of Kigali on 22/08/2017, instructing them to deposit all the amount it accepted to pay Rwabukwisi Jean to the account number 1000004258 of the Prosecution Authority open in National Bank of Rwanda (BNR) destined for the deposit of seized assets because Rwabukwisi Jean is under indictment as a fugitive offender since he fled to the Netherlands while they deem these monies seizable in accordance with the law and that in the event he is handed them, he would use them to keep escaping justice.

[19] The Court finds that letter of the Prosecution Authority is considered as an act taken in the context of the privilege of the public administration that prevented the City of Kigali from respecting the obligation to pay Rwabukwisi Jean the monies of rent that it owed him. The law scholars state that such an act consists of a decision of the administrative organs and is regarded as a force majeure unpredictable by the party to the agreement, and that prevents him from respecting their obligations either contractual or legal. For explaining the act of the public administration that affects the contract between both parties, the Court of Cassation in France sets an example of an administrative act of seizure of goods that the transporter was supposed to deliver.² The Court deems that this example leads to the clear understanding that the decision of the prosecution authority was in itself enough as an unusual cause that prevents the City of Kigali from respecting the obligation to pay Rwabukwisi Jean his monies of rent as agreed upon because this organ has no reason to refute the decision of the prosecution authority taken within its statutory competence of investigation, prosecution, and tracking of suspects³. It finds in addition that even at the time the City of Kigali signed the agreement, it was not in the position to know the occurrence of that decision, and nothing indicates that it played any role thereto.

¹ *Le débiteur échappe à la responsabilité lorsque l'inexécution est imputable à une cause étrangère, sauf s'il était tenu d'une obligation de garantie. La cause étrangère la plus caractéristique est la force majeure à laquelle sont assimilés les faits du créancier et d'un tiers. Ces causes d'exonération libèrent le débiteur, à moins qu'elles aient eu un caractère momentané : elles n'entraînent alors que la suspension du contrat (Ph. Malaurie, L. Aynès, Droit des obligations, Paris, LGDJ, 2015, pp. 513-514).*

² *La saisie par les autorités publiques de marchandises que le transporteur devait livrer (Cass. com., 5 oct. 1953 : Bull. civ. 1953, III, n° 280).*

³ article 3 of the Law n°014/2018 of 04/04/2018 determining the organization, functioning and competence of the national public prosecution authority and of the military prosecution department. Article 2 of the Organic Law N° 04/2011/OL of 03/10/2011 determining the organization, functioning and competence of the national public prosecution authority and of the military prosecution department, provides that the Public Prosecution shall be responsible for the prosecution of any person suspected of having committed acts constituting an offence.

[20] The Court finds therefore that since there is a reason that prevented the City of Kigali from respecting the contract, it discharges them from any liability in this regard, and this is in line with the opinions of the law scholars stated above, where they explain that the act of a third party or the public administration is also a cause for exoneration of the defaulting debtor, if it was irresistible, unforeseeable and if the debtor should not be liable for it⁴.

[21] The Court finds in addition that, the fact that the City of Kigali did not execute the obligation of payment to Rwabukwisi Jean of his amount of rent monies following the instruction by the Prosecution Authority to deposit them to its account open in National Bank of Rwanda for reasons clarified above, this is not inconsistent with the reading of clause 4 of the agreement of 02/06/2017 concluded by both parties as indicated above, because the City of Kigali was not entitled to reject the instructions of the prosecution Authority.

[22] The Court deems that the arguments of the counsel for Rwabukwisi Jean - that the City of Kigali should have exercised caution and refuted the instructions of the prosecution authority- would not be given merit because it had no choice considering the order's status of the prosecution authority.

[23] The Court also finds that it is not necessary for the High Court to go into the analysis of the seizure procedures, as it is not the issue in this case, as the City of Kigali had no obligation to first consider whether the seizure was lawful or not, since this was an issue for the Public Prosecution Authority which took that decision.

[24] Based on the content of the agreement concluded by both parties and the explanations provided above, the Court finds that the appeal by the City of Kigali on this issue has merit because there is no evidence indicating that it did not manifest the intention to pay the debt of which it owed Rwabukwisi Jean.

1. Determining whether the High Court should not have awarded pecuniary damages to Rwabukwisi Jean.

[25] Counsel Mbonigaba Eulade states that the High Court ordered the City of Kigali to pay Rwabukwisi Jean pecuniary undeserved damage because article 138 of the Law governing contracts provides that pecuniary damages awarded to the aggrieved party should have been expected. He alleges that in this case, despite that Rwabukwisi Jean has demanded damages amounting to ten million (10,000,000Frw), he never demonstrated the amount of the damages he was expecting, and for this reason, the High Court has awarded him damages without indicating their basis, and in addition to that, he is not a trader such that he would be awarded them.

[26] Counsel Rudakemwa Jean Félix adduces that the High Court did not error in awarding pecuniary damages to Rwabukwisi Jean on the basis of the Law governing contracts though both parties did not provide that in the contract they concluded. He requests the Court of Appeal to compute these damages at a 10% rate per annum on the basis of 105,000,000Frw starting from 31/05/2019, the date the appealed judgment was delivered, until the date of the pronouncement by this court.

DETERMINATION OF THE COURT

⁴ Le fait d'un tiers ou du prince est également une cause d'exonération du débiteur défaillant, s'il a été irrésistible, imprévisible et si le débiteur ne devait pas en répondre (Ph. Malaurie, L. Aynès, op.cit.,p. 519).

[27] Article 141 of the Law N° 45/2011 of 25/11/2011 governing contracts reads that “Damages shall not be granted for loss that the party in breach did not have reason to foresee as a probable result of such breach when the contract was made.”

[28] The Court finds that the City of Kigali should not have been ordered to pay Rwabukwisi Jean pecuniary damages, because it was not responsible for the failure to pay him the rent monies from his houses it owed him as held above, and accordingly, pecuniary damages amounting to 7,280,625 Frw awarded by the High Court should be quashed and those requested at this court level should not be granted.

2. Determining whether Rwabukwisi Jean would be granted moral and judicial damages

[29] Counsel Rudakemwa Félix prays the Court to instruct the City of Kigali to pay Rwabukwisi Jean 1,000,000Frw of counsel fees, 500,000Frw of judicial damages, as well as 10,000,000Frw in moral damages that he requested before the High Court, which did not grant them to him because being deprived of his monies made him sad and miserable.

[30] Counsel Mbonigaba Eulade adduces that requested damages are unfounded.

DETERMINATION OF THE COURT

[31] Regarding the moral damages amounting to 10,000,000Frw of which Rwabukwisi Jean requests the Court to instruct the City of Kigali to pay him, the Court finds that he does not deserve them, because as provided for by article 81 of the Law N° 45/2011 of 25/11/2011/2011, such damages are paid by the party that breached the contract, while as it was held above, the City of Kigali did not breach the agreement.

[32] With regards to 1,000,000Frw of counsel fees and 5,00,000Frw of judicial damages requested by Rwabukwisi Jean, the Court is of the view that he should not also be awarded them given that the appeal by the City of Kigali was given merit.

III. DECISION OF THE COURT

[33] Finds the appeal by the City of Kigali with merit;

[34] Reverses in whole the judgment number RADA 00129/2018/HC/KIG rendered by the High Court on 31/05/2019;

[35] Quashes the decision ordering the City of Kigali to pay Rwabukwisi Jean 105,900,000Frw arising from the contract it entered into with Rwabukwisi Jean and pecuniary damages of 7,280,625Frw;

[36] Orders Rwabukwisi Jean to reimburse the City of Kigali 50,000Frw of court fees deposited for lodging the appeal.