

VUNINGOMA ET AL. v RWANDA DEVELOPMENT BANK LTD (BRD) ET AL.

[Rwanda COURT OF APPEAL – RCOMAA 00088/2020/CA (Ngagi, P.J.) April 9, 2021]

Law determining the jurisdiction of courts - Jurisdiction of the Court of Appeal - When the monetary value of the subject matter before the Court of Appeal cannot in its nature be determined, it has no jurisdiction over that case – Law n ° 30/2018 of 02 / 06/2018 determining the jurisdiction of the courts, article 52.

Facts: BRD Ltd offered credit to Hotel SPLENDID KARISIMBI Ltd to build a hotel in Kiyovu, which in return mortgaged that hotel, from Vuningoma Alexis and Murekatete Rose, and it failed to pay off the loan as provided, and the Bank sued it in the Commercial Court of Nyarugenge, the Court ruled in favor of liquidation, and appointed a liquidator.

Vuningoma and Murekatete filed a claim to the Commercial Court, requesting to confirm the one who could sell the mortgage between the liquidator decided by the Court and the receiver, as they did not understand why the mortgage they had secured to the Bank could be sold in the context of receivership whereas the Court had already ruled that all the assets of SPLENDID KARISIMBI Ltd and those which were secured by it were vested under the control of the liquidator.

Basing on the fact that the mortgaged property belongs to Vuningoma Alexis and Murekatete Rose, the Commercial Court has found that the property could not be incorporated within the assets of SPLENDID KARISIMBI Ltd in order to pay the general loan, instead it has found that the fact that they have mortgaged it to BRD emphasises that it is the particular security of BRD, because it was given to it, that same property could not be sold for repaying other debts of SPLENDID KARISIMBI Ltd, rather it should be sold in case of failing to pay the existing loan, and the property secured as a mortgage must be sold by the receiver because he is the one entrusted with competence, and it held that its claim is unfounded.

Vuningoma and Murekatete were not satisfied with the ruling of that judgment and appealed to the Commercial High Court requesting to determine whether the property secured as mortgage to an insolvent company is not under control of a liquidator, must be sold particularly by the receiver, to determine whether the liquidator must intervene in the trial and they concluded by requesting the reimbursement of spent trial follow up expenses, the court fees and fees for lawyer.

The Commercial High Court examined whether the liquidator should be forced to intervene during trial, whether the property secured as mortgage to an insolvent company should be sold by a liquidator or a receiver and whether the claimed damages are due.

Regarding the issue of determining whether the liquidator must be forced to intervene, the Court has found that the appellants did not justify any interest of the liquidator that is jeopardized in the case so that he could apply for third party opposition against its rulings, it has found that the property under litigation is not the own asset of the company for which he is the liquidator, and therefore he is not linked with that property so that the decision taken therein could affect him, and it has found that the legal procedure on that issue was not respected, as he was not notified by those who requested for his intervention.

Regarding the issue that the property secured as mortgage to an insolvent company must be sold by a liquidator or a receiver, the Commercial High Court has found that the appellants' statements that the property secured as mortgage to an insolvent company must be sold by a liquidator not particularly by a receiver cannot be considered as founded, because at the appeal level they are unable to indicate what they criticise against the decision of the Court of the first instance, it has found that such property is not registered in the general asset of the insolvent company, therefore it must not be sold by the liquidator.

Vuningoma and Murekatete were also dissatisfied with the ruling of the judgment, and they appealed to the Court of Appeal, also BRD raised an objection relating to lack of jurisdiction of the Court based on the value of the subject matter, it sustained that the second appeal should not be admitted for trial by the Court of Appeal on the second appeal because, both at the first instance and in the appeal, the subject matter was to uphold the one who must sell the mortgage between the liquidator and the receiver, it was not the value of the mortgage which was the subject matter, and it argued that because it was not the value of the mortgage which was the subject matter, and in the previous judgments, there is no party who filed a claim against it, they have found that for deciding on the one who must sell the mortgage, it cannot be given a monetary value to enable the competence of the Court of Appeal at the second appeal level.

Vuningoma and Murekatete respond that the Court of Appeal has jurisdiction because the value of mortgage in dispute is 190,228,298 Frw which exceeds the amount of 75,000,000 Frw and the one who sold it had based on its value.

Held: When the subject matter before the Court of Appeal cannot in its nature be evaluated in monetary value, it has no competence.

**Objection sustained;
Court fees deposited cover expenses incurred.**

Statutes and statutory instruments referred to:

Law n°30/2018 of 02/06/2018 determining the jurisdiction of courts, article 52

Case referred to:

RCOMAA 00046/2020 / CA; FARAJA HOTEL Ltd v. COGEBANQUE Plc ET.AL. rendered on 05/03/2021, by the Court of Appeal.

Judgment

I. BACKGROUND OF THE CASE

[1] The case derived from a loan of 1,050,000,000 Frw, BRD granted to SPLENDID KARISIMBI Ltd for the construction of a hotel in Kiyovu. In order to grant the loan, that hotel was mortgaged, SPLENDID KARISIMBI Ltd added another house with UPI: 1/02/09/02/2412 located in Rindiro Village, Kibagabaga Cell, Kimironko Sector, Gasabo District, Kigali City, secured by Vuningoma Alexis and Murekatete Rose. SPLENDID KARISIMBI Ltd did not repay

the loan as planned, and by the judgment RCOM 00985/2016/TC/NYGE rendered by the Commercial Court of Nyarugenge on 09/09/2016, it was placed under insolvency reorganization, until 13/11/2017, the Commercial Court of Nyarugenge took a decision for its liquidation and appointed a liquidator.

[2] Vuningoma Alexis and Murekatete Rose filed a claim before the Commercial Court, requesting the appointment of the person between the liquidator decided by the Court and the receiver who should sell the mortgage registered to UPI: 1/02/09/02/2412, as they did not understand why the mortgage they secured could be sold in the context of receivership while the Court had already upheld in judgment RCOM 0435/2019 / TC that all the assets of SPLENDID KARISIMBI Ltd as well as all that had been secured to it were vested in the liquidator.

[3] On 28/06/2019, in the judgment RCOM 00779/2019 / TC, basing on the fact that the property registered on UPI: 1/02/09/02/2412 belongs to Vuningoma Alexis and Murekatete Rose, the Commercial Court found that it could not be amalgamated with the assets of SPLENDID KARISIMBI Ltd for payment of general loan, rather, it found that the fact that they have mortgaged it in BRD highlights that the mortgage is the property of BRD as it was given it, so that that property cannot be sold for repayment of other debts of SPLENDID KARISIMBI Ltd, rather it could only be sold if the existing loan remains unpaid. The Court also found that the property secured as mortgage must be sold by the receiver because he is competent in accordance with the Registrar General's Regulations, and it held that its claim was unfounded, it ordered to Vuningoma Alexis and Murekatete Rose to pay to BRD 600,000 Frw as counsel's fees and 40,000 Frw as procedural fee.

[4] Vuningoma Alexis and Murekatete Rose were not satisfied with the decision of judgment and appealed before the Commercial High Court, requesting to determine whether the property secured as mortgage to an insolvent company is not vested in a liquidator should be sold particularly by the receiver, to determine whether the liquidator should be forced to intervene in the case and they concluded by requesting to be repaid the procedural fees, the court fees and the counsel's fees.

[5] In the judgment RCOMA 00662/2019/HCC rendered on 04/09/2020, the Commercial High Court examined whether the liquidator should be forced to intervene in the case, whether the property secured as mortgage to an insolvent company should be sold by the liquidator or receiver, it also examined whether the claimed damages are grounded.

[6] Whether the liquidator should be forced to intervene in the case, the Court found that the appellants failed to justify interests of the liquidator who is Milimo Mukwende Olivier in such a case that would be jeopardized so that he should apply for third party opposition, it found that the property under litigation was not the own asset of the company for which he is the liquidator and therefore he is not linked with that property so that the decision taken therein could jeopardize him, and it found that the legal procedure on that issue was not respected as Milimo Mukwende Olivier was not notified by those who requested for his intervention.

[7] Regarding the fact that the property secured as mortgage to an insolvent company should be sold by a liquidator or a receiver, the Commercial High Court found that the appellants' statements that the property secured as mortgage to an insolvent company should be sold by a

liquidator not particularly by a receiver cannot be considered as founded, because at the appeal instance they were unable to indicate their criticism against the decision of the Court of the first instance, it found that such property is not registered in the general property of the insolvent company, therefore it should not be sold by the liquidator as his responsibility is to collect the company's assets wherever they are located, for the purpose of selling them to repay proportionally its debtors, it finds that due to the fact that property was mortgaged on the outstanding loan, such property must be sold on the basis of the agreement of both parties in the loan agreement they concluded, the receiver appointed by the Registrar General must sell the mortgage aforementioned, and it held that the appeal of Vuningoma Alexis and Murekatete Rose was unfounded, the appealed judgment was sustained, it ordered them to pay to BRD 800,000Frw for procedural and counsel fees.

[8] Vuningoma Alexis and Murekatete Rose were also not satisfied with the ruling of the judgment and appealed to the Court of Appeal.

[9] The judgment was heard in public on 08/03/2021, Vuningoma Alexis and Murekatete Rose were represented by Counsel Murutasibe Joseph and BRD by Counsel Mbera Martine and Counsel Ntazika Néhémie, the hearing was held on the objection related to the lack of the jurisdiction of the Court based on the value of the subject matter and the fact that the appellants lost in both previous courts on the basis of the same grounds submitted by the BRD.

II. ANALYSIS OF THE LEGAL ISSUES

1. Whether the second appeal of Vuningoma Alexis and Murekatete Rose is not within the jurisdiction of this Court

[10] In the framework of examining the objection relating to the lack of the jurisdiction of this Court raised by the BRD, it is necessary first to consider the matter of the jurisdiction of the Court based on the value of the subject matter, before analyzing whether it is necessary to determine whether the appellants have lost the cases in both courts on the same grounds.

[11] As to the value of the subject matter, the legal counsel for BRD submit that they based on article 52, paragraph 4, of Law n ° 30/2018 of 02/06/2018 determining the jurisdiction of courts, they noted that this second appeal cannot be admitted for trial by the Court of Appeal at the second appeal because both in the first instance and on the appeal level, the subject matter was to determine the person who could sell the mortgage between the liquidator and the receiver, not the value of the mortgage. They aver that because it is not the value of the mortgage which is in dispute, and no party filed a claim against it in previous cases, they find that the appointment of a person who could sell the mortgage cannot be valued in terms of money for vesting in the Court of Appeal the jurisdiction at the level of the second appeal.

[12] They explain that the aforementioned Law n ° 30/2018 of 02/06/2018 provides for the claims that can be admitted in the Court of Appeal, there are claims that are only appealed once, including this instant one, they submit that Vuningoma Alexis and Murekatete Rose should have applied for review due to injustice instead of lodging appeal.

[13] Vuningoma Alexis and Murekatete Rose sustain that the Court of Appeal has the jurisdiction on basis of Article 52, paragraph 4, of Law n ° 30/2018 of 02/06/2018 determining the jurisdiction of courts, as the mortgage in dispute has a value of 190,228,298 Frw which exceeds 75,000,000 Frw and the seller had based on its value.

DETERMINATION OF THE COURT

[14] Article 52, paragraph 4, of Law n ° 30/2018 of 02/06/2018 determining the jurisdiction of the Courts, provides that: “the Court of Appeal has also jurisdiction to try at the second level of appeal cases tried by the High Court, the Commercial High Court and the Military High Court, when the monetary value of the dispute was not determined in the earlier cases, it must have a value of at least seventy-five million Rwandan francs (FRW 75,000,000) determined by an expert if necessary”.

[15] The case file indicates that in the judgment RCOM 00779/2019/TC rendered by the Commercial Court on 28/06/2019, Vuningoma Alexis and Murekatete Rose filed the claim before the Court requesting the appointment of the person who should sell the mortgage registered on UPI: 1/02/09/02/2412 between the liquidator decided by the court and the receiver, as the claimants do not understand why the mortgage they secured could be sold in the context of receivership. The Court found that the mortgage was to be sold by the receiver because he was competent according to the Registrar General's Regulations and it held that the claim was unfounded, but it ordered to Vuningoma Alexis and Murekatete Rose to pay to BRD the counsel and procedural fees.

[16] The case file also indicates that in the judgment RCOMA 00662/2019/HCC rendered by the Commercial High Court on 04/09/2020, Vuningoma Alexis and Murekatete Rose appealed requesting to determine whether the property secured as mortgage to an insolvent company is not vested in a liquidator should be sold particularly by the receiver, to determine whether the liquidator should be forced to intervene in the case and they concluded by requesting to be repaid the procedural fees, the court fees and the counsel's fees and the Commercial High Court held that the appeal of Vuningoma Alexis and Murekatete Rose was unfounded and maintained the appealed judgment.

[17] In the premises, the two previous courts were seized and examined the issue of the person who could sell the mortgage registered on UPI: 1/02/09/02/2412 between the liquidator and the receiver, any party raised the issue of the value of the mortgage under litigation, it is not the subject matter at this instance, rather the issue is to determine whether the mortgage was to be sold by the liquidator or the receiver, and both previous courts found that the mortgage had to be sold by the receiver, because the property registered on UPI: 1/02/09/02/2412 belongs to Vuningoma Alexis and Murekatete Rose, it should not be amalgamated with the assets of SPLENDID KARISIMBI Ltd. This Court also finds that the subject matter as filed by Vuningoma Alexis and Murekatete Rose from the Commercial Court cannot be valued in terms of money, because it

should not be amalgamated with the mortgaged property registered on UPI: 1/02/09/02 / 241 having the value which exceeds 75,000,000 Frw as alleged by the claimants.

[18] As to the statements of the legal counsel for Vuningoma Alexis and Murekatete Rose that this Court has jurisdiction under article 52, paragraph 4, of Law n ° 30/2018 of 02/06/2018 determining the jurisdiction of the courts, because the mortgage in dispute is valued at more than 75,000,000 Frw and the seller based on its value, the Court finds them unfounded, as the debates in all the lower courts were based on determining who should sell the mortgage between the liquidator and the receiver, and this cannot be valued in money so that it may be considered as being within the jurisdiction of this Court pursuant to article 52 of the Law referred to in this paragraph. Such was the same position of this Court in the judgment RCOMAA 00046/2020/CA rendered on 05/03/2021, FARAJA HOTEL Ltd v. COGEBANQUE Plc et al. in which the Court held that the subject matter as filed by FARAJA Hotel Ltd from the Commercial Court cannot be valued in terms of money.

[19] Basing on the aforementioned explanations and legal provisions, the Court finds that the objection concerning the lack of jurisdiction relating to the value of the subject matter raised by BRD is grounded, therefore the second appeal filed by Vuningoma Alexis and Murekatete Rose is inadmissible, given that it is not within the jurisdiction of the Court of Appeal. The Court also finds that it is not necessary to analyze the objection relating to the fact that the appellants lost in both previous courts on basis of the same grounds.

2. Whether the counsel and procedural fees claimed in this case should be awarded

[20] BRD claims that Vuningoma Alexis and Murekatete Rose should pay to it the damages of 2,000,000 Frw for being dragged in lawsuits and counsel's fees.

[21] Vuningoma Alexis and Murekatete Rose submit that their appeal is legally supported, and the lawyers of BRD do not explain their request, rather they sustain that BRD should be ordered to pay to Vuningoma Alexis and Murekatete Rose 300,000Frw as the procedural fee, the court fees for all levels and counsel's fees.

DETERMINATION OF THE COURT

[22] Article 111, of Law n ° 22/2018 of 28/04/2018 on Civil, Commercial, Labor 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 with the principal claim. It can also be admitted and adjudicated even if the principal claim has not been admitted.”

[23] The Court finds that the expenses incurred during the judicial proceedings claimed by BRD are well-founded, as it was necessary to hire a lawyer to represent it before the court, in its sole discretion, it orders to Vuningoma Alexis and Murekatete Rose to pay to BRD 700,000 Frw as counsel and procedural fees at this level ; whereas the damages claimed by Vuningoma Alexis and Murekatete Rose should not be examined, as the case is limited to the objection.

III. DECISION OF THE COURT

[24] Holds that the objection relating to the lack of the jurisdiction of this Court raised by DEVELOPMENT BANK OF RWANDA (BRD) is founded;

[25] Holds that the appeal of Vuningoma Alexis and Murekatete Rose is inadmissible, given that it is not within the jurisdiction of the Court of Appeal;

[26] Holds that the incidental appeal filed by DEVELOPMENT BANK OF RWANDA (BRD) is founded;

[27] Orders to Vuningoma Alexis and Murekatete Rose to jointly pay to DEVELOPMENT BANK OF RWANDA (BRD) 700,000 Frw including counsel and procedural fees, at this level;

[28] Holds that the court fees deposited cover the expenses incurred during the judicial proceedings.