

MUKERAMIRIMO CONSTRUCTION ET AL. v QUALITY CONSTRUCTION ET AL.

[Rwanda – COURT OF APPEAL– RCOMAA 00107/2022/CA CMB RCOMAA 00108/2022/CA (Nyirandabaruta, P.J., Kamere and Ngagi, J.) 25 May 2023]

Jurisdiction of courts – Jurisdiction of Court of Appeal – Second appeal – Judgments rendered by competent courts – Agreement providing for arbitration – Claim for quashing the lower court decisions on basis of the fact that the claimant should have resorted to the arbitration. In case a party deprives himself/herself of the right of resorting to the arbitration and seizes the court, and the respondent admits it, no one can pretend that he/she was tried by the court lacking the jurisdiction for claiming for the admissibility of the second appeal.

Facts: QUALITY CONSTRUCTION (QUALICONS) Ltd (Sub-contractor), concluded with MUKERAMIRIMO CONSTRUCTION Ltd the contract for the construction works at CLUB HOUSE LA PALISSE HOTELS Ltd, including the demolition, excavation and construction of the stone wall, cementing, laying bricks, and constructing its office, it should bill by cubic meter. Upon request by MUKERAMIRIMO CONSTRUCTION Ltd, ACTIVE CM INVESTMENT Ltd supplied the construction equipment including cement, crashed stones and stones amounting to 21,727,600 Frw.

The contract between MUKERAMIRIMO CONSTRUCTION Ltd and CLUB LA PALISSE HOTELS Ltd was terminated due to the disagreement between both parties so that QUALITY CONSTRUCTION (QUALICONS) Ltd and ACTIVE CM INVESTMENT Ltd sued MUKERAMIRIMO CONSTRUCTION Ltd and Mbaduko Jimmy, its representative, before the Commercial Court requesting it to order to them to perform the contract concluded between them together with the damages. ZIGAMA CSS and CLUB HOUSE LA PALISSE HOTELS Ltd forcibly intervened for seizing the money paid by that Hotel and deposited on the account of MUKERAMIRIMO CONSTRUCTION Ltd in ZIGAMA CSS. Rubayiza Alexis and Twagirimana Jean Claude voluntarily intervened for ordering to ACTIVE CM INVESTMENT Ltd to pay the owed debt in case it is paid.

The Commercial Court upheld that the claim of QUALITY CONSTRUCTION Ltd and ACTIVE CM INVESTMENT Ltd is grounded for MUKERAMIRIMO CONSTRUCTION Ltd and Mbaduko Jimmy, but ungrounded for ZIGAMA CSS and CLUB HOUSE LA PALISSE HOTELS Ltd; the claim of Rubayiza Alexis and Twagirimana Jean Claude is grounded, it ordered to MUKERAMIRIMO CONSTRUCTION Ltd and Mbaduko Jimmy to pay to QUALITY CONSTRUCTION Ltd 71,258,767 Frw and ACTIVE CM INVESTMENT Ltd 10,291,666 Frw and to pay to each company 580,000 Frw as procedural and lawyer fees, it held that in case the debt owed by MUKERAMIRIMO CONSTRUCTION Ltd and Mbaduko Jimmy to ACTIVE CM INVESTMENT Ltd is paid, Rubayiza Alexis and Twagirimana Jean Claude shall be firstly paid for the debt it owes to them.

MUKERAMIRIMO CONSTRUCTION Ltd lodged appeal against such judgment in the Commercial High Court claiming for reexamining whether the damages granted to QUALITY CONSTRUCTION Ltd and ACTIVE CM INVESTMENT Ltd are founded while they did not perform the contract they concluded; determine whether Mbaduko Jimmy should be held liable

for the debt of which his company MUKERAMIRIMO CONSTRUCTION Ltd is accused, it claimed for the damages claimed at the first and appeal instances. QUALITY CONSTRUCTION Ltd and ACTIVE CM INVESTMENT Ltd also filed appeal against the judgment, their appeal was based on the fact that the Commercial Court did not hold that CLUB HOUSE LA PALISSE HOTELS was jointly liable with MUKERAMIRIMO CONSTRUCTION Ltd and Mbaduko Jimmy for the debt and the damages; the very Court did not uphold that ZIGAMA CSS was jointly liable with MUKERAMIRIMO CONSTRUCTION Ltd and Mbaduko Jimmy for the debt and damages (liability in solidum); the fact that they were charged less damages for non-performance of contract. ACTIVE CM INVESTMENT Ltd filed appeal due to the fact that MUKERAMIRIMO CONSTRUCTION Ltd and Mbaduko Jimmy were jointly ordered to pay the debt by deducting the debt owed to EGE Ltd while it had issued the power of attorney.

The cases were combined for being heard in the same case, the Commercial High Court held that the appeal filed by MUKERAMIRIMO CONSTRUCTION Ltd, by QUALITY CONSTRUCTION Ltd and ACTIVE CM INVESTMENT Ltd are founded in parts; the appealed judgment was only reversed on the quantity of the debt owed by MUKERAMIRIMO CONSTRUCTION Ltd to QUALITY CONSTRUCTION Ltd and on the involvement of CLUB HOUSE LA PALISSE HOTEL Ltd in the case.

The Commercial High Court ordered to MUKERAMIRIMO CONSTRUCTION Ltd, Mbaduko Jimmy and CLUB HOUSE LA PALISSE HOTEL Ltd to jointly pay to QUALITY CONSTRUCTION LTD the debt amounting to 59,240,260 Frw plus 2,019,507 Frw as the interests and compensation for delay and breach of contract, 580,000 Frw as procedural and lawyer fees at the first instance and 1,000,000 Frw at the appeal instance and 20,000 Frw as court fees, the total is 62,859,767 Frw, it ordered to them to pay to ACTIVE CM INVESTMENT Ltd the debt amounting to 10,000,000 Frw, plus 291,666 Frw as interests, the compensation for delay and breach of contract and 20,000 Frw as court fees, the total is 10,311,666 Frw.

It ordered to ACTIVE CM INVESTMENT Ltd to pay to Rubayiza Alexis 21,311,986 Frw and to Twiringiyimana Jean Claude 4,555,658 Frw and to pay to each one 530,000 Frw as procedural and lawyer fees; it ordered that in case the debt owed by MUKERAMIRIMO CONSTRUCTION Ltd to ACTIVE CM INVESTMENT Ltd is paid, Rubayiza Alexis and Twiringiyimana Jean Claude shall be firstly paid; it ordered to reimburse to them 20,000 Frw as court fees for each one.

Dissatisfied with the court decision, MUKERAMIRIMO CONSTRUCTION Ltd filed appeal against the judgment rendered by the Commercial High Court before the Court of Appeal stating that it bases the jurisdiction of the Court of Appeal on the fact that the lower courts lacked the jurisdiction to hear the case and such issue was the appeal ground, it requested the very Court to quash the rulings of the lower courts. CLUB HOUSE LA PALISSE HOTELS Ltd also filed appeal against such judgment in the Court of Appeal claiming to determine whether the Commercial High Court had the jurisdiction to hear the case filed to it and determine whether it did not violate the law.

Before pleading on the appeal, QUALITY CONSTRUCTION Ltd, ACTIVE CM INVESTMENT Ltd, Rubayiza Alexis and Twiringiyimana Jean Claude raised the objection on its inadmissibility as MUKERAMIRIMO CONSTRUCTION Ltd did not deposit the court fees; the fact that in the appealed judgment the damages less than 75,000,000 Frw were granted; MUKERAMIRIMO CONSTRUCTION Ltd and CLUB HOUSE LA PALISSE HOTELS Ltd lost the cases in both lower courts for the same reason, the Court of Appeal has no jurisdiction to hear its second appeal.

The judgment was held in public, MUKERAMIRIMO CONSTRUCTION Ltd was represented by Counsel Nyirasuku Jeanne, CLUB HOUSE LA PALISSE HOTELS Ltd by Counsel Sebukonoke Innocent, QUALITY CONSTRUCTION Ltd by its Managing Director Nkurikiyimfura Alexis, assisted by Counsel Bangamwabo Octave who also assisted by ACTIVE CM INVESTMENT Ltd, Rubayiza Alexis was assisted by Counsel Munyamasoko Jovith who also assisted Twiringiyimana Jean Claude, ZIGAMA CSS was represented by Counsel Kayigirwa Téléspore; the debates were held on the raised objection, but before the commencement of the debates, Counsel Kayigirwa Téléspore indicated to the Court that ZIGAMA CSS that he represented did not claim anything and is not held liable for anything and there is no decision of the appealed judgment that concerns it, he claims that it should be dissociated from the case. After hearing the statements of other parties, the Court of Appeal decided on the bench and decided that ZIGAMA CSS is dissociated from the case because there is no ground for being party to it.

Held: 1. The fact that a party opted for depriving himself/herself of the right to resort to the arbitration and seizes the courts while the respondent was normally aware of the contract they concluded and opts for not requesting to the court to submit the issue to the arbitration means that they implicitly prefer to modify their contract regarding the resolution of disputes arising from the concluded contract and they prefer to be tried by the courts. Therefore, no one can allege that they were tried by the court lacking the jurisdiction.

The appeal is not admissible.

Statutes and statutory referred to:

The Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, article 7

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

The Ministerial Order N° 17/MOJ/AG/20 of 30/10//2020 determining court fees in civil, commercial, social and administrative matter, article 2.

Case referred to:

Judgment RCOMA 0090 /13/ CS, PUBLICCELL SARL v. MTN RWANDACELL SARL.rendered by the Supreme Court on 28/03/2014

Judgment

I. BACKGROUND OF THE CASE

[1] On 17/12/2020, QUALITY CONSTRUCTION (QUALICONS) Ltd concluded with MUKERAMIRIMO CONSTRUCTION Ltd the contract for the construction works on CLUB HOUSE LA PALISSE HOTELS Ltd, including the demolition, excavation and construction of the stone wall, cementing, laying bricks, and constructing its office, it should bill by cubic meter.

[2] ACTIVE CM INVESTMENT Ltd states that, upon the request of MUKERAMIRIMO CONSTRUCTION Ltd, on 04/01/2021 it supplied the construction equipment including cement, crashed stones and stones amounting to 21,727,600 Frw.

[3] QUALITY CONSTRUCTION (QUALICONS) Ltd and ACTIVE CM INVESTMENT Ltd sued MUKERAMIRIMO CONSTRUCTION Ltd and Mbaduko Jimmy who represented it, before the Commercial Court, requesting it to order to them to perform the contract they concluded for paying for the completed works and various damages. ZIGAMA CSS and CLUB HOUSE LA PALISSE HOTELS Ltd forcibly intervened for seizing the money paid by that Hotel and deposited on the account of MUKERAMIRIMO CONSTRUCTION Ltd in ZIGAMA CSS. Rubayiza Alexis and Twagirimana Jean Claude voluntarily intervened for ordering to ACTIVE CM INVESTMENT Ltd to pay the owed debt in case it is paid.

[4] The Commercial Court rendered the judgment RCOM 00554/2021/TC on 10/11/2021 and upheld that the claim of QUALITY CONSTRUCTION Ltd and ACTIVE CM INVESTMENT Ltd is grounded for MUKERAMIRIMO CONSTRUCTION Ltd and Mbaduko Jimmy, but ungrounded for ZIGAMA CSS and CLUB HOUSE LA PALISSE HOTELS Ltd; the claim of Rubayiza Alexis and Twiringiyimana Jean Claude is grounded, it ordered to MUKERAMIRIMO CONSTRUCTION Ltd and Mbaduko Jimmy to pay to QUALITY CONSTRUCTION Ltd 71,258,767 Frw and ACTIVE CM INVESTMENT Ltd 10,291,666 Frw and to pay to each company 580,000 Frw as procedural and lawyer fees.

[5] The Commercial Court ordered to ACTIVE CM INVESTMENT Ltd to pay to RUBAYIZA Alexis 21,311,986 Frw, to Twiringiyimana Jean Claude 4,555,658 Frw and to pay 530,000 Frw as procedural and lawyer fees to each one; it ordered that in case the debt owed by MUKERAMIRIMO CONSTRUCTION Ltd and Mbaduko Jimmy to ACTIVE CM INVESTMENT Ltd is paid, Rubayiza Alexis and Twiringiyimana Jean Claude should be firstly paid for the debt it owes to them. The same Court also ordered to MUKERAMIRIMO CONSTRUCTION Ltd and Mbaduko Jimmy to reimburse to QUALITY CONSTRUCTION Ltd and ACTIVE CM INVESTMENT Ltd 20,000 Frw as court fees and ACTIVE CM INVESTMENT Ltd to repay to RUBAYIZA Alexis and Twiringiyimana Jean Claude 20,000 Frw as court fees deposited by each one.

[6] MUKERAMIRIMO CONSTRUCTION Ltd appealed against that judgement before the Commercial High Court, the appeal was registered on RCOMA 00794/2021/HCC, it requested the Court to determine whether the damages granted to QUALITY CONSTRUCTION Ltd and ACTIVE CM INVESTMENT Ltd were founded while they did not perform the contract they concluded; determine whether Mbaduko Jimmy should be held liable for the debt owed by his company MUKERAMIRIMO CONSTRUCTION Ltd and requested to be granted the damages claimed at the first and appeal instances.

[7] QUALITY CONSTRUCTION Ltd and ACTIVE CM INVESTMENT Ltd also appealed against the court ruling, their appeal was registered on RCOMA 00801/2021/HCC. Their appeal was based on the fact that the Commercial Court did not decide on the joint liability of CLUB HOUSE LA PALISSE HOTELS Ltd, MUKERAMIRIMO CONSTRUCTION Ltd and Mbaduko Jimmy for the debt and the damages; the very Court did not hold for the joint liability of ZIGAMA CSS, MUKERAMIRIMO CONSTRUCTION Ltd and Mbaduko Jimmy for the debt and damages;

the fact that they were charged less damages for non-performance of the contract. ACTIVE CM INVESTMENT Ltd filed appeal due to the fact that MUKERAMIRIMO CONSTRUCTION Ltd and Mbaduko Jimmy were jointly ordered to pay the debt by deducting the debt owed to EGE Ltd while it had issued the power of attorney. QUALITY CONSTRUCTION Ltd and ACTIVE CM INVESTMENT Ltd concluded by requesting to be granted the procedural and lawyer fees.

[8] Both cases were combined for being jointly heard in the same judgment RCOMA 00794/2021/HCC-CMB RCOMA 00801/2021/HCC rendered on 16/09/2022, the Commercial High Court upheld that the appeal filed by MUKERAMIRIMO CONSTRUCTION Ltd, by QUALITY CONSTRUCTION Ltd and ACTIVE CM INVESTMENT Ltd is grounded in parts; the judgment is only reversed on the quantity of the debt owed by MUKERAMIRIMO CONSTRUCTION Ltd to QUALITY CONSTRUCTION Ltd and CLUB HOUSE LA PALISSE HOTEL Ltd in this case.

[9] The Commercial High Court ordered to MUKERAMIRIMO CONSTRUCTION Ltd, MBADUKO Jimmy and CLUB HOUSE LA PALISSE HOTEL Ltd to jointly pay to QUALITY CONSTRUCTION LTD the debt amounting to 59,240,260 Frw, plus 2,019,507 Frw for the interests, the compensation for delay and breach of contract, 580,000 Frw as procedural and lawyer fees at the first instance and 1,000,000 Frw at the appeal instance and 20,000 Frw as court fees, the total is 62,859,767 Frw, it ordered to them to jointly pay to ACTIVE CM INVESTMENT Ltd 10,000,000 Frw, plus 291,666 Frw for the interests, the compensation for delay and breach of contract and 20,000 Frw as court fees, the total is 10,311,666 Frw. It ordered to ACTIVE CM INVESTMENT Ltd to pay to Rubayiza Alexis 21,311,986 Frw and to pay to Twiringiyimana Jean Claude 4,555,658Frw and to pay to each one 530,000 Frw as procedural and lawyer fees; it ordered that in case the debt owed by MUKERAMIRIMO CONSTRUCTION Ltd to ACTIVE CM INVESTMENT Ltd is paid, Rubayiza Alexis and Twiringiyimana Jean Claude should be firstly paid for the debt it owes to them; it ordered to it to repay 20,000 Frw as court fees deposited by each one.

[10] MUKERAMIRIMO CONSTRUCTION Ltd lodged appeal against the judgment rendered by the Commercial Court and the Commercial High Court before this Court, the appeal was registered on RCAA 00107/2022/CA, it stated that it bases the jurisdiction of the Court of Appeal on the reason that the lower courts lacked the jurisdiction to hear the case, such issue is the appeal ground, it requests this Court to quash the rulings of the lower courts, it requests to be granted the procedural and lawyer fees.

[11] CLUB HOUSE LA PALISSE HOTELS Ltd also lodged appeal against that judgment before the Court of Appeal, its appeal was registered on RCOMAA 00108/2022/CA, it claims to determine whether the Commercial High Court had the jurisdiction to hear the case filed to it and it did not violate the law, it claims for damages for being unnecessarily dragged in lawsuits, the procedural and lawyer fees.

[12] Before pleading on the appeal, QUALITY CONSTRUCTION Ltd, ACTIVE CM INVESTMENT Ltd, Rubayiza Alexis and Twiringiyimana Jean Claude raised the objection on its inadmissibility for the following reasons: MUKERAMIRIMO CONSTRUCTION Ltd did not deposit the court fees; the fact that in the appealed judgment the damages less than 75,000,000 Frw were granted; MUKERAMIRIMO CONSTRUCTION Ltd and CLUB HOUSE LA PALISSE

HOTELS Ltd lost the cases in both lower courts for the same reasons, the Court of Appeal has no jurisdiction to hear its second appeal.

[13] The judgment was held in public on 08/05/2023, MUKERAMIRIMO CONSTRUCTION Ltd was represented by Counsel Nyirasuku Jeanne, CLUB HOUSE LA PALISSE HOTELS Ltd by Counsel Sebukonoke Innocent, QUALITY CONSTRUCTION Ltd by its Managing Director Nkurikiyimfura Alexis, assisted by Counsel Bangamwabo Octave who also assisted ACTIVE CM INVESTMENT Ltd, Rubayiza Alexis was assisted by Counsel Munyamasoko Jovith who also assisted Twiringiyimana Jean Claude, ZIGAMA CSS was represented by Counsel Kayigirwa Téléphore; the debates were held on the raised objection, but before the commencement of the debates, Counsel Kayigirwa Téléphore indicated to the Court that ZIGAMA CSS that he represented did not claim anything and is not held liable for anything and there is no decision of the appealed judgment that concerns it, he claims that it should be dissociated from the case. After hearing the statements of other parties, the Court of Appeal decided on the bench and held that ZIGAMA CSS is dissociated from the case because there is no ground for being party to it.

[14] After analyzing the reasons on which the appellants base the jurisdiction of the Court of Appeal in this case and the objections raised by the respondents, the Court found that the following legal issues should be examined:

- Determine whether MUKERAMIRIMO CONSTRUCTION Ltd did not deposit the court fees by lodging the appeal so that its appeal should not be admitted;
- Determine whether the lower courts lacked the jurisdiction to hear the case so that it can be the ground for the admissibility of the second appeal filed by MUKERAMIRIMO CONSTRUCTION Ltd and by CLUB HOUSE LA PALISSE HOTELS Ltd basing on the jurisdiction of the Court of Appeal;
- Determine whether the second appeal should not be admitted by this Court as in the appealed judgment the granted damages were less than 75,000,000 Frw;
- Determine whether MUKERAMIRIMO CONSTRUCTION Ltd and CLUB HOUSE LA PALISSE HOTELS Ltd lost in both lower courts for the same reasons.

II. ANALYSIS OF LEGAL ISSUES

1. Determine whether MUKERAMIRIMO CONSTRUCTION Ltd did not deposit the court fees by lodging the appeal so that its appeal cannot be admitted

[15] Counsel Bangamwabo Octave, assisting Nkurikiyimfura Alexis who represents QUALITY CONSTRUCTION Ltd and ACTIVE CM INVESTMENT Ltd, raised the objection related to the inadmissibility of the appeal lodged by MUKERAMIRIMO CONSTRUCTION Ltd for failing to deposit the court fees. He states that IECMS indicates that the court fees were deposited by Mbaduko Jimmy holding the identification card N° 119888014786172, even it is specified that such court fees were for MUKERAMIRIMO CONSTRUCTION Ltd. He further submits that the court fees were deposited by Mbaduko Jimmy who did not lodge appeal, the fact that the TIN and identification of MUKERAMIRIMO CONSTRUCTION Ltd were not uploaded in the system, instead the names and the number of the identification card of Mbaduko Jimmy were mentioned, means that MUKERAMIRIMO CONSTRUCTION did lodge appeal.

[16] Counsel Nyirasuku Jeanne, representing MUKERAMIRIMO CONSTRUCTION Ltd and Mbaduko Jimmy, by pleading on this issue, avers that the objection is not grounded because the parts of GENERAL and COURT FEES of IECMS indicate that it is MUKERAMIRIMO CONSTRUCTION Ltd which lodged appeal, and the fact that the number of the identification card and the e-mail of Mbaduko Jimmy are mentioned is not prohibited by the law, the essential is that the court fees have been deposited; the fact that Mbaduko Jimmy who is the unique shareholder deposited the court fees using his telephone is the same like if it was done by an agent on behalf of MUKERAMIRIMO CONSTRUCTION Ltd.

[17] [Counsel Sebukonoke Innocent representing CLUB HOUSE LA PALISSE HOTELS Ltd, submits that they note that it is MUKERAMIRIMO CONSTRUCTION which lodged the appeal after depositing the court fees.

[18] Rubayiza Alexis and Counsel Munyamasoko Jovith who assists him together with Twiringiyimana Jean Claude, maintain that in the lower court Mbaduko Jimmy and MUKERAMIRIMO Construction Ltd were parties, probably it deposited the court fees, but it did not file appeal, by their submissions they state that it is MUKERAMIRIMO CONSTRUCTION Ltd which lodged appeal, however, in case it has filed appeal, its TIN and e-mail should have been indicated.

DETERMINATION OF THE COURT

[19] Article 7 of the Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure as amended to date provides that “The claimant has the following obligations : to deposit court fees, unless otherwise provided by law”.

[20] Article 2 of the Ministerial Order N° 17/MOJ/AG/20 of 30/10//2020 determining court fees in civil, commercial, social and administrative matter provides that in the Court of Appeal the court fees are fifty thousand (50,000 Frw).

[21] In IECMS, the part “Court fees” indicates that MUKERAMIRIMO CONSTRUCTIONS Ltd (Payee) paid 50,000 Frw as court fees¹. The part “General Information” indicates that the appellant is MBADUKO Jimmy who acted on behalf of MUKERAMIRIMO CONSTRUCTION Ltd.

[22] The Court of Appeal finds that the fact that Mbaduko Jimmy as the representative of MUKERAMIRIMO CONSTRUCTION Ltd had, on its behalf, deposited the court fees and filed the appeal and it was registered that the court fees were deposited by MUKERAMIRIMO CONSTRUCTION Ltd as appellant as indicated in IECMS is not illegal because the court fees were deposited and they were recorded on its names and it is the party in this case; the objection of inadmissibility of the appeal because the court fees were not deposited is not founded.

2. Determine whether the lower courts lacked the jurisdiction to hear the case

¹ IECMS Case no. RCOMAA 00107/2022/CA, Court fees.

[23] Counsel Nyirasuku Jeanne, representing MUKERAMIRIMO CONSTRUCTION Ltd and Mbaduko Jimmy, states that the lower courts should not adjudicate this case as it was contrary to the law and the contract on which the subject matter was based as by the article 9² of the subcontract agreement of 17/12/2020, MUKERAMIRIMO CONSTRUCTION Ltd and QUALITY CONSTRUCTION Ltd agreed that the disputes shall be amicably settled, in case of failure, they shall resort to arbitration.

[24] Basing on the article 158 of the Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure which provides that “When the appeal court finds that the first-instance court has been seized irregularly or the court seized is not competent, but the lower court has decided to decide on the case whereas it should not; the appeal court receives that appeal and motivates that the appeal case was irregularly filed at the first level, and the appellate court quashes all the decisions taken on the basis of this error; the interested party may file a new claim”, Counsel Nyirasuku Jeanne requests to the Court of Appeal to admit the appeal of her clients and quash all the decisions taken by the lower courts.

[25] Counsel Sebukonoke Innocent, representing CLUB HOUSE LA PALISSE HOTELS Ltd, also avers that the Commercial High Court lacked the jurisdiction to hear the appealed case as the article 9 of the agreement of 17/12/2020 stipulated that the disputes arising from the agreement performance shall be amicably settled, in case of failure, they shall resort to the arbitration, therefore, their appeal should not be admitted and the decisions it took should be quashed.

[26] Counsel Bangamwabo Octave submits that the Court of Appeal only decided on QUALITY CONSTRUCTION Ltd and MUKERAMIRIMO CONSTRUCTION Ltd only evoked it by filing the appeal and it produced the agreement they concluded on which the Court relied by admitting the claim and motivating that the agreement provides that they shall resort to the arbitration, while such should not be based on as the provisions of the article 158 of the Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure on which the appellants base their statement are examined at the first appeal instance, while this is the second appeal, this means that they disregard that there had been the pre-trial conference in which the parties agreed on the court jurisdiction.

[27] Counsel Bangamwabo Octave maintains that the court hearing was due to the fact that there are different parties in the case who do not conclude the agreement with MUKERAMIRIMO CONSTRUCTION Ltd, all parties agree to seize the commercial courts and at the first and second instances, no party raised the objection related to the lack of jurisdiction as they had agreed on the court jurisdiction.

[28] He states that ACTIVE CM INVESTIEMENT Ltd represented by Uwamahro Claudine did not conclude any agreement with MUKERAMIRIMO CONSTRUCTION Ltd, rather, basing on the memorandum of understanding which was not denied by the respondent who lost the case on basis of such document, the Court of Appeal should not remain silent on issues related to ACTIVE CM INVESTMENT Ltd, it should not admit the claim concerning it, especially that ACTIVE CM

² Article 9: all matters concerning the breach of this agreement shall be settled amicably by both parties before being submitted to the competent arbitration in accordance with Rwandan law.

INVESTIMENT Ltd was granted the damages less than 75,000,000 Frw; therefore this claim should not be admitted.

[29] Counsel Munyamasoko Jovith submits that the Registry of the Court of Appeal should not record this appeal, and in case the Court finds that it should be registered, it shall hold that it lacks merits because the issue related to the lack of the court jurisdiction was not debated before the courts, also both parties agreed on the draft pretrial conference report and the issues to be examined by the Court; also, the claim was filed by two parties who shared the interest in the case and the persons who are not parties to the arbitration agreement forcibly and voluntarily intervened in the case.

DETERMINATION OF THE COURT

[30] The debates on the issue of this case are based on determining whether there is dispute opposing QUALITY CONSTRUCTION Ltd and ACTIVE CM INVESTMENT Ltd to MUKERAMIRIMO CONSTRUCTION Ltd and Mbaduka Jimmy, that triggered the forced intervention of CLUB HOUSE LA PALISSE HOTELS Ltd as well as the voluntary intervention of Rubayiza Alexis na Twiringiyimana Jean Claude, the lower courts lacked the jurisdiction to hear the case; taking into consideration the article 9 of the agreement concluded by QUALITY CONSTRUCTIONS Ltd and MUKERAMIRIMO CONSTRUCTION Ltd on 17/12/2020 which provides that the disputes arising from the agreement execution shall be amicably settled, in case of failure, the parties shall resort to the arbitration; due to the fact that the issue was submitted to the courts which rendered the related judgments, such issue should not be admitted and tried at the second instance (2) by the Court of Appeal because the appealed judgment was adjudicated by the courts who lack the jurisdiction as provided under the article 52, al. 2, 3⁰ of the Law N^o 30/2018 of 02/06/2018 governing the jurisdiction of courts. Briefly, the issue is to determine whether the fact that the appealed judgment was rendered by the ordinary courts while the agreement between MUKERAMIRIMO CONSTRUCTION Ltd and QUALITY CONSTRUCTION Ltd provides for the arbitration is conclusive to decide that the judgment was tried by the courts lacking the jurisdiction.

[31] Article 52, al. 2, 3⁰ of the Law N^o 30/2018 of 02/06/2018 governing the jurisdiction of courts provides that “The Court of Appeal has jurisdiction to hear at the first level of appeal cases tried at first instance by the High Court, the Commercial High Court and the Military High Court, if such cases are decided based on a non-existing law, refer to repealed legal provisions or are tried by a court lacking jurisdiction”.

[32] Regarding the claim filed to the courts while the agreement stipulated for arbitration, the Supreme Court, in the judgment RCOMA 0090 /13/ CS rendered on 28/03/2014 upheld that, due to the fact that by their agreement the parties deprived themselves of the right of being tried by the Commercial High Court as provided under the law and mutually conferred such right to the arbitration, they had realized that such right is not of public order; therefore, in case they do not have any challenge on such right in the preliminary hearing, they can continue proceeding with the hearing before the courts³. The Supreme Court found that the article 10 of the Law N^o 005/2008

³ Judgment no RCOMA 0090 /13/ CS rendered on 28/03/ 2014: PUBLICELL SARL v. MTN RWANDACELLSARL, paragraph 10, 3.

of 14/02/2008 on arbitration and conciliation in commercial matters which provides that “An ordinary court before which an action regarding an arbitration agreement is seized shall submit it to the arbitration, if a party so requests”, means that the right to arbitration is not of public order, it based on such provision to decide that the statement of PUBLICELL that the dispute of the parties should be settled through arbitration is not founded.

[33] Concerning this judgment, the case file contains the subcontract agreement of 17/12/2020 concluded by MUKERAMIRIMO CONSTRUCTION Ltd represented by Mbaduko Jimmy and QUALITY CONSTRUCTION (QUALICONS) Ltd represented by Nkurikiyimfura Alexis, its article 9 provides that “All matters concerning the breach of this agreement shall be settled amicably by both parties before being submitted to the competent arbitration in accordance with Rwandan law”, the disputes arising from the breach of the agreement shall be amicably by the contracting parties, in case of failure, they shall resort to arbitration.

[34] As stated by Counsel Bangamwabo Octave and indicated by the case file in the Commercial Court, he filed the claims of QUALITY CONSTRUCTION Ltd and ACTIVE IM INVESTMENT Ltd in one motion instituting proceedings and paid only one filing fee, in accordance with the article 33⁴ of the abovementioned Law N^O 22/2018 of 29/04/2018, QUALITY CONSTRUCTION Ltd sued MUKERAMIRIMO CONSTRUCTION Ltd together with its Managing Director Mbaduko Jimmy for the breach of the agreement, by disregarding that such agreement provides that the disputes arising from the agreement should be amicably settled, in case of failure, they should resort to arbitration and it claimed for the forced intervention of CLUB HOUSE LA PALISSE HOTELS Ltd.

[35] In the Commercial Court, MUKERAMIRIMO CONSTRUCTION Ltd and Mbaduko Jimmy pleaded on the charges by their submissions, within the pretrial conference or the hearing, they never requested the Commercial Court to submit the issue to arbitration, nor the Commercial High Court to do so.

[36] As upheld by the Supreme Court in the abovementioned judgment RCOMA 0090/13/CS rendered on 28/03/2014, the Court finds that the fact that QUALITY CONSTRUCTION Ltd opted for depriving itself of the right to resort to arbitration and seized the courts, MUKERAMIRIMO CONSTRUCTION Ltd and Mbaduko Jimmy who were aware of the agreement opted for not requesting the Court to submit the issue to arbitration means that they preferred to deprive themselves of that right to resort to arbitration.

[37] It also finds that the fact that both parties opted for modifying the agreement and accepted to be tried by the courts and agreed on the subject matter in the pretrial conference means that they implicitly opted for the modification of their agreement concerning the modalities of settling the disputes arising from the agreement concluded on 17/12/2020, they preferred to be tried by the courts; therefore, no one (QUALITY CONSTRUCTION Ltd which filed the claim and

⁴ If several parties have shared interests in a case, and sue or are sued, each of them assume the rights and obligations of parties to proceedings on his/her own behalf. However, persons with shared interests in a case file their claims in one motion instituting proceedings and pay only one filing fee. The provisions of paragraph One of this Article also apply in case of successors or members of associations who file a joint claim. A person against whom a claim is filed with respect to jointly owned property has the obligations to indicate his/her co-owners. If the subject-matter is jointly owned by many persons, the claimant has the obligation to seek their intervention.

MUKERAMIRIMO CONSTRUCTION Ltd) cannot pretend that the case was adjudicated by the court lacking the jurisdiction.

[38] Concerning ACTIVE CM CONSTRUCTION, the Court finds that nothing could not preclude it to sue MUKERAMIRIMO CONSTRUCTION Ltd before the commercial courts in case it requests to be redressed in its rights resulting from the joint commercial activities, especially that they did not conclude any agreement that provides for the modalities of settling the potential disputes.

[39] It also finds that the statement of CLUB HOUSE LA PALISSE HOTELS that the High Court violated the law as it disregarded the article 9 of the abovementioned agreement of 17/12/2020 which provides for the amicable settlement of the disputes is not founded because it is not a party to that agreement; therefore, nothing could preclude QUALITY CONSTRUCTION Ltd and ACTIVE CM INVESTMENT Ltd to request for its forced intervention in case they deem it necessary.

[40] The Court finds that the fact that by filing the appeal, the representatives of MUKERAMIRIMO CONSTRUCTION Ltd and CLUB HOUSE LA PALISSE HOTES Ltd state that they base the jurisdiction of the Court of Appeal to hear their appeal on the article 52, al. 2, 30 of the Law N^o 30/2018 of 02/06/2018 governing the jurisdiction of courts which provides that “The Court of Appeal has jurisdiction to hear at the first level of appeal cases tried at first instance by the High Court, the Commercial High Court and the Military High Court, if such cases are decided based on a non-existing law, refer to repealed legal provisions or are tried by a court lacking jurisdiction” and it had been held that the Commercial Court and the High Commercial Court had the jurisdiction as both parties agreed on, means that the appeal of MUKERAMIRIMO CONSTRUCTION Ltd and of CLUB HOUSE LA PALISSE HOTES Ltd cannot be admitted in the jurisdiction of this Court, especially that the representatives of those companies did not indicate any other basis of its jurisdiction.

[41] It finds that in case the appeals filed by MUKERAMIRIMO CONSTRUCTION Ltd and by CLUB HOUSE LA PALISSE HOTELS Ltd were not admitted because they did not fall under the jurisdiction of this Court because it found that the unique reason on which they base its jurisdiction confers to them the right to file their appeal before this Court, is not founded; it was not necessary to examine other objections raised by the respondent at the appeal instance, they were meant to indicate that their claim should not be admitted in the jurisdiction of this Court.

3. Regarding the lawyer and procedural fees

[42] Counsel Nyirasuku Jeanne representing MUKERAMIRIMO CONSTRUCTION Ltd requests the Court of Appeal to order to QUALITY CONSTRUCTION Ltd to pay to MUKERAMIRIMO CONSTRUCTION Ltd 2.000.000 Frw as procedural and lawyer fees from the lower courts to this level.

[43] Counsel Bangamwabo Octave, assisting Nkurikiyimfura Alexis representing QUALITY CONSTRUCTION Ltd and ACTIVE CM INVESTMENT Ltd pleading about the request of MUKERAMIRIMO CONSTRUCTION Ltd, states that such request is unfounded, by its claim it avers that the Courts unjustly treated it by refusing to deprive of their jurisdiction; therefore, the

fees should not be awarded by those who did not unjustly treat it, rather, MUKERAMIRIMO CONSTRUCTION Ltd should pay them because it did not raise the objections which were not examined by the courts. He requests to order to MUKERAMIRIMO CONSTRUCTION Ltd to pay to ACTIVE CM INVESTMENT Ltd 2,000,000 Frw as lawyer fee and 500,000 Frw for procedural fee. Nkurikiyimfura Alexis requests the Court to order to MUKERAMIRIMO CONSTRUCTION Ltd to pay to QUALITY CONSTRUCTION Ltd 2,000,000 Frw for lawyer fee and 500.000 Frw for procedural fee, the total is 2,500,000 Frw.

[44] Counsel Nyirasuku Jeanne, representing MUKERAMIRIMO CONSTRUCTION Ltd pleading about the lawyer and procedural fees claimed by QUALITY CONSTRUCTION Ltd and ACTIVE CM INVESTMENT Ltd, submits that the requests of those companies are not founded because they filed the claim before the courts lacking the jurisdiction.

[45] Counsel Sebukonoke Innocent representing CLUB HOUSE LA PALISSE HOTELS Ltd, avers that QUALITY CONSTRUCTION Ltd and ACTIVE CM INVESTMENT Ltd disregarded the content of the agreement concluded with MUKERAMIRIMO CONSTRUCTION Ltd by filing a claim against it while they did not conclude any agreement, and they lodged the claim before the courts lacking the jurisdiction, they dragged it in unnecessary lawsuits so that it hired the legal counsel, he requests the Court to order to QUALITY CONSTRUCTION Ltd and ACTIVE CM INVESTMENT Ltd to pay to it 1,000,000 Frw as lawyer fee, 2,000,000 Frw for being dragged in courts and repay 50,000 Frw deposited as court fees.

[46] Concerning the request of CLUB HOUSE LA PALISSE HOTELS Ltd, Counsel Bangamwabo Octave representing QUALITY CONSTRUCTION LTD and ACTIVE CM INVESTMENT LTD, maintains that its request is impossible because it is the losing party who pays, rather it should be held liable for damages.

[47] Counsel Munyamasoko Jovith, representing Twiringiyimana Jean Claude and assisting Rubayiza Alexis, requests the Court of Appeal to order to the appellants to pay to Rubayiza Alexis and Twiringiyimana Jean Claude 2,000,000 Frw as lawyer fee, for each one, for having delayed the case so that they incurred the loss, they spent money for this case by rejecting the rulings of the lower courts, they delayed them to be granted the damages won in the case, it filed the second appeal by disregarding the provisions of article 158 of the abovementioned Law N° 22/2018 of 29/04/2018 because its request should have been submitted at the first appeal.

[48] Counsel Nyirasuku Jeanne, representing MUKERAMIRIMO CONSTRUCTION Ltd, pleading about the damages claimed by Twiringiyimana Jean Claude and Rubayiza Alexis, he states that they are not justified because the fact that MUKERAMIRIMO CONSTRUCTION Ltd had lodged appeal was its right entitled to it by the law.

[49] Concerning the damages claimed by Twiringiyimana Jean Claude and Rubayiza Alexis, Counsel Sebukonoke Innocent representing CLUB HOUSE LA PALISSE HOTELS Ltd submits that they are not justified.

DETERMINATION OF THE COURT

[50] The article 111 of the Law No 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 with the principal claim. It can also be admitted and adjudicated even if the principal claim has not been admitted”.

[51] The Court finds that the lawyer and procedural fees claimed by MUKERAMIRIMO CONSTRUCTION Ltd and CLUB HOUSE LA PALISSE HOTELS Ltd shall not be granted to them as they lose the case.

[52] The Court finds that the fees claimed by QUALITY CONSTRUCTION Ltd and ACTIVE CM INVESTMENT Ltd shall be granted to them as they paid the legal counsel to follow up their case and represent them, but because 2,000,000 Frw as lawyer fee and 500,000 Frw as procedural fee for each one are excessive and there is no proof evidencing that they spent such amount, in the discretion of the Court, each one shall be granted 500,000 Frw as lawyer fee and 200,000 Frw as procedural fee.

[53] The Court finds that the lawyer and procedural fees claimed by Twiringiyimana Jean Claude and Rubayiza Alexis against MUKERAMIRIMO CONSTRUCTION Ltd shall not be granted to them as they voluntarily intervened in the case, it did not claim for their forced intervention, it cannot be held liable for the expenses for the case in which they were parties for protecting their interests.

III. DECISION OF THE COURT

[54] Holds that the appeal lodged by MUKERAMIRIMO CONSTRUCTION Ltd and by CLUB HOUSE LA PALISSE HOTELS Ltd is not admitted as it does not fall under the jurisdiction of this Court ;

[55] Orders to MUKERAMIRIMO CONSTRUCTION Ltd to pay to QUALITY CONSTRUCTION Ltd and ACTIVE CM INVESTMENT Ltd, for each one, 500,000 Frw as lawyer fee and 200,000 Frw as procedural fee at this instance ;

[56] Declares that the court fees deposited by the appellants cover the expenses of the judicial proceedings.