

BUCYENSENGE v. I&M BANK

[Rwanda COMMERCIAL HIGH COURT – RCOMA 0464/14/HCC (Rwanyindo, P.J.)
September 12, 2014]

Commercial procedure – The time limit to lodge an appeal against an ex parte application – Appeal against an ex parte application is lodged within five days – Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 329.

Commercial procedure – Opposition against the order of the President of the court determining the date of the auction – The party cannot apply for opposition against the order of the President which determines the date of the auction claiming that it has defect since it is not a claim as such but an administrative decision – Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 295.

Facts: Upon the request of I&M BANK, in perspective of the execution of the judgment rendered by the Supreme Court, Nyarugenge Commercial Court fixed the date of auctioning the land and building on plot n° 283 and n° 544. The Court also ordered Bucyensenge to pay 103,777,778Frw and 10,377,778Frw to I&M BANK. Bucyensenge Charles lodged an opposition against the decision before Nyarugenge Commercial Court stating that the judgment to be executed was nullified. The court declared his claim without merit.

Bucyensenge appealed before the Commercial High Court stating that the decision taken by Nyarugenge Commercial Court fixing the date of the auction would be dismissed for its defect. In addition, he stated that the claim of I&M BANK was lodged basing on ex parte application.

I&M BANK Ltd contends that that Bucyensenge Charles's claim would not be admissible because he appealed after the time limit. It also stated that it did not lodge an ex parte application but legally applied for the fixation of the date of the auction which does not require the deposit of court fees.

Held: 1. Appeal of Bucyensenge was lodged within the time prescribed by the law since the time limit to appeal against an ex parte application is five days.

2. I&M BANK did not lodge an ex parte application but it provided the court with all requirements to get the date of the auction. The proof is that no court fees were deposited as the request was in the competence of the President of the court to take such administrative decisions. Thus, that order may neither be appealed against nor be opposed.

3. Bucyensenge Charles's claim opposing the order n° 008/BMG/2014 of fixing the date of the auction of the land and building on plot n° 283 and n° 544 at the request of I&M BANK taken by the President of Nyarugenge Commercial Court on 30/06/2014 would not have been admitted by the judge of the first instance since that decision is an administrative.

Appeal has merit.

Claim lodged at the first instance has not merit.

Court fees deposited by the appellant remains in public treasury.

Statutes and statutory instruments referred to:

Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 295 and 329.

No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Upon the request of I&M BANK, in perspective of the execution of the judgment rendered by the Supreme Court, ordering Bucyensenge to pay 103,777,778Frw and 10,377,778Frw to I&M BANK, on 30 June 2014, the President of the Commercial Court of Nyarugenge fixed the date (12/08/2014) of auctioning the land and building on plot n° 283 and n° 544.

[2] Bucyensenge Charles filed an opposition against the decision before the Commercial Court of Nyarugenge which found his claim without merit due to the fact that it was taken in respect of article 295 of the Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure “Upon request by the distrainer, and after verification that all the formalities for seizure have been met, the President of the Primary Court of the place where the auction will take place, or the President of Commercial Court, for execution of a judgment delivered by a commercial court, fixes the date and place of sale, the places where it must be publicized by posting, and the conditions under which the posting is to take place” while that decision was not among the decisions which are provided for by article 360 of the above stated law which requires a deposit of court fees. The court also decided Bucyensenge’s claim without merit because his allegations that of the judgment RCOMA 00119/10/CS to be executed has been nullified, has no merit since he does not produce another enforceable judgment contradicting it. It also decided that the claim of Bucyensenge regarding the procedure of seizure was not respected, has no merit since he has been notified of the decision forcing him to pay otherwise the decision would change into distrait of his immovable properties. Finally, the court decided Bucyensenge’s claim to have no merit since his request to be authorized to give other immovable property to be seized has no merit since he does not reveal those properties, where they are located and whether they can cover the payment of the debt he is requested to reimburse.

[3] Bucyensenge appealed against this judgment decided by the Commercial Court of Nyarugenge for the following grounds:

The decision of auctioning could have been nullified because of its defect but the court did not do it. In addition to that what should be analyzed by the previous judgewas to check whether that decision should urgently safeguard something as provided for by the article of the above mentioned Law.

In deciding that the opposed was not provided for by the article 360 of the above mentioned law, the court contravened with this article, since in its paragraph 8, it provides for an exparte application, which I&M Bank has used to get the court decision bearing the Judge and Registrar’s signature, since there is no other legal procedure demonstrated thought which the court was seized.

[4] I&M Bank argued by raising the objection of the inadmissibility of Bucyensenge Charles's claim since it was lodged after the time limit. It stated that Bucyensenge Charles would have lodged it not later than 17 August 2014 since the decision was taken on 12 August 2014 while the period for appeal is five days. It also argues that as the judge of the first instance motivated the procedure of fixing the date of the auction it is not among the claims which require the deposit of the court fees provided for by article 360 of the above mentioned law, instead, this procedure is done in accordance with the provision of article 295 paragraph 1 of the mentioned law.

[5] The issues to be analyzed in this case are the following:

To know whether Bucyensenge Charles lodged his appeal after the time limit;

To know whether Bucyensenge Charles could file an opposition against the decision of the President of Commercial Court of Nyarugenge fixing the date of the auction.

II. ANALYSIS OF LEGAL ISSUES

Whether Bucyensenge Charles has lodged his appeal after time limit

[6] A&M BANK Ltd states that Bucyensenge's claim should not be admissible since he appealed after the time limit provided for by the law. It argues that he could have lodged his appeal not later than 17 August 2014 since the decision was taken on 12 August 2014 considering the period for appeal is 5 days.

[7] Bucyensenge argues that he has appealed within the time prescribed by the law. He articulates that the judgment could have been delivered on 11 August 2014 but it was not delivered on the next day, 12 August 2014. When he was asked the time he was notified of the decision of the court, he responded that he does not remember. However he added that he is not the one to prove the time he was notified of the decision instead it is the one who argues that he appealed after the time limit since the plaintiff has to prove what he claims.

[8] With regard to this issue, the court finds that after hearing the pleadings of Bucyensenge Charles, I&M BANK Ltd stated that the available copy of judgment reveals that the court registrar delivered it to Bucyensenge Charles on 19 August 2014. It finds that Bucyensenge does not deny it as well. It finds therefore the fact that Bucyensenge Charles appealed on 26 August 2014 while he was notified of the decision on 19 August 2014 then he appealed in the time prescribed by the law, since the time limit to appeal against an *ex parte* application is five days as provided for by the article 329 of the law relating to the civil, commercial, labour and administrative procedure of 2012.

a. Whether Bucyensenge Charles could lodge an opposition against the decision of the President of Commercial Court of Nyarugenge fixing the date of the auction.

[9] Bucyensenge Charles lodge an opposition against the decision of the President of Commercial Court of Nyarugenge arguing that it has defects and that it was analyzed and decided upon while the one who lodged it did not pay the court fees.

[10] I&M Bank Ltd argues that it did not lodge an *ex parte* application but it requested the date of the auction as provided for by article 295 of the above mentioned law, which does not require the deposit of the court fees.

[11] The Court finds that I&M Bank Ltd did not lodge an appeal through an *exparte* application as stated by Bucyensenge, instead I&M Bank requested the date of the auction and provided the court with all requirements to be given the date of auction. The Court finds that the President of the Court fixed the date of the auction without the hearing since it is not required instead, he analyses the requirements submitted to him allowing him to fix the date of auction. It finds the President of the Commercial Court of Nyarugenge based his decision on article 295 of the above mentioned law which states that “upon request by the distrainer, and after verification that all the formalities for seizure have been met, the President of the Primary Court of the place where the auction will take place, or the President of Commercial Court, for execution of a judgment delivered by a commercial court, fixes the date and place of sale, the places where it must be publicized by posting, and the conditions under which the posting is to take place”. Pursuant to the abovementioned article the court finds that the decision taken by the president of the court is administrative since it is not the claim as such. Thus, this decision is not opposable. The Court finds that as the president decided being assisted by a registrar has no merit because article 295 above mentioned does not prevent him being assisted by a registrar. Furthermore, the Court finds that the proof that it is an *exparte* application is that it did not deposit the court fees since the request was within the competence of the President of the Commercial Court to take an administrative decision.

[12] Therefore, it finds that Bucyensenge Charles’s opposition against the Court order n° 008/BMG/2014 decided by the President of the Commercial Court of Nyarugenge on 30 June 2014 fixing the date of the auction of the land and building on plot n° 283 and n° 544 upon the request of I&M Bank could not have been admitted by the first judge since it is an administrative decision.

III. THE DECISION OF THE COURT

[13] Admits the appeal of Bucyensenge;

[14] Decides that the opposition filed at the first Court against the order n° 008/BMG/2014 of the President of the Commercial Court of Nyarugenge fixing the date of the auction could not have been admitted.

[15] Dismisses the case RCOM 0788/14/TC/NYGE decided on 12 August 2014 by the Commercial Court of Nyarugenge.

[16] Orders that the court fees deposited by Bucyensenge Charles remains in public treasury.