

## **AQUILLA & PRISCILLA v. ENGEN ET AL**

[Rwanda SUPREME COURT – RCOMA 0165/12/CS (Mugenzi, P.J., Hatangimbabazi and Munyangeri, J.) December 13, 2013]

*Law governing professional Court Bailiff – The competence of the professional court bailiff – If requested by the justice or any other person having the interest, is authorized to note and make a certification report but he/she cannot expel any person without the court decision authorizing her/him to do so – The Court Bailiff and the principal pay damages resulting from unlawfully expelling person – Law n° 31/2001 of 12/06/2001 establishing the Professional Court Bailiff, article 18.*

*Evidence Law – Evidence of contracts – The photocopy bearing a defect cannot be taken as an evidence of the contract in case its original copy is not revealed.*

**Facts:** AQUILLA & PRISCILLA filed a case against ENGEN and the court bailiff in the Commercial High Court for having breached the lease contract of a petrol station they have signed. This breach is based on the fact that ENGEN has illegally expelled it and seized the property made up of money and its properties through the court bailiff Kanyana Bibiane.

The Court decided that there is no reasonable and unequivocal evidence to be considered as the basis of the contract likely to indicate that ENGEN has really breached the contract, and decided that the court bailiff did not honour her duties when together with ENGEN expelled AQUILLA & PRISCILLA from the petrol station, and ordered them to pay it damages. AQUILLA & PRISCILLA appealed to the Supreme Court requesting to decide that ENGEN has breached the contract and to order it to pay moral damages resulting from expelling AQUILLA & PRISCILLA from its working place without the court decision. ENGEN and Kanyana argue that what the court bailiff has done was lawful, and ENGEN argues in addition that there was no breach of the contract since the contract they have signed was terminated.

**Held:** 1. The professional Court bailiff has the right to make certification report if he/she is requested but he/she cannot expel a person without the court decision. Therefore, the fact that ENGEN and the court bailiff expelled AQUILLA & PRISCILLA without a court decision is unlawful. For that reason, they should pay damages.

2. The photocopy of written contract cannot be considered as its evidence if it contains defects in its content while there is no original document.

**Appeal has merit in part.**

**Respondents have to pay damages resulting from unlawful expulsion of the plaintiff, advocate fees and procedural fees.**

**ENGEN has to pay the plaintiff, damages of the seized properties.**

**All parties shall jointly pay court fees.**

**Statutes and statutory instruments referred to:**

Law n° 31/2001 of 12/06/2001 establishing the Professional Court Bailiff, article 18.

**No Case referred to.**

## **Judgment**

### **I. BRIEF BACKGROUND OF THE CASE**

[1] AQUILLA AND PRISCILLA company (in summary we will use AQUILLA), states that on 18<sup>th</sup> February, 2011, it entered into a lease contract of petrol station with ENGEN RWANDA Ltd located at Giporoso in order to run a petroleum products business of ENGEN RWANDA Ltd for one (1) year. After that, AQUILLA filed a case against ENGEN RWANDA Ltd and the professional court bailiff, Kanyana Bibiane in the Commercial High Court alleging that it repossessed the station on 23 July 2011 assisted by the professional court bailiff, Kanyana Bibiane while the contract was not terminated and without prior court order. AQUILLA alleges in addition that ENGEN unlawfully seized its property, consisting of money and equipment, and requested the court to compel ENGEN to pay back the money paid in excess to ENGEN, for water, power, cleaning, business license taxes (*patente*) and other taxes imposed by the district.

[2] The Commercial High Court ruled that there is no reasonable and unequivocal evidence to prove that ENGEN RWANDA Ltd breached the contract it signed with AQUILLA, but confirmed that Kanyana Bibiane, the professional court bailiff acted unlawfully when jointly with ENGEN RWANDA Ltd, expelled AQUILLA from the ENGEN RWANDA petrol station. It ordered Kanyana to pay AQUILLA civil damages equal to 500,000 Rwf and ENGEN RWANDA Ltd to pay 500,000 Rwf to AQUILLA AND PRISCILLA.

[3] AQUILLA appealed against that decision to the Supreme Court, alleging that the Commercial High Court decided not to examine other relevant grounds related to the contract for which the original document was not produced, disregarding that it was not presented to the court since it was part of the assets confiscated by ENGEN RWANDA. AQUILLA claims the court disregarded other evidences proving that it concluded a binding contract with ENGEN RWANDA Ltd; therefore, the court in its discretion, ordered it to pay AQUILLA 500.000 Rwf only while the fault committed was grave, and that the Commercial High Court did not consider ordering ENGEN RWANDA Ltd and the court bailiff to pay AQUILLA procedural and advocate fees while they were requested.

[4] In its appeal submissions, AQUILLA requested the Court to confirm that ENGEN RWANDA Ltd breached the contract, and order it to pay moral damages equal to 5,000,000 Rwf resulting from the act of expelling it from the working place without court order, 30,000,000 Rwf for unlawful termination of the contract, 5,000,000 Rwf of procedural and advocate fees ; hand back all seized assets valued at 32,636,066 Rwf, pay 26,058,200 Rwf of extra bills paid including interest of 18% of 18 months amounting to 115,177,244 Rwf; pay 5,920,724 Rwf for water, power and cleaning bills spent when it occupied ENGEN petrol station at Remera and business license and other district taxes. All these requests were amended by AQUILLA in various hearings by this court stating that the amounts vary with time.

[5] The hearing was held on various dates: 25<sup>th</sup> June, 2013, 24<sup>th</sup> September, 2013 and 19<sup>th</sup> November, 2013, AQUILLA AND PRISCILLA was assisted during the first session by Mutungirehe Anastasie, the Counsel, and by Karega Blaise Pascal, the counsel, who was also assisting the director of that company, Nkwaya Alfred during the remaining sessions while ENGEN was represented by the consels Rutembesa Phocas and Buzayire Angele who also assisted Kanyana Bibiane,

## II. ANALYSIS OF LEGAL ISSUES

### **Whether ENGEN and Kanyana unlawfully expelled AQUILLA from the petrol station.**

[6] Regarding this issue, the counsel for AQUILLA argues that the part of the damages they requested are based on the fact that on 26<sup>th</sup> July, 2011 the court bailiff Kanyana drafted the seizure report of all equipments and requested 5,000,000 Rwf of damages based on unlawful expulsion from the petrol station. The previous court did not consider these grounds and ordered the court bailiff to pay 500.000 Rwf.

[7] The counsel representing ENGEN RWANDA Ltd and assisting Kanyana argues the damages of 500,000 Rwf to be paid by ENGEN RWANDA Ltd and Kanyana are groundless because the court bailiff's actions were provided for by the law since she came to the station, found many people there, asked the accountant to open the safe box (*coffre fort*), and handed all equipments and money to ENGEN. Additionally, the bailiff drafted a certification report (*PV de constat*) but Nkwaya Jules refused to sign it and ENGEN continued to keep these equipments at the station and NKWAYA received the equipments from the bailiff who drafted the hand off statement (*PV de remise*).

[8] They continued arguing that damages of 500,000 Rwf are groundless because Kanyana did not violate the law while what occurred was the statement of petrol station abandonment drafted by AQUILLA director. This implies that they didn't expel it them from the station as pleaded by AQUILLA, and that in such a case the enforcement order is not necessary; for that reason, they find that even the damages of 500,000 Rwf awarded to it should be set aside.

## THE VIEW OF THE COURT

[9] The law of 12/06/2001, regulating the bar of professional court bailiffs provides in its article 18, in its last point that court bailiffs are allowed to execute a certification report called a (*constatations purement matérielles*) when requested by the court, or by any person interested.

[10] In the analysis of the provisions of the article mentioned above, the court finds that the court bailiff KANYANA, upon the request of ENGEN RWANDA Ltd, was entitled to execute the certification report (*PV de constat*) as requested by that company as she states.

[11] However the court finds that in the document called the repossession of the management of Engen petrol station Remera "*reprise de la gestion de la station Engen Remera*", Kanyana indicates that AQUILLA was removed from the station due to the breach of the contract concluded with ENGEN RWANDA Ltd, and this company decided to permanently repossess its station. This clearly demonstrate that AQUILLA was actually expelled from the petrol station

without a court order, while article 18 paragraph 3, stated above provides that court bailiffs are only allowed to expel individuals from a place upon the court's order (*expulsions ordonnées par un tribunal*).

[12] The Court finds that while what happened to AQUILLA was expulsion, the professional court bailiff could not have done it without a court order. For that reason, what she did together with ENGEN are unlawful, thus they have to pay damages.

[13] In its appeal, AQUILLA states that on the first instance requested for 5,000,000 Rwf in damages from Kanyana for what she did without the court order, however the court was silent on it.

[14] As mentioned above, the court finds that ENGEN RWANDA Ltd and KANYANA, both must pay AQUILLA damages for their unlawful act of expelling it from the petrol station without a court order. However, in the discretion of the court, it deserves to be awarded 2,000,000 Rwf in damages, for 5,000,000Rwf it requested is excessive.

**Whether there was a contract between AQUILLA and ENGEN valid from 18th February 2011 to 18/02/2012 and damages for its breach.**

[15] The counsel for AQUILLA states that their ground of appeal is based on the fact that the previous court held that there was no contract between it and ENGEN RWANDA Ltd, valid from 18th February 2011 to 18<sup>th</sup> February 2012, because its original copy was not produced, while it was in the possession of ENGEN RWANDA Ltd, for it took it when it expelled AQUILLA from the petrol station together with the professional court bailiff Kanyana Bibiane.

[16] He continues adducing that the lack of original copy of the contract should not be the basis of the court to rule that there was no existence of the contract but rather it should have considered other evidences proving the existence of the contract with ENGEN RWANDA Ltd, such as:

The certification report (*PV de constat*) drafted by the professional court bailiff Kanyana where she states that ENGEN RWANDA Ltd has repossessed the petrol station because AQUILLA failed to fulfil the obligations in the contract;

-Documents demonstrating that there was correspondence between both parties;

-Purchase order bearing the official stamp of ENGEN;

-Bills on which petroleum products were cleared issued by ENGEN to AQUILLA

[17] The counsel for AQUILLA states that the contract existed; that even the court bailiff Kagame Alexis reported it in the certification report, that Kanyana did not demonstrate the original copy of that contract.

[18] The counsel for AQUILLA argues that basing on the existence of the contract, in the Commercial High Court, AQUILLA requested for 30,000,000 Rwf of damages based on the unlawful termination of the contract, but the court remained silent on it. He added that the court disregarded the gravity of the fault that ENGEN RWANDA Ltd and the professional Court bailiff committed against AQUILLA, but it ordered them to pay little damages thus he requests

those damages to be awarded to AQUILLA, and also be awarded 47,412,000 Rwf in damages resulting from the loss it incurred after 12 months computed on 3,951,000 Rwf it had to accrue of monthly interests.

[19] The counsel for ENGEN RWANDA Ltd argues that the appeal for AQUILLA has no merit because the act performed by ENGEN RWANDA Ltd was to repossess its petrol station which AQUILLA had refused to vacate, while the contract they concluded on 18 February 2010 had expired. Concerning the other contract invoked by AQUILLA; are forged as explained by the previous court after noticing that even the dates of its conclusion on the photocopy were altered, they even filed a case for forgery.

[20] He continues adducing that the requested damages should not be awarded because they are based on that contract, which never existed; even the amounts mentioned above are based on the forged contract. He concludes by stating that the previous court could not presume other evidences based on a false fact.

## THE VIEW OF THE COURT

[21] The court finds as held by the Commercial High Court that the photocopy of the *instrumentum* (contract) which AQUILLA produces, refuted by ENGEN, contains various defects, including:

- The fact that on the last page it is evident that the date of the conclusion of the contract was altered, whereby on top of the page the handwriting in "18è Fevrier 2011" is not the same as in "18ème Fevrier 2011" written at the bottom of the page. - For the word "Fevrier" in photocopy of the *instrumentum* (contract) produced by AQUILLA is capitalized, which differs from the handwriting in "18è Fevrier 2011" written on top.

- It is evident that where "Fevrier" is written in capital letters there are letters which were erased

- It is evident that the last figure of 2011 was erased and replaced by (1)

[22] The Court finds that those defects in addition to the fact that the document AQUILLA produces is a photocopy, it leads the court to hold that there was no contract, valid from 18<sup>th</sup> February 2011 up to 18 February 2012 entered into between AQUILLA and ENGEN RWANDA Ltd, especially that it has not been able to produce its original copy.

[23] The Court finds the statement that the original copy was retained by ENGEN among the equipments it seized as alleged by AQUILLA has no merit, for neither in the certification report drafted by the court bailiff Kanyana, certification report drafted by Court bailiff Kagame nor in the letter it wrote to CID requesting for its equipments, AQUILLA doesn't not raise the issue of the original copy of that contract.

[24] Basing on those explanations, the court finds that there is no basis to decide that the stated contract existed, hence the damages equal to 30,000,000 Rwf which are based on it, or 47,412,000 Rwf resulting from the loss it incurred within 12 months requested by AQUILLA has no merit.

[25] The Court finds as explained by ENGEN in its pleadings in the Commercial High Court, even if on 18<sup>th</sup> March, 2011 it wrote to AQUILLA notifying it of the expiration of the contract between them, they continued to work together although there was no written contract, because ENGEN continued supplying it with its products, waiting for the renewal of the contract which had expired on 18 February 2011. The fact that ENGEN unlawfully expelled AQUILLA from the petrol station convinced the court to award AQUILLA 2,000,000Rwf in damages for unlawful acts committed against it which will be jointly paid by Kanyana and ENGEN RWANDA Ltd, and this court finds those damages are fair.

**Regarding the 32,870,517Rwf in damages equivalent to assets and equipments of AQUILLA which continued to be seized by ENGEN RWANDA Ltd.**

[26] The Counsel for AQUILLA argues that when it was expelled from the petrol station, there were assets and equipments equivalent to 32,870,517 Rwf ENGEN RWANDA Ltd which remained confiscated as it is evidenced by the certification report drafted by Court bailiff Kagame Alexis which indicates those which were missing and those which were found. Their intent is to demonstrate that the issue of the missing assets was raised in the Commercial High Court but ENGEN did not respond on that. However after the judgment was rendered, ENGEN refused to hand them back.

[27] He continues stating that the seized assets includes equipments purchased by AQUILLA as stipulated by article 8 of the contract, that apart from the buildings and petrol pumps all other assets belonged to AQUILLA.

[28] The Counsel for ENGEN RWANDA Ltd states that the ground of appeal of AQUILLA has no merit, because what ENGEN RWANDA Ltd did was to repossess its petrol station which AQUILLA had refused to vacate, and some of the seized asset belonged to ENGEN including, the office files, and the petroleum products stock, He added that AQUILLA should have used it after paying because it had a procedure of working with ENGEN, hence what the court bailiff Kagame Alex handed back to AQUILLA are what belonged to it , and what was not given back to it belonged to ENGEN.

[29] Regarding the petroleum products, the Counsel for ENGEN RWANDA Ltd state that article 10 point 4 of the contract they had concluded provides that in case AQUILLA fails to pay, ENGEN will repay itself from AQUILLA's assets, consequently since AQUILLA owed ENGEN about 12,550,515 Rwf and it issued a bouncing check, it lead it to get payment beginning with gasoline valued at 903,000 Rwf and the "bons" they found there, but again the debt was not cleared.

[30] Regarding the money taken from the safe box evidenced by checks, note of bill, bankslips, purchase order stated by AQUILLA, the Counsel for ENGEN RWANDA Ltd states that AQUILLA did not demonstrate the amount which was in that safe box, thus he finds that what the court bailiff Kagame noted should be followed. AQUILLA

## **THE VIEW OF THE COURT**

[31] The court finds, in the course of the hearing the counsel for ENGEN RWANDA Ltd first stated that the assets it seized belonged to it, because they were at the petrol station, where AQUILLA worked as an employee of ENGEN, later he recanted that it was not its employee I it implies that as AQUILLA was not an employee of ENGEN, there are assets seized by ENGEN that should be restituted to it.

[32] The court finds that among the assets of AQUILLA seized by ENGEN, as demonstrated by the certification report (proces verbal de constat) excuted by the court bailiff Kagame, there are some assets which were not restituted to AQUILLA which include: Gasoline equivalent to 264 ltrs in the tank stating that it is valued at 270,000 Rwf and Gasoil equivalent to 900 Ltrs which AQUILLA states that its valued at 922,500 Rwf, Kerosene which is in the 3<sup>rd</sup> tank 34,600 Ltrs which AQUILLA states that its valued at 24,739,100Rwf, the money in the safe box amounting to 1,885,450 Rwf, and other 277,650 Rwf, 159,000 paid by Millenium on 21<sup>st</sup> July 2011; “bons” which were used equivalent to 970,000 Rwf. AQUILLA in its submissions states that all the seized assets have the value of 32,870,517 Rwf.

[33] The court finds that since there are assets which were not restituted to AQUILLA, while ENGEN RWANDA Ltd failed to prove that they belonged to it, there is no reason as to why they should not be restituted to their owner, AQUILLA. Therefore since ENGEN RWANDA Ltd did not contradict 32,870,517 Rwf as the value of those assets, the Court must hold that value is the one equivalent to the assets of AQUILLA which have to be paid by ENGEN.

**Regarding the excessive amount paid to ENGEN (26,058,200Rwf in addition to the bank interest of 18% per month, equivalent to 115,177,244Rwf); water bills, electricity and cleaning, business licence and taxes imposed by the district.**

[34] The Counsel for AQUILLA states that it should be paid 26,058,200 Rwf by ENGEN RWANDA Ltd which it was paid in excess for fuel, and that excessive amount was demonstrated by auditors, in addition to the bank interest of 18% per month for 18 months equivalent to 115,177,244 Rwf, and be reimbursed the money for water, electricity and for cleaning and 233,333 Rwf equivalent to the business license and the taxes imposed by the District it paid.

[35] The Counsel for ENGEN RWANDA Ltd states that the statements made by AQUILLA are without merit, because it produces no evidence.

[36] The court finds that the money paid in excess 26,058,200Rwf requested by AQUILLA arguing that it was demonstrated by the auditors, it does not demonstrate the link between that excessive money and the unlawful expulsion. Therefore it has no basis for awarding it.

[37] The court finds that the other money requested by AQUILLA for water, electricity and cleaning, business licence and tax imposed by the District its evident that they are operating expenses especially those concerning electricity, water and gas on the building it works from, and according to article 11.2<sup>1</sup> of the contract which AQUILLA relies on in this case demonstrates that it is the one which is supposed to pay those bills, further more as it has been

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<sup>1</sup> Article 11.2 states that: “Le concessionnaire doit...payer sans délai....toutes les factures de consommation d’électricité, eau et gaz dans ou sur les Locaux”

stated above it does not establish the link between that money and its unlawful expulsion from the petrol station, hence the court cannot award them to it.

**Regarding the procedural and counsel fees requested in this case.**

[38] In its appeal, AQUILLA requested to be awarded 5,000,000 Rwf for procedural and counsel fees which should be jointly paid by Kanyana and ENGEN, as requested at the first instance level, but the court was silent on it, therefore, it prays to be awarded them as it had requested before. However, the counsel for ENGEN RWANDA Ltd and assisting Kanyana state that the 500,000Rwf in damages they were ordered to pay by the Commercial High Court has no merit, because the court bailiff did not commit any fault, He requests the court should be set aside, and order AQUILLA to pay 5,000,000 Rwf to ENGEN RWANDA Ltd and Kanyana each because of dragging them in lawsuits.

[39] The court finds that as explained above, AQUILLA was unlawfully expelled from the petrol station of ENGEN because of unlawful acts committed against it; it led it to engage a counsel to follow up on its case up to this court. Therefore there is no reason why ENGEN and Kanyana Bibiane who committed those unlawful acts against it, should not pay the counsel and procedural fees. However, it should be determined in the discretion of the court, since 5,000,000 Rwf it requests is excessive therefore it should be awarded 800,000 Rwf for the procedural and counsel fees on both levels, which should be paid by ENGEN RWANDA Ltd together with Kanyana Bibiane.

### **III. THE DECISION OF THE COURT**

[40] Decides that the appeal of AQUILLA AND PRISCILLA has merit in part;

[41] Decides that there was no contract concluded between AQUILLA-PRISCILLA and ENGEN RWANDA Ltd valid from 18/02/2011 up to 18/02/2012, for there is no evidence produced by AQUILLA;

[42] Orders Kanyana and ENGEN RWANDA Ltd to pay to AQUILLA AND PRISCILLA 2,000,000 Rwf in civil damages for unlawful acts by expelling it from the petrol station without court order

[43] Orders ENGEN RWANDA Ltd to pay AQUILLA AND PRISCILLA 32,870,517 Rwf equivalent to the value of the assets and the equipments ENGEN RWANDA Ltd did not retribute to AQUILLA AND PRISCILLA.

[44] Orders ENGEN and Kanyana to pay to AQUILLA AND PRISCILLA 800,000 Rwf for court fees and Advocate fees;

[45] Orders ENGEN and Kanyana to jointly pay ½ of court fees in this case (31,450), which is equal to 15,725, and AQUILLA to pay ½ another 15,725 Rwf.