

COGEBANQUE LTD v. GAHITIRA

[Rwanda SUPREME COURT – RCOM009/15/CS (Mukanyundo, P.J., Ngagi and Rugabirwa, J.) July 31, 2015]

Commercial procedure – Penalty forcing execution of judgment – Hindrances to the execution of judgment – Since the Notary is the only competent to certify the authenticity of the power of attorney to act on behalf of another person, the bank's refusal, as a professional, to deliver the house title deed prior to production of the notarized power of attorney by the advocate and written contract by the court bailiff as provided by the law cannot be considered as hindrance to the judgment execution, therefore, the penalty forcing judgment execution should be cancelled – Law N°13bis/2014 of 21/05/2014 governing the Office of Notary, article 52(1) – Law N°21/2012 of 14/06/2012 governing the civil, commercial, labour and administrative procedure, article 220.

Facts: COGEBANQUE Ltd granted the loan to DALBIT PETROLEUM Company. The latter failed to repay the loan and this prompted COGEBANQUE Ltd to attach the mortgaged house belonging to Gahitira Cyusa Richard who was still a minor because it was mortgaged by his father who filed the claim on behalf of the child praying for invalidation of the mortgage. The Court invalidated the mortgage agreement because they mortgaged a house belonging to a minor without prior authorization by the court. The dispute arose between parties about the person to whom the house title deed that was still in possession of the bank should be returned. The child's father argues that he is the one to whom it should be handed back while COGEBANQUE Ltd argues that it should rather be handed over to DALBIT PETROLEUM as it is the borrower. The Supreme Court held that the title deed should be handed back to the child's father and in case of the bank's failure to comply within 30 days it shall be liable to the penalty forcing execution of 50,000Frw per day.

The father of Gahitira who is his representative kept requesting the house title deed from the Bank, but the latter requested him to present the notarized power of attorney or any other written contract with Gahitira because the bank had information that the entire family of Gahitira now lives in Europe. As for her, Bailiff Kanyana Bibiane issued the order forcing the bank to pay to deliver the emphyteutic lease title and 12,000,000Frw as a result of penalty forcing judgment execution. She also attached the Bank's car for its auctioning so as to get payment. COGEBANQUE Ltd also immediately filed with the Supreme Court a summary procedure claim requesting cancellation of the penalty forcing execution of judgment. The representative of Gahitira also raised the objection praying for inadmissibility of the claim of the bank on the ground that the summary procedure claim is filed when the court was seized with the principal claim which is pending. The Court rejected the objection and the hearing on merits resumed.

The representative of Gahitira submits that it is the bank that hindered the execution by requiring the power of attorney which prompted him to seek assistance of the bailiff since the latter is not required by any law to have the power of attorney in the judgment execution process.

Held: 1. The fact that the Bank, as a professional, has refused to hand over the house title deed and required prior production of a notarized power of attorney by the advocate and the written contract by the bailiff as provided by the law cannot be considered as hindering judgment execution. Therefore, the appeal of the Bank praying for cancellation of the penalty

forcing judgment execution has merit because it has not refused to execute the judgment and the amount of money claimed from the bank as a penalty forcing execution of judgment should be cancelled as well.

**The Summary procedure claim has merit.
The penalty forcing execution of the judgment is cancelled.
Court fees to the defendant.**

Statute and statutory instruments referred to:

Law N°13bis/2014 of 21/05/2014 governing the Office of Notary, article 52(1).

Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 220.

No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] COGEBANQUE Ltd granted the loan to DALBIT PETROLEUM Company. DALBIT PETROLEUM failed to repay the loan and COGEBANQUE Ltd attached the mortgaged house located at Nyarutarama belonging to Gahitira Cyusa Richard who was still a minor. The house was mortgaged by his father Gahitira Bishumba Raymond who later filed the claim for cancellation of that mortgage on behalf of this child.

[2] The case about cancellation of the mortgage was finally settled by the Supreme Court on 13/09/2013 through judgment N° RCOMA0121/11/CS whereby it was held that the mortgage is cancelled because Gahitira Bishumba Raymond has mortgaged a house of his minor child without prior authorization by the court.

[3] After that judgment, disputes arose between parties about the person to whom the house title deed that was still in possession of COGEBANQUE Ltd should be returned. Gahitira Bishumba Raymond argues that it should be returned to him as the father of the child while COGEBANQUE Ltd states it should be returned to DALBIT PETROLEUM in its capacity of the borrower.

[4] Gahitira Cyusa Richard represented by his father filed a claim with the Supreme Court praying for settlement of that dispute. In the judgment RCOMA0004/14/CS - RCOMA0121/11/CS, this Court ruled that in his capacity as the father of the child Gahitira Bishumba Raymond is the one to whom the title deed of the house mortgaged to secure the loan granted to DALBIT PETROLEUM should be handed back. It ruled that in case of failure to comply by COGEBANQUE Ltd within 30 days from the date of judgment delivery, it shall be subjected to the penalty forcing execution of judgment of 50,000Frw per day.

[5] COGEBANQUE Ltd argues that it was requested by Counsel Mutembe Protais who represented Gahitira Cyusa Richard to hand to him that title deed and in return it requested him to first present the notarized power of attorney with more reasons that it had information that Gahitira and his entire family were then living in Europe; but Mutembe did not comply. Thereafter, the professional Bailiff Kanyana Bibiane has also requested that title deed, but the

bank also requested her to present the notarized power of attorney or a written contract that might exist between her and Gahitira Bishumba Raymond.

[6] Later on, the Professional Bailiff Kanyana Bibiane issued an enforcement order preceding the distraint by which she ordered COGEBANQUE Ltd to pay 12,000,000Frw computed pursuant to judgment RCOMA0004/14/CS - RCOMA 0121/11/CS and to hand back the house title deed to Gahitira Raymond. Later, she has also attached the Ford brand car plate N° RAB 779 V of COGEBANQUE for its auction to get 12,000,000Frw of the penalty forcing COGEBANQUE to pay. The public auction of that car was scheduled on 21/07/2015.

[7] COGEBANQUE Ltd filed a summary procedure claim with the Supreme Court requesting cancellation of the penalty forcing judgment execution (*astreinte*) imposed by judgment RCOMA0004/14/CS - RCOMA0121/11/CS because it has not refused to execute the judgment, but it was rather blocked from executing the judgment.

[8] The case was heard in public on 28/07/2015 where COGEBANQUE Ltd was represented by Counsel Kayitare Serge while Gahitira Cyusa Richard was represented by Counsel Mutembe Protais.

[9] Pursuant to article 316 of Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, Counsel Mutembe Protais raised an objection of inadmissibility of the claim of COGEBANQUE Ltd arguing that the summary procedure claim is filed with the court seized with the principal claim still pending; therefore this claim should not be admitted.

[10] Counsel Kayitare Serge submits that article 220 of the aforesaid Law N°21/2012 provides that the court may, upon summary proceedings by the penalised person cancel, suspend the penalty forcing execution during a specified period or reduce it, if the person ordered to pay finds it temporarily or permanently impossible to pay the total or part of the principal penalty awarded. Therefore, he finds no ground why this Court should not admit this summary procedure claim account taken of its nature.

[11] After deliberations in camera and pursuant to article 220 of the aforesaid Law N°21/2012, the Court rejected the objection raised by Counsel Mutembe Protais and the hearing on merits resumed.

II. ANALYSIS OF LEGAL ISSUES

Whether the penalty forcing execution of judgment imposed on COGEBANQUE Ltd should be cancelled.

[12] Counsel Kayitare Serge submits that COGEBANQUE Ltd has not refused to deliver the ownership title deed, but it instead requested Counsel Mutembe to produce the notarized power of attorney signed by Gahitira Bishumba Raymond or issued by the Embassy as provided for by article 52 of Law N°13bis/2014 of 21/05/2014 governing the Office of Notary. He states that Counsel Mutembe has never presented it. Thereafter, came also the Professional Bailiff Kanyana Bibiane to whom COGEBANQUE also requested the same power of attorney or any contract that might exist between her and Gahitira Bishumba Raymond and which she also failed to produce. What followed is that on 11/5/2015, Kanyana issued an enforcement order preceding the distraint whereby she ordered COGEBANQUE to

pay 12,000,000Frw of penalty forcing execution of the judgment and to return the house title deed to Gahitira B. Raymond. On 10/7/2015, Kanyana attached the Ford branded car plate N° RAB 779 V of COGEBANQUE for its auction to get the aforesaid amount of money. Counsel Kayitare Serge argues that he fails to understand any link between attachment of the car and the ownership title deed. He has questions about why Counsel Mutembe and Kanyana do not first abide by the law in order to get reply to their requests. He finds that they purposefully do so to increase the amount of fees of that penalty. This is why COGEBANQUE Ltd requests cancellation of this penalty as it has never refused to execute the judgment, but it was rather blocked from executing it.

[13] In addition, Counsel Kayitare Serge submits that from the date of judgment delivery on 06/08/2014 the execution of judgment was followed up by Counsel Mutembe while the Bank has only seen Bailiff Kanyana Bibiane in May 2015 when she brought her letter ordering payment of the penalty forcing execution of judgment. He explains that Kanyana Bibiane came to request money instead of requesting the title deed for the house of Gahitira Cyusa Richard; and when COGEBANQUE Ltd requested her to present the written contract between her and Gahitira Bishumba Raymond she did not produce it and it replied her that once she will present that contract and it will give her the title deed.

[14] Counsel Kayitare Serge concludes submitting that the Bank has never refused to comply with what it was requested to hand over; but it was instead blocked from doing so. He further argues that in case Gahitira Bishumba Raymond may personally come or give the notarized power of attorney, he may be given that title deed without any obstacle. He requests the Court to cancel the penalty forcing execution of judgment or reduce it as also provided by article 220 of the aforesaid Law N°21/2012.

[15] Counsel Mutembe Protais argues that it is rather COGEBANQUE Ltd that blocked Gahitira Bishumba Raymond by requesting a notarized power of attorney. He further argues that the Bank had refused to voluntarily hand over that title deed which prompted Gahitira Bishumba Raymond to hire the services of a Bailiff for its forceful hand over by the bank. Moreover, he says that the Bank should have handed over that title deed to Kanyana Bibiane since the bailiff is not required by any law to be in possession of the power of attorney for purposes of judgment execution.

[16] Counsel Mutembe Protais submits that Kanyana Bibiane came to request money instead of the house title deed because the Bank has blocked them and when they realised nothing could be done they resorted to the forceful procedure.

THE VIEW OF THE COURT

[17] In respect to the notarized power of attorney requested by COGEBANQUE Ltd, Counsel Mutembe Protais representing Gahitira Cyusa Richard argues that article 52, paragraph one of Law N°13bis/2014 of 21/05/2014 governing the Office of Notary provides that the competent Notary shall be qualified to certify the authenticity of a power of attorney issued to one or more persons in order to act on behalf of one or more persons.

[18] Pursuant to the aforesaid article 52, the Court finds that only the Notary is competent to certify the authenticity of the power of attorney to act on behalf of another person. Even if the principle is that the mandate contract is concluded by the mere consents of the parties, the third party may require the notarized power of attorney account taken of the nature of the

mandate. This is emphasized by the legal scholar Michel Beauchamp who points out that for more safety, the power of attorney should be notarized. This gives it more value as the Notary certifies that the principal really wants to entrust some powers to his/her agent who also agrees to accept¹. The fact that COGEBANQUE Ltd wanted to ascertain the authenticity of the power of attorney given by Gahitira Bishumba Raymond to Counsel Mutembe Protais and required its authentication by the Notary cannot be considered as an obstacle set by the Bank. The Court finds that the Bank, as a professional, could not hand over the house title deed simply on the basis of the power of attorney that is not notarized even if it was presented by an advocate. The fact that the Bank doubted and required a notarized power of attorney cannot be considered as setting obstacles with more reasons that Counsel Mutembe Protais does not explain any ground of his failure to present that power of attorney to the bank.

[19] With regard to the fact that the Bank blocked the Professional Bailiff Kanyana Bibiane from executing the judgment, the Court finds that after delivery of the Supreme Court judgment N° RCOMA0004/14/CS - RCOMA0121/11/CS of 06/08/2014 to 09/03/2015, Kanyana Bibiane has not requested COGEBANQUE Ltd to pay and that she only notified to COGEBANQUE Ltd the enforcement order preceding distraint in execution of the aforesaid judgment on 10/3/2015.

[20] The Court finds that on 10/03/2015, COGEBANQUE Ltd replied to Kanyana that it has not refused to execute the judgment, but it is rather waiting for Counsel Mutembe Protais to submit the necessary document it requested him to submit and on the same occasion it also requested her to present the written contract between her and Gahitira Bishumba Raymond empowering her to execute that judgment pursuant to article 38² of Law N°12/2013 of 22/03/2013 governing the Bailiff Function. Since Kanyana Bibiane has not presented that written contract provided for by the law before she could be given the title deed, the Court cannot find any ground to decide that COGEBANQUE Ltd refused to execute the judgment.

[21] Pursuant to article 220 of the aforesaid Law N°21/2012, the Court finds with merit the appeal of COGEBANQUE Ltd praying for cancellation of the penalty forcing execution of the judgment (*astreinte*) imposed by judgment RCOMA0004/14/CS - RCOMA0121/11/CS of 06/08/2014; therefore 12,000,000Frw claimed from the Bank as the penalty forcing execution should be cancelled.

III. THE DECISION OF THE COURT

[22] The Court decides that the summary procedure claim filed by COGEBANQUE Ltd has merit.

[23] The Court rules that the penalty forcing execution of the judgment ordered in judgment RCOMA0004/14/CS - RCOMA0121/11/CS of 06/08/2014 should not be executed.

¹ “For more safety,... it is advisable to execute a notarized power of attorney. “It has more value. Indeed, the notary certifies that the principal really wants to entrust some powers to his agent who also agrees to accept” (Maryse Guénette, Prudence avec les procurations, <https://www.lebelage.ca/argent-et-droits/vos-droits/prudence-avec-les-procurations?page=all>, accessed on 31/7/2015).

² Before executing any judgment, decisions or any other enforcement orders, the professional bailiff shall conclude a written contract with the client specifying the amount of his/her fees and the modalities of payment. That contract must take into account the scale referred to in article 37 of this Law.

[24] The Court rules that 12,000,000Frw; Gahitira Bishumba Raymond claims from COGEBANQUE Ltd on behalf of his child Gahitira Cyusa Richard as a penalty forcing execution of the judgment are cancelled.

[25] The Court rules that once Gahitira Bishumba Raymond will personally come to collect the title deed of the house of his child Gahitira Cyusa Richard or send an agent with notarized power of attorney and GOGEBANQUE Ltd refuses to hand over the aforesaid title deed it shall be subjected to the penalty forcing judgment execution of 50,000Frw per day that shall be computed from that day.

[26] The Court orders Gahitira Cyusa Richard to pay court fees equal to 100,000Frw.