

KIGALI CITY v. KAGABO

[Rwanda SUPREME COURT – RADA0017/11/CS (Nyirinkwaya, P.J., Kayitesi R. na Hatangimbabazi, J.) May 04, 2012]

Administrative law – Administrative decisions – The principle of automatic execution – Administration has the prerogative to execute their decisions without resorting to the prior authorization of a judge.

Administrative Law – The principle of “privilege d’exécution d’office or “Exécution forcée” – It constitutes the authority of the administration which entails its decision to be binding on citizens – That principle implies that the administration can recourse to the government coercion to protect the public interest but in case it prejudices an individual interest, it has to be authorized by the court basing on three elements: the existence of law that expressly provides for it, the lack of other means to protect the public interest or the existence of urgency for the execution of the administrative decision or one of those – When the administration recourse to the coercion in the absence of one of those elements or in case an individual has not resisted to execute its decision, this is regarded as a fault for which the administration has to be held liable.

Facts: The vehicle of Kagabo (MERCEDES Benz RAB196D) was seized by the police on the instructions of the Kigali City because it destroyed the palm trees when it had an accident and demanded him to pay 2,000,000Frw. After requesting for its release but in vain he sued Kigali City before the High Court requesting for various damages because of the seizure of his vehicle and to be given it back. That Court held that Kigali City should pay him various damages and the hand back of the vehicle and its yellow card.

That Court relied on the fact that the decision made by Kigali City to seize the MERCEDES Benz RAB 196D vehicle, until Kagabo Achille pays 2.000.000Frw in fine was taken in accordance to the general instructions contained in the book of November 2004 called “the book of penalties for some of the petty offences committed in the Kigali City” which has not been signed, which was not intended to implement the environmental law since this came into force latter and those instructions are contrary to the laws on which they should rely, and that they did not follow the right procedure in order to be lawful and binding. In addition to that, such decision provided for a severe sanction compared to the fault consisting of damaging the ornamental palm tree through accident while this is likely to be committed by anybody as this results in an unforeseen event.

Kigali City appealed to the Supreme Court claiming that there exists a principle in accordance to which the administrative decisions are automatically executed (privilège du préalable et d’exécution forcée) and contested in courts of law latter therefore Kagabo should have first paid damages for the palm trees as it was required in the decision of Kigali City and sue later. They claim in addition that although those principles were not argued upon but the Court should have based on it on its own because it is knowledgeable about the law. Regarding the fine which Kagabo was charged, it supports that they are lawful because they relied on the instructions of RURA but damages amounting 25,000Frw per day which it was charged by the court is excessive because the time the vehicle of Kagabo has spent is unknown.

In the defence of Kagabo, he argues that the principle or law scholars’ opinions cannot be relied upon where laws in the matter exist. Thus the act of Kigali City of ordering him to pay

for the destroyed ornamental palm trees instead of demanding it from his insurer which is Phoenix insurance S.A is contrary to the insurance laws where the prejudiced one has to claim the payment from the insurer instead of the insured. Regarding damages, he argues that the Court awarded them in its discretion because he had requested for excessive damages but it awarded him that amount. He lodged a cross appeal requesting to be awarded 30,000Frw x 354 (per day) for renting another vehicle since the date of judgment of the High Court, counsel and the procedural fees in addition to those he was awarded in the High Court. He concludes by requesting the penalty forcing execution in case Kigali City defaults to pay at time.

Regarding the cross appeal, the Kigali City alleges that the fact for him to have rented another car was due to his failure to comply with the decision of the Kigali City because if he did, he would have been given back his vehicle instantly. Regarding the procedural and counsel fees, it alleges that given that he was represented he should not claim for the procedural fees, rather he should request for the counsel fees, and on the penalty forcing execution it claims that it has means for payment in case it loses the case therefore there is no need to impose it.

Held: 1. The administrative decisions have the privilege to be executed as such and are presumed to be lawful before they are contested in the courts of law (*privilège du préalable*) and the Government is exempted from first resorting to the courts for citizen who did not participate in its enactment to abide by it.

2. The principle of automatic execution provides that the administration can use the government coercion to protect the public interest but when it prejudices an individual interest it has to be authorized by the court basing on the three elements: the existence of the law that expressly provides for it, when there is no other means to protect public interest or when there is an urgency for the execution of the administrative decision or one of them. Therefore if the coercion is resorted to in the absence of one of those elements or in case an individual has not refused to execute the decision, it is regarded as a fault for which the administration has to be held liable.

3. The decision to seize the vehicle until the fine is paid is a decision made by Kigali City which prejudices to a person's interests since it is based on the instructions which did not follow the right procedure, like not having been affixed a signature, not published in the official gazette, came into force without the existence of any law it is meant to implement especially that the law came into force latter, thus the instructions of Kigali City and the decisions relating to them including the penalties for destroying the ornamental palm trees are illegal which implies even the seizure of Kagabo's vehicle which relied on those instructions is illegal.

4. There is no urgency (*intérêt immédiat*) or imminent interest for the police to seize a personal vehicle and deprive the owner the right to drive it when it has its documents and the owner having a residence because the default of instant payment of the fine does not obstruct anything.

5 The ground for the appeal of Kigali City that the court on its own motion should have based on those principles is not a new claim because those principles are common and they are often based on in the administrative decisions but have to be applied in fulfilment of the conditions laid down, which is not the case. Thus the pecuniary damages of 25,000Frw per day awarded by the High Court has to be computed until the case will be delivered in this court.

6. The pecuniary damages awarded to Kagabo has merit because of the fault committed by Kigali City of seizing his vehicle unlawfully while there were other remedies for the payment of the palm trees.
7. There is no proof that the vehicle of Kagabo was sold, therefore the money for rent of another vehicle lacks merit and should not be awarded.
8. The procedural and counsel fees awarded in the previous court is sustained and he should be awarded additional amount corresponding to appeal level upon the court's discretion.
9. In case there is no evidence that Kigali City sold the vehicle, the penalty forcing execution should not be ordered against it, because there is no reason why Kagabo do not get back his vehicle.

**The appeal has no merit;
The cross appeal has partial merit;
Court fees on Kigali City.**

Statutes and statutory instruments referred to:

Law N°18/2004 of 20/6/2004 relating to the civil, commercial, labour and administrative procedure, article 346.

Decree - Law N°20/75 of June 20, 1975 regulating insurance, article 37.

No case referred to.

Doctrine:

J.Rivero et J.Waline, *Droit administratif*, Paris, Dalloz, 20^eédition, p.334.

Judgment

I. BACKGROUND OF THE CASE.

[1] The vehicle of Achille of MERCEDES Benz RAB196D model which was insured in “Phoenix of Rwanda Assurance S.A” had an accident and destroyed two palm trees and a post of “Hard ware unique, and was immediately seized by the police pursuant to the instructions of Kigali City. Kagabo requested for the release of his vehicle but in vain because those instructions provides for the seizure of the vehicles which destroy the trees.

[2] Kagabo seized the High Court, requesting to be given his vehicle and its yellow card back and various damages for the seizure of his vehicle .In the judgment RAD0008/10/HC/KIG rendered on 19/04/2011 the Court held that the vehicle be released and together with the yellow card be returned to the owner, Kagabo Achilles, and ordered Kigali City to pay him 25,000Frw per day since it was seized up to the day this judgment was rendered, that is to say 6,475,000Frw, moral damages and procedural and counsel fees, totalling to 7,475,000Frw.

[3] The motivation of the Court was that the decision to seize the vehicle MERCEDES Benz RAB 196D until Kagabo pays 2,000,000Frw was based on the general instructions which are in the book of November 2004 entitled “the book of penalties of some of the faults committed in the Kigali City” which has no signatory, was not put in place to enforce an

environmental law because it came into force after them, are contrary to the laws which it had to enforce, did not follow the rightful procedure. In addition to that the decision was so heavy compared to the offence it was penalising which could be committed by anybody because palm tree was destroyed by an accident which cannot be prevented.

[4] Kigali City appealed in the Supreme Court claiming that the High Court disregarded that Kagabo had to first execute the decision of the administration, and pay for the damaged trees, and latter seize the courts of law, was awarded baseless damages. The screening judge ruled that it has a *prema facie* case.

[5] The case was heard in public on 28/02/2012, Kigali City being represented by state attorney Umujyi Sebazungu Alphonse, and Kagabo Achille by Counsel Nkundabarashi Moise.

II. ANALYSIS OF THE LEGAL ISSUES

Wether Kagabo Achille had to first execute the decision of Kigali City of paying the destroyed palm tree before he seized the court of law.

[6] The counsel for Kigali City claim that even though the decision of Kigali City was illegal, Kagabo had to comply with the principle of execution *ex-officio* and prior execution (*privilège du préalable et d'exécution forcée*). He adduces that even though those principles were not debated upon, but the court on its own motion should have based on it, and rules that Kagabo did not execute the decision of Kigali City as it is in the instructions of 2004, therefore do not award him damages.

[7] The counsel for Kagabo claims that the ground of not complying with the principles should not be admissible because law scholars' opinions, cannot apply in lieu of existent laws. He explains that the act of Kigali City of ordering Kagabo to pay for the destroyed palm trees instead of his insurer ``Phoenix insurance S.A`` is illegal because the prejudiced claim for the compensation from the insurer instead of the one who caused the prejudice.

[8] Regarding the principle of execution *ex-officio* and prior execution (“*Privilège du préalable*” et “*privilège d'exécution d'office*”), even though the Rwandan law is silent on that issue but those principles are well established that the administrative decisions are executed as they are, because they are in the spirit of protecting the public interest.

[9] The law scholars explain that prior execution principle “*privilège du préalable*” is the principle whereby the administrative decision has to be executed as if it is lawful before it is contested in the courts of law (*La décision exécutoire bénéficie, avant toute vérification par le juge, d'une présomption de conformité au droit*)¹. André de Laubadère states that, in summary that principle means that the government is exempted from first resorting to courts of law for its decision to be implemented by a third party. (*L'administration se trouve dispensée, pour réaliser ses droits, de s'adresser préalablement à un juge; si l'administré conteste les prétentions de l'administration, c'est lui qui devra saisir le juge*).

[10] And for the execution *ex officio* or coercive execution “*privilège d'exécution d'office* ou “*Exécution forcée*” is the force (*contrainte*), a unilateral decision of an administrator which creates rights and obligations for third parties (*acte juridique accompli unilatéralement*

¹ *Idem*, p.354.

par une autorité publique administrative et créant pour les tiers des droits ou des obligations)². This principle means that the administration can apply the government coercion for its decision to be applied without initiating a claim to the court (ce privilège signifie que l'administration peut employer la contrainte contre le particulier réfractaire en recourant à la force publique et sans saisir le juge).

[11] The entitlement of using the government coercion to protect the public interest, when it prejudices an individual rights has to be endorsed by the court³ decision granted basing on the following three conditions:

When there is a law providing for it (une loi qui prévoit expressément le recours à la force publique pour faire exécuter un acte unilatéral ou exécution forcée).

When there is no other means of protection of public interest (absence d'autre voie de droit pour sauvegarder l'intérêt général).

When there is urgency for the execution of that decision. (Exécution forcée en cas d'Urgence, affaire Société immobilière Saint-Just, TC, 1902).

[12] The legal scholars again state that when the administrators apply the government coercion (recours à l'exécution forcée) in absence of those conditions or when a person has not refused to comply with the administrative decision, the administration commits a fault of which it has to be held liable (Lorsque l'administration procède à une exécution forcée en dehors de ces 3 hypothèses ou encore lorsqu'il n'y a pas de résistance, de l'administré, elle commet une faute de nature à engager sa responsabilité⁴).

[13] Concerning the 1st condition of the availability of a law providing for that seizure by the police: It is evident that the decision to seize Kagabo's vehicle and ordering him to first pay the fine is a decision made by Kigali City which was executed by the police. The issue is to analyze if there is one of the conditions explained above which is likely to back the seizure because it is a decision which prejudices an individual's interests.

[14] The Court is of the view that as it was held by the High Court, those instructions are contrary to the laws because they did not comply with the formalities set down by the law for it to be valid, such as inexistence of the signatory, default of publication the official gazette and especially that it was adopted before the existence of the law it was intended to enforce as that law came into force after those instructions which means it was early. Therefore the instructions of Kigali City and the decisions related to them including the penalties for destroying the palm trees are unlawful, that is to say that the seizure of Kagabo's vehicle which is based on those instructions is unlawful as well.

[15] Concerning the 2nd condition that there existed no other alternative to protect the two palm trees which were destroyed, apart from seizing Kagabo's vehicle so that he pays the fine, the Court finds that there are other alternative means which could have been used to protect the destroyed ones because Kagabo demonstrated that his vehicle has an insurance from Phoenix Insurance, therefore Kigali City should have held the insurer accountable basing on article 37 of the Decree- Law N^o20/75 of 20 June 1975 which provides that the insurer is held accountable for the damage caused by third party, nonetheless he has to prove

² J.Rivero et J.Waline, Droit administratif, Paris, Dalloz, 20^eédition, p.334.

³ <http://www.luiss.it/erasmuslaw/francia/amm-03.htm>; page 1.

<http://www.lemondepolitique.fr/cours/droit-public/actes-administrat....>, 1920.

⁴ <http://www.lemondepolitique.fr/cours/droit-public/actes-administrat...> page 20.

the fault of the one who caused the damage. The insurer cannot pay the total or part of the money to any person apart from the one who was prejudiced. Kigali City could also have ordered him to pay the fine in a certain period without depriving him of his right to use his vehicle considering the amount of fine he had to pay or it would have imposed him another penalty.

[16] Regarding the 3rd condition concerning the urgency which drove the police to seize a personal vehicle and deprive her/him the right to drive it when it has its document, the owner having a known residence, the Court finds that there is no direct interest (*intérêt immédiat*) for the police to seize the vehicle of Kagabo because the default of payment of fine instantly would obstruct nothing.

[17] Pursuant to the laws and the explanations given above, the Court finds that the fact for the Kigali City to state that the High Court should on its own motion based on those principles is not a new claim as claimed by the counsel for Kagabo Anchille because those principles are common and are applied in regards to the administrative decisions, but have to be applied in compliance with conditions explained above. The Court is of the view that no condition among them was fulfilled for the court to rely on them.

The basis and amount of pecuniary damages

[18] The counsel for Kigali City claims that due to the fact that those fines were based on the instructions of RURA, no mistake was made but that damages amounting to 25,000Frw per day awarded by the court are excessive because the period Kagabo Achille's vehicle has spent is unknown, therefore it should have been computed on 20,000Frw because it may have been old to the extent that it could not be used every day for 20 days a month especially that it was not meant to work during holidays (Saturday, Sunday, incidental holidays), therefore the total of damages should amount to 6,800,000Frw.

[19] The counsel for Kagabo argues that even though in the previous Court he prayed for damages amounting to 89,000Frw per day, but the Court awarded him 25,000Frw per day upon its own discretion, he is of the view that no mistake was made.

[20] Regarding the basis of the awarded damages basing on the explanations above, the Court finds that the pecuniary damages awarded to Kagabo has merit due to the fault committed by Kigali City consisting of seizing his vehicle without any basis of the law. There are other means through which the palm trees should have been paid or Kagabo given another penalty, and there was no urgency in the decision taken against him, therefore Kagabo should not have been deprived of the right on his vehicle for long a time that he has to pay for the destroyed palm trees while the vehicle was insured. Concerning the amount of the damages of 25,000Frw per day awarded by the High Court, the Court finds that it is enough regarding the rental price of the vehicle in Kigali City, without considering the activity of the vehicle or the number of working days because it is the right of the owner to decide whether drive it even during public holidays and there is no proof that it was old or had a technical problem to the extent that it had to spend days without working, therefore the appeal of Kigali City has no merit on that ground.

Cross appeal

[21] The Counsel for Kagabo Achille claims that since the hearing of the case in the High Court, the vehicle was auctioned by Kigali City and after realising that getting it back will be hard he decided to rent another one at 30,000Frw per day. He states that the rent contract was

concluded on 10/04/2011, therefore he requests for 30,000Frw x 354 (days) = 10,620,000Frw.

[22] He adds that in the High Court he had requested for 2,000,000Frw for the counsel fees and 2,000,000 for the procedural fees, but the High Court awarded him only 1,000,000Frw, and now he requests for counsel fees of 1,000,000Frw for procedural expenses on the appeal instance level, 1,000,000Frw of counsel fees for first instance case and 1,000,000Frw on the appeal level.

[23] Regarding Kagabo's renting of a car, the counsel for Kigali City argues that it was due to his fault because had he executed the decision of Kigali City he would have got back his vehicle, while regarding the procedural and counsel fees, he adduces that since Kagabo was represented in court, he should claim for counsel fees but not procedural fees.

[24] The court finds that there is no proof that his vehicle was sold, thus the money for the rent he is claiming for has no basis for the court to award it.

[25] The Court finds that the pecuniary damages of 25000Frw per day as awarded by the High Court should continue to be computed up to the day the judgment in this court be rendered. That is to say from 19/4/2011 when the High court rendered the judgment up to 04/05/2012, when this court rendered this judgment, which is 375 days. Thus Kagabo Achille has to be awarded pecuniary damages amounting to 25,000Frw x 375 = 9,375,000Frw

[26] Concerning procedural and counsel fees, the Court finds that the one awarded by the High Court is sufficient, but the Court awards Kagabo Achille 500,000Frw for both procedural and counsel fees upon its own discretion for appeal level.

[27] The Court finds that the total of the money Kagabo Achille has to be paid is as follow: 6,475,000Frw for pecuniary damages and 1,000,000Frw for procedural and counsel fees awarded by the High Court, plus 9,375,000Frw as shown above, 500,000Frw of the procedural and counsel fees awarded by this court, all in total amounting to 17,375,000Frw.

Penalty forcing the execution.

[28] The counsel for Kagabo Achille claims that because the vehicle was sold, it will be hard to get it back, thus he requests the court to order for the fine forcing Kigali City to execute the judgment in due time.

[29] The counsel for Kigali City argue that the vehicle was not sold and Kigali City has money, therefore in case it loses the case, it has the capacity to pay, therefore there no need for fine to force the execution.

[30] Article 346 of the Law N°18/2004 of 20/6/2004 Law relating to the civil, commercial, labour and administrative procedure as modified up to date provides "When a court makes a decision in administrative cases, it may issue to an administrative organ, an order to do or an injunction restraining it from doing an action or operation, and prescribe a penalty for the noncompliance with a determined date".

[31] The Court find that Kagabo does not produce evidence that Kigali City sold his vehicle, therefore it cannot order for the fine forcing the execution because nothing is likely to prevent Kagabo to get back his vehicle, thus the ground for the fine forcing the execution of the judgment has no merit.

III. DECISION OF THE COURT

[32] It holds that the appeal of Kigali City has no merit;

[33] It holds that the cross appeal of Kagabo Achille has partial merit;

[34] It holds that pecuniary damages of 25,000Frw as held by the High Court continue to be computed until the day this judgment has been rendered in this Court.

[35] It overturns the Judgment N° R.AD0008/10/HCL/Kig rendered by the High Court on 9/04/2011 in regards to pecuniary damages, procedural and counsel fees.

[36] It orders Kigali City to pay pecuniary damages, procedural and counsel fees to Kagabo all amounting to 17,375,000 as explained.

[37] It orders Kigali City to pay court fees amounting to 45,600Frw.