

BRALIRWA v. GISA

[Rwanda SUPREME COURT – RCOMAA00023/2017/SC
(Hatangimbabazi, P.J., Ngagi and Kanyange, J.) October 06,
2017]

Commercial procedure – Jurisdiction of Commercial Courts – Non-contractual obligations – Non-contractual obligations are treated as commercial obligations when they arise from commercial activity – The cases which results from such obligations are within the jurisdiction of the commercial courts.

Commercial procedure – Jurisdiction of courts – Pecunial jurisdiction – Damages awarded in the case – The amount of damages awarded by a judge in the event of a dispute shall be the basis for determining whether the appeal is within the jurisdiction of the Supreme Court – Organic Law N° 03/2012 / OL of 13/06/2012 determining the organization, functioning and jurisdiction of the supreme court, article 28, paragraph 2, section 7.

Facts: Gisa Frediane sued BRALIRWA Ltd in the Commercial Court of Nyarugenge alleging that it used her images in the media (TVR and You tube) in the advertisement of its Heineken product without her permission and for that she prays to Court to award her various damages amounting to 130,000,000Frw.

BRALIRWA Ltd raised a preliminary objection of lack of jurisdiction of the commercial courts stating that the claim should not be admitted, rather that it should have been lodged in ordinary courts because the issue is violation of privacy which is a civil case, within the jurisdiction of the ordinary courts.

On the contrary, the court held that the case was within its jurisdiction because the defendant is a commercial company, and that the defendant's alleged use of images and photographs of the plaintiff to advertise its business is treated as a commercial activity.

In the ruling of the case on its merits, the Commercial Court of Nyarugenge found the plaintiff's claim was unfounded, thus no damages awarded to her because the court found that BRALIRWA Ltd did not use her images and audio to advertise its products and ordered the plaintiff to pay BRALIRWA procedural fees.

Gisa was dissatisfied with the outcome of the case and appealed to the Commercial High Court arguing that the previous court disregarded BRALIRWA Ltd's role in advertising its Heineken product using her images and photographs while the defendant admitted that the images and photographs were used. In advertising its beer without having a contract with her, therefore Gisa prays to the court to award her damages which the previous court denied her.

In this Court, BRALIRWA Ltd raised again its objection of lack of jurisdiction of the commercial courts, stating that in the event where images or photographs of a person are used in advertising without the permission of the owner, is a civil matter which has to be settled by the ordinary courts. The court overruled the objection and on the merit of the case, it ruled that the appeal was well-founded because it found that BRALIRWA had used the images and photographs of Gisa without permission, overturned the rulings of the case and ordered BRALIRWA to pay her 8,200,000Frw in damages.

BRALIRWA appealed to the Supreme Court requesting the court to re-examine whether it is liable for damages for using Gisa's audio and images in advertising of its product, because it never meet her. In her defence, Gisa raised an objection of lack of jurisdiction of the appellant court because the damages awarded in the appealed judgment is less than 50,000,000Frw. On the side of BRALIRWA Ltd, it argues that this court has jurisdiction on the ground that the damages requested are more than 50,000,000Frw because the damages which were initially claimed are 130,000,000Frw and also that the jurisdiction of this is Court is again based on the ground that this case was heard by the commercial courts, which had no jurisdiction.

Gisa Frediane, on the other hand, argues that based on the Organic Law on the organisation, functioning and jurisdiction of commercial courts, she finds that the previous courts had jurisdiction because the contested activities referred to in this case are commercial in nature.

Held: 1. Non-contractual obligations are treated as commercial obligations when they arise from business activity, therefore the cases which results from those obligations are within the jurisdiction of the commercial courts.

2. The amount of damages awarded by a judge in the event of a dispute shall be the basis for determining whether the appeal is within the jurisdiction of the Supreme Court, rather than merely basing on the value of the subjectmatter as submitted by the party in his or her claim.

The objection of lack of jurisdiction on the ground that the damages awarded in the appealed judgment is less than 50,000,000Frw is sustained;

**Appeal rejected;
Court fees deposit covers the expenses of the case.**

Statutes and statutory instruments referred to:

Organic Law N ° 03/2012 / OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, article 28.

Organic Law N°06/2012/OL of 14/09/2012 determining the organisation, functioning and jurisdiction of commercial courts, article 2.

Cases referred to:

RCOMAA 00020/2016/SC – RCOMAA 0025/15/CS, Rural Development Solution Company Ltd v District of Nyabihu rendered by the Supreme Court on 21/04/2017

Authors cited:

D. FASQUELLE, M.- A. FASQUELLE, Droit de l'entreprise 2010/2011, "Introduction au droit et au droit commercial", Paris, Lamy, 2010 p. 143.

Judgment

I. BACKGROUND OF THE CASE

[1] Gisa Frediane filed a lawsuit in the Nyarugenge Commercial Court, accusing Bralirwa Ltd of using her images to advertise its Heineken brand without her permission, and of using her photos on television (RTV), " You tube", "Websites " with her consent and therefore claim for various damages.

[2] At the preliminary hearing on 05/10/2016, Bralirwa Ltd's counsel raised an objection of inadmissibility of the claim because it was not within the jurisdiction of the Commercial Court, whereby its counsel argued that the claim is based on the law of intellectual property, while yet Gisa did not first demonstrate that her claims are indeed part of intellectual property, and that he has no business contract with Bralirwa Ltd. On 11/10/2016, the Commercial Court of Nyarugenge ruled that the claim filed by Gisa Frediane was within its jurisdiction, after finding that Bralirwa Ltd is a commercial company, and that the action in which its also alleged to have involved the use of images and photographs of Gisa Frediane. which is to advertise its Heineken product, is considered as a commercial activity.

[3] The case was heard in merit and in the Judgment RCOM 00965/2016/TC/NYGE rendered on 28/10/2016, the Commercial Court of Nyarugenge found Gisa Frediane's claim without merit and held that Bralirwa Ltd had not advertised its Heineken product using her images and sounds to the extent that it could compensate her. It ordered her to pay Bralirwa Ltd 600,000Frw for procedural and counsel fee.

[4] Gisa Frediane was dissatisfied with the outcome of the case at Commercial Court of Nyarugenge, and she appealed to the Commercial High Court stating that the trial court disregarded BRALIRWA Ltd's role in advertising its Heineken products using her images and photographs and the damages she requested were not awarded.

[5] BRALIRWA Ltd, also, reiterated its objections of inadmissibility on the ground that the case was not within the jurisdiction of the commercial courts, because in the event that

images or photographs of a person are used in advertisement without her permission, it is a civil matter which has to be taken in ordinary courts

[6] In the Judgment RCOMA 00645/2016 / CHC / HCC rendered on 09/02/2017, the High Court of Commerce found that the case was within the jurisdiction of the Commercial Courts and held that Gisa Frediane's appeal was well-founded. It also held that BRALIRWA Ltd had used the photographs and photographs of Gisa Frediane without her permission, ordering it to pay her 8,200,000Frw and to reimburse her all the costs of the case at the first and appeal levels.

[7] BRALIRWA Ltd appealed the judgment to the Supreme Court, requesting that it consider the following issues:

- To determine whether BRALIRWA Ltd was liable for damages for images and photographs of Gisa Frediane that had nothing to do with it;
- Assessing the effects of the judgment rendered without any legal basis; - Assessing whether the Court is authorized to award damages at its discretion while yet the applicant is relying on the profit which the defendant accrued from her;
- To determine whether the Court did not contradict itself in awarding damages to Gisa in a commercial claim and again held that such damages was only awarded because the photographs and images were used without the owner's consent.

[8] The case was heard in public on 12/09/2017, BRALIRWA Ltd represented by Counsel Umurerwa Jeanne

Marie Christine together with Counsel Mpayimana Isaïe, and Gisa Frediane represented by Counsel Ruton Ndasheja Sonia, who challenged the jurisdiction of the Court of the Supreme Court because the damages awarded in the appealed case were less than 50,000,000Frw, the lawyers of BRALIRWA Ltd also argued that the jurisdiction of this Court was based on the fact that the case was decided by the commercial courts which had no jurisdiction and that the damages claimed were more than 50,000 .000Frw.

II. ANALYSIS OF THE LEGAL ISSUES

Determine whether the case is within the jurisdiction of the Supreme Court.

[9] In considering of this issue, the Court finds it necessary to first consider whether the case is within its jurisdiction based on the fact that it was decided by the courts without jurisdiction, and then re-examine whether it is not within its jurisdiction because no damages of at least 50,000. 000Frw was awarded in the judgment under appeal.

a. The jurisdiction of the Supreme Court based on the fact that in the first and second instance, the case was decided by the courts without jurisdiction.

[10] Counsels for BRALIRWA Ltd argue that the jurisdiction of the Supreme Court is based on article 28, paragraph two, section 2 °, of Organic Law N ° 03/2012 / OL of 13/06/2012 determining the organization, functioning and jurisdiction of the supreme court, since the Commercial High Court admitted an appeal against a case that is not within the jurisdiction of the commercial courts, that Gisa Frediane filed a case at the

Commercial Court of Nyarugenge seeking damages of 130,000,000Frw due to the use of her images in advertising BRALIRWA Ltd products without her permission and the use of her photos on Television, You Tube, websites etc., and her case was based on the law on the protection of the intellectual property (loi sur la propriété intellectuelle), and even cited the provisions of that law (paras 1, 2, 3, 6, 7, 16, 177, 178, 179, 180, 181, 183 and 184); that in its defense, BRALIRWA Ltd elaborated that the claim was not a commercial matter, and therefore should not have been admitted in commercial courts (exception d'incompétence des juridictions de commerce) because:

1. None in the provisions of the law on the protection of intellectual property expressly states that photographs and images of an individual, are innovation that should be protected as an intellectual property;
2. The first article of the law sets out a list of novations that can be protected as intellectual property but photographs and images of a person are not included,
3. Gisa herself admits that she never met with BRALIRWA Ltd for them to carry out commercial activities together;
4. There is no way this claim can be commercial and civil, while Gisa is suing for violation of privacy moreover basing on article 23 of the Constitution, and even that was the only basis for the damages which the Commercial High Court charged BRALIRWA Ltd, therefore the claim is a civil one, within the jurisdiction of the Intermediate Court of Nyarugenge.

[11] They also argue that, even though the two previous courts did not rely on the same grounds in ruling on the issue of their respective jurisdiction over Gisa's claim, but article 178 of the Organic Law on the organization, functioning and jurisdiction of Courts is a basis for the Supreme Court to admit this appeal, because in civil cases, laws concerning jurisdiction are of public order.

[12] Counsel Ruton Ndasheja Sonia assisting Gisa Frediane argues that based on article 2 of Organic Law N°06/2012/OL of 14/09/2012 determining the organization, functioning and jurisdiction of commercial courts, the case which the previous courts ruled on the case which was within their jurisdiction as the activities referred to in the case are commercial in nature.

DETERMINATION OF THE COURT

[13] Article 28, paragraph 2, part 2, of Organic Law N ° 03/2012 / OL of 13/06/2012 determining the organization, functioning and jurisdiction of the supreme court, provides that: the Supreme Court also has jurisdiction to hear appeals of cases decided in the second instance by the High Court, the Commercial High Court or the Military High Court are based on non-existing law, repealed legal provisions or decided by a court that does not have jurisdiction”.

[14] Article 2 of Organic Law N ° 06/2012 / OL of 14/09/2012 determining the organisation, functioning and jurisdiction of commercial courts, provides that : [...] “commercial matters” shall mean commercial, financial, fiscal and other related matters in connection with : disputes related to intellectual property, including trade marks and names;. [...] ”.

Article 12, paragraph 1, of this Organic Law, provides that: “ Commercial Courts shall hear in the first instance, all commercial, financial and fiscal cases and other correlated matters as described in Article 2 of this Organic Law.”

[15] Legal Scholars, Daniel FASQUELLE and Marie-Alice FASQUELLE explain that in terms of non-contractual obligations, these obligations are deemed to be commercial in nature as long as they are derived from commercial activity¹.

[16] In the present case, the case file indicates that the dispute between Gisa Frediane and BRALIRWA Ltd a commercial company, originates from her images and photographs used (by BRALIRWA Ltd) in the advertising of Heineken product without her permission, for which she seeks damages. As a redress. The case file also demonstrates that the counsel for BRALIRWA Ltd, in the Commercial High Court, admitted that the images and photos were indeed used by BRALIRWA Ltd in advertising its products and it had no contract with GISA Frediane, that those images and photos were given to BRALIRWA Ltd by EXP RWANDA, but he was not able to produce the contract it had with that company.

[17] The Court finds that BRALIRWA Ltd is a commercial company, which implies that advertising its Heineken brand using images and photographs of Gisa Frediane, is a commercial related activity, and therefore, therefore, in accordance with the provisions of article 2 and 12 mentioned

¹ *Pour ce qui concerne les engagements extra-contractuels, ceux-ci sont commerciaux dès lors qu'ils sont nés à l'occasion de l'activité commerciale* (D. FASQUELLE, M.- A. FASQUELLE, *Droit de l'entreprise 2010/2011*, “Introduction au droit et au droit commercial”, Paris, Lamy, 2010 p. 143.

above, the disputes arising from that activity are to be settled by the commercial courts, as the aforementioned legal scholars explained that non-contractual obligations are treated as commercial when they arise from commercial activity, thus the cases resulting from those activities are within the jurisdiction of the commercial courts

[18] The Court finds that, in the light of the foregoing motivations, the judgment under appeal was rendered by competent courts, therefore the argument of BRALIRWA Ltd that the jurisdiction of the Supreme Court is based on the ground that the lower courts ruled on the case which is not in their jurisdiction, lacks merit.

b. Supreme Court's lack of jurisdiction to hear this case on the basis that the damages awarded in the appealed case does not reach at least 50,000,000 Frw.

[19] Counsel Ruton Ndasheja Sonia, counsel for Gisa Frediane, states that, pursuant to article 28, paragraph two, section 7, of Organic Law N ° 03/2012 / OL of 13/06/2012 determining the organization, functioning and jurisdiction of the supreme court, the case is not within the jurisdiction of the Supreme Court, on the ground that BRALIRWA Ltd appealed the judgment on the second instance while the damages awarded are 8,200,000 Frw, while the minimum amount allowed by the law is atleast 50,000,000Frw.

[20] The counsel for BRALIRWA Ltd argue that pursuant to article 28, paragraph four, of the Organic Law N ° 03/2012 / OL, this appeal must be admitted to the Supreme Court, because the damages that are claimed, either in the written submissions, or in the pleadings of GISA Frediane, is 130,000,000 Frw,

which is therefore more than 50,000,000Frw provided by law on the second appeal and that it is not necessary to consider the amount awarded by the court, but to consider what was previously sued for.

DETERMINATION OF THE COURT

[21] Article 28, paragraph 2, section 7, of Organic Law N ° 03/2012 / OL of 13/06/2012 determining the organization, functioning and jurisdiction of the supreme court, provides that: “ The Supreme Court shall also have appellate jurisdiction over cases heard and decided in the second instance by the High Court, the Commercial High Court or by the Military High Court if such cases: [...] involve a judgment in respect of which there was an award of damages of at least fifty million Rwandan francs (50,000,000Frw), or when the value of the case , as determined by the judge in case of a dispute, is at least fifty million Rwandan francs (50,000,000 Frw)”.

[22] The case file indicates that, at the first instance, GISA Frediane sued BRALIRWA Ltd for using her images and photographs to advertise its Heineken beer, claiming 100,000,000Frw for economic compensation, moral damages for 20,000,000Frw, procedural fees of 5,000,000Frw² and counsel fees of 10,000,000Frw, all amounting to 135,000,000Frw. On the first instance, GISA Frediane was not awarded damages because he lost the case, and on the second instance (at the Commercial High Court) he was awarded 5,000,000Frw in damages on the ground that her images and photos were posted

² In the Commercial High Court the plaintiff stated that the procedural fess is 3,000,000Frw.

by BRALIRWA Ltd on its products without her permission, 2,000,000Frw were awarded to her moral damages for being dragged into unnecessary lawsuits and 1,200,000Frw for counsel and procedural fees, all totaling to 8,200,000Frw.

DETERMINATION OF THE COURT

[23] The Court finds that, although, as already explained, the at the beginning the damages claimed for was 130,000,000Frw which is above 50,000,000Frw, referred to in article 28 of the above mentioned Organic Law N ° 03/2012 / OL , however pursuant to the provisions of paragraph 2, section 7, of that article, the amount of damages awarded by a judge in the event of a dispute shall be the basis for determining whether the appeal of BRALIRWA Ltd is within the jurisdiction of the Supreme Court, instead of merely the value of the subject matter submitted by the plaintiff in his claim as alleged by the counsel of BRALIRWA Ltd. The fact that in this case the damages awarded by the judge is 8,200,000 Frw, which did not reach 50,000,000 Frw provided for in article 28, paragraph 2, section 7°, of Organic Law N ° 03 / 2012 / OL cited above, this undoubtedly proves that the appeal of BRALIRWA Ltd is not within the jurisdiction of the Supreme Court. This was also the position taken by this Court in the Judgment RCOMAA 00020/2016 / SC – RCOMAA 0025/15 / CS rendered on 21/04/2017 (RURAL DEVELOPMENT SOLUTION COMPANY LTD vs NYABIHU DISTRICT).

[24] The Court therefore finds that, on the basis of the foregoing motivation, the objection of lack of jurisdiction of the Supreme Court, on the ground that the damages awarded in the

appealed judgment is less than 50,000,000Frw which was raised by Gisa Frediane is sustained.

III. DECISION OF THE COURT

[25] The objection of lack of jurisdiction of the Supreme Court raised by Gisa Frediane is sustained;

[26] The appeal of BRALIRWA Ltd is rejected because it is not within the jurisdiction of the Supreme Court;

[27] Orders that the court fees deposited by BRALIRWA Ltd be equivalent to the expenses in this case.