

NEW KIGALI BUSINESS SERVICES LTD v. KASESE DISTILLERS LTD

[Rwanda SUPREME COURT – RS/INJUST/RCOM 00004/2020/SC – (Mukamulisa, P.J., Muhumuza, Cyanzayire, Hitiyaremye and Karimunda, J.) November 19, 2021]

Contracts law – Commercial contract – Evidence in commercial cases – The general principle is that in commercial cases, the hierarchy of elements of evidence does not apply – The evidence of commercial activities should not necessarily be in written form; instead, they can be supported by any form of evidence as long as it demonstrates the situation of commercial activities performed. It is sufficient for the evidence to establish that such activities are generally conducted in the manner described. Therefore, it is not necessary to produce the original versions of the documents relied upon by the parties as evidence. No exclusive evidence is required to prove the existence of undertakings between traders. On the contrary, when examining whether business undertakings occurred between them, their existing undertakings are taken into consideration.

Contracts law – Commercial contract – Effects of the breach of contract with regard to business organizations or companies – Business organizations or companies can be awarded moral damages for the loss of their reputation, trust, and public trust, similar to the case with individuals.

Contracts law – Commercial contracts – Awarding moral damages to business organizations or companies – In determining the amount of moral damages to be awarded, the court is required to exercise caution and reasonableness to prevent the damages from being too low and inadequate, or excessively high to the point of being mistaken for pecuniary damages or damages for the loss suffered by the company.

Tax law – Tax declaration – Liability of the taxpayer who submitted the tax declaration – If it is evident that the imported goods disappeared en route without evidence that they had been really stolen, the owner remains liable for taxes.

Facts: New Kigali Business Services Ltd filed a lawsuit against Kasese Distillers Ltd (Rwanda), alleging that it entrusted the latter with the task of making tax declaration of its products, it so did, but the products did not reach Rwanda. As a result, New Kigali Business Services Ltd was charged of taxes and fines amounting to 152,165,333 Frw. It requested that the owner of the goods should be held liable because it had the responsibility to import the goods into Rwanda. It also requested to be awarded moral damages because Rwanda Revenue Authority deemed it untrustworthy, leading to its removal from the server where tax declaring agents are listed. Additionally, it requested for procedural fee, counsel fee and reimbursement of the court fee it had deposited.

The case was initiated before the Commercial Court of Nyarugenge and it was successively appealed until New Kigali Business Services Ltd applied for review on grounds of injustice before the Supreme Court.

Kasese Distillers Ltd (Rwanda) presented its defense throughout all court instances, arguing that it had never imported any goods. Furthermore, it stated that during the time the goods were allegedly ordered, it was prohibited from operating by the Rwanda Bureau of Standards. Kasese Distillers Ltd also pointed out that the evidence provided by New Kigali Business Services Ltd to prove that they were responsible for importing the goods from abroad indicated a location in Nyagatare, Eastern Province, while Kasese Distillers Ltd is actually located in Nyarugenge, Kigali City.

It explained that it does not know how New Kigali Business Services Ltd obtained the documents pertaining to the importation of the goods, as it did not provide them. New Kigali Business Services Ltd did not disclose the original documents or submit any contract or agreement to establish that it

was entrusted with the duty, instead, it alleged that it interacted with and was given goods-related documents by Byekwaso, employee of Kasese Distillers Ltd (Uganda), who is known to be a fraudster, the reason why New Kigali Business Services Ltd should be held responsible for engaging with well-known fraudsters. New Kigali Business Services Ltd argues that all the requested damages lack merit because its goods were not normally declared for tax purposes.

Held: 1. The evidence of commercial activities should not necessarily be in written form; instead, they can be supported by any form of evidence as long as it demonstrates the situation of commercial activities performed. It is sufficient for the evidence to establish that such activities are generally conducted in the manner described. Therefore, it is not necessary to produce the original versions of the documents relied upon by the parties as evidence. No exclusive evidence is required to prove the existence of undertakings between traders. On the contrary, when examining whether business undertakings occurred between them, their existing undertakings are taken into consideration.

2. Business organizations or companies can be awarded moral damages for the loss of their reputation, trust, and public trust, similar to the case with individuals.

3. In determining the amount of moral damages to be awarded, the court is required to exercise caution and reasonableness to prevent the damages from being too low and inadequate, or excessively high to the point of being mistaken for pecuniary damages or damages for the loss suffered by the company.

4. If it is evident that the imported goods disappeared en route without evidence that they had really stolen, the owner remains liable for taxes.

**The application for review due to injustice has merit.
The judgment rendered by the Court of Appeal is overruled.**

Statutes and statutory instruments referred to:

East African Community Customs Management Act, 2004, articles 144, 147 and 148.

Law n° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, article 111.

Law n° 45/2011 of 25/11/2011 governing contracts, article 75.

Law n° 15/2004 of 12/06/2004 relating to evidence and its production, article 9.

Ministerial order n° 133/MOJ/AG/18 of 04/06/2018 on court fees in civil, commercial, social and administrative matters.

Ministerial order n° 002/08.11 of 11/02/2014 on court fees in civil, commercial, social and administrative matters.

Cases referred to:

Prime Insurance Ltd vs Kansime James, RS/INJUST/RCOM 00005/2018/SC rendered by the Supreme Court, on 12/06/2020.

Bralirwa Ltd vs Kazigaba André et al, RCOMAA 0015/14/CS rendered by the Supreme Court, on 23/06/2017.

Rock Global Consulting Ltd vs Impact Distributors East Africa Ltd, RCOMA0041/13/CS rendered by the Supreme Court, on 3 March 2016.

Unidare Plc v. Cohen and Dermot Power [2006] Ch 489, para 19.

Jafa vs La Pizzeria, Com. 15 mai 2012, n° 11-10-278 Bulletin Civil IV n° 101.

Metropolitan International Schools Ltd v. Designtecnica Corporation, Google UK Ltd and Google Inc, [2010] EWHC 2411 (QB) 35.

Comingersoll S.A. v. Portugal, CEDH, 6 Avril 2000, para 32-37.

Authors cited:

Memento Expert, Baux Commerciaux 2015-2016, Francis Lefebvre, Levallois, La liberté de preuves à l'égard des commerçants exclus ... la formalité du double original, 2015, verbo 19105.

Georges Decocq na Aurélie Ballot-Léna, Droit Commercial, Paris, Dalloz, 2015, pp. 84-85.

Véronique Wester-Ouisse, Le préjudice moral des personnes morales: quand la perversion de la cité commence par la fraude des mots, JCP, G n° 39,24 Septembre 2012.

Philippe Le Tourneau, Droit de la responsabilité et des contrats: Régimes d'Indemnisation, Paris, Dalloz, 2014, pp.664-665.

Philippe Malaurie, Laurent Aynès na Philippe Stoffel-Munck, Droit des obligations, Paris, LDGJ, 2015, p.126.

Judgment

I. BACKGROUND OF THE CASE

[1] This case was initially brought before the Commercial Court of Nyarugenge, where New Kigali Business Services Ltd alleged that it proceeded with the tax declaration for goods belonging to Kasese Distillers Ltd transported from Dar-Es-Salaam to Rwanda but they missed during the shipment. When New Kigali Business Services Ltd inquired with Freight World Ltd, the company responsible for transportation, it was informed that the goods had been unloaded midway, and the trucks returned to Dar-Es-Salaam. New Kigali Business Services Ltd stated that on 30/06/2016, it notified to Rwanda Revenue Authority about the fact that the goods in question did not arrive in Rwanda, instead of taking this into consideration, it was surprised to discover on 25/07/2016 that it had been imposed taxes and fines amounting to 152,165,330 Frw, and subsequently removed from the server for tax declaration agents. New Kigali Business Services Ltd requested to be reinstated on the server and held Kasese Distillers Ltd liable for the taxes and fines imposed upon them.

[2] Kasese Distillers Ltd submits that the claim has already been heard in another judgment which became final (RCOM 00492/2017/TC/NYGE) in which New Kigali Business Services sought for the annulment of the Commissioner's order, it states that criminal matters related to tax fraud should be filed in criminal courts and, therefore, they do not fall under the jurisdiction of the Commercial Court. Regarding the merits of the case, Kasese Distillers Ltd stated that it never entrusted New Kigali Business Services Ltd with the duty of making tax declaration because it did not indicate any manager nor employee of Kasese Distillers Ltd who concluded the contract for the tax declaration of their goods.

[3] On 16/03/2018, the Court heard the interlocutory judgment (RCOM 02196/2017/TC/NYGE), it was firstly examined the objection of inadmissibility raised against the claim on the grounds that it had already been heard in the judgment (RCOM 00492/2017/TC/NYGE) that became final. The Court determined that in the previous judgment, the claim was not admitted due to non-compliance with time limit for filing a claim and that the parties involved in both cases were different. It concluded that the judgment (RCOM 00492/2017/TC/NYGE) did not prevent New Kigali Business Services Ltd from filing a new claim.

[4] On 10/05/2018, the Commercial Court of Nyarugenge also addressed the objection regarding whether the case should be tried in criminal courts. After considering the matter, the Court determined that the imposition of taxes did not involve criminal prosecution. Therefore, the objection of inadmissibility raised by Kasese Distillers Ltd lacks merit, as the claim filed with the Court is a commercial case, not a criminal one. Regarding the merits of the case, the Court found that since

New Kigali Business Services Ltd had made tax declarations for goods that subsequently went missing, it should be considered the owner and be responsible for paying the taxes and fines, as stipulated in Article 147 of the East African Community Customs Management Act, 2004, especially that it failed to provide evidence that the declared goods got missed by Kasese Distillers Ltd so that it can be held liable for the imposed taxes and fines. Consequently, the Court concluded that the claim filed by New Kigali Business Services Ltd lacks merit and ordered to it to pay the taxes and fines amounting to 152,165,330 Frw, as well as 500,000 Frw as counsel fees to Rwanda Revenue Authority.¹

[5] New Kigali Business Services Ltd appealed to the Commercial High Court, claiming that it provided a Certificate of Origin and the Bill of Lading, which indicate that it had declared Kasese Distillers Ltd's goods while the goods were still at the port of Dar-Es-Salaam. They further argued that Kasese Distillers Ltd had filed a complaint with the Tanzanian judicial police after losing their goods, which served as evidence that the goods had existed and intended for transit to Rwanda. However, the Commercial Court disregarded this evidence and instead ordered to New Kigali Business Services Ltd to produce a contract of collaboration by disregarding that it usually performed tax declaration for Kasese Distillers Ltd's goods and was paid in the form of bank checks, it requested the Court to consider the merits of its appeal and hold Kasese Distillers Ltd liable for the taxes and fines that were imposed upon it.

[6] In the judgment RCOMA 00441/2018/CHC/HCC rendered on 15/11/2018, the Commercial High Court found that New Kigali Business Services Ltd failed to provide the agreement for the tax declaration of Kasese Distillers Ltd's goods. It also failed to prove the circumstances in which it got the Certificate of Origin and Bill of Lading for the goods it claimed that they belonged to Kasese Distillers Ltd because this Company stated that it was aware of those documents for the first time during the judicial proceedings the Court concluded that New Kigali Business Services Ltd did not provide relevant and unequivocal elements of evidence to substantiate their claim that the goods they declared belonged to Kasese Distillers Ltd and that they got missed, therefore, the appealed judgment was upheld.

[7] Kasese Distillers Ltd filed an appeal to the Court of Appeal, contending that the mere act of performing a tax declaration for goods while they were in Dar-Es-Salaam port does not constitute fault on its part, it should not be held responsible for the goods not delivered in Rwanda and should not be held liable for the resulting taxes and fines, instead, it asserts that the liabilities should fall upon Kasese Distillers Ltd and its transporter, it requests that the liability should be held by the owner.

[8] Kasese Distillers Ltd countered by stating that there is evidence of the prosecution of a tax fraud offense, and that it had raised this objection in the initial proceeding. However, the Commercial Court of Nyarugenge found this objection to be without merit, and when it appealed, the Commercial High Court overlooked this issue, it requests the Court of Appeal to overturn all previous judgments on the basis that the case should have been tried in criminal courts, but if it otherwise determines the issue, it shall declare the appeal unfounded due to New Kigali Business Services Ltd's failure to provide relevant and irrefutable evidence proving that Kasese Distillers Ltd performed a tax declaration for the goods in question.

[9] In the judgment RCOMAA 00038/2019/CA rendered on 06/12/2019, the Court of Appeal determined that the filed claim was not of a criminal nature, dismissing the objection raised by Kasese Distillers Ltd on these grounds. In terms of the merits of the case, the Court observed that New Kigali Business Services Ltd failed to provide evidence regarding the circumstances in which Kasese Distillers Ltd had provided it with the Certificate of Origin, Commercial Invoice and Bill of Lading

¹Rwanda Revenue Authority was not a party to that case.

upon which they relied. Furthermore, the information regarding Kasese Distillers Ltd on these documents did not align with their actual particulars. Additionally, Rutagengwa Emmanuel, the chairperson of New Kigali Business Services Ltd, testified that six months had passed without performing tax declarations on behalf of Kasese Distillers Ltd. As a result, the Court of Appeal concluded that the appeal brought by New Kigali Business Services Ltd lacked merit, and it upheld the decision of the appealed judgment.

[10] On 05/01/2020, New Kigali Business Services Ltd submitted a letter to the President of the Supreme Court, requesting a review of the case RCOMAA 00038/2019/CA, which was rendered by the Court of Appeal on 06/12/2019, citing grounds of injustice. Per Order no 261/CJ/2020 issued on 18/05/2020, the President of the Supreme Court examined the application and directed its transfer to the court registry for being re-adjudicated.

[11] The public hearing was held on 12/01/2021, 15/03/2021 and 12/10/2021. New Kigali Business Services Ltd was represented by Counsel Ngirumpetse Jean Marie Vianney, while Kasese Distillers Ltd was represented by Counsel Butare Emmanuel and Counsel Nsengiyumva Abel.

[12] The Court initially addressed the objection of inadmissibility raised by Kasese Distillers Ltd which contended that the commercial courts lacked competence to hear the case on the basis that the filed claim constituted a criminal action.

[13] On 12/01/2021, the Court deliberated in the bench and determined that the objection had already been raised before the Court of Appeal and that the Court of Appeal had made a decision on it, Kasese Distillers Ltd did not express any dissatisfaction about it. In light of the position taken by the present Court in the judgment Prime Insurance Ltd vs Kansime James,² which held that a litigant is not permitted to take advantage of the application for review based on injustice filed by another for challenging a judgment of which he/she was satisfied, this Court finds the objection to be without merit. It then proceeded to resume the hearing by examining the issues related to the merits of the case.

II. ANALYSIS OF LEGAL ISSUES

1. Whether Kasese Distillers Ltd should be held liable for the taxes and fines imposed on New Kigali Business Services Ltd

[14] Counsel Ngirumpetse Jean Marie Vianney, representing New Kigali Business Services Ltd, argues that the injustice they have suffered is linked to the disregard of the elements of evidence included in the case file, which indicate the existence of the goods imported by Kasese Distillers Ltd (Rwanda) and the fact that it entrusted New Kigali Business Services Ltd with the duty of performing tax declaration. He explains that both companies entered into undertakings for the first time in the year 2015, as evidenced by the tax declarations found in the case file. Kasese Distillers Ltd used to issue to it a bond for the purpose of effecting tax declaration. Subsequently, it would be provided with a bill of lading to establish an invoice (including an Electronic Billing Machine (EBM) invoice and an ordinary one). In the event that the tax due exceeds 500,000 Frw, the payment would be made by check. He states that for such undertakings, a written contract was not necessarily required. Instead, in most cases, they were based on trust with documents being exchanged in person while Kasese Distillers Ltd retained the original copies of the documents they provided.

[15] He states that the registration certificate, bill of lading, packing list, commercial invoice, certificate of origin and the list of lorry drivers from Freight World Ltd who transported the goods

² Judgment RS/INJUST/RCOM 00005/2018/SC rendered on 12/06/2020, para 41.

all serve as evidence that goods were indeed ordered using the particulars and TIN (Tax Identification Number) 102959519 of Kasese Distillers Ltd (Rwanda). He explains that the original documents of the goods were handed to Byekwaso Rogers, the owner of Kasese Distillers Ltd (Uganda). Byekwaso Rogers then passed them to Ruzindana Hassan, who was responsible for finding a tax declaration agent for Kasese Distillers Ltd in Kigali. Ruzindana Hassan, in turn, remitted the documents to New Kigali Business Services Ltd. This can be supported by the emails they exchanged and the documents that Byekwaso Rogers handed to the drivers of Freight World Ltd, who transported the goods.

[16] He adds that Byekwaso Rogers, the owner of Kasese Distillers Ltd (Uganda) and the mother company to Kasese Distillers Ltd (Rwanda), filed a claim at the police station in Nyakato (Mwanza), Tanzania, stating that his goods were stolen. Furthermore, Byekwaso Rogers sent an email to Rutayisire Emmanuel, the Managing Director of Kasese Distillers Ltd (Rwanda), informing him about the theft of the goods. Rutayisire Emmanuel then forwarded the email to New Kigali Business Services Ltd. Additionally, there are correspondence records from the Rwanda Revenue Authority sent to Kasese Distillers Ltd (Rwanda), notifying them of tax fraud. The tax was imposed on New Kigali Business Services Ltd, as they were the guarantor in this situation. They conclude that all these elements of evidence were disregarded by the courts, despite clearly proving the existence of the goods belonging to Kasese Distillers Ltd (Rwanda) and the fact that New Kigali Business Services Ltd was entrusted with the responsibility of handling tax declarations on their behalf. This is why they appeal for justice to be rectified and for the Court to hold that it is the owner of the goods who should be held liable for the taxes and fines.

[17] Rutayisire Emmanuel, the Managing Director of Kasese Distillers Ltd (Rwanda), declares that this company has belonged to him personally since 2014. He further clarifies that Kasese Distillers Ltd (Rwanda) has no affiliation with Kasese Distillers Ltd (Uganda), operates solely in Kigali, and did not place any orders for goods from abroad on 13/06/2016. He states that he learned about such goods and the fact that New Kigali Business Services Ltd carried out the tax declaration for them for the first time on 30/06/2016, as informed by Murekatete Sonia, an employee of New Kigali Business Services Ltd. He wonders how he could have been unaware that he placed an order for the goods and, at the same time, how the original importation documents and those of the Rwanda Revenue Authority were handed over to tax declaration agents without his knowledge.

[18] He states that a long time ago, Murekatete Sonia asked him for the telephone number of Byekwaso Rogers and she informed him that the goods belonged to him and were stolen. Meanwhile, Rutagengwa Emmanuel, the Managing Director of New Kigali Business Services Ltd, told him that fraudsters manipulated his employee to create documents that facilitated the transfer of such goods to Rwanda. He argues that since he knew that Byekwaso Rogers used to commit tax fraud, he has been cautious and started to record conversations with Murekatete Sonia. Therefore, he believes that the judgment rendered by the Court of Appeal did not result in injustice.

[19] Counsel Butare Emmanuel and Counsel Nsengiyumva Abel, representing Kasese Distillers Ltd, state that New Kigali Business Services Ltd was instructed to provide evidence that they were entrusted with the consultancy. However, the only documents provided by New Kigali Business Services Ltd were the Certificate of Origin and the Bill of Lading, which are unknown to Kasese Distillers Ltd and not recorded in their records. Additionally, when asked about the destination of the goods, they replied that the goods were transferred to Kasese Distillers Ltd in Uganda. They explain that the fact that New Kigali Business Services Ltd had previously engaged in undertakings with Kasese Distillers Ltd (Rwanda) does not serve as evidence to prove that in the year 2016, New Kigali Business Services Ltd was entrusted with the duty of making tax declarations for their goods. They argue that Kasese Distillers Ltd (Rwanda) could not have imported goods on 13/06/2016 because they were under provisional suspension by the Rwanda Bureau of Standards (RBS). Furthermore, even for the goods that were imported before the suspension, they had to request authorization to

enter the country, and upon arrival, the RBS locked the goods in the warehouse due to the absence of the necessary authorization.

[20] They argue that when Kasese Distillers Ltd (Rwanda) was authorized to resume operations, they began with the spirits that were still in store and reimported goods on 24/04/2017. In response to the allegations made by New Kigali Business Services Ltd, which claim the existence of emails establishing a connection between Byekwaso Rogers and Kasese Distillers Ltd (Rwanda), as well as the determination by Rwanda Revenue Authority that the goods belonged to Kasese Distillers Ltd (Rwanda) due to being ordered under their particulars and using their Tax Identification Number (TIN), they argue that these claims should not be given any merit. This is because the emails and Bill of Lading do not mention Byekwaso Rogers or Kasese Distillers Ltd (Rwanda). Furthermore, Murekatete Sonia, an employee of New Kigali Business Services Ltd, expressed her belief that Byekwaso Rogers is also the owner of Kasese Distillers Ltd (Rwanda). They state that their company learned about the missing goods when New Kigali Business Services Ltd informed them two weeks after the theft occurred. They also mention that they are unaware of how New Kigali Business Services Ltd obtained the document they are relying on since it was not provided by Kasese Distillers Ltd (Rwanda) themselves. Therefore, they argue that they should not be held liable for the intended tax fraud allegedly conducted by Kasese Distillers Ltd (Uganda), as there is no affiliation between them as a branch or shareholder.

DETERMINATION OF THE COURT

[21] Article 9 of the Law n° 15/2004 of 12/06/2004 relating to evidence and its production provides that an evidence based on a legal issue or on fact can be proved by the use of written evidence, testimony, presumption or circumstantial evidence, admission of a party or any other material evidence.

[22] Article 75 of the Law no 45/2011 of 25/11/2011 governing contracts provides that the usage of trade shall be determined by the nature of the trade. If a usage is embodied in the trade code or any similar writing, the interpretation shall be done by the court in accordance with the law.

[23] Upon a concurrent reading of these provisions of the law and considering the nature of commercial claims, it is suggested that commercial activities do not necessarily require written evidence alone, instead, they can be proven through various means of evidence, such as correspondences exchanged between the parties, invoices, registries, books of accounts, testimony or material evidence. In addition, the Court, at its own discretion, assesses whether the documents presented as evidence in commercial cases are relevant and applicable to the nature of the case.

[24] Regarding the substance of the documents relied upon in commercial cases or the weight of the documents submitted as evidence in such cases (probative value), the Court clarified this matter in the case of ROCK GLOBAL CONSULTING Ltd vs IMPACT DISTRIBUTORS EAST AFRICA Ltd. In that case, the Court stated that determining whether there have been undertakings between traders does not necessarily require the presentation of irrefutable evidence. Instead, it takes into account the usual collaboration among traders, followed by an examination of the value to be attributed to the elements of evidence submitted to the court.³

[25] The Court finds that the principle that the hierarchy of elements of evidence does not apply in commercial cases is consistent with the stance taken by courts in other jurisdictions. For instance, in the case of Unidare Plc v Cohen and Another, the High Court of Wales and England, it was

³ See the judgment RCOMA0041/13/CS rendered by the Court of Appeal on March 3, 2016, from paragraph 8 to paragraph 12.

established that when documents were provided indicating how commercial activities were managed, and if it is proven that such activities did indeed occur in that manner, the court should accept that the presentation aligns with the actual occurrence.⁴ This viewpoint is also echoed by legal scholars in commercial law, as they assert that the fact that evidence can be based on any mode implies that it is not always necessary to present the original document being invoked as evidence.⁵

[26] Based on the principles governing evidence in commercial matters above explained, the Court finds that since the litigants concur that they used to engage in undertakings, which is also proved by tax declaration documents filed in the dossier, the absence of written undertakings agreement between New Kigali Business Services Ltd and Kasese Distillers Ltd, is not enough to negate that such undertakings occurred between those companies.

[27] Regarding Kasese Distillers Ltd's assertion that the evidence indicating that they did not entrust New Kigali Business Services Ltd with the duty of making tax declarations for goods is based on the mention of an operating location in Nyagatare, while their registered address is in Nyarugenge, the Court notes the following: The mentioned operating location in Nyagatare was declared by Rutayisire Emmanuel, the owner of Kasese Distillers Ltd, during the company's registration with the Rwanda Development Board (RDB). Despite this discrepancy, the company continued to use the registered address for importing goods. This is supported by various documents found in the case file, including:

- *Full registration for foreign company and Certificate of foreign company registration.*
- The Shares Sale Agreement of Kasese Distillers Ltd (Rwanda), established on 17/11/2014, indicating that the company was purchased by Rutayisire Emmanuel, with an address in Nyagatare District, Rwempasha Sector.
- The document known as the Certificate of Origin, established by Super Spirits Pvt Ltd on 06/05/2016, and the Bill of Lading issued by Mediterranean Shipping Company S.A on 22/05/2016, indicate that the purchaser of the goods mentioned in those documents, and the intended recipient, is Kasese Distillers Ltd, located in Eastern Province, Nyagatare, Kigali, Rwanda.

[28] The Court also finds that among the elements of evidence presented by Kasese Distillers Ltd, its failure to indicate the existence of another company with the same name operating in Nyagatare, Eastern Province, Rwanda, which would have resulted in them being incorrectly charged for the duties of that other company, serve as an indication that their claims of not being the company that imported the goods in question lack merit.

[29] In addition, concerning the statements made by Kasese Distillers Ltd claiming that they did not import any goods from abroad in 2016, the Court finds that these statements are not accurate for the following reasons:

- There is a document in the case file called the "Batch Certificate of Analysis," issued by Superior Spirits Pvt Ltd on 06/05/2016. This document indicates the purchase of 198,000 liters of Ethyl Alcohol (Extra neutral Alcohol) AT Min 96%. The alcohol was loaded into six containers, as described below: MEDU 8229568, MEDU 8532194, MEDU 8795502, MEDU 8883007, GLDU 7375930 and MESU 8533288. The factory also issued another

⁴ When parties to a transaction involving the execution of multiple documents intend them to be executed in a particular order which is necessary to give effect to the intended transaction, the Court should be ready to presume that they were executed in the correct order to give effect to the transaction. See *Unidare Plc v Cohen and Dermot Power* [2006] Ch 489, para 19.

⁵ La liberté de preuves à l'égard des commerçants exclut ... la formalité du double original. See *Memento Expert, Baux Commerciaux 2015-2016*, Francis Lefebvre, Levallois, 2015, verbo 19105. See also *Georges Decocq et Aurélie Ballot-Léna, Droit Commercial, Paris, Dalloz, 2015, pp. 84-85.*

document called the "Certificate of Origin" on 06/05/2016. This document states that the owner is Kasese Distillers Ltd, located in Eastern Province, Nyagatare, Kigali, Rwanda. It further indicates that the goods originated from Ludhiana, India, and were intended to transit through Dar-es-Salaam, Tanzania, en route to Rwanda.

- Furthermore, the case file includes the Bill of Lading issued on 22/05/2016, which specifically identifies the aforementioned containers and confirms that they belong to Kasese Distillers Ltd, located in Eastern Province, Nyagatare, Kigali, Rwanda. It also states that the goods were transferred to Rwanda, the country of final destination. This information is further supported by Freight World, which subsequently sent such documents to Kasese Distillers Ltd on 30/05/2016 and 01/06/2016. Additionally, the document was later sent to Rutayisire Emmanuel via email on 13/08/2016.

[29] The Court also finds that on 28/06/2016, Freight World, the Company responsible for transporting the goods to Kigali, informed New Kigali Business Services Ltd that the goods had been unloaded midway, and the trucks had turned back to Dar-Es-Salaam. They requested New Kigali Business Services Ltd to follow up on the matter by contacting Byekwaso Rogers, as he was in Kigali at the time. It is also evident that on 03/08/2016, the Head of Nyakato Police Station in Tanzania wrote a letter to Kasese Distillers Ltd in Kigali, Rwanda, informing them that the following containers: MEDU 8229568, MEDU 8532194, MEDU 8795502, MEDU 8883007, GLDU 7375930, and MESU 8533288, which were heading to Kigali, had been stolen. The correspondence indicated that an investigation was underway and the stolen goods were registered under the name of Rogers S/O Byekwaso. Furthermore, on 07/10/2016, Byekwaso Rogers wrote to Rutayisire Emmanuel, the Managing Director of Kasese Distillers Ltd, requesting him to immediately notify him if the summon issued by the Court of Mwanza in Tanzania, which was handling the theft case, becomes available (Please let me know as soon as you recover (*sic*) it). On 27/10/2016, Byekwaso Rogers wrote to him again and also sent the summon issued by the court to New Kigali Business Services Ltd.

[30] The Court finds that the containers referred to by the Nyakato Police Station, which were reported missing, are the same containers mentioned on the Bill of Lading, Certificate of Origin, and Batch Certificate of Analysis, and were intended for Kasese Distillers Ltd, as mentioned previously. When the goods were unloaded midway, Rutayisire Emmanuel, the owner of Kasese Distillers Ltd (Rwanda), was notified of the situation and actively sought to locate them. Therefore, it is perplexing that he claims that his company has no connection to these goods when he demonstrated such concern and took active measures, involving the police and courts in Tanzania, to search for and recover them.

[31] The Court also finds that the allegations made by Kasese Distillers Ltd, claiming that they could not have imported the goods before 08/09/2016 due to their suspension by Rwanda Bureau of Standards and the prohibition on importing spirits from abroad, should not be given merit. This is because, despite being prohibited on 28/09/2015 from importing other spirits until resolving the issue related to packaging alcohol in plastic bottles, Kasese Distillers Ltd violated this decision, as evidenced by the proofs presented earlier. Rutayisire Emmanuel, the owner of Kasese Distillers Ltd, admitted this fact during a conversation he had with Murekatete Sonia, as demonstrated by the audio recordings submitted in the case file.

[32] Regarding the issue of who should be held liable for taxes, the Court finds that the Commissioner for Customs made a decision with reference number 1776/RRA/CCS/OAU/2016. In this decision, New Kigali Business Services Ltd was notified that as they had guaranteed the goods for which they made tax declarations and subsequently went missing midway, they were responsible for paying the withholding tax amounting to 57,894,334 Frw and a fine of 94,270,996 Frw. This decision was made based on Section 147 of the East African Community Customs Management Act, 2004. According to this section, when certain faults are committed that prevent the goods from

reaching their intended destination, an agent who handles tax declarations is considered the owner of the goods and is personally responsible for paying any duties applicable to the goods⁶. Therefore, since it has not been proven that the goods were stolen in order to qualify for a refund of the paid duties, as stated in Section 144 of the mentioned Act,⁷ an agent who handled tax declarations is personally liable for the consequences arising from the fact that the goods did not reach Rwanda.

[33] The Court finds that New Kigali Business Services Ltd was indeed subject to tax and fines on the goods belonging to Kasese Distillers Ltd, despite Kasese Distillers Ltd's claim of never importing the goods, all the presented elements of evidence mentioned above demonstrate that it was indeed the company that imported them. Furthermore, Kasese Distillers Ltd has failed to provide sufficient evidence to support its assertion that the goods were actually stolen, as outlined in Section 144 of the East African Community Customs Management Act, 2004, which was referenced to earlier. For these reasons, Kasese Distillers Ltd is liable for the taxes and fines, as stated in Section 148 of the East African Community Customs Management Act, 2004. This section specifies that if the agent responsible for tax declaration on behalf of the owner of the goods did not commit any fault in the performance of their duties, the owner of the goods who authorized the agent to make the tax declaration shall be held liable for the actions and declarations of the authorized agent.⁸

[34] Based on the foregoing, the Court finds that Kasese Distillers Ltd is responsible for paying the tax amounting to 57,894,334 Frw and the fine of 94,270,996 Frw, totaling 152,165,330 Frw, which were imposed on New Kigali Business Services Ltd. This is because Kasese Distillers Ltd (Rwanda) failed to provide sufficient evidence to explain why the goods did not reach Rwanda.

2. Whether Rwanda Revenue Authority should have been awarded counsel fees despite even if it was not a party to the case

[35] Counsel Ngirumpetse Jean Marie Vianney, representing New Kigali Business Services Ltd, argues that his client should not have been ordered to pay the counsel fees awarded to Rwanda Revenue Authority, as this institution was not a party to the case.

DETERMINATION OF THE COURT

[36] Article 111 of the Law n° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure provides that “the claim for representation fees is an incidental claim to the principal claim aiming to repay expenses incurred during judicial proceedings. The claim for legal costs is adjudicated at the same time with the principal claim. It can also be admitted and adjudicated even if the principal claim has not been admitted.” Following the provisions of this article, the person likely to be awarded the procedural fee is the one who was involved as a party in the case and can claim the expenses incurred for case follow-up, including counsel fees.

[37] The Court finds that, despite the presence of judgment RCOM 00492/2017/TC/NYGE dated 15/09/2017 in the case file, in which the Commercial Court of Nyarugenge ordered to New Kigali Business Services Ltd to pay 500,000 Frw as counsel fees to Rwanda Revenue Authority, this

⁶ A duly authorized agent who performs any act on behalf of the owner of any goods shall, for the purpose of this act, be deemed to be the owner of such goods, and shall accordingly, be personally liable for the payment of any duties to which the goods are liable and for the performance of all acts in respect of the goods which the owner is required to perform under this Act: Provided that nothing herein contained shall relieve the owner of such goods from such liability.

⁷ (1) Subject to any regulations, the Commissioner shall refund any customs duty paid on the importation of the goods-
a) Of any import duty, or part thereof which has been paid in respect of goods which have been ... pillaged during the voyage...

⁸ An owner of any goods who authorizes an agent to act for him or her in relation to such goods for any of the purposes of this Act shall be liable for acts and declarations of such duly authorized agent ...”

suggests that the aforementioned judgment is distinct from the judgment RCOM 02196/2017/TC/NYGE rendered by the Commercial Court of Nyarugenge on 10/05/2018, which is the basis of the claim before the Supreme Court. Notably, Rwanda Revenue Authority was not involved as a respondent in the latter case.

[38] The Court finds that the order for New Kigali Business Services Ltd to pay counsel fees to Rwanda Revenue Authority, even if the latter was not a party to the case, was a mistake. Therefore, the counsel fees awarded to Rwanda Revenue Authority in the case RCOM 02196/2017/NYGE should be nullified.

3. Whether the requested damages are justified

[39] Counsel Ngirumpetse Jean Marie Vianney argues that the fact that Kasese Distillers Ltd failed to bring the declared goods into Rwanda, resulted in prejudice and financial loss for his client, New Kigali Business Services Ltd. The specific damages are as follows:

- It lost the trust of the supervising public institution.
- It incurred a loss of expected income as it was suspended from 28/06/2016 to date.
- It incurred expenses for defending its rights before government institutions and courts.

[40] He argues that, for these reasons, he requests to the Court to order to Kasese Distillers Ltd (Rwanda) to pay to New Kigali Business Services Ltd moral damages amounting to 50,000,000 Frw, 3,000,000 Frw for procedural and counsel fees, and to reimburse them 140,000 Frw for court fees.

[41] Counsel BUTARE Emmanuel and Counsel NSENGIYUMVA Abel, representing Kasese Distillers Ltd (Rwanda), submit that the goods mentioned in this case do not belong to Kasese Distillers Ltd (Rwanda) and that the company has never authorized New Kigali Business Services Ltd to make tax declarations on its behalf. Therefore, they contend that Kasese Distillers Ltd should not be held liable for any wrongdoing in this matter. They explain that Kasese Distillers Ltd (Rwanda) has been unnecessarily involved in multiple legal proceedings, and therefore, they request to be awarded counsel fees amounting to 3,000,000 Frw as stipulated in the contract between the company and its legal counsel. Additionally, they request 1,000,000 Frw as procedural fees.

DETERMINATION OF THE COURT

[42] Article 111 of the Law no 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, provide that “The claim for representation fees is an incidental claim to the principal claim aiming to repay expenses incurred during judicial proceedings. The claim for legal costs is adjudicated at the same time with the principal claim. It can also be admitted and adjudicated even if the principal claim has not been admitted”.

[43] The Court finds that the counsel and procedural fees requested by New Kigali Business Services Ltd should be awarded, as it was necessary to diligently pursue the case and engage legal representation. However, since it has not been specified how the amount of 3,000,000 Frw represents the actual expenses incurred, the Court awards a discretionary amount of 500,000 Frw as counsel fees and 300,000 Frw as procedural fees, resulting in a total amount of 800,000 Frw.

[44] Regarding the claim for moral damages made by Kigali Business Services, the Court finds that this is not the first instance where such an issue has been adjudicated. In the case of Bralirwa Ltd v. Kazigaba André and co-respondents, Bralirwa Ltd also sought moral damages based on various allegations, including the intention to cause difficulties and contempt towards them. The Supreme Court found that the requested damages lack merit because damages of such nature are determined

based on the emotional distress experienced by an individual (natural person). Therefore, as a legal entity, Kigali Business Services Ltd cannot experience such emotional distress.⁹

[45] The Court observes, however, that courts in foreign jurisdictions have taken a stance on this matter. For instance, the case between Jafa and La Pizzeria, both companies from France, serves as an example. The Court of Cassation in France found that the Court of Appeal of Pau erred by dismissing the claim for moral damages made by those companies. It held that the judgment in this regard is overturned, and the case is remanded for being re-adjudicated¹⁰. In contrast, in the case between Metropolitan International Schools Limited and Designtechnica Corporation, Google UK Ltd, and Google Inc, the High Court of England recognized that the defamatory statements made by Designtechnica Corporation, alleging scam and theft in relation to distance learning offered by Metropolitan International Schools Limited, resulted in the defamation of the latter and discouraged potential students from enrolling. Consequently, the Court awarded moral damages amounting to £50,000.¹¹

[46] The Court also acknowledges that the European Court of Human Rights reaffirmed this principle in the case between Comingersoll S.A. and Portugal. It stated that it is not appropriate to establish a general rule that companies cannot be awarded moral damages without considering the specific circumstances of each case. They explained that the purpose of awarding moral damages is to restore the reputation that the company has lost, and such restoration cannot be easily quantified in monetary terms.¹²

[47] The Court finds that the position referenced by the Supreme Court in the case between Bralirwa Ltd and Kazigaba André and co-respondents, taking into account scholarly writings¹³, is consistent with the stance upheld by courts in other countries. Furthermore, recent scholarly writings in the field of civil law have deemed this position as outdated. Among the scholars is Véronique Wester Ouisse, who argues that it should not be denied that a company can seek moral damages. Just like natural persons, a company's honor and reputation in the eyes of the public can be affected, which can have implications for their overall situation. Therefore, the consideration of moral damages should not be limited solely to commercial activities. However, she explains that a company seeking moral damages should first demonstrate the harm it has suffered.¹⁴

⁹ See the judgment RCOMAA 0015/14/CS rendered by the Supreme Court on 23/06/2017, paragraph 39.

¹⁰ Attendu que pour rejeter les demandes de la société La Pizzeria et de la société Jafa au titre du préjudice moral, l'arrêt retient que s'agissant des sociétés elles ne peuvent prétendre à un quelconque préjudice moral; ...Casse et Annule, mais seulement en ce qu'il a rejeté les demandes des sociétés La Pizzeria et Jafa au titre du préjudice moral, l'arrêt rendu le 12 juillet 2010, ... remet en conséquence, sur ce point, la cause et les parties dans l'état où elles se trouvaient avant ledit arrêt... See the judgment Com. 15 mai 2012, n° 11-10-278 Bulletin Civil IV n° 101.

¹¹ Metropolitan International Schools Ltd v Designtechnica Corporation, Google UK Ltd na Google Inc, [2010] EWHC 2411 (QB) 35.

¹² On ne doit pas écartier de manière générale la possibilité d'octroyer une réparation pour le préjudice moral allégué par les personnes morales; cela dépend des circonstances de chaque espèce... Le préjudice autre que matériel peut en effet comporter, pour une telle société, des éléments plus au moins objectifs et subjectifs. Parmi ces éléments, il faut reconnaître la réputation de l'entreprise, mais également l'incertitude dans la planification des décisions à prendre, les troubles causés à la gestion de l'entreprise elle-même, dont les conséquences ne se pretent pas à un calcul exact... See Comingersoll S.A. Portugal, CEDH, 6 Avril 2000, para 32-37.

¹³ www.business.leschos.fr/entrepreneurs/juridique/10021714-prejudice-moral-d'une-societe-34118?pJiLTS CoGVKQ

¹⁴ Au vrai, nul ne disconvient qu'une société commerciale puisse subir un dommage moral, au sens d'une atteinte à la personnalité sociale qu'elle a pu se forger aux yeux du public: la considération, la réputation voire l'honneur ne sont pas propres aux personnes physiques. Mais une société ne devrait pas pouvoir entirer réparation que si un préjudice en résulte. Or, pour admettre qu'elle puisse subir un préjudice moral, il faudrait reconnaître que son image, son crédit, sa réputation lui servent à autre chose qu'à développer l'activité commerciale qui borne son objet social et donc sa personnalité juridique. See Véronique Wester-Ouisse, Le préjudice moral des personnes morales: quand la perversion de la cité commence par la fraude des mots, JCP, G n° 39,24 Septembre 2012.

[48] In addition, Philippe Le Tourneau states that although the concept of moral damages in relation to companies may come as a surprise, it is possible for significant aspects of a company to be harmed without any direct connection to its commercial interests or property. He cites instances such as a taxpayer making false accusations against the tax administration, claiming that forged documents were used during the tax assessment process, or a commercial company's trademark being used in an exaggerated manner in obscene videos¹⁵. Philippe Malaurie, Laurent Aynès, and Philippe Stoffel-Munck also state that while the concept of moral damages for companies differs from that of natural persons, courts have ruled that companies are entitled to be awarded moral damages. This is because companies can suffer harm to their honor or reputation.¹⁶

[49] Based on the foregoing, the Court finds that the possibility of awarding moral damages to companies has become an established principle in civil liability law. Nonetheless, such damages are intended to address liability based on the public's perception of the company's reputation or to restore the honor of the company that has been lost as a result of defamation. This leads to the understanding that a company (k) should not seek moral damages for experiencing distress, physical injury, moral hurt, or humiliation, as these are experiences that are particularly associated with natural persons (c). In addition, a company cannot be awarded moral damages without first providing evidence of the harm it has suffered.

[50] The Court also finds that damages awarded to a company are intended solely to restore the honor and reputation it has lost. Therefore, when determining the amount of damages, the Court is required to exercise caution and common sense to avoid both inadequate awards that would be insufficient and excessive awards that would be mistaken for pecuniary damages or compensation for financial losses suffered by the company.

[51] The Court finds that based on the aforementioned reasons, the moral damages requested by New Kigali Business Services Ltd from Kasese Distillers Ltd should be awarded. The reputation of New Kigali Business Services Ltd was tarnished in the eyes of the public and Rwanda Revenue Authority, resulting in penalties and removal from the server of tax declaration agents. These negative consequences were a direct result of the actions of Kasese Distillers Ltd (Rwanda) in unloading its goods midway after they had been declared for tax purposes in Rwanda. Nonetheless, since the requested amount of fifty million (50,000,000Frw) is excessively high, the Court, in its discretion, finds that one million (1,000,000Frw) should be awarded instead.

[52] Regarding the request for reimbursement of 140,000Frw as court fees by New Kigali Business Services Ltd, the Court finds that there have been changes in court fees since the beginning of the case¹⁷. In his court submissions, Counsel Ngirumpetse Jean Marie Vianney does not demonstrate

¹⁵ Il peut sembler étrange d'étendre aux personnes morales la notion de préjudice extrapatrimonial...Mais il arrive qu'un dommage véritablement extrapatrimonial soit en cause, en ce sens que le fait dommageable atteint un intérêt qui ne participe pas du patrimoine de la personne, au sens juridique du terme. Il en va ainsi quand sont atteints certains traits d'une personne morale qui participent de son essence et fondent ainsi son identité foncière, sa personnalité au sens social du terme, si tant qu'elle en ai une... Voici des exemples de préjudice moral, en liaison ou non avec une atteinte à la réputation: ● de l'administration des douanes, pour une inscription de faux faite à tort par un contrevenant contre un procès verbal, ...● d'une société, dont la marque a été utilisée de façon massive dans un film pornographique, ...Reba Philippe Le Tourneau, Droit de la responsabilité et des contrats: Régimes d'Indemnisation, Paris, Dalloz, 2014, 2014, pp.664-665.

¹⁶ Les tribunaux admettent la réparation du préjudice moral éprouvé par les personnes morales, bien que ce préjudice soit différent de celui que subissent les personnes physiques. Il s'agit d'une atteinte à leur patrimoine moral, par exemple leur honneur, ...ou leur réputation...Philippe Malaurie, Laurent Aynès na Philippe Stoffel-Munck, Droit des obligations, Paris, LDGJ, 2015, p.126.

See the Ministerial order n° 002/08.11 of 11/02/2014 on court fees in civil, commercial, social and administrative matters replaced by Ministerial order n°133/MOJ/AG/18 of 04/06/2018 on court fees in civil, commercial, social and administrative matters.

how he arrived at the amount of 140,000Frw, and he did not provide any evidence in the file to support his claim. Therefore, the Court has no basis to award this amount to his client.

[53] Regarding the counsel and procedural fees requested by Kasese Distillers Ltd (Rwanda), the Court finds that they should not be awarded, as Kasese Distillers Ltd did not win in this case.

III. DECISION OF THE COURT

[54] Decides that the application for the review of the judgment RCOMAA 00038/2019/CA, rendered by the Court of Appeal on 06/12/2019, submitted by New Kigali Business Services Ltd due to injustice, has merit.

[55] Decides tthe judgment RCOMAA 00038/2019/CA rendered by the Court of Appeal on 06/12/2019 is entirely overruled.

[56] Decides that Kasese Distillers Ltd is liable for the payment of taxes and fines amounting to 152,165,330Frw, which were initially imposed on New Kigali Business Services Ltd.

[57] Orders to Kasese Distillers Ltd to reimburse to New Kigali Business Services Ltd the amount of 152,165,330Frw, which represents the taxes and fines paid by New Kigali Business Services Ltd for the goods of Kasese Distillers Ltd.

[58] Orders to Kasese Distillers Ltd to pay to New Kigali Business Services Ltd the amount of 1,000,000Frw as moral damages.

[59] Orders to Kasese Distillers Ltd to pay to New Kigali Business Services Ltd a total amount of eight hundred thousand (800,000Frw) consisting of five hundred thousand (500,000Frw) for counsel fees and three hundred thousand (300,000Frw) for procedural fees.

[60] Holds that the five hundred thousand (500,000Frw) counsel fees ordered to be paid by New Kigali Business Services Ltd to Rwanda Revenue Authority in the judgment RCOM 02196/2017/TC/NYGE rendered by the Commercial Court of Nyarugenge on 10/05/2018 are hereby quashed.