

RWANDA / JUDGMENT

AGASEKE BANK v. KALINGANIRE ET AL

RCOMA 0530/13/HCC

COURT

Commercial High Court

DECIDED

24 January 2014

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Text

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AGASEKE BANK v. KALINGANIRE ET AL [Rwanda SUPREME COURT – RCOMA 0530/13/HCC (Niwemugeni, P.J.,) January 24, 2014] Law on mortgage – Suing the mortgage – The mortgagee on a matrimonial home shall be valid only if it is signed by the mortgagor or his/her spouse if any – The mortgagee shall have the responsibility to ensure whether or not the mortgagor has a spouse who has to sign for it – Law n°10/2009 of 14/05/2009 on mortgages, article 5. Evidence Law – Removing the house in the mortgage – At appeal instance, requesting that the case of appeal should stay for the criminal case, it may be depriving the party's right for appealing against the judgment to which he/she is not satisfied. There is no ground for which the house guaranteed as mortgage cannot be removed from the mortgage in case the mortgagor admits that he use the forged documents, and gets a loan he guarantees for it without the knowledge of his spouse – Law N° 01/2012/OL of 02/05/2012 instituting the penal code, article 609 and 610. Facts: On 16/06/2013, there has been a loan contract between Agaseke Bank Ltd and Kalinganire Seth Salvator, for sixteen millions (16,000,000 rwf), without the knowledge of his wife, Mpinganzima Claudia, she says that she knew about that loan when Agaseke Bank came to make the auction of the house in which they live. The bank accused her of having accepted that their house be guaranteed as

mortgage since she signed for it. Mpinganzima after realising that the photo which was on the identity card was for Kalinganire's daughter who is the one who signed on the mortgage contract of that house, it has been necessary that Mpinganzima sued her husband together with Agaseke Bank before the Commercial Court of Nyarugenge, requesting to remove within mortgage their house since Kalinganire gave it for mortgage without his wife's knowledge. The court decided that that house be removed from the mortgage since it was illegally performed, and its title deeds be returned to its owners, Kalinganire Seth Salvador and Agaseke Bank Ltd give to Mpinganzima two hundred thousand (200,000 rwf) for the procedural fees and the advocate fees. Agaseke Bank got not satisfied of that decision of the Court; saying that it couldn't be sued. Mpinganzima too, lodged a cross appeal over that of Agaseke requesting the moral damages, the procedural fees and the advocate fees. With regard to knowing whether Agaseke Bank could not have been sued, Agaseke Bank says that if Mpinganzima and Kalinganire were married under the community of the property, they have pulled together all their properties, it means that one of the spouses who fails to fulfil his obligations which are in that agreement, it is the one who is liable. Mpinganzima says that Agaseke has been sued in this case because there is a loan contract it made with Kalinganire, that Agaseke had the obligation of knowing whether what Kalinganire told them was true as the law on mortgage provides for. With regard to knowing whether the court shouldn't really have removed that house in mortgage, Agaseke says that there is a criminal action that the prosecution has file before the Intermediate Court of Nyarugenge, accusing Kalinganire of having used the falsified document, it said that the appealed judgment should have waited for the criminal case and then after other decisions to be taken. Mpinganzima says that Agaseke raised this incidence on the appeal instance, which was not raised at the first instance; that this case waiting for the criminal case basing on the principle which says that the

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civil action must stay for the decision of a criminal Court, it may be said that Mpinganzima may lose her right to get other instance of appeal in case the request of Agaseke is considered. Held: 1. The fact that the mortgagee did not consider knowing if the one who signed on the mortgage contract is the spouse of the mortgagor, that mortgage was signed by anyone calling herself Kalinganire's wife, and Agaseke Bank Ltd did accept it, it has to be sued since it received the mortgage without considering whether the one who signed for that mortgage is the wife of mortgagor whom they live together in that property, who has the right of knowing that her house was given for the mortgage and why it is given.

2. The fact that the mortgagor admits before the court that he falsified the document, and got the loan from the bank, he has given their house for the mortgage without his wife knowing it; requesting that the appealed judgment stay for the criminal case be decided, it has no merit. The appeal has no merit; Agaseke bank and Kalinganire lose the case; The decision of the court in the case RCOM 0713/13/TC/NYGE will be respected. Statutes and statutory instruments referred to: Law n° 01/2012 of 02/05/2012 instituting the penal code, article 609 and 610; Law n°10/2009 of 14/05/2009 on mortgages, article 5. No Case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

- [1] On 16/06/2013, there has been a loan contract between Agaseke Bank Ltd and Kalinganire Seth Salvator, for sixteen millions (16,000,000 rwf). Mpinganzima Claudia, Karinganire's wife says that she knew about that loan when Agaseke Bank came to make the auction of the house in which they live, when she asked her husband, he responded that he did not know since he had no debt. It has been necessary that she went to Agaseke Bank to ask the ground on which they wanted to take their house for auctioning, and they demonstrated her that her husband Kalinganire Seth Salvador has taken a loan of sixteen million (16.000.000 rwf), and they showed her that herself, Mpinganzima accepted that their house be given as a loan since she signed for it.
- [2] After realising that the photo which was on her identity card was not hers instead it was for Kalinganire's daughter who signed on the mortgage contract of a house, it has been necessary that she sue her husband Kalinganire Seth Salvador and Agaseke Bank before the Commercial Court of Nyarugenge, requesting to remove within mortgage the house located in the plot no 511 in Nyamirambo Sector, since Kalinganire Seth Salvador gave it as mortgage without the knowledge of his wife Mpinganzima.

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- [3] The Commercial Court of Nyarugenge decided that the house located in the plot no 511 in Kiberinka Village, Rugarama Cell, Nyamirambo Sector, Nyarugenge District, in Kigali City be removed from the mortgage since it has been illegally, and its title deeds be returned to its owners. It decided that Agaseke Bank Ltd and Kalinganire Seth Salvador give to Mpinganzima two hundred thousand (200,000 rwf) for procedural fees and the advocate fees.
- [4] Agaseke Bank got not satisfied with the decision of the Commercial Court of NYARUGENGE and appealed and also Mpinganzima lodged a cross appeal requesting the moral damages, the procedural damages and advocate fees. In this case the court is going to analyze whether Agaseke Bank could not have been really sued as it says it, analyze whether the court should not have really removed the house talked about in that case from the mortgage, and again analyze whether the judgment appealed against had to wait for the trial of the case RP 426/13/TGI/NYGE. The court will analyze whether the damages claimed by both Agaseke Bank Ltd and Mpinganzima are really necessary.
- ### II. THE ANALYSIS OF LEGAL ISSUES OF THE CASE

1. Hadn't Agaseke Bank Ltd really been sued in this case?

- [5] Agaseke Bank says that the court decided basing on the article 5 of the Law n°10/2009 of 14/05/2009 on mortgages. Agaseke Bank Ltd, says that with regard to the management of the property, Mpinganzima and Kalinganire were married under the community of the

property, which means that they have pulled together all their properties, movables and immovable and all their liabilities, and it again means that one of the spouses who fails to fulfil his obligations which are in that agreement, it is the one who is liable. (Article 3 of Law no 22/99 of 12/11/1999), That if Mpinganzima has not been notified of the issuance of that house for mortgage so that they are given a loan of 16,000,000 rwf, that Kalinganire had to be responsible alone, since it is whom who has that obligation, that it is not Agaseke Bank Ltd, basing on the article 22 of the Law no 22/99 of 12/11/1999.

- [6] Mpinganzima Claudia says that Agaseke has been sued in this case because there is a loan contract between Kalinganire and Agaseke, that she cannot sue Kalinganire alone while the contract was made between both parties. That she cannot accept that that contract has effects on her while she didn't sign for them nor notified of them, in addition to that Agaseke had the obligation of knowing whether what Kalinganire told them was true as the law on mortgage in its article 5 provides for.
- [7] The article 5 of the law on mortgage provides for: "the mortgage of a matrimonial home shall be valid only if any document or any other instrument used in obtaining such a mortgage is signed by both the mortgagor and his spouse living in that matrimonial home, or where there is evidence as to any agreement entered into between them for its granting; The mortgagee shall have the responsibility to ensure whether or not the mortgagor has a spouse". The court realises that it is not Kalinganire alone who is liable, having given the loan of 16,000,000 rwf and give the house as mortgage without knowledge of his wife, since Agaseke Bank Ltd had to first know whether Kalinganire has the spouse with whom they live together in that house, and sign on the document granting the mortgage. The fact that it didn't care for it, that mortgage got signed by anyone who called herself Karinganire's wife and Agaseke Bank Ltd accepted it, the court

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realises that Agaseke Bank has to be sued since it took the mortgage without caring on knowing whether the one signed for that mortgage was Karinganire's wife who live with him in that matrimonial house, who has right of knowing that the house has been given for mortgage and why it was given.

2. Hadn't really the court to remove the house located in the plot n o511, Kiberinka Village, Rugarama Cell, Nyamirambo Sector, City of Kigali from the mortgage?
- [8] Agaseke Bank Ltd that basing on the article 13 of the law relating to the evidence and its production, there is a criminal action that the prosecution has file before the Intermediate Court of Nyarugenge on 30/07/2013, accusing Kalinganire to have used of counterfeited document, the crime provided for and punished by the article 609 and 610 of the Law no1/2012, of 02/05/2012, instituting the penal code. The plaintiff says that that case has been given the number NO RP 426/13/TGI/NYGE and has not been tried yet. The plaintiff says again that basing on the principle which says: "The civil action must stay for the decision of

a criminal Court” “Le penal tient le civil en etat”, the appealed judgment should have waited for the criminal case for Kalinganire to be convicted for that crime, for other decisions to be taken.

- [9] Mpinganzima, for her, says that basing on the article 13 of the above mentioned law, confirms the agreement between Kalinganire and Agaseke Bank. That raising this incidence on the appeal instance, in addition to that Agaseke Bank Ltd did not raise that request at the first instance of case that this case should wait for the criminal case, basing on the principle of: “the civil action must stay for the decision of a criminal Court”; it means that Mpinganzima may lose the right of getting other recourse to appeal for if the request of Agaseke Bank is considered.
- [10] Within the arguments of Kalinganire Seth Salvador are in general because he didn’t defend himself on each part of the appeal, and he didn’t submit the court submission to the court, he testifies that he took a loan from Agaseke Bank Ltd and grant the house in which they live for mortgage without the knowledge of his wife Mpinganzima Claudia, since he thought he would pay it because he has engaged himself in commerce of coffee but he got bankrupt and got ill, he says, him too, that he realises that house may be removed from the mortgage since he granted it without the knowledge of his wife by using the falsified document, and in addition he testifies that he had no good relationship with his wife because she harassed him for not have a job, this made him to take that loan without notifying her through the use of his daughter’s photo and the signature and attribute them to Mpinganzima.
- [11] The fact that Agaseke Bank Ltd, itself, accepts that the action in which the prosecution accuses Kalinganire for use of counterfeited document has been filed in the Intermediate Court of Nyarugenge on 30/07/2013, while Mpinganzima has seized with the Commercial Court on 06/08/2013 and decided on 30/10/2013, during the whole time of the trial, Agaseke Bank has not requested that this case should wait the criminal case, and raised it in appeal, this court realises the request of Agaseke Bank Ltd not to be considered since as Mpinganzima explains it, she may be withdrawn of the chance of lodging an appeal for what she may be not satisfied of. Moreover Kalinganire Seth Salvador, who is accused in a criminal action for falsified documents, admits within this court that he really counterfeited the document, and took the loan from the bank and granted the house as a mortgage without the knowledge of his wife Mpinganzima Claudia. This ground for the appeal of Agaseke Bank Ltd is not considered.

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3. May the damages requested by Agaseke Bank Ltd be provided?
- [12] Agaseke Bank Ltd requests the damages of 3,000,000 rwf to be paid by Mpinganzima Claudia, since it approves that she sued it for no ground, and requests from both Mpinganzima Claudia and Kalinganire Seth Salvador the procedural damages and the advocate fees of 1,000,000 rwf. Be it during the court submission and during the course of trial, both

Mpinganzima and Kalinganire said nothing about it, since Mpinganzima testifies that that appeal had no merit. This court realises that those damages cannot be provided with the appellant since its grounds of appeal, the court finds them baseless.

4. May the damages requested by Mpinganzima Claudia be given?

[13] Mpinganzima requests the moral damages of 3,000,000 rwf and of the for the procedural damages and advocate fees of 2,000,000 rwf. The appellant talked nothing on them during the trial since it requested that this case be stayed for the criminal case. Kalinganire too talked nothing about them. This court realises that Mpinganzima will be provided with these damages within its discretion; since nothing proves that she really deserves these damages.

III. THE COURT DECISION

[14] The Commercial High Court:

[15] It decides to receive the appeal it was provided with Agaseke Ltd.

[16] It decides that it is groundless.

[17] It settles that Mpinganzima Claudia wins, that Agaseke Bank Ltd and Kalinganire Seth Salvador lose the case.

[18] It orders Agaseke Bank Ltd and Kalinganire Seth Salvador to pay to Mpinganzima Claudia 500,000 rwf, comprising of the procedural fees and the advocate fees at the appeal instance, to give them within eight days after the decision become final, if they fail, it will be taken from their properties through the state's power.

[19] It orders Agaseke Ltd and Kalinganire Seth Salvador to pay 4800 rwf equivalent to what has been has been done at appeal instance, they have to pay them within eight days after the court decision becomes final, if they fail it will be taken from their property through the state's power.

[20] It orders that with regards to others, the decision of the court RCOM 0713/13/TC/NYGE executed.

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