

RWANDA / JUDGMENT

AKAGERA GAME LODGE v. RWANDA BETON

RCOMA 0178/12/CS

COURT

Supreme Court

DECIDED

14 November 2014

CASE / FILE NUMBER

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Text

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AKAGERA GAME LODGE v. RWANDA BETON [Rwanda SUPREME COURT – RCOMA 0178/12/CS (Mutashya, P.J., Nyirinkwaya and Gakwaya, J.) 14 November 2014] Contract Law – Two complementary contracts – Contract with purpose to settle litigation between parties – Agreement on payment for the claimant party to Self deprivation of the right to action – When both parties agreed on the payment and fail to execute and led to the non-paid party to file a case to court for requesting the payment, if another second contract is made, it does not imply that it replaced the first one because the purpose is to pay amicably. Contract Law – Suspensive condition – Breach of contract – When parties made a contract on mode of payment, the party with duty shall not based to the not breach contract of absence of suspensive condition in case is based to their only will but shall be understood as a way of showing the sources of payment – Law no 45/2011 of 25/11/2011 governing contracts article 78. Contract Law – Indemnity for lack of executing obligations – The aggrieved party has right to damages from the party failing to perform his/her contractual obligations because of lack of execution of obligations – Law no

45/2011 of 25/11/2011 governing contracts, article 137. Contract Law – Calculation of interests resulting from the non-payment – Interests for non- payment are calculated from the time the performance was due less all deduction to which the party in breach is entitled - Law no 45/2011 of 25/11/2011 governing contracts, Article 144. Law governing contracts – Payment of interests in place of damage – If the breach of the contract consists of a failure to pay a sum of money, shall be given interests in place of damage – Law no 45/2011 of 25/11/2011 governing contracts, article 144. Facts: RWANDA BETON S.A.R.L had disputes with AKAGERA GAME LODGE ltd resulting from the works of building a hotel. On 23 August 2006 both parties made a memorandum of understanding for settling them. They agreed that AKAGERA GAME LODGE ltd shall pay 66,705,310 Rwf within 90 days. AKAGERA GAME LODGE LTD did not respect that contract which led to RWANDA BETON S.A.R.L to filed a claim to the Commercial High Court but on 21 September 2011 both parties made another contract for settling disputes amicably. RWANDA BETON S.A..L.R had to withdraw the case and AKAGERA GAME LODGE ltd had to execute its duties with the payment of damage of 7,000,000 Rwf and should pay 25,000,000 Rwf immediately after signing of the contract, and the balance should be paid before the selling of the hotel or before the expected innovation. AKAGERA GAME LODGE LTD did not pay the balance which led to RWANDA BETON LTD S.A.R.L to file again a claim to the Commercial High Court. It decided that AKAGERA GAME LODGE ltd shall pay to RWANDA BETON S.A.R.L 89,298,204 Rwf withdraw the balance debt to be paid, interests calculated on 18% from 23 August 2006 till on 22 October 2012, procedural and advocate fees.

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AKAGERA GAME LODGE LTD appealed to the Supreme Court stating that the memorandum of understanding made by both parties was replaced by the one of 21/09/2011 with purpose to settle the disputes amicably. Therefore, the decision of the court was based on the wrong contract shall be cancelled and AKAGERA GAME LODGE ltd did not breach contract because of suspensive condition but was a promise of paying in short period. Then the court should not consider the damages mentioned on that contract when AKAGERA GAME LODGE ltd did not execute the contract as agreed. RWANDA BETON S.A.R.L filed a cross appeal stating that it should be paid the full debt, interests of 25%, damages of 1,389,694 Rwf each month till definitive judicial decision is rendered, procedural and advocate fees. AKAGERA GAME LODGE ltd states that it accepts 63,705,310 Rwf of the debt and 7,000,000 Rwf of damages mentioned on the second contract, that interests of 25% has no merit because even banks cannot grant them. Held: 1. Contract called “out of court settlement agreement” has not changed the debt that AKAGERA GAME LODGE ltd should pay but it was for determining the mode of payment. Then, the second contract has not replaced the first one because the purpose was to pay without recourse to court.

2. Without suspensive condition from the party to execute duties is taken as breach of contract. Thus the second contract between parties shall be understood as showing the sources of the payment.

3. The aggrieved party because the other party didn't execute its obligation has rights to damages because AKAGERA GAME LODGE Ltd didn't execute its obligations which caused the loss of RWANDA BETON S.A.R.L .
4. Interests resulting from the failure to pay, are calculated from the time for performance was due less all deductions to which the party in breach is entitled interests shall be calculated to 18% while to be 25% as requested by RWANDA BETON S.A.R.L because of lack of provision that the Commercial High Court breached in determining interests.
5. Interests are granted in place of damages when breach of contract is related to the failure to pay. Therefore, RWANDA BETON S.A.R.L shall not be given the damages of 1,389,694 frs because it was granted the interests. Appeal has no merit. Cross appeal has merit in part. Court fees to the defendant. Statutes and statutory instruments referred to: Law n°45/2011 of 25/11/2011 governing contracts, article 78, 137 and 144. No case referred to.

Judgment

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I. BRIEF BACKGROUND OF THE CASE [1] Rwanda Béton s.a.r.l had with Akagera Game Lodge Ltd disputes resulting from building a hotel. On 23 August 2006 both parties signed the contract called 'Mémorandum of Understanding (MoU)' with purpose to settling their disputes. They agreed that Akagera Game Lodge Ltd shall pay 66,705,310 Rwf within a period not exceeding 90 days. [2] Akagera Game Lodge Ltd did not respect its duties contained in MoU and Rwanda Béton s.a.r.l filed a claim to the Commercial High Court. But on 21 September 2011, both parties met again and signing another contract called "Out of Court settlement agreement", where they agreed to settle their disputes amicably (art 1) and Rwanda Béton s.a.r.l was to self deprivation of the right to action (art 2) and Akagera Game Lodge Ltd should pay the amount determined on the MoU, damages of 7,000,000 Rwf, "down payment" of 25,000,000 Rwf after signing of the contract. The remaining balance should be paid before the sale of Akagera Game Lodge Ltd or before the start of expected renovation of Akagera Game Lodge Ltd). [3] Rwanda Béton s.a.r.l withdrawal the case, Akagera Game Lodge Ltd paid 25,000,000 Rwf but did not pay other amount agreed which led Rwanda Béton s.a.r.l to file again a claim on 25 April 2012 to the Commercial High Court requesting to be paid 66,705,310 Rwf, damages of 25% from 24 November 2006 till the verdict, 1,000,000 of damages for loss for each month till the verdict advocate fees. It requested again that Akagera Game Lodge Ltd shall pay the debts accepted to pay in RRA and to ECOBANK. [4] The case was heard by default of Akagera Game Lodge Ltd, without even its defense submissions. The court rendered the case RCOM 0105/12/HCC on 22 October 2012, and decided that Akagera Game Lodge Ltd must pay to Rwanda Béton s.a.r.l 89,298,204 Rwf including:

- 41.705.310 Rwf of the whole balance debt to be paid removing 25,000,000 Rwf already paid;
- 46.292.894 Rwf of interest calculated on 18% each month from 23 August 2006 till the verdict on 22 October 2012;

- 1.300.000 Rwf of procedural and advocate fees. [5] Akagera Game Lodge Ltd appealed to the Supreme Court on 20 November 2012. The case was heard in public on 07 October 2014, Akagera Game Lodge Ltd was represented by Kayitana Dominique Savio, the counsel while Rwanda Béton s.a.r.l represented by Zitoni Pierre Claver, the counsel. II. ANALYSIS OF LEGAL ISSUES:

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- a) Whether the first judge based on fake contract. [6] Kayitana Dominique Savio, the counsel stated that the claim of Rwanda Béton s.a.r.l was based to the contract of 23 August 2006 called “Mémorandum of Understanding”, and did not explain to the first judge that the said contract has been replaced by the contract of 21 September 2011 called “Out of Court settlement agreement”. He finds that the case must be quashed because it was rendered on fake contract and Rwanda Béton s.a.r.l shall approach Akagera Game Lodge Ltd for settling their issues or filing a claim for the second contract. [7] Zitoni Pierre Claver, the counsel states that Rwanda Béton s.a.r.l has not neglected the contract of 21 September 2011 because it explained them to court and notified it its invalidity because it has never been respected, that is why Rwanda Béton s.a.r.l filed a new case for getting justice after a full year Akagera Game Lodge Ltd neglected that contract. [8] He also stated that the second contract was not replaced by the first one, but it came to execute the issue of non payment which led to file a claim to court and agreed that Rwanda Béton s.a.r.l withdraw its case and Akagera Game Logde Ltd should pay “down payment” of 25,000,000 Rwf basing on the first contract which mention all debt. The balance should be paid as soon as possible because Akagera Game Logde Ltd was stating that it is going to sold or innovates for getting amount. Therefore, the argument of the counsel of Akagera Game Logde Ltd which is calling suspensive conditions shall be understood as promise of paying in short period. VIEW OF THE COURT [9] In the MoU of 23 August 2006, parties agreed that Akagera Game Lodge Ltd shall pay 66,705,310 Rwf within 90 days. [10] The Court found that contract called “out of court settlement agreement” did not change anything to the debt amount that Akagera Game Lodge Ltd should pay to Rwanda Béton s.a.r.l refers to MoU of 23 August 2006, but it was for clarifying how Rwanda Béton s.a.r.l should be paid because Akagera Game Lodge Ltd has failed to fulfil its obligations mentioned in MoU. Thus Rwanda Béton s.a.r.l should deprive its claim filed to court. [11] The Court finds that the second contract related to the payment of the debt did not replace the first because the purpose was to provides how Rwanda Béton s.a.r.l should be paid without taking claim into court. Thus, the point of appeal Akagera Game Lodge Ltd the first relating that the previous Judge based his decision to the wrong contract has no merit.

- b) Whether Akagera Game Lodge Ltd breached any obligation. [12] Kayitana Dominique Savio, the counsel states that there is no obligation breached by Akagera Game Lodge Ltd because of two suspensive conditions of 21 September 2011 were not occurred before Rwanda Béton s.a.r.l filed a case that of Akagera Game Lodge Ltd find a client or innovate. [13] He also states that Rwanda Béton s.a.r.l had an obligation of follow up to for being paid when Akagera Game Lodge Ltd sold or innovated. He added that suspensive conditions

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mentioned occurred on 23 April 2013 when some of shareholders sold their shares equal to 47.6% to Rwanda Social Security Board (RSSB). [14] Zitoni Pierre Claver, the counsel states that what his colleague calls suspensive condition is rather a promise to pay in short period because Akagera Game Lodge Ltd stated that it could sell because it has a client or shall innovate for getting the money. [15] He also states that even if some of shareholders of Akagera Game Lodge Ltd sold their shares does not have any relationship with this case because Rwanda Béton s.a.r.l does not pursue the payment shareholders of Akagera Game Lodge Ltd but to the company itself. VIEW OF THE COURT [16] The article 78 of the Law no 45/2011 of 25/11/2011 governing contracts published official gazette 04 bis of 23/01/2012 provides non-occurrence of the suspensive condition is not a breach of the contract unless it is caused by the party with the obligation to make the condition occur. [17] As explained above, the purpose when parties signed the second contract of 21 September 2011, was to agree on the payment without intervention of court. The court finds that that agreement on the payment is null if the obligations of Akagera Game Lodge Ltd should not executed because of suspensive conditions of selling or innovate from its own will. [18] The court finds that the provision in the paragraph iii of the second contract between parties shall not be understood as suspensive conditions because it based to the will of the debtor. Thus, it shall contradict the payment contract made between them but shall be understood as a means of showing the source of the payment. Therefore, then the argument of Akagera Game Lodge Ltd of stating that it not breached any obligation because suspensive conditions was not reached before the claim of Rwanda Béton s.a.r.l, has no merit. [19] The court finds that argument of Akagera Game Lodge Ltd of not breaching obligations was not true because itself know that 66,705,310 Rwf it owed Rwanda Béton s.a.r.l they agreed in the contract on 23 August 2006, it paid only down payment of 25,000,000 Rwf.

- c) whether Rwanda Béton s.a.r.l was granted undue interest different to ones agreed in the contract. [20] Kayitana Dominique Savio, the counsel states that the commercial High Court allocated interests of 46,292,894 Rwf despite that Rwanda Béton s.a.r.l accepted the interests of 7,000,000 Rwf in the contract of 21 September 2011 made between them. [21] Zitoni Pierre Claver, the counsel states that Court should not consider interests mentioned in that contract when Akagera Game Lodge Ltd did not execute the contract as agreed.

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VIEW OF THE COURT [22] As explained above, Akagera Game Lodge Ltd did not execute its obligations as agreed in the contract of 21 September 2011 (To pay interests of 7,000,000 Rwf and to pay the remain debt). Then, the court finds that it shall not considered that contract made for settling disputes of debt amicably owed to Rwanda Béton s.a.r.l when that agreement failed for its fault. [23] The court also finds that ordering Akagera Game Lodge Ltd to pay only 7,000,000 Rwf is to despite the article 137 of the law governing contract mentioned providing that the aggrieved party has right to damages from the party failing to perform his/her contractual obligations, unless the claim for damages has been suspended or withdrawn, it owed to Rwanda Béton s.a.r.l debt from 23 August 2006 when both parties signed the first contract, which means that it had a loss.

- d) For the cross appeal of Rwanda Béton s.a.r.l. [24] Zitoni Pierre Claver, the counsel requests that Akagera Game Lodge Ltd shall be paid the whole debt of 66,705,310 Rwf, interests of 25% per year equal to 16,676,328 Rwf per year till the verdict. On this interests, shall be withdrawn 25,000,000 Rwf of down payment paid because to withdraw it on the debt it shall be to protect the defaulter, adding the damages of 1,389,694 Rwf per month till the verdict and execution, advocate fees calculated to 10% of the debt requested and 5,000,000 Rwf of procedural fees. [25] Kayitana Dominique Savio, the counsel states that the they accept is 63,705,310 Rwf of the debt and 7,000,000 of interest mentioned in the second contract, that interest of 25% are not fair because even bank cannot grant them. VIEW OF THE COURT [26] The court finds that Akagera Game Lodge Ltd shall not pay 66,705,310 Rwf of the main debt as request by Rwanda Béton s.a.r.l because it has already paid down payment of 25,000,000 Rwf but rather it shall pay 41,705,310 Rwf remaining (66.705.310 – 25.000.000) refers to article 144 of the law governing contract mentioned which provides that interest consists of a failure to pay a sum of money is paid from are calculated from the time for performance was due less all deductions to which the party in breach is entitled. This matches with decision of the Commercial High Court. [27] The court also finds that those interests shall be calculates on 18% as decided by the Commercial High Court instead of being calculated on 25% as requests by Rwanda Béton s.a.r.l because it did not explain the law breach by court in allocating them. [28] For update of that interests, the court finds it fair because the loss of Rwanda Béton s.a.r.l has increase from the first verdict. Thus it shall be given 59,993,088 Rwf calculates from 24 November 2006 till 14 November 2014 the day of final verdict, it means within 2887 days. (41.705.310 Rwf x 18 x 2.877). 100 x 360

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- [29] For the interests of 1,389,694 Rwf per month requested by Rwanda Béton, the court finds that it shall not allow them because as explained by High Commercial Court it has given interests, article 144 of law governing contract stipulates that shall be given interests in place of damages if the breach of the contract consists of a failure to pay a sum of money. [30] For the advocate fees and procedural fees in the second instance, the court finds that

Rwanda Béton s.a.r.l must be given them based on article 258 CCLIII but shall be given only 1,500,000 Rwf determined in its discretion refers to the nature of the case. This amount shall be added to 1,300,000 Rwf allocated in the first instance, and the total is 2,800,000 Rwf. III. DECISION OF THE COURT [31] Admits the appeal of Akagera Game Lodge Ltd, but decides that it lacks merit; [32] Admits the cross appeal of Rwanda Béton s.a.r.l, and decides that it has merit in part; [33] Orders Akagera Game Lodge Ltd to give Rwanda Béton s.a.r.l 41,705,310 Rwf of the main debt, interests of 59,993,088 Rwf, 2,800,000 Rwf of procedural fees and advocate fees, and the total is 104,498,398 Rwf (41,705,310 Rwf + 59,993,088 Rwf + 2,800,000 Rwf); [34] Orders Akagera Game Lodge Ltd to pay the court fees.

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