

RWANDA / JUDGMENT

GAHIZI v. RUHAMYAMBUGA

RCOMA 0069/13/CS

COURT

Supreme Court

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Text

Page 1

GAHIZI v. RUHAMYAMBUGA [Rwanda SUPREME COURT – RCOMA 0069/13/CS (Nyirinkwaya, P.J., Mukandamage and Kanyange, J.) February 6, 2015] Evidence law – Burden of proof – A plaintiff has the burden of proving the facts it alleges, otherwise the defendant wins the case – Law n° 15/2004 of 12/06/2004 relating to evidence and its production, article 9. Commercial procedure – A new claim at appeal – Parties are not allowed to file new claims at appeal level – Law n° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, article 168. Law of contract or obligation – Damages – Moral damages due to being dragged into litigations – Moral damages are not awarded in case the plaintiff was not intending to cause prejudice to the respondent – Procedural and advocate fees – When the involvement of court suit was due to the fault of the appellant, he/she/it has to reimburse Procedural and advocate fees to the respondent – Law of 30/07/1888 Governing obligation or contracts, article 258. Facts: Gahizi Thaddée in partnership with Ruhamyambuga Paul started a company known as SOKERWA Sarl. They had all agreed to have equal shares. They opted also to have Ruhamyambuga Paul as a Legal Representative in Rwanda. Sometimes later, the problem about the company management come about and it led Gahizi to file a claim against Ruhamyambuga in the Commercial High Court for

mismanagement of the property of the company by making its tracks as well as the building CITY PLAZA his personal properties while he had never been able to build up it at all. Gahizi requested the Court both to seize the rent from CITY PLAZA and liquidate SOKERWA. The court held that his claim was without merit since both the plaintiff and the defendant played a role in the mismanagement of the company's property since each one used to sign on the bank account with no need of authorization of the signature of his counterpart and even withdraw the money from the fund as he wanted. The court decided that he could not lodge a claim for mismanagement while his role in mismanagement is established as well. Regarding tracks, the court decided that it Ruhamyambuga would not be liable since it was Gahizi who was in full control then. Regarding the building, CITY PLAZA, the court found that it was the ownership of Ruhamyambuga as long as it was registered under his name and that he built it upon the loan granted by BCDI which was paid from the rent. It held that the rent could not be seized, since CITY PLAZA was a building of Ruhamyambuga. Regarding the liquidation SOKERWA, the court decided that a new appropriate claim should be filed. The court concluded that claim filed by Gahizi was without merit and ordered him to pay Ruhamyambuhga 1, 000, 000, 00Frw for dragging him into unjustified litigations. Gahizi appealed to the Supreme Court claiming that the Commercial High Court disregarded evidence proving that CITY PLAZA is the property of SOKERWA since it was built from its money (of the company) and therefore should be reinstated in its property as all of other properties registered under his name are ownership of the company. He added that the court ruled *infra petita* on the shares of SOKERWA which were in COGEAR as well as in the stock SOKERWA had in 1999.

Page 2

Ruhamyambuga responded that the fact that some of the property of SOKERWA registered under his name, it does not deprive him from having his personal property. He precised that CITY PLAZA was built while SOKERWA had already gone bankruptcy. He added that it was built by the loan which he was granted by BCDI. Regarding the shares of SOKERWA which were in COGEAR as well as the stock that SOKERWA had in 1999, he explained that the claim was new and hence should not be examined at appeal. Ruhamyankiko filed a cross appeal requesting moral damages of 10, 000, 000, 00Frw because of being dragged into litigations and 30, 000, 000, 00 Frw for advocate fees on both instances. Gahizi responded that all the requests were not substantiated since even they did not acknowledge those granted at the first instance. Held: 1.The plaintiff should prove what he/ she alleges failure of which result his loss to the defendant. Evidence can be proved by the use of writing, testimony, presumption or, admission of a party or any other material evidence being considered. Therefore CITY PLAZA cannot be reinstated in the property of SOKIRWA in case no plausible evidence has been produced.

2. Requesting that the shares of SOKERWA which were into COGEAR and the available stock at the end the year 1999 be reinstated into the property of SOKERWA, should not be examined since it is a new claim filed at appeal level.

3. Moral damages due to being dragged into litigations are granted in case it is established that the plaintiff proceeded in such a way with intention to cause prejudice to the interests of the defendant, however, in case it is established otherwise, they are not granted. In case the court finds that advocate and procedural fees requested are excessive, taking into consideration the cost of all works in litigation, they are granted in its discretion. Appeal has no merit Cross appeal is substantiated in parts Court fees to the plaintiff. Statutes and statutory instruments referred to: Law n° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, article 168. Law n° 15/2004 of 12/06/2004 relating to evidence and its production, article 9. Law of 30/07/1888 governing obligations or contracts, article 258. No case was referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE. [1] Gahizi Thaddée sues Ruhamyambuga Paul to have made his personal properties tracks and the building which had been named CITY PLAZA owned by the company named SOKERWA sarl that they had started on August 1, 1995 with equal shares except that he had

Page 3

conferred to Ruhamyambuga the right to be its Legal Representative in Rwanda since he was a resident of Kenya where he used to buy wholesale and send commodities for his mate to sell. [2] The Commercial High Court which was seized at the first instance delivered the verdict on RCOM 0140/12/HCC on November 29, 2012 and held that the claim filed by Gahizi Thaddée had no merit and ordered him to pay Ruhamyambuga Paul 1,000,000,00Frw of moral damages for he dragged him in unfounded litigations and the expert service for auditing SOKERWA so as to figure out its properties since it was started. [3] The grounds based on by the court are below set forth: i Regarding the one who was in charge of SOKERWA management, the court found that each one managed the company as to his understanding without respecting the memorandum of association whereby each shareholder used to sign on the accounts without the approval of his counterpart and withdrawing the money from the fund at any time he needs it. Therefore, Gahizi Thaddée should not allege the mismanagement of the company of which he is liable as well. ii. Regarding whether there are still tracks which are remaining in the properties of SOKERWA that Ruhamyambuga Paul made a personal property, the Court found that some of them are still remaining but cannot be entail the liability of Ruhamyambuga Paul since Gahizi Thaddée personally accepts that he is then the one in charge of management. iii.Regarding the building CITY PLAZA, the court found that it belongs to Ruhamyambuga Paul since the documents identifies him as owner. Regarding the statements of Gahizi that there are other properties registered under Ruhamyambuga Paul which he accepts that they are in ownership of SOKERWA, the court found that he registered them under his name while the company was not registered yet commercial. Regarding the statement that Paul Ruhamyambuga had no fanancil capacity to build that house, the court found it without merit since he built it from the loan granted by BCDI and the payment was from the rent. iv.Regarding whether the rent from CITY PLAZA can be

seized, the court found it without merit since the house belongs to Ruhamyambuga Paul. Regarding whether SOKERWA should be liquidated, the court found that it should not be assessed in this case; rather, a separate claim should be filed for that. [4] Gahizi Thaddée appealed to the Supreme Court on December 27, 2014 lamenting that the Commercial High Court overlooked evidence he submitted proving that the building CITY PLAZA is in general property of SOKERWA. He added that the court ruled *infra petita* on the shares of SOKERWA which were in COGEAR the same as on the stock that SOKERWA had at the end of the year 1999. [5] The case was heard in open session on January 6, 2015, Gahizi Thaddée represented by Abel Nsengiyumva, the counsel, while Ruhamyambuga Paul was assisted by Ngarambe Raphaël alongside Zitoni Pierre Claver, the counsel. II. ANALYSIS OF LEGAL ISSUES.

Page 4

- a) Whether CITY PLAZA should be reinstated in the general property of SOKERWA. [6] The counsel for Gahizi Thaddée complains that the Commercial High Court overlooked evidence submitted by his client indicating that CITY PLAZA is in the general property of SOKERWA though it is not registered under its name (SOKERWA). Evidence includes among others: i The fact that the deals of Gahizi Thaddée together with Ruhamyambuga were governed by good faith in such a way that there are still some other properties of SOKERWA as vehicles for transport activities which are registered under Ruhamyambuga Paul which the latter does not deny to belong to SOKERWA which he had also acknowledged before the court. ii The fact that SOKERWA used to run its activities in CITY PLAZA without paying the rent as it had been demonstrated by an expert appointed by the court that SOKERWA carried out its activity in that building without paying the rent until 1997 when the house was already bought and completed. It implies that it was among its properties; otherwise, it (SOKERWA) would have paid the rent as all other tenants. iii. The fact that Ruhamyambuga could not afford to get money to raise such a building since he had not showed the court its source apart from SOKERWA. [7] Regarding the used money to raise CITY PLAZA, he argues that the loan granted by BCDI pretended by Ruhamyambuga, it was granted in 2001 while the house was raised in 1998. He stated a house of 3 billion could not be raised by 600 million which the judge confirmed to have been used to build up the house. [8] He added that the statement of Ruhamyambuga Paul that the house was built in 2001 by the loan granted by BCDI cannot apply since at that time the bank had commenced operating therein and the house could not be built by 89,809, 117 Frw that the bank had granted to Ruhamyambuga at the end of the year 2000 because it had started being used. [9] He continues pleading that Ruhamyambuga Paul had admitted that he had requested the loan of 303, 809, 117, 00 Frw while the judge in paragraph 34 of the appealed judgment held that he requested the loan of 607, 618, 234, 00 Frw. The judge reasoned in this sense in the perspective of overstepping the issue regarding the source of the other money since the house of six floors cannot be raised by 303, 809, 117 Frw. [10] He disputed further that the judge had interpreted the testimony of the witness not in its real sense and held that the witness Kayihura Claver had stated that Ruhamyambuga Paul had other source of income

since he had had deals in Mozambique while he (Kayihura Claver) had stated that it was a hearsay from Ruhamyambuga Paul. [11] He precised that Ruhamyambuga Paul had admitted before various people who attempted their amicable settlement that they are co-owners of all properties and reached the concursus that the commission in charge of making an inventory be established so as to seek means of sharing based on properties registered to each one since they are co owners but after the commission was established and started its mandate, he declared that he does not accept it as long as it is not the court.

Page 5

[12] Ruhamyambuga Paul and his counsels state that the fact that there is the property of SOKERWA which is registered under him does not prevent him from having his own ones. He added that if he had gone to Europe and bought tracks for the Company could not be the cause to take his properties as if they were of the company. [13] With regard to the statements of Gahizi Thaddée that CITY PLAZA had been built from the money of SOKERWA, they responded that they (the statements) lack merit because the house started being built in 1998 while SOKERWA had already gone bankrupt with only transport activities remaining. They insisted that Gahizi had no evidence that the money from that transport activities could be enough to raise the building as CITY PLAZA [14] Ruhamyambuga Paul aduces that he bought a house of 50, 000, 000, 00 Frw on a plot n° 2258/Nyarugenge which now is 2020/Nyarugenge at the public auction in 1997 which was the loan he had obtained from BCDI and guaranted by her wife. He articulated that after the payment he requested another loan for construction and BCDI requested him a quotation and the one called Nzabanita elaborated the one of 500, 000, 000, 00 Frw with some surplus. From there, BCDI accepted to grant a loan and it gave him 89.809.117 Frw at the beginning on September 15, 2000, BCDI again released 214,000,000, 00 Frw on February 6, 2001 and BACAR 40, 000, 000, 00 Frw which led him to mortgage his house at Kicukiro and the completion of CITY PLAZA was achieved at the end of the year 2001. [15] Furthermore, he states that Gahizi Thaddée was in Kigali when he bought the house which was near CITY PLAZA since he had come for attendance of the wedding of Kayihura Claver. He added that if they had been co - owners of CITY PLAZA, they should have all signed on the contract. He added that he had gone through financial difficulties for failure to pay the bank and the latter attempted to sell CITY PLAZA at public auction and hence, if they were co owners, he (Gahizi Thaddée) should have helped him to pay. [16] He states that the statements that he had had no other source of income apart from SOKERWA cannot be considered since he demonstrated that he had deals in Congo, Mozambique and Angola and was granted loans with different banks. He added that the house he bought at public auction was regularly used and rented. [17] Regarding his admission in the attempted amicable settlement that they are co- owners of all properties registered under them, he responded that Gahizi Thaddée does not demonstrate the minute of the attempted settlemt so as to consider as a truth his statements. The view of the court [18] In assessing whether CITY PLAZA on plot n° 2258/Nyarugenge which is now 2020/ Nyarugenge was built using the money from SOKERWA, the court has not starting point

apart from evidence submitted by parties. [19] Regarding the Law relating to evidence and its production, article 9 point 1 of the Law 21/2012 of 14/06/2012 relating the civil, commercial, labour and administrative procedure, states that the plaintiff should present evidence of what he/ she alleges; otherwise the defendant wins the case while article 9 of the law n° 15/2004 of 12/06/2004 relating to evidence and its

Page 6

production provides that evidence can be proved by the use of written evidence, testimony, presumption or, admission of a party or any other material evidence.¹ [20] Regarding the particularity of evidence related to testimony, article 64 of the same law relating to evidence states that without prejudice to particular legal provisions, verbal witness evidence cannot be acceptable for the contract exceeding fifty thousand Rwandan francs (50.000) or of the object whose value exceeds such amount of money (...) unless the testimony is supported by other evidence. Regarding presumption, article 108 states that the court admits only those presumptions if they are important, precise and consistent. [21] Regarding this case, Gahizi Thaddée, the plaintiff states that Ruhamyambuga Paul and him used to run their business governed by good faith which had been established by the expert appointed by the Commercial High Court in the context of discovering the truth about the management of properties of SOKERWA which had not been inventoried and that each shareholder used to sign on the bank account without the need of approval of his counterpart and withdrawing the money in whatever manner he wants. The court therefore notes that there is no accounting related evidence of SOKERWA which can serve as a starting point to assess whether CITY PLAZA was built from its money in a such a way that Gahizi Thaddée can claim its recuperation. [22] Regarding evidence based on testimony, in the Commercial High Court, Gahizi Thaddée requested the summon of people who attempted the amicable settlement so as to testify that Ruhamyambuga Paul had accepted that they co-own all the properties he alleges including CITY PLAZA. The court granted the request and summoned various witnesses but among other Kanzayire Bernadette, Rutayisire Déo and Kayihura Claver appeared and had a say on some situations. However, when the court assesses their statements as contained in the minute of the hearing of October 21, 2013, this court finds that all of them focalize on the statement that Gahizi and Ruhamyambuga had worked together for so long but finally failed to to have the same mind on the property they co-owned and that they tried their conciliation and advised them but in vain. Nevertheless, they did not mention that Ruhamyambuga Paul had accepted before them that they co-own CITY PLAZA or that it had been built from the money of SOKERWA. Their statements therefore, cannot be considered as evidence which can be supported by other since it does not partake the object of the litigation as such. [23] Regarding human presumption as requested by Gahizi Thaddée, the assessment includes that there are other properties belonging to SOKERWA like vehicles which are registered under Ruhamyambuga Paul which the latter does not deny that they belong to that company, that SOKERWA had not paid rent since the year 1997 after the house was bought and completed, (completion), tha Ruhamyambuga Paul had not had any source of income to build such a house apart from SOKERWA, the court is to assess whether it is important, precise and

consistent evidence as provided for by the law. 1 A evidence based on a legal issue or on a fact can be proven by the use of written evidence, testimony, presumption, circumstantial evidence, admission of a party or any other material evidence/ La preuve d'un acte juridique ou d'un fait peut être établie par écrit, témoignage, présomption, par aveu ou par la présentation d'un autre élément matériel.

Page 7

[24] The court finds that the fact that there are tracks of SOKERWA which are registered under Ruhamyambuga Paul cannot serve as a landscape to conclude that CITY PLAZA which is registered under him as well is the ownership of SOKERWA, since, as held by the Commercial High Court because the parties themselves, the time when expertise was performed, demonstrated that they used the money generated by those tracks and that the money gained from their sale was used to pay the suppliers of SOKERWA. However, Gahizi Thaddée had never used the money generated by CITY PLAZA as he used that generated by transport activities. In addition, that money had never been deposited on the bank account of SOKERWA as it was done for the money generated by transport activities. [25] SOKERWA had never paid the rent since the year 1997 when the house which was bought at public auction was bought and completed (completion), which indicates that it belongs to SOKERWA given that the latter could not pay the rent while the house is included in its property, the Court finds that there is no evidence to confirm it because SOKERWA did not have reliable accountancy as concluded by an expert appointed by the Commercial High Court so as to serve in assessing its transactions about the payment and non payment of the rent of the house in which its activity were carried out. [26] Regarding the source of the money Ruhamyambuga used to build CITY PLAZA, evidence to the court in the documents in the case file submitted as evidence is that it is Ruhamyambuga who personally bought at public auction the plot on which the house (Gahizi Thaddée does not contradict that the house had tenant since it was bought) is and that he is the one who requested the loan of 50, 000, 000, 00 Frw to buy it and guaranteed by his wife as well as his house. Another fact is that he is the one who concluded loan contracts with different banks which led to the grant of money amounting to 343, 809, 117, 00 Frw (89, 809, 117, 00Frw + 214, 000, 000, 00 Frw + 40, 000, 000, 00 Frw since the year 2000 till 2001(The Commercial High Court erred in confirming that it is 607, 618, 234, 00 Frw) and he he was the one who used to pay such a debt. [27] The Court notes that even if such amount is not the only one which was used to build CITY PLAZA, evidence presented is convincing in such a way that it cannot be rebutted by the statements that Ruhamyambuga had not any source of income to build a house apart from SOKERWA while the plaintiff, Gahizi Thaddée, who should prove the fact he alleges, failed to present evidence of properties SOKERWA owned, the way they had been regularly used and even the expert appointed by the court to audit the property indicated that they had not been counted. [28] The court therefore finds that there is no presumption, important, precise and consistent evidence proving that the money from SOKERWA was used to build CITY PLAZA since its (SOKERWA) real properties are not unknown so as to

establish a part of SOKERWA which might have been used to built CITY PLAZA.. [29] Based on the holdings above, the court finds that the request of Gahizi of reinstating CITY PLAZA in properties of SOKERWA lacks merit since there is no written evidence, testimony, presumption, admission of parties or the presentation of other material facts that he managed to produce.

Page 8

- b) Whether shares of SOKERWA which were in COGEAR and the stock it had at the end of the year 1999 should be reinstated in its property. [30] Gahizi Thaddée alongside his counsels state that the judge kept silent on the shares of SOKERWA which were in COGEAR and finally withdrawn by Ruhamyambuga and the stock which had the value of 73, 275, 658 Frw which SOKERWA had at the end of the year 1999 when Ruamyambuga pleads that SOKERWA stopped its commercial activities. [31] Ruhamyambuga presents the defence that the shares of SOKERWA which were in COGEAR were exchanged into the debts that SOKERWA owed COGEAR while with regard to the remaining stock, at the end of the year 1999, he states that the whole stock had the value of 21, 072, 137, 00 Frw and that it had been destroyed by the rainfall as demonstrated in the document personally signed by Gahizi Thaddée. [32] His counsels also state that the shares of SOKERWA in COGEAR are for the first time raised at appeal. They disputed that it is not allowed to file new claims at appeal level. [33] Paragraph 1 of article 168 of the Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure states that no new claim may be lodged at the appeal level, apart from those provided for in that article. [34] It is not mentioned in the parties' pleadings on the first instance that the shares of SOKERWA which were in COGERA and the stock at the end of the year 1999 have been part of the claim and the properties which had been part of the claim after the expert presented his report are the tracks and CITYPLAZA only. [35] The court finds that basing on article 168 of the law referred to above, the request of Gahizi that the shares of SOKERWA which were in COGEAR and the stock at the end of the year 1999 would be reinstated in property of SOKERWA should not be assessed since it would be filing a new claim at appeal.
- c) Regarding moral damages and procedural fees that Ruhamyambuga is requesting in his cross appeal. [36] Ruhamyambuga alongside his counsels request the court to order Gahizi to pay him moral damages of 10, 000, 000, 00 Frw because of dragging him into litigations, 30, 000, 000, 00Frw for procedural and advocate fees on both instances while Gahizi and his counsels contend that his requests lack merit and that they do not admit the money granted at first. The view of the court [37] Regarding moral damages that Ruhamyambuga requests, the court finds that even those granted at the first instance are worthy of nothing because the fact that Gahizi Thaddée sued to court, is the right guaranteed by the law, except when it is established that he did so only with intention of causing prejudice to the interests of Ruhamyambuga Paul and it was not demonstrated so.

Page 9

[38] Regarding the procedural and advocate fees, the court finds that the amount he requests is excessive taking into account all activities performed in this lawsuit. Therefore, it grants in its discretion 1, 000, 000, 00 Frw on both instances basing on article 258 of CCBIII which states that any act of a person, which causes damage to another obliges the person by whose fault it happened to repair it. III. THE DECISION OF THE COURT [39] Decides that appeal filed by Gahizi Thaddée has no merit. [40] Decides that cross-appeal of Ruhamyambuga Paul has only merit with regard to procedural and advocate fees at appeal level. [41] Orders Gahizi Thaddée to pay Ruhamyambuga 1, 000, 000, 00Frw for procedural and advocate fees. [42] Orders him to pay the court fees.

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