

RWANDA / JUDGMENT

KOBIL PETROLEUM RWANDA v. MILIMO GASPARD

RCOMA 0010/11/CS

COURT

Supreme Court

DECIDED

18 November 2011

CASE / FILE NUMBER

RCOMA 0010/11/CS

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KOBIL PETROLEUM RWANDA v. MILIMO GASPARD

- Source: Amategeko
- Section: Decisions (Judgements)
- Date: 2011-11-18
- Case/document no.: RCOMA 0010/11/CS
- Collection: Supreme Court

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KOBIL PETROLEUM RWANDA v. MILIMO GASPARD [Rwanda SUPREME COURT -- RCOMA 0010/11/CS (Nyirinkwaya, P.J., Kanyange and Hatangimbabazi, J.) November, 18th 2011] Law relating to commercial procedure – The summary procedure – Admissibility of the claim basing on the review – To know whether the case for review is admissible cannot be analyzed to be the basis in the admissibility or inadmissibility of the summary procedure case since it may disturb the main case in its merits – Law n° 18/2004 of 20/6/2004 relating to the civil, commercial, labour and administrative procedure, in article 324- Law relating to commercial procedure – The summary procedure claim requesting the suspension of the provisional judgment execution – If the provisional execution of the judgment may cause considerable loss to one of the parties, it is taken as one of the grounds that makes that execution to be suspended – Law n° 18/2004 of 20/6/2004 relating to the civil, commercial, labour and administrative procedure, article 320. Facts: MILIMO Gaspard has filed the case against Kobil Petroleum Rwanda before the Commercial High Court arguing that it didn't honor the contract of transport they have signed.

This court heard the case in KOBIL's default and decided that KOBIL did not honor the contract. KOBIL made an opposition; the Commercial High Court decided that opposition admissible since KOBIL showed serious reason and unpredictable that prevented it to appear, that reason was that its counsel was sick on that day. MILIMO appealed against this decision before the Supreme Court, which decided that the decision taken by the Commercial High Court has to be changed since the certificate that MILIMO has presented undoubtedly shows that KOBIL'S counsel has gone to Nyagatare to plead, thus he was not sick. On 11th, 10, 2011, KOBIL has filed a claim for review; the Commercial High Court decided that that claim is not admitted since it could be disturbing the principal lawsuit which is not accepted. KOBIL appealed against this decision and filed the summary procedure claim requesting the provisional suspension of the execution of the judgment RCOM 0103/09/HCC. The one representing MILIMO Gaspard requested that the summary procedure claim for review to has not to be admitted. The one representing KOBIL argued that the judgment may be appealed against since the judge didn't decide that the first judgment to be executed. When the one representing KOBIL requests for the judgment execution to be provisionally suspended since its accounts have been seized which prevent it to purchase the oil, and which results in considerable effects to commerce, the one representing MILIMO Gaspard contends it saying that it has no effect. Held: 1.The appeal for review is reserved to the judge who will try the principal claim since it is the issue of the interpretation of the laws which shall be debated in the principal lawsuit. Thus to decide on it during the summary procedure case would be an interruption to the principal case while it is not accepted. And it cannot be the basis for analyzing the summary procedure claim. 1

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2. Due to the fact that MILIMO has seized the accounts of KOBIL which prevented it from using its money which may cause it the considerable loss for having stopped its commercial deals of oil. This is the ground which results in the fact of suspending the provisional judgment execution until the decision on the principal lawsuit is taken. The appeal has merit. Court fees to the appellant. Statutes and statutory instruments referred to: Law n° 18/2004 of 20/6/2004 relating to the civil, commercial, labour and administrative procedure, article 320 and 324. No Cases referred to:

Judgment

I. BRIEF BACKGROUND OF THE CASE .

- [1] Milimo Gaspard accused KOBIL PETROLEUM RWANDA to have breached a transportation contract signed between them. The substantial hearing was held in the Commercial High Court on 09/03/2010 KOBIL absent but legally summoned, and judgment n° RCOM 0103/09/HCC rendered on 06/08/2010, confirmed that KOBIL breached a contract signed with Milimo Gaspard. The court ordered KOBIL to pay Milimo 576.313.920 rwf for the loss he had, 2.500.000rwf of court and 5.000.000 rwf of civil damages, total amount to be paid equivalent to 583.813.920 rwf, and 23.352.556 rwf of public treasury.

- [2] KOBIL asked the case to be revised (opposition), and the case was registered as RCOM 0288/10/HCC, the Commercial High Court in its decision of 25/11/2010, confirmed that decided to receive the opposition of KOBIL since they have shown reasons of their absence on 09/03/2010 relating to the fact that their Counsel was sick.
- [3] Milimo appealed in the Supreme Court, and decision RCOM A 0001/11/CS was taken on 25/03/2011, confirmed that the decision taken RCOMA 0010/11/CS paragraph 2 of the Commercial High Court has to be cancelled because the evidence given by Milimo is made up by the judgment RP 0413/TGI/NYG rendered by the intermediate court of Nyagatare on 09/03/2010 shows that Kobil's counsel wasn't sick at the day of hearing (he went to Nyagatare to participate another hearing).
- [4] On 05/10/2011 it is when Milimo assisted but the court bailiff notified KOBIL the judgment RCOM 0103/09/HCC and RCOM A 0001/11/CS, asking the money he won in the case, and started seizure to different accounts of KOBIL in different banks.
- [5] On 11/10/2011, KOBIL submitted a case asking the court to review the judgment n° RCOM 0103/09/HCC, the Commercial High Court rendered a judgment RCOM 0225/11/HCC on 02/11/2011, confirmed that the case is not received. 2

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- [6] KOBIL appealed against the judgment rendered on 07/11/2011 then 08/11/2011 submitted an summary procedure case asking the court to stop the execution of the judgment RCOM 0103/09/HCC.
- [7] The substantial hearing on this case was held on 16/11/2011 in the presence of all parties, KOBIL assisted by Maître Nzamwita Toy, Milimo assisted by Maître Kayitare Serge.
- [8] Following the defense of parties, the first is to examine incident raised Me Kayitare assisting Milimo. II. LEGAL ISSUES OF THE CASE AND THEIR ANALYSIS To know if the emergence case of KOBIL should not be received because the court refused to receive the case relating to "review" which cannot be subject to appeal
- [9] Me Kayitare Serge, assisting Milimo Gaspard, says that the case of reviewing upon new facts cannot be subject to appeal, so the judgment RCOM 0225/11/HCC entered in force, which means that there is no reason to make this judgment n° RCOM 0103/09/HCC unexecuted.
- [10] As he says that is confirmed by the article 189 of the law n° 18/2004 of 20/6/2004 relating to the civil, commercial, labour and administrative proceeding as modified in its paragraph 3, stating that "if the review of the case is not allowed, the judgment rendered has to confirm that the previous judgment has to be executed without any condition".

- [11] He also says that there are many judgments as rendered by the Supreme Court confirming that it is not allowed to do the review to appeal “révision“, the example is the judgment RCAA 0065/09/CS and RCOM A 0001/06/CS. He explains that when the appeal did by KOBIL has not received and the summary procedure case is based on that appeal, means that the summary case also should not be received by, this is similar case as decided by the Supreme Court in the judgment of RADA 0023/06/CS between DISCENTRE and Huye District.
- [12] Me Nizamwita Toy, assisting KOBIL, says that in the judgment RCOM 0288/10/HCC the judge did not consider to order that the judgment n° RCOM 0103/09/HCC to be executed as it stated by the article 189, al 3 of the law above mentioned, and if that was not ordered it is evident that the appeal is possible for that case.
- [13] Regarding the judgment RCAA 0065/09/CS, RCOM A 0001/06/CS given as examples, Me Nizamwita Toy says that any reaction is possible for those judgments since any final decision “dispositive” was provided in this case as strong evidence in order to confirm if the judgment could be executed as decided.
- [14] As he says an appeal is possible to a judgment rendered by the High Court in the first or second level in the Supreme Court if all requirements are available.
- [15] Article 324 of the law n° 18/2004 of 20/6/2004 relating to the civil, commercial, labour and administrative proceeding, states that: “A judge in the summary procedure cases decided on
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all emergence issues, but in a fair way which cannot affect the previous judgment in the merit of the case”.

- [16] In the case between DISCENTRE and Huye District given as strong evidence by Me Kayitare, the Supreme Court explained that the article above mentioned cannot be an obstacle to a judge on the emergence case, to refuse examining it while it evident that an appeal is not possible against the previous case, following on those explanations while it is evident that the previous case was submitted into the court when the deadline for appeal had already passed, the related emergence case has to be received.
- [17] In that case file, the issue that the judge decided on was to know if the case submitted by Huye District in the High Court was submitted before the expiration of one month deadline as stated by the law.

- [18] The court found that the issue of being aware if the case was reviewed following new facts presented can be appealed or not, even if there was many decisions taken on to the case in supreme court, it is evident that only judge will be examine the primary case since this is the issue of analyzing laws which is possible to engage debates in the primary hearing, taking decision on the summary procedure case is considered as an obstacle to the judgment which is not allowed as stated in the article 324 of the law n° 18/2004 of 20/6/2004 above said.
- b) To know if the fact of stopping the execution of the judgment asked has merit.
- [19] Me Nzamwita Toy says that the KOBIL's case requesting to stop the judgment execution is based on the article 187 and 320 of the law n° 18/2004 of 20/6/2004 relating to the civil, commercial, labour and administrative proceeding as modified up to now.
- [20] As he said the first that KOBIL is basing it request to stop provisionally the execution while the primary hearing is not yet held is the fact that Kobil didn't had opportunity to defend it position, as he said this was independent of their will because their counsel did not honour his mission to represent Kobil to the hearing since the right to defense cannot be breached.
- [21] The second reason as he said is that KOBIL has strong evidences that the judgment to be executed is based on wrong information given by Milimo in the court.
- [22] The third reason is that Milimo has already started some activities of judgment implementation, those activities are relating to the seizure of money to the Kobil's accounts in different banks and seizure of Kobil's petrol oil in Magerwa which can also affect the crisis of petrol oil in the country and different people can lose their job.
- [23] Me Kayitare Serge says that the judgment to be executed was taken in the absence "par défaut" of Kobil in a legal way, laws protects people at the same level, what happened to Kobil should have happened to Milimo if he could not be present to the hearing, if the counsel didn't respect the contract that he had with Kobil, the issue will be between Kobil and its counsel but this issue has no relations with Milimo. 4

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- [24] He also said that the fault that KOBIL is accusing Milimo should be raised in the trial that they asked the court to review for the new facts presented, it cannot be a reason for stopping the execution of judgment since it wasn't considered.
- [25] As he says there are no effects of execution to the petrol oil, as it appear in the letter addressed themselves to the court, Milimo wrote to KOBIL on 11/11/2011 notifying them that in the interest of justice and parties is given a right to do its business as normal but all money has to pass by the account of Milimo until when the whole debt will be paid.
- [26] Me Nzamwita Toy says that effects are still on the side of KOBIL since all accounts have been seized and Kobil cannot be able to buy other petrol oil when the store will be empty, so Kobil is ready to provide guaranty in the court in order to have execution stopped.

- [27] Me Kayitare giving guaranty its different issue and has it way to pass in, that procedure requires to pass by case submission and then judge take a decision.
- [28] Article 320 of the law n° 18/2004 of 20/6/2004 relating to the civil, commercial, labour and administrative proceeding says that: “when there is a primary case, in which judge has to decide provisionally and urgently to the case submitted to the court but not yet done a hearing, the case has to be submitted to the judge in charge of examining urgent cases.
- [29] Although Me Kayitare Serge says that there are no effects of judgment execution to the business of petrol oil of KOBIL because Milimo admitted in a letter wrote to Kobil to continue the business activity but let the money pass to his account, the court found that the fact limit Kobil to use it money will generate a big loss for Kobil because stopped petrol oil business activity, and this is strong reason to stop provisional the execution of judgment until when the primary decision will be taken. III. THE DECISION OF THE COURT.
- [30] Confirm to receive the summary procedure case as submitted by KOBIL PETROLEUM RWANDA because it was legally submitted.
- [31] Says that this case has merit.
- [32] Orders that the execution on the judgment n° RCOM 0103/09/HCC is stopped until when the primary judgment decision will be decided.
- [33] Orders KOBIL PETROLEUM RWANDA to pay court fees equal to 10.500 rwf, if it not given in time ordered, be deducted from their assets by public coercion.

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Prepared on 14 October 2026 · Esheria