

RWANDA / JUDGMENT

ACCESS BANK Ltd v. NGARAMBE ET AVL; MUCUMBITSI v. ACCESS BANK Ltd

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ACCESS BANK Ltd v. NGARAMBE ET AVL; MUCUMBITSI v. ACCESS BANK Ltd [Rwanda SUPREME COURT – RCAA 0088/11/CS & RCA 0179/12/HC/KIG (Mugenzi, P.J., N. Munyangeri and G. Gatete, J.) November 15, 2013] Law determining jurisdiction of courts – Connexity of claims– Various related claims pending in two different courts, one being superior to the other – If there are various claims such that the resolution of one may affect the other, these are related cases and shall be joined and tried in the same suit – Organic Law N° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of Courts, article 153. Civil procedure – Appeal – Scope of appeal – Trial on grounds of appeal or cross-appeal – The decision to invalidate the mortgage contract while the subject matter concerned the resolution of public auction, is considered as an ultra petita ruling. Law of securities – Mortgage – The merit of mortgage contract which is not recorded in the register of mortgages held by the office of the Registrar General, signed before commencement of the law n° 10/2009 of 14/05/2009 on mortgages – All mortgage contracts concluded before the commencement of this law remain valid – Law N° 13/2010 of 07/05/2010

amending and complementing the law n° 10/2009 of 14/05/2009 on mortgages, article 4. Civil procedure – Public auction – Auction of mortgage without recourse to judicial proceedings – The organ delivering the order for public auction of the mortgage without recourse to judicial proceedings based on the mortgage contract certified by the notary and affixed with an enforcement formula in case it is not recorded by the office of the Registrar General – The president's court order is based on to carry out the public auction since both litigants would not have requested the services of the Registrar General whereas the property to be auctioned was not registered – Law n° 10/2009 of 14/05/2009 on mortgages as amended and complemented by the Law N° 13/2010 of 07/05/2010, article 26. Contracts or obligations law – Damages – Reimbursement of the value and related interests of the house in litigation – Loan flat fees – Damages from the loss of rent – Moral damages – Reference costs and counsel fees – The litigant is not entitled to be reimbursed flat fees deducted from the bank loan since they are irredeemable by nature – The distrainee should pay damages including costs for litigation diligence and counsel fees for all proceeding levels as fixed under discretion of the Court – Law N° 45/2011 of 25/11/2011 governing contracts, article 89 – Decree of 30/07/1888 relating to contracts or conventional obligations, article 258. Facts: ACCESS BANK appealed against the judgment of the High Court, arguing that it was not satisfied with its decision that overruled the decision of the Intermediate Court which had already decided to uphold the public auction of the mortgaged house of Ngarambe acquired by Mucumbitsi. The High Court ruled that the mortgage should be nullified and ordered him to pay damages whereas none of the litigants prayed for the resolution of mortgage, since the claim of Ngarambe intended the resolution of public auction rather than the resolution of mortgage contract. ACCESS BANK argues that if it were the case, the Law N° 10/2009 of 14/05/2009 which upheld valid the mortgage contracts concluded before its commencement, should have been considered.

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In another judgment RCA 0179/12/HC/KIG, in which Mucumbitsi appealed against ACCESS BANK; he requests that in case the Court finds the public auction should be resolved, ACCESS BANK, which is also appellant in the judgment RCAA 0088/11/CS before the Supreme Court; be requested to reimburse the value of the house he acquired through public auction and pay compensation for the loss of the house rent he should have been paid, moral damages, reference costs and counsel fees. Meanwhile, before the hearing of the case on the merits, ACCESS BANK raised an objection that both cases are related and requests them to be joined and heard in the same suit while Mucumbitsi and Ngarambe argues that they do not deserve to be joined for the reason that they are not connected. In his defence, Ngarambe states that the mortgage cannot exist if not registered in land register, therefore the public auction did not comply with the law because the auction without recourse to judicial proceedings would not be carried out since there was not a registered mortgage, and that the President of the Court was not competent to order the public auction to take place due to the fact that the law of 15/05/1922 was repealed by the law n° 10/2009 of 14/05/2009 on mortgages; therefore the one who should have ordered it, is the Registrar General; hence, the Bank should bear all consequences related to the grant of loans unsecured

with a registered mortgage. Held: 1. In case the Supreme Court decides that the public auction is unexceptionable and the buyer holds the house, meanwhile the High Court decision awards him its price, there would be two contradictory verdicts on the same subject matter, the reason why these cases are connected and should be joined and heard in the same suit.

2. The judge ruled *ultra petita* in invalidating the mortgage contract while it had not been requested.
3. The Law N° 10/2009 of 14/05/2009 on mortgages provided that all mortgage contracts signed before its commencement remain valid; this implies that the mortgage contract signed before the notary and which was based on to carry out the public auction, was valid in accordance with the Law N° 13/2010 of 07/05/2010 amending and complementing the law n° 10/2009 of 14/05/2009 on mortgages.
4. The public auction was conducted in accordance with the law for the mortgage contract was approved and certified before the notary and affixed with enforcement formula before it was conducted.
5. No fault was committed by the Bank in requesting public auction order, since it needed it for enforcing the contract and the public auction was carried out in accordance with the law in order to get the payment of the allocated loan.
6. Fee and commission on credit intervention are irredeemable flat fees, therefore should not be reimbursed.
7. According to the discretion of the Court, and pursuant to the laws relating to contracts or conventional obligations, Ngarambe should pay Mucumbitsi the deprieved sums of rent computed on monthly basis for a period of 41 months in consideration of the value of the house and its location.
8. In accordance with its discretion and pursuant to the law relating to contracts or obligations, Ngarambe should pay Mucumbitsi damages encompassing litigation diligence cost and counsel fee for all trial levels; however he does not deserve to be awarded moral damages since he was awarded compensation for the loss incurred.

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Appeals in both cases granted. The distrainee shall pay compensations to the purchaser. Public auction upheld and the house awarded to the purchaser. The appealed judgment RCA 0156/11/HC/KIG overruled. Court fees to the distrainee. Statutes and statutory instruments referred to: Organic Law N° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of Courts, article 153. Law N° 45/2011 of 25/11/2011 governing contracts, article 89. Law n° 10/2009 of 14/05/2009 on mortgages as amended and complemented by the Law N° 13/2010 of 07/05/2010, articles 4 and 26. Decree of 30/07/1888 relating to contracts or obligations, article 258. No case referred to.

Judgment

I. BREIF BACKGROUND OF THE CASE [1] On 31 October 2008, ACCESS BANK Ltd (former BANCOR S.A.) entered into a contract with THEME ENTREPRESE SARL with the purpose of granting to that company a loan of 41,000,000 Rwf, and thereafter, Ngarambe Emmanuel who is its Director mortgaged his house located on plot n° 4650/Remera as third party constituent, which was later auctioned for the reason that the company had not abide by the reimbursement agreement. [2] Ngarambe Emmanuel sued ACCESS BANK Ltd before the Intermediate Court of Gasabo requesting for the invalidation of the public auction of that house conducted on 25 April 2010. On 28 March 2011, the Court ruled that the petition of Ngarambe Emmanuel lacks merit for the reason that all the grounds he submitted including the fact that the mortgage was not registered, that of relying on an abrogated law for public auctioning of the house and that of the benefit of discussion on the assets of THEME ENTREPRISE, were not considered. [3] Ngarambe Emmanuel appealed to the High Court and the case was recorded on RCA 0156/11/HC/KIG. On 14 July 2011, this Court overruled the ruling of the case RC 0171/10/TGI/Gsbo, ordered that the conducted public auction be invalidated and ACCESS BANK Ltd was ordered to pay damages amounting to 500,000Rwf to Ngarambe Emmanuel. Motivation of the High Court ruling [4] The Judge of the High Court found that the Intermediate Court erred on the interpretation of article 19 of the law of 15/05/1922 on mortgages, which provides that “no mortgage is valid if it is not registered in land registry.....”. The Judge found that the substantial formality of mortgage registration in land registry still exists, and this provision of the first paragraph of article 4 of the law n°10/2009 of 14/05/2009 on mortgages which states that “a mortgage is considered to be valid when recorded in the mortgage register in the office of the Registrar General”. The Judge confirmed that this provision has not been amended in the Law n° 13/2010 of 07/05/2010 amending and complementing the law n°

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10/2009 of 14/05/2009, for those reasons, ACCESS BANK made a mistake and negligence as it did not proceed for registration of mortgage while this is the essential formality which makes the mortgage valid. [5] After the delivery of that judgment, ACCESS BANK Ltd appealed to the Supreme Court and its appeal was recorded on RCAA 0088/11/CS. However, in the meantime, it was discovered that there was another related case RCA 179/12/HC/KIG pending in the High Court in which Dr Mucumbitsi sued ACCESS BANK Ltd /CS. On 28 March 2013, the Judge decided to join them and the case was heard on 15 November 2013. II. ANALYSIS OF LEGAL ISSUES A. Analysis of the objection raised by the counsels for Ngarambe and Dr Mucumbitsi relating to the act of not joining both cases on the ground that they have no connection. [6] Dr Mucumbitsi J. states that there exists no link between these cases; Karongozi, his counsel supports him arguing that Dr Mucumbitsi requests the Bank to pay him 42,270,000 Rwf, the price of the house bought in public auction, and requests for damages relating to reference costs and moral damages, while Ngarambe requests that the conducted public auction be invalidated. The intention of the Bank in its request of joining the cases is that Mucumbitsi would seek payment from Ngarambe while the Bank already received the check paid for the house purchased in public auction, and Mucumbitsi

is still paying ECOBANK the loan he was granted to buy a house which he never enjoyed. [7] Bigaraba John, the Counsel for Ngarambe E. explains that he does not find any link between these cases, because for the connexity to exist, parties to the case, subject matter and cause of action should be the same, which is not the case since the claims to be decided on are different. [8] Buzayire Angèle, the Counsel for the bank explains that both cases are related, for the reason that the claim of Ngarambe E. aims at invalidating the public auction of the house he mortgaged, and that of Dr Mucumbitsi J. aims at the same (Invalidation of public auction), except that he also requests for various damages. [9] Regarding this issue, the Court finds that the link raised in this case derives from the fact that the house of Ngarambe Emmanuel, which was mortgaged for the loan that had been granted by ACCESS BANK, was auctioned and bought by Dr Mucumbitsi Joseph who paid its price to ACCESS BANK but was not delivered the house; instead, Ngarambe Emmanuel immediately sued ACCESS BANK requesting that the public auction be invalidated for the reason that there were some formalities which had not been observed. Due to the fact that the house was not delivered to him, Dr Mucumbitsi sued ACCESS BANK requesting the invalidation of the public auction in order to get back the amount of the price he paid. [10] Therefore, the Court finds that both cases are related as specified by article 153 of the Organic Law N° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of Courts as amended and modified to date, because the resolution of one may affect the the outcome of the other if it is examined whether the conducted public auction was in compliance with the law, since, if this Court decides that the auction was fair and the purchaser acquires the house, meanwhile the High Court rules that he be reimbursed its price, there would be two contradicting decisions on the same subject matter. That is the reason

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why these two cases are linked and should be joined to be heard in same case as specified by the provision of the mentioned organic law. B. Concerning the merit of the case Whether the mortgage contract signed between ACCESS BANK Ltd and Ngarambe Emmanuel is void on ground that it was not registered. [11] Counsels Buzayire A. and Rukangira E., for ACCESS BANK Ltd state that the judge confirmed that the Bank neglected to register the mortgage which is an essential formality for the validity of the mortgage, and therefore invalidated it in contradiction with the provision of the law (article 170 of CCLAP) since “the appealed Court may only decide on the issues brought forth by the appellant and respondent at the appeal level”, yet it decided to invalidate the mortgage. That decision is groundless because none of the parties to the case has requested its invalidation: They state that the claim of Ngarambe aimed at quashing the auction, not invalidating the mortgage contract. [12] They explain that even if it was the claim submitted to the Court, there should be considered article 26 of the Law n° 10/2009 of 14/05/2009 on mortgages mentioned above, which validates the mortgage contracts concluded before its commencement. Therefore, the judge should not have considered whether or not the registration of the mortgage occurred, because the law provides that the contract remains valid until its full performance. They also emphasized that Ngarambe cannot rely on article 19 of the law 15/05/1922 stated above and requests for the resolution of the auction while he knows that he is

the one who acted with bad faith for the mortgage not to be registered and the bank was not paid; the reason why he has to bear all consequences. [13] Bigaraba J., Counsel for Ngarambe E. emphasizes that article 19 of the law of 15/05/1922 on mortgages specified that “no mortgage is valid if it is not registered in land registry...”. This is also provided for by the first paragraph of article 4 of the law n°10/2009 of 14/05/2009 on mortgages as amended and complemented to date in the following words: “A mortgage is considered to be valid when recorded in the mortgage register in the office of the Registrar General”, therefore the ACCESS BANK neglected and did not register the mortgage while it constitutes an essential formality for its validity. He argues that the Bank should bear all consequences of granting the loan without a registered mortgage. [14] The Court finds that the judge ruled *ultra petita* and declared invalid the mortgage contract, and confirmed wrongly that the contract was not in written form while the file indicates that it was signed in presence of the notary on 04 November 2008. For the reason that article 26 of the Law N° 10/2009 of 14/05/2009 on mortgages provided that all mortgage contracts concluded before its commencement (15/05/2009) remain valid, and that it was assigned time till the 14 May 2011 so that parties submit it to the Registrar General; implying that when the public auction was conducted on 25 April 2010, the mortgage was valid as specified by article 4 of the Law N° 13/2010 of 07/05/2010 amending and complementing the law n° 10/2009 of 14/05/2009 on mortgages. Whether the public auction was carried out in accordance with the law. [15] Bigaraba J., Counsel for Ngarambe E. explains that the public auction did not comply with the law because the auction without recourse to judicial proceedings would not be applied since the mortgage was not registered. He also explained that the President of the Court was no longer competent to order the public auction for the Law of 15/05/1922 had

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already been repealed by the Law n° 10/2009 of 14/05/2009 on mortgages; consequently, the one who must have ordered it should have been the Registrar General. [16] On this issue, the Court finds that those submissions are groundless due to following

reasons:

1. The public auction was conducted on 25 April 2010 when the mortgage contract providing for the sale of property without recourse to judicial proceedings was still valid, since the parties had the duty to deliver it to the Registrar General before 14/05/2011 (for a period of two years).
2. Holding that the sale of property without recourse to judicial proceedings has been repealed by the Law n° 10/2009 of 14 May 2009 on mortgages would be disregarding that, the mortgage contract on which relies that procedure remained valid by virtue of that statute in its article 26 as explained in previous paragraphs. Therefore, the President's order should have been the basis for the conduct of the auction because both parties could not resort to the service of the Registrar General as the property that should be auctioned was not recorded in his registry. [17] Pursuant to previous motivation, the Court considers that the public auction

was carried out in accordance with the law, since the mortgage contract was signed in the presence of the notary and was affixed with enforcement formula on 12 November 2009 before the conduct of the auction on 25 April 2010, the reason why it should remain valid for the house of Ngarambe was auctioned when the THEME ENTREPRESE had defaulted to pay the loan it was granted as agreed upon. Regarding the appeal of Mucumbitsi. Whether ACCESS BANK caused a loss to Dr Mucumbitsi Joseph. [18] Counsels Karongozi André Martin and Nubumwe Jean Bosco, explain that the Bank was paid money from public auction proceeds but their client who purchased the house, was not given it, while it is the Bank which requested for the court order and was awarded it. For that reason, they argue that the bank played a serious role in the loss suffered by Mucumbitsi since he was not handed the subject of sale. [19] Counsels Buzayire Angèle and Rukangira Emmanuel, state that they have a different view, because there is no sale contract concluded between Dr Mucumbitsi and the Bank, since he purchased the house in the public auction; consequently, the bank should not be held liable of anything. [20] The Court finds that the Bank did not commit any fault when it requested for the court order for public auction, since it intended to enforce the contract (article 33 of CCB.III). The public auction was conducted in accordance with the law in order for the Bank to be reimbursed the loan it granted. The Counsels for Dr Mucumbitsi failed to demonstrate the liability of the Bank in relation to the loss incurred for failure to enjoy the house he bought in auction. The fact for the Bank to have filed a case to the Court for that contract to remain valid indicates instead, that it is a diligent process undertaken with the aim of facilitating Dr Mucumbitsi to enjoy the purchased property. Concerning various damages that Dr Mucumbitsi Joseph requests to be paid by the ACCESS BANK Ltd and Ngarambe Emmanuel.

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- [21] Karongozi A.M, counsel for Dr Mucumbitsi requests to be paid back the price of the house he bought and damages amounting to 39,059,179 Rwf; and in case the Court decides the public auction to remain valid, Dr Mucumbitsi be handed back his house, and ACCESS BANK Ltd with Ngarambe Emmanuel jointly pay him compensation amounting to 39,059,179 Rwf of the capital and interests paid to ECOBANK till 5 September 2013, loan charges amounting to 3,660,000 Rwf, 10,000,000 Rwf of moral damages and 11,391,988 Rwf encompassing the reference cost and counsel fees. [22] Counsels Buzayire Angèle and Rukangira Emmanuel for the Bank explain that it should not be held liable of anything because it did not cause any loss to Dr Mucumbitsi Joseph. [23] As explained, the Court finds that the fact that Dr Mucumbitsi has not yet been handed the house he purchased up to now, the person who should be held liable is Ngarambe Emmanuel who initiated lawsuits to request the resolution of the auction whereas the law has been complied with as held above; and he should therefore bear the damages for the loss suffered (article 258 of CCB.III). [24] The Court finds that among the damages requested by Dr Mucumbitsi, includes 3,660,000 Rwf (of commission fees on credit and intervention). Except that he did not even present evidence thereon, the Court finds that such amount is a non-refundable flat fee and he himself admits

that he received a loan, therefore he should not be reimbursed it since he is awarded the sold asset. [25] Concerning the loss incurred from non-enjoyment of the house he bought, the Court finds that, according to its discretion, Ngarambe Emmanuel should pay Dr Mucumbitsi, the amount of rent he lost amounting to 12,300,000 Rwf, meaning 300,000 Rwf a month for a period of 41 months. The rent is fixed in consideration of the value of the house amounting to 42,000,000 Rwf and its location in Bibare cell, Kimironko sector, Gasabo district in Kigali city (Article 258 CCB.III and article 89 of the Law N° 45/2011 of 25/11/2011 governing contracts). [26] The Court finds also that in accordance with its discretion, Ngarambe should pay to Dr Mucumbitsi Joseph the amount of 1,000,000 Rwf encompassing the reference costs and counsel fees on all levels of court proceedings (article 258 CCB.III). However, it finds that Dr Mucumbitsi should not be awarded moral damages while he was awarded damages for the loss suffered. III. THE DECISION OF THE COURT [27] Decides that the appeals of ACCESS BANK Ltd and Dr Mucumbitsi Joseph have merit; [28] Rules that Ngarambe loses the case; [29] Orders Ngarambe Emmanuel to pay to Dr Mucumbitsi Joseph the compensation amounting to 13,300,000 Rwf immediately after the delivery of this judgment;

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[30] Orders him to pay court fees amounting to 32,400 Rwf immediately after the delivery of this judgment; [31] Rules that the public auction carried out for selling the house located in the plot n° 4650 at Remera – Bibare is held valid and the purchased house be handed over to the owner Dr Mucumbitsi Joseph; [32] Overrules the judgment RCA 0156/11/HC/KIG delivered on 14/07/2011.

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